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**Identity and its Protection as the Aim and Purpose of
International Human Rights Law:**

The Case of (Inter)sex Identity and its Protection

A thesis

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Rogena Sterling



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ABSTRACT

The history of intersex people has demonstrated a life of invisibility with an imposed identity they did not choose. The lack of identity, or at least an autonomous one, led to a theoretical investigation into identity and how it has or has not been understood within international human rights. Intersex and sex has been used as an illustration of a multiplicity (often referred to as identities) to determine whether or not it has been protected and enabled through international human rights law.

Before considering international human rights law, it was important to understand identity, what it means and how it is formed. This led to a hermeneutic inquiry into identity, in particular, from a Ricoeurian perspective. The hermeneutic inquiry leads to an understanding that what is called 'identity' centres on recognition of oneself and of others. This is a recognition of who one is and how one becomes one's narrative identity. The becoming, however, develops through one of two interpretive horizons – vertical or horizontal – which may limit or expand one's becoming. This becoming is understood through one's narrative identity. The narrative identity reveals a temporal personal identity.

Personal identity comprises of two forms or sources of identity: identity as *idem* (sameness) and identity as *ipse* (selfhood). How these are interpreted and implemented either limits or expands one's becoming. When understood through the divesting of one's personal identity from its narrative identity – identity as an identity or status – it can be referred to as a problematic of identity. This problematic creates vulnerability of the human being, in particular, the loss of autonomy over who one is and how one comes to be. To prevent this vulnerability, one needs a moral identity living the good life of self-esteem and self-respect and the autonomy over one's capabilities to speak, act, and narrate one's life and be held imputable towards it. This enables relationality and respect toward others.

Sex is commonly interpreted by international bodies within the binary which still leaves intersex people invisible. This is the result of understanding sex through the vertical interpretive horizon – as a sex status of male or female. As such, this required a study whether human rights were there to protect the status or the human person. The analysis revealed the basis and foundation of international human rights was the human person as a dignified being. The duty of state and society was to enable this human person so that they could freely and fully develop their personality. This would result in a dignified being. All the rights and freedoms were set for this purpose.

For an intersex person to have a moral identity, they required the ability to freely and fully develop to form an identity. This came through the right to privacy. However, this development, and therefore one's dignity, is limited when one's well-being is interfered with or violated such as through sex-normalising treatment and other issues. It is therefore important to protect intersex people from such interference and violation to ensure their well-being. The development of who one is and the autonomy of how one comes to be enables recognition. This returns to the beginning – the purpose of identity. These represent the core issues for intersex people – the recognition of who they are and the autonomy of how they come to be.

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Convention on the Elimination of all Forms of Discrimination against Women (1981).

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X v Colombia Communication No 1361/2005, 30 March 2007 (ICCPR Human Rights Committee, UN).

Youcif Almegaryaf and Hisham Matar v Libya, No Communication No 2006/2010, 21 March 2014 (ICCPR Human Rights Committee, UN).

LIST OF ABBREVIATIONS

Below is the list of abbreviations used in this thesis.

LGBT	Lesbian, Gay, Bisexual, Transgender
LGBTI	Lesbian, Gay, Bisexual, Transgender, and Intersex
UN	United Nations
IBOR	International Bill of Rights (Includes the UDHR, ICCPR, and ICESCR)
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant of Civil and Political Rights
ICESCR	International Covenant of Economic, Social and Cultural Rights
EP	Equality Principle
HRC	Human Rights Commission
CERD	Convention on the Elimination of Racial Discrimination
CEDAW	Convention on the Elimination of Discrimination Against Women
AAA	American Anthropological Association
ECtHR	European Court of Human Rights
HRC	Human Rights Committee

INTRODUCTION

This thesis has a personal connection for me. I was born with an intersex variation and had operations to make me a 'normal male' early in life. Due to the information provided to my parents, they agreed as they were told it would make me normal and had not been provided with any information to the contrary. Normality is something all parents hope their children to have. However, for me, life was never normal. I knew I had been assigned 'male', but that did not match what I felt inside. From as young as I can remember, there was a female side demanding expression, and as much I tried to suppress it, it remained. I lived in a state of confusion not knowing what was correct, the assigned social status as a male or the expressions involving male and female being demanded from inside. However, I knew I had to fit in, so I tried to suppress the internal conflict and started to narrate a large part of my life, as the sex I had been assigned. Despite this, the internal sense kept nagging me and I was confused not truly knowing who I was, though knew who I was meant to be, or at least was assigned to be.

This all came to a head when I discovered fertility issues in my late 30s. This led to more investigation into my early surgeries I had at infancy and as a teenager. This investigation which began looking as to why there might be issues of infertility began to unlock my world of who I am. I initially started with some basic internet searches of which much of the information explained why the surgeries were performed and how they did it. The predominant narratives were still that of the medical profession. These narratives reflected an understanding that 'surgery enabled fixing the mistake of nature'. Such a narrative did not match what I had been attempting to suppress inside. However, there were also some personal stories that I came across showing experiences that were similar to how I felt.

However, in 2006 I gained access to a University database. This led to a wider investigation beyond that of only the medical narration as a mistake of nature. I discovered that there was such a thing as being an intersex person and I had one

of the many intersex variations. Moreover, I discovered that what I was feeling inside, the sense of self, was the reality of being an intersex person. Intersex was a reality of having elements of maleness and femaleness and necessarily being able to define as one or the other. After discovering this, the feelings I had all my life made so much sense. With what I had discovered, I was able to understand, I was not the only person like this. There were others like me out there in this world intersex people who considered themselves as intersex males, intersex females, or intersex people who consider themselves are both male and female or even neither.

My situation highlighted that if I did not have access to the academic material, I would have been less able to fully make sense of myself or more likely that I would have continued to live a life of conflict. It also highlighted the power and authority that medical professionals had in defining elements of our life, in particular, sex (identity). The information that was available on being intersex was “censored” by the medical profession¹ either directly or indirectly. From my investigation, the ‘censorship’ revolved around enforcing the dominant narrative of intersex as a medical condition or disease that needed fixing and appeared to dismiss any narrative to the contrary as ‘disgruntled patients’. However, for me, having had access to academic material, something many people do not have access to, I was able to understand my life in perspective and make sense of my life without being confined to viewing it as a disease or condition.

This became a discovery of my identity. I had reconciled my inner turmoil with my identity. Moreover, I could now embrace and accept myself as an intersex person along with the many other parts that make me who I am. My whole life suddenly fell into place. I now felt like I had power over who I was and, from that point forward, how I was to come to be. Now that I understand who I am, I live my life,

¹ Alice Domurat Dreger *Hermaphrodites and the Medical Invention of Sex* (Harvard University Press, 1998) at 23.

not as who I should be according to 'my documentation', but have changed my documentation as to who I am. Although this has been a challenging journey, at the same time, I have had a feeling of inner peace and contentment of life that was my own creation involving my inner sense of who I am with my social self and a whole identity. This was the first time I felt as though I had real value and meaning in life.

My discovery of who I am coincided with my study of law. This has also resulted in a broader realisation of society and the need for rights as who one is rather than what one is determined to be. I came to new conception of socio-legal life that was more fraternal and reciprocal, rather than one based on a determinative status such as sex. Moreover, I have come to believe that human rights are not about what one can achieve or is entitled to, but rights are what is necessary to live an autonomous full and freely developed life with others. Therefore, changing individuals to match what society believes a person should be, like that which occurs with intersex people, is not moral nor just and does not improve the rights of an intersex person. A just and moral society requires education to understand the diversity of life, including the diversity of sex, so that all humans are recognised and accepted as who they are.

Intersex People through History

My discovery led to an investigation into intersex people and sex diversity throughout history. Although the common narrative of sex is that there is male and female, there has been a wide variety of forms and expressions of sex, a diversity of sex. Sex was important to most societies, but each society had different systems of social organisation and thus meaning and value of sex. The domination of sex as a binary of male and female so widely conceptualised around the world today was not a universal system in many earlier societies. Of focus to this thesis is a group of people that express such sex diversity – intersex people. Although intersex people were not named in many earlier or indigenous societies, they were certainly part of the sex diversity of these societies.

Intersex people have bodily diversity² inclusive of chromosomal, hormonal, and anatomical sexual features that are neither exclusively male nor female, but are typical of both at once or not clearly defined as either.³ Some of the more common intersex variations are:⁴

5-alpha Reductase Deficiency, Androgen Insensitivity Syndrome (AIS), Aphallia, Clitoromegaly (large clitoris), Congenital Adrenal Hyperplasia (CAH), Gonadal Dysgenesis (partial and complete), Hypospadias/Epispadias, Klinefelter Syndrome, Micropenis, Mosaicism involving 'sex' chromosomes, MRKH (Mullerian agenesis; vaginal agenesis; congenital absence of vagina), Ova-Testes (formerly 'true hermaphroditism'), Partial Androgen Insensitivity Syndrome (PAIS), Progesterin Induced Virilisation, Swyer Syndrome, Turner Syndrome.

There may well be large populations of intersex persons worldwide,⁵ but few countries count the number of intersex people in their population or health data, as such, at least administratively, they are invisible. The only estimates available are from some medical statistics. Even medical data can be difficult to measure as not all places collected the same data.⁶ A survey of the medical literature of sexual

² Silvan Agius and Christa Tobler *Trans and Intersex People: Discrimination on the Grounds of Sex, Gender Identity and Gender Expression* (2012) at 12.

³ At 12; Katrina Roen "Intersex Embodiment: When Health Care Means Maintaining Binary Sexes" (2004) 1 *Sexual Health* 127 at 127; Sara Benson "Hacking the Gender Binary Myth: Recognising Fundamental Rights for the Intersexed" (2005) 12 *Cardozo J L & Gender* 31 at 33; Melanie Blackless and others "How Sexually Dimorphic Are We? Review and Synthesis" (2000) 12 *Am J Hum Biol* 151 at 161; Philip Ebels "Intersex People in EU: Ashamed and Invisible" *EUobserver.com* (12 June 2012) <<http://euobserver.com/890/116578>>.

⁴ Garry L Warne "Disorders of Sex Development" in (online ed, Oceana Therapeutics Limited); Christine Muckle "Giving a Voice to Intersex Individuals through Hospital Ethics Committees" (2006) 2006 *Wis L Rev* 987 at 993; Kishka-Kamari Ford "'First, Do No Harm': The Fiction of Legal Parental Consent to Genital-Normalizing Surgery on Intersexed Infants" (2001) 19 *Yale Law & Policy Review* 469 at 470; Neil K Kaneshiro "Intersex" (2011) *MedlinePlus - US National Library of Medicine National Institutes of Health* <<http://www.nlm.nih.gov/medlineplus/ency/article/001669.htm>>; Intersex Society of North America "Intersex Conditions" (1993–2008) Intersex Society of North America <<http://www.isna.org/faq/conditions>>; University of Michigan Health System "Disorders of Sex Development (DSD): Your Child" (2013) <<http://www.med.umich.edu/yourchild/topics/dsd.htm>>.

⁵ Blackless and others, above n 3, at 159.

⁶ (1) there are a wide range of intersex 'conditions' of which not all are counted as intersex by medical professionals but as cosmetic defects; (2) sex has been determined and defined by

ambiguity has identified the frequency of 1.7% of live births.⁷ Once two male intersex variations - cryptorchidism and hypospadias – are added, the average increases by another 1.8%⁸ to become 3.5%. However, analysis of historical accounts may indicate increased numbers. For example, many accounts of Berdaches in traditional North American societies indicated that mixed sex identity was quite common, unlike the frequency of intersex that is currently assumed to be relatively low.⁹

In the West, although in many other parts of the world as well, the history of intersex people¹⁰ lost the right to identify as a sex identity that matches who they are – male, female, both or neither. The history¹¹ of intersex people (or

history and culture as a binary; and (3) whether one has chosen a broad enough population sample including geographical variations. See: J David Hester “Intersexes and the End of Gender: Corporeal Ethics and Postgender Bodies” (2004) 13 *Journal of Gender Studies* 215 at 216; Blackless and others, above n 3, at 159; Some medical professionals only count specific variations, such as Leonard Sax, who argued that “If the term intersex is to retain any clinical meaning, the use of this term should be restricted to those conditions in which chromosomal sex is inconsistent with phenotypic sex, or in which the phenotype is not classifiable as either male or female” See: Leonard Sax “How Common is Intersex? A Response to Anne Fausto-Sterling” (2002) 39 *J Sex Res* 174 at 177.

⁷ Blackless and others, above n 3, at 159; Leonard Sax with his restricted definition of intersex believed the percentage was only 0.018%: Sax, above n 6, at 177.

⁸ Blackless and others, above n 3, at 160.

⁹ Roger N Lancaster *The Trouble with Nature: Sex in Science and Popular Culture* (University of California Press, Berkeley, 2003) at 223.

¹⁰ Including people whose sex identity is outside of the binary.

¹¹ For a more detailed history, refer to the following: Alice Domurat Dreger, above n 1; Gerald N Callahan *Between XX and XY* (Chicago Review Press, Chicago, Ill, 2009); Sharon E Preves *Intersex and identity* (Rutgers University Press, New Brunswick, NJ, 2003); Elizabeth Reis *Bodies in doubt* (Johns Hopkins University Press, Baltimore, 2009); Julia Epstein “Either/Or-Neither/Both: Sexual Ambiguity and the Ideology of Gender” (1990) 7 *Genders* 99; Matthew Bennett “The History of Intersexuality: The Emergence and Control of Intersexuality in Medical Discourse” (2009) 12 *Estro* 1; Palmira Fontes Da Costa “The Medical Understanding of Monstrous Births at the Royal Society of London During the First Half of the Eighteenth Century” (2004) 26 *History & Philosophy of the Life Sciences* 157; Marie-Amélie George “The Modern Mulatto: A Comparative Analysis of the Social and Legal Positions of Mulattoes in the Antebellum South and the Intersex in Contemporary America” (2006) 15 *Colum J Gender & L* 665; M Danielsson “Intersexuality And its Medical and Social Implications” (Bachelor Thesis, Malmö högskola/Hälsa och samhälle, 2006); Christina Annalena Eckert “The Historicisation of the Hermaphroditic/Intersexed Body: From Medicalisation to De-Medicalisation” (Master of Gender History, University of Essex, 2003); Sara Edenheim “Bodies out of Place - on Abjection, Exclusion, and Adaption of Intersexed and

hermaphroditism as it used to be referred to) is largely the history of the struggles over the realities of sex – the nature of true sex, the proper roles of the sexes, and the question of what sex can, should and must mean.¹² Due to historical influences, intersex people have been known as various states: mythical creatures, social abnormalities, and medical pathologies of sex differentiation.¹³

In Ancient Greece, men and women had clearly defined social, sexual and political roles, and androgynes¹⁴ such as an intersex child did not fit within such roles. Rules were created to cleanse society of androgynes because the birth threatened the social order.¹⁵ Usually, the child was drowned as a reparation/sacrifice made to the gods.¹⁶ The Roman scholar, Pliny the Elder (AD 23-79), was the first to use the word hermaphrodite for beings who were just people who suffered from an accident of nature – not oracles or ill omens.¹⁷

From the Dark Ages until the end of the 18th century, hermaphrodites (intersex people) were included under the category of “monsters” in the medieval period and early Renaissance, and literature about monsters and marvels was ubiquitous at the dawn of the age of print.¹⁸ This was because, according to Foucault, they

Homosexual Bodies within Legal and Scientific Discourses, 1919-1968” (paper presented to Gender and Power in the New Europe, the 5th European Feminist Research Conference, Lund University, Sweden, 2003).

¹² Alice Domurat Dreger, above n 1, at 15.

¹³ Elizabeth Reis “Divergence or Disorder? The Politics of Naming Intersex” (2007) 50 *Perspect Biol Med* 535 at 536.

¹⁴ A term used to signify one who does not fit in the male or female socio-political schema. Now understood as the male-female binary.

¹⁵ Callahan, above n 11, at 26.

¹⁶ At 26–27.

¹⁷ At 27.

¹⁸ Jenny Mann “How to Look at a Hermaphrodite in Early Modern England 1500- 1900” (2006) 46 *Stud Eng Lit* 67 at 70; Dr Cawadias “Hermaphroditism: a Historical Approach” (1941) 2 *BMJ* 818 at 818.

confounded the natural law that distinguished the two sexes.¹⁹ Much has not changed even today. Some still think of them as mythical creatures, not a person walking beside them on the street today.

The Renaissance saw the growth of the medical profession. One of the results of this was the upholding of the ideals of sex, in particular, reproductive sex, based on the assumption that there are only two sexes, and therefore two genders.²⁰ Even though the political fact of differences between the male and female are exposed,²¹ scientists still insist on the difference and base their research around those differences without questioning them and do not accept the diversity of sex including intersex.²² They became medical observations and experiments to not only retain the binary of male-female but also to understand the biology of male-female 'sex'.²³ Information about intersex people became buried in the medical information and held by those in power.²⁴ Children born into the "enlightened world" had to be either boys or girls, regardless of how little they might resemble either.²⁵ Doctors and midwives, fathers, and mothers simply took a look between a new born child's legs and chose a sex.²⁶ Parents have been socialised to expect

¹⁹ Robert Hurley (translator) Michel Foucault *The History of Sexuality: The Will to Knowledge* (Penguin Books Ltd, United Kingdom, 1998) at 38.

²⁰ This assumption of a sex binary took the religious doctrines of the Middle Ages and gave them validity within the new Enlightenment era where any justification had to be through the scientific method. However, this method was socially constructed with the aim of upholding the ideals of the desired political society. See: Terry S Kogan "Sex-Separation in Public Restrooms: Law, Architecture, and Gender" (2007–2008) 14 Mich J Gender & L 1 at 23.

²¹ Alex More "Coming Out of the Water Closet: The Case Against Sex Segregated Bathrooms" (2007–2008) 17 Tex J Women & L 297 at 307.

²² Doctors have never fully incorporated intersex into their vocabulary, but rather considered as a disease. moreover, since the medical conference in 2005 of the Lawson Wilkins Pediatric Endocrine Society and the European Society for Paediatric Endocrinology, the intersex (or hermaphrodites) were now to be known as "disorders of sex development" (DSDs) in medical settings. See: Elizabeth Reis, above n 13, at 537.

²³ Cawadias, above n 18, at 818.

²⁴ Callahan, above n 11, at 25.

²⁵ At 27–28.

²⁶ At 27–28.

children to be either a boy or a girl. Having a child labelled as ‘intersex’ puts fear into some parents which are often negatively associated with sexuality, eroticism, or sexual orientation.²⁷ This fear enables the medical profession to continue the ideology of male-female without others questioning it.

Significance of the Topic

History demonstrates that intersex people continue to face violations of both their identity and being – who they are and how they come to be. This has devastating effects on their lives. It prevents them from living to their full potential. Those advocating for intersex people, not only want non-life-threatening sex-normalising treatment to stop, but to enable each person to have autonomy over who they are and what happens to them.

Identity, understood as making sense of who one is and how one comes to be in a relational environment, is essential to everyone in all places throughout time. It gives meaning and purpose to each one’s life and enables them to relate to others around them in society. Identity has not always been named or had a special term, yet it has always been essential to every individual and every community. Identity is central to recognition, and as such, it is important to understand how identity is formed and how human rights can both enable and protect identity. This thesis uses intersex people as a study to highlight the formation or development of identity and whether human rights have, and moreover if it can, protect and enable identity in such a sense.

This topic has been timely. When I first started researching, there were only a few books or articles. By the end of my thesis, those ground-breaking books have been supplemented by many more articles and reports. Moreover, it has had recognition at the United Nations (UN) as an issue of focus. Furthermore, the WHO

²⁷ Elizabeth Reis, above n 13, at 537.

has also picked up these issues of intersex especially focusing on the enforced sex-normalising procedures. There is a slow, yet important, making intersex issues visible, though for many people, intersex people is still invisible to them. This thesis intends to expand upon this awakening of intersex. It brings these issues together to illustrate the importance of identity as who one is (one having intersex variations) and how one comes to be whether one lives out a male, female, or non-binary life.²⁸ This must be autonomously derived, and not a determined existence.

Intersex and the World of Sex Diversity

Before considering the methodology and structure, it is time to pass through a story. This story may seem fantastical but relays a society where intersex people have recognition, yet not as intersex people, but as human beings. This story comes from a book John Stoltenberg wrote *Refusing to be a Man: Essays on Sex and Justice*.²⁹

I'd like to take you, in an imaginary way, to look at a different world, somewhere else in the universe, a place inhabited by a life form that very much resembles us. But these creatures grow up with a peculiar knowledge. They know that they have been born in an infinite variety. They know, for instance, that in their genetic material they are born with hundreds of different chromosome formations at the point in each cell that we would say determines their "sex." These creatures don't just come in XX or XY; they also come in XXY and XYY and XXX plus a long list of "mosaic" variations in which some cells in a creature's body have one combination and other cells have another. Some of these creatures are born with chromosomes that aren't even quite X or Y because a little bit of one chromosome goes and gets joined to another. There are hundreds of different combinations, and though all are not fertile, quite a number of them are. The creatures in this world enjoy their individuality; they delight in the fact that they are not divisible into distinct categories. So when another newborn arrives with

²⁸ A non-binary life is one where one's expression and life cannot be classed as either male or female, but both or neither. There is a slow, but increasing number of people who identify as non-binary.

²⁹ John Stoltenberg *Refusing to be a Man: Essays on Sex and Justice* (UCL Press, London, 2000) at 22–24.

an esoterically rare chromosomal formation, there is a little celebration: “Aha,” they say, “another sign that we are each unique.”

These creatures also live with the knowledge that they are born with a vast range of genital formations. Between their legs are tissue structures that vary along a continuum, from clitorises with a vulva through all possible combinations and gradations to penises with a scrotal sac. These creatures live with an understanding that their genitals all developed prenatally from exactly the same little nub of embryonic tissue called a genital tubercle, which grew and developed under the influence of varying amounts of the hormone androgen. These creatures honor and respect everyone’s natural-born genitalia—including what we would describe as a microphallus or a clitoris several inches long. What these creatures find amazing and precious is that because everyone’s genitals stem from the same embryonic tissue, the nerves inside all their genitals got wired very much alike, so these nerves of touch just go crazy upon contact in a way that resonates completely between them. “My gosh,” they think, “you must feel something in your genital tubercle that intensely resembles what I’m feeling in my genital tubercle.” Well, they don’t exactly think that in so many words; they’re actually quite heavy into their feelings at that point; but they do feel very connected—throughout all their wondrous variety.

I could go on. I could tell you about the variety of hormones that course through their bodies in countless different patterns and proportions, both before birth and throughout their lives— the hormones that we call “sex hormones” but that they call “individuality inducers.” I could tell you how these creatures think about reproduction: For part of their lives, some of them are quite capable of gestation, delivery, and lactation; and for part of their lives, some of them are quite capable of insemination; and for part or all of their lives, some of them are not capable of any of those things—so these creatures conclude that it would be silly to lock anyone into a lifelong category based on a capability variable that may or may not be utilized and that in any case changes over each lifetime in a fairly uncertain and idiosyncratic way. These creatures are not oblivious to reproduction; but nor do they spend their lives constructing a self-definition around their variable reproductive capacities. They don’t have to, because what is truly unique about these creatures is that they are capable of having a sense of personal identity without struggling to fit into a group identity based on how they were born. These creatures are quite happy, actually. They don’t worry about sorting other creatures into categories, so they don’t have to worry about whether they are measuring up to some category they themselves are supposed to belong to.

These creatures, of course, have sex. Rolling and rollicking and robust sex, and sweaty and slippery and sticky sex, and trembling and quaking and tumultuous

sex, and tender and tingling and transcendent sex. They have sex fingers to fingers. They have sex belly to belly. They have sex genital tubercle to genital tubercle. They have sex. They do not have a sex. In their erotic lives, they are not required to act out their status in a category system—because there is no category system. There are no sexes to belong to, so sex between creatures is free to be between genuine individuals—not representatives of a category. They have sex. They do not have a sex. Imagine life like that.

This story represents a key theme to this thesis. It illustrates how important narrativity is to human beings to speak and act their life forming their own narrative which reveals a becoming, and identity. The individuals (creatures) in this story did not start with an identity, but at the end of the story, their identity – as who they are and how they came to be – is revealed. This story illustrates that although sex is important to society it does not necessarily require the naming or the categorising according to sex. Such a society represents a reciprocal society that respects people for who they are as a constructive member, and not what they can do for society. It is in this sense the story demonstrates recognition in society as identity. As the thesis continues, the relevance of this story becomes clear.

Methodology

This thesis is a theoretical investigation of identity, how it is or is not understood within international human rights law, and whether or not, if it is recognised, it is protected by such law. It uses narrativity and interpretive theory to aid the understanding of identity. There was no empirical research undertaken in this thesis. International human rights case law from the UN and the European Court of Human Rights has been used to understand and interpret international human rights law in relation to this thesis.

The understanding of identity requires the understanding of and separation of two types of interpretation of identity: identity as identity or sameness and identity as a mediation of sameness and self. This draws heavily on the philosophy of Paul

Ricoeur³⁰ as well as others such as Joseph Raz,³¹ and Jill Marshall,³² among others. Ricoeurian philosophy considers the two identities – the idem identity and the ipse identity – and how they have been understood and applied to identity. One conceptualisation is the identity as identicality where the ipse or self is separated or divested from one’s identity. The other understanding of identity is of a mediatory nature where the singularity of identity reflects the narrative of one’s being transformable through time. The manner in which identity is understood and applied affects the very lives of people and how their lives are narrated.

As mentioned, the methodology of this thesis revolves around narrativity. To expand, narrativity is the basis of interpretation and understanding of who one is and how one comes to be. It has been the basis of life in most societies. This draws again on the Ricoeurian philosophy. Narrativity reveals the becoming of one’s own character, the protagonist of their story, as their identity. Every narrative is constructed in and interpreted through interpretive horizons. This draws on Hans Georg Gadamer’s concept of horizons.³³ Drawing on his concept of horizons, I interconnect this with Chirkov, Ryan, Kim, and Kaplan and their work of horizontal and vertical type societies.³⁴ The interconnecting of these society types with

³⁰ David Pallauer (translator) Paul Ricoeur *The Just* (University of Chicago Press, Chicago, 2000); David Pallauer (translator) Paul Ricoeur *Reflections on the Just* (University of Chicago Press, Chicago, 2007); Kathleen Blamey (translator) Paul Ricoeur *Oneself as Another* (University of Chicago Press, Chicago, Ill, 2008); Paul Ricoeur “Narrative Identity” (1991) 35 *Philosophy Today* 73; Paul Ricoeur “Capabilities and Rights” in Séverine Deneulin, Mathias Nebel and Nicholas Sagovsky (eds) *Transforming Unjust Structures: the Capability Approach* (Springer, Dordrecht, The Netherlands, 2006) 17; Paul Ricoeur “Becoming Capable, Being Recognized”.

³¹ In particular this thesis has focused on this work of Joseph Raz, it has also used others’ works as well: Joseph Raz *The Morality of Freedom* (reprinted ed, Clarendon Press, Oxford, 2009).

³² Jill Marshall *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers, Leiden; Boston, 2009); Jill Marshall *Human Rights Law and Personal Identity* (Routledge, Abingdon, Oxon; New York, NY, 2014).

³³ Hans Georg Gadamer *Truth and Method* (second revised ed, Continuum, New York, 2003).

³⁴ Valery Chirkov and others “Differentiating Autonomy from Individualism and Independence: A Self-determination Theory Perspective on Internalization of Cultural Orientations and Well-being” (2003) 84 *Journal of Personality and Social Psychology* 97.

horizons enables an explanation of identity as what or who one is and how one comes to be. It explains how one's life is narrated within and through either that of a vertical or horizontal interpretive horizon.

Although everyone becomes within a narrative identity, it is possible that one's narrative identity may be separated from their personal identity. This is what Paul Ricoeur refers to as 'a problematic of identity'. When this occurs, one's narrative life is the life of an assignation and revealed through such an assignation. To retain one's narrative identity and the autonomy over who one is and how one comes to be, one must have a moral identity. This draws upon the Aristotelian notion of the good life. This thesis expounds on the notion of the good life, the flourishing life, by writers not normally associated with Aristotle and the good life, in particular, Ricoeur, Joseph Raz³⁵ and John Stuart Mill.³⁶

The other important lens of analysis in this thesis is human rights. This was a look at the history of international human rights and at how they were drafted. It considered the philosophy upon which it drew and the philosophy that was espoused from human rights. The philosophy of human rights provided the basis to understand how to both interpret and apply human rights. The purpose of this is to understand whether international human rights enables identity and moreover, whether it protects the enabling of one's identity. This will be illustrated through intersex people and their issues. In doing so, it evaluates how certain rights enable and protect who one is and how they come to be – their identity.

³⁵ Raz, above n 31.

³⁶ John Stuart Mill *On Liberty* (The Pennsylvania State University, Hazleton, PA, USA, 1998).

Thesis Structure

The title of this thesis is: “Identity and its Protection as the Aim and Purpose of International Human Rights Law: The Case of (Inter)sex Identity and its Protection.” In unpacking this, it led to a great journey in understanding identity and human rights. This led to several investigations based around some questions:

- How do the elements of personal identity connect to be what or who one is including one’s sex?
- Is identity something that just is, or is it deeper? Is there a morality of identity?
- How sex had been viewed and interpreted within international law?
- What is the basis and purpose of human rights and what is the interconnection or understanding of identity in international human rights law or not as the case may be?
- If applied to intersex issues, could they aid intersex people in forming a moral identity?

The investigations that were based on these questions became critical to understanding how intersex people and their identity may or may not be protected under international human rights law. It was only after investigating each of these areas and connecting them together was the big picture brought into view. These investigations became the basis of various parts of the thesis.

The first chapter considers the becoming of life. It outlines how narratives are critical to one’s becoming. As such to understand one’s becoming, it is important to understand one’s narrative. These narratives are developed within horizons – vertical or horizontal – that become the environment in which the narrative (development) occurs. There are many multiplicities which comprise the becoming of which sex one is. The chapter explains how sex becoming forms and is understood from within interpretive horizons either vertical or horizontal.

The second chapter considers the personal identity that comes from the narrative identity as seen through the last chapter. It considers what occurs if the narrative identity is divested from one’s personal identity – the problematic of identity. This leaves the human condition, or as referred to in human rights language, the

human person, vulnerable. It is for this reason that a narrated identity must be for a moral identity to protect against such a vulnerability. As such, the chapter explains what is needed to have a moral identity as a personal identity is open to vulnerability.

The third chapter considers the way sex is currently been read into international instruments and understood within international organisations. Sex has not been defined in international law as it also has not been in most domestic jurisdictions. Furthermore, despite the improvement in equality, at least to a certain extent, Sex has remained within the conceptualisation of status. This has been viewed within the development of rights over time. Due to the continued emphasis on status, especially sex status, there is a need to consider the subject of rights?

The understanding of the subject of rights leads was the quest in chapter 4. The focus was to understand what is the foundation and purpose of human rights. The foundation of human rights is the dignified person and the purpose is to enable to freely and fully develop their personality as a dignified being. This then enables an understanding of how the list of rights and freedoms in the International Bill of Rights (IBOR) are to be applied as intended. The chapter demonstrates that rights and freedoms are not merely a list of independent items but have been intentionally brought together as necessary for the dignified being to freely and fully develop. When interpreted in this sense it provides an equality of being that is equally applicable to everyone.

The last three chapters (chapter 5-7) return to the focus of this thesis of enabling and protecting intersex people to become who they are and ensure they have autonomy over how they come to be. Chapter 5, considers human right through the right to privacy. This provides for the right to autonomously shape one's life and identity as a dignified being. However, chapter 6 illustrates that this may be hampered if well-being is inhibited as with intersex people. This chapter highlights some key areas that inhibit or deny intersex people's well-being and limit their possibility to be who they are and how they come to be. The last chapter, chapter

7, considers non-recognition or misrecognition as the cause of human rights violations, but conversely recognition is the source of being who one is and how one comes to be. Recognition as a human being, not as some status feature, is essential to becoming a dignified moral being.

CHAPTER 1: NARRATIVITY AND THE BECOMING OF (INTER)SEX

The thesis aims to consider whether international human rights understands and protects the identity of the human person. If it does protect one's identity, then how does international human rights law protect identity? These questions however cannot be answered until conceptualising what identity is and how it is formed. This chapter will demonstrate that identity is understood through the narrative of one's becoming. The next chapter, despite what is illustrated in this first chapter of a singularity of identity (in a point of time) is revealed through one's narrative of becoming, the problematic of identity arises where one's narrative of becoming is divested from one's identity. That is, identity becomes a fixed determination irrespective of one's narrative of becoming. To overcome the problematic of identity and return the narrative of becoming to reveal one's identity, it requires a moral basis, and as such, sets out a basis for a moral identity.

This first chapter focuses on the inquiry of identity as becoming what or who one is. Becoming is a narrated process involving one's many multiplicities, often referred to as identities.¹ They are a composition or a web of attributes that make each person unique.² They include, in addition to (inter)sex as the focus of this thesis, many other aspects such as facial features, height, as well as religion, ethnicity, social group affiliation, sports team loyalty, family, profession, artistic

¹ It is not a singular identity, fixed and immutable as a political identity would like to presuppose or as reductionist technology imposes. The multiple and sometimes contradictory or unresolved identities are inclusive of attributes, roles and memberships that are representative of that person and make up one's Self including aspects such as race, culture, social class, and sexual orientation, are constructed in sociocultural and socio-political contexts. See: Susan R Jones and Marylu K McEwen "A Conceptual Model of Multiple Dimensions of Identity" (2000) 41 *Journal of College Student Development* 405 The multiplicities are sometimes referred to as multiple identities – race, gender, class, job, religious affiliation, national origin or something else. Often one of these is singled out as a person's identity.

² M Montserrat Guibernau *Belonging: Solidarity and Division in Modern Societies* (Polity Press, Cambridge, UK, 2013) at 18; Jill Marshall *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers, Leiden; Boston, 2009) at 93.

preferences, culinary preferences, and place of origin and so on.³ In other words, the intersectional becoming of each of these many multiplicities represents one's becoming as a human being. Although this thesis focuses on (inter)sex it must be stated it is recognised that any multiplicity of one's identity is and always will intersect with and interact with and through the many other multiplicities of one's identity.

Central to one's becoming is the multiplicity of sex.⁴ Sex has intrigued societies and cultures for millennia. In their work *Sex at Dawn*, Christopher Ryan and Cacilda Jethá describe the wonder that sex poses to humanity and the way societies have looked for clues to understand it. They write:⁵

In a sky swarming of uncountable stars, clouds endlessly flowing, and planets wandering, always and forever there has been just one moon and one sun. To our ancestors, these two mysterious bodies reflected the female and male essences. From Iceland to Tierra del Fuego, people attributed the Sun's constancy and power to his masculinity; the Moon's changeability, unspeakable beauty, and monthly cycles were signs of her femininity...Some will say, 'Interesting coincidence'. Others will wonder whether there isn't an extraordinary message contained in this celestial convergence of difference and similarity, intimacy and distance, rhythmic constancy and cyclical change. Like our distant ancestors, we watch the eternal dance of our sun and moon, looking for clues to the nature of man and woman, masculine and feminine here at home."

What is notable about this is the importance of sex to the understanding of life. How sex is understood and incorporated within life has varied from time and place. Although today, it is almost universally thought of as a divide of pink and

³ Avner Ben-Ner and Claire A Hill "Negative Dimensions of Identity: A Research Agenda for Law and Public" (2008) 9 Minn JL Sci & Tech 643 at 643.

⁴ Australian Human Rights Commission *Sex Files: the Legal Recognition of Sex in Documents and Government Records: Concluding Paper of the Sex and Gender Diversity Project* (2009) at 7; Susan K Egan and David G Perry "Gender Identity: A Multidimensional Analysis with Implications for Psychosocial Adjustment" (2001) 37 Developmental Psychology 451 at 451; Marshall, above n 2, at 103.

⁵ Christopher Ryan and Cacilda Jethá *Sex at Dawn* (Harper, New York, 2010) at 311–312.

blue, male and female, it has not always been so.⁶ Different societies have understood sex in varied ways from diversity to that of one sex and of two sexes.⁷ Moreover, diversity of sex has been documented across cultures and every epoch of history such as hijras, mahu, and two-spirited people to name a few.⁸ However, in the modern era, the binary of male-female sex is seen as fundamental to the dividing of the social world.⁹

Whatever the conceptualisation, the multiplicity of sex is a critical part of social organisation and function of society. Sharon Preves writes of the importance of sex and its conceptualisation to social organisation:¹⁰

“Whether we are conscious or not, gender structures our most basic sense of self as well as our primary social institutions. From issues of identity development and everyday social interaction, to the structure of family, economic, political, religious, and educational relations, gender is one of the primary organising principles of society and daily living.”

⁶ Claudia Lang and Ursula Kuhnle “Intersexuality and Alternative Gender Categories in Non-Western Cultures” (2008) 69 *Hormone Research* 240 at 241.

⁷ See generally: Gerald N Callahan *Between XX and XY* (Chicago Review Press, Chicago, Ill, 2009).

⁸ Deborah Rudacille *The Riddle of Gender: Science, Activism, and Transgender Rights* (Pantheon Books, New York, 2005) at 3; Callahan, above n 7, at 143–149; Joan Roughgarden *Evolution’s rainbow* (University of California Press, Berkeley, California, 2009) at 329–351 (Two-spirit, mahu, and Hijiras); For example in the Dominican Republic, male female and guevedoces. See Carl Elliott “Why Can’t We Go on as Three?” (1998) 28 *Hastings Cent Rep* 36; Maori society was no exception here prior to colonisation First contact European explorers around the shores of Aotearoa on several occasions noticed the striking beauty of Māori maidens, however they soon realised when in more intimate circumstances, these female companions were actually male like themselves. (Salmond, 1993 cited in NZAF, 2005) ...Māori tribal society provided space for transgender people to live within the comfort and confines of their whānau. (Herewini, 2003 quoted in NZAF, 2005). - See Human Rights Commission *To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People* (2008) at 24.

⁹ Cordelia Fine *Testosterone Rex - Unmaking the Myths of Our Gendered Minds* (Icon Books Ltd, London, United Kingdom, 2017) at 14.

¹⁰ Sharon E Preves *Intersex and identity* (Rutgers University Press, New Brunswick, NJ, 2003) at 15.

As she wrote, from identity development, social interaction and relations, to institutional structure, organisation and processes, sex has become integral.¹¹ It is so central, at least today, that it is one of the first questions asked: ‘is it a boy or a girl?’¹² This is despite the past revealing a diversity of sex more than only boy or girl (man or woman). Given the importance of sex to social organisation, it leads to the important question that biologist Joan Roughgarden poses about sex becoming: “How does one fertilized egg grow up to become a corporate CEO while another grows up to be a drag queen?”¹³ This question leads to consideration of one’s becoming and the connection to sex. The two becomings of sex and how that inhibits and enhances what sex one is or who they are as a sex and how they come to be will be considered in the later part of this chapter.

Before considering the becoming of (inter)sex, this chapter first situates becoming as a revealing of one’s identity rather than that of a determinative or a fixed statement of one’s identity. Becoming is a mediatory process involving biological, social, and environmental factors as one narrates or authors their life. For example, the becoming of sex is a mediation of the sense of self (including the biological elements of self) and the social self as through one’s self-image, self-expression, aspirations, sexual desires, and society’s expectations.¹⁴ It is through such a narrative process of becoming that reveals who or what one is and how they come to be – one’s identity.

Second, this chapter makes the connection of becoming with narration. It outlines how all life is understood through and within narratives. The narratives, whether scientific or mythical for example, are what members of society use to understand

¹¹ Lauren Leve “‘Identity’” (2011) 52 *Current Anthropology* 513 at 513; Lawrence M Friedman “The Concept of the Self in Legal Culture” (1990) 38 *Clev St L Rev* 517 at 517; Fine, above n 9, at 14; Jones and McEwen, above n 1, at 411.

¹² Fine, above n 9, at 14.

¹³ Roughgarden, above n 8, at 185.

¹⁴ Marshall, above n 2, at 103, 104.

life itself and how to relate to each other and organise as a society. Although each person has a narrative, these narratives interconnect with others' narratives weaving many stories together. It is from understanding these narratives that it is possible to understand what or who one is and how they come to be.

The third part of this chapter outlines two different horizons in which one's narrative develops – a vertical or horizontal. The horizon determines how one becomes who or what they are and what type of relations between people of the community there is. These horizons set the path of development. Different societies incorporate varying degrees of the horizons and may even switch between them over time. It is from understanding the horizon that it is possible to understand the development of who or what one is and how one comes to be.

The last part of this chapter brings the first two parts together the narratives through the horizons – in the understanding of sex becoming, and in particular, intersex becoming. It then is possible to understand the effect of the horizon on how one comes to be as one's sex. The becoming of sex in the vertical limits sex becoming to particular sexes – most commonly male and female – and it prohibits becoming that may exhibit diversity as with intersex variations. The horizontal though, does not determine one's sex, but permits the becoming of who they are. This enables people with intersex variations to blossom without constraint or manipulation into a particular sex. This becoming respects diversity of sex and enables who one is to come through one's narrative as how one comes to be.

1.1 Becoming - a Revealed not a Determinative Fixed Identity

Becoming is essential to understand one's identity. That is, it is impossible to know and explain identity without understanding one's becoming. Becoming is a process from birth till death (or beyond) of what or who one is. In other words, it is through one's becoming that it is possible to understand how one comes to be what or who one is. The process of becoming includes the many multiplicities that make up what or who one is including (inter)sex, the illustrative multiplicity of this thesis.

Human beings are relational beings, not mechanical beings. They do not “simply react to the circumstances as they present themselves.”¹⁵ This would indicate that there is no autonomy or ability of humans to make choices, have feelings, or determine one’s own life path. Furthermore, William Reiner, a specialist doctor in intersex patients and psychologist, wrote: “anatomy does not the man make.”¹⁶ One’s anatomy, or for that matter one’s genetics, does not determine what one is to be lived out as circumstances dictate. That is of similar nature to referring to humans as a mechanical being. Suggesting that humans react to life as circumstances present themselves and as anatomy dictates suggests that there is no meaning to life but to exist and live out one’s pre-determined life. It suggests that human beings do not have autonomy over who they are or how they come to be.

It is this relational being or relational person that George Mead refers to in his famous work on *The Social Self*.¹⁷ In that work, he explains the becoming as a dialectic mediation between the ‘I’ and the ‘me’ in the producing of the self. For him, the self that results from “a ‘me’ is inconceivable without an ‘I’.”¹⁸ Yet, the ‘I’ does not produce the ‘me’ in some causative manner, but rather it is the dialectic of these two, that is, it is a dialectic of I-me. He argues that it is ‘me’ that ‘I’ addresses and it is ‘I’ to whom the ‘me’ observes.¹⁹ The ‘I’ produces the contents that make up the self,²⁰ while the ‘me’ is the experience that is induced by this

¹⁵ Georgia Warnke *Debating Sex and Gender* (Oxford University Press, New York, 2011) at 7.

¹⁶ William Reiner “To be Male or Female—That is the Question” (1997) 151 *Arch Pediatr Adolesc Med* 224 at 2.

¹⁷ George H Mead “The Social Self” (1913) 10 *The Journal of Philosophy, Psychology and Scientific Methods* 374.

¹⁸ At 374.

¹⁹ At 374–375.

²⁰ “The ‘I’ is “just those contents which go to make up the self which is distinguished from the others whom he addresses.”: At 375.

action of the "I."²¹ It is also the same 'me' that is affected by the means of the social stimulation of others.²² His proposition is that it is the I that as an existential being with all of its biological, psychological and spiritual parts, but these become experienced by the 'me'. The 'me' is the experiences of the biological and the social.

Moreover, the social self, as it suggests, is relational in nature. The social self, through the introspection of the "I" by the 'me', enters into social relations with other selves.²³ Mead writes that²⁴

"it is only as the individual finds himself acting with reference to himself as he acts towards others, that he becomes a subject to himself rather than an object, and only as he is affected by his own social conduct in the manner in which he is affected by that of others, that he becomes an object to his own social conduct."

The introspection of the 'I' by the experiential 'me' only becomes a subject to oneself in a relational environment. This indicates the importance of society in the producing of the social self.

This producing of the self, as referred to here as one's becoming is of mediatory nature. The experience of the 'me' results from the addressing of the 'I'. The experience of the 'me' is not only through the biological but also the social and the environmental. The meaning and significance result from the experience (me) upon and through the biological being (I).²⁵ For example, in relation to the multiplicity of sex, along with the biological and the environmental experiences,

²¹ The me is "the experience which is induced by this action of the 'I.' If the 'I' speaks, the 'me' hears. If the 'I' strikes, the 'me' feels the blow.": At 375.

²² "It is the same self who is presented as observing himself, and he affects himself just in so far and only in so far as he can address himself by the means of social stimulation which affect others.": At 375.

²³ At 375.

²⁴ At 375.

²⁵ Warnke, above n 15, at 7.

the social experiences such as self-image, self-expression, aspirations, sexual desires, and society's expectations,²⁶ are important in producing of the sexual self, or the becoming of the multiplicity of sex. It is through this mediatory process that one finds meaning and significance in life which is essential to becoming who or what one is. Experience mediated through existentiality is the process of becoming rather than some pre-determined linear development of an identity upon what the self develops.

1.2 *Narrativity of Becoming*

Becoming, or as Mead referred to as the producing of the social self, is a narrative, interpretive, activity. It is this becoming that Paul Ricoeur refers to in his chapter *Life in Quest of Narrative*:²⁷

"It has been known and often been repeated that life has something to do with narrative; we speak of a life story to characterise the interval between life and death."

Becoming of one's life from birth to death is understood through one's narrative. Sandy Farquhar, suggests that²⁸

"Ricoeur's position is congruent with the idea that individuals and communities make sense of actions and events by telling stories, where the function of narrative is to provide explanations of actions and events."

As Farquhar suggests, Ricoeur's idea is that understanding of oneself and the world around them is through narratives. It is through these narratives that connect the experiential 'me' to the observed 'I' with the relational others of Mead's work. Narratives are a universal feature of social life and a fundamental

²⁶ Marshall, above n 2, at 103, 104.

²⁷ Paul Ricoeur "Life in Quest of Narrative" in *Narrative and Interpretation* (Routledge, London, UK, 1991) at 20.

²⁸ Sandy Farquhar *Ricoeur, Identity, and Early Childhood* (Rowman & Littlefield Publishers, Lanham, Md, 2010) at 10.

model through which the grounding of human experience in time is understood.²⁹ They have been expressed through various narrative forms including songs, stories, and art.³⁰ They are also utilised in understanding of the scientific, religious, and philosophical basis of life. As Pierre Bourdieu stated: “life is inseparable from the sum of events of an individual existence seen as a history and a narrative of that history.”³¹ Narratives provide the means to understand oneself, others and the world around and how it is all interconnected. They tie people’s present with the past and future.

Humans, by their very nature, are self-reflexive and self-narrating beings.³² As a self-narrating being, one is the protagonist, the central character³³ within one’s life story.³⁴ The protagonist is durable and dynamic³⁵ representing one from one’s birth till death.³⁶ Douglas Ezzy refers to the protagonist as being³⁷

“coherent but fluid and changeable, historically grounded but ‘fictively’ reinterpreted, contracted by an individual, but constructed in interaction and dialogue with other people.”

²⁹ Lois McNay “Gender and Narrative Identity” (1999) 4 *Journal of Political Ideologies* 315 at 319.

³⁰ In addition to the use songs, stories and art, the modern era also includes such narratives in forms of movies, TV, and gaming to describe to individuals and communities came to be and how they understand themselves.

³¹ Pierre Bourdieu “The Biographical Illusion” in Jessica Evans, Paul Du Gay and Peter Redman (eds) *Identity - a Reader* (Sage Publications Ltd, London, UK, 2000) at 297.

³² David R Maines “Narrative’s Moment and Sociology’s Phenomena: Toward a Narrative Sociology” (1993) 34 *The Sociological Quarterly* 17 at 23.

³³ Charles Tilly “Citizenship, Identity and Social History” (1995) 40 *International Review of Social History* 1 at 6, 7; Rogers Brubaker and Frederick Cooper “Beyond ‘identity’” (2000) 29 *Theory and Society* 1 at 12.

³⁴ Maines, above n 32, at 23.

³⁵ Paul Ricoeur “Narrative Identity” (1991) 35 *Philosophy Today* 73 at 77, 80.

³⁶ Ricoeur, above n 27, at 20.

³⁷ Douglas Ezzy “Theorizing Narrative Identity - Symbolic Interactionism and Hermeneutics” (1998) 39 *Sociological Quarterly* 239 at 246.

One's becoming, thus, is as the protagonist of their own life story through the mediated I-me and in dialogical relations with others.³⁸ Becoming is thus dialogically accomplished³⁹ as a self-reflexive, self-narrating being.

Self-narration is relational. It always involves others - other humans and non-humans - with oneself within one's narrative. Although we may have an individual existence, it is only meaningful through the presence of others⁴⁰ even where people have been considered as individualistic.⁴¹ As such, the interpretation of narratives will require the understanding of the interaction and involvement with others.⁴² The narratives indicate the sense of belonging and grounding of everyone⁴³ in the understanding of what or who one is and how they came to be.

Meaning and significance of one's narrative comes through interpretation and understanding of experience of the I-me within social relations. These experiences are lived in the temporality of the present (clocks, schedules, etc.), but uses time

³⁸ Charles Taylor "The Politics of Recognition" in Charles Taylor and Amy Gutmann (eds) *Multiculturalism and "The Politics of Recognition": An Essay* (Princeton University Press, Princeton, NJ, 1992) at 34.

³⁹ At 32.

⁴⁰ Sonia Kruks *Simone de Beauvoir and the Politics of Ambiguity* (Oxford University Press, New York, 2012) at 7.

⁴¹ Individualism is not the concept of self-reliance – independent from society, a near impossibility, which is not analogous to autonomy as understood by Chirkov et al. Valery Chirkov and others "Differentiating Autonomy from Individualism and Independence: A Self-determination Theory Perspective on Internalization of Cultural Orientations and Well-being" (2003) 84 *Journal of Personality and Social Psychology* 97; It is often seen as a natural phenomenon countering or vis-à-vis collectivities. It is in this sense it is seen as "a belief system privileges the individual over the group, private life over public life, and personal expression over group experience; it is a world view where autonomy, independence, and self-reliance are highly valued and thought to be natural; and it is an ideology based on self-determination, where free actors are assumed to make choices that have direct consequences for their own unique destiny. However, this is a myth established within capitalistic societies which still operate as forms of hegemonic collectivities. See: Peter L Callero *Myth of individualism* (second ed, Rowman & Littlefield Publishers, Inc, Lanham, 2013).

⁴² Hans Georg Gadamer *Truth and Method* (second revised ed, Continuum, New York, 2003) at 271.

⁴³ Ben-Ner and Hill, above n 3, at 643.

in the construction of action which can be abstracted to the past and future.⁴⁴ They include one's own feelings, pains, and pleasures acquire meaning and significance through one's social self in the cultural life of the surrounding community.⁴⁵ However, for some, there is no words to express their experiences⁴⁶ until understood within abstractions. Some examples of such abstractions are sex and gender, but also class, ethnicity, and other statuses. Not that the experience did not exist, but that it could not be conveyed or expressed until the abstraction was understood. For this reason, David Maine writes: humans are "self-reflexive organism[s] that by a fairly early age has transformed its raw experiences into abstractions."⁴⁷ Abstractions are the ability to place experiences within or outside of some frame to give meaning and significance. These abstractions are learned at an early age. It is through such abstractions that it is possible to understand oneself and the world around them. It is through understanding of the abstractions within oneself, one's horizon, that it is possible to read one's story of who one is and how one has come to be. David Maine writes: "the self-abstracted person, so clearly seen in adulthood, is one who has acquired a biography and thereby can tell his or her life story."⁴⁸

The abstractions illustrate the interconnection of history and fiction in the self-narrating of one's becoming. All narratives involve an interweaving of fiction with history. As Paul Ricoeur argues, humans do not separate between the interconnection of history and fiction in the construction of narratives.⁴⁹ This fusion of history and fiction incorporates the privileged mediation of signs and symbols borrowed from one's interpretive viewpoint upon one's physical

⁴⁴ Maines, above n 32, at 23.

⁴⁵ Caroline Ramazanoglu "Back to Basics: Heterosexuality, Biology and Why Men Stay on Top" in Mary Maynard and June Purvis (eds) (*Hetero*)sexual Politics (1995) at 33, 38.

⁴⁶ At 33.

⁴⁷ Maines, above n 32, at 22.

⁴⁸ At 23.

⁴⁹ Ricoeur, above n 35, at 73.

existentiality.⁵⁰ As such, it is impossible to separate this fusion of history and fiction that becomes the reality of one's narrative.⁵¹ Sandy Farquhar illustrates this through the writing of a life story, even when two people either have the same traits or the same experiences. She writes that⁵²

When we talk about our identity, as in our life story, we include some things and not others. This process of exclusion and inclusion is carried out in the interests of constituting a particular story about our self. It is in this process of making and telling the story that we produce the self. To do this, we draw on our memories and our histories. We create our own identities, interpreting past events, creating history and identity through storying.

As Farquhar noted, the authoring of one's narrative is the producing of the self and includes what is important to oneself. This will always be one's own story with a particular mix of history and fiction. Everyone authors their narrative and it is only through the sum of events of one's history that one's identity can be interpreted.⁵³ The sum of events inclusive of fictive and historical elements become one's narrative.

Human lives are only readable when interpreted in the function of the stories that people tell about themselves.⁵⁴ Therefore, to understand life, and the individuals within it, one must understand both the collective and the individual narratives that make it up. This requires throwing light on the situation through the process of interpretation.⁵⁵ Interpretation is trying to get meaning from a narrative as with any text.⁵⁶ As far as the narrativity of life, this is continuous or, as Gadamer writes,

⁵⁰ At 73.

⁵¹ At 73.

⁵² Farquhar, above n 28, at 31.

⁵³ Bourdieu, above n 31, at 297.

⁵⁴ Ricoeur, above n 35, at 73.

⁵⁵ Gadamer, above n 42, at 269.

⁵⁶ Alan McKee *Textual Analysis: A Beginner's Guide* (Sage Publications, London; Thousand Oaks, California, 2003) at 4.

it is a “task that is never fully completed.”⁵⁷ Such interpretation requires the hermeneutic task of the whole and parts to achieve a full understanding.

This hermeneutic task of interpretation is the circular interpretation of the whole and parts of a narrative.⁵⁸ The whole, for example, can represent one’s narrative identity which comprises of many parts which here is referred to as multiplicities. However, these multiplicities, such as sex, can then in turn be understood through their parts. In either case, the whole requires an understanding of its parts and the parts the whole. The circular understanding can be interpreted in two ways. One is the whole determining the parts while the other is the parts can give meaning and context from which the whole is to be interpreted.⁵⁹ Georgia Warnke uses the heart as an example. The heart can be viewed as a mechanical pump that requires regularity and stability or as a self-organising chaotic system that is flexible and adaptable which can operate in a range of different situations.⁶⁰ It involves a hermeneutic circle of one’s whole being and one’s many multiplicities where the multiplicities give meaning and context from which the whole is to be interpreted.⁶¹

1.3 Horizons of Narrative Becoming

Becoming occurs within a horizon with particular abstractions. These abstractions make it possible to interpret and find meaning and significance in one’s life. However, these abstractions may enhance or inhibit the autonomy over who one is and how one comes to be. It is for this reason, that it is important to understand the horizons in which someone becomes who or what they are.

⁵⁷ Gadamer, above n 42, at 269.

⁵⁸ Warnke, above n 15, at 109.

⁵⁹ At 106, 109.

⁶⁰ At 105.

⁶¹ At 106, 109.

These horizons are situational. That is, they have a particular vantage point. The vantage point is the situation one is in and that enables one's becoming. This infers, as Hans Georg Gadamer notes, that the situation requires awareness of something that we are always within.⁶² It is such situation that Christopher Ryan and Cacilda Jethá refer to in discussing one's view of the sense of normal and natural:⁶³

Like those early Europeans, each of us is constrained by our own sense of what is normal and natural. We're all members of one tribe or another – bounded by culture, family, religion, class, education, employment, team affiliation, or any other number of criteria.”

The situation requires an awareness of the vantage point one is in. It is the understanding of the vantage point from which one sees the world that is often referred to as culture.

Culture is not inert nor is it natural. Rather it is the worldview, the vantage point, by which the world is understood. It becomes central to how narratives are written and understood. Stuart Hall defines culture as the⁶⁴

mental frameworks – the languages, concepts, categories, imagery of thought and the systems of representation – which different classes and the social groups deploy in order to make sense of, define, figure out and render intelligible the way society works.

It has also been defined similarly by Dick Hebdige as⁶⁵

a particular way of life which expresses certain meanings and values not only in art and learning, but also in institutions and ordinary behaviour. The analysis of

⁶² Gadamer, above n 42, at 269.

⁶³ Ryan and Jethá, above n 5, at 22.

⁶⁴ Stuart Hall “The Problem of Ideology: Marxism without Guarantees” in David Morley and Kuan-Hsing Chen (eds) *Stuart Hall: Critical Dialogues in Cultural Studies* (Routledge, London; New York, 1996) 24 at 25–26.

⁶⁵ Dick Hebdige *Subculture: the Meaning of Style* (Routledge, London; New York, 1991) at 6.

culture, from such a definition is the clarification of the meanings and values implicit and explicit in a particular way of life, a particular culture.

According to Hall referring to the Marxist thought, culture has its roots in a “double relation: to nature and to other human beings.”⁶⁶ He goes on to write that⁶⁷

“man’s relation to nature becomes socially mediated. The reproduction of human society, in increasingly complex and extended forms, and the reproduction of material existence are fundamentally linked: in effect the adaptation of nature to man’s material needs is affected only through the forms which his social collaboration with men assume.

It is through culture that one becomes both situated and the way of understanding and functioning in life. It is through culture, one’s situation, that mediates value and significance of the narratives of life.

The becoming of the social self is not merely a personal experience. Thus, the ‘me’ experiences culture through one’s feelings and behaviour which may have input from the ‘I’. These experiences result from a complex and arbitrary constellation of cultural processes⁶⁸ understood through the ‘I’. To understand a human being, it is important to understand the situation or culture in which their narrative is formed. This requires, as Christopher Ryan and Cacilda Jethá write, that “we have to recognise the various tribes we belong to and begin extricating ourselves from the unexamined assumptions each of them mistakes for the truth.”⁶⁹ Interpretation involves the recognition of the situation of one’s becoming. It also involves examining of assumptions that may often be mistaken for the truth. Only

⁶⁶ Stuart Hall “Culture, The Media, and the ‘Ideological Effect’” in James Curran, Michael Gurevitch and Janet Woollacott (eds) *Mass Communication and Society* (Edward Arnold, London, 1984) at 315.

⁶⁷ At 315.

⁶⁸ David M Halperin “Is There a History of Sexuality?” (1989) 28 *Hist Theor* 257 at 273.

⁶⁹ Ryan and Jethá, above n 5, at 22.

then by taking this into account will it be possible to interpret one's life story or narrative.

1.3.1 Situating One's Horizon – Vertical or Horizontal

The narrative of becoming occurs in and through situations. A situation provides the concepts and categories at their disposal of how one makes sense of the world through one's experiences, perceptions, and interpretations.⁷⁰ Such a situation, as Gadamer writes, represents "a standpoint that limits the possibility of vision" – a horizon.⁷¹ A horizon is a "range of vision that includes everything that can be seen from a particular vantage point."⁷² This horizon becomes the possibility of vision of one's situation. Gadamer writes the historical consciousness of one's own past and that of others, the situation, "help to shape this moving horizon out of which human life always lives, and which determines it as tradition."⁷³ Historical consciousness involved in the shaping of the moving tradition or situation requires the awareness of something that we are always within, that is, the horizon.

Gadamer writes that a "person who has an horizon knows the relative significance of everything within this horizon, as near or far, great or small."⁷⁴ With no horizon, one cannot "see far enough and hence overvalues what is nearest him. Contrawise, to have an horizon means not to be limited to what is nearest, but to be able to see what is beyond it."⁷⁵ A horizon can expand beyond the present point to that which was beyond it,⁷⁶ that is, it includes the ability to look to the past and

⁷⁰ Linda Alcoff *Visible Identities: Race, Gender, and the Self* (Oxford University Press, New York, 2006) at 95, 102; Warnke, above n 15, at 101; Farquhar, above n 28, at 40.

⁷¹ Gadamer, above n 42, at 269.

⁷² At 269; Alcoff, above n 70, at 95.

⁷³ Gadamer, above n 42, at 271.

⁷⁴ At 269.

⁷⁵ At 269.

⁷⁶ At 269; David Vessey "Gadamer and the Fusion of Horizons" (2009) 17 *International Journal of Philosophical Studies* 525 at 532.

future. If the horizon is narrow or closed, it limits the interpretation and thus, the eventuating narrative. An expansive or open horizon enables a much more open narrative in which the vantage point is seen “within a larger whole and in true proportion.”⁷⁷ The horizon provides the space through which the situation of becoming occurs whether it be an open expansive or closed restrictive situation. It determines the relativity of freedom and autonomy in becoming who one is and how one comes to be such as seen later in the becoming of sex.

These horizons, the vantage points by which we interpret and understand things, may be understood within two types of horizon. The types of horizons are not about whether a horizon is hierarchical or not as all societies have some form of hierarchy.⁷⁸ Rather, horizons concern relationality and meaning of human beings and its structure and operation within one’s situation often viewed as culture. Moreover, they are not particular to a ‘culture’, time or place. In any one situation, great or small, there may be more of a predominance of either a vertical or a horizontal horizon.

The concept of vertical and horizontal horizons has been adapted from the work of Chirkov, Ryan, Kim, and Kaplan.⁷⁹ For them, the vertical horizon has a hegemonic dominance through hierarchical competitive status, where as a horizontal horizon operates through a relational dialectic of an individual being with the community.⁸⁰ The vertical horizon is more closed hegemonic and heteronomous while the horizontal is open and autonomous and relational. This interconnects with Gadamer’s argument of open and closed horizons. The horizons can be understood as the vertical being closed, restrictive and hegemonic

⁷⁷ Hans-Georg Gadamer “Classical and Philosophical Hermeneutics” (2006) 23 *Theory Culture Society* 29 at 272.

⁷⁸ Melvyn L Fein *Human Hierarchies* (Transaction Publishers, 2012) at 29.

⁷⁹ Chirkov and others, above n 41.

⁸⁰ At 100.

while the horizontal is open, inclusive, and fraternal or relational. These horizons are in relativity rather than either or and are not restricted to some time or place. It is by understanding the horizon that it is possible to interpret and understand one's becoming and the situation in which it occurs.

1.3.2 The Vertical Horizon

The first, and the more common, horizon in situating one's becoming is the vertical horizon. Central to the vertical horizon is the collectivity. This collectivity provides the situatedness for becoming. Such a horizon is described by Chirkov, et al. as:⁸¹

Vertical collectivism as an “emphasis on loyalty to one's in-group adherence to hierarchical relations within one's group” while vertical individualism “involves wanting to become distinguished and acquire status, especially through direct competition with others, and it embraces self-assertion to achieve one's personal aims.”

This illustrates the two sides of such a horizon – collectivism and individualism – which interconnect together rather than being oppositional to each other. On one side is the strength through the collectivity while on the other side is the positionality and recognition of each individual of the collectivity through status. Together these two sides advance the collectivity. Before expounding the understanding of becoming within the vertical horizon, it is first important to consider Althusser's metaphor of the superstructure and Infrastructure. Then, the section will continue by explaining how the two sides of this horizon interact to provide situatedness for becoming.

⁸¹ At 100.

1.3.2.1 *The Superstructure/Infrastructure Metaphor*

To enable a clearer vision of how such collectives operate,⁸² it is essential to consider Althusser's metaphor⁸³ of the superstructure and the infrastructure. The superstructure comprises two integrated platforms: the ideological⁸⁴ and the institutional.⁸⁵ The infrastructure⁸⁶ is the productive social forces and their relations⁸⁷ that the superstructure is built around.⁸⁸ Together these enable the collective to retain its structure, dominance, and interests.

The first platform of the superstructure is ideology. Ideology is values and ideals that structure a society. Such ideology may influence "reasoning, judgement and causal inference oriented towards the situation or social context."⁸⁹ On one side, ideology represents the dominant group in its ideas, meanings, conceptions, theories, beliefs, and so on, while on the other side, it forms the consciousness

⁸² Louis Althusser *Essays on Ideology* (Verso, London, 1984) at 8; Craig Martin "Ideology and the Study of Religion: Marx, Althusser, and Foucault" (2013) 7 Religion Compass 402 at 404.

⁸³ Both Marx and Althusser use this metaphor. Marx considers that every society has a base, or the infrastructure, which would include both a means of production and the social relations tied to production. He believes that this comes first before the superstructure which is built upon this. It is this 'social being' derived from the base and its superstructure that determines one's consciousness. This is critiqued, in the sense that both are complicit together, and it is difficult to argue which comes first. They are interlinked and interdependent. The "superstructure cannot merely reflect the base or infrastructure; on the contrary, the infrastructure embodies the superstructure". See Martin, above n 82, at 404–405.

⁸⁴ The ideological includes the ideas, meanings, conceptions, theories, beliefs, and so on, and the forms of consciousness appropriate to such a superstructure. Refer to: Hall, above n 66, at 320.

⁸⁵ The institutional here is the political-legal institutions of the particular society. They include the religious institutions and the arrangements that dominate within that particular society. This includes the institutional forms such as civil society, the family, the juridico-political forms, and the state. Refer to: At 320.

⁸⁶ According to Althusser, the infrastructure is the productive socio-economic element with its social forces and their relations through the people.

⁸⁷ Althusser, above n 82, at 8; Martin, above n 82, at 404–405.

⁸⁸ For Althusser, infrastructure was the unity of the productive forces and the relations of production – see: Althusser, above n 82, at 8.

⁸⁹ Daphna Oyserman, Heather M Coon and Markus Kimmelmeier "Rethinking Individualism and Collectivism: Evaluation of Theoretical Assumptions and Meta-analyses" (2002) 128 Psychological Bulletin 3 at 5.

within the people.⁹⁰ Such ideology, however, serves the dominant group.⁹¹ Stuart Hall defines ideology as the⁹²

“concepts and the languages of practical thought which stabilise a particular form of power and domination; or which reconcile and accommodate the mass of the people to their subordinate place in the social formation”

This ideology that becomes the embodiment of truth⁹³ is not neutral and objective,⁹⁴ but it is central in maintaining dominance and power over the people. It entrenches systems of inequality. Furthermore, although it has become the consciousness within the people and has been accepted by the people,⁹⁵ its cultural domination has been disguised.⁹⁶ Its dissemination has been craftily implemented through those in dominance. Craig Martin explains this process as:⁹⁷

A dominant class or group have control over both material and intellectual production and the ability to freely disseminate their ideas which in turn reflects and reinforces the ideology of the dominant class ... In turn, these intellectual and political structures advance the control, production, and dissemination over the understanding of the ideological concepts and ideas which reflects and reinforces its dominance of the ideology over and through society.

⁹⁰ Hall, above n 66, at 320.

⁹¹ Martin, above n 82, at 405.

⁹² Hall, above n 64, at 26.

⁹³ Ideology embodies the truths of the collective rather than being oppositional or distinguishable from it. As a Foucauldian analysis illustrates, ‘truths’ are produced discourses that in themselves are neither true nor false.

⁹⁴ Martin, above n 82, at 408.

⁹⁵ Hall, above n 66, at 333.

⁹⁶ Martin, above n 82, at 406.

⁹⁷ At 403.

Ideology is not some inert worldview, but one instigated for dominance and power carefully disseminated to enable dominance and control over the population. As Luis Urrieta defines it, it is the⁹⁸

“world views that the members of the society share and the cultural artifacts that convey meaning that is they are constructed around certain mythical values and ideals that falsely persuade and coerce people to believe in them, when in reality people benefit unequally from those ideals, according to their position in society.

Ideology maintains positionality and the reasoning behind it so as to persuasively, and if required coercively, maintain a social order. The values and ideals of such ideology become the collectivity’s world view and modus operandi despite its system of inequality.

The second platform of the superstructure is the institutions or (state) apparatuses. They include the state, state bureaucracies⁹⁹ and even non-state entities and organisations. The purpose of such apparatuses is to implement and realise the ruling ideology.¹⁰⁰ They present themselves as distinct and specialised.¹⁰¹ The apparatuses can be ideological or repressive. The Ideological State Apparatuses (ISA) are, for example, religion, education, the family, the legal and political systems, trade unions, communications, and culture, and so.¹⁰² The ISAs institute particular rituals and their practices by the mass of society to maintain the ideology.¹⁰³ The repressive state apparatuses (RSA) include the government, the administration, the army, the police, the courts, the prisons,

⁹⁸ Luis Urrieta “The Social Studies of Domination: Cultural Hegemony and Ignorant Activism” (2005) 96 *The Social Studies* 189 at 191.

⁹⁹ Martin, above n 82, at 406.

¹⁰⁰ Althusser, above n 82, at 59.

¹⁰¹ At 17.

¹⁰² At 16–17.

¹⁰³ At 58.

etc,¹⁰⁴ which may take physical and non-physical forms.¹⁰⁵ Execution of the RSAs occur when the ISAs fails to take effect.¹⁰⁶ The basic function of the ISAs and the RSAs is ‘in the interests of the ruling classes’ and their dominant ideology.¹⁰⁷ It is through these apparatuses that the material and political interests of the dominant group advance.

The last element of this metaphor is the infrastructure. The infrastructure is the ‘unity’ of the forces and relations of the collectivity and their reproduction.¹⁰⁸ The forces and relations become critical in maintaining the superstructure as the collective what¹⁰⁹ through its ideology and the institutions with its specific subordinate elements¹¹⁰ – the individuals. Althusser states that “a social formation which does not reproduce the conditions ... would not last a year.”¹¹¹ As such, it requires a continuous process to win, to reproduce, to sustain and even to reinvigorate the ideology and the institutions of the system.¹¹² The superstructure is at risk of collapse,¹¹³ or may even be lost¹¹⁴ if it is not maintained.

¹⁰⁴ At 16–17.

¹⁰⁵ At 17.

¹⁰⁶ At 11.

¹⁰⁷ At 11.

¹⁰⁸ For Althusser, infrastructure was the unity of the productive forces and the relations of production. See: At 8; Martin, above n 82, at 404–405.

¹⁰⁹ Anne Becker “Identity Premised on Equality of Difference as a Fundamental Human Right” in Cornelia Roux (ed) *Safe Spaces* (Sense Publishers, 2012) 83 at 84; Chirkov and others, above n 41, at 100.

¹¹⁰ Guibernau, above n 2, at 15; Anu Realo, Jüri Allik and Maaja Vadi “The Hierarchical Structure of Collectivism” (1997) 31 *Journal of Research in Personality* 93 at 95.

¹¹¹ Althusser, above n 82, at 1.

¹¹² Hall, above n 66, at 333; Dick Hebdige “From Culture to Hegemony” in Simon During (ed) *The Cultural Studies Reader* (Routledge, 1993) 357 at 366; Urrieta, above n 98, at 189; Martha Chamallas “Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences” (1994) 92 *Michigan Law Review* 2370 at 2385.

¹¹³ Althusser, above n 82, at 9.

¹¹⁴ Hall, above n 66, at 333.

The maintenance and control occur through the loyalty and adherence to the hegemony. TJ Jackson Lears writes that hegemony is "the 'spontaneous' consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group."¹¹⁵ It is where an individual internalises the collective's ideology and structure of life and transforms them into his or her own subjective cognitive systems.¹¹⁶ This is also defined in such a way by *The New Fontana Dictionary of Modern Thought*, defines hegemony as¹¹⁷

projecting its own particular way of seeing the world, human and social relationships, so that this is accepted as 'common sense' and part of the natural order by those who are in fact subordinated to it.

Hegemony is ideology internalised by the masses becoming the accepted and consented way of life. As such, it becomes common sense and part of the natural order of things, whether consciously and unconsciously. It is in this way that hegemony, as Hall writes, "unites such a bloc from the inside, and maintain its dominance and leadership over the society as a whole."¹¹⁸ Hall states that hegemony¹¹⁹

is in operation when the dominant class not only dominate, but direct and lead; when they not only possess the power to coerce but actively organise so as to command and win the consent of the subordinated classes to their continuing sway. 'Hegemony thus depends on a combination of force and consent.

Hegemony demands loyalty to one's in-group and adherence to hierarchical relations within one's group¹²⁰ whether by consent or force. The hegemonic

¹¹⁵ TJ Jackson Lears "The Concept of Cultural Hegemony: Problems and Possibilities" (1985) 90 *The American Historical Review* 567 at 568.

¹¹⁶ Realo, Allik and Vadi, above n 110, at 96.

¹¹⁷ Alan Bullock, Stephen Trombley and Alf Lawrie *The New Fontana Dictionary of Modern Thought* (3 ed, paperback ed ed, HarperCollins, London, 1999) at 388.

¹¹⁸ Hall, above n 64, at 26.

¹¹⁹ Hall, above n 66, at 332.

¹²⁰ Chirkov and others, above n 41, at 100.

system binds and mutually obligates individuals within the society¹²¹ to adhere to its values and ideals. This is often seen as the “obedience, submissiveness, and the respect for traditions.”¹²² Total hegemony exists when, as Hall writes,¹²³

when a ruling class ... is able not only to coerce a subordinate class to conform to its interests, but exerts a ‘total social authority’ over those classes and the social formation as a whole.

This hegemony maintains the superstructure and prevents the collapse of the system.

The dominance of the collective is through the superstructure of its ideology and its institutions. The superstructure of both ideology and institutions do not merely reflect the infrastructure, but the infrastructure embodies a superstructure.¹²⁴ The superstructure becomes the driver of the community to inform the way of life and social relations (the infrastructure).

1.3.2.2 Collectivity of Individuals

At the centre of the vertical horizon is the collectivity comprising of individuals. This collectivity centres on the superstructure and infrastructure which ensures the maintenance of this collectivity including loyalty and adherence to it. On the other side, vertical individualism is the status by which each individual may participate within the collectivity.¹²⁵ Individualism indicates a relativity of certain freedoms, or at least, some illusion of such freedoms. It often is heteronomy masquerading as autonomy. That is individualism is not the same as autonomy as discussed later in this thesis. Even in the most individualistic societies, although

¹²¹ Oyserman, Coon and Kimmelmeier, above n 89, at 5.

¹²² Realo, Allik and Vadi, above n 110, at 97.

¹²³ Hall, above n 66, at 332.

¹²⁴ Martin, above n 82, at 405.

¹²⁵ Chirkov and others, above n 41, at 100.

self-reliance is highly valued, there will always be a relativity of dependency on other members of society. These represent the two parts of the same system within the vertical horizon.

However, there is often confusion equating the two as two different types of society as either a collectivist¹²⁶ or individualistic¹²⁷ in which societies are either one or the other. This has been a mistaken belief in the vertical horizon.¹²⁸ This is actually misleading. As in the horizontal horizon, they are two sides of the same horizon rather than two different societies. As will be seen, the vertical situated societies, whatever, the political bent, have both sides. Even the most 'individualistic' of such societies does not account for the collectivist manner in which such societies still function. For example, it does not provide for the means¹²⁹

“(a) to provide the contents of the particular thoughts of particular social classes of groups at any specific time; or (b) to fix or guarantee for all time which ideas will be made use of by which classes.”

It is more appropriate to consider the vertical as collectives within a relativity. Chirkov, et al. explain this as:¹³⁰

“The dimension of individualism/collectivism refers to the relative priority given to the individual’s goals and preferences versus priority placed on the needs, norms and goals of the group or collective.”

¹²⁶ The collective is sometimes referred to as communitarian, but in the vertical, the collective disregards the individual where the interests and rights are at odds with that of the collective.

¹²⁷ Individualism is “a belief system that privileges the individual over the group, private life over public life, and personal expression over group experience; it is a world view where autonomy, independence, and self-reliance are highly valued and thought to be natural; and it is an ideology based on self-determination, where free actors are assumed to make choices that have direct consequences for their own unique destiny.” See: Callero, above n 41, at 15.

¹²⁸ Oyserman, Coon and Kimmelmeier, above n 89, at 5.

¹²⁹ Hall, above n 64, at 43.

¹³⁰ Chirkov and others, above n 41, at 99–100.

The collectives determine the relativity of 'individuality' that one may express, inclusive of what rights, entitles, and freedom are available. This is usually dependent upon the issue and/or situation.¹³¹ In other words, all such societies organised primarily through the vertical horizon are hegemonically collectivist with a relativity of individualism.

1.3.2.3 Collectivity - the Focus of the Horizon

The collectivity is the focus of this horizon. They may be varied in socio-political nature such as religious, traditional, liberal, capitalistic or some other form, or a combination of them. Irrespective of the socio-political nature, there are common links of the collectivity. Realo, Alik, and Vadi define a collectivity as¹³²

“a social pattern consisting of closely linked individuals who see themselves are parts of one or more collectives; are motivated by the norms of, and duties imposed by those collectives; are willing to give priority to the goals of those collectivities over their personal goals; and emphasise their connectedness to the members of these collectives.”

The collectivities determine the social and political patterns of life within the collectivity. They set in motion the norms and duties by which each individual that comprises the collectivity must adhere and be loyal to. This determines the superstructure, the ideology and institutions, that bind such collectivities together. This is commonly referred to as 'culture'. This 'culture' of the collectivity is maintained and enforced through the infrastructure as the metaphor has described. The infrastructure organises and operates through heteronormative hegemonies. These often have an appearance or illusion of autonomy.

¹³¹ HC Triandis "Collectivism and Individualism as Cultural Syndromes" (1993) 27 Cross-Cultural Research 155 at 159; Oyserman, Coon and Kemmelmeier, above n 89, at 5; Realo, Allik and Vadi, above n 110, at 94.

¹³² Realo, Allik and Vadi, above n 110, at 94.

While the individuals of the collectivity have the ability to make choices and have at least some autonomy,¹³³ there is an underlying pull towards heteronomy. Heteronomy is to speak or act according to determinations outside of oneself wittingly or unwittingly.¹³⁴ By default, heteronomy, as Anthony Elliot writes, leads to an identity as¹³⁵

a social product through and through, an outcome of symbolic interaction – of emergent, ongoing creation, thinking, feeling, the building of attitude structures, the taking of roles, all in a quest for coherence and orientated in the social world.

Heteronomy refers to action that is influenced by a force outside the individual, in other words the state or condition of being ruled, governed, or under the sway of another.

The strength of the heteronomy sways any autonomy, often subconsciously, within its realms. It is for this reason it is hegemonic. This maintains the superstructure whether through choice or coercion. Hegemony implies that there is political or cultural dominance, or authority over others.¹³⁶ The hegemonic system binds and mutually obligates individuals within the society such as recognised through the hegemonic binary sex system.¹³⁷ It determines who counts as equals, granting certain rights and entitlements yet also imposing certain

¹³³ Autonomy is the “idea of something that cannot be substituted for” and the possibility to “dare to think for yourself. You and not someone else in your place.” See: David Pellauer (translator) Paul Ricœur *Reflections on the Just* (University of Chicago Press, Chicago, 2007) at 80.

¹³⁴ Michael J Sandel *Justice* (Penguin Books, London, 2010) at 109.

¹³⁵ Anthony Elliott *Concepts of the Self* (Polity Press ; Blackwell Publishers, Cambridge, UK : Malden, MA, 2001) at 26.

¹³⁶ *Oxford Dictionaries* (online ed, 2015) Hegemony (Oxford Dictionary) <<http://www.oxforddictionaries.com/definition/english/hegemony>>.

¹³⁷ Societies with strong norms repress the anatomical (intersex traits) and quassi-anatomical (one’s sexual orientation) attributes while the more culturally enforcing attributes, the non-anatomical (behaviour or ideology) are encouraged. Societies with weak norms allow biology to have a stringer influence, and thus become more autonomy supporting, See: Realo, Allik and Vadi, above n 110, at 757.

obligations and expectations directly and indirectly on individuals.¹³⁸ In other words, the hegemony holds in place the various ideology of the collectivity through its various institutions to the extent it appears natural and even self-evident. It also ensures that individual is subsumed as a member through the adherence and loyalty to hierarchical relations within one's status group.¹³⁹ The ethos or morality of the collectivity by rule is lived out by the individuals for the collectivity.

There has been some attempt in the modern period to contrast such collectivities with 'liberalism'. However, what most people refer to as 'liberalism', is actually still a collectivity. Although relatively new and has a particular socio-political situatedness,¹⁴⁰ it is interconnected with capitalism.¹⁴¹ The basis of liberalism is that individuals should be left alone and their freedom should not be limited.¹⁴² It assumes they act out of self-interest and that personal decisions are made so as to maximise private benefits.¹⁴³ In fact, individualism is directly implicated within

¹³⁸ Oyserman, Coon and Kimmelmeier, above n 89, at 5; Sandra Fredman *Discrimination law* (Oxford University Press, New York, 2002) at 4; Chirkov and others, above n 41, at 100; Peter Spiller (6th edition ed, LexisNexis NZ, 2005) Butterworths New Zealand Law Dictionary: a Sixth Edition of Hinde & Hinde's Law Dictionary at 223.

¹³⁹ Chirkov and others, above n 41, at 100.

¹⁴⁰ Joseph Raz *The Morality of Freedom* (reprinted ed, Clarendon Press, Oxford, 2009) at 17; Isaiah Berlin *Four Essays on Liberty* (Oxford University Press, New York, USA, 1971) at 138.

¹⁴¹ The capitalist economic system is based upon core principles: (1) it depends on the idea of private property in the production process; (2) the labour market is essential to it by people selling one's labour; and (3) it is characterised by the profit motive that drives the entire system. See: Callero, above n 41, at 22–23.

¹⁴² The laissez-faire understanding of the economy believes that if individuals are left alone without government intervention, the better for everyone, the laws that limit freedom of capitalists to do what they want is bad for the economy. See: At 25.

¹⁴³ At 24.

the liberal capitalist economic system,¹⁴⁴ in fact, it is intrinsic to its operation.¹⁴⁵

This individualism has been understood as:¹⁴⁶

“a belief system that privileges the individual over the group, private over public, and personal expression over social experience; it is a worldview where autonomy independence and self-reliance are highly valued and thought to be natural; and it is an ideology based on self-determination where free-actors are assumed to make choices that have direct consequences for their own unique destiny.”

It assumes that individuals have total free choice and control over their lives. It also conceives, at least somewhat, that an individual is devoid of necessary connections to society, intimate others, cultural traditions and so on.¹⁴⁷ Such individualism is not the same as autonomy as discussed later in this thesis. Although such concepts as empowered through liberalism have spread throughout all areas of life,¹⁴⁸ individuals often forget that underlying this, sometimes more or less visible, is the hegemonic systems that maintains the system and structure of the collectivity. Even in the most individualistic societies where self-reliance is highly valued, there is strong hegemonic pull within its underlying ideology and institutions and upheld through its infrastructure. In the purest sense, individualism misunderstands the perspective and interests of persons as social entities.¹⁴⁹ As such, human life becomes narrowed and poorer in

¹⁴⁴ The capitalist economic system is based upon core principles: (1) it depends on the idea of private property in the production process; (2) the labour market is essential to it by people selling one’s labour; and (3) it is characterised by the profit motive that drives the entire system. See: At 22–23.

¹⁴⁵ Berlin, above n 140, at 138.

¹⁴⁶ Callero, above n 41, at 15.

¹⁴⁷ John Christman “Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves” (2004) 117 *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 143 at 145.

¹⁴⁸ Although liberalism had an initial focus on capital basis, it quickly spread to other areas of life such as through social institutions from religion, education, sport, and so on. See: Callero, above n 41, at 22.

¹⁴⁹ Christman, above n 147, at 145.

meaning.¹⁵⁰ Social forces shape our lives.¹⁵¹ The ideology behind the social forces determine one's being or identity as a heteronomous entity with an illusion of individualism.

1.3.2.4 Individuals of the Collectivity

This collectivity comprises of many individuals loosely connected together as its parts or components.¹⁵² They are entities, independent of one another,¹⁵³ yet they see themselves as part of the collective¹⁵⁴ as the greater good. As explained by Chirkov, et al., each individual wants to¹⁵⁵

to become distinguished and acquire status, especially through direct competition with others, and [embrace] self-assertion to achieve one's personal aims.

The wording alludes to many concepts of individualism, but in context becomes critical to the upholding of a status in society. It must be remembered that collectivities are highly stratified, and inherent in such structures are interactive and competitive dynamics for the individual of a status within and between levels of the collectivity. It is for this reason that status not only positions one within the collectivity, but also due to the nature of the structure must, continually assert one's position, or better it where possible.

The many individuals of the collectivity are known through and organised by their status. This is the ascription of what one is¹⁵⁶ based on valued social traits and

¹⁵⁰ Marshall, above n 2, at 97.

¹⁵¹ Callero, above n 41, at 34.

¹⁵² Realo, Allik and Vadi, above n 110, at 94; Oyserman, Coon and Kimmelmeier, above n 89, at 5.

¹⁵³ Oyserman, Coon and Kimmelmeier, above n 89, at 4.

¹⁵⁴ Realo, Allik and Vadi, above n 110, at 94.

¹⁵⁵ Chirkov and others, above n 41, at 100.

¹⁵⁶ "H.L.A. Hart speak of 'who' in terms of 'ascription' – the assignment of an action or segment of an action to someone (Ricoeur refers to this as assignment or assignation) which becomes closer

situational descriptors¹⁵⁷ such as gender, race, class, and many others.¹⁵⁸ The statuses are attributed by fiat¹⁵⁹ onto an individual¹⁶⁰ usually at birth based on lineage, gender, social status, and other attributes.¹⁶¹ Some claims to status and rights can occur through accomplishments or meritocracy of individuals.¹⁶² Statuses, such as race/ethnicity and sex/gender, are stable, fixed or immutable, as the 'facts of life',¹⁶³ while some, such as one's profession, are mutable. The boundaries of statuses are closed and fixed, and define the in-group, acceptable to the collective, and the out-groups, which lead to ambiguity of the in-groups, are non-acceptable or even non-recognised.¹⁶⁴ This denies variation or uniqueness of the human 'categories'.¹⁶⁵ They inhibit the very autonomous process of becoming who one is and how one comes to be.¹⁶⁶

to what than who as it is no longer the author of the story." See: David Pallauer (translator) Paul Ricœur *The Just* (University of Chicago Press, Chicago, 2000) at 2.

¹⁵⁷ Oyserman, Coon and Kimmelmeier, above n 89, at 5.

¹⁵⁸ Joseph Slaughter "The Textuality of Human Rights: Founding Narratives of Human Personality" [2004] *Interdisciplinary Law and Humanities Junior Scholar Workshop Paper* at 34, 36–37, 46; Costas Douzinas "Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?" (2002) 29 *Journal of Law and Society* 379 at 379; Margaret R Somers "The Narrative Constitution of Identity: A Relational and Network Approach" (1994) 23 *Theory and Society* 605 at 605.

¹⁵⁹ Status is a normative category which does not match to the physiology and psychology except by fiat. It has come to common perception as natural, despite the artificiality of creating social categories.

¹⁶⁰ Douzinas, above n 158, at 379.

¹⁶¹ Guibernau, above n 2, at 15.

¹⁶² Ricœur, above n 156, at 9.

¹⁶³ Oyserman, Coon and Kimmelmeier, above n 89, at 5.

¹⁶⁴ At 5; Matthew Gayle "Female by Operation of Law: Feminist Jurisprudence and the Legal Imposition of Sex" (2006) 12 *Wm & Mary J Women & L* 737 at 742; Realo, Allik and Vadi, above n 110, at 96.

¹⁶⁵ Guibernau, above n 2, at 15.

¹⁶⁶ Francisco Valdes "Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & (and) Sexual Orientation to Its Origins" (1996) 8 *Yale JL & Human* 161 at 170.

Statuses¹⁶⁷ are defined and lived through the collectivity. It becomes the ontological experience of being human.¹⁶⁸ Status determines whether an individual is recognised or not.¹⁶⁹ Where an individual's status is not recognised, they have usually been considered as non-human. It is that recognition through one's status that sets out for the positionality within the collectivity and, along with that, any rights, benefits, entitlements, and duties. Each individual, one of the many parts of the collectivity, understands themselves and their place in the collectivity through their status. The collectivity determined the relations of life and how that operated. Dignity and honour is tied to one's status and fulfilling one's social role¹⁷⁰ and accomplishments. These determine what one is and how one lives.¹⁷¹

Although the collectivity is a hegemony, responsibility is individuated. Each individual is an agent. Agency is individually attributed as the "idea of the efficient cause" or the cause of the action.¹⁷² Each individual was responsible to the collectivity as the agent of their action irrespective of influence of others or the effect of society leading to the said speech or action. Such individuated responsibility was part of most vertical situated societies whether 'liberal' or more conservative/authoritarian states.

Collectivities are highly stratified, and inherent in such structures are interactive and competitive dynamics for the individual of a status within and between levels

¹⁶⁷ Statuses are normative categories used for identifications and organisation life and control through the superstructure and infrastructure of the collectivity. They are in the modern era often referred to as identities or what I refer to in this thesis as multiplicities.

¹⁶⁸ Becker, above n 109, at 84.

¹⁶⁹ Oyserman, Coon and Kimmelmeier, above n 89, at 5; Becker, above n 109, at 84.

¹⁷⁰ As opposed to being inherent as a human being: Rhoda E Howard and Jack Donnelly "Human Dignity, Human Rights, and Political Regimes" (1986) 80 *The American Political Science Review* 801 at 808–809.

¹⁷¹ Jessica Knouse "From Identity Politics to Ideology Politics" (2009) 2009 *Utah L Rev* 749 at 756.

¹⁷² Ricœur, above n 156, at 3.

of the collectivity. Due to competition in all areas of life from family to the broader socio-political life, one self-asserts themselves through personal aims to maintain or better one's status and positionality.¹⁷³ This can also occur through direct competition with others. This competition, either implicit or explicit, is a negative reciprocity¹⁷⁴ that encourages maximisation of one's own interest or benefit without any necessary consideration of reciprocation.¹⁷⁵ However, the collective through consensual or coercive means must carefully balance competition, that is who can complete and how they compete, as it has the potential to be destabilising.¹⁷⁶

The situatedness of this horizon is central to any collectivity irrespective of any political basis. Rather than being an either/or of vertical collectivism and vertical individualism, it situates in a vertical collectivism with means by which an individual operates within the collectivity. Each individual as according to their status strongly adheres to its hegemonic system of its ideology and institutions. Although there is some autonomy in collectivities, the pull of heteronomy is much stronger though often it is subconsciously active. Moreover, it the ideology for the majority of the collectivity becomes natural and just the way of life.

1.3.3 Horizontal Horizon

The horizontal horizon is the other horizon that is less common though not less important. The horizontal horizon is described by Chirkov, et al as on one side, there is the person who is unique and distinct while at the same time being of equality in worth, dignity, and rights.¹⁷⁷ Upon the other side, within the horizon

¹⁷³ Cillian McBride "Demanding Recognition: Equality, Respect, and Esteem" (2009) 8 *European Journal of Political Theory* 96 at 106, 107.

¹⁷⁴ Geoffrey MacCormack "Reciprocity" (1976) 11 *Man* 89 at 99.

¹⁷⁵ At 98; Armin Falk and Urs Fischbacher "A Theory of Reciprocity" (2006) 54 *Games and Economic Behavior* 293 at 294, footnote 1.

¹⁷⁶ McBride, above n 173, at 107.

¹⁷⁷ Chirkov and others, above n 41, at 100.

the person has “the tendency to see oneself as similar to others and to emphasize common goals, interdependence, and sociability.”¹⁷⁸ Such a form does not delete one’s ‘individualness’ or uniqueness yet at the same time it recognises the ability of each individual to enhance and contribute to the sustainability of the community. It is in this sense that Gadamer states that this horizon, being an open horizon, enables one to see past one’s own prejudices.¹⁷⁹

The horizontal operates with a relational individual. This individual mediates between the dependency of sociality and the inner being of oneself. It recognises that each individual is necessary for the community and that the community can only flourish to the optimal state when all the individuals flourish. For this to occur, it requires an environment that provides and supports the basic human needs of competency, autonomy, and relatedness. This environment is mediated through the reciprocity of life of recognition and respect. This reciprocity of life enables dignity and equality of each being as equals. It is a horizon of rights as it provides all the rights to enable each one to flourish to potentiality.

1.3.3.1 Basic Needs – Autonomy, competence, and Relatedness

This environment both acknowledges and supports the basic psychological human needs:¹⁸⁰ autonomy, competence, and relatedness.¹⁸¹ Of the three basic needs, competence is not horizon specific. One has competence in either horizon, but the horizon will outline the extent to which this has potentiality. Therefore, the key to competency is the other two basic needs: autonomy and relatedness. These two

¹⁷⁸ At 100.

¹⁷⁹ Gadamer, above n 42, at 269.

¹⁸⁰ These basic psychological needs are as determined by the Self-Determination Theory as outlined in Chirkov and others, above n 41, at 97.

¹⁸¹ At 97.

are interconnected,¹⁸² rather than oppositional.¹⁸³ The interconnectability and utilisation of all three enable and enhance potentiality.

Competency is the ability to exercise and extend human capacity optimal to one's development.¹⁸⁴ This can be referred to as potentiality. It is the developmental potentiality of what one is and what one can be. This potentiality is the need "to experience satisfaction in exercising and extending one's capabilities" and in doing so, people "naturally seek out challenges that are optimal for their level of development."¹⁸⁵ It can be referred to as the "successful attainment of life's goals and its consequences for well-being [as] a function of exploring and committing to choices."¹⁸⁶ It is something inherent within all human beings including human ability and consciousness of life. To achieve potentiality, it is dependent upon one's well-being. Although competence may be enabled heteronomously, competence leads to greater well-being when it develops autonomously and emanates from the self (self-determined).¹⁸⁷ Due to this, the potentiality of competency is horizon dependent. An enabling environment that is one that supports fulfillment¹⁸⁸ also enhances well-being.¹⁸⁹ The development of potentiality is only free when it emanates from the self or is autonomous.¹⁹⁰

¹⁸² Autonomy is often considered to be oppositional to relatedness as it has been subsumed within the concept of individualism. However, this is not the case here. Autonomy is interrelated with relatedness in that there cannot be one without the other. The opposite of autonomy and relatedness is heteronomy and collective hegemony.

¹⁸³ Chirkov and others, above n 41, at 99, 106.

¹⁸⁴ Chantal Levesque and others "Autonomy and Competence in German and American University Students: A Comparative Study Based on Self-Determination Theory" (2004) 96 *Journal of Educational Psychology* 68 at 68.

¹⁸⁵ At 68.

¹⁸⁶ Marshall, above n 2, at 92.

¹⁸⁷ Levesque and others, above n 184, at 68.

¹⁸⁸ While within the vertical horizon, the environment is such that it diminishes one's well-being.

¹⁸⁹ Chirkov and others, above n 41, at 97.

¹⁹⁰ Levesque and others, above n 184, at 68.

Autonomy is the power to determine for oneself who one is and how one comes to be.¹⁹¹ It is the dynamic state that includes the ability to freely pursue and fulfill one's personal and social goals.¹⁹² It is the ability to independently make one's own choices.¹⁹³ Therefore, Joseph Raz writes, that an autonomous person is "marked out by how one came to be, not what he is."¹⁹⁴ To have autonomy one must conduct a life in a certain way (does not drift through life, is aware of his options, etc.) and lives in a certain environment, an environment which respects the condition of independence, and furnishes him with an adequate range of options.¹⁹⁵ As such, Chirkov et al state¹⁹⁶

"A person is autonomous when his or her behaviour is experienced as willingly enacted and when he or she fully endorses the actions in which he or she is engaged and/or the values expressed by them."

Autonomy always connects through relatedness or interconnectedness. Early philosophers have noted the importance of relatedness to enable one to flourish through the ideas of unity and well-being.¹⁹⁷ Relatedness is the interconnectedness of life. However, while relatedness is the interconnecting web, it is not the centre piece such as through the vertical – the hegemonic collectivity.¹⁹⁸ Rather, within the horizontal, the relational individual¹⁹⁹ is front and

¹⁹¹ John Eekelaar "Personal Rights and Human Rights" (2002) 2 Hum Rts L Rev 181 at 185.

¹⁹² Raz, above n 140, at 391; June Statham and Elaine Chase *Childhood Wellbeing: A brief Overview* (2010) at 2.

¹⁹³ Raz, above n 140, at 391; Marshall, above n 2, at 97.

¹⁹⁴ Raz, above n 140, at 391.

¹⁹⁵ At 391.

¹⁹⁶ Chirkov and others, above n 41, at 98.

¹⁹⁷ Jill Marshall *Human Rights Law and Personal Identity* (Routledge, Abingdon, Oxon; New York, NY, 2014) at 93.

¹⁹⁸ The hegemonic collective comprises of individuals who are individuated by status competing with one another within the hierarchical (super)structure of the collective.

¹⁹⁹ I have purposely used relational individual here to differentiate from the individual of individualism.

centre.²⁰⁰ The relatedness within which the relational individual is placed requires sociability, interdependence, and common goals.

While the vertical centres on collectivity through hegemonic adherence,²⁰¹ the horizontal sociability centres relatedness and support. Relatedness and support enable a sense of well-being and an enhanced potentiality. It is thus through relatedness that we see others as oneself, the equality of being. Sociability provides a sense of belonging which is a human need to be part of something greater than oneself. It is through such belonging that establishes a process of recognition and respect and equality of being. It is the needs of all members constituting and constructing the community as per one's potentiality. It is something of value through which one attaches value in themselves. This is different to the collectivity where value becomes imposed.

Sociability has a reliance on one another. This reliance is an interdependence on one another. Interdependence indicates that it is a reciprocal dependence. All members of society are dependent upon each other. This dependence is a willing reliance on the other's care and guidance, particularly if the other is perceived as supportive and responsive.²⁰² This is not about directive guidance or obedience,²⁰³ but providing support for autonomous life. This is illustrated through research for example with families that shows parents who support autonomy have teens who rely on them more and who are more likely to internalise parental norms.²⁰⁴

²⁰⁰ Chirkov and others, above n 41, at 100.

²⁰¹ Hegemonic adherence is the indirect and direct regulatory enforcement of ideology and institutions of the collective.

²⁰² Chirkov and others, above n 41, at 98.

²⁰³ The vertical also utilises dependence, but in the sense of force or submission, such as with a child forced to submit to the guidance from a parent, as opposed to autonomously accepting any guidance. See: At 98.

²⁰⁴ At 98.

Sociability is the interdependence on others through common goals. While common goals also occur in the vertical such as socio-political or economic goals, in the horizontal they centre on relational well-being. One's well-being is interrelated with others well-being, and thus, leads to the well-being of the community as a whole. This common purpose as Charles Taylor explains, allows one to be oneself, yet be part of the common goals: "I am not in any way pulled outside myself. I am still 'obeying myself' a member of this common project or 'general will'."²⁰⁵

1.3.3.2 Reciprocity of Life – Rights and Equality

The reciprocity principle is found in most general accounts of human society.²⁰⁶ It can occur as a negative type of reciprocity²⁰⁷ or a balanced, or as Mauss refers, social reciprocity.²⁰⁸ Balanced²⁰⁹ or social reciprocity is the principle of equivalence.²¹⁰ It expresses an equivalence between that given and that received.²¹¹ This is illustrated through Mauss' discussion of Maori society where the given is alive, containing the spirit (hau) and brings balance or equivalence

²⁰⁵ Taylor, above n 38, at 48.

²⁰⁶ MacCormack, above n 174, at 96.

²⁰⁷ Negative reciprocity is not about relatedness, that is, there is no personal relationship. Rather it is where "each strives to outdo the other and acquire as much profit as he can. Such relationships range from situations of 'barter' or 'haggling' to situations characterised by a succession of reprisals." See: At 98, 99; Reciprocity cannot be based on selfish or outcome-oriented preferences, such as 'reciprocal altruism' where one is only willing to reciprocate if there are future rewards arising from reciprocal actions. See: Falk and Fischbacher, above n 175, at 294, Footnote 1.

²⁰⁸ Edward L Schieffelin "Reciprocity and the Construction of Reality" (1980) 15 Man 502 at 503.

²⁰⁹ This is sometimes referred to as balanced reciprocity. Balanced reciprocity is different to generalised reciprocity which is based on strong relationships. This is where the flow of goods and services tends to be largely from one of them to the other. There may be some expectation of repayment but the return gifts or services may be far inferior to what has been received or may be deferred for a very considerable time. See: MacCormack, above n 174, at 98.

²¹⁰ At 98.

²¹¹ At 91.

back to the clan.²¹² MacCormack argues to the importance of reciprocity in society when he refers to Firth's analysis of Maori society. Firth believed that²¹³

“the principle of reciprocity as 'one of the most fundamental drives to action' among the Maori. What is meant is that the Maori attach great importance to the notion of 'compensation' or 'equivalent return' in many different situations.

Reciprocity is an essential element of social life. As a principle of equivalence, it determines what that society views as valuable and significant. Social reciprocity becomes the norm²¹⁴ that ratifies and constructs social relations.²¹⁵ These relations include the social, the spiritual,²¹⁶ and all other facets of life.²¹⁷ This reciprocity that enables a behavioural response to perceived kindness and unkindness, where kindness comprises both distributional fairness as well as fair intentions.²¹⁸

This reciprocity engages the giver and the receiver through dignity and worth. This is best illustrated through Marcel Mauss' writing on reciprocity of the gift. He states that²¹⁹

“each gift is part of a system of reciprocity in which the honour of giver and recipient are engaged. It is a total system in that every item of status or of spiritual or material possession is implicated for everyone in the whole community.”

Reciprocity centres on the value and in the general sense, this value is one's dignity and worth. Through reciprocity, the whole and the part is involved in the

²¹² Marcel Mauss *The gift* (Routledge, London, 2002) at 14; Schieffelin, above n 208, at 503.

²¹³ MacCormack, above n 174, at 92.

²¹⁴ At 99.

²¹⁵ Schieffelin, above n 208, at 504.

²¹⁶ At 506.

²¹⁷ At 505.

²¹⁸ Falk and Fischbacher, above n 175, at 294.

²¹⁹ Mauss, above n 212, at xi.

'exchange'. That is, each exchange of reciprocity not only affects that part, the moment in time and that situation, but also that of the whole which affects that individual's being and that of the community. Mauss goes on to say²²⁰

"The system is quite simple; just the rule that every gift has to be returned in some specified way sets up a perpetual cycle of exchanges within and between generations. In some cases the specified return is of equal value, producing a stable system of statuses; in others it must exceed the value of the earlier gift, producing an escalating contest for honour. The whole society can be described by the catalogue of transfers that map all the obligations between its members. The cycling gift system is the society."

This principle of equivalence is relational where the dignity of two individuals or groups meet. The unitary equivalence is that of dignity. Dignity is the concept of all human beings equally worthy of respect.²²¹ However, it is through such an equivalence or equality principle that politics enters into dignity.²²² Dignity²²³ attributes value – worth or esteem – to everyone solely by the fact of existentiality. This goes beyond the Kantian idea of dignity as based on status as "rational agents, capable of directing our lives through principles."²²⁴ Value through worth in the sense of esteem is a universal human potential, a capacity that all humans share. This potential, rather than anything a person may have made of it, is what ensures that each person deserves respect.²²⁵ Indeed, our sense of the importance of potentiality reaches so far that we extend this protection even to people who through some circumstance that has befallen them are incapable of realising their potential in a normal way – handicapped people or those in a coma, for

²²⁰ At xi.

²²¹ Taylor, above n 38, at 41.

²²² At 39.

²²³ This is significantly different to the vertical horizon which understands dignity through a concept of honour, achieved through status or deeds.

²²⁴ Taylor, above n 38, at 41.

²²⁵ At 41.

instance.²²⁶ Simply suggesting that one does not have potential or is not of worth is simply to deny human equality.²²⁷ To show that someone is of value and worth, one must offer recognition, respect, and esteem.

Recognition is a process of reciprocity. Such recognition is not based on status identities, what one is,²²⁸ but it is the tendency to see others as themselves, as equal beings,²²⁹ yet while being unique and distinct.²³⁰ It enables the awareness of specificity and difference on an ongoing dynamic basis thus forging a stronger sense of identity.²³¹ For this reason, due recognition becomes essential to the development of the self, one's being.²³² Due recognition not only affects the perception of others, but also the perception of oneself.²³³ It is for these reasons that recognition is not a mere courtesy or toleration, but as Charles Taylor states, it is "a vital human need."²³⁴ Denial of such recognition, or misrecognition, is to suffer both a distortion of one's relation to one's self and an injury to one's identity.²³⁵

Reciprocity obligates or demands respect as a basic human need. Respect is the appreciation of others, or as Axel Honneth argues love, for one another as existential beings.²³⁶ This respect is not only for others and by others, but also

²²⁶ At 41–42.

²²⁷ At 42.

²²⁸ Raz, above n 140, at 391.

²²⁹ Chirkov and others, above n 41, at 100; Nancy Fraser "Rethinking Recognition" (2000) 3 NLR 107 at 109.

²³⁰ Fraser, above n 229, at 109.

²³¹ Marshall, above n 2, at 96.

²³² Fraser, above n 229, at 109; Marshall, above n 2, at 90.

²³³ Marshall, above n 2, at 93.

²³⁴ Taylor, above n 38, at 26.

²³⁵ Fraser, above n 229, at 109.

²³⁶ Axel Honneth "Integrity and Disrespect Principles of a Conception of Morality Based on the Theory of Recognition" (1992) 20 Political Theory 187 at 193.

towards oneself – self-respect.²³⁷ Respect is the acknowledgement of each being, each one's identity and what is peculiar to each. As Charles Taylor states:²³⁸

We give due acknowledgement only to that is universally present – everyone has an identity – through recognising what is peculiar to each. The universal demand powers an acknowledgement of specificity.

It is “one that is particular to me, and that I discover in myself.”²³⁹ It respects one's sense of self and their interpretation of their own life and surroundings.²⁴⁰ As such, within the horizontal this respect prizes²⁴¹ uniqueness and difference – the diversity of life. Respect is appreciation, rather than toleration or acceptance. This respect for uniqueness and individual traits that one has enables one to autonomously define oneself as an existential yet relational being²⁴² of the community.²⁴³ Thus, respect is a reciprocal interplay of social relations.²⁴⁴ It is through this respect of oneself and from others that one can realise one's well-being²⁴⁵ which is consistent with empowerment.²⁴⁶

Respect enables integrity to one's self, one's being. Integrity is “being true to myself and my own particular way of being.”²⁴⁷ Without integrity, there is no dignity. Integrity is not socially, but inwardly generated.²⁴⁸ This links with esteem.

²³⁷ At 193; Helen MF Jones “Respecting Respect: Exploring a Great Deal” (2002) 28 Educational Studies 341 at 342.

²³⁸ Taylor, above n 38, at 39.

²³⁹ At 28.

²⁴⁰ Jones, above n 237, at 343.

²⁴¹ This horizon favours or incorporates diversity as part of the natural way of life while the vertical horizon eliminates or disfavors it

²⁴² Rather than accepted as a status being of what one must be.

²⁴³ Chirkov and others, above n 41, at 100.

²⁴⁴ Tilly, above n 33, at 7.

²⁴⁵ Jones, above n 237, at 343.

²⁴⁶ At 343.

²⁴⁷ Taylor, above n 38, at 28.

²⁴⁸ At 32.

Esteem is the value or worth, and thus the respect, that one sees in another or oneself. It is an equality of esteem, a worth bestowed on all in the sense of equality of valued beings. It is through such a unity of purpose, through the common goals, that all are honoured equally through the support of the general will.²⁴⁹ As opposed to the vertical,²⁵⁰ the equality of esteem is incompatible with any differentiation.²⁵¹ It is by caring about esteem that enables unity of purpose compatible with freedom and social unity because the society is one in the same operating through right reasons.²⁵² The right reasons Charles Taylor argues is the Rousseauian idea of esteem characterised by equality, reciprocity, and unity of purpose (common goals).²⁵³

The 'rights' as understood within this horizon is that which is required to be worthy as a human being – that of living a good life – a life where one can achieve potentiality. Equality of being, rather than equal treatment is essential to this horizon. This horizon sees everyone as similar to oneself – equally human while acknowledging that everyone has different needs according to each one's competency and potentiality.

Social reciprocity provides the basis for rights and equality. It recognises each human being as of equal worth and value. However, in doing so, it does not force people into statuses or categories but respects them as unique and distinct beings

²⁴⁹ At 49.

²⁵⁰ The vertical differentiates according to adherence and loyalty to hierarchical status. It demands reverence from those of subordinate status. Status differentiation leads to competition where one's own values are side lined while operating to the collective's trying to win favour of others. Here one person's honour is another's shame or at least obscurity. It requires reverence and obedience. There is no equality of esteem or dignity or worth. See the following for more detail: Andrew Brennan and YS Lo "Two Conceptions of Dignity: Honour and Self-Determination" in Jeff Malpas and Norelle Lickiss (eds) *Perspectives on Human Dignity: A Conversation* (Springer Netherlands, 2007) 43; David Mattson and Susan Clark "Human Dignity in Concept and Practice" (2011) 44 *Policy Sciences* 303; Taylor, above n 38.

²⁵¹ Taylor, above n 38, at 50.

²⁵² At 48.

²⁵³ At 49.

who have competency and potentiality and the need to autonomously author their own life. The rights are the 'positive rights' of enabling one's being so that one can autonomously author who one is and who one is to be. These rights occur through relatedness and reciprocity based on mutual recognition, respect, and esteem.

1.3.4 Horizons of Becoming

As illustrated above, life is understood through narratives which are written within and understood by interpretive horizons. These horizons not only provide the vantage points but also the basis for understanding life. These horizons are important to orient a person in society. As Gadamer writes, "a person with this horizon knows the relative significance of everything within this horizon, as near or far, great or small."²⁵⁴ The horizon is the principle by which not only one understands the world around them, but also the principles by which one becomes who or what they are. It may either limit or enhance one's vision of the world.

One horizon limits the vision to that of the collective as front and centre of the world view while the other enhances the world view incorporating all far and near with the relational being front and centre. The beginning of this chapter illustrated two possibilities of becoming. One was open and diverse, while the other is closed and restricted. In one becoming, recognition is through one's collective status, such as sex status. The other is as a relational human being inclusive of whatever uniqueness one has been endowed with. As will be noted later, it is this relational human being or human person, that was conceptualised within international human rights.

²⁵⁴ Gadamer, above n 42, at 269.

1.4 Two Becomings of (Inter)Sex

Sex is a dynamic life-long authorship of becoming.²⁵⁵ Understanding sex as a becoming brings to mind Simone de Beauvoir's famous statement, "one is not born a woman, but becomes a woman."²⁵⁶ Her work acknowledged the hermeneutic process of becoming a sex.²⁵⁷ She continues by saying that:²⁵⁸

"No biological, psychical, or economic destiny defines the figure that the human female takes on in society; it is civilisation as a whole that elaborates this intermediary product between the male and eunuch that is called the feminine."

Her writing indicates that sex is not some linear biological process or phenomena, but it is a becoming involving many mediatory elements. As indicated by Simone de Beauvoir, sex is a product of becoming and belonging.²⁵⁹

Like the many other multiplicities, sex is not deducible to and cannot be claimed as a biological nor a historical fact.²⁶⁰ Sex, as with other multiplicities, is interpretive rather than inborn.²⁶¹ As mentioned that interpretive horizons are a hermeneutic process of the whole and the parts. This is also true for sex as it is to any of the other multiplicities that makeup who or what one is. Sex (the whole)

²⁵⁵ Lois McNay *Gender and Agency: Reconfiguring the Subject in Feminist and Social Theory* (Polity Press; Blackwell Publishers, Cambridge, UK: Malden, Massachusetts, 2000) at 82–82.

²⁵⁶ Constance Borde and Sheila Malovany-Chevallier (translators) Simone de Beauvoir *The Second Sex* (Jonathan Cape, London, 2009) at 293; Warnke, above n 15, at 5.

²⁵⁷ Sara Heinämaa "Sex, Gender, and Embodiment" in Dan Zahavi (ed) *The Oxford Handbook of Contemporary Phenomenology* (Oxford University Press, Oxford, New York, 2012) at 236.

²⁵⁸ Beauvoir, above n 256, at 293.

²⁵⁹ Serge Gutwirth "Beyond Identity?" (2009) 1 IDIS 123 at 129.

²⁶⁰ Warnke, above n 15, at 7; McNay, above n 255, at 91.

²⁶¹ Georgia Warnke "Intersexuality and the Categories of Sex" (2001) 16 Hypatia 126 at 130.

comprises many parts including the biological – primary²⁶² and secondary²⁶³ sex characteristics, the socio-political,²⁶⁴ and the environmental.²⁶⁵ Like Warnke’s use of the heart example, sex may be understood as the base which informs the parts and enables the interpretation of the parts of sex, or it may be an interpretation of the parts – the biological, socio-political and environmental parts – in informing the whole which in turn inform the parts. The first example is the common understanding as a linear process of sex development. This starts from the genetic code and the presence of the “Y chromosome makes the embryo develop as a male; in its absence, the default development is along the female pathway”²⁶⁶ and from there a linear process occurs leading to the other sexual characteristics such as testes, scrotum, ovaries, uterus, vagina, and clitoris and most importantly the brain and the neural system as male or female as determined by the genetic code.²⁶⁷ While the second is the whole of sex understood through the mediation of the many parts that inform the whole. Unlike the linear process, there are no

²⁶² The primary sex characteristics focus by many on genetics, genitals and gonads (3G sex): Fine, above n 9; A full list of primary sex characteristics include chromosomal sex, foetal gonadal sex, foetal hormonal sex, foetal internal reproductive sex, brain sex, and external genital sex. Refer to: Anne Fausto-Sterling *Sex/Gender: Biology in a Social World* (Taylor & Francis, New York, 2012) at 10–11; Elof Axel Carlson *The 7 Sexes: Biology of Sex Determination* (Indiana University Press, Bloomington, Indiana, 2013) at 111; John Curra *The Relativity of Deviance* (third ed, Sage Publications, Inc, Thousand Oaks, California, 2014) at 273.

²⁶³ For example, secondary characteristics include factors such as body hair, breasts, voice, pitch, menstruation. See: Fausto-Sterling, above n 262, at 10–11; Carlson, above n 262, at 111; Curra, above n 262, at 273.

²⁶⁴ The socio-political includes factors such as the assigned sex, sex of rearing, sexual orientation, personality, behaviour, and desires.

²⁶⁵ Curra, above n 262, at 313; Gutwirth, above n 259, at 129; Ben-Ner and Hill, above n 3, at 643; Jessica Knouse “Intersexuality and the Social Construction of Anatomical Sex” (2005) 12 *Cardozo J L & Gender* 135 at 136; Julie A Greenberg “Defining Male and Female: Intersexuality and the Collision between Law and Biology” (1999) 41 *Ariz L Rev* 265 at 278; Anna Chapman and others *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination: Consultation Report: 2011* (2011) at 5.

²⁶⁶ Fine, above n 9, at 84.

²⁶⁷ Curra, above n 262, at 273.

preconceptions of what one is to become. It is like a committee of the various parts that negotiate the various possibilities how one comes to be a sex.²⁶⁸

1.4.1 Sex - Horizons and Culture

The whole and parts, such as one's sex, are unintelligible without understanding them from the vantage point from which the becoming derived. In relation to the hermeneutic task to sex becoming, Georgia Warnke refers to these different vantage points of the hermeneutic task writing that:²⁶⁹

we are bound within specific stories or wholes...that are more or less intelligible depending on the context in which they appear; there are different ways of understanding those contexts and therefore who counts as males or females or as men or women within them; and ...our understandings of men and women and or males and females will depend on the understanding of the contexts in which we can successfully see them as parts.

The interpretive horizon ground the basis of sex becoming. It sets how sex is understood and what is expected in the becoming of sex. In her work on gender and race Linda Alcoff explains horizons:²⁷⁰

“The horizon is just the individual or particular perspective that each person has, that makes up who that person is, consisting of his or her background assumptions, form of life, and social location or position within the social structure and hierarchy.”

The authorship occurs through the interpretive horizons that provide the perspectives and assumptions as Georgia Warnke states:²⁷¹

²⁶⁸ Claire Ainsworth “Sex Redefined” (2015) 518 *Nature* 288 at 289; Roughgarden, above n 8, at 186, 199–200; Carlson, above n 262, at 75.

²⁶⁹ Warnke, above n 15, at 110–111.

²⁷⁰ Alcoff, above n 70, at 96.

²⁷¹ Warnke, above n 261, at 130.

“assumptions and expectations about proper and distinct gender activities erect the interpretive frameworks through which certain features and combinations of features appear to be fundamental to bodies and to comprise their sex.”

It is the background of the interpretive horizon that provides the scene for sex becoming. In other words, it provides the interpretive context, the perspectives and assumptions through which one's sex becomes.

It is, therefore, the interpretive horizons that provide the basis for sex becoming. Gayle Rubin wrote in her renowned work *The Traffic in Women: Notes on the "Political Economy" of Sex* that²⁷²

Hunger is hunger, but what counts as food is culturally determined and obtained. Every society has some form of organized economic activity. Sex is sex. But what counts as sex is equally culturally determined and obtained. Every society has a sex/gender system – a set of arrangements by which the biological raw material of human sex and procreation is shaped by human social intervention and satisfied in a conventional manner, no matter how bizarre some of these conventions may be.

This well-renowned statement implies that one's physiology is just that, physiology, and it only has meaning through one's horizon. It is, therefore, the horizon that gives social and political meaning to sex as well as all other parts of life. Sex, therefore, as Rubin says, is “not ahistorical emanations of the human mind; they are products of historical human activity.”²⁷³ Cordelia Fine argues that “sex is surprising dynamic, and not just open to influence from gender constructions, but reliant on them.”²⁷⁴ Thus, although biology is involved in sex becoming, meaning and significance come through the interpretive horizon or the cultural background. Sex is, therefore, an interpretation of the mediated ongoing

²⁷² Gayle Rubin “The Traffic in Women: Notes on the ‘Political Economy’ of Sex” in Rayna R Reiter (ed) *Toward an Anthropology of Women* (Monthly Review Press, New York, 1975) at 165.

²⁷³ At 204.

²⁷⁴ Fine, above n 9, at 23.

relationship between the personal and the socio-political practices and experiences upon the biological and not caused by it.²⁷⁵ Jo Bird argues that it is through the interpretive horizons that the socio-political nature is inscribed upon one's sex. She writes:²⁷⁶

“(T)he body is literally written on, inscribed by desire and signification, at the anatomical, physiological, and neurological levels. The body is in no sense naturally or innately psychical, sexual or sexed. It is indeterminate and indeterminable outside its social constitution as a body of a particular type...(T)he body...is an open-ended pliable set of significations, capable of being re-written, reconstituted in quite other terms than those which mark it, and consequently capable of reinscribing the forms of sexed identity and psychical subjectivity at work today.”

The interpretive force on the biologism is often stronger than that of the inborn characteristics such as the ‘biological sex characteristics’.²⁷⁷ That is living bodies are responsive to the interpretive horizon. Cordelia Fine reminds us that “Living bodies are dynamic systems that develop and change in response to their social and historical contexts.”²⁷⁸ Therefore, to understand sex becoming, one must understand the interpretive horizon in which it becomes on and through one's body.²⁷⁹

As such all sex becoming begins the same. It starts with two gametes together in the forming of a new human being. This is the only point at which a perfect binary of male and female actually exist. Joan Roughgarden writes that:²⁸⁰

²⁷⁵ Carlos A Ball “Martha Nussbaum, Essentialism, and Human Sexuality” (2010) 19 Colum J Gender & L 3 at 4; Jones and McEwen, above n 1, at 411.

²⁷⁶ Jo Bird “When Sex Means Condition or Impairment: Evaluating the Human Rights of Transgender and Intersex Peoples” (2001) 5 S Cross U L Rev 1 at 1.

²⁷⁷ Lang and Kuhnle, above n 6, at 241.

²⁷⁸ Fine, above n 9, at 180.

²⁷⁹ Warnke, above n 261, at 130; Rubin, above n 272, at 32.

²⁸⁰ Roughgarden, above n 8, at 26.

“When it comes to sex, there are only two generalisations: (1) Most species reproduce sexually; and (2) Among the species that do reproduce sexually, gamete size obeys a near-universal binary between very small (sperm) and large (egg), so that the male and female can be defined biologically as the production of small and large gametes, respectively. Beyond these two generalizations, the generalizing stops and diversity begins.”

Beyond the generalisation that there are sperm and egg producers which are required to produce new offspring, no other generalisation of a sex binary exists.²⁸¹ From the time they combine, that is after fertilisation, the interpretive horizons begin to influence on sex becoming.²⁸² In the early stages, sex becoming is similar as it is mostly biological. However, the understanding of what is going on from without is different as will be seen. It is from this very fertilisation of the two binary elements that a new sex becoming begins. The next two sections will describe the two becomings of sex.

1.4.2 Diversity of (Inter)Sex Becoming

Many societies, in particular, indigenous societies, were accepting of uniqueness and difference seeing everyone as equal beings having interdependence and sociability.²⁸³ Despite what is commonly discussed as determining sex (chromosomes or gonads), everyone has a physiological variety of ‘sex anatomy’.²⁸⁴ While each person may have a propensity for sex diversity, we are

²⁸¹ It must be remembered, for example, not all those categorised as ‘women/female’ today are egg producers. Likewise, not all those categorised as ‘men/males’ are sperm producers. I purposely do not state that eggs come from females and sperm from males. As will be seen as this section continues, sex cannot be divided into a binary of male and female. Rather than referring to men and women, there is a subset of human beings who are sperm producers and a subset who are egg producers. That is as far as any division can truly occur. Thus, human beings are not split into two groups, but there are two sub-groups which produce cells that can enable new beings. Refer to: At 23, 26, 28–29.

²⁸² Heather Looy and Hessel Bouma III “The Nature of Gender: Gender Identity in Persons who are Intersexed or Transgendered” (2005) 33 *Journal of Psychology & Theology* 166 at 167.

²⁸³ Chirkov and others, above n 41, at 100.

²⁸⁴ Sex organs include “chromosomal sex, foetal gonadal sex, foetal hormonal sex, foetal internal reproductive sex, brain sex, and external genital sex. Refer to: Fausto-Sterling, above n 262, at 10–11; Carlson, above n 262, at 111.

not a blank slate for gender ascription.²⁸⁵ The development begins from the moment of fertilisation of the egg but does not start with any preconceptions. It develops from an organic mediation of the biological, the socio-cultural and even the environmental influences that become part of who one is rather than any 'linear biological development'. As Joan Roughgarden describes:²⁸⁶

"Imagine that genes are like mice at the top of the bowling lane, who scurry down the lane, bumping into genetic pins as they go eventually knocking down all of the genetic pins in a variable but directional, clamor. In my picture of how development works, diversity begins from the very beginning."

Each very element that forms our being, using the terminology from Joan Roughgarden, is a 'committee' which determines the outcome, of who we are.²⁸⁷ The committee as a social entity is all independent and essential to determining the outcome of a unique individual. From the very moment the gametes meet, there is a variety of 'social' influences upon the possible outcomes on how the future individual will develop. Rather than a determination as many still assume, genes are a contestation for various sex of the tissues such as for the gonads through negotiation by a 'committee' of genes.²⁸⁸ Carlson writes that "each component of the reproductive system is probably the consequence of dozens of different genes and numerous pathways by which cells are assembled, differentiated, and assigned alternate functions in the male and female pathways."²⁸⁹ Chromosomes do not operate in isolation, but require certain biochemicals called enzymes to makes the genes effective.²⁹⁰ Without the appropriate enzymes, variations may occur.

²⁸⁵ Ryan and Jethá, above n 5, at 23.

²⁸⁶ Roughgarden, above n 8, at 186.

²⁸⁷ At 186.

²⁸⁸ Ainsworth, above n 268, at 289; Roughgarden, above n 8, at 199–200.

²⁸⁹ Carlson, above n 262, at 75.

²⁹⁰ Roughgarden, above n 8, at 200.

Biology is not separated from the sense of self but rather becomes intrinsic and integral to the whole and parts in the becoming of (inter)sex.²⁹¹ I purposely use (inter)sex here in this section to demonstrate that sex is not a simple binary and the many intersex variations demonstrate the diversity of sex that is possible in becoming who one is. That is, the authorship of sex (the whole) mediates with the many parts that together become one's sex. This relational mediation in the authorship of (inter)sex includes the biological, social, and even the environmental.²⁹² Thus, unlike the vertical system, sex is not broken into two different definitions but is best described as²⁹³

the felt sense of meaning through the belonging to and felt compatibility with a sex – male, female, both, or neither – relating how they see themselves, and how they think others see them, in performing social roles, expressions, and functions through their biological body.

This indicates that from the very beginning, rather than categories of sex, sex should be understood as a diversity of sex potentialities where there are many possible combinations all of which contribute to overall human potentiality.

Prenatal becoming has already initiated physiological structures, such as ovaries, uterus, vagina, clitoris, and/or penis, testes, and scrotum while at the same time forming the brain and the neural system.²⁹⁴ During the prenatal period, there may also be certain maternal sources such as food, medication, and even beauty products and other chemicals. For example, the use of endocrine disruptors in

²⁹¹ This includes the different aspects that are referred to in identity politics of late such as sex, gender identity, and sexual orientation.

²⁹² Ryan and Jethá, above n 5, at 23; Roughgarden, above n 8, at 221; Carlson, above n 262, at 111–112.

²⁹³ Australian Human Rights Commission, above n 4, at 7; Heike Polster "Gender Identity as a New Prohibited Ground of Discrimination" (2003) 1 NZ J Pub & Int'l L 157 at 159; Egan and Perry, above n 4, at 451; Carol Lynn Martin and Diane Ruble "Children's Search for Gender Cues Cognitive Perspectives on Gender Development" (2004) 13 Current Directions in Psychological Science 67 at 68.

²⁹⁴ Curra, above n 262, at 273.

utero have been linked to variations such as hypospadias.²⁹⁵ However, predominantly, at this point, the biology mediates in initiating the establishment of sex authorship. It is these, as well as the rest of one's physiology that begins to mediate with the socio-environment relationally in authoring one's sex.

It is important to note that many people refer to elements of sex such as chromosomal sex, foetal gonadal sex, foetal hormonal sex, foetal internal reproductive sex, brain sex, and external genital sex,²⁹⁶ however, none of these in themselves are indicative of one's sex, especially as a binary sex of male or female, but enable the becoming of a diversity or spectrum of sex.²⁹⁷ This diversity is most clearly illustrated through intersex variation that is diversity²⁹⁸ of sexual feature including Intersex people have bodily diversity inclusive of chromosomal, hormonal, and anatomical features that are neither exclusively male nor female, but are typical of both at once or not clearly defined as either.²⁹⁹ Diversity can also occur in secondary characteristics such as muscle mass, hair distribution, breasts and stature, pitch, menstruation.³⁰⁰ Each of the layers of the sex development process can operate independently of each other, and hence, leaves a person's sex identity, unpredictable.³⁰¹ It is "the like bass and treble knobs on a

²⁹⁵ Rudacille, above n 8, at 240–276; Fausto-Sterling, above n 262, at 119–120; "Endocrine Disrupting Chemicals (EDCs)" (2017) World Health Organisation <<http://www.who.int/ceh/risks/cehemerging2/en/>>.

²⁹⁶ Fausto-Sterling, above n 262, at 10–11; Carlson, above n 262, at 111.

²⁹⁷ John Stoltenberg *Refusing to be a Man: Essays on Sex and Justice* (UCL Press, London, 2000) at 24.

²⁹⁸ Silvan Agius and Christa Tobler *Trans and Intersex People: Discrimination on the Grounds of Sex, Gender Identity and Gender Expression* (2012) at 12.

²⁹⁹ At 12; Katrina Roen "Intersex Embodiment: When Health Care Means Maintaining Binary Sexes" (2004) 1 *Sexual Health* 127 at 127; Sara Benson "Hacking the Gender Binary Myth: Recognising Fundamental Rights for the Intersexed" (2005) 12 *Cardozo J L & Gender* 31 at 33; Melanie Blackless and others "How Sexually Dimorphic Are We? Review and Synthesis" (2000) 12 *Am J Hum Biol* 151 at 161; Philip Ebels "Intersex People in EU: Ashamed and Invisible" *EUobserver.com* (12 June 2012) <<http://euobserver.com/890/116578>>.

³⁰⁰ Agius and Tobler, above n 298, at 12; Curra, above n 262, at 273.

³⁰¹ Fausto-Sterling, above n 262, at 11.

radio that can be mixed in all manner of combinations."³⁰² These variations are important to the self-authorship of sex and one's sense of sex whether it be male, female, both or neither.

At this point, it is important to interlude by introducing a key in the becoming of (inter)sex, and identity in general. Within the vertical system, the brain is considered a blank slate through which the authorship of one's sex status/gender is authored. The vertical horizon does not see the brain as influencing the 'biological sex development. This is not within the horizontal horizon. The brain is not a "blank slate awaiting operating instructions."³⁰³ It is rather the plane through which mediates the internal and external during the authorship of (inter)sex. This is illustrated by a medical researcher, William Reiner, at John Hopkins who states:³⁰⁴

In the end, it is only the children themselves who can and must identify who and what they are. It is for us as clinicians and researchers to listen and to learn. Clinical decisions must ultimately be based not on anatomical predictions, nor on the "correctness" of sexual function, for this is neither a question of morality nor of social consequence, but on that path most appropriate to the likeliest psychosexual developmental pattern of the child. In other words, the organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain.

In short, he states that it is the brain that determines one's sex, the platform where this mediation of the various parts occurs, and not the genitals or other physiology.

³⁰² Callahan, above n 7, at Cover.

³⁰³ Ryan and Jethá, above n 5, at 23; The brain here refers to the other associated neural areas. They have direct influence on the brain and its influence on one's personhood and identity. The diversity of sexual differentiation illustrates the interplay of a hormonal axis involving the hypothalamus, the anterior pituitary gland, the adrenal cortex, and the gonads - See: Carlson, above n 262, at 130; Brain difference analyses demonstrate a predominance of overlap between the 'sexes' and any detectable average differences are minute don't have any meaning for us as individuals...There are as many possible variations as is there are people's faces (p. 246) and any minute differences have real meaning for the real lives of individuals. See: Roughgarden, above n 8, at 226, 231.

³⁰⁴ Greenberg, above n 265, at 326.

Moreover, a biologist Joan Roughgarden states that our personhood and identity emerge from the substances of the brain.³⁰⁵ This area becomes central to the mediation and negotiation between the ‘me’ and the ‘you’ and the institutional/general otherness. Although the brain is developing and continually being renewed, even at the time of birth, it is critically involved in this process.

Thus, from the time one enters the world, there is already potential for many variations of sex from a biological and physiological initiation. These are waiting for the mediation of the ‘me’ relationality. Even prior to talking, children recognise the socialised and acceptable sex identities, what it means to be a particular sex identity – boy or a girl, both or neither and discriminate between them.³⁰⁶ As the horizontal appreciates diversity, the child feels safe to author their sex as initiated by or emanate from the infant/child.³⁰⁷ The infant learns that it is appropriate to act, think and feel accordingly without having to comply with sex organisation in society.³⁰⁸ Research has also shown that by the modal age of 5 (mean of 8) they recognise how they identify – whether it be as male, female, both or neither,³⁰⁹ despite at that point not being aware of how their sexual relationships (often referred to as sexual orientation) may become.³¹⁰

These relational interactions develop as one matures³¹¹ within a supportive environment, both in the home and in the social environment generally. They

³⁰⁵ Roughgarden, above n 8, at 221.

³⁰⁶ Martin and Ruble, above n 293; Susan D Witt “Parental Influence on Children’s Socialization to Gender Roles” (1997) 32 *Adolescence* 253 at 253.

³⁰⁷ Martin and Ruble, above n 293, at 68.

³⁰⁸ Curra, above n 262, at 273.

³⁰⁹ Fausto-Sterling, above n 262, at 10–11; Carlson, above n 262, at 111; Natacha Kennedy and Mark Hellen “Transgender Children: More than a Theoretical Challenge” (2010) 7 *GJSS* 25 at 28, 30.

³¹⁰ Erika Skougard “Best Interests of Transgender Children, The” (2011) 2011 *Utah L Rev* 1161 at 1165.

³¹¹ Marshall, above n 197, at 227.

enable the child to have a strong sense of self. Supportive people around the child recognise the boundaries between their own interests and those of the children in their care which enable development.³¹² This enables the child to receive respect and have esteem (as will be detailed in the next chapter) to be a constructive member of society. It also enables the child to have worth and feel valued. It enables them to develop in a moral supportive environment and become a participatory constituent. Infants have the ability to recognise sex and discriminate between them.

This does not mean that becoming of sex is complete. There is another further biological mediation and the socio-environmental mediation which continues for most of one's life. As one's authorship continues, the interaction with others continues to mediate one's sex. At puberty, biology continues the narration process. The gonads which differentiated during fetal development become active, creating another layer – *pubertal hormonal sex*.³¹³ At this stage, two other biological aspects add complexity to the narrative process. First, there is the flow of hormones which not only initiate other 'secondary sex aspects' (for example, body hair, breasts, voice, pitch, menstruation) but also influence the erotic sensations and desires (pubertal erotic sex) and adult differentiated anatomy – what John Money called *pubertal morphological sex*.³¹⁴ During childhood, sexual relations and relationships were formed socially, but at puberty, one's 'sexual orientation' becomes a factor in the narrative process.

All of the biological and the psychological and social capabilities are in place to enable the child to become who it wants to be and become.³¹⁵ This means that physiologically there is the ability to develop an array of different sex identities.

³¹² At 230.

³¹³ Fausto-Sterling, above n 262, at 11.

³¹⁴ At 10–11; Carlson, above n 262, at 111; Curra, above n 262, at 273.

³¹⁵ Marshall, above n 197, at 230–231.

For this to happen, it requires the supportive environment from which the conditions autonomously develop.³¹⁶ Thus, it requires a social environment with choices and options available. It also requires independence. This determines whether a person's sex is developed autonomously or not.

The 'adult' sex identity which is formed post-puberty, becomes one's sense of self.³¹⁷ By this stage, biology has predominantly done its job in the narrative process. Although hormone levels may change throughout one's life as one ages and may change bodily appearance, the narrative process is predominantly influenced by the social elements. This may include some medical adaption of the body to match one's identity. This sense of self, whether it be autonomous or heteronomous, is determined by whether one's well-being is supported by the social environment. The narrative process continues, but by adulthood, for many people becomes relatively stable with little change throughout one's life. For some, knowledge and or environmental changes, may lead to further narrative changes in one's sex.

One's sex, whatever it turns out to be, becomes part of who one is and how one comes to be. This includes the connectedness to one's intersex variations or other variations of sex diversity that occurs. It is through one's sex and the many other multiplicities that one becomes a functioning member of society. Although there may be gendered roles these are not fixed and immutable in who counts as fulfilling such roles. They have meaningfulness and value in life.

³¹⁶ As well as the basic conditions for autonomy of capacity and integrity, autonomy requires basic needs which have to be met. Therefore, if newly developing individuals are to have capacities as a capable subject require support and recognition from those caring for them. Our caring relationships are crucial to our survival, emotional well-being, and psychological identity. Feeding, bathing, changing, comforting, transporting, and nurturing. See: At 230–231.

³¹⁷ Fausto-Sterling, above n 262, at 11.

The horizontal horizon centres on the relational human being. It provides the basic needs of humanness: competency, autonomy, and relatedness. It is thus clear that the horizontal tilts in favour of autonomy as it supports an autonomous life.³¹⁸ The community within such a horizon is guided by principles which positively maintain the sense of community and connectedness. These principles centre on the reciprocity of life of recognition and respect. These principles enable all individuals to be treated as equals in their narrating of their life. They have the autonomy to become who they are. This becoming of sex enables esteem and respect of a life of integrity to become a constructive member of society.

One's becoming in the horizontal horizon is always one of reciprocity. One's becoming is authored with uniqueness and diversity as even elemental to its understanding and structure. Although one's becoming will always occur in and through social relations, they will not necessarily define us. It is never fixed, immutable or determinable. It is always a process of meditation. As Stuart Hall stated, it is "a process of articulation, a suturing, an over-determination not a subsumption."³¹⁹ It accepts that³²⁰

identities are never unified, and ... increasingly fragmented and fractured; never singular, but multiply constructed across different, often intersecting and antagonistic, discourses, practices and positions. They are subject to radical historicization, and are constantly in the process of change and transformation.

As such horizontal becoming is a process of evolving, reinventing, or transforming nature.³²¹ It is a mediation between stasis and change³²² where nothing is resolved or in closure, yet often contradictory as it accommodates the emergence of new

³¹⁸ Raz, above n 140, at 391.

³¹⁹ Stuart Hall "Who Needs 'Identity'?" in Jessica Evans, Paul Du Gay and Peter Redman (eds) *Identity - a Reader* (Sage Publications Ltd, London, UK, 2000) at 16–17.

³²⁰ At 17.

³²¹ Jones and McEwen, above n 1, at 412.

³²² McNay, above n 255, at 86–87; McNay, above n 29.

possibilities or transformations of the whole and the parts of one's becoming.³²³ It is from this 'to and fro' between ipse (self) and idem (sameness), between individual thrust, and the categories which match with or to which a person adheres,³²⁴ that it is possible to interpret one's becoming. Sex becoming within the horizontal horizon leaves all possibilities of sex becoming. The variations of intersex are simply some of the many possibilities with the many expressions of one's sex.

1.4.3 The Becoming of a Linear Sex (Status) as Male or Female

Although the beginning of the vertical becoming of sex is the same as the horizontal becoming, it is not the biological, but the interpretation of the existential and the experiences that differ. People understand their experience within their interpretive horizon or their worldview.³²⁵ Becoming within the vertical interpretive horizon is part of the collectivity. The collectivity operates as a hegemonic system.³²⁶ This becoming is near universal in modern societies and in some pre-modern societies. These societies understand sex within two parts the determinable (sex) and the constructed becoming (sex/gender). This is illustrated by Cordelia Fine:³²⁷

"Sex is so fundamental, so the story goes. It is the timeless, unchanging seed from which either a male or female developmental programme unfurls.

³²³ Gutwirth, above n 259, at 129; Renée C Fox and David P Willis "Personhood, Medicine, and American Society" (1983) 61 *The Milbank Memorial Fund Quarterly Health and Society* 127 at 127; McNay, above n 29, at 320; Jones and McEwen, above n 1, at 410–411; Guibernau, above n 2, at 16–17; Alistair Ross "Multiple Identities and Education for Active Citizenship" (2007) 55 *British Journal of Educational Studies* 286 at 287.

³²⁴ Gutwirth, above n 259, at 125; McNay, above n 29, at 320; Paul De Hert "A Right to Identity to Face the Internet of Things?" [2008] *Global Open Access Portal - UNESCO* at 1.

³²⁵ Stoltenberg, above n 297, at 25.

³²⁶ Hegemony is a direct and indirect consent/coercion system." It is in operation when the dominant class not only dominate, but direct and lead; when they not only possess the power to coerce but actively organise so as to command and win the consent of the subordinated classes to their continuing sway. 'Hegemony thus depends on a combination of force and consent.' See: : Hall, above n 66, at 332.

³²⁷ Fine, above n 9, at 23.

Experience plays a secondary role in the individual's developmental journey to a male brain and male nature, or to a female brain and female nature."

Fine's description of sex becoming demonstrates the process of becoming within the vertical interpretive horizon. It is taken for granted that the biological basis of sex is so fundamental, that unless nature makes a mistake, there are two species – male or female – and these will biological develop in a linear pattern irrespective of one's becoming. This becoming, the narrative of one's life occurs secondary to one's biological development and is interpreted and understood in relation to such biological development.

Sex becoming is understood as a status determined by nature that unfurls into socio-political roles. There are two different species as male and female and not just two different reproductive systems (women have ovaries, a womb and lactate while men are sperm producers).³²⁸ This is based on three assumptions:³²⁹

First, it assumes that sex is dimorphic, having two different forms, male and female, which have distinct anatomical structures and biological functions. Second, each form has different physical characteristics...Third, each form has different psychological and behavioural characteristics.

These assumptions inform not only the determination of sex but also the becoming that follows on from such a determination. These sex statuses do not allow room for any variation which is considered a mistake of nature or an abnormality that must be erased or rectified. In other words, intersex is not recognised except for as an abnormality or mistake.

³²⁸ Beauvoir, above n 256, at 21; Fine, above n 9, at 14; Judith Lorber "Believing is Seeing: Biology as Ideology" (1993) 7 *Gend Soc* 568 at 569.

³²⁹ Jillian Todd Weiss "Transgender Identity, Textualism, and the Supreme Court: What is the Plain Meaning of Sex in Title VII of the Civil Rights Act of 1964" (2009) 18 *Temp Pol & Civ Rts L Rev* 573 at 599–600; Virginia Braun and Sue Wilkinson "Vagina Equals Woman? On Genitals and Gendered Identity" (2005) 28 *Women's Studies International Forum* 509 at 509.

1.4.3.1 *Determined Sex of Identicality*

Biological sex development begins from the very time of conception and continues through a linear pathway throughout life. The fertilisation of the egg begins a process that according to this interpretive horizon unfurls into a male or female biology. This initiates a pathway based on the chromosomes which are either XX or XY. As Cordelia Fine states that the old, but still prevalent account:³³⁰

“is that the presence of a Y chromosome makes the embryo develop as a male; in its absence, the default development is along the female pathway, ...individuals with Y will develop testes and in the absence of Y chromosomes, ovaries will develop.”

Sex determination depends on the presence or absence of the Y-chromosome. The sex will then lead to the direction of other related sex characteristics. Biologist Joan Roughgarden describes this process:³³¹

a master gene triggers a subordinate gene, which cascades to downstream genes in a descending hierarchy of control. In this point of the picture, bodies develop as though a bowling ball were accurately rolled to hit the genetic kingpin at just the right spot and cause all the genetic bowling pins behind to fall down in a perfect order. Producing a normal baby is bowling a genetic strike.

The chromosomes, as Fine refers to, lead to a linear development of other anatomical structures including those often referred to as sex structures (for example, ovaries, testes, uterus, scrotum, vagina, and clitoris) and most importantly the brain and the neural system.³³² This assumes there is a close linear association of “3G” sex – genetic, gonadal, and genitals – as core markers of sex.³³³

³³⁰ Fine, above n 9, at 84.

³³¹ Roughgarden, above n 8, at 185.

³³² Curra, above n 262, at 273.

³³³ Fine, above n 9, at 85.

From the time of birth, the linear development continues along the chromosomal pathway albeit at a slower pace until puberty. At puberty, sex development continues with 'secondary sex characteristics' of body hair, breasts, voice, pitch, menstruation, and sexual sensations and desires.³³⁴ One's biological sex further develops into adulthood. Later in life, other factors change such as menopause in women. Up till recently, it has also been assumed that this determined sex will also determine one's sexual relations, and hence the system of heterosexuality.

This understanding excludes other variations and any differences that are considered as abnormalities or medical conditions, or some even refer to them as mistakes of nature. Joan Roughgarden explains how it is possible to understand through a different narrative:³³⁵

"Although early scientists could equally well have approached developmental biology with an open heart, ready to embrace the diversity of molecular mechanisms that produce bodily and behavioural diversity, the part line has instead been to sound the alarm at any hint of diversity, then to label diversity as disease and 'cure' it. Of course, disease does sometimes occur, and cures for true diseases are needed, but the disease model of diversity fundamentally misrepresents human nature, inflicting needless procedures or actual harm on people in the name of 'curing' them."

Intersex people have been understood rather as a pathology, a disease. They are mistakes of nature that need a cure so that they can live successful lives in society. In the modern era, the majority of them undergo sex-normalising treatment to physically match them to the sex which the medical professionals deem them to be. However, in the past, they have been killed, or ostracised from society, as noted in the introduction of the thesis. A remaking of the body is considered where the body fails to fit with the gender we expect or where it fails to possess the appendages or sites necessary to our ideas of the form or activities and practices

³³⁴ Fausto-Sterling, above n 262, at 10–11; Carlson, above n 262, at 111; Curra, above n 262, at 273.

³³⁵ Roughgarden, above n 8, at 185–186.

that mark a particular gender (and its supposed heterosexuality).³³⁶ This narrative does not necessarily reflect the only way of understanding the world. This then maintains the understanding and operation of the two-sex system as either male or female.

1.4.3.2 Determined Becoming of Sex

The linear biological development of sex as male or female, according to vertical interpretive horizon, establishes the differences between males and females³³⁷ through “the biological and physiological characteristics that define men and women.”³³⁸ For example, these physiological differences are said to divide humans into two species:³³⁹

women menstruate and have developed breasts that are usually capable of lactating, while men do not; men have testicles while women do not. And men generally have more massive bones than women.

All humans within this horizon are believed to fit within one of these two species with any variation from the markers of the species an anomaly. Therefore, “we are born as males and females” but we “become girls, boys, women, and men by learning from our families and societies.”³⁴⁰ Otobe’s wording indicates that from a biological point of view, sex is a foregone conclusion. Within this horizon, sex becoming is one’s socio-political becoming. As such, sex becoming is understood as:³⁴¹

³³⁶ Warnke, above n 261, at 131.

³³⁷ At 129.

³³⁸ World Health Organisation “What Do We Mean by ‘Sex’ and ‘Gender?’” WHO <<http://www.who.int/gender/whatisgender/en/>>.

³³⁹ World Health Organisation, above n 338.

³⁴⁰ Naoko Otobe, International Labour Office and Employment Policy Department *Resource Guide on Gender Issues in Employment and Labour Market Policies Working towards Women’s Economic Empowerment and Gender Equality* (Internat Labour Off, Geneva, 2014) at 81.

³⁴¹ Agius and Tobler, above n 298, at 12–13; Chapman and others, above n 265, at 5; Roughgarden, above n 8, at 27; Myra J Hird “Gender’s nature: Intersexuality, Transsexualism and

the way a person perceives, expresses, and experiences sex identity within social relations of a social-political environment through imposed expectations (such as getting married and having children), norms, qualities and behaviours upon an individual which vary across history societies, cultures and classes.

Becoming from infancy is a complex process of sex becoming within the socio-political world. The biology has caused the establishment of what one is – either male or female – and now one’s becoming is an integration of one’s perception and experiences within the socio-political expectations. In this sense, one’s sex becoming is a reaction to and is influenced by other’s view of themselves³⁴² such as through projecting through their dress code and manners.³⁴³ Most people accept the assigned sex which becomes their sex status and accordingly their sense of worth.³⁴⁴

Assignment of sex occurs at birth as either male or female according to the ‘definable’ anatomy.³⁴⁵ This usually is through a quick glance between the legs to deduce one’s status³⁴⁶ and at the same time both symbolically and literally reveals the truth of one’s gender (the modern term for social sex) that one will become.³⁴⁷ One’s becoming is pre-determined, in type but not in action. It is thus, the action of becoming that the vertical interpretive horizon indicates that one’s becoming is a socio-political person with a narrative identity.

the ‘Sex’/‘Gender’ Binary” (2000) 1 *Feminist Theory* 347 at 348; Greenberg, above n 265, at 274; PL Chau and Jonathan Herring “Defining, Assigning and Designing Sex” (2002) 16 *Int’l J L Pol’y & Fam* 327 at 328; Knouse, above n 265, at 136–136.

³⁴² Guibernau, above n 2, at 17.

³⁴³ At 17, 18.

³⁴⁴ Lorber, above n 328, at 578.

³⁴⁵ Katrina Alicia Karkazis *Fixing Sex: Intersex, Medical Authority, and Lived Experience* (Duke University Press Books, 2008) at 95; Bird, above n 276, at 21; Polster, above n 293, at 158.

³⁴⁶ Valdes, above n 166, at 162.

³⁴⁷ Katrina Alicia Karkazis, above n 345, at 95.

The process of becoming gender is a lifelong process but begins from the time of birth. Even prior to talking, the infant's brain begins to recognise gender cues, acceptability of the cues within society, and what it means to be their gender.³⁴⁸ There is a continuous process in the early years by picking up cues in the world around them in how to become their gender. Cordelia Fine writes that³⁴⁹

“From birth, children encounter endless gender clues and hints in the real world: gender stereotypes transmitted in advertisements; encouraging or discouraging words, expressions, or body language from others; toy stores and packaging; movies; TV shows; the sex-segregation of adult social roles; and so on.”

These cues are picked up both consciously or unconsciously. Their becoming of gender as male or female and the associated patterns of permitted freedoms of that gender become quickly understood. Judith Lorber writes that infants take note of gender and its boundaries from the men and women around them. She writes that the infants learn: “Whatever a ‘woman’ is has to be ‘female’; whatever a ‘man’ is has to be ‘male’.”³⁵⁰ This becomes the perpetual gender categories that the child will use to reference the world and author his or her life.³⁵¹ Although the infant knows their gender by the age of five,³⁵² they have also established stable conceptions of³⁵³

“(a) the degree to which they typify their category, (b) their contentedness with their assignment, (c) whether they are free to explore cross-sex options or are

³⁴⁸ Martin and Ruble, above n 293, at 69; Witt, above n 306, at 253.

³⁴⁹ Fine, above n 9, at 184.

³⁵⁰ Lorber, above n 328, at 569.

³⁵¹ Martin and Ruble, above n 293, at 69.

³⁵² This is by the modal age of 5 (or the mean age of 8) that a child knows their sex. However, as seen in the following section, they also know that if their sex is not adhering to the binary system and is not acceptable within the social setting, that it must be concealed and suppressed and will attempt to author their sex according to the ‘sex determined at birth’, their sex society expects them to be. Refer to the following: Kennedy and Hellen, above n 309, at 28, 30; Skougard, above n 310, at 1165.

³⁵³ Egan and Perry, above n 4, at 459.

compelled to conform to sex stereotypes, and (d) whether their own sex is superior to the other.”

That indicates they are fully aware of the necessity to conceal or suppress their true gender if it is different from what is assigned.³⁵⁴ From the early years, infants have established boundaries of gender becoming that will guide them for most of their lives.

From this point in life, gender becoming is fortified through an internal and external sense.³⁵⁵ This includes cues regarding “the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.”³⁵⁶ This fortification requires the embracing of what is appropriate, the prescriptions and proscriptions for acting, thinking, and feeling) and roles and cultural responsibilities associated with one’s gender.³⁵⁷ The presentation of one’s becoming feeds back to their sex and is “interpreted by others using specific gender framework of an individual’s culture.”³⁵⁸ This is reinforced through carers, whether it be family or other members of society, reinforcing their own social interests in the child’s gender becoming.³⁵⁹ Cordelia Fine writes:³⁶⁰

“Gender stereotypes operate throughout life both as expectations about the characteristics men and women have, and as gender norms dictating double standards for how women and men should behave, influencing people’s interests, self-concept, performance, and beliefs about capabilities in gendered domains. These gender stereotypes and norms are also the foundation of both conscious and unconscious forms of sex discrimination, like biased evaluations

³⁵⁴ Kennedy and Hellen, above n 309, at 28, 30.

³⁵⁵ Fausto-Sterling, above n 262, at 10–11; Carlson, above n 262, at 111.

³⁵⁶ World Health Organisation, above n 338.

³⁵⁷ Curra, above n 262, at 273.

³⁵⁸ Fausto-Sterling, above n 262, at 7.

³⁵⁹ Marshall, above n 197, at 230.

³⁶⁰ Fine, above n 9, at 192.

of performance and potential, and social and economic backlash against people whose behaviour isn't in line with them."

The stereotypes of expectations and characteristics that define male and female both consciously and unconsciously influence one's becoming through one's life. For example, Katrina Karkazis writes:³⁶¹

"If a baby is labelled 'female' at birth, it is assumed that person will grow to understand herself as a woman, to dress and act like a woman, and to desire and have sex with men. Because this is a normal course of events, it is assumed natural."

Both the sense of naturalness and the social-political hegemonic pressure have a strong influence on one's self-concept of sex. For those who fail to conform, they are seen as outsiders to the schema something of an inhibition that stops much diversity of expression and maintains conformity. Due to the naturalness of appearance and hegemonic forces at play, there is little resistance to sex becoming within the vertical interpretive horizon. For those that resist, by self-defining their sex becoming encounter barriers to their becoming.

Moreover, as one matures, one continues to author gender as cued by relationships, society, and sociality.³⁶² This continues with the child as their status as sex determined, and gender authored. This becomes their socio-political status of life which is not escapable. It is central to and entangled within one's social and legal life of recognition and relationality. At an early age, the infant uses these cues as a guide together with the gendered world around them in becoming their gender. They pick up on cues about acceptable and non-acceptable relationships, even though they yet may not know their favoured sexual relationships.³⁶³ As they turn to their teens, they begin to form relationships which usually favours

³⁶¹ Katrina Alicia Karkazis, above n 345, at 95.

³⁶² Marshall, above n 197, at 227, 239.

³⁶³ Kennedy and Hellen, above n 309, at 28, 30; Skougard, above n 310, at 1165.

culturally accepted values such as heterosexuality.³⁶⁴ These relationships primarily adhere to the socio-political way of life.

1.5 Conclusion

This chapter has argued that life is understood through the many narratives that give it meaning and purpose. Life is understood through narratives within the interpretative horizons.³⁶⁵ These narratives are an interpretation of many whole and parts which are hermeneutically interpreted. It is through the hermeneutic interpretation of one's and others' narratives that one finds meaning and purpose in life. It is through the narratives and the interpretive horizons which are authored that it is possible to answer questions about oneself.³⁶⁶ The narratives are the story of how one becomes who or what one is. It is part of life that gives meaning and purpose to people and communities.

At this point, it is useful to introduce the analogy of the drama to illustrate how narratives reflect the life story of one's becoming. The types of drama illustrate two possibilities of becoming. The first type of drama is commonly understood and applied. Becoming of the characters in the drama occurs according to a pre-determined script. The details of the characters – what they are and how they come to be – are spelt out with minimal room for autonomous choice or options. The director and the writer have set the hegemony from which the drama occurs and is understood. This illustrates becoming within a vertical interpretive horizon. The second type of drama with no script. The character starts with no or limited pre-determinations. A director is there to coordinate or mediate but not direct. As there is no set script, becoming is continually in motion, even transformable. Such a drama is representative of the horizontal interpretive horizon.

³⁶⁴ Kennedy and Hellen, above n 309, at 28, 30; Skougard, above n 310, at 1165.

³⁶⁵ This includes the "personal, the social, and the political" that create and become the framework of the horizons. See: Farquhar, above n 28, at 11.

³⁶⁶ At 11.

Sex becoming, integrative with the many other multiplicities, is a becoming within interpretive horizons as explained above. While the same biological elements are there in both, the interpretation of these depend on the drama one is in. The first is sex becoming in the drama set in the vertical horizon. This drama pre-sets the boundaries of sex becoming at birth. One is labelled a male or female as an actor in the drama. The scripts are inflexible to diversity or variation and the introduction of diversity such as intersex will cause instability to the drama itself. The writer and the director have set the roles (how one comes to be) as one develops through the drama. Although an actor has some freedom during the drama, they are expected to maintain the overall set roles. One's esteem derives from the fulfilling one's role in the drama successfully and respect derives from one's positionality. In the other type of drama set in the horizontal horizon, there is no script for gender becoming. This drama permits sex development and becoming over time. As there is no boundaries, sex is interpreted by the person, whether it be male, female, both or neither, which may transform over time. As such, an intersex person has the freedom to be who they are and the autonomy over how they come to be. This enables one to be true to oneself with esteem and respect others around them.

The history of intersex people reflect such becomings. Somewhere from mythology to the present intersex people have gone from revered to repressed. Although intersex people have existed since time immemorial, although not always named as such, they have not always been recognised and accepted within society. Some societies in the past respected them as human beings, and some societies even revered them, while today, most intersex people are only recognised through the determined sexed identity as either male or female. This has resulted in their death, ostracism, or the physical and psychological manipulation of their bodies to conform them to the socio-cultural understanding of sex. They have been left marginalised and invisible to themselves and to others around them. Invisibility of intersex people has not always been the norm. It is dependent upon the horizon situatedness as to whether intersex people are

invisible. This section highlights the two types of sex becoming one accepting of diversity inclusive of intersex and the other not accepting and resulting in the intersex people existing yet invisible.

Lives are part of, and yet in themselves make narratives. As with any narrative, lives are a story to be read. As Kim Atkins writes: “not only are our life stories ‘written’, they must also be ‘read’.³⁶⁷ The reading of one’s story requires interpretation. Failing to interpret becoming within a horizon leads to the misunderstanding of one’s becoming and misinterprets one’s story. Gadamer highlights the point that failing to place oneself “within the historical horizon out of which tradition speaks, we shall misunderstand the significance of what it has to say.”³⁶⁸ Misreading one’s story has the potential to have effects on one’s and others’ lives and affect their very sense of being. It can also segregate them from the community and prevent them from being a valuable member of the community. Often today, intersex people are misread as being a deformed what rather than who they are. The effect of this is to ‘fix the deformity’. They are forced to undergo normalising surgery to remedy this reading of what they should be.

Each life story is formed in and through interpretive horizons as explained above this may be vertical or horizontal. Narratives though are complex, and may contain segments of both horizons or even transform over time. For example, even if being born into a vertical interpretive horizon, they may form their character through a horizontal interpretive horizon. Ricoeur explains that the narrative³⁶⁹

³⁶⁷ Kim Atkins *Internet Encyclopedia of Philosophy* (2015) Ricoeur, Paul <<http://www.iep.utm.edu/ricoeur/>>.

³⁶⁸ Gadamer, above n 42, at 270.

³⁶⁹ Kathleen Blamey (translator) Paul Ricoeur *Oneself as Another* (University of Chicago Press, Chicago, Ill, 2008) at 147–148; See also: Ricoeur, above n 35, at 77; Alya Khan “Using Ricoeur’s Oneself as Another: Narrative Identity, Gender and Relational Autonomy” (paper presented to Thinking Gender - The Next Generation, United Kingdom, 2006) at 10.

“constructs the identity of the character, which may be called his or her identity, in constructing the story told. It is the identity of the story which makes the identity of the character.”

The narrative constructs the character. That is, depending on the interpretive horizon, it may provide a more open free horizon or closed hegemonic horizon in which the character develops. It is through the development of the character within the construction of the story that it is possible to find one’s identity. In other words, it is revealed through the story told. It is through the interpretation of the narrative, the narrative identity, that it is possible to understand who or what one is and how one comes to be.³⁷⁰ Linda Alcoff wrote that identity is revealed the “moment in which it suddenly emerges from hiddenness in the full functional context of world.”³⁷¹ Identity signifies a revealing rather than a determiner.

The complexity of identity, such as that of sex, comes through its interpretation of one’s becoming. Understanding of identity depends on its horizon of situatedness: is it a revealing of a mediated source or does it determine what one is and how one will come to be? The common conceptualisation of identity, as will be seen in the beginning of the next Chapter, is what Paul Ricoeur refers to as the ‘problematic of identity’ – an immutable determined understanding of what one is. This is very much situated within the vertical horizon. To overcome the problematic of identity, there needs to be an attestation of a moral being over one’s life as to becoming who they are. The answer to this question is critical to the autonomy and freedom in which people may live their life. Intersex people clearly illustrate the issue of the problematic of identity in that through determination of sex (identity) they have been made invisible and forced into a pre-determined sex. To overcome the issues they face, they require a moral

³⁷⁰ Farquhar, above n 28, at 10.

³⁷¹ Alcoff, above n 70, at 94–95.

identity that derives from a moral being of an autonomous capable human being.
This is the focus of the next Chapter.

CHAPTER 2: MOVING FROM PERSONAL TO MORAL IDENTITY

As described in the last chapter, every person's life story or narrative is formed in and through interpretive horizons of situatedness.¹ It is either predominantly vertical based determination by the collectivity of what one is as upon which a narrative is constructed or a horizontal mediatory environment enabling a narrative that reveals who one is. The interpretive horizons are not equal in enabling how one comes to be or the recognition in what or who one is. Irrespective of horizon, becoming is part of an intentional process of the narrative of life. Charles Tilly supports this in relation to becoming. He writes humans are living bodies "to which human observers attribute coherent consciousness and intention."² These bodies were a conscious becoming of how one comes to be. It is both purposeful and full of meaning.³ Whether it be autonomous or heteronomous becoming, either way, it is an intentional becoming. It certainly is not a mechanical life. This intentionality of becoming reveals through one's life-story or narrative identity.

The narratives reveal's one's character, the protagonist of the story of who, or what, one is and how one comes to be – one's becoming.⁴ The revealing of the character reveals not only what or who one is, but also how one comes to be. The revealing of one's character requires interpretation. As Max Latona writes, identity

¹ This includes the "personal, the social, and the political" that create and become the framework of the horizons. See: Sandy Farquhar *Ricoeur, Identity, and Early Childhood* (Rowman & Littlefield Publishers, Lanham, Md, 2010) at 11.

² Charles Tilly "Citizenship, Identity and Social History" (1995) 40 *International Review of Social History* 1 at 6.

³ Georgia Warnke *Debating Sex and Gender* (Oxford University Press, New York, 2011) at 7; Tilly, above n 2, at 6.

⁴ Kathleen Blamey (translator) Paul Ricoeur *Oneself as Another* (University of Chicago Press, Chicago, Ill, 2008) at 147–148; Farquhar, above n 1, at 10; See also: Paul Ricoeur "Narrative Identity" (1991) 35 *Philosophy Today* 73 at 77; Alya Khan "Using Ricoeur's Oneself as Another: Narrative Identity, Gender and Relational Autonomy" (paper presented to Thinking Gender - The Next Generation, United Kingdom, 2006) at 10.

is the product of interpretation of one's life story, one's narrative.⁵ The interpretation of these life stories is through the interpretive horizons in which they are understood. The interpretation of these narrative identities thus reveals the identity of the character or one's personal identity. It emerges from the hidden context of the world.⁶

(Inter)sex becoming, as illustrated in the last chapter, is revealed through one's narrative. The horizon in which it is authored impacts on the becoming of sex. We know that children know their sex at a young age, and this may or may not reflect the assigned sex one has been given. The same is true for intersex children. That is, while the vertical focuses on sex status and may or may not permit other statuses than male or female, the horizontal permits the capability to become who one is – male, female, both or neither – irrespective of sex characteristics. One can be who one is without having to be named. In the modern world, few nations permit people to live in a body with sex characteristics other than 'male' or 'female'. As such, they live a determined sex that they did not decide, in a body that has been manipulated with lifelong physical, psychological, and sexual effects, and an identity that may or may not reflect who they are. Often this conflicts with internal notions of one's sense of being.

As intersex people today piece their life together, they like many others around them, begin to understand that becoming is not always an autonomous process. Intersex children's bodies have been manipulated and their experiences relating to what/who they are – their sense of being - may conflict with the above sense

⁵ Max J Latona "Selfhood and Agency in Ricoeur and Aristotle" (2001) 45 *Philosophy Today* 107 at 107.

⁶ Linda Alcoff *Visible Identities: Race, Gender, and the Self* (Oxford University Press, New York, 2006) at 94–95.

of self. This was noted by Sharon Preves in her research in intersex people. She wrote⁷

Because most intersexuals grow up without accurate and complete knowledge of their physical sexual differences, they experience intense identity confusion when they finally piece together the mystery of their 'gender trouble'.

This conflict of the sense of self becomes complex, especially when one's becoming has been both socially and physically interfered with and people, such as intersex people, cannot make sense of their life. This confusion can have flow on effects including psychological effects through one's life. Moreover, for them, it has involved more than simply a determination of a sex even though this be somewhat a narrow definition. They have had their very moral identity interfered with their moral being and their autonomous capability to form a good life for themselves in and with others. For intersex people, this is their central concern. This leads to a problematic of identity (described below) as indicated through the lives of most intersex people. Their immutable identity including their sex (identity) has been predetermined for them from which one finds their self. This has issues over morality of or over one's life and the autonomy of the capability to become who or what one is.

This chapter begins with the problematic of identity where one's personal identity is divested from its narrative base as its singularity. The narrative self is added to, and not formative of one's personal identity. This leads to the vulnerability of the human condition. The chapter then argues, to overcome and protect against the vulnerabilities, personal identity must retain its narrative mark of power and attest to one's becoming as an autonomous capable being. This section illustrates what capabilities human beings have and what the conditions of autonomy are. The following section indicates that the autonomous capable being exists in a moral

⁷ Sharon E Preves *Intersex and identity* (Rutgers University Press, New Brunswick, NJ, 2003) at 108.

form or in other words has a moral basis. This reflects the worthiness of the self-esteem and self-respect of the capable autonomous human being. This indicates the identity of a dignified being. This results not in someone just having a personal identity but with a moral identity. The moral identity ensures autonomy over who one is and how one comes to be.

2.1 Problematic of Identity

Becoming involves, as Mead refers, a dialectic of the “I” and the ‘me’. The existentialism of ‘I’ to some extent is a form of identity in that it remains the same. This is exemplified by the DNA a person has which remains identical through time. This is illustrated by intersex people who have sex characteristics unique to themselves that cannot be classed as clearly male or female as part of their existential ‘I’ despite what normalising treatments may be performed. The ‘me’ is the self that mediates through the reflection of the “I” with that of the surrounding environment. The experience of those ‘sex characteristics’ in a relational society are part of an intersex person’s becoming that may be as male, female, both or neither. It is that dialectic relationship that forms one’s narrative through life, including one’s sex. In this sense, identity is a mediation of these two which is reflected through one’s narrative identity. However, in many nations, intersex people have been interfered with both biologically or physically and socially. This interference with the existential ‘I’ has an effect on the existential ‘I’ reflected in the ‘me’ while this occurs, the real ‘I’ is not reflected through the ‘me’. This represents a disconnected I-me relationship. As such, the experience of ‘me’ is restricted to a determined sex as either male or female by others, usually by medical professionals, that they must experience. Although they still have a narrative it has limited autonomy, or even possibly disconnected one, from one’s existential ‘I’. The narrative may reveal an identity for intersex people but leaves them vulnerable as will be explained due to the problematic of identity.

2.1.1 Two Identities – Idem and Ipse Identities

The identity of I-me revealed through one's narrative is composed of two parts of a dialectic understood through two Latin words: 'idem' (sameness) and 'ipse' (self/selfhood). This depending on the horizon in which one's narrative is authored, has one of two understandings. The first is an understanding of identity as identicality (idem) where the self (ipse) is narrated upon. The second is a becoming of a mediation of the idem and the ipse identities that results in or reveals one's becoming. The second understanding has been dominated by the first relegating the self or ipse as a becoming upon one's identity (idem) based on the understanding that it does not change over time or space. This creates a problematic of identity and leaves the human being vulnerable. First, it is important to describe these two interpretations and understandings of identity before leading to why the first creates a problematic of identity. Then it is possible to explain why the human being is vulnerable due to the problematic of identity. This is clearly illustrated by intersex people.

2.1.1.1 *Idem - Identity as Identicality (Separated Idem-Ipse)*

The first understanding of identity is that of *identity as identicality*. The 'idem' as sameness of all times is central to this understanding. The ipse or self is separated from the idem and becomes incidental to one's identity. This understanding understands the parts is based on the understanding of the whole – one's *idem* identity. This conceptualisation considers that as such an identity is the same throughout time it is immutable and certain. It is through this understanding that it is possible to interpret the self or ipse.

Identity as identicality stemmed from the Latin word 'idem' that arrived through the Middle French *identité* and had the meaning of "sameness, oneness, state of

being the same.”⁸ Paul Ricoeur has described this sense of identity (idem) as being made up of four aspects:⁹

- Uniqueness as numerical identity or re-identification of the same
- Extreme resemblance - one substituted for the other
- Uninterrupted continuity over the development of being from birth
- Permanence over time¹⁰

This identity is in the sense of permanence, in affirming the identity of a thing, a plant, and animal, of a human being.¹¹ That is, it is understood as the ‘sameness of a person (or thing) at all times, and in all circumstances’.¹² It restricts identity, in the whole as the parts, to an immutable fact, an immutable substrate,¹³ a constancy. From the very beginning or till the end of life, the interpretation and understanding of one’s identity is understood as identity in that the same has remained from beginning to end – from acorn to oak tree it is still the same,¹⁴ and have merely gone through the various stages of life. This is illustrated through the definition of identity in the Oxford Dictionary: ‘identity’ is the fact of being who or what a person or thing is.”¹⁵

This understanding follows the positivist-Cartesian model based upon the understanding that identity is the ‘sameness of a person (or thing) at all times, and

⁸ Douglas Harper *Online Etymology Dictionary* (online ed, 2001–2015) Identity <http://www.etymonline.com/index.php?term=identity&allowed_in_frame=0>.

⁹ Ricoeur, above n 4, at 74.

¹⁰ Permanence over time relates to the immutable substrate from ontological with Aristotle to transcendental with Kant.

¹¹ Ricoeur, above n 4, at 75.

¹² Philip Gleason “Identifying Identity: A Semantic History” (1983) 69 *The Journal of American History* 910 at 911.

¹³ This derives from a reductionist understanding of identity.

¹⁴ David Pellauer (translator) Paul Ricoeur *Reflections on the Just* (University of Chicago Press, Chicago, 2007) at 78.

¹⁵ *Oxford Oxford Dictionaries* (online ed, 2015) Identity <<http://www.oxforddictionaries.com/definition/english/identity>>.

in all circumstances'.¹⁶ It suggests that one remains identical from birth to death despite bodies ageing or having change imposed through cosmetic operation and experiences throughout one's life. This understanding of identity is illustrated in Pierre Bourdieu's work *The Biographical Illusion*. He exemplifies this through the use of the 'proper name', that is, identity is associated with normality, and thus identity is understood as the constancy. The unifying of the self with the constancy has numerous socio-political institutions available:¹⁷

The proper name 'Marcel Dassault' is, along with the biological individuality for which it represents, the socially instituted form, that which assures constancy through time, and unity through the social spaces of the different social agents who are the manifestation of this individual in the different fields: the businessman, the publisher, the official, the film producer, etc.

That is, the proper name is the core of one's identity that remains constant throughout one's life, a universality, upon which one's life develops and other elements of one's identity are added such as an official or a banker and so on. This understanding has been applied to the administrative identity documents such as one's identity card, birth certificate, or travel documents/passport that indicates identity of one's sex/gender and race/ethnicity as immutable and static. This determinable, immutable identity can only attest to the abstracted person – the universalised essentialised person – the identity of an abstracted socially constituted person.¹⁸ This understanding signifies that identity is a fact, it is deductible and based on that deduction the interpretation and understanding of one's life is possible. As identity has identity throughout life it is determinable and life processes and life events are understandable based on such a determination. This was illustrated in the vertical becoming of sex where one's sex

¹⁶ Gleason, above n 12, at 911.

¹⁷ Pierre Bourdieu "The Biographical Illusion" in Jessica Evans, Paul Du Gay and Peter Redman (eds) *Identity - a Reader* (Sage Publications Ltd, London, UK, 2000) at 299.

¹⁸ At 300.

was predetermined, and as such, lived out. It was through one's determination of status multiplicities such as one's sex that one's life was interpreted.

This conceptualisation of identity extends well beyond idem into the ipse identity or one's sense of self.¹⁹ One's sense of self becomes consequential to identity as determined at birth, the idem identity and understood as such.²⁰ The ipse identity will develop with minimal variation from the idem determined identity as one's life develops. Any study of one's ipse or sense of self will look back to the whole, the determined idem identity, and understand it through such a lens. As such, the sense of self or ipse has also become determinable, knowable, and identical to one's idem. One's sense of self (ipse) identity is merely added to and created from the (idem) identity that has been established at birth. The identity determined at birth initiates one's linear development.

It is this 'identity' – identity as identity – that becomes one's socio-legal existence.²¹ Integrated across time and social space, it is manifested in official records, curriculum vitae, police records, obituary, or biography.²² Identity is reducible to identities or identity markers such as sex (that I refer to as multiplicities²³). These are indicated upon one's identity card or birth certificate, or travel documents/passport, and also on collected statistical information about oneself. These multiplicities become important when discussing immigration,

¹⁹ At 301.

²⁰ Ricoeur, above n 4, at 74.

²¹ Bourdieu, above n 17, at 300.

²² At 300.

²³ Elements that make up who one is have over time been referred to as statuses or identity/identity markers. I shall refer to these as multiplicities (of who one is). This recognises that one's identity comprises of many multiplicities that intersect with one another and cannot be isolated as one's identity. This must be contrasted identity politics.

nationality, ethnicity, or gender and so on.²⁴ They become the basis of inquiries into identity whether official/administrative or academic.

This understanding of identity has become so naturalised that it is used in social, political and academic discussion about identity. This interpretation of identity as an identity of an immutable substance, a permanence in time,²⁵ which becomes the determinable tag of 'what one is'.²⁶ This has been cemented into the socio-legal fabric of society as one's civil identity and represented on documentation such as one's birth certificate or identity card. It does not allow for mediation with the ipse, but that the ipse identity develops according to one's determined immutable being. This understanding provides no room for pluralism, difference, nor diversity.²⁷

2.1.1.2 Mediated (Idem-Ipse) Identity

Identity as identity cannot account for an identity of a being whose biological and social properties are continually undergoing constant flux.²⁸ It can never be pinned to a single aspect nor issue, nor a set of reducible individuated immutable markers.²⁹ The reality is there is no fixed essence, universality or permanence of

²⁴ Gleason, above n 12, at 910.

²⁵ Ricoeur, above n 14, at 78–79.

²⁶ 'What one is' is the external determination of one's being. Such determination pre-determines one's path of authorship, one of heteronormativity. 'What' is the descriptive, or more exactly, the ascriptive assignation of a person - what a person is. This is similar to the common understanding of 'idem' as identity as used today. This understanding one's identity is determinable as a 'what'. It is no longer one as the author of one's being: David Pallauer (translator) Paul Ricoeur *The Just* (University of Chicago Press, Chicago, 2000) at 2.

²⁷ For Ricoeur, pluralism is the opposite of uniqueness or re-identification, difference is the opposite of extreme resemblance, and permanence is the opposite of diversity. Refer to: Ricoeur, above n 4, at 74.

²⁸ Bourdieu, above n 17, at 300.

²⁹ Jill Marshall *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers, Leiden; Boston, 2009) at 90; *Belonging* (Polity Press, Cambridge, UK, 2013) at 19.

an identity beyond that of the existentiality of human beings.³⁰ Identity presumes no fixed essence beyond the fact of the inherent temporality of human existence.³¹ Moreover, as some theorists highlight, identity is relational, fragmented, and transformable. Hall, for example, writes:³²

“identities are never unified, and are ... increasingly fragmented and fractured; never singular, but multiply constructed across different, often intersecting and antagonistic, discourses, practices and positions. They are subject to radical historicization, and are constantly in the process of change and transformation.”

As Hall writes, identity is under change and transformation throughout one’s life. The understanding of identity as identity does not account for the points made above.

The above issues are resolved by the other major understanding of identity – identity through mediation or dialectic narrative. This understanding of identity interprets identity as a mediated, nebulous and complex discursive process, that of a narrative or a narrative identity. Before getting the discursive narrative identity, first, the hermeneutic self must be put in perspective to make lives intelligible, a preoccupation that Paul Ricoeur had.³³ Ricoeur and Mead, among others, understood identity through the mediatory nature of this hermeneutic self. The hermeneutic self involves the mediatory nature of the *idem* (sameness) and *ipse* (self³⁴).³⁵ While one represents the temporary permanence of one’s

³⁰ Lois McNay *Gender and Agency: Reconfiguring the Subject in Feminist and Social Theory* (Polity Press; Blackwell Publishers, Cambridge, UK: Malden, Massachusetts, 2000) at 91.

³¹ At 91.

³² Stuart Hall “Who Needs ‘Identity?’” in Jessica Evans, Paul Du Gay and Peter Redman (eds) *Identity - a Reader* (Sage Publications Ltd, London, UK, 2000) at 17.

³³ Kim Atkins *Internet Encyclopedia of Philosophy* (2015) Ricoeur, Paul <<http://www.iep.utm.edu/ricoeur/>>.

³⁴ The self is also referred to as selfhood or *Selbstheit* in German.

³⁵ Ricoeur, above n 4, at 73; Khan, above n 4, at 9; Serge Gutwirth “Beyond Identity?” (2009) 1 *IDIS* 123 at 125; Lois McNay “Gender and Narrative Identity” (1999) 4 *Journal of Political Ideologies* 315 at 320.

being, the other is the existential mode of being through which one's becoming is understood. The mediation of these becomes one's being, one's identity.

Idem, as sameness,³⁶ represents the permanence over time, a structural permanence, such as genetic code or finger prints which has a corollary, the same thing over the course of some development – the acorn and the oak tree are one in the same tree.³⁷ Khan refers to idem as that of “being the one and the same, complete with a genetic identity that allows for change and development through time whilst remaining the same being (for example, a butterfly that can be identified with the earlier caterpillar).”³⁸ Moreover, this idem identity has several relations operating at the same time: (1) uniqueness, yet pluralistic, and (2) extreme resemblance yet different, (3) continuity of development, and (4) permanence over time yet temporality.³⁹ It responds to what we call character,⁴⁰ the existentialia mode of being, that which can be given and manipulated.⁴¹

Ipseity is the core, the source of one's will and energy, of a human's existence, the 'existential mode of being'.⁴² It is within this mode of being that one has the capacity to “interrogate itself about its own mode of being and thus relate to being qua being.”⁴³ It is that sense of self and perception that relates to how one sees themselves and how others see them as a human person.⁴⁴ This selfhood⁴⁵

³⁶ Ricoeur, above n 4, at 73.

³⁷ Ricœur, above n 14, at 78.

³⁸ Khan, above n 4, at 8–9.

³⁹ Ricoeur, above n 4, at 74.

⁴⁰ Ricœur, above n 14, at 78.

⁴¹ Ricoeur, above n 4, at 75.

⁴² At 75; Gutwirth, above n 35, at 125.

⁴³ Ricoeur, above n 4, at 75.

⁴⁴ Gutwirth, above n 35, at 124–125; Paul De Hert “A Right to Identity to Face the Internet of Things?” [2008] Global Open Access Portal - UNESCO at 1.

⁴⁵ Khan, above n 4, at 9.

“does not depend on something permanent for its existence, but it is nevertheless distinct. It is temporalized self, the self that is constituted by a unity of past accomplishments and future projects. There is a possibility for change and difference in ipseity, and certainly for reflexivity.”

It is not made of substance, nor any substantial homogeneity, it is continuous through time and space, but it does not remain stable or consequent *per se*, let alone identical.⁴⁶ For example, one’s experiences (including one’s experiences of physiology), desires and beliefs are not stable in the sense of immutability but transformable over time.⁴⁷ Ipse covers the range of ascription of a character (the agent) which may vary in time and space.⁴⁸ Ipse is thus the sense of self that mediates with one’s idem and becomes the ‘who’ the agent or author of action.⁴⁹ Ipse cannot exist without one’s idem and vice versa.

Together both ipse and idem represent a temporary permanence of one’s self as one becomes who one is. This hermeneutic circle of whole and parts of the ipse and idem identities mediate through “genetic, cultural, and neural bases in an evolutionary process.”⁵⁰ It weaves and transforms the physiological, psychological, spiritual, relational and environmental experiences⁵¹ through relational “exchanges and relationships involving people, situations, values, ideologies, and objectives.”⁵² It is through such a mediation that one’s multiplicities⁵³ are

⁴⁶ Gutwirth, above n 35, at 125.

⁴⁷ Ricoeur, above n 14, at 78–79.

⁴⁸ Ricoeur, above n 4, at 75.

⁴⁹ At 75.

⁵⁰ Avner Ben-Ner and Claire A Hill “Negative Dimensions of Identity: A Research Agenda for Law and Public” (2008) 9 *Minn JL Sci & Tech* 643 at 643.

⁵¹ Tilly, above n 2, at 7.

⁵² M Montserrat Guibernau *Belonging: Solidarity and Division in Modern Societies* (Polity Press, Cambridge, UK, 2013) at 18.

⁵³ It is not a singular identity, fixed and immutable as a political identity would like to presuppose or as reductionist technology imposes. The multiple and sometimes contradictory or unresolved identities are inclusive of attributes, roles and memberships that are representative of that person and make up one’s Self including aspects such as race, culture, social class, and sexual orientation, are constructed in sociocultural and socio-political contexts. See: Susan R Jones and

authored such as sex, race, class and so on.⁵⁴ It is through the mediation of these two identities that enables one to interrogate one's own mode of being and thus relate to oneself and also relate to others.

2.1.2 The Problematic: Identicality Replacing Mediatory Identity

Identity in the sense of knowing who one is and how one comes to be has always been important to societies for the recognition of one another. However, in the modern world, although still important, identity has become a blurred concept.⁵⁵ This blurring has occurred through how (or not) has idem and ipse identities been interpreted and understood.

The mediated becoming of identity has no fixed or determinable base from which a narrative derives. Elements of idem identity, including that of DNA, is always mediated through one's 'me', the experience, and becomes part of one's narrative and does not determine one's narrative. One's identity is not reducible to individuated markers but rather comprises of many intersecting and interconnecting multiplicities that mediate together in one's becoming. It is through the mediated becoming of one's identity that recognises a pluralism of diversity and uniqueness. Identity as a mediatory becoming cannot be understood through linear processes but must be considered from looking at how one came to be.

Where identity derives from 'identity as identicality', on the other hand, it is understood to remain throughout one's life as a constancy or certainty. It is

Marylu K McEwen "A Conceptual Model of Multiple Dimensions of Identity" (2000) 41 *Journal of College Student Development* 405 at 410–411 These multiplicities include all of the various aspects one considers compose of one's identity which intersect and interact with each other, in particular race/ethnicity class, and sex. None of these can be isolated, and it must be acknowledged that although focusing on one multiplicity, there will always be intersections and interactions with other multiplicities throughout one's development.

⁵⁴ Warnke, above n 3, at 100.

⁵⁵ Tilly, above n 2, at 7.

reducible to many individuated markers, such as sex as mentioned above. One's existential life develops in a linear biological and psychological normality consistent with one's identity. Any deviation is an abnormality or even may be considered as 'pathological'. The ipse identity is the becoming of one's life derived from such an identity, in other words, it is caused by it. The understanding of one's becoming, the ipse identity, is understood through the interpretation of the individuated immutable markers that define what one is.

It is now time to return to the topic of the problematic of identity. Although one's life is understood through their narrative or narrative identity (one's becoming), it is represented through a singularity of identity. In this sense everyone has a singularity of identity. Horizontal becoming recognises the singularity or personal identity as revealing one's identity at a point in time from one's narrative identity. This may not necessarily be the same identity throughout one's life as it may change or transform. However, the problematic of identity arises from the divesting of one personal identity the singularity of one's identity, from one's narrative identity. This is indicative of vertical becoming. This personal divested identity is understood by determinable facts of what one is. This views ipse identity as inconsequential to one's identity, rather as the forming of one's self. It is upon this determined identity that one forms a narrative. It is for this reason that the identity as identicality creates the problematic of identity through the divesting of one's narrative identity or one's becoming as what makes one's identity.

The problematic of identity is clearly illustrated by intersex people. Although if they narrated their life within a horizontal horizon they would be free to fully become who they are as a male female or even as non-binary (both or neither), most nations are predominantly in the vertical horizon, therefore, this has not been the case. Most nations have understood, in particular in modern society, identity as identicality, where sex status is as either a male or female. When a baby is born, the assigned sex status is their identity. For an intersex person who has

sex characteristics not clearly definable as one or the other, this creates issues for an identity. When a child is born, they are assigned a sex status which becomes the fact of what they are either male or female. As an intersex person due to their characteristics do not fit the standard categories of male or female, the majority undergo sex normalisation treatment to ensure that their body complies with their assigned or determined sex. Intersex people illustrate that through understanding identity as identity, although they may have a personal identity, one narrated upon an assigned and normalised sex, they have no control over who they are and how they come to be as a sex.

Intersex people demonstrated that this problematic of identity where the identity is predetermined for oneself, divested from one's narrative, is no longer something of autonomy, but heteronomy. They have no control over who they are, but have been assigned what they are, as a sex in the example of this thesis, and have little control over how they come to be as a sex. This leaves the identity of intersex people vulnerable to the dictates of the society around them. It is for this reason that intersex people who speak out argue that they find it hard to make sense of the world prior to knowing who they are as an intersex person and without the autonomy to become who they consider themselves to be.

2.1.3 Vulnerability and the Problematic of Identity

Identity concerns the making sense of oneself as who one is and how they come to be. While through a vertical horizon, one makes sense of oneself by referring to oneself or their status identity, the other makes sense of oneself through a mediation of the idem-ipse or through the dialectic process or I-me.⁵⁶ The two senses of identity provoke confusion of identity. There are two excessive claims. The first is “the historical claim to identity with the prestige of immutability, in order to remove such identity from the bite of historical time,” and the second is

⁵⁶ Khan, above n 4, at 14.

“the inability to attribute some identity to someone or something because we have not acquired the ability to apply what I have called the narrative identity.”⁵⁷ Either of such claims to identity create a problematic of identity resulting in the suffering of the human condition – that of being human.

The suffering one “underscores the vulnerability of the human condition.”⁵⁸ This has primarily occurred through the divesting of one’s personal identity from their narrative identity and “claim the kind of immutability we have placed under the idem heading.”⁵⁹ Personal identity becomes a recognition of something “referred back to,”⁶⁰ a determination, immutable and historical. Such an identity depicts the power relations “premised upon dubious metaphysical assumptions about gender, race and mind.”⁶¹ One’s status is something knowable and discoverable such as through contemporary analytical and post-modern philosophy, it ignores the fundamental basis ‘who am I’.⁶² Identity becomes a tool of utility and instrumentalism.⁶³ It is such divesting that leads to the passivity of capacities creating fragility of the human condition of acting and suffering.⁶⁴ Although the other excessive claim also has consequences, the excessive claim on personal identity divested from one’s narrative identity leaves one vulnerable by limiting or denying one’s capabilities.

2.2 Capabilities and the Paradox of Autonomy

In order to overcome the problematic of identity with its excessive claims – as a “prestige of immutability, in order to remove such identity from the bite of

⁵⁷ Ricœur, above n 14, at 79.

⁵⁸ Paul Ricœur “Becoming Capable, Being Recognized” at 1.

⁵⁹ Ricœur, above n 14, at 79.

⁶⁰ Khan, above n 4, at 14.

⁶¹ Atkins, above n 33.

⁶² Atkins, above n 33.

⁶³ Atkins, above n 33.

⁶⁴ Ricœur, above n 14, at 37.

historical time” or “the inability to attribute some identity to someone or something because we have not acquired the ability to apply what I have called the narrative identity”, it is important to connect the paradox of autonomy and vulnerability, or fragility (as Ricoeur sometimes refers to). Ricoeur argues that⁶⁵

The paradox of autonomy and fragility [or vulnerability] is the same human being who is both of these things from different points of view. ...[t]he autonomy in question is that of a fragile, vulnerable being. And this fragility would be something pathological if it were not called on to become autonomous, because it were already so in some way.

The human being is centre in the paradox at what is fragile in the paradox of autonomy and vulnerability is the capabilities. When one’s autonomy is affected, it has a double effect. The vulnerability is of two natures: the first is the divesting of the narrative identity transferring who one is to what – a categorical status – and the second is the suffering of the human condition which inhibits human capabilities of how one comes to be. These capabilities would be pathological if they were not called to be autonomous. This indicates a strong relation between autonomy and capability.

2.2.1 Capable Being

Paul Ricoeur asks “what kind of being is a human being that he can give rise to the problematic of autonomy?”⁶⁶ before turning to the problematic of identity, it is important to answer this question. Again, Ricoeur writes that “I identify myself by my capacities, by what I can do. The individual refers to him- or herself as a capable person.”⁶⁷ In his question to find the subject of rights, he begins with the capable being or capable person that answers to who.⁶⁸

⁶⁵ At 71.

⁶⁶ At 74.

⁶⁷ Ricoeur, above n 58, at 1.

⁶⁸ This is the question of ‘who’. Who is speaking? Who did this or that action? Whose story is this? Who is responsible for this injury or this wrong done to another person? This is not ‘what’

Who is speaking? Who did this or that action? Whose story is this? Who is responsible for this injury or this wrong done to another person?

In other words, the basic capacities are (to speak, to act, to tell/narrate and to impute/promise. These questions above indicate the “fundamental powers constitute the primary base of humanity, in the basic sense of humanness.”⁶⁹ By understanding the capable person it is possible to answer these questions.

The first primary capability is the capacity to speak, the use of language, in all of its forms, it is essential to a social human life.⁷⁰ It involves a kind of action reciprocating or doing things with words⁷¹ through performance and relationality.⁷² It is a reflexive⁷³ meaningful and spontaneous production⁷⁴ that includes simple assertions or questions through to the most complex of discussions have the need of confirmation, approval, and/or response of the part of the other.⁷⁵ It designates the “cause” or “principle” of their action in the narration of one’s identity.⁷⁶ The capability to speak designates oneself as the author of one’s utterances⁷⁷ and becomes the medium for the establishment and

as a description or ‘why’ as an explanation in terms of causes or motives. Peter Strawson and H.L.A. Hart speak of ‘who’ in terms of ‘ascription’ – the assignment of an action or segment of an action to someone (Ricoeur refers to this as assignment or assignation) which becomes closer to what than who as it is no longer the author of the story. Refer to: Ricœur, above n 26, at 2.

⁶⁹ Ricoeur, above n 58, at 1.

⁷⁰ Ricœur, above n 26, at 2.

⁷¹ Paul Ricoeur “Capabilities and Rights” in Séverine Deneulin, Mathias Nebel and Nicholas Sagovsky (eds) *Transforming Unjust Structures: the Capability Approach* (Springer, Dordrecht, The Netherlands, 2006) 17 at 18.

⁷² At 18.

⁷³ Ricœur, above n 26, at 2.

⁷⁴ Ricoeur, above n 58, at 2.

⁷⁵ Ricoeur, above n 71, at 18–19.

⁷⁶ At 18.

⁷⁷ Ricœur, above n 26, at 2.

renegotiation of identities.⁷⁸ The ‘right’ to speak⁷⁹ is essential to the capability in the authoring of one’s being.

The second is the capability to act: “meaning of being able to make events happen.”⁸⁰ This capability interconnects with the capability to speak as core capabilities to author one’s life. Ricoeur clarifies that as *to act* is⁸¹

“to produce events in society and nature. This intervention transforms the notion of events which are not simply what happens. It introduces human contingency, uncertainty and unpredictably into the course of things.”

This capability ascribes them “the capacity to designate themselves as the true authors of their deeds”⁸² or having agency.⁸³ Agency is the exercising of power over and through one’s bodily members and the course of things.⁸⁴ This must be separated from the judicial capacity⁸⁵ which disconnects one from one’s authorship and replaces it with assignation of causal motive.⁸⁶ Rather, an agent as an author of one’s action implies the “action belongs to the agent who appropriates it and calls it his own.”⁸⁷

⁷⁸ Tilly, above n 2, at 7.

⁷⁹ Ricoeur, above n 71, at 19.

⁸⁰ At 19.

⁸¹ Ricoeur, above n 58, at 2.

⁸² Ricoeur, above n 71, at 19.

⁸³ Agency or being the author of one’s actions is either understood as metaphorically the master of the action (as suggested by Aristotle – as a father of a child, is father of the action), or as the primitive usage as the idea of an efficient cause – the power we exercise over bodily members and, through them, on the cause of things. See: Ricoeur, above n 26, at 3.

⁸⁴ At 3.

⁸⁵ This capability must be distinguished from the juridical procedures forcing one to compensate for an injury or to suffer a penalty for some delinquent or criminal act.: See: At 3.

⁸⁶ At 2.

⁸⁷ Ricoeur, above n 71, at 19.

The third capability is to tell or to narrate. This enables one to tell stories about events and characters including oneself.⁸⁸ Ricoeur argues that this capacity has a pre-eminent part among one's capabilities as it is only through this capacity that⁸⁹

events of whatever origin become legible and intelligible only when recounted in stories; the age-old art of story-telling, when applied to oneself, produces life narratives which the historians articulate as history.

This capability enables the "turning points in the story contributes to the overall significance of the story that is told as well as that of the protagonists."⁹⁰ It is through the telling or narrating of one's life that incorporates the temporal dimension, that of speaking and action, within the whole of ones being (the sameness and the selfhood), and is thus comprehensible.⁹¹ This removes one from the sphere of identity or identity of the substance⁹² or structure.⁹³ It is no longer the identity of the same, but has its own identity that incorporates change as peripeteia.⁹⁴ It admits change (mutability) in both characters and the story itself.⁹⁵ It is through narrativity of identity that becomes essential to the inquiry into the identity of peoples and nations.⁹⁶ It is through the dialectical idem and ipse nature of personal identity that one claims recognition at the level of juridical, social, and political relationships.⁹⁷

⁸⁸ At 19.

⁸⁹ Ricoeur, above n 58, at 2.

⁹⁰ Ricoeur, above n 26, at 3.

⁹¹ At 3; Ricoeur, above n 71, at 19.

⁹² The identity of a substance infers the stability and immutability of a structure, illustrated by the genetic code of a living organism where narrativity and transformation are abnormalities as opposed to the norm.

⁹³ Ricoeur, above n 58, at 3.

⁹⁴ At 2.

⁹⁵ Ricoeur, above n 26, at 3.

⁹⁶ At 3.

⁹⁷ Ricoeur, above n 71, at 19.

The final and the peak of the capabilities is imputation. Imputation is also the act of promising or a pledge⁹⁸ “as the one who, in counting on me, on my capacity to keep my word, calls me to responsibility and renders me responsible.”⁹⁹ As part of the pledge or promise, imputation applies reflexively as one who is responsible and accountable.¹⁰⁰ Ricoeur argues that¹⁰¹

“the ability to recognise ourselves as accountable for our acts in the sense of being their actual author. I can hold myself accountable, imputable, in the same way that I can speak, can act on the course of things, can recount my action through an emplotting of events and characters”

This is promise of accountability for one’s speech and actions. It is the “capacity of a subject to designate itself, himself, or herself as the actual author of its, his, her acts.”¹⁰² It signals that when harm is done to others and accountability is required, there is the possible need for reparation and final sanction.¹⁰³

This is the capability of self-designation or autonomy.¹⁰⁴ Ricoeur views imputation as the lynch pin of capabilities and the moral forms¹⁰⁵ by creating a promise while at the same time cements dependability and limits unpredictability. One becomes accountable regardless of the organic or physical causes.¹⁰⁶ The promise or pledge to be accountable for one’s actions is central to the capable subject worthy of esteem and respect. The capable being – worthy of esteem and respect – requires all of the capabilities as an autonomous being.

⁹⁸ Ricoeur, above n 58, at 2, 3.

⁹⁹ Ricoeur, above n 26, at 7.

¹⁰⁰ Ricoeur, above n 71, at 20.

¹⁰¹ Ricoeur, above n 14, at 2.

¹⁰² At 2, 47.

¹⁰³ Ricoeur, above n 58, at 3; Ricoeur, above n 71, at 19, 20.

¹⁰⁴ Ricoeur, above n 71, at 19, 20.

¹⁰⁵ Ricoeur, above n 14, at 2; Ricoeur, above n 58, at 3.

¹⁰⁶ Ricoeur, above n 58, at 3.

2.2.2 Autonomy and its Conditions

The capacities described above – to speak, act, to tell, and to promise/impute – indicate what kind of being gives rise to the problematic of autonomy.¹⁰⁷ That is, although one may have capacities, it still may lead to the problematic of autonomy rather than giving rise to autonomy. This indicates that having capacity itself is not sufficient, as it can still lead to vulnerability. Ricoeur notes that “if the basis of autonomy is ability, then it is inability or lesser ability that human fragility expresses itself.”¹⁰⁸ That is, these capacities of a capable human being require autonomy.¹⁰⁹ First, this section will describe what is autonomy and then continue by defining the conditions of autonomy.

Autonomy has the implication of an “idea of something that cannot be substituted for” and the possibility to “dare to think for yourself. You and not someone else in your place.”¹¹⁰ Autonomy is not automatic. Without the enabling as an autonomous being, one has a heteronomous enabling – to speak or act according to determinations outside of oneself wittingly or unwittingly.¹¹¹ By default heteronomy, as Anthony Elliot writes, leads to an identity as¹¹²

a social product through and through, an outcome of symbolic interaction – of emergent, ongoing creation, thinking, feeling, the building of attitude structures, the taking of roles, all in a quest for coherence and orientated in the social world.

Autonomy is essential to a relational world, and when it is inhibited or denied leads to a heteronomous-based society where people make choices and become, but

¹⁰⁷ Ricoeur, above n 14, at 74.

¹⁰⁸ At 76.

¹⁰⁹ At 76.

¹¹⁰ At 80.

¹¹¹ Michael J Sandel *Justice* (Penguin Books, London, 2010) at 109.

¹¹² Anthony Elliott *Concepts of the Self* (Polity Press ; Blackwell Publishers, Cambridge, UK : Malden, MA, 2001) at 26.

this is no longer due to who they are but based on what they are. Autonomy is not the absence of heteronomy, but on a continuum with it. The greater one's autonomy, the greater the capability of being that leads to imputability. To overcome the paradox of autonomy, there are three conditions of autonomy: ability, adequate options and independence.

The first condition is ability, or sometimes referred to as capability.¹¹³ It enables the exploring of and the committing to choices required to plan and execute one's life.¹¹⁴ It is through capabilities that one can have the "successful attainment of life's goals and its consequences for well-being."¹¹⁵ Joseph Raz defines ability as:¹¹⁶

the mental abilities required to form intentions of a sufficiently complex kind and plan their execution. These include minimum rationality, the ability to comprehend the means required to realize his goals, the mental faculties necessary to plan actions, etc.

The capability to plan and execute one's life plans for well-being requires more than its latency. It requires competency or potentiality – the ability to exercise and extend human capacity.¹¹⁷ Potentiality indicates the need "to experience satisfaction in exercising and extending one's capabilities."¹¹⁸ This requires empowering and enabling of abilities.¹¹⁹ This empowering and enabling develops

¹¹³ Capabilities are sometimes also referred to as capacities. It is not limited to the juridical notion whether one has or does not have the juridical capacity.

¹¹⁴ Marshall, above n 29, at 92.

¹¹⁵ At 92.

¹¹⁶ Joseph Raz *The Morality of Freedom* (reprinted ed, Clarendon Press, Oxford, 2009) at 372–373.

¹¹⁷ Chantal Levesque and others "Autonomy and Competence in German and American University Students: A Comparative Study Based on Self-Determination Theory" (2004) 96 *Journal of Educational Psychology* 68 at 68.

¹¹⁸ At 68.

¹¹⁹ Edward J Eberle "Human Dignity, Privacy, and Personality in German and American Constitutional Law" (1997) 1997 *Utah L Rev* 963 at 229.

through various stages of life.¹²⁰ Ability signals that left to one's own devices people "naturally seek out challenges that are optimal for their level of development."¹²¹ Although one can enact capabilities heteronomously such as to speak and to act, these are done according to determinations outside of oneself consciously or unconsciously. This leaves one fragile in the human condition and thus fragile. Having autonomy over one's capabilities reduces human fragility. As such, the potentiality of ability is greater when it is autonomous.¹²²

This leads to the second condition of autonomy – having adequate choices. This requires adequate, favourable, and valuable options¹²³ to reflect upon, to choose between – execute or decline them – and to adopt as one's own.¹²⁴ They require self-awareness, knowledge, and material resources.¹²⁵ These include the trivial to complex options¹²⁶ such as desires and impulses as well as beliefs and restraints.¹²⁷ This also includes options ranging from the short to long term with all different levels of consequences.¹²⁸ However, having adequate options does not mean they need to be limitless. Joseph Raz defines two limits in relation to options:¹²⁹

¹²⁰ Raz, above n 116, at 372–373; Marshall, above n 29, at 65; Levesque and others, above n 117, at 68.

¹²¹ Levesque and others, above n 117, at 68.

¹²² Ricœur, above n 14, at 80; Raz, above n 116, at 369; Levesque and others, above n 117, at 68; Valery Chirkov and others "Differentiating Autonomy from Individualism and Independence: A Self-determination Theory Perspective on Internalization of Cultural Orientations and Well-being" (2003) 84 *Journal of Personality and Social Psychology* 97 at 97.

¹²³ Raz, above n 116, at 378–379, 412; Marshall, above n 29, at 57; John Stuart Mill *On Liberty* (The Pennsylvania State University, Hazleton, PA, USA, 1998) at 16; James Griffin "First Steps in an Account of Human Rights" (2001) 9 *European Journal of Philosophy* 306 at 311.

¹²⁴ Raz, above n 116, at 371, 375, 376; Griffin, above n 123, at 311; Margaret Isabel Hall "Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability" (2012) 58 *McGill Law Journal* 61 at 65.

¹²⁵ Griffin, above n 123, at 311.

¹²⁶ Raz, above n 116, at 374.

¹²⁷ Mill, above n 123, at 70.

¹²⁸ Raz, above n 116, at 374.

¹²⁹ At 410–411.

first, while autonomy requires the availability of an adequate range of options, it does not require the presence of any particular option among them; secondly, it does not extend to the morally bad and repugnant, since autonomy is valuable only if it is directed at the good it supplies no reason to provide, nor any reason to protect, worthless let alone bad options.

First, there is no requirement for particular options and these options may vary from place to place and time to time. Raz illustrates some examples where restrictions do not lead to adequate options such as conditions leading to survival,¹³⁰ slavery even if they do have some choices.¹³¹ He also argues that restricting options between 'good and evil' for one's own good does not provide adequate options.¹³² Second, adequate options do not extend to the morally bad and repugnant that which prevents or restricts one's pursuit of the good life.¹³³ The state has no authority to judge as 'good' or 'moral' where it does not judge a factor as valuable or valueless on its own merit.¹³⁴ Morality is self-referential and self-regarding. Providing of morally bad or repugnant options contribute nothing to the value of the good life and make life worse than a comparable non-autonomous life.¹³⁵

The last condition of autonomy is independence. Independence in relation to autonomy over one's own life is what shapes and defines it, without having that determined on one's behalf.¹³⁶ It is generative rather than being freely willed or externally imposed.¹³⁷ For example, slaves lack autonomy as despite having

¹³⁰ At 379.

¹³¹ At 377.

¹³² At 378–379.

¹³³ At 376.

¹³⁴ At 412.

¹³⁵ At 412.

¹³⁶ Jannifer Nedelsky "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 *Yale JL & Feminism* 7 at 8–9; Jill Marshall *Human Rights Law and Personal Identity* (Routledge, Abingdon, Oxon; New York, NY, 2014) at 68.

¹³⁷ McNay, above n 30, at 85.

options, they are not free, not independent.¹³⁸ Alya Khan states that independence as autonomy (rather than as individualism) is in opposition to coercion and/or manipulation.¹³⁹

“It is the capacity of persons to self-direct, to make autonomous decisions rather than being primarily subject to constraints and coercions.”

When one’s becoming is shaped by external pressures¹⁴⁰ or it is subjected to the will of another, it becomes constrained.¹⁴¹ Necessity or coercion deny freedom and meaningfulness.¹⁴² These hegemonic constraints, such as coercion and manipulation, draw us away from independence.¹⁴³ An autonomous life requires freedom from coercion and manipulation to make choices.¹⁴⁴ Coercion is the restriction or prevention of particular choices in favour of other choices.¹⁴⁵ Manipulation, “unlike coercion, does not interfere with one’s options, but instead perverts the way that a person reaches decisions, forms preferences or adopts goals.”¹⁴⁶ It distorts normal decision-making processes and forms preferences on basis of social convention loading them with meaning regardless of their actual consequences.¹⁴⁷ This diminishes a person’s options below adequacy.¹⁴⁸ Any coercion or manipulation has the potential to deny or at least inhibit autonomy, and thus the ability to aim towards an accomplished life. Like other areas of life,

¹³⁸ Raz, above n 116, at 377.

¹³⁹ Khan, above n 4, at 3.

¹⁴⁰ Stephen Riley “Human Dignity: Comparative and Conceptual Debates” (2010) 6 *International Journal of Law in Context* 117 at 127.

¹⁴¹ Raz, above n 116, at 378.

¹⁴² Richard N Williams “The Human Context of Agency” (1992) 47 *American Psychologist* 752 at 753.

¹⁴³ Raz, above n 116, at 378.

¹⁴⁴ At 373.

¹⁴⁵ At 377.

¹⁴⁶ At 377–378.

¹⁴⁷ At 378.

¹⁴⁸ At 377.

coercion and manipulation occur in a matter of degree, and so, the less the more enhanced one's autonomy is. Furthermore, support and guidance should not be confused with coercion or manipulation. Although people need support and guidance which can enhance autonomy, coercion and manipulation inhibits autonomy.

Now is a good time to return to Paul Ricoeur's question: "what kind of being is a human being that he can give rise to the problematic of autonomy?"¹⁴⁹ This human being is the capable human being – to speak, to act, to tell/narrate, and to impute/promise – in autonomy. However, limited or no autonomy inhibits the capabilities of the human being, and ultimately, limits one's imputability to oneself and others. This demonstrates the vulnerability of fragility of autonomy. The capable being requires the conditions of autonomy to be an autonomous being.

2.2.3 Vulnerability/Fragility and Autonomy

The capable being with its capacities (to speak, to act, to tell/narrate and to impute/promise) are inherent to human beings. They are essential to identity as Ricoeur writes:¹⁵⁰

I identify myself by my capacities, by what I can do. The individual refers to him- or herself as a capable person, but adds also... a suffering one, in order to underscore the vulnerability of the human condition.

Although one may identify oneself by one's capacities as a capable person, one can also connect with the suffering one. The suffering one is expressed through its fragility. Ricoeur writes: "if the basis of autonomy is ability, then it is inability or lesser ability that human fragility expresses itself."¹⁵¹ This expressed fragility of the suffering one highlights the vulnerability of the human condition.

¹⁴⁹ Ricoeur, above n 14, at 74.

¹⁵⁰ Ricoeur, above n 58, at 1.

¹⁵¹ Ricoeur, above n 14, at 76.

The vulnerability of the human condition is reflected through agency. Ricoeur highlights, there are two views of agency: either as an agent (author) of the action (Aristotelian sense) or as the cause of the action (Galileo or Newton).¹⁵² Agency must be recognised as being either autonomous as the author of the action or heteronomous as the cause of the action. Agency in these two respects connects with ability or inability where ability indicates autonomy by extension, inability or restricted ability signals limited autonomy or heteronomy.¹⁵³ Autonomous agency not only indicates having capacities, as with heteronomous agency, but also the other two conditions of autonomy of adequate options and independence. Without these two added to the capable being, there is limited or no autonomy or in other words, it is heteronomous agency. In summary, autonomous agency enables the ability to independently plan, choose, and realise one's being and life.¹⁵⁴

Much of the current understanding of agency reflects 'agency as the cause of the action'. This conceptualisation has separated one's humanity from one's agency. Agency is rendered to a 'moral question' of "mere instrumentality or utility."¹⁵⁵ It detaches the agent and an action from interactions and externalities such as the hegemonic forces that may have led or contributed to such an action. This indicates that the agent was not at least in part responsible for an action, but it does not account for the hegemonic forces at play which may be stronger or have left the individual with few options.

Rather agency should refer to someone having "the ability to do something"¹⁵⁶ or having the ability to enact one's human capabilities as ability is based on

¹⁵² Ricoeur, above n 26, at 3.

¹⁵³ Ricoeur, above n 14, at 76.

¹⁵⁴ Raz, above n 116, at 372, 391, and 408; Marshall, above n 29, at 97.

¹⁵⁵ Atkins, above n 33.

¹⁵⁶ Ricoeur, above n 26, at 3.

autonomy.¹⁵⁷ Autonomous agency infers as Joseph Raz writes the ability to “make their own lives” or to be the “author of his own life.”¹⁵⁸ Autonomous agency thus requires not only ability, but that of adequate choices and the independence to make decisions on such choices. It is the power and capability to determine for oneself who one is and how one comes to be.¹⁵⁹ Autonomy requires awareness and active engagement of who one is and how one comes to be.

Ricoeur argues that the fragility would be something pathological if it were not “called on to be autonomous” and already so in some way.¹⁶⁰ That is, personal identity, understood through the singularity of identity as a representation of one’s narrative identity, is autonomous and establishes a mark of power and the capability to become who one is. If it was not autonomous, in other words, if it is heteronomous, it is pathological. The pathology is due to the loss of the mark of power of one’s identity. Such pathology is personal identity being determined by outside oneself and one’s narrative hegemonically controlled. Although identity is still important, it is heteronomous and hegemonic – a product outside of oneself – that one’s self must adhere to.

As Ricoeur eloquently writes, our life is called on to be autonomous and is already so.¹⁶¹ However, autonomy is not simply something one has or does not have, but rather a continuum from heteronomy through to full autonomy. As Ricoeur writes, autonomy reaches its full deployment in one’s (anthropological) capabilities.¹⁶² That is, the full deployment of autonomy occurs only when the capable being with

¹⁵⁷ Ricœur, above n 14, at 76.

¹⁵⁸ Raz, above n 116, at 369.

¹⁵⁹ John Eekelaar “Personal Rights and Human Rights” (2002) 2 Hum Rts L Rev 181 at 185; Davina Cooper “‘And You Can’t Find Me Nowhere’: Relocating Identity and Structure within Equality Jurisprudence” (2000) 27 Journal of Law and Society 249 at 250; Raz, above n 116, at 391.

¹⁶⁰ Ricœur, above n 14, at 73.

¹⁶¹ At 73.

¹⁶² At 74.

all capacities are enabled, which ultimately occurs through the last capacity of imputation which leads to attestation of autonomy over one's being. The ability to attest to one's narrative identity – of one's speech and actions – and indicates autonomy. If one has limited or no ability to attest to one's narrative identity, then it indicates a pull through heteronomy over one's speech and actions exposing the vulnerability of the human condition.

The above sections indicate the importance of autonomy for the capable being. Where autonomy is limited, it inhibits the capability of the human being, and in particular, the ability to attest to the narrativity authored through one's speech and actions. This has occurred with intersex people. Although they can still speak and act, the manner in which this occurs has been externally determined, and their bodies often have been modified without their consent to match the external determination attributed at birth. They live their lives not being able to match who they are with what they are and how they are expected to live. They do not have the full deployment of autonomy of their capable being, and it could even be argued that their capable being has been affected as the integrity of their moral basis of being has been interfered with to such an extent that the autonomous value of their lives has been degraded.

2.3 Basis of a Morality for an Autonomous Capable Being

The capable autonomous being is important for all people including intersex people as in the case exemplar of this thesis. Intersex variations are part of who the person is, not some 'appendage' of meaningless value. That is, intersex variations are important in forming one's person's narrative identity as one forms through speech and action of who one is and as such are meaningful to an intersex person's life. It is for this reason, intersex people demand to be recognised, not as an abnormality or a disease, but as a person. Intersex people claim the right to be recognised as and to have the ability to become who they are which may have various sex expressions whether it be male or female or non-binary as both or neither sex.

Paul Ricoeur argues the paradox of autonomy is not that of the temporal dimension – personal identity – but with regards to the test of alterity.¹⁶³ The test of alterity is the confrontation of reflexivity. Alterity exists at the point of the interior split of the I/me dialectic when the idem becomes the separated singularity of one’s immutable personality identity.¹⁶⁴ This confrontation “leads to a fracture of the reflexive relation of the self to itself, which has its moral and psychological legitimacy on the plane that institutes and structures the human person.”¹⁶⁵ As opposed to the test of the norm, the test of alterity is confrontational and separative. This test leads to a state of fragility, paradoxical with autonomy, yet part of the very same being.¹⁶⁶ This fragility arrives through the collision of social pressure upon one’s singularity of personality.¹⁶⁷ It occurs through the possibility of manipulation and coercion through the hegemonic social forces and pressure.¹⁶⁸ Ricoeur writes:¹⁶⁹

“To learn how tell the same story in another way, how to allow our story to be told by others, how to submit the narrative of a life to a historians’ critique, are al practices applicable to the paradox of autonomy and fragility.”

To overcome such a paradox as an autonomous subject, he, continues by saying that a human being must be “capable of leading [one’s] life in agreement with the idea of narrative coherence.”¹⁷⁰ For example, an intersex person should be able to lead one’s life including the mediation of their intersex variation (and the rest of one’s physiology) with one’s inner self and also that of the social self in a

¹⁶³ Alterity is the “confrontation with other perspectives” or the difference and otherness: At 80.

¹⁶⁴ At 81.

¹⁶⁵ At 80.

¹⁶⁶ At 73.

¹⁶⁷ At 81.

¹⁶⁸ At 81.

¹⁶⁹ At 80.

¹⁷⁰ At 80.

narrative coherence. This requires autonomous agency. Autonomous agency is one that is imputable to test that of alterity.¹⁷¹

Autonomous agency is that of a human being living a life with the idea of a narrative coherence. Although autonomy is the prerogative of the capable being, vulnerability limits autonomy to a condition of possibility.¹⁷² This limitation indicates that there is not the full deployment of autonomy. Rather, one's life, is heteronomous with a degree of autonomy. Although one may be a biological entity, the heteronomy over their becoming exposes the vulnerability of the human condition when one's humanness is separated from one's biologism. The vulnerability results from the reducing of a person to the question of 'what' through the claim of immutability placed under the idem heading.¹⁷³ When one's humanness is separated from one's biologism through the reducing of a person to the question of 'what', it renders the 'moral question' to one of "mere instrumentality or utility."¹⁷⁴ However, persons are not just mechanistic beings, they are spiritual-moral beings.¹⁷⁵ But if human beings are moral beings, this requires a different moral question. What does it mean to be a moral being as a human being?

This is answered through Ricoeur's work on the 'who is the subject of rights?'. In this work, he argues that the moral form of the human being is one who is worthy of esteem and respect.¹⁷⁶ This moral form is based in dignity, not of the status of individuals including positionality and honour but on being worthy of esteem and

¹⁷¹ At 80.

¹⁷² At 72.

¹⁷³ At 79.

¹⁷⁴ Atkins, above n 33.

¹⁷⁵ Marshall, above n 136, at 42.

¹⁷⁶ "Who is the subject of rights?" is not to be distinguished in the final analysis from the question with the moral form 'who is the subject worthy of esteem and respect?' " See: Ricœur, above n 26, at 1.

respect. The being worthy of esteem and respect has autonomous agency - self-referential and self-regulating – and has the ability to independently plan, choose, and realise one’s being and life.¹⁷⁷ The reflexivity of the worthy being of esteem and respect is understood through two forms of mores (a Latin form of morality) that Ricoeur applies as ethical (Greek) and moral (Latin). A moral being results from the reflexive application to agents of the predicates of the good and the obligatory.¹⁷⁸ Ricoeur writes in regarding these predicates:¹⁷⁹

“We ourselves are worthy of esteem or respect insofar as we are capable of esteeming as good or bad, or as declaring permitted or forbidden, the actions of either others or of ourselves.”

The first is ethical as the aim of the good (‘accomplished life’) and the moral is the norm of the aim (the obligatory).¹⁸⁰ Together these form the basis of the moral being which is core to the autonomous capable being. The autonomous capable being provides a dynamic state that includes the ability to freely pursue and fulfil one’s personal and social goals.¹⁸¹ This expresses one’s moral being. It is through the esteem and respect of a moral being one forms an accomplished life centred around who one is and how one comes to be.

2.3.1 The Ethical – The Aim of the Good, Accomplished Life

The ethical predicate often is confused with external morality or values including values in a utilitarian sense. Rather, the central focus of the moral form through the ethical predicate centred through self-esteem. Ricoeur argues that there is a “bond of mutual implication between self-esteem and ethical evaluation of those

¹⁷⁷ Raz, above n 116, at 372, 391, and 408; Marshall, above n 29, at 97.

¹⁷⁸ Ricœur, above n 26, at 4.

¹⁷⁹ At 4.

¹⁸⁰ Ricoeur, above n 4, at 170–171.

¹⁸¹ Raz, above n 116, at 391; June Statham and Elaine Chase *Childhood Wellbeing: A brief Overview* (2010) at 2.

who actions that aim at the good life.”¹⁸² This predicate is the mutual bond through which actions are evaluated in the aim to pursue the good (in the Aristotelean sense) or accomplished life of well-being and potentiality.¹⁸³ Self-esteem derives from an examining life, a life worth living,¹⁸⁴ in the evaluating and judging of oneself to be good.¹⁸⁵ Self-esteem underscores imputation through this ethical predicate.¹⁸⁶ Ricoeur argues that the ethical form – is the “the aim for a good life with and for others.”¹⁸⁷ The aim for the accomplished life leads to self-esteem.

Paul Ricoeur calls self-esteem the ethical form that “clothes this claim to singularity.”¹⁸⁸ Self-esteem is the acknowledgement of who one is including one’s uniqueness while at the same time being at ease within oneself maintaining a positive self-regard of oneself.¹⁸⁹ For example, using Chazan’s example of an ugly person, an ugly person has self-esteem when there is an acknowledgement of¹⁹⁰ one’s ugliness yet maintains a positive regard of and ease with oneself.¹⁹¹ On the other hand, a lack of self-esteem¹⁹² is where one lacks self-regard and well-being allowing this quality (outwardly determined) to get one down or allows oneself to be dictated by others, and as such has no value in oneself and what is required to

¹⁸² Ricœur, above n 26, at 4.

¹⁸³ At 4; Ricoeur, above n 4, at 170, 171.

¹⁸⁴ Ricoeur, above n 4, at 178.

¹⁸⁵ At 181.

¹⁸⁶ Ricœur, above n 26, at 7.

¹⁸⁷ Ricoeur, above n 4, at 203–204.

¹⁸⁸ Ricœur, above n 14, at 81.

¹⁸⁹ Pauline Chazan “Self-esteem, Self-respect, and Love of Self: Ways of Valuing the Self” 26 *Philosophia* 41 at 49, 50.

¹⁹⁰ This acknowledgement is not something he deems appropriate to take as a reason to act in any particular way, and thus enables one to be a lover of the self.

¹⁹¹ Chazan, above n 189, at 49, 50.

¹⁹² Lack of self-esteem can be referred to as negative self-esteem.

make good of oneself and one's life.¹⁹³ Self-esteem here "refers to the valuing of self, that, if accurate, is in proportion to a person's objectively observable qualities or in proportion to her own (correct) judgements of these."¹⁹⁴ These qualities do not determine one's esteem but may be utilised in achieving it.¹⁹⁵ Esteem is guided from within which may involve inner conflict and disunity,¹⁹⁶ but it is not indifferent to others' opinions, yet also finds the courage to resist promptings and pressures from without.¹⁹⁷ This is in contrast to the traditional conceptualisations that esteem is based on qualities¹⁹⁸ that must meet hegemonically agreed standards in order to succeed.¹⁹⁹

The accomplished life is a life that leads towards human flourishing. It is a pursuit as it is always in process, it may be achieved in part yet never achieved as a whole.²⁰⁰ The pursuit of the accomplished life is the most desirable life according to Aristotelian philosophy – *Eudaimonia* or human flourishing.²⁰¹ It is the highest good as it is the most desirable life. Erik Ostenfeld argues that²⁰²

Eudaimonia seems to be an end that is always chosen for itself and never because of something else, whereas honor, pleasure, intelligence and the virtues

¹⁹³ Chazan, above n 189, at 52.

¹⁹⁴ At 42.

¹⁹⁵ Ricoeur, above n 4, at 181; Chazan, above n 189, at 49–52.

¹⁹⁶ Chazan, above n 189, at 56.

¹⁹⁷ At 50, 51–52.

¹⁹⁸ Qualities here include the various qualities referred to as standards by which esteem and respect are judged. This includes status (inherited or otherwise), talents and accomplishments, or achievements. These will be referred to generally as qualities.

¹⁹⁹ Chazan, above n 189, at 43–46.

²⁰⁰ Erik Ostenfeld "Aristotle on the Good Life and Quality of Life" in Lennart Nordenfelt (ed) *Concepts and Measurement of Quality of Life in Health Care* (Springer Netherlands, 1994) 19 at 23.

²⁰¹ At 19, 20–21; Dana S Dunn and Clint Brody "Defining the Good Life following Acquired Physical Disability" (2008) 53 *Rehabilitation Psychology* 413 at 414.

²⁰² Ostenfeld, above n 200, at 20.

are chosen partly for themselves partly for their consequence, i.e., eudaimonia.
Hence eudaimonia fulfils one of the marks of the highest good.

Flourishing is chosen for itself as the ultimate good, and not because of something else such as goods of short-term pleasure or honour. In other words, consequence²⁰³ or instrumental/utility value²⁰⁴ do not lead to human flourishing. Such things may improve the 'greater good', or some other good, but not human flourishing. For example, status identities may improve stability and coherence of the collective value and meaning but lead to the vulnerability of the human condition. Flourishing is achieved for itself as the highest good, and as such, is the end in itself. Flourishing is the highest possible human good. It is a "life marked by contentment; doing well and living well."²⁰⁵ This mark of contentment and doing well/living well is a sign of flourishing.

As the ultimate end that human flourishing represents human potentiality. Potentiality refers to what one can be and not what one should be. It is the unlocking of life potential within human beings. Human flourishing is defined by Erik Ostenfeld as²⁰⁶

a person who is well-adapted and well-functioning socially and psychologically, and who lives a rich life in the sense that he or she uses all human potentialities, i.e. not restricted to immediate pleasure seeking from e.g. television watching, beer-drinking and easy sex, and not even more calculated pleasure seeking, but involving intellect and feelings that are special to man.

Human flourishing as an end concerns the actualisation of potentiality. It is predicated on the reasoned reflection, action, and actualising of one's own potentials.²⁰⁷ It requires the cultivation and exercising of virtues that include

²⁰³ At 20; Ricoeur, above n 4, at 179.

²⁰⁴ Dunn and Brody, above n 201, at 414.

²⁰⁵ At 414.

²⁰⁶ Ostenfeld, above n 200, at 31.

²⁰⁷ Dunn and Brody, above n 201, at 414.

personal growth, autonomy, and self-acceptance.²⁰⁸ It aims at a well-adapted and well-functioning life both socially and psychologically. The focus is not on short-term pleasures, but it is focused on reaching a richer sense of life of autonomously becoming who one is.

Paul Ricoeur describes flourishing as “the nebulous of ideals and dreams of achievements with regard to which a life is held to be more or less fulfilled or unfulfilled.”²⁰⁹ This occurs through the pursuit through projects and relationships that gives one’s life value, significance and meaning.²¹⁰ The commitment to such projects and relationships shape one’s moral world.²¹¹ Joseph Raz considers the importance of value to one’s moral world. He writes: that²¹²

first the value of human relationships which depend on the way that individuals choose to develop them and the different normative implications with which they deliberately endow the relations; and secondly, the moral value involved in the justification of different ways in which persons mould their moral world is the value of forming and pursuing projects that give shape and content to one’s life.

These projects and relationships are those that give content and shape to one’s moral good life. It requires the awareness and the taking account of the past, present and future development of one’s projects and relationships and being aware of one’s progress in them.²¹³ Interference with these projects and relations restricts one’s flourishing of a good life. For example, many intersex people are aware of a sense of difference regarding their sex and yet have not been able to incorporate this into their projects and relationships. This has been limiting in their

²⁰⁸ At 414.

²⁰⁹ Ricoeur, above n 4, at 179.

²¹⁰ Raz, above n 116, at 86–87, 387.

²¹¹ At 154, 387.

²¹² At 87.

²¹³ At 385, 387.

shaping of the moral world and pursuing their good life. Value and significance do not come about through about success or failure.²¹⁴ Neither does it come through a planned or unified life such as a determined life.²¹⁵ Rather it is free and arbitrary in the sense it is not constrained by external morality.²¹⁶

Although the accomplished life and human flourishing is subjective, the window to such a life is well-being. Well-being is an indicator of the flourishing accomplished life. It is marked by “contentment; doing well and living well.”²¹⁷ Well-being requires one to be well-adapted, well-functioning socially and psychologically and living to one’s potentiality.²¹⁸ It is a state of being that must be maintained. That is, there cannot be human flourishing without well-being, and therefore a lack of well-being inhibits the aim for the accomplished life.²¹⁹ Harm occurs when there is a deprivation of or frustration in one’s well-being which affects the pursuit of becoming within one’s narrative identity.²²⁰

Well-being implicates autonomy. That is, it is defined by and measured by the autonomous person, not by outside values. Joseph Raz writes “Well-being signifies the good life, the life which is good for the person whose life it is.”²²¹ It demands autonomy over the establishing of relations and projects that form and shape over one’s accomplished life. John Stuart Mill states:²²²

²¹⁴ Success and failure may occur at different periods of one’s life but do not determine one’s value or meaningfulness.

²¹⁵ Raz, above n 116, at 385–387.

²¹⁶ At 387–388.

²¹⁷ Dunn and Brody, above n 201, at 414.

²¹⁸ Ostenfeld, above n 200, at 31.

²¹⁹ Joseph Raz “The Role of Well-Being” (2004) 18 *Philosophical Perspectives* 269 at 269; Marshall, above n 29, at 94.

²²⁰ Raz, above n 116, at 413.

²²¹ Raz, above n 219, at 269; Marshall, above n 29, at 94.

²²² Mill, above n 123, at 13.

The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Such autonomy is critical to well-being and flourishing. For this reason, Raz states that “a person enjoys a high degree of well-being if his life is good in a way which is good for him.”²²³ This indicates that well-being is correlative with autonomy – the more autonomy, the more well-being is enhanced. It is this that John Stuart Mill refers to when he writes:²²⁴

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.

For Mill, the sole purpose of freedom is to enable the accomplished life. This freedom is a reciprocal duty expected from others and by others expected from you. It is only through such freedom that one can freely and fully pursue who one is and how one comes to be.

It is in this sense Mill’s utilitarian principle connects with the principle of solidarity. Although the aim for the good is for whose life it is and not that of others, it will always be relational. Mill writes that “to do as one would be done by, and to love one’s neighbour as oneself, constitute the ideal perfection of utilitarian morality.”²²⁵ The pursuing of one’s good life will always be relational in that it occurs “in and with others.”²²⁶ The pursuance of an accomplished life does not disregard others or independence from others in an isolationist sense, but actually requires others, even a dependency of others. There will always be a need and

²²³ Raz, above n 116, at 270.

²²⁴ Mill, above n 123, at 16.

²²⁵ John Stuart Mill and Scott Davis *Utilitarianism* (Barnes & Noble, New York, 2005) at 17.

²²⁶ Raz, above n 116, at 86, 154, and 385.

dependency of others in the form of guidance, love and care, and a sense of responsibility.²²⁷ It is such interconnectedness that provides a “sense of social need, personal responsibility and human solidarity.”²²⁸ It is the need of solidarity with and for each other to enable each one to lead the accomplished life that also leads to a flourishing society or community. This results in what John Stuart Mill believes is “the perfection of human nature.”²²⁹

Self-esteem results from the aim for the accomplished life. It is the indicator of how worthy and capable an individual deems oneself to be.²³⁰ It is the valuing of oneself as worthy and capable as a human being and to be a lover of oneself.²³¹ This love of self becomes extendable to others. Pauline Chazan refers to the Aristotelian concept connecting this to the relatedness of esteem when she wrote:²³²

The Aristotelian concept of esteem reflects the connection of love of self and friendship, “in that the good man is related to his friend as himself (for his friend is another self). ... The love of self is extendable to others; one must relate to oneself in a certain way before one is able to relate to others in the same way.

The extending of self-love to others through one’s moral being enables an equally respecting, reciprocal-based relational society. Ricoeur explains that²³³

Self-esteem does not reduce to a simple relation of oneself to oneself alone. This feeling also includes within itself a claim addressed to others. It includes an expectation of approbation coming from these others. In this sense, self-esteem is both a reflexive and a relational phenomenon, where the notion of dignity reunites the two faces of such recognition.

²²⁷ Marshall, above n 29, at 65.

²²⁸ Eberle, above n 119, at 207.

²²⁹ Mill, above n 123, at 91.

²³⁰ Chazan, above n 189, at 42.

²³¹ At 50.

²³² At 42.

²³³ Ricoeur, above n 14, at 196.

Self-esteem through the accomplished life indicates how worthy one and others are through the flourishing life of well-being. Such a life is not only for oneself, but also for others. As such it is reflexive and relational and based on and in dignity.

The ethical predicate is the aim for the accomplished life of well-being and potentiality – human flourishing. Human flourishing that leads to self-esteem has been defined as a “life marked by contentment; doing well and living well.”²³⁴ Ostenfeld defined flourishing as “a person who is well-adapted and well-functioning socially and psychologically, and who lives a rich life in the sense that he or she uses all human potentialities.”²³⁵ Therefore a lack of well-being inhibits the aim for the accomplished life.²³⁶ Harm occurs when there is a deprivation of or frustration in one’s well-being which affects the pursuit of becoming within one’s narrative identity.²³⁷

This deprivation has occurred to most intersex people. For many, they lack self-esteem due a frustration in one’s well-being dictated by others values with its significance and meaning over their life. The determination of their sex and any normalisation that is associated with it, affects their whole being, not merely a sex determination. It affects their very ability to narrate who they are and how they come to be. Most have lost the ability to have the flourishing life of well-being which is good for them.²³⁸ They have lost autonomy, or as Mill writes sovereignty, over their body and mind.²³⁹ This has deprived them of freedom, and as Mill wrote, this is the only freedom that deserves a name. This creates harm of which individuals need protection from as Mill writes in his work. The end result is a loss

²³⁴ Dunn and Brody, above n 201, at 414.

²³⁵ Ostenfeld, above n 200, at 31.

²³⁶ Raz, above n 219, at 269; Marshall, above n 29, at 94.

²³⁷ Raz, above n 116, at 413.

²³⁸ Raz, above n 219, at 269; Marshall, above n 29, at 94.

²³⁹ Mill, above n 123, at 13.

of or a deprivation of self-esteem of how worthy and capable an individual deems oneself to be. This must change to enable the perfection of human nature as Mill stated which includes intersex people.

2.3.2 The Moral - Norm of the Aim

The moral form, on the other hand, is 'norm of the aim'. The norm is the obligatory (the deontological or Kantian heritage)²⁴⁰ or the obligation to respect the norm.²⁴¹ It has a double function: one as designatory (what is permitted or prohibited); and the other, the sense of subjective relationality.²⁴² The moral form ensures self-esteem of a relational society as all aim for the good, accomplished life.

The central thread throughout the norm is self-esteem. Self-respect is self-esteem under the reign of the moral law.²⁴³ The moral law as the norm of is self-respect.²⁴⁴ This is understood through Ricoeur's proposed thesis in *Oneself as Another*. He states:²⁴⁵

“(1) that self-esteem is more fundamental than self-respect, (2) that self-respect is the aspect under which self-esteem appears in the domain of norms, and (3) that the aporias of duty create situations in which self-esteem appears not only as the source but as the recourse for respect, when no sure norm offers a guide for the exercise *hic et nunc*²⁴⁶ of respect.”

²⁴⁰ The aim of the good or the accomplished life is the Aristotelian or teleological view of *mores*.

²⁴¹ Ricoeur, above n 4, at 170.

²⁴² At 170, 171; Ricoeur, above n 26, at 4; Ricoeur, above n 58, at 6; Ricoeur, above n 14, at 45.

²⁴³ Ricoeur, above n 4, at 204.

²⁴⁴ At 170–171.

²⁴⁵ At 171.

²⁴⁶ Latin phrase meaning here and now.

Self-esteem is the source and recourse of the norm – respect. Respect results from that interpretation and the importance of an awareness of the conditions²⁴⁷ for an individual to realise her or his well-being and potentiality for one’s good life.²⁴⁸ This indicates that the norm of respect is a duty as a guide to social relations.

Core to the moral form is self-respect that correlates with the love of the self: “Our self-esteem will fluctuate according to the respect we have for our own selves.”²⁴⁹ The love of ourselves through self-respect is a norm of an active learned, communicative, social process.²⁵⁰ It is reciprocal towards oneself and others, and at the same time others towards.²⁵¹ It is the fundamental moral relation of acknowledgement of one’s sense of inner worth as a human being reflected through one’s self-esteem as reflected through dignity.²⁵²

The moral form tests or subjects the ethical aim to the test of the norm.²⁵³ Ricoeur argues that “there is a bond between self-respect and the moral evaluation of these same actions submitted to the test of the universalization of our maxims of actions.”²⁵⁴ The test of the norm as the designatory element – what is permitted

²⁴⁷ The conditions that enable one to autonomously plan, plot and control their future without coercion, the ability to experiment with different ideas and aims, to select our favoured goals and to decide on the best way of achieving them and to give effect to that decision.

²⁴⁸ Marshall, above n 29, at 63–64; Marshall, above n 136, at 216; Charles Taylor *Sources of the Self: the Making of the Modern Identity* (Harvard University Press, Cambridge, Massachusetts, 1989) at 12; Helen MF Jones “Respecting Respect: Exploring a Great Deal” (2002) 28 *Educational Studies* 341 at 343.

²⁴⁹ Chazan, above n 189, at 53–54.

²⁵⁰ This is a learned communicative process through osmosis and exposure to good practice that requires encouragement, praise, expressions of gratitude, and explicit statements of agreement but are more than surface aspects of relevance to what is being said, they are essential to respect. See: Jones, above n 248, at 342; Taylor, above n 248, at 12.

²⁵¹ Jones, above n 248, at 342.

²⁵² Chazan, above n 189, at 41.

²⁵³ Ricoeur, above n 4, at 203.

²⁵⁴ Ricœur, above n 26, at 4.

or prohibited – is self-referential. Paul Ricoeur argues in the *Reflection on the Just* writes that²⁵⁵

Morality presupposes nothing more than a subject capable of positing itself in the norm that posits it as subject. In this sense, we can take the moral order to be self-referential.

In other words, the norm is the self-referential capable being, the subject of self-esteem of one's aim for the good. It is the 'norm' as self-esteem of an accomplished life which becomes the basis of human society. It becomes the custom, the law by which relations are understood.

The self-referential test of the norm "requires nothing more than a subject capable of imputation."²⁵⁶ The norm is thus, the self-referential being through imputation who puts demands on themselves.²⁵⁷ This connects with respect through the love of self and by extension the love of others. Ricoeur wrote: "We respect ourselves in that we are capable of impartially judging our actions."²⁵⁸ To impartially judge one's own actions Francisco Ayala argues has three conditions:²⁵⁹

(i) the ability to anticipate consequences of one's own actions; (ii) the ability to make value judgements; and (iii) the ability to choose between alternative courses of action. These abilities exist as a consequence of the eminent intellectual capacity of human beings.

These conditions provide the self-referential ability as a capable subject positing itself as the norm. They become internal principles in self-regulating one's good

²⁵⁵ Ricoeur, above n 14, at 48.

²⁵⁶ The capable subject is a self-referential subject "capable of positing itself in positing the norm that posits it as subject" - refer to: At 47.

²⁵⁷ Raz, above n 116, at 86.

²⁵⁸ Ricoeur, above n 26, at 4.

²⁵⁹ FJ Ayala "The Difference of Being Human: Morality" (2010) 107 PNAS 9015 at 9018.

life. This demands self-awareness, while at the same time one's being is open to change, willing to question and challenge themselves.²⁶⁰

The norm is not controlled by external values, or external morality. For example, it does not depend upon beliefs or feelings of others' lives,²⁶¹ nor is it achieved through the exercise of power or authority²⁶² as may be considered in the vertical interpretive horizon. The vertical horizon is an imposed sense of values, and although may be absorbed as one's own, may or may not aid the norm of the aim. Furthermore, it may distract from self-respect of one's self-esteem. It may also affect the relationality of people to that of a collectivity of individuals.

However, the norm of the aim is the obligation in the sense of regulation. It arises in this sense as a norm²⁶³ of right or wrong. Francisco Ayala describes this as consisting "of the urge or predisposition to judge human actions as either right or wrong in terms of their consequences for other human beings."²⁶⁴ This is supported by Émile Durkheim who writes that morality is²⁶⁵

"everything that is the source of solidarity, everything that forces man to take account of other people, to regulate his actions by something other than the promptings of his own egoism.

²⁶⁰ Jones, above n 248, at 344.

²⁶¹ At 344.

²⁶² At 342.

²⁶³ Ricoeur, above n 58, at 6.

²⁶⁴ Ayala, above n 259, at 9018.

²⁶⁵ Émile Durkheim *The Division of Labor in Society* (Macmillan, Basingstoke, 1991) at 331.

This obligation is an obligatory subjective relationality²⁶⁶ is the sense of gift giving²⁶⁷ through a process of reciprocity.²⁶⁸ Reciprocity is a process of considering others before one self,²⁶⁹ and respecting others and oneself as another.²⁷⁰ It is obligatory as a 'duty' to others by considering the humanity of the other before one's self.²⁷¹ The reciprocal nature of the moral form ensures accountability to the relational environment. It is the accountability of one's own speech and actions and its impact on others in a sympathetic way.²⁷² It is in this sense the obligatory nature of the norm ensures the social bonds of mutual concern, trust, appreciation, and affection that are crucial to successful ongoing dialogical relations.²⁷³ This moral form was essential to a relational society.

2.3.3 Integrity/truthfulness

The moral basis of esteem and respect demands integrity and truthfulness. This is the link of holding the capable being to the moral basis of self-esteem. Integrity and truthfulness require one to aim for the accomplished life even if that is the more difficult or less favourable life. For example, Joseph Raz says:²⁷⁴

“The morally good are those who would have led a moral life even if even if the circumstances of their life were less favourable, yet only in the sense of being able to cope with the temptations and pressures normal in their society.”

²⁶⁶ Ricoeur, above n 4, at 170, 171; Ricoeur, above n 26, at 4; Ricoeur, above n 58, at 6; Ricoeur, above n 14, at 45.

²⁶⁷ This gift exchange is not that of commodity gift exchange, but that of in archaic societies in the logical of reciprocity that creates mutuality; it consists in the appeal to “return the gift” that is contained in the act of giving: Ricoeur, above n 58, at 6.

²⁶⁸ At 6.

²⁶⁹ Sandy Farquhar “Narrative Identity - Ricoeur and Early Childhood Education” (PhD in Philosophy, University of Auckland, 2008) at 2.

²⁷⁰ Ricoeur, above n 4, at 203–204.

²⁷¹ Farquhar, above n 269, at 2.

²⁷² Ayala, above n 259, at 9015.

²⁷³ Jones, above n 248, at 342.

²⁷⁴ Raz, above n 116, at 381.

A moral basis through self-esteem and self-respect requires living truthfully irrespective of being favourable or the social pressure. A moral repugnant basis, on the other hand, is the options or choices which may be favourable, or hegemonic but not holding to the integrity and truthfulness of who one is.

As such, integrity is an essential condition of the autonomous life of a capable moral being.²⁷⁵ It is defined as the 'commitment to a choice and being loyal to that commitment'.²⁷⁶ Lynne McFall takes this definition further and states that integrity requires²⁷⁷

that someone (1) subscribes to some consistent set of principles or commitments and (2), in the face of temptation or challenge, (3) uphold these principles or commitments, (4) for what the agent takes to be the right reasons.

Integrity requires the commitment and loyalty to the accomplished life one has chosen for oneself irrespective of the favourability or difficulty to which it might lead. Holding to integrity helps to prevent giving into social hegemonic pressures of a particular way of life and thinking and being true to oneself. This helps to avoid morally repugnant choices and also from being manipulated and coerced into who one is or how one comes to be.

With integrity, one can exercise to the fullest truthful, social, and moral participation.²⁷⁸ It enables one to pursue the accomplished life as a relational social being through one's chosen relationships and projects.²⁷⁹ This requires "being truthful to one's very being,²⁸⁰ who one really is and will be," and being

²⁷⁵ At 383.

²⁷⁶ At 382, 383.

²⁷⁷ Lynne McFall "Integrity" (1987) 98 Ethics 5 at 9.

²⁷⁸ Williams, above n 142, at 758.

²⁷⁹ Marshall, above n 29, at 64.

²⁸⁰ This includes one's physical, psychological, social and moral being.

involved in the world truthfully.²⁸¹ Holding to the integrity of who one is and the autonomous capability of how one comes to be enables one to live in the world truthfully. Without integrity and truthfulness to who one is and how one comes to be, it is difficult to hold oneself to the norm and reciprocally hold such a duty to others.

Although they physically exist, most intersex people do not have self-esteem and self-respect. They have not been able to live in the world truthfully. They have lost the integrity over their physical (anthropological) capable and moral being. This prevents the fullest participation of a socio-political life and restricts potentiality and well-being. They require integrity as to who they are and the ability to live their life truthfully.

2.3.4 Moral Basis: Predicates of Dignity (Esteem) and Relational Respect

The moral basis, or as Ricoeur refers to as the moral form, of the human being is as one who is worthy of esteem and respect. This moral form has two predicates: first, the ethical predicate of self-esteem arrived at by aiming for the accomplished life and it is an evaluation of self-esteem through one's well-being and achieving potentiality; and second moral predicate of the norm of the aim posits one as self-regarding attestation while also having an obligation to oneself and others. The second predicate of obligation of the norm bridges the anthropological and the moral being and inclines a moral subject to do one's duty. Ricoeur wrote:²⁸²

“Respect, in my opinion, constitutes only one of the motives capable of inclining a moral subject to “doing his duty. ... I would give place of honor to one strong sentiment, something like indignation, which is a negative of intending of others' dignity as well as one's own dignity. Negatively, refusing humiliation expresses the recognition of what makes the difference between a moral and a physical subject, a difference called dignity.”

²⁸¹ Williams, above n 142, at 757–758.

²⁸² Ricoeur, above n 14, at 48.

Dignity is a mediatory mechanism of the norm. It is the difference of the moral and the physical, or in other words, it is the attestation of one's capacities while also having an obligation to oneself and others. This dignity is the fundamental moral relation of acknowledgement of one's sense of inner worth as a human being reflected through one's self-esteem and the expectation of approval, recognition, from oneself and others as a human being. Dignity is evaluative²⁸³ through the examination of one's accomplished life in the aim for the good' with and for others. It is within the sphere of dignity of a moral being that the capable being can live truthfully irrespective of being favourable or the social pressure and maintaining integrity to who one is and how one comes to be. This is the dignity of the human being.

Dignity through self-esteem and self-respect does not simply add to the self-designation of the capable being, but rather recapitulates it.²⁸⁴ Dignity is the fundamental moral relation of acknowledgement of one's sense of inner worth as a human being reflected through one's self-esteem. It is the expectation of approval from oneself and others, and indicates recognition as a human being. Dignity in the sense of this thesis is best described by Sandra Fredman. She writes that:²⁸⁵

based on what people say and do, dignity seems to be a condition signified by a sense of contentment, satisfaction, and wellness – an integrative evaluation of our lives and circumstances. Inherent to the very notion of dignity is the idea that dignity is ultimately reckoned by each individual for him or herself.

As such, dignity is inherent to a capable being. It separates one from being only of instrumental or utility value. Without dignity, what kind of being is one? Ricoeur's

²⁸³ At 48–49.

²⁸⁴ Ricoeur, above n 26, at 4.

²⁸⁵ "Human Dignity in Concept and Practice" (2011) 44 Policy Sciences 303 at 313–314.

work illustrates that the capable being recapitulates the moral form of being – a being of dignity.

Dignity is something to be evaluated. Dignity is an autonomous condition of being and it is reflected through the wellness and flourishing. It examines one's life – a 'life worth living' or judging one's 'aim for the good' with and for others.²⁸⁶ It is for this reason, Ricoeur writes that it is "an evaluative measure that our moral feeling grasps."²⁸⁷ It is the evaluative tool of and esteemed life as determined through attestation. Dignity is the indicator of how worthy and capable an individual deems oneself to be.²⁸⁸ The higher one's dignity, the more self-esteem one has which indicates well-being and human flourishing.

Such dignity is not that of self-reliance but important to a relational flourishing society. A person's experience of dignity though is relational. As Fredman writes:²⁸⁹

Dignity is shaped by our relationships with ourselves, but also by our relationships with others as well as our interactions with the physical world. Viewed in this way, each person's experience of dignity is inextricably coupled with that of others through the health and vigour of the commonwealth which may arise, in part, from the unique extent to which human biological fitness is contingent on the institutions that we develop.

Dignity or its lack thereof, is shaped through relationships with others and one's situatedness or horizon. Though understanding one's narrative it is possible to find one's experience of dignity and the well-being and flourishing of the human being. This indicates the connection of dignity to respect, the norm of the aim,²⁹⁰

²⁸⁶ Ricoeur, above n 4, at 181.

²⁸⁷ Ricoeur, above n 14, at 48–49.

²⁸⁸ Chazan, above n 189, at 42.

²⁸⁹ "Human Dignity in Concept and Practice", above n 285, at 313–314.

²⁹⁰ The aim for the good or accomplished life.

becomes critical to ensure the dignity of self-esteem. Such respect is more than a toleration. Toleration infers putting up with another. This goes beyond toleration extending the dignity of humanness to all humans. Respect is the treating of each other²⁹¹ with mutual recognition and acceptance of one another irrespective of their uniqueness and differences.²⁹² Respect indicates the awareness of the conditions to realise one's well-being and potentiality in the aim for the accomplished life of both oneself and of others for self-esteem and hence, their dignity. As such, respect is consistent with empowerment, an active virtue with the potential to foster change.²⁹³

Although respect may not be based on an inherent equality, its product is a form of balance or parity.²⁹⁴ That is respect results in a balance of human beings that are equally respected. This, Ricoeur writes, is when respect for the norm²⁹⁵

blossoms into respect for others and for 'oneself as another,' and when respect will be extended to anyone who has the right to expect his or her just share in an equitable distribution.

This equitable distribution of respect provides the "public space" and "the orders of recognition" as a dignified being that interacts with 'the institutional other'.²⁹⁶ The mutuality of respect, though not inherent to dignity, is critical to enable dignity of the human being – the capable being worthy of esteem and respect.

²⁹¹ Oscar Schachter "Human Dignity as a Normative Concept" (1983) 77 *The American Journal of International Law* 848 at 849.

²⁹² Jones, above n 248, at 342.

²⁹³ At 343.

²⁹⁴ At 342.

²⁹⁵ Ricoeur, above n 4, at 203–204.

²⁹⁶ Janne E Nijman "Paul Ricoeur and International Law: Beyond 'The End of the Subject' Towards a Reconceptualization of International Legal Personality" (2007) 20 *Leiden Journal of International Law* 25 at 46.

The moral basis of the autonomous capable being is a dignified being as one who is worthy of esteem and respect. The dignified being is the humanness of the anthropological being. In other words, dignity moves one from a mechanical entity or organism to a being of humanness. Such dignity is critical to the lives of intersex people to enable them to live a life of truthfulness and integrity as an autonomous capable moral being.

2.4 *Moral Identity*

Personal identity is the singularity of one's narrative identity and the singularity of its narrative form.²⁹⁷ Thus, personal identity is thus, "posed as the outcome of narration."²⁹⁸ Personal identity is possible through the access, as Ricoeur writes, "to the mediation of the narrative function."²⁹⁹ Personal identity gives recourse to others to give that personal certainty a social 'status',³⁰⁰ that is, a social recognition. However, although personal identity as a singularity of one's narrative identity limits the unpredictability of the future and maintains dependability, it does so at the risk of betrayal.³⁰¹ The risk results from the personal identity betraying the narrative identity of the capable being.

The betrayal of one's narrative identity occurs when it is divested from one's personal identity. Personal identity in this sense is a recognition through attribution rather than an outcome of a narration. It is "a term for impotence through the admission of all the signs of vulnerability that threaten any such narrative identity."³⁰² The process of divestment from its source of narrative identity threatens the narrative character of identity leaving the being vulnerable.

²⁹⁷ See: Ricoeur, above n 14, at 78–81.

²⁹⁸ Ricoeur, above n 4, at 77.

²⁹⁹ At 73.

³⁰⁰ Ricoeur, above n 58, at 1.

³⁰¹ At 3.

³⁰² Ricoeur, above n 14, at 79.

The being becomes vulnerable losing autonomy and as such resulting in the inability or lesser ability of the human condition.³⁰³

The divesting of the narrative identity results in a personal identity as an attributed status category as the same at all times and in all circumstances.³⁰⁴ This is a claim of immutability and historicity³⁰⁵ under the heading of idem identity.³⁰⁶ This singularity and immutability provides certainty of being as occurs within the vertical horizon. It affirms the status of an individual,³⁰⁷ as a tag of 'what one is',³⁰⁸ and is inscribed on one's identity documents.³⁰⁹ Identity is attached to a person as something that is referred to or "referred back to"³¹⁰ as the status identities attributed to an individual. As such, identity becomes a tool of utility and instrumentalism. Kim Atkins, writes:³¹¹

"At the same time, contemporary philosophy of mind reduces questions of "who?" to questions of "what?", and in doing so, closes down considerations of self while rendering the moral question one of mere instrumentality or utility."

Identity is an instrument in the structuring and operation of society. It becomes part of utility considerations. This removes the basic sense of humanness and its morality or dignity. The mark of power over identity has shifted from the individual

³⁰³ At 76.

³⁰⁴ Gleason, above n 12, at 911.

³⁰⁵ This derives from a reductionist understanding of identity.

³⁰⁶ Ricœur, above n 14, at 79.

³⁰⁷ Ricoeur, above n 4, at 75.

³⁰⁸ 'What one is' is the external determination of one's being. Such determination pre-determines one's path of authorship, one of heteronormativity. 'What' is the descriptive, or more exactly, the ascriptive assignation of a person - what a person is. This is similar to the common understanding of 'idem' as identity as used today. This understanding one's identity is determinable as a 'what'. It is no longer one as the author of one's being: Ricœur, above n 26, at 2.

³⁰⁹ Bourdieu, above n 17, at 300.

³¹⁰ Khan, above n 4, at 14.

³¹¹ Atkins, above n 33.

that has a capability becoming to an outside force that determines what one becomes. It is to this determination that one becomes and attests irrespective of one's narrative. Attestation of one's life refers back to the status identities that have been attributed, and any diversion from such identities are seen as pathological. This is the problematic of identity as identified above that leaves people vulnerable in the human condition. They have lesser or an inability of the capacities in their humanness. Moreover, it leads to the possibility of a "fracture of the reflexive relation of the self to itself, which has its moral and psychological legitimacy on the plane that institutes and structures the human person."³¹² It is for this reason the paradox of autonomy and vulnerability/fragility is critical to the attestation of an identity as noted by Ricoeur.³¹³

Identity is not a static attribution of characteristics of what one is, but a reflection of who one is as an outcome of one's narrative identity. Although we all have a personal identity, it has no meaning, or purpose, without investment in the narrative identity in which it derives. Given the vulnerability of the human condition that Ricoeur illustrates, and the issues of the paradox of autonomy over the capable being, identity must be more than a reflection of the anthropological being. Human beings have an anthropological form, the capable being demanding autonomy, but also a moral form, the moral basis of life with interconnects with one's autonomous capable being and recapitulates it. Sandy Farquhar considers this in her work. She writes, while reflecting on the work of Ricoeur:³¹⁴

"Although others may seem like me, I have my own personal identity – I have something in which I am different from all others. Being like others and different from others are combined in what Ricoeur calls the moral identity of a person."

³¹² Ricoeur, above n 14, at 80.

³¹³ At 71.

³¹⁴ Farquhar, above n 269, at 2.

A moral identity includes the moral basis of the capable being making one worthy of esteem and respect in how one becomes who they are. This is important to not only retain the investment of the personal identity within and through one's narrative identity but also to enable one to attest to who they are. It is in this way that one's identity has legitimacy.

It is in this sense that Ricoeur describes a personal identity as "characterized by a temporality that may be described as constitutive."³¹⁵ Constitutive indicates the "power to establish or give organized existence to something."³¹⁶ The constitution of this personal identity is through the capable being and its capacities. These capacities³¹⁷ are hierarchical in order.³¹⁸ They culminate in the specific capability of attestation.³¹⁹ They work in tandem with the moral form of the capable being worthy of esteem and respect. Although the capacities are observable from the outside, they are felt or experienced in a mode of certainty.³²⁰ The certainty derives from one's attestation of the autonomous capable being worthy of esteem and respect.³²¹

The full deployment of autonomy of the capable human being leads to the moral world of the moral being – one who is worthy of esteem and respect, or, in other words dignity. The moral being, while aiming for the good or accomplished life, through the norm is brought to a life of solidarity through social and political

³¹⁵ Ricœur, above n 14, at 80; Ricoeur, above n 58, at 2.

³¹⁶ "Constitutive" (2017) Oxford Dictionaries | English
<<https://en.oxforddictionaries.com/definition/constitutive>>.

³¹⁷ The capacities of the capable being are those of to speak, to act, to tell/narrate, and to promise/impute.

³¹⁸ Ricoeur, above n 71, at 18.

³¹⁹ At 18.

³²⁰ Ricoeur, above n 58, at 1.

³²¹ At 1.

structures for and with others in living the accomplished life. This is expressed by Sandy Farquhar who writes:³²²

“I uncover who I am by living a good life, for and together with others, based on respect for the self and others. This orientation takes Ricoeur into the world of shared community and the social and political structures that enhance the development of identity.”

The development of identity is a process by living the good accomplished life through respect of self and of others. It occurs in and through the shared structures of society. The enabling of such an autonomous capable being of esteem and respect is the dignified human being.³²³

It is through one’s moral identity that capability underlines the main structures between self-recognition and attestation.³²⁴ It is only through capability that recognition becomes attestable. Recognition is self-reflexive and requires the capacities of the capable being. Recognition of the capable being that calls for identification of the self³²⁵ including the narratives of the personal, the social, and the political within one’s narrative identity. Ricoeur describes the reflexive process of recognition: “I identify myself by my capacities, by what I can do. The individual refers to him- or herself as a capable person.”³²⁶ Although capabilities may be observable, their certainty comes through that of imputability, the ultimate capability, which attests both to who one is and how one comes to be.³²⁷ In other words, the certainty of identity is achieved through the attestation of oneself as the author of one’s acts.³²⁸ This attestation is a mark of power claiming power or

³²² Farquhar, above n 269, at 2.

³²³ Ricoeur, above n 14, at 74.

³²⁴ Ricoeur, above n 71, at 18.

³²⁵ Ricoeur, above n 26, at 1.

³²⁶ Ricoeur, above n 58, at 1.

³²⁷ At 1; Ricoeur, above n 71, at 18.

³²⁸ Ricoeur, above n 14, at 75.

autonomy as to who one is and how they come to be. Ricoeur writes that “Narrative identity is something claimed, something like a mark of power. It also declares itself as a kind of attestation.”³²⁹ It is for this reason that personal identity cannot be divested from one’s narrative identity. Thus, the same capability that enables the attestation of one’s narrative identity is also the same one that self-recognises, and in turn is recognised by others. It is in this interconnection of the capable being through recognition and attestation that implies a being worthy of self-esteem and self-respect³³⁰ – a dignified being.

2.5 Conclusion

Narratives are part of life and seen through one’s becoming. It is through one’s becoming that people belong and are part of a community. A person’s narrative represents one’s becoming from birth to death. Each one’s becoming occurs within horizons of situatedness or interpretive horizons.³³¹ These give one meaning and purpose. The first is a vertical horizon which is determinative in what one is (an identity) and hegemonic in formation of the narrative. The second is a horizontal horizon which is a mediatory environment enabling one’s becoming resulting in an identity – who one is. Interpretation of one’s narrative makes it possible to answer questions about oneself – one’s personal identity.³³² However, the misreading of one’s story has the potential to affect one’s and others’ lives and affect their very sense of being. The narratives are the story of how one becomes who or what one is. It is part of life that gives meaning and purpose to people and communities. It can also segregate them from the community and prevent them from being a valuable member of the community. Whether within a vertical or horizontal horizon, each person has a becoming resulting in a narrative.

³²⁹ At 79.

³³⁰ Ricoeur, above n 26, at 1, 4.

³³¹ This includes the “personal, the social, and the political” that create and become the framework of the horizons. See: Farquhar, above n 1, at 11.

³³² At 11.

The becoming of sex, as illustrated in the last chapter, occurs through one of these two horizons. For most people, sex becoming is determined at birth as a sex status – either male or female – which defines their life and becomes the basis of their narrative of life irrespective of the inner self and the I-me mediation. Intersex people with variation of sex characteristics are misread as mistakes of nature that need completion as a true male or female. This often requires forced normalising surgery to remedy this reading of what they should be. Few have a sex becoming that is not pre-determined that enables the I-me mediation of sex to become who one is including those with many different sex variations.

The character of one's becoming is constructed within one's narrative. Depending on the horizon, it may provide a more open free horizon or closed hegemonic horizon in which the character develops. The importance of identity to the character and the narrative is illustrated by Ricoeur. He wrote that the narrative³³³

“constructs the identity of the character, which may be called his or her identity, in constructing the story told. It is the identity of the story which makes the identity of the character.”

Identity is what results from the character of the story being told. Or, as Linda Alcoff wrote, identity is revealed the “moment in which it suddenly emerges from hiddenness in the full functional context of the world.”³³⁴ In other words, identity is the resultant of one's narrative revealed to the world around them. It is through one's narrative that it is possible to understand who or what one is and how one comes to be.³³⁵ This character is important to one's recognition in the world. In most societies, sex is an important characteristic of the character.

³³³ Ricoeur, above n 4, at 147–148; See also: Ricoeur, above n 4, at 77; Khan, above n 4, at 10.

³³⁴ Alcoff, above n 6, at 94–95.

³³⁵ Farquhar, above n 1, at 10.

Identity, and the certainty it brings, has always been important for societies around the world, though most did not have a term for 'identity'. For most societies, 'identity' was the recognition of oneself and others. This recognition entwined with one's narrative identity. The recognition of each person through their narratives is by their personal identity. However, personal identity is "also a term for impotence through the admission of all the signs of vulnerability that threaten any such narrative identity."³³⁶ This occurs through the problematic of identity that threatens one's narrative identity by divesting it of its personal identity and leaving personal identity as an immutable substrate disconnected from one's narrative by which one is recognised. This process inhibits ability and thus leaving a paradox of autonomy.

To overcome this, one's becoming requires a full deployment of autonomy for the capable being to make or author one's own life.³³⁷ This also includes, as Francisco Valdes notes, having "control over one's capacity to experience and express the self; to shape and direct personality, both socially and sexually; and to realize one's being and fate."³³⁸ It is through this autonomous capability that one can fully attest to who one is. This attestation reflects the moral form or basis of the capable being. Combined, this reflects the autonomous agency of the power and capability to determine for oneself who one is and how one comes to be.³³⁹ Only in this way is one's narrative identity attested as a personal identity. It is such an identity that both Farquhar and Ricoeur refer to as a moral identity which while relationally situated and guided, one's identity can be different from and alike at the same time.

³³⁶ Ricœur, above n 14, at 79.

³³⁷ Raz, above n 116, at 369.

³³⁸ Francisco Valdes "Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & (and) Sexual Orientation to Its Origins" (1996) 8 Yale JL & Human 161 at 170.

³³⁹ Eekelaar, above n 159, at 185; Cooper, above n 159, at 250; Raz, above n 116, at 391.

The difference between the immutable determined identity (the problematic of identity) and a moral identity is dignity. The dignity of being is through self-esteem and self-respect that recapitulates the autonomous capable being.³⁴⁰ Dignity is reckoned autonomously and not heteronomously. It is a condition reflected through wellness and flourishing. It examines one's life a 'life worth living' or judging one's 'aim for the good' with and for others.³⁴¹ It is for this reason, Ricoeur writes that it is "an evaluative measure that our moral feeling grasps."³⁴² It is the evaluative tool of and esteemed life as determined through attestation. Dignity is the indicator of how worthy and capable an individual deems oneself to be.³⁴³ The higher one's dignity, the more self-esteem one has which indicates well-being and human flourishing.

Dignity is based in self-esteem and occurs through self-respect. Self-respect is more than toleration, it is extending the dignity of humanness to all humans. This requires treating each other with equal recognition and acceptance as human beings irrespective of their uniqueness and differences.³⁴⁴ It also demands awareness of the conditions to realise one's well-being and potentiality in the aim for the accomplished life of both oneself and of others for self-esteem and hence their dignity. As such, respect is consistent with empowerment, an active virtue with the potential to foster change.³⁴⁵ This enables a just share in an equitable distribution.³⁴⁶

Intersex people clearly illustrate the issue of the problematic of identity. The immutable status of maleness and femaleness prevents the recognition of other

³⁴⁰ Ricoeur, above n 26, at 4.

³⁴¹ Ricoeur, above n 4, at 181.

³⁴² Ricoeur, above n 14, at 48–49.

³⁴³ Chazan, above n 189, at 42.

³⁴⁴ Jones, above n 248, at 342.

³⁴⁵ At 343.

³⁴⁶ Ricoeur, above n 4, at 203–204.

possibilities of sex multiplicities as part of one's identity. This is clearly represented through the history of intersex people. Somewhere from mythology to the present intersex people have gone from revered to repressed. Although intersex people have existed since time immemorial, although not always named as such, they have not always been recognised and accepted within society. Some societies in the past respecting them as human beings, and some societies even revering them, while today, most intersex people are only recognised through the determined sexed identity as either male or female. This has resulted in their death, ostracism, or the physical and psychological manipulation of their bodies to conform them to the socio-cultural understanding of sex. They have been left marginalised and invisible to themselves and to others around them. This indicates it is not intersex people who are the difference but that recognition, and the opposite of invisibility, of intersex results from two types of sex becoming. Most societies today, have an immutable determination of sex as either male or female and nothing in between. When a baby is born, their sex status is assigned and defined. One authors their life according to one's status. There are few societies that accept intersex or sex diversity, and as such, they remain invisible to society.

Although most intersex people have a personal identity, it is questionable if they have a moral identity. This would require them retaining the mark of power over one's sex – as a male, female, both or neither – and how they come to be including the autonomy over their sex characteristics. This does not occur in most places. A moral identity will enable recognition of who one is including their sex multiplicity – as a male, female or both or neither – along with one's many other multiplicities. This results in a dignified being - the autonomous capable being as one who is worthy of esteem and respect. Dignity centres an intersex person in humanness and not as a disease or mistake of nature. Such dignity is critical to the lives of intersex people to enable them a life of truthfulness and integrity as a moral autonomous capable being. A dignified life for an intersex person requires freedom to be who they are – whether male, female, both or neither – and the

autonomy over how they come to be. This enables them to be true to themselves with esteem and respect from and to others around them.

CHAPTER 3: CONCEPTUALISATION OF SEX WITHIN RIGHTS

Core to this thesis is the recognition of intersex people as who they are and the respecting of how they come to be. The first chapter has detailed how becoming of (inter)sex is a process understood within one's narrative identity. It is through this narrative identity that one's personal identity is revealed. It is through that personal identity that people are recognised. However, the second chapter began highlighting that becoming occurs within interpretive horizons and these have led to two different understandings of the idem-ipse identities. The horizontal interpretive horizon views these as a meditative process resulting in an identity. The vertical, however, views identity as an identity – the idem identity – the immutable characteristic by which one is recognised and understood, and that the ipse identity incidentally becomes accordingly. This consequentially views one's identity as immutable through time and space. This has led to the problematic of identity as it divests one's personal identity from one's narrative identity foundation. However, due to the problematic of identity – conceptualising identity as identity – intersex people like many others have been left vulnerable. They have lost their ability to autonomously actualise their capabilities – to speak, to act, to narrate and to promise and impute – to form an accomplished moral life of who they are and how they come to be. This accomplished moral life is central to all intersex people's issues.

The struggle for the rights and equality of sex have occurred for more than 100 years. Primarily these rights centred around women's rights although in the last 25 years especially, there has been a slow but increasing focus on Lesbian, Gay, Bisexual and Transgender (LGBT) rights. The question remains how has the fight for rights and equality supported or not the fight for intersex issues?

This chapter will first consider the concept of rights and its development over time. It will then consider how rights at international law have understood sex and whether this has included intersex people. Through this analysis, it will be possible

to understand how the understanding of sex in international human rights law fits in with the development of rights.

The next part of this chapter argues that the understanding of sex and the invisibility of intersex people in international law is not accidental, but part of the maintenance of sex status. It will illustrate this through how the struggle for rights and equality has played out within international human rights law. It will then continue by outlining how status, in particular, that of sex, has remained so central to society even using intersex to maintain the demarcation moving from biology to gender. This will be explained the way that rights are understood through the different interpretive horizons.

The chapter finishes by arguing for rights to do its juridical task of enabling autonomy, international human rights law must recapture the subject of rights as the focus and aim of rights. To overcome the problematic of identity and its resulting vulnerabilities, one has to rely on one's rights through systems of justice to remedy such a problem. Paul Ricoeur argues that autonomy is the prerogative of the subject of rights, but it is vulnerability that makes autonomy remain a condition of possibility that juridical practice turns into a task.¹ Although autonomy is fundamental to the subject of rights, at times it requires a juridical task – the help of rights law – to enable autonomy. The importance of rights law is to rescue autonomy from being a possibility due to the vulnerabilities and enable it to be a reality. Ricoeur argues, that this juridical task of rights is as follows: as human beings are autonomous, they must become so.² Only then can one autonomously actuate one's capabilities to form one's accomplished moral life as a sex – male, female, both or neither - and how one comes to be which is so central for intersex people.

¹ David Pellauer (translator) Paul Ricoeur *Reflections on the Just* (University of Chicago Press, Chicago, 2007) at 72.

² At 72.

3.1 *Sex and International Human Rights*

Sex has been included in the United Nations (UN) and its instruments in particular the International Bill of Rights (IBOR) from its very foundations. Despite inclusion in these documents, it has not been defined in the international case law, not even in the General Comments. As will be seen in the way sex is applied in and through international documents and international bodies, it has been restricted to that of the male-female binary status. This has also been the case in trying to achieve recognition of international human rights for Lesbian, Gay, Bisexual, Transgender, Intersex and other sexual minorities (LGBTI) people. As will be seen rather than understanding them as part of the diversity of sex, there has been a tendency to view them as a new status of sex different to that of male and female, retaining the status of male and female as sex. Intersex, apart from the issue of surgery and normalisation processes (discussed in a later chapter) has been disregarded.

3.1.1 **Sex Incorporated into the Charter and IBOR**

The inclusion of sex came through the acknowledgement of women, their status, and the issues they face in socio-political and economic life. This was first taken up by the League of Nations in 1935, however, “it was not until the Charter of the United Nations and peace treaties concluded after World War II that international instruments called for equality of the sexes.”³ Equality of the sexes was considered to be one of the basic tenants.⁴ The push to include women came primarily from Latin women and a representative from China.⁵ The English and American

³ Laura A Donner “Gender Bias in Drafting International Discrimination Conventions: The 1979 Women’s Convention Compared with the 1965 Racial Convention” (1993–1994) 24 *Cal W Int’l LJ* 241 at 244.

⁴ Laura Reanda “Human Rights and Women’s Rights: The United Nations Approach” (1981) 3 *Human Rights Quarterly* 11 at 11.

⁵ Torild Skard “Getting Our History Right: How Were the Equal Rights of Women and Men Included in the Charter of the United Nations?” (2008) 35 *Forum for Development Studies* 37 at 42.

delegations were pushing for the version of the word man to include everyone.⁶ In spite of the different reasoning of these two groups, we know from the beginning that sex was one of the statuses that the UN believed should not be used to prevent the free and full development of the dignified being.

In 1946, the 'Sub-Commission on the status on Women' was "set up to advise the Commission on Human Rights on problems relating to the status of women."⁷ The Sub-Commission began a programme of work based on the principle "that freedom and equality are essential to human development and women are as much a human being as man and therefore entitled to share with him."⁸ The goal of this Sub-Commission was to⁹

enable women to participate fully as 'free and responsible members' in the building of the new society, it was necessary 'to raise the status of women to equality with men in all fields of human enterprise.

The premise was that "throughout history women had not been considered as 'humans' and most human rights had been enjoyed exclusively by men, being denied to women. There was hardly any sphere of life in which the rights of women had been respected."¹⁰ The goal of UN Women, through the Sub-Commission on the Status of Women, was to advocate on the respecting the rights of women in all spheres of life.

From there, sex equality was incorporated through the IBOR. Unlike other issues of inequality, discrimination, and so on, sex even has a special article in the International Covenant of Civil and Political Rights (ICCPR) and International

⁶ At 42–43, 47, 51.

⁷ *Report of the Sub-Commission on the Status of Women to the Commission on Human Rights* (E/HR/18 1946) at 1; Donner, above n 3, at 244.

⁸ Reanda, above n 4, at 18.

⁹ At 18.

¹⁰ Skard, above n 5, at 53.

Covenant on the Economic, Social and Cultural Rights (ICESCR).¹¹ The Sub-Commission on the Status of Women continued their work in other areas with regards to work on sex equality and other women's rights issues. Moreover, they pushed for and achieved the Convention on the Elimination of Discrimination against Women (CEDAW) adopted in 1967.¹² By the time CEDAW came in force, there had been a large shift from sex to gender. Although it appears a positive force, intersex people demonstrate, as seen later in the chapter, that they have been used to create gender and then used by gender to make them invisible.

3.1.2 Adoption of 'LGBT' Rights – Inclusive of I (Intersex)?

Although sex was explicitly mentioned in the IBOR, there has been great debate recently if that also includes the LGBTI population. Despite slow acceptance in many places domestically and internationally, almost all states still conceptualise sex through the male-female binary. This adherence to sex status as a binary of male and female remains strong. There has been a reluctance for diversity and pluralism of sex. Although there was a start to include these rights within sex, they have moved to 'other status'.

The beginning of international acceptance of LGBT rights begins in 1994 with the *Toonen* case brought before the Human Rights Committee. The *Toonen* case¹³ concerned criminal laws of sodomy that were still legal in Australia although they had not been enforced at the time of the case. *Toonen* brought the case before the Committee arguing that this was both a violation of privacy in Article 17 and was discrimination under Article 26 on the basis of sex under the ICCPR. This was upheld in both cases and the Committee agreed that this was discrimination on

¹¹ International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolution 2200 A (XXI) Resolution 2200 A (XXI) (adopted, entered into force), Art.3, , Art. 3.

¹² Donner, above n 3, at 244.

¹³ *Toonen v Australia* UN Human Rights Committee UN Doc CCPR/C/50/D/488/1992, 31 March 1994.

the basis of sex. This was supported in the case of *Mr Edward Young v Australia* which confirmed the *Toonen* case.¹⁴ The Committee went on to argue that “the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.”¹⁵ The *Toonen* and *Young* cases have been upheld in *X v Colombia* in 2007.¹⁶ At least in 2007, sex has included sexual orientation.

From that time, there has been a struggle for LGBT rights at the UN level. A Brazilian Resolution to recognise sexual orientation and gender identity at the UN was put forward by a number of countries in 2004, but it was decided at this time to delay discussion for another time as there would not be enough votes for it. Since then, a group of experts came together in 2006 with a purpose to connect the existing international law that related to sexual orientation and gender identity. This became the *Yogyakarta Principles on Sexual Orientation and Gender Identity* (commonly referred to as the Yogyakarta Principles). It was decided that instead of creating a new convention, that there was sufficient international law. As such, the group collated the principles from the existing law with a jurisprudential guide to support it. Thus, although the Yogyakarta Principles themselves are not binding international law, the conventions upon which they have been drawn are binding.

At the UN though, there still was little momentum. Around two years later in 2008, there was a discussion concerning sexual orientation and gender identity in the General Assembly at the UN noting the extra-judicial killing of people due to their

¹⁴ *Mr Edward Young v Australia* ICCPR Human Rights Committee Communication No 941/2000, 8 August 2003 at [10(4)].

¹⁵ At [10(4)].

¹⁶ *X v Colombia* ICCPR Human Rights Committee Communication No 1361/2005, 30 March 2007 at [7(2) and 9].

sexual orientation and gender identity.¹⁷ There were two opposing resolutions, one was supportive of rights for this group of people while the other was opposed and both documents were left open for signature. This left LGBT rights open to jurisdictions to decide their validity. The UN still left LGBT rights unclear.

However, by July 2011 a resolution was passed that affirmed that human rights apply to all human beings without distinction of any kind and in a fair and equal manner which recognises the acts of violence and discrimination committed against people because of sexual orientation and gender identity.¹⁸ The Resolution was an important mark in LGBTI rights at the UN level. It was a sign that recognition of sexual orientation and gender identity had been recognised as a human rights issue. The resolution also requested a report¹⁹

“documenting the discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.”

The report delivered to the UN in December of 2011 on *Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity*²⁰ did mention intersex as included within this group as in the acronym LGBTI. However, in spite of this being included in the acronym, much of the recognition of intersex people, still exist as an abnormality or disease.

¹⁷ UN General Assembly “General Assembly Adopts 52 Resolutions, 6 Decisions Recommended by Third Committee on Wide Range of Human Rights, Social, Humanitarian Issues” *Press Release* (18 December 2008) <<http://www.un.org/News/Press/docs/2008/ga10801.doc.htm>>.

¹⁸ 17/19 Human Rights, Sexual Orientation and Gender Identity, Human Rights Council A/HRC/RES/17/19 (adopted 14 July 2011).

¹⁹ 17/19 Human Rights, Sexual Orientation and Gender Identity.

²⁰ Human Rights Council *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on their Sexual Orientation and Gender Identity* (A/HRC/19/41 2011).

Current UN instruments and programmes directed towards LGBTI groups aim to use the term ‘gender identity’ and ‘sexual orientation’ inclusively, including intersex. It is assumed that gender identity issues apply to all of the sexual minorities including intersex individuals. This is illustrated in the statement in the UN fact sheet describing terms on sexual orientation and gender identity where it states “intersex people experience the same range of sexual orientations and gender identities as non-intersex people.”²¹ The International Day against Homophobia and Transphobia is “also aimed at highlighting the struggle against the discrimination and prejudice suffered by intersex people.”²² The UN Committee on Economic, Social and Cultural Rights recently confirmed that “gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.”²³ However, when analysing gender identity, it is a method of providing a transition between the ‘sexes’ according to the sex identification of the individual – that it is only transgender issues that can be found.²⁴ There is little recognition that some intersex people, as well as other people, may want to live a sex that is not male or female.

Despite beginnings from the *Toonen* case, where sex included sexual orientation and presumably (although not explicitly stated) gender identity, LGBT has been moved to other status. Other status was designed to indicate grounds of

²¹ UN Human Rights Commission *Fact sheet - LGBT Rights: Frequently Asked Questions* (UN Human Rights Commission, 2013).

²² Nils Muižnieks “A Boy or a Girl or a Person – Intersex People Lack Recognition in Europe” (9 May 2014) The Council of Europe Commissioner’s Human Rights Comment <<http://humanrightscomment.org/2014/05/09/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-europe/>>.

²³ UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 20: Non-discrimination in economic, social and cultural rights (Art 2, paragraph 2, of the ICESCR)* (2009) E/C12/GC/20 at [32].

²⁴ Dan Christian Ghattas *Human Rights between the Sexes - a Preliminary Study on the Life Situations of Inter*Individuals* (Volume 34 2013) at 8.

discrimination not already listed.²⁵ Despite this case law has included sexual orientation as part of sex and thus not requiring separation, the General Comments since 2000 begun listing both sex and sexual orientation as grounds of discrimination in CESCR General Comments 14²⁶ and 15.²⁷ Although listed separately in these two General Comments, it could be argued that this was to highlight them more than shifting sex orientation, for example, from the ground of sex. However, in 2009, the CESCR *General Comment No. 20 on Non-discrimination*²⁸ writes that “other status” as recognized in article 2, paragraph 2, includes sexual orientation.²⁹ It went on to argue in discussing ‘other status’ that “In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.”³⁰ Again, gender identity is defined as reflecting “a deeply felt and experienced sense of one’s own gender. A person’s gender identity is typically

²⁵ “The inclusion of ‘other status’ indicates that this list is not exhaustive and other grounds may be incorporated in this category.” See: UN Committee on Economic, Social and Cultural Rights (CESCR), above n 23, at [15].

²⁶ “By virtue of article 2.2 and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.” See: UN Committee on Economic, Social and Cultural Rights (CESCR) *CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)* (2000) E/C12/2000/4 at [18].

²⁷ “The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water.” See: UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 15: The Right to Water (Arts 11 and 12 of the Covenant)* (2003) E/C12/2002/11 at [13].

²⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), above n 23.

²⁹ At [32].

³⁰ At [32].

consistent with the sex assigned to them at birth.”³¹ However, gender identity has been indicated as ‘other status’ when referring to transgender and intersex people. Sex, according to this General Comment since the adoption of the Covenant³²

has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights. Thus, the refusal to hire a woman, on the ground that she might become pregnant, or the allocation of low-level or part-time jobs to women based on the stereotypical assumption that, for example, they are unwilling to commit as much time to their work as men, constitutes discrimination. Refusal to grant paternity leave may also amount to discrimination against men.

This is based on the assumption of a binary of male and female but does not explicitly state so. It does, however, strongly indicate the impact of stereotypes in sex discrimination. The General Comment, highlighting its reasoning from General Comments 14³³ and 15,³⁴ sexual orientation, gender identity, and intersex are now considered as ‘other status’.

The Committee on the Rights of the Child in *General Comment No. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child* make it clear that sexual orientation is included in the prohibition of discrimination.³⁵ This is also confirmed in *General Comment No. 3 (2003): HIV/AIDS and the Rights of the Child*.³⁶ Neither of these has stated whether sexual

³¹ It goes on to describe that "For transgender people, there is an inconsistency between their sense of their own gender and the sex they were assigned at birth. In some cases, their appearance and mannerisms and other outwards characteristics may conflict with society's expectations of gender-normative behaviour. See: UN Human Rights Commission, above n 21.

³² UN Committee on Economic, Social and Cultural Rights (CESCR), above n 23, at [20].

³³ UN Committee on Economic, Social and Cultural Rights (CESCR), above n 26, at [18].

³⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), above n 27, at [13].

³⁵ UN Committee on the Rights of the Child (CRC) *General Comment No 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child* (2003) CRC/GC/2003/4 at [2].

³⁶ UN Committee on the Rights of the Child (CRC) *General Comment No 3 (2003): HIV/AIDS and the Rights of the Child* (2003) CRC/GC/2003/3 at [8].

orientation is included in sex or in other status. Moreover, the Committee against Torture, demonstrated in *General Comment No. 2 - Implementation of Article 2 by State Parties*, wrote it differently to most lists of prohibitions of distinctions. Rather than saying sex, they have been listed as “gender, sexual orientation, transgender identity.”³⁷ It has continued by stating that³⁸

“Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof.”

It has also recognised that non-conformity with stereotypes of the binary of men and women are often a discriminatory basis of a violation of the Convention:³⁹

“Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles. States parties are requested to identify these situations and the measures taken to punish and prevent them in their reports.”

These statements indicate the discriminatory nature related to sex, but it does not define it as a binary. Rather it is assumed as a binary of male and female by the separation of sexual orientation and gender identity to ‘other status’.

The European Union has been leading the way in providing rights to the LGBT population. There has been a success in highlighting the needs of the LGBT population. But like at the UN, limitations on how far it will provide identity in the narrative sense is still in the making with an insistence on immutable sex identity (or status) categories. Sex determined at birth and lived out through gender is still the predominate understanding in European law, although flexibility is being given

³⁷ UN Committee Against Torture (CAT) *General Comment No 2: Implementation of Article 2 by States Parties* (2008) CAT/C/GC/2 at [21].

³⁸ At [22].

³⁹ At [22].

for those who are desiring to change from one 'sex' to the other. There is still persistence in justifying the 'sex determination at birth' fiction through the essential basis of genetics and prenatal hormones, despite the weight of the social construction argument.⁴⁰

What sex encompasses in international law is complicated and also appears to be changing over time. While initial interpretation appeared through *Toonen* and *Young* to support sex as including the different facets of sex and sexual orientation, they have over time been separated them out from sex and placed them into 'other status' as their own category with no reasoning given. Apart from being mentioned in the General Comment General Comment No. 20: Non-discrimination in economic, Social and Cultural Rights (Art. 2, paragraph 2, of the ICESCR),⁴¹ intersex has been conspicuously absent. Yet despite such 'interpretation of sex', intersex has been pivotal to the demarcation of and stabilisation of the 'sex' status.

3.1.3 The Overall Conceptualisation of Sex through International Law

Sex is not actually defined in international law just as it is not in most jurisdictions. The only place in international law that defines sex or gender is in the Rome Statute of the International Criminal Court. In Article 7(3), it states "for the purposes of this Statute, it is understood that the term 'gender' refers to the two sexes male and female, within the context of society. The term 'gender does not indicate any other meaning different from the above."⁴² The commentary on the International Criminal Court states that the term 'gender' refers to "socially constructed roles played by women and men."⁴³ The Rome Statute does clearly

⁴⁰ Diane Richardson "Constructing Sexual Citizenship: Theorizing Sexual Rights" (2000) 20 Critical Social Policy 105 at 118.

⁴¹ UN Committee on Economic, Social and Cultural Rights (CESCR), above n 23, at 32.

⁴² Rome Statute of the International Criminal Court, ACONF183/9 (adopted 16 January 2002, opened for signature 17 July 1998, entered into force 1 July 2002), Art. 7(3).

⁴³ Mark Klamberg "ICL Database & Commentary - Rome Statute" (2014) <http://www.iclklamberg.com/Statute.htm?zoom_highlight=gender#_ftn39>.

state an understanding of a binary gender.⁴⁴ Not only does this Article clearly define them as binary, but it states that these are based on sociological dimensions, not the biological.

This leaves the question how the UN Economic and Social Council came to the conclusion that “since the adoption of the Covenant, the notion of the prohibited ground ‘sex’ has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfilment of economic, social and cultural rights.”⁴⁵ Nowhere has the understanding of ‘physiological’ understanding been captured and at most, it has been assumed that sex has been determined at birth. As just has been argued, the capturing of sex within the UN and the IBOR was the socio-political understanding of sex and the inequalities that women faced as opposed to men.

This does not mean there was no understanding or assumption of physiological differences. Some international institutions, such as the International Labour Organization (ILO), define sex as “biological differences between males and females.”⁴⁶ The World Health Organization (WHO) defines it as “the biological and physiological characteristics that define men and women.”⁴⁷ . The WHO gives some examples of these different characteristics:⁴⁸

⁴⁴ Rome Statute of the International Criminal Court, Art. 7(3).

⁴⁵ UN Committee on Economic, Social and Cultural Rights (CESCR), above n 23, at [20].

⁴⁶ Naoko Otobe, International Labour Office and Employment Policy Department *Resource Guide on Gender Issues in Employment and Labour Market Policies Working towards Women’s Economic Empowerment and Gender Equality* (Internat Labour Off, Geneva, 2014) at 81.

⁴⁷ World Health Organisation “What Do We Mean by ‘Sex’ and ‘Gender’?” WHO <<http://www.who.int/gender/whatisgender/en/>>.

⁴⁸ World Health Organisation, above n 47.

women menstruate and have developed breasts that are usually capable of lactating, while men do not; men have testicles while women do not. And men generally have more massive bones than women.

Sex is believed according to the WHO to be constant throughout time and societies.⁴⁹ According to these organisations, gender as sociological roles was supposedly constructed upon the biological bases. The WHO refers to gender as “the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.”⁵⁰ Naoko Otake writing a report for the ILO refers to gender as “the socially constructed roles, rights and responsibilities that communities and societies consider appropriate for men and women.”⁵¹ The ILO definition finishes by stating that “We are born as males and females,⁵² but we become girls, boys, women and men by learning from our families and societies.”⁵³ Though these are not legal definitions, they give some indication of what is being considered within the UN organisations. These definitions indicate that sex becoming within these organisations, the WHO and the ILO, is through the vertical horizon, where sex is determined as either a male or female, and through such a determination one constructs a ‘sex’ self or what is today referred to as ‘gender’.

However, when the documents were being drafted and ratified, the inequalities discussed were not the physiological differences, but the socio-political differences that prevented women from having a public life the same as men. This historical understanding of sex is reflected through the socio-political context. This

⁴⁹ World Health Organisation, above n 47.

⁵⁰ World Health Organisation, above n 47.

⁵¹ Otake, International Labour Office and Employment Policy Department, above n 46, at 81.

⁵² This is as determined by medically professionals usually and inscribed on the child’s birth certificates.

⁵³ Otake, International Labour Office and Employment Policy Department, above n 46, at 81.

has not changed for many years.⁵⁴ It is clear from the discussion above that the following statement would be correct: sex being determined at birth of two species and live the socially constructed roles, rights and responsibilities that communities and societies consider appropriate for men and women.

The belief that there were two species physiologically definable at birth had come to appear as natural.⁵⁵ This was deemed to be immutable and as such, non-debatable. The focus of sex at the UN has always been the inequalities and discrimination based on socio-political sex. Although an argument can be made that sex is not used for definitive but illustrative purposes, at the same time, it must be remembered that most discussion has been on the assumption that there are only two species – male or female. Although none of this is binding, it is still influential. Furthermore, it strongly suggests that there is still a very vertical interpretive horizon to the understanding of sex as described in chapter one. Due to the influence of this horizon, intersex people have remained predominantly invisible.

3.2 Maintenance of Sex Status

International law itself has not actually defined sex. The closest international law gets to a definition is in the International Criminal Court and articulation within CESCR General Comments. Predominantly, this refers to a social, not biological definition. The reason sex was initially incorporated into international law was the inequality that women faced in society. Sex, has been important to the status of individuals, and at the international stage, it appears no different. Though not commonly acknowledged, intersex has been used to demarcate and separate sex

⁵⁴ For more information see: Francisco Valdes “Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & (and) Sexual Orientation to Its Origins” (1996) 8 Yale JL & Human 161.

⁵⁵ This appearance as natural has been built upon and derived from the bio-medical work that was started in the 1800s. Refer to: Alice Domurat Dreger *Hermaphrodites and the Medical Invention of Sex* (Harvard University Press, 1998) at 25–30.

from gender and sexual orientation, while at the same time, there was non-recognition of intersex or sex diversity as natural. As such, the use of intersex people have been important in the maintaining of sex status.

3.2.1 Intersex a Tool to Demarcate Sex

In the maintaining of sex demarcation as a status, intersex has been known to those in power even if not to the average person. Intersex has been first used to help make a divide between biology, but when that became too diverse and not able to hold as a strict binary, it was again used to show the break in the social division. In both cases, the reality failed but the hegemonic story still remains strong.

The current issues facing intersex date back to the 19th century.⁵⁶ At that time, several things culminated in the need to categorise and differentiate sex: reports of sex diversity abroad, concerns about behavioural hermaphrodites – now referred to as intersex – (homosexuals, transgender, and feminists) and a rise in anatomical hermaphrodites (noticed due to the new medicine of gynaecology).⁵⁷ Scientists connected anatomical and behavioural hermaphrodites to inversion or broadly grouping them as homosexuals.⁵⁸ They challenged the socio-political status of what it means to be a woman or man, thus, medical and scientific men saw the need to strengthen the boundaries of the male and female categories.⁵⁹ As Alice Dreger wrote: “The social sex order had to stand as it did because it was

⁵⁶ At 26–30; Commissioner for Human Rights and Silvan Agius *Human Rights and Intersex People* (2015) at 19.

⁵⁷ Alice Domurat Dreger, above n 55, at 25–27, 30.

⁵⁸ Commissioner for Human Rights and Agius, above n 56, at 19.

⁵⁹ Alice Domurat Dreger, above n 55, at 26–27, 28.

the natural order of things.”⁶⁰ In her writing on hermaphrodites, Alice Dreger writes:⁶¹

“This is, then, a story about more than hermaphrodites and doctors. It is a story of bodies and beings and what these have meant to each other. It is as well a story about a struggle over who would decide what anatomy and identity could and would and should mean to each other.”

This enabled the strict definition of the categories of male and female and what it meant to be a woman and man. It began to dominate almost all societies in the twentieth century.⁶²

The importance to determine one’s sex and categorise it according to the male-female binary was important to avoid or prevent homosexuality.⁶³ Intersex people were viewed as a disgust of society.⁶⁴ They blurred the social lines and the way of life between man and woman. Dreger writes:⁶⁵

“Hermaphroditism was a sticky problem, one whose possible solutions held important ramifications well beyond the life of the individual doubtful patient. So...many medical and scientific men simultaneously expressed disgust at the very idea and resentment at the confusion hermaphrodites caused.”

Two things derive from this period. The first was the requirement to find the ‘true sex’ for each individual⁶⁶ and biomedicine understood the problem of hermaphroditism and the importance of early intervention and the need to make invisible the signs of ambiguity the highlight the fiction of the binary system. The

⁶⁰ At 27.

⁶¹ At 10–11.

⁶² Stephen Whittle *Respect and Equality: Transsexual and Transgender Rights* (Routledge Cavendish, 2002) at 4.

⁶³ Alice Domurat Dreger, above n 55, at 8.

⁶⁴ SF Ahmed, S Morrison and IA Hughes “Intersex and gender assignment; the third way?” (2004) 89 *Archives of Disease in Childhood* 847 at 848.

⁶⁵ Alice Domurat Dreger, above n 55, at 27.

⁶⁶ At 28.

second eventuated in the normalising of sex due to the “crude desire to eradicate ambiguity and prevent homosexuality, rather than a genuine concern for the well-being and best interest of intersex people.”⁶⁷

Over time discoveries lead scientists to realise that sex was not the binary that everyone had assumed it to be. Whether it be genitals, chromosomes, or hormones, or gonads there were variations and no standard.⁶⁸ This created a return to the socio-political sex that had been the status quo until roughly the 1800s, but under a new name ‘gender’. But like that of sex, it was not neutral nor natural.

Prior to the 1950s, gender was merely a grammatical term. Any use of the word gender, although rare, prior to 1950 was synonymous with the word sex in the socio-political sense.⁶⁹ Although feminists and non-feminists alike see gender as natural, intersex people and the treatment of them have played a significant role in the rise of gender and its mainstreaming. David Rubin writes:⁷⁰

“The dominant understandings of sex and gender have overdetermined the meaning of intersex, historically speaking, the concept of intersex paradoxically preceded and inaugurated what we call today the sex/gender distinction.”

The use of gender in the sense of social sex, as opposed to biological, has been linked back to John Money and his research with intersex infants and children.⁷¹

⁶⁷ Commissioner for Human Rights and Agius, above n 56, at 19.

⁶⁸ For more information refer to the following sources: Alice Domurat Dreger, above n 55; Elof Axel Carlson *The 7 Sexes: Biology of Sex Determination* (Indiana University Press, Bloomington, Indiana, 2013); Gerald N Callahan *Between XX and XY* (Chicago Review Press, Chicago, Ill, 2009); Joan Roughgarden *Evolution's rainbow* (University of California Press, Berkeley, California, 2009); Christopher Ryan and Cacilda Jethá *Sex at Dawn* (Harper, New York, 2010).

⁶⁹ David Haig “The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945-2001” (2004) 33 Archives of Sexual Behavior 87 at 95.

⁷⁰ David A Rubin “‘An Unnamed Blank That Craved a Name’: A Genealogy of Intersex as Gender” (2012) 37 Signs 883 at 883.

⁷¹ J Germon *Gender* (Springer, 2009), in particular, refer to the Introduction; Rubin, above n 70, at 886.

John Money proposed “using the term sex to refer to the biological classification of male/female and gender to refer to differences in behaviour by sex.”⁷² In cases of ambiguity, such as in intersex children, it was possible to alter the child’s anatomy from its ‘biological basis and the child’s “gender role could differ from various biological definitions of an individual’s sex.”⁷³ He believed that a sex could be determined, and the child was a blank slate and could be brought up in the gender that was assigned. As such, one could be surgically altered and if brought up in that role, they would adapt and fit in.⁷⁴

John Money introduced the term into the biomedical sphere in the 1950s and later it became popularised in the academic and socio-political spheres. As David Rubin writes:⁷⁵

“The tracing of the genealogy of intersex is underrecognized but historically pivotal role in the development of gender as a concept in twentieth-century American biomedicine, feminism and their globalizing circuits.”

The term carried more than a distinction. It carried the heteronormative system that could be implanted in and through society at large.

As biology could no longer demarcate the sexes, the enforcement of gender and the erasing of the ambiguity of intersex was required. It was from this usage that gender became common usage within both biomedical and social sciences.⁷⁶

David Rubin argues

“not only that intersexuality played a crucial role in the invention of gender as a category in the mid-twentieth-century biomedical and, subsequently, feminist

⁷² J Richard Udry “The Nature of Gender” (1994) 31 *Demography* 561 at 561.

⁷³ Haig, above n 69, at 95.

⁷⁴ Refer to this article for more detail on the connection of gender to John Money’s work and to the extension to feminist’s use: Rubin, above n 70.

⁷⁵ At 883.

⁷⁶ Germon, above n 71, at 2.

discourses and that Money used the concept of gender to cover over and displace the biological instability of the body he discovered through his research on intersex.”

Biomedicine centred on the interpretation of gender to explain the biological phenomena and disease. Rubin continues that gender is the story about “the regulation of embodied difference through biopolitical discourses, practices, and technologies of normalization that materialize in, through, and as gender.”⁷⁷ Cordelia Fine argues that rearranging gender enabled a reinterpretation of the⁷⁸

“social structures, values, norms, expectations, schemas, and beliefs that penetrate our minds, interactions, and institutions, and that influence interact, and become entangled with biology.”

These social structures with their norms and values became imbued through biology to appear natural over time when in fact it is a social construction implanted on and through the body. Alisa Sánchez refers to this binary as:⁷⁹

being founded naturally existing binary (between man and woman); is phallogentric; heteronormative; have the traits of male and female genders are fixed and also mutually exclusive; gender is inborn in a person and discoverable by medical science; gender is harmonious; and gender identity is socialised into human beings.

This not only affects intersex people, though it does affect them more than others leaving them with “violations such as shame, secrecy, and unwanted normalising treatment’,” but it also had a wider effect in maintaining and controlling the wider ‘sex scheme’ and preventing it from collapsing into diversity.⁸⁰ This had an effect

⁷⁷ Rubin, above n 70.

⁷⁸ Cordelia Fine *Testosterone Rex - Unmaking the Myths of Our Gendered Minds* (Icon Books Ltd, London, United Kingdom, 2017) at 191.

⁷⁹ Alisa Sánchez “Intersexuality, Human Rights, and the Colombian Constitutional Court’s Notion of Gender” [2010] UCLA Center for the Study of Women at 3.

⁸⁰ Rubin, above n 70.

of continuing the demarcation of sex as two species, but at the same time left intersex invisible.

3.2.2 Upholding Status of Sex

Although inequality was recognised as an important issue and women's rights became part of the UN reality, society was not ready to give up status. It was so entrenched within the system. Some statuses were slowly removed, but when it came to sex, it was so important, and so entrenched that it was essential to maintain the system and sex status had to remain. This was seen through the implementation of LGBT rights. Even introducing them within the UN framework, there was careful work not to break the binary of sex status. The male-female binary had to remain. This section will review the status system before reviewing the sex status system.

The hegemonic systems through the vertical horizon see sex status as important. They operate according to the "political, economic and socially constructed meta-narratives."⁸¹ Hegemony maintains the stability of hierarchical structures and social relations⁸² through a heteronomous becoming where one speaks or acts according to determinations outside of oneself wittingly or unwittingly.⁸³ It is so robust that, as Joan Roughgarden explains,⁸⁴

⁸¹ This meta-narrative may be supported by a capitalistic or labour/class consciousness, though it also may be through a scientific or religious one, or even a combination of these in advancing its hegemonic cause in both defining the collective what and the derivatives of the collective what, the statuses. Refer to: Anne Becker "Identity Premised on Equality of Difference as a Fundamental Human Right" in Cornelia Roux (ed) *Safe Spaces* (Sense Publishers, 2012) 83 at 86.

⁸² Valery Chirkov and others "Differentiating Autonomy from Individualism and Independence: A Self-determination Theory Perspective on Internalization of Cultural Orientations and Well-being" (2003) 84 *Journal of Personality and Social Psychology* 97 at 99.

⁸³ Michael J Sandel *Justice* (Penguin Books, London, 2010) at 109.

⁸⁴ Fine, above n 78, at 191.

“you can pull out a brick here and there, but the others continue to hold everything in place. They’re not easily torn apart and reconstructed in new ways.”

For example, it permits competition,⁸⁵ individualism⁸⁶ and pluralism to the extent that it does not destabilise the system. The hegemony defines the rules or the “cultural norms” of the collective and those of the status (identity) groups.⁸⁷ It is through hegemonic norms that it is possible to assign, or not as the case may be, entitlements, rights and duties.⁸⁸

Status is an ontological experience of hegemonic belonging.⁸⁹ It is usually attributed by fiat at birth⁹⁰ although may be attained by achievement or meritocracy. It determines recognition,⁹¹ ascribes positionality⁹² and roles. It also governs behaviour⁹³ and determines who counts as equals.⁹⁴ It is the “descriptive,

⁸⁵ Competition includes the bettering or the maintaining of one’s interests and benefits. Cillian McBride “Demanding Recognition: Equality, Respect, and Esteem” (2009) 8 *European Journal of Political Theory* 96 at 106, 107.

⁸⁶ Individualism rather than a separate understanding of society is more of a relativity of individual’s goals and preferences that may or may not be permitted with regards to the priority placed on the needs, norms and goals of the group or collective. See: Chirkov and others, above n 82; This relativity is thus situation and issue dependent, not society based. See: HC Triandis “Collectivism and Individualism as Cultural Syndromes” (1993) 27 *Cross-Cultural Research* 155 at 159; Daphna Oyserman, Heather M Coon and Markus Kemmelmeier “Rethinking Individualism and Collectivism: Evaluation of Theoretical Assumptions and Meta-analyses” (2002) 128 *Psychological Bulletin* 3 at 5; Anu Realo, Jüri Allik and Maaja Vadi “The Hierarchical Structure of Collectivism” (1997) 31 *Journal of Research in Personality* 93 at 94.

⁸⁷ Jessica Knouse “From Identity Politics to Ideology Politics” (2009) 2009 *Utah L Rev* 749 at 757.

⁸⁸ Sandra Fredman *Discrimination law* (Oxford University Press, New York, 2002) at 4; Chirkov and others, above n 82, at 100; Peter Spiller (6th edition ed, LexisNexis NZ, 2005) *Butterworths New Zealand Law Dictionary: a Sixth Edition of Hinde & Hinde’s Law Dictionary* at 223.

⁸⁹ Becker, above n 81, at 84.

⁹⁰ Costas Douzinas “Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?” (2002) 29 *Journal of Law and Society* 379 at 379.

⁹¹ Chirkov and others, above n 82, at 100.

⁹² Becker, above n 81, at 86.

⁹³ T Marshall “A Note on Status” in Jessica Evans, Paul Du Gay and Peter Redman (eds) *Identity - a Reader* (Sage Publications Ltd, London, UK, 2000) at 305.

⁹⁴ Joseph Slaughter “The Textuality of Human Rights: Founding Narratives of Human Personality” [2004] *Interdisciplinary Law and Humanities Junior Scholar Workshop Paper* at 4–5, 26–27, 29,

or more exactly, the ascriptive assignation of a person.”⁹⁵ They are normative categories⁹⁶ of underlying essences⁹⁷ of constitutive intrinsic attributes or traits⁹⁸ such as sex/gender, race, class, social status and other attributes.⁹⁹ Hegemony ensures the existing social arrangements and structures, while at the same time stifling diversity and difference and uniqueness.¹⁰⁰

3.2.3 Sex Status

Furthermore, the understanding and discussion of sex within international law has demonstrated that the importance of status remains strong, especially in relation to sex, even within international law. Although not defined in international law, the inference to status and its definitions as male or female are not so subtle. This indicates that the vertical interpretive horizon is still influential at least when it comes to sex becoming.

Sex status is the reproductive basis of society physically and symbolically.¹⁰¹ It regulates both socially – one’s expression, relations, roles and functions and legally

40; James Griffin “First Steps in an Account of Human Rights” (2001) 9 *European Journal of Philosophy* 306 at 311.

⁹⁵ David Pallauer (translator) Paul Ricœur *The Just* (University of Chicago Press, Chicago, 2000) at 2.

⁹⁶ Becker, above n 81, at 84.

⁹⁷ The categorising based on essences is the concept of ‘essentialism’: Roughgarden, above n 68, at 23.

⁹⁸ Carlos A Ball “Martha Nussbaum, Essentialism, and Human Sexuality” (2010) 19 *Colum J Gender & L* 3 at 3.

⁹⁹ M Montserrat Guibernau *Belonging: Solidarity and Division in Modern Societies* (Polity Press, Cambridge, UK, 2013) at 15; Slaughter, above n 94, at 34, 36–37, 46; Douzinas, above n 90, at 379.

¹⁰⁰ Jill Marshall *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers, Leiden; Boston, 2009) at 19; Jill Marshall *Human Rights Law and Personal Identity* (Routledge, Abingdon, Oxon; New York, NY, 2014) at 239; Guibernau, above n 99, at 15.

¹⁰¹ Lois McNay *Gender and Agency: Reconfiguring the Subject in Feminist and Social Theory* (Polity Press; Blackwell Publishers, Cambridge, UK; Malden, Massachusetts, 2000) at 90; Fine, above n 78, at 14; Ball, above n 98, at 13.

– one’s rights, duties and entitlements.¹⁰² It is neither a natural distinction nor ahistorical but is a product of historical and political-cultural forces.¹⁰³ While historical sex was male and non-male in the Greco-Roman period,¹⁰⁴ in the modern period, sex is recognised as two species with not just two different reproductive systems (women have ovaries, a womb and lactate while men are sperm producers) but also different socio-politically.¹⁰⁵ The separation was based on four tenets:¹⁰⁶

(1) the bifurcation of personhood into male and female components under the active/passive paradigm; (2) the polarisation of these male/female sex/gender ideals into mutually exclusive, or even opposing, identity composites; (3) the penalisation of gender atypicality or transitivity; and (4) the devaluation of those who are feminised.

These tenets not only separate sex into two species but also reject diversity and devalue difference. These tenets have remained so strong and hegemonic that they have come to appear as natural.

¹⁰² Marshall, above n 100, at 103; Cecilia L Ridgeway *Framed by gender* (Oxford University Press, New York, 2011) at 4; Gayle Rubin “The Traffic in Women: Notes on the ‘Political Economy’ of Sex” in Rayna R Reiter (ed) *Toward an Anthropology of Women* (Monthly Review Press, New York, 1975) at 169–170; Jennifer M Protas “Divesting from ‘The Apartheid of the Closet’: Toward an Enriched Legal Discourse of Sexual and Gender Identity” (2007) 38 *McGeorge L Rev* 571 at 575.

¹⁰³ John Stoltenberg *Refusing to be a Man: Essays on Sex and Justice* (UCL Press, London, 2000) at 25; Roughgarden, above n 68, at 23; Rubin, above n 102, at 204.

¹⁰⁴ Non-males include non-free men, women, slaves, and eunuchs (the word at that time for gender-diverse that includes today what we would call transgender and possibly intersex): Brent L Pickett “Natural Law and the Regulation of Sexuality: A Critique” (2004) 8 *Rich J L & Pub Int* 39 at 50.

¹⁰⁵ Constance Borde and Sheila Malovany-Chevallier (translators) Simone de Beauvoir *The Second Sex* (Jonathan Cape, London, 2009) at 21; Fine, above n 78, at 14; Judith Lorber “Believing is Seeing: Biology as Ideology” (1993) 7 *Gend Soc* 568 at 569; See generally: Robert Hurley (translator) Michel Foucault *The History of Sexuality: The Will to Knowledge* (Penguin Books Ltd, United Kingdom, 1998).

¹⁰⁶ Valdes, above n 54, at 170.

Sex status is essentialised through essences of attributes or traits¹⁰⁷ – every attributed action, reaction or feeling, whether it is physical, psychological or behavioural is mapped onto and understood according to one’s sex status as either male or female¹⁰⁸ as normative categories.¹⁰⁹ Cordelia Fine further describes these innate, immutable essences:¹¹⁰

“Of course, there is variability – not all men are identical, nor are all women. But amid all the ‘noise’ of individual differences, a male or female ‘essence’ can be extracted: characteristics of maleness and femaleness that are natural, immutable, discrete, historically and cross-culturally invariant, and grounded in deep-seated biological factors.”

They have come to be seen as natural, “static and fixed,” and “immune or separate from forces of social construction.”¹¹¹ These factors have been considered so ‘natural, innate, and immutable that they do not even change through time or culture. Its biological nature sets life on its course, and thus one status identity.

In fact, biology while having the possibility to narrate the diversity of nature has taken the narrative of hegemonic ideology upholding sex status. Joan Roughgarden remarks, science has been used to reinforce the status categories of sex. She writes this¹¹²

¹⁰⁷ The categorising based on essences is the concept of “essentialism”: Roughgarden, above n 68, at 23; Essences are the attributes or traits that are intrinsically constitutive of categories: Ball, above n 98, at 3.

¹⁰⁸ Jillian Todd Weiss “Transgender Identity, Textualism, and the Supreme Court: What is the Plain Meaning of Sex in Title VII of the Civil Rights Act of 1964” (2009) 18 Temp Pol & Civ Rts L Rev 573 at 599–600; Virginia Braun and Sue Wilkinson “Vagina Equals Woman? On Genitals and Gendered Identity” (2005) 28 Women’s Studies International Forum 509 at 509.

¹⁰⁹ Becker, above n 81, at 84.

¹¹⁰ Fine, above n 78, at 23.

¹¹¹ Ball, above n 98, at 3; See also: John D DeLamater and Janet Shibley Hyde “Essentialism vs Social Constructionism in the Study of Human Sexuality” (1998) 35 J Sex Res 10 at 10; Valdes, above n 54, at 162.

¹¹² Roughgarden, above n 68, at 23.

“amounts to passing the buck. Instead of taking responsibility for who counts as socially as a man or woman, people turn to science, trying to use the biological criteria for male to define male and the biological criteria for female to define a woman. However, the definition of social categories rests with society, not science, and social categories can’t be made to coincide with biological categories except by fiat.”

Furthermore, development biology is a method of removing the human from becoming who one is. A narrated life is one that refers back to the sex that develops in a linear process in spite of one’s narrative. It infers that sex, in this case, is not in one’s control, and rather is an inert process that will occur irrespective of what one may think or act. Joan Roughgarden writes that¹¹³

“developmental biology has fallen into the same trap as sexual selection theory has: it assumes that one master template is the norm, and that variety reflects a defective deviation from that ideal norm.”

The story of sex status has become so strong much of science follows the very same narrative. This is illustrated by Cordelia Fine:¹¹⁴

“Sex is so fundamental, so the story goes. It is the timeless, unchanging seed from which either a male or female developmental programme unfurls. Experience plays a secondary role in the individual’s developmental journey to a male brain and male nature, or to a female brain and female nature.”

This narrative then rejects diversity which would disrupt the linear development of this sex status from which the world is built. Francisco Valdes argues that this “inhibits sex/gender cultural diversity, harmony, and equality, and also subverts individual sex/gender autonomy and dignity.”¹¹⁵

¹¹³ At 185.

¹¹⁴ Fine, above n 78, at 23.

¹¹⁵ Valdes, above n 54, at 170.

3.2.4 Where to for intersex people?

It appears that both before and after the introduction of the UN and the IBOR, the sex status based on the binary of male-female still holds strong. One's becoming in these societies is part of a normative story. The hegemonic forces at play, directly and indirectly, lead one's becoming as a civil and social person. This social and civil person is understood and operated through status identities. Although rights are still part of the system, it depends on what one is, one's status. The autonomy to develop as who one is and how one comes to be when it comes to sex whether it be male, female, both or neither still appears distant. To understand why this is the case, it is important to look at the history of rights. Then, it will be possible to consider the subject of rights and recapturing of rights for the subject to whom they belong.

3.3 *The Concept of Rights and its Development.*

Societies all over the world subscribe to moral philosophies of freedom and justice in a sense of reciprocation. The moral basis of life may not have the word 'rights' or even 'human rights' as we know it today, but the basis and conceptualisation often still contained the basis of autonomy for development within reciprocal freedom and justice. In this sense 'rights' dates back for centuries. They are critical to the enabling of autonomy and as such are important, for example, for intersex people to have power over who they are and how they come to be. However, although many societies have had such moral basis of life, there have also been other forces at play that may deny such moral rights or restrict them in ways that benefit those forces and people in power. Under those conditions, the loss or restriction on moral rights impacts on their integrity of being and their dignity as a human being and the power over how one comes to be who they are.

Rights are central to their being, becoming and belonging. Becoming and belonging occur within socio-political situatedness. Paul Ricoeur argues that "the point where politics appears as the setting par excellence for the achievement of

human potentialities.”¹¹⁶ To actualise such potentialities, he argues “a person must also both interact with other capable persons and be the beneficiary of the continual mediation of institutionalized forms of association.”¹¹⁷ It is these institutionalised forms of association that is the place of politics, or what “Hannah Arendt called the ‘public space of appearance.’”¹¹⁸ He goes on to say that¹¹⁹

This notion of a public space first expresses the condition of plurality resulting from the extension of interhuman relations to all those that the face-to-face relation of ‘I’ and ‘you’ leaves you out as a third party. In turn, this condition of plurality characterises the will to live together of a historical community – a people, nation, religion, class, and so forth – itself irreducible to interpersonal relations. In this sense, the political institution confers a distinct structure on this will to live together that earlier characterised all such systems as ‘orders of recognition’.

These orders of recognition determine the situatedness of the ‘political body’ and how belonging and rights are attributed and operate. It is through this public space and the orders of recognition that one interacts with ‘the institutional other’ as Paul Ricoeur describes in his works such as the “obligation to participate in the burdens related to perfecting the social bond.”¹²⁰ This participation through such orders of recognition set the burdens of socio-political life and the rights derive from such a social bond.

As is previously seen, these orders of recognition may be based through humanity (horizontal horizon) or through institutional structures of collectivities including those of the modern state (vertical horizon). These orders of recognition are

¹¹⁶ Ricoeur, above n 95, at 8.

¹¹⁷ “Corrective Justice and Constitutional Torts Symposium: Re-Examining First Principles: Deterrence and Corrective Justice in Constitutional Torts” (2000–2001) 35 Ga L Rev 903 at 914.

¹¹⁸ Ricoeur, above n 95, at 8.

¹¹⁹ At 8.

¹²⁰ Janne E Nijman “Paul Ricoeur and International Law: Beyond ‘The End of the Subject’ Towards a Reconceptualization of International Legal Personality” (2007) 20 Leiden Journal of International Law 25 at 46.

intrinsic to the understanding and application of rights. Such distinction in rights of the vertical and horizontal horizons is illustrated through the work of Anne Becker. She argues “that there is a distinction between claiming rights rooted in only what (belonging) we are and claiming rights protecting who (in togetherness) we are.”¹²¹ The horizontal rights protect who (in togetherness) we are and how we come to be as relational beings while vertical rights are based on moral determinations of what one is and how one lives.

The horizontal understanding of rights focused on the individual and applied within relationality. It is based in who one is as a unique and distinct being worthy of dignity while protecting togetherness and relationality.¹²² The overall aim is to achieve well-being and potentiality (human flourishing) rather than one’s personal interests.¹²³

The vertical understanding of rights, however, centres on the morality of the collectivity. The morality of the collectivity and its associated social structures determines what (material) interest¹²⁴ or benefit one has. As such, each one’s rights (and entitlements) are according to one’s status rights (‘what one is’),¹²⁵ including that of positionality, dignity, honour, and the associated rights and entitlements.¹²⁶ When one is entitled to such status-based rights, there is a

¹²¹ Becker, above n 81, at 84.

¹²² Chirkov and others, above n 82, at 100; Becker, above n 81, at 84.

¹²³ John Eekelaar “Personal Rights and Human Rights” (2002) 2 Hum Rts L Rev 181 at 185.

¹²⁴ Susana Narotzky and Paz Moreno “Reciprocity’s dark side: Negative reciprocity, morality and social reproduction” (2002) 2 Anthropological Theory 281 at 285.

¹²⁵ Chirkov and others, above n 82, at 100.

¹²⁶ Dignity is that of power and positionality as opposed to being inherent as a human being: Rhoda E Howard and Jack Donnelly “Human Dignity, Human Rights, and Political Regimes” (1986) 80 The American Political Science Review 801 at 808–809; Andrew Brennan and YS Lo “Two Conceptions of Dignity: Honour and Self-Determination” in Jeff Malpas and Norelle Lickiss (eds) *Perspectives on Human Dignity: A Conversation* (Springer Netherlands, 2007) 43 at 808–809.

tendency to assert and maximise them to one's interest or benefit.¹²⁷ This is often at the expense of others around them. 'Liberal rights' rather than breaking down statuses and the utilities involved in them, has merely increased the number of status groups looking to maximise their interests and benefits. Where reciprocity is invoked¹²⁸ consideration often focuses on the expectation of returned benefits.¹²⁹ These rights are not protecting of or based on relationality.¹³⁰ Rather they are centred on maintaining the vertical structures of the collectivity as described in chapter 1.

This section outlines the basic history of rights throughout time. It highlights that moral rights are not new and nor are they necessarily Western-based. There has been a push and pull between a vertical and horizontal understanding of rights as just outlined, over the last few thousand years. This is noticeable as whenever there has been a move to improve moral rights based in the horizontal, there has systematically been a pushback by those in power. This was often to suppress such understanding or re-interpret such moral philosophies in favour of those of their vertical horizon. This difference in understanding of rights at different periods of time and in different places varies between autonomous relationality rights of potentiality and well-being and the heteronomous status-based rights of the hegemonic collectivity.

3.3.1 Early Moral Rights

There are some societies throughout time where the orders of recognition within systems of plurality characterises a will to live together as its orders of

¹²⁷ Eekelaar, above n 123, at 185; Geoffrey MacCormack "Reciprocity" (1976) 11 *Man* 89 at 98; Chirkov and others, above n 82, at 100.

¹²⁸ This sense of reciprocity is the negative reciprocity as explained in MacCormack, above n 127, at 99.

¹²⁹ Armin Falk and Urs Fischbacher "A Theory of Reciprocity" (2006) 54 *Games and Economic Behavior* 293 at 294, Footnote 1.

¹³⁰ MacCormack, above n 127, at 99.

recognition.¹³¹ Within such orders, a moral obligation to live together established principles and rights to enable a relational society. This illustrates what would be called moral rights, and an early form of what today is known as ‘human rights’.

Although the term ‘human rights’ may be modern, there have been conceptualisations of human rights around for thousands of years. The concept, even without being named, “can be traced to the origin of the human race itself” central to “all philosophies of our time.”¹³² Paul Lauren wrote:¹³³

“Early ideas about general human rights thus did not originate exclusively in one location like the West or even with any particular form of government like liberal democracy, but were shared throughout the ages by visionaries from many intellectually rich cultures in many lands who expressed themselves in many ways.”

The concept of moral rights are essential to community life and have been around for many centuries. It has not been confined to one period or one particular civilisation. It is arguable that it is part of humanness.

Some of the earliest traces of moral rights go back to the Hammurabi Code (17795-1750 BCE). This code indicated the principle of equal protection of the law among other relational issues.¹³⁴ Furthermore, Paul Gordon Lauren referred to the philosophy of Meng Zi or Mencius from over two thousand years ago. Such philosophy believed that¹³⁵

¹³¹ Ricœur, above n 95, at 8.

¹³² Howard and Donnelly, above n 126, at 801.

¹³³ Paul Gordon Lauren *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press, Philadelphia, 2003) at 12.

¹³⁴ Dinah Shelton *Advanced Introduction to International Human Rights Law* (Edward Elgar, Cheltenham, UK; Northampton, MA, USA, 2014) at 16.

¹³⁵ Lauren, above n 133, at 10.

“all human beings naturally share a common humanity, moral worth, inherent dignity and goodness, and a compassionate mind that cannot bear to see others suffer.”

This philosophy indicated the importance of relationality to the maintenance of community and respect for others within the community. Such principles provided guidance for the solidarity of community and the interconnections for everyday functioning of that community.

This understanding continued even in the middle of the first millennia AD. The natural law understanding of solidarity continued as an important principle. Lauren refers to Roman philosophers, such as Marcus Tullius Cicero that claimed¹³⁶

“natural law ‘binds all human society together’, applies to every member of the ‘whole human race’, “marks the unique dignity of each person, imposing on all of us responsibilities to be keepers of others, and provides ‘eternal and unchangeable law ... valid for all nations and all times’.”

Moreover, Abu Al-Farabi, a tenth Century Islamic philosopher, wrote of a vision of a “moral society in which all individuals were endowed with rights and lived in charity with their neighbours.”¹³⁷ Furthermore, Africa had the Idea of Ubuntu. The conceptualisation of Ubuntu is as follows:¹³⁸

I am a person because you are a person; that I can’t separate my humanity from an acknowledgement of your humanity. It presupposes that I don’t strengthen my personality through isolating myself from you; but on the contrary, I benefit from my association with you.

¹³⁶ At 13; Shelton, above n 134, at 4.

¹³⁷ Lauren, above n 133, at 11.

¹³⁸ Albie Sachs “Liberty, Equality, Fraternity: Bringing Human Solidarity Back Into the Rights Equation” (2012) 4 J Human Rights Practice 365 at 378.

These moral philosophies which represent various areas of the world indicate the importance of the principles of solidarity and respect for each one's dignity and a unique, yet essential relational being. This was a respect for humanness of oneself and of others. Moral rights enabled the upholding of such principles and remedies to bring them back in balance. This snapshot of various philosophies, though it cannot be claimed as universal, certainly indicates a widespread acceptance of such conceptualisation. It certainly does not belong solely to one particular worldview.

Much of the early philosophical moral rights showed similar characteristics of the maintenance of dignity and respect of humanness and the rights to bring about balance in society when dignity and respect were not upheld. Although they may not have had a complete list of rights and freedoms we see with the modern rights codes, the core principles were there including that of liberty, equality (as in respecting people as who they are as a human being and their flourishing) and fraternity. It is in this sense one can argue that human rights or the early proto form of them were universal.

3.3.2 Collectivities (including States) and Rights

There are some societies throughout time where the orders of recognition are situated within a vertical horizon. This is illustrated by Paul Gordan Lauren where he stated that¹³⁹

Throughout history most individuals in the world found themselves confronting hierarchical societies and imperial or authoritarian regimes of one kind or another in which differences mattered.

¹³⁹ Lauren, above n 133, at 28.

Such societies may have had various political basis, such as 'traditional', religious, or other forms of stratified collectivities¹⁴⁰ such as political or economic basis or a combination of them including those such as authoritarian or 'liberal'. They all had in common the nature of powerful stratified societies¹⁴¹ adhering to principles and practices of the collectivity.¹⁴²

The prevailing culture as expressed through their ideology was accepted as 'the natural order'.¹⁴³ They emphasised the hierarchical, patriarchal relationships of the powerful over the subordinate.¹⁴⁴ The system was skewed in favour of the elite which often excluded particular groups. These societies were structured to maintain the interests of those in power.¹⁴⁵ Those in power aimed "to retain privilege, hierarchy, hereditary rule, property, dominance, and caste."¹⁴⁶ This was upheld through respect and fear of authority.¹⁴⁷ They¹⁴⁸

"aimed and still aim to maintain power and invoke cultural traditions subordinating, inter alia, women, children, minorities and workers. Throughout much of history, slavery has been widespread, often justified by distorted theology, and torture has been prevalent method of investigation and punishment."

¹⁴⁰ Jerome J Shestack "The Philosophic Foundations of Human Rights" (1998) 20 Human Rights Quarterly 201 at 205–206.

¹⁴¹ These have sometimes been referred to as traditional societies and even sometimes indigenous communities or societies (It must be noted that not all traditional/indigenous societies were stratified hierarchical collectivities.) Refer to Howard and Donnelly, above n 126, at 808–809.

¹⁴² At 808.

¹⁴³ Lauren, above n 133, at 21, 23.

¹⁴⁴ At 23.

¹⁴⁵ At 21, 23, 35.

¹⁴⁶ Shelton, above n 134, at 15.

¹⁴⁷ Lauren, above n 133, at 23.

¹⁴⁸ Shelton, above n 134, at 15.

In doing so, it often resulted in violence, the subordination of women, slavery, military conquest, or torture.¹⁴⁹ Adherence and conformity to the system was tantamount and in the worst-case scenario, methods including torture or imprisonment were utilised.

These orders of recognition were inbuilt or inherent to the system. Within such societies orders of recognition were built into the 'superstructure/infrastructure'. Bernard Dauenhauer and Michael Wells writes that within such societies one is¹⁵⁰

bound to these others through the mediation of different orders of large scale social systems or "orders of recognition" that structure the interaction. Among these orders are pedagogical systems, scientific systems, monetary systems, health systems, and, of central interest in the present context, legal systems. It is within these systems that persons receive recognition as holders of specific positions or roles, e.g., teacher or physician. In legal systems in democratic societies, there are multiple positions of office and there is the position of citizen.

Such orders of recognition provided stability and certainty through strict conformity and obedience¹⁵¹ where everybody knew their place and role. In these societies, one was individually responsible for one's action, irrespective of the influence and control over one's person or the effect of society on one's person. It became the natural order of things, and naturalised among the collectivity.

The order of recognition within the collectivity justified the natural order of stratified divisions.¹⁵² These were based on statuses based on caste or class, race, gender, belief, ethnicity, place of origin or other ascriptions.¹⁵³ These statuses

¹⁴⁹ Lauren, above n 133, at 24, 28.

¹⁵⁰ Bernard P Dauenhauer and Michael L Wells "Corrective Justice and Constitutional Torts" (2000–2001) 35 Ga L Rev 903 at 914.

¹⁵¹ Lauren, above n 133, at 21, 23.

¹⁵² At 24.

¹⁵³ Howard and Donnelly, above n 126, at 808; Lauren, above n 133, at 21.

determined one's positionality, worth, rights and responsibilities along with privileges and duties.¹⁵⁴ If one's status was inferior or not recognised (non-human), then there would be limited or no rights and entitlements.¹⁵⁵ Dignity was tied to one's status and fulfilling one's social role.¹⁵⁶

These societies had various sizes and leadership. Power and control was vested through the authoritative power such as a monarch.¹⁵⁷ As the sovereign state appeared, it took over where other societies had operated through such systems. Thomas Hobbes argued that such a state was required due to the 'state of nature' and to ensure the maintenance of order and that ruler had to be absolute to which the subject had to obey.¹⁵⁸ Even with the transfer from sovereign to the States, the system of power and control was also transferred to the State, known today as State sovereignty. The principle of sovereignty was enunciated by sixteenth-century French political philosopher Jean Bodin as the¹⁵⁹

“power absolute and perpetual and subject to no law...providing the distinguishing mark of the state. It alone possessed the power to decide how it would behave in the world and how it would treat its own borders and those under its control elsewhere.”

Hobbesian philosophy argues that the essence of sovereignty is “the power of the state and the absolute monarch that acted in its name ruled without challenge, doing whatsoever he shall think necessary to be done.”¹⁶⁰ He also argued that the social contract enables the moral-juridical action of the sovereign state as a

¹⁵⁴ Howard and Donnelly, above n 126, at 808

¹⁵⁵ Lauren, above n 133, at 21.

¹⁵⁶ As opposed to being inherent as a human being: Howard and Donnelly, above n 126, at 808–809.

¹⁵⁷ Lauren, above n 133, at 23.

¹⁵⁸ At 22.

¹⁵⁹ At 26–27.

¹⁶⁰ At 27.

supreme power.¹⁶¹ They recognised no universal moral authority of natural law on behalf of individual rights from above and no petition from below.¹⁶²

The individual is contractually subject to rights, and obligations, in exchange for security and civil status, while at the same time, their association with other individuals in a political body is insecure and revocable.¹⁶³ Although rights and freedoms were part of most such societies, they could be denied in part or full to certain statuses when deemed politically expedient or necessary, such as for security reasons. Moreover, these rights and freedoms were centred on status. One's rights and access to them depended on one's status, such as positionality and access to resources and people of influence. There was a thought of equality of status or equality between equals, but the thought of equal respect was foreign consideration.¹⁶⁴ Lower status or non-recognised statuses have had little or no access to rights and entitlements.¹⁶⁵

Though status maintained the superstructure and infrastructure, it had great effect on individuals. In particular, it has greater effect on those at the lower levels of the collectivity and those statuses that were not recognised, such as women or sexual minorities, who were treated as inferior beings.¹⁶⁶ As Lauren states:¹⁶⁷

“The majority of those who lived and died found themselves confronting various forms of prejudice and discrimination based on gender, race, caste or class, belief, ethnicity, place of origin, or some other form of difference. For this reason, they were not regarded as being fully human, and therefore never

¹⁶¹ Nijman, above n 120, at 26, footnote 3.

¹⁶² Lauren, above n 133, at 27.

¹⁶³ Ricœur, above n 95, at 9–10.

¹⁶⁴ Howard and Donnelly, above n 126, at 808; Lauren, above n 133, at 23.

¹⁶⁵ Lauren, above n 133, at 21.

¹⁶⁶ Howard and Donnelly, above n 126, at 808; Lauren, above n 133, at 23, 35.

¹⁶⁷ Lauren, above n 133, at 35.

allowed to exercise whatever rights they may claim, or that others might assert on their behalf.”

Even if one had entitlement, they did not have the means to enforce such rights. For those who were not recognised, did not have status, they had not rights to claim.

3.3.3 Rights of Man

In reaction to the absolutist states and the sovereign rulers, rebellions began in Spain and France, spreading to England.¹⁶⁸ These revolutions ended the divine right of Kings.¹⁶⁹ These were in reaction to and the result of the abuse of power over the citizens within its territories.¹⁷⁰ The citizens sought protection of natural rights such as the right to life, representative government, and the rule of law.¹⁷¹ The seventeenth century in political practice and liberal theory stressed natural rights.¹⁷²

Intellectuals sought to free the individual from dogma and traditional authority.¹⁷³ At the beginning of the era of the Enlightenment, there was the recognition of the need to protect and guarantee individual rights.¹⁷⁴ They saw a need to redraw the social contract from that of the Hobbesian model. For Rousseau, the social contract was meant to be a relationship between the citizens and the state in mutuality. He viewed that the “relationship of the individual to the State provides the foundation of human rights, in which the State’s role is to protect and

¹⁶⁸ At 14.

¹⁶⁹ Louis B Sohn “New International Law: Protection of the Rights of Individuals Rather Than States, The” (1982–1983) 32 Am U L Rev 1 at 1.

¹⁷⁰ Lauren, above n 133, at 14.

¹⁷¹ Stephen Andrew James *Universal Human Rights: Origins and Development* (LFB Scholarly Pub, New York, 2007) at 13.

¹⁷² At 13.

¹⁷³ Lauren, above n 133, at 15.

¹⁷⁴ Shelton, above n 134, at 5.

guarantee individual rights.”¹⁷⁵ This protection and guarantee were written into the documents such as the ‘Rights of Man’ as proposed by John Locke, Thomas Paine, and Jean-Jacque Rousseau among others.¹⁷⁶ Thomas Paine returned to the theme of¹⁷⁷

“responsibility for being a ‘keeper’ of others by explicitly responding to the French Declaration in these terms: ‘A Declaration of Rights is, by reciprocity, a Declaration of Duties also. Whatever is my right as a man is also the right of another; and it becomes my duty to guarantee as well as to possess’.”

It was these connections that later were to become influential on the IBOR under the UN.¹⁷⁸ These rights of man have maintained some relevance even today, but they have been constrained.

3.3.4 Reaction to and the Constraints on the Rights of Man

However, the visions as provided for in the rights of man and the sovereignty of the individual did not go unchallenged and uncontested.¹⁷⁹ They were seen as a direct challenge to the sovereign state and the interests of the powerful elite saw these ‘rights of man’ as a direct challenge to their “powerful interests, privilege and tradition.”¹⁸⁰ Writing in regard to this concern, Edmund Burke wrote that the French Revolution would lead to the “destruction of the established tradition, hierarchy, inherited privilege and property, and historical continuity.”¹⁸¹ Reaction against the rights of man were such that even governments sponsored attacks on

¹⁷⁵ At 5.

¹⁷⁶ At 5.

¹⁷⁷ Lauren, above n 133, at 20.

¹⁷⁸ At 18.

¹⁷⁹ At 21.

¹⁸⁰ At 21, 28.

¹⁸¹ At 22.

philosophers, their selling and promotion of it, and even the execution of the philosophers or their followers.¹⁸²

These reactions to rights in protection of elite interests and maintaining the systems were critical to upholding the hegemony of the collectivity. Any rights available and access to them had to be limited so as not to destroy the status quo. Situated within the vertical horizon, the protection of the hegemonic collectivity derived from sovereign states. Sovereign states were a transition from the Middle Ages culminating in consolidating in Europe¹⁸³ around the Peace of Westphalia in 1648.¹⁸⁴ Daniel Philpott writes that “For Hobbes, the people established sovereign authority through a contract in which they transferred all of their rights to the Leviathan, which represented the abstract notion of the state.”¹⁸⁵ These states took on the authority to protect the hegemonic collectivity. The Hobbesian concept of the sovereign state ruled without challenge both from within and without.¹⁸⁶ Sovereignty enabled States the full right in how to advance their own interests as it was "a matter exclusively within their own domestic jurisdictions."¹⁸⁷ Paul Lauren referred to Jean Bodin’s work stating that¹⁸⁸ (27)

“sovereign power provided ‘the distinguishing mark of a state’. It alone possessed the power to decide how it would behave in the world and how it would treat its own people within its borders and those under its control elsewhere.”

¹⁸² At 21.

¹⁸³ Daniel Philpott “Sovereignty” in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (summer 2016 ed, Metaphysics Research Lab, Stanford University, 2016).

¹⁸⁴ The Peace of Westphalia, (adopted 1648, signed 24 October 1648, entered into force 24 October 1648).

¹⁸⁵ Philpott, above n 183.

¹⁸⁶ Lauren, above n 133, at 27.

¹⁸⁷ At 26.

¹⁸⁸ At 27.

The sovereign states had the right of control over the people within their jurisdiction. This went without challenge and ensured the protection of the interest of the state and maintained the hegemonic collectivity.

At the early stages of international law, the sovereign state had the power and authority as international subjects of law.¹⁸⁹ International law would not interfere with the States rights over the treatment of its people. As Lauren writes:¹⁹⁰

“How they treated their own people or those under their control was their own business and most certainly not subject to any outside international standards, scrutiny, criticism, or interference.”

States determined the rules over the people and this was not subject to constraint or criticism. It left the citizens at the mercy of their own state, and “international law had little to say about mistreatment of persons by their own government.”¹⁹¹ At that time, international law concerned the relations between states. It did enable the protection of states or of that of a state’s citizen when in another state but not the individuals within the state.¹⁹² However, a stateless person was entitled to no protection whatsoever.”¹⁹³ International law at that time could not confer rights to others citizens as they only were for the protection of state sovereignty. The Oppenheim Treatise on International Law states the ‘Rights of Man’ “could not enjoy any protection under international law because that law is concerned solely with the relations between States and cannot confer rights on individuals.”¹⁹⁴ Individuals were reliant on the state for protection. The rights of man were only valid if applicable within that state and its understanding of it.

¹⁸⁹ At 27.

¹⁹⁰ At 26.

¹⁹¹ Sohn, above n 169, at 9.

¹⁹² At 2–4.

¹⁹³ At 9.

¹⁹⁴ Shelton, above n 134, at 25.

The sovereign state established its own laws and norms. These enabled the protections of its interests within its own jurisdiction.¹⁹⁵ However, over time, there was reaction to natural law and in particular the push of rights through natural law. This was achieved through legal positivism arising in the eighteenth century. It is synonymous with positive norms, that is, norms made by the legislator or considered as common law or case law.¹⁹⁶ These laws or norms provide the “sufficient conditions for the truth of the proposition of the law.”¹⁹⁷ It did not require, at least according to the positivists, a moral basis. It has two dualities: the separation of morals from the legal sphere and within the legal sphere, attention solely to the “legal rules enacted by the state and excludes all law whose existence cannot be traced to the statute books or the decisions of the courts.”¹⁹⁸ Positivists such as Bentham and Hobbes argue law can only stem from the authority and prescription of state and officials and nothing else.¹⁹⁹ This divorced the legal system of ethical and moral foundations.²⁰⁰ They viewed that there was “no moral authority of natural law on behalf of individual rights from above, no claims of an emperor or a pope, and no petitions from feudal barons or subjects below.”²⁰¹ The only source of law was the state.

Legal positivism enabled the enforcement of the sovereign state without, at least it is argued, the reliance on morals. The sole source of law was the state. Individuals had a moral duty, to the law of the state. As David Dyzenhaus wrote, it is a “general moral duty to obey the law even when there is no freedom,” and the

¹⁹⁵ Lauren, above n 133, at 26.

¹⁹⁶ Kenneth Einar Himma *Internet Encyclopedia of Philosophy* (online ed, 2018) Legal Positivism <<http://www.iep.utm.edu/legalpos/>>.

¹⁹⁷ Ronald Dworkin *Taking Rights Seriously* (Harvard Univ Press, Cambridge, Mass, 1978) at vii.

¹⁹⁸ Hans J Morgenthau “Positivism, Functionalism, and International Law” (1940) 34 *Am J Int’l L* 260 at 261.

¹⁹⁹ Shestack, above n 140, at 209; Dworkin, above n 197, at vii.

²⁰⁰ Shestack, above n 140, at 209.

²⁰¹ Lauren, above n 133, at 27.

duty is stronger within the conditions of freedom of a democratic government.²⁰² This duty is the maintenance of society and the rule of law. Joseph Slaughter writes that²⁰³

“[p]ositive law presses to become common sense through the force of the commandment – a sociohistorically contingent precept, the legitimacy of which depends upon the threat of violence.”

Legitimacy was seen in the law and its source as common sense and incorporated the threat of violence. Rights such as ‘The Rights of Man’ were contentious as they were seen as abstract and irrational. Bentham saw such rights as nonsense on stilts and “people should know their proper place” in society.²⁰⁴ For example, Bentham believed that²⁰⁵

“abstract declarations and proclamations of natural rights might easily replace positive law and specific legislation. ‘Rights’, he wrote, ‘is a child of the law; from real law come real rights; but from imaginary laws from ‘law of nature’ come imaginary rights. Natural rights are simple nonsense.”

This was in reaction to the natural law based push of rights. Positivism rejects the pre-existence of natural law or that rights exist outside of the explicit collection of rules.²⁰⁶ As such, it became the most serious attack on natural rights, and in particular, the rights of man²⁰⁷ – a fore runner to human rights.

²⁰² David Dyzenhaus “The Genealogy of Legal Positivism” (2004) 24 Oxf J Leg Stud 39 at 42.

²⁰³ Joseph R Slaughter *Human Rights, Inc* (1st ed, Fordham University Press, New York, 2007) at 63.

²⁰⁴ Shelton, above n 134, at 15.

²⁰⁵ Lauren, above n 133, at 22.

²⁰⁶ Dworkin, above n 197, at xi.

²⁰⁷ Shestack, above n 140, at 208.

Positivist law in many states have used the vehicle of personhood²⁰⁸ to determine or recognise legal status including that of natural persons²⁰⁹ as a right-and-duty-bearing unit.²¹⁰ This is a legal fiction, man-made and artificial,²¹¹ in that it can mean ‘whatever the law makes it to mean’.²¹² For example, it refers back to entities St. Thomas Aquinas called *personae fictae*²¹³ and later also included granting of such status to business corporations.²¹⁴ For a natural person, this was based on certain characteristics which excluded others or any variations of them²¹⁵ that became an expression of pre-formed and complete ideological selves.²¹⁶ This was supported through scientific positivism to justify the inequality and discrimination such as with racism²¹⁷ and sexism.

Recognition of personhood is essential to the granting of rights, freedoms, and entitlements.²¹⁸ For example, it determined if one could make contracts, own property, sue in court or exercise civil rights as if they were an individual.²¹⁹ These rights and freedoms were only available to a legal person when “created by explicit political decisions or explicit social practice.”²²⁰ They are applied narrowly as

²⁰⁸ Personhood is also referred to as legal personality.

²⁰⁹ This includes natural persons but it is not an equivalent of human being.

²¹⁰ John Dewey “The Historic Background of Corporate Legal Personality” (1926) 35 *The Yale Law Journal* 655 at 656; Bryant Smith “Legal Personality” (1927–1928) 37 *Yale L J* 283 at 283; Michael Galchinsky “Quaint and Obsolete: The ‘War on Terror’ and the Right to Legal Personality” (2013) 14 *Int Stud Perspect* 255 at 256; Slaughter, above n 203, at 18; Slaughter, above n 94, at 29.

²¹¹ Slaughter, above n 203, at 62.

²¹² Dewey, above n 210, at 656; Slaughter, above n 203, at 18; Slaughter, above n 94, at 29.

²¹³ Dewey, above n 210, at 665.

²¹⁴ Slaughter, above n 203, at 21.

²¹⁵ In themselves characteristics, elements, and traits exist prior to rights and other public institutions, have no inherent meaning apart from that of the individual concerned, see: Douzinas, above n 90, at 379; Slaughter, above n 94, at 34, 36–37, 46.

²¹⁶ Douzinas, above n 90, at 379.

²¹⁷ James, above n 171, at 14.

²¹⁸ Spiller, above n 88, at 223.

²¹⁹ Galchinsky, above n 210, at 256; Smith, above n 210, at 283.

²²⁰ Dworkin, above n 197, at xii.

“individualistic, largely ‘negative’, civil and political rights held against the state.”²²¹ In so doing, there is minimal account taken of the enforcing of such rights on others. Such an understanding and implementation of rights does not focus on well-being and flourishing.²²² The status of personhood determined whether one had rights and entitlements and moreover, dependent upon one’s status whether there was the ability to access such rights through class and resources and so on.

Positivism and other politico-legal theories have impacted on the significance of the revolutionary rights ideals of the Eighteenth Century and distorted the struggle for freedom and dignity.²²³ Recognition or protection through personhood was clearly not sufficient. As Jill Marshall States:²²⁴

“many past injustices, including legal categorisations, mean that certain types of humans have been disregarded as human beings with rights, and as persons who are legal subjects. Such injustices continue into the present and will continue in the future unless changes are made.”

The violations of the human person and denial of rights do not mean they do not exist. Jack Donnelly explains this as the shortcoming of the institutions and not the rights themselves:²²⁵

“If the world or particular societies are structured in such a way that enjoyment of the right is regularly denied or frustrated – that is, if the right is not widely implemented – that is a regrettable, even deplorable, shortcoming. However, it is a shortcoming of social and political institutions and practices and does not entail that one does not have the right, is not entitled to x, or is not morally justified in claiming x as a right.”

²²¹ James, above n 171, at 7.

²²² Eekelaar, above n 123, at 185.

²²³ Asbjørn Eide and Gudmundur Alfredsson “Introduction” in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights: a Commentary* (Scandinavian University Press, Oslo : Oxford, 1992) at 8–9; James, above n 171, at 14.

²²⁴ Marshall, above n 100, at 26.

²²⁵ Jack Donnelly “Human Rights as Natural Rights” (1982) 4 Hum Rts Q 391 at 398.

Thus, personhood permitted the enforcing of the rights of others while denying the rights to some,²²⁶ such as slaves, women, sexual minorities, stateless individuals, and children.²²⁷ Some groups, such as slaves were not granted personhood at all, while others were granted limited or conditional personhood such as with children.²²⁸ This enhanced inequality, injustice, and, in some cases, became the justified basis of it. This use of positivist personhood and the associated rights and entitlements justified the expansionist and segregationist schemes and policies of the imperial and colonising nations.²²⁹ This has led to the violation of rights through societies such as in Europe, and the settled colonies such as in North America, Latin America, Australia, and New Zealand.²³⁰ It has enabled the radical inequalities of racism, sexism and slavery²³¹ and severe repression causing extensive suffering.²³²

Even later international law, such as the 'League of Nations' was not sufficient to uphold the rights of being. Zeid Ra'ad Al Hussein, Human Rights Commissioner, refers to the time under the League of Nations when he states:²³³

Aside from some successes, it was stymied by military aggressions, the absence of the United States and the withdrawals of Germany, Italy, Japan and the USSR.

²²⁶ Jan Mårtenson "The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Programme" in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights: a commentary* (Scandinavian University Press, Oslo : Oxford, 1992) at 17; Slaughter, above n 94.

²²⁷ Galchinsky, above n 210, at 256–257.

²²⁸ Jessica Berg "Of Elephants and Embryos: A Proposed Framework for Legal Personhood" (2007) 59 *Hastings L J* 369 at 373.

²²⁹ James, above n 171, at 14.

²³⁰ Eide and Alfredsson, above n 223, at 9.

²³¹ James, above n 171, at 14.

²³² Eide and Alfredsson, above n 223, at 8.

²³³ Zeid Ra'ad Al Hussein and UN High Commissioner for Human Rights "Opening ceremony of the 34th session of the Human Rights Council in Geneva" (34th session of the Human Rights Council, Human Rights Council, Geneva, 27 February 2017).

Its treatment of colonialism was undermined from the outset by rejection of the principle of non-discrimination.

This was highlighted through the atrocities of the Second World War which were considered some of the most “barbarous acts which have outraged the conscience of mankind.”²³⁴ However, due to the immediate background of the Second World War, the atrocities and human rights violations “shocked the conscience of human beings worldwide and laid the ground for a broad consensus that a new humanistic legal order would have to be established.”²³⁵ Although the sovereign state had jurisdiction, atrocities prevailed even in states who espoused the rights of man.

3.3.5 Historical Repetition

There has been a continuous tug of war between two types of societies that are through the two horizons – horizontal and vertical – and consider rights ideologically differently as described above over the last two millennia. History has demonstrated that the powerful elite and rulers have continually fought against the moral rights in order to retain their interests and power. The vertical societies aimed to maintain stratified societies that cemented a hegemonic positionality over them and each individual maintained the positionality deemed by one’s status. On the other hand, situated within the horizontal horizon provides a human rights environment that enhance the fraternity or community through the enabling of people to flourish which respects each one’s dignity.

However, even in societies that are ‘liberal’ and espouse rights and freedoms, these are often constricted characterisations of human rights.²³⁶ The liberal view of rights often fails, as Stephen James states, “to take proper account of the role that duties, socio-economic rights, the interest of the community, group claims,

²³⁴ Slaughter, above n 94, at 26.

²³⁵ Eide and Alfredsson, above n 223, at 10.

²³⁶ James, above n 171, at 9.

and importantly, conceptions of inherent dignity have in that heritage.”²³⁷ While essentialising individuals as a particular type of personhood, it denies their own narrativity of identity as a dignified being and the dutiful respect and duty to society as a capable being.

Furthermore, liberal rights, often in the name of human rights, are fought for in through benevolence on behalf of those concerned. It aims to help people in ways that appear good for the individual irrespective of whether the person agrees with such a perspective or action. Joseph Slaughter argues that the liberal benevolence of rights is troubling through their violations of rights in name of rights themselves.²³⁸

“the banalization of human rights means that violations are often committed in the Orwellian name of human rights themselves, cloaked in the palliative rhetoric of humanitarian intervention, the chivalric defense of women and children, the liberalization of free markets, the capitalist promise of equal consumerist opportunity, the emancipatory causes of freedom and democracy, etc.”

These rights appear in the name of freedom but can sometimes leave some people, especially the vulnerable, less free. Such human rights have become increasingly systematic, corporate, and institutional.²³⁹ The beneficiary of such rights may not be the ones they are aiming to help. The treatment of intersex people demonstrate such benevolence. Anne Fausto-Sterling writes that after an intersex person begins the normalisation process so that they can²⁴⁰

“quietly slip into society as ‘normal’ heterosexual males or females...The aims of the policy are genuine humanitarian, reflecting the wish that people be able to

²³⁷ At 7.

²³⁸ Slaughter, above n 203, at 2.

²³⁹ At 2.

²⁴⁰ Anne Fausto-Sterling “The five sexes: Why Male and Female Are Not Enough” (1993) 33 *The Sciences* 19 at 22; Morgan Holmes *Intersex: a Perilous Difference* (Susquehanna University Press, 2008) at 20.

'fit in' both physically and psychologically. In the medical community, however, the assumptions behind that wish – that there be only two sexes, that heterosexuality alone is normal, that there is one true model of psychological health – have gone unexamined.

The benevolence is portrayed in the eyes of doing the right thing for the person, it often hides deeply ingrained ideology even within liberal rights-based societies.

Another demonstration of the use of human rights in societies today is through non-discrimination. The most common method in solving discrimination has been through the difference-blind approach. This approach is paradoxical through its two principles: the first is that all should be treated equally (treated the same for all), while the second recognises and fosters particularity.²⁴¹ Charles Taylor spoke to this paradox. He states while²⁴²

the first makes to the second is just that it violates the principle of non-discrimination." He stated the "reproach the second makes to the first that it negates identity by forcing people into a homogenous mold that is untrue for them.

While in rhetoric it supports people's identities, in reality, it universalises people to an ideal standard of what a person is – the problematic of identity. Moreover, as critics' state, the approach of the universalised ideal by which all are held to is not neutral, but a reflection of the hegemonic culture²⁴³ by which the marginalised, subordinated and excluded must conform with.²⁴⁴ This approach not only suppresses autonomous identity but is also highly discriminatory.²⁴⁵ While it

²⁴¹ Charles Taylor "The Politics of Recognition" in Charles Taylor and Amy Gutmann (eds) *Multiculturalism and "The Politics of Recognition": An Essay* (Princeton University Press, Princeton, NJ, 1992) at 43.

²⁴² At 43.

²⁴³ This universalisation can be that as often seen as "Western" universalisation of values and ideals or of cultural relativist values and ideals which universalise their standard. Either way, people are essentialised into particular status categories.

²⁴⁴ Taylor, above n 241, at 43.

²⁴⁵ At 43.

is based on equal treatment, the approach is using status as a yardstick to measure difference and equality, and also justify through various means reasons for unequal treatment, such as due to gender or skin colour.²⁴⁶ Even if the goods or facilities are equal, while statuses such as that of race, caste, or gender are retained, there will never be equality as equal beings.²⁴⁷ Any gains under such a system will always be limited while universalising people to particular statuses, even if the number of statuses be increased. This simply creates competition through identity politics. Such a system does not recognise the difference in and between statuses. Nor does it recognise that statuses are intersectional. Moreover, it does not respect all as moral equals irrespective of differences.

The understanding and recognition of rights for sex as illustrated at the beginning of the chapter has followed a similar path to that of the system of rights at large. There has been a push and pull between the different interpretive horizons in the conceptualisation of rights. The hegemonic power of the vertical interpretive horizon has meant that this interpretation has held greater sway in the conceptualisation of rights. This has even with that of the liberal societies where autonomy is supposed to be overriding and life of our own choosing. The restrictions in such societies of one's rights and what they mean in society finish at the dividing line of the binary sex. The relations of what make us a man or woman remain strong and divided.²⁴⁸ There is little room for sex diversity in society. This has been illustrated through the discussion of sex and its incorporation, or not, within international human rights law as illustrated above.

²⁴⁶ Carl Knight "Describing Equality" (2009) 28 *Law and Philosophy* 327 at 328.

²⁴⁷ Elizabeth Anderson "Equality" in David M Estlund (ed) *The Oxford Handbook of Political Philosophy* (Oxford University Press, New York, 2012) at 41.

²⁴⁸ Ngaire Naffine "Our Legal Lives as Men, Women and Persons" (2004) 24 *Legal Stud* 621 at 622.

3.3.6 Horizons of Rights

The concept of rights like all other social concepts are situated within a horizon as illustrated in chapter 1. The structure and content of such rights as either orders of recognition may be based through humanity and dignity of who one is in the horizontal horizon or through institutional structures of collectivities including those of the modern state as orders of recognition upon and through what one is (statuses) in the vertical horizon. As history has indicated, there has been a push and pull between a vertical and horizontal understanding of rights as just outlined, over the last few thousand years.

The horizontal understanding of rights is more naturally suited within communities but vulnerable. Relationality of unique beings is easily overrun by collectivities of individuals through power structures and ideologies that remove one's uniqueness and replace it by statuses (what one is) – an imposed moral life – with associated positionality with allocated rights and duties. Improving one's life including benefits and interests often involves maximising their rights at the expense of others. This is in the sense of a negative reciprocity where consideration often focuses on the expectation of returned benefits.²⁴⁹ The good, is not the moral basis as described in Chapter 2, but one of the greater good of the collective or in other words, those who benefit from such a system. This is seen even with 'liberal rights' so often discussed as aiding people.

Sovereign states have been in control of such rights. They could equally implement rights or situate them through either horizon. History has shown that few situate rights in the horizontal. As explained above, the interest of those in power have been used to justify violation of rights to advance their own interests in the name

²⁴⁹ Falk and Fischbacher, above n 129, at 294, Footnote 1.

of “their own interests” as a “matter of their own jurisdictions.”²⁵⁰ Paul Lauren continues highlighting this:²⁵¹

It is precisely this reason that those with power entrenched interests in hierarchy, privilege, prejudice, and sovereignty wherever they might be viewed those who advocate rights, like Thomas Paine burned so vigorously in effigy, as heretics and revolutionaries who threatened to overturn their long-standing exercise of power. They believed that the future should reproduce the past and continuity should prevail over change, and consequently vowed that they and their successors would do whatever they could to oppose dangerous visions of human rights.

Rights were permitted as long as they did not inhibit the interests of those in power or the superstructure and infrastructure that maintains their place in society.

The rise of development of state sovereignty occur at the beginnings of positivism. Scientific positivism enabled a new way to maintain entrenched beliefs yet divorce the cloak of natural law that previously had been used to support such ideals. Positive law, evolving from positivism, began in the eighteenth century. This arose at the time of other politico-legal theories including utilitarianism, historicism, libertarianism, social contract and liberalism.²⁵² This issue with positivism, was not that there were legal norms, but that it was believed to have divorced the legal system of ethical and moral foundations.²⁵³ They viewed that there was “no moral authority of natural law on behalf of individual rights from above, no claims of an emperor or a pope, and no petitions from feudal barons or subjects below.”²⁵⁴

²⁵⁰ Lauren, above n 133, at 27.

²⁵¹ At 28.

²⁵² Jack Donnelly “Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights” (1982) 76 *The American Political Science Review* 303 at 305; Eide and Alfredsson, above n 223, at 8–9; Dyzenhaus, above n 202, at 42.

²⁵³ Shestack, above n 140, at 209.

²⁵⁴ Lauren, above n 133, at 27.

However, legal positivism arose at the similar time to scientific positivism which though based on a scientific system was still imbued with a collective morality.

The issue is not the legal system or the norms enacted, but the morality behind it. It is naïve to believe that ‘positivism’ as declared by some of the writers, was not imbued with a morality. Deeply imbedded within positivism was a mix of Bethamite utilitarianism, historicism, liberalism and libertarianism to name a few. Depending on place and time, the mix and implementation of these varied. Suggesting that separating out morals from the legal sphere did not mean that morality was no longer part of the law, but simply a rejection of natural law. The “proper place in society” that Bentham referred to was a new way to order and control society, perhaps more scientific than the past. This has maintained rights within a vertical horizon situated in one’s status and not the dignity of being human.

This chapter has shown that rights have been part of society, but like all other parts of life occur within an interpretive horizon. History has demonstrated that through various reasons rights have been predominantly understood and implemented through a vertical interpretive vantage point. This is one where entitlement of rights are based on one’s status (what one is)²⁵⁵ including that of positionality, dignity, honour, and the associated rights and entitlements.²⁵⁶ The environment of such rights and entitlements provide for, and even encourage, the maximisation of one’s interests and entitlements.²⁵⁷ The rights are not relationally-based²⁵⁸ and not centred on the dignity of the human person as will be described in the next chapter. Liberal rights have not removed status from rights

²⁵⁵ Chirkov and others, above n 82, at 100.

²⁵⁶ Dignity is that of power and positionality as opposed to being inherent as a human being: Howard and Donnelly, above n 126, at 808–809; Brennan and Lo, above n 126, at 808–809.

²⁵⁷ Eekelaar, above n 123, at 185; MacCormack, above n 127, at 98; Chirkov and others, above n 82, at 100.

²⁵⁸ MacCormack, above n 127, at 99.

issues and has actually increased the number of statuses fighting for the maximising of their interests. This results in the subject of rights minimised to a particular type of person. This is illustrated by Joseph Slaughter:²⁵⁹

Becoming what one already is by right a serviceable abstract for the plot of the idealist, affirmative Bildungsroman, which narrates the normative story of how the natural and the individual might become civil and social – the story of how the individual will partakes of the general will without recourse to social coercion

The human person is still being understood according to status, including that of sex, and although more statuses are reluctantly available such as a slow break down accepting sex orientation or transgender, these have not broken the binary of male-female. In such an environment, one's capabilities would remain virtual, even aborted or repressed, in the absence of interpersonal and institutional mediations and rather are misconceived as accomplishments.²⁶⁰ Thus, there needs to be another model, an alternative understanding.

3.4 Recapturing the Subject of Rights

This other alternative to understanding and interpreting rights is from the horizontal interpretive horizon. From such a viewpoint, rights may be seen through a sense of togetherness where rights protect who one is as a unique and distinct being worthy of dignity, and rights²⁶¹ to achieve well-being and potentiality (human flourishing).²⁶² Rights are, at least from this viewpoint, not about the political state, but as something that precedes the state and rights derive from the human person.²⁶³ It is time to understand respect of the person and not the status. People desire to be respected for who they are and how they

²⁵⁹ Slaughter, above n 203, at 26.

²⁶⁰ Ricœur, above n 95, at 9.

²⁶¹ Chirkov and others, above n 82, at 100; Becker, above n 81, at 84.

²⁶² Eekelaar, above n 123, at 185.

²⁶³ Ricœur, above n 95, at 9.

come to be. This question leads back to Paul Ricoeur's question: "who is the subject of rights?"

One of the key tasks of Ricoeurian philosophy was the important juridical question "Who is the subject of rights?" The 'who' refers to a capable being – with human capabilities to speak, to act, to narrate, and to impute – that is "ultimate referent of moral respect and of the recognition of a human being as a subject of rights."²⁶⁴ The moral respect and recognition are reciprocal. One has a duty to the other, in that, in asking 'who' considers the humanity of the other before one's self.²⁶⁵ This is made clear when Ricoeur articulates:²⁶⁶

"like me, the other can designate himself as an I when he speaks. The expression like me already announces the recognition of the other as my equal in terms of rights and duties."

Ricoeur writes that "the rights attached to the capacities and potentialities we have spoken of constitute, in effect, the rights of humanity."²⁶⁷ They do not have these rights because of some political community but purely as being human.²⁶⁸ This human being, the who, worthy of esteem and respect is the dignified human being. That is, rights are available simply due to the dignity of being human. However, rights and duties can only be imputed on autonomous subjects. As Ricoeur states the²⁶⁹

imputation of rights and duties can only be imputed on an autonomous person who has power over bodily members, and through them, and on the course of things to author one's life.

²⁶⁴ At 2.

²⁶⁵ Sandy Farquhar "Narrative Identity - Ricoeur and Early Childhood Education" (PhD in Philosophy, University of Auckland, 2008) at 2.

²⁶⁶ Ricoeur, above n 95, at 6.

²⁶⁷ At 9.

²⁶⁸ At 9.

²⁶⁹ At 3.

Jill Marshall writes that²⁷⁰

“The purpose of having international human rights law might be said, then, to ensure that the core quality or qualities of our identity – the ‘age old’ question of what it is that makes you who and what you are – are protected and enshrined, controlled or brought to fruition through the legal and political system.”

Jill Marshall identifies that core to international human rights is the protecting of the human being from the vulnerability of hegemonic impact of status identities on one’s autonomy of one’s narrative identity revealed in one’s personal identity. Intersex people desire the esteem and respect to form a moral identity through an autonomous becoming that reveals how they come to be and who they are whether it be male, female both or neither.

3.5 Conclusion

On Intersex Awareness Day, Jane Fae wrote an article Intersex Rights? 'We are not yet even at the Starting Line. She stated:²⁷¹

“When it comes to the politics of intersex, we are not yet even at the starting line. That will happen when politicians, doctors and the general public finally get that intersex exists, that people who are intersex deserve consideration for who they are and not by virtue of being some 'failed' version of men or women; and that a natural consequence of recognition is for individuals to have civil rights as well as the right to full involvement in any treatment that concerns them. Perhaps then – and only then – can we consider the task of intersex awareness to be done.”

She points out the focus of intersex rights: the rights to be recognised for who they are and not as a disease or as an other. Intersex people are a subject of rights as an autonomous capable being aiming for a good moral life as with any other

²⁷⁰ Marshall, above n 100, at 28.

²⁷¹ Jane Fae “Intersex Rights? ‘We Are not yet even at the Starting Line’” *Gay Star News (online)* (26 October 2012) <<http://www.gaystarnews.com/article/intersex-rights-we-are-not-yet-even-starting-line261012>>.

human being. However, at present, many have been denied the dignity of self-esteem and self-respect as who they are as an intersex person and the freedom of how they will come to be.

Given that sex has been considered in such a way by international bodies, and the status remains strong, it is important to investigate if that is the basis of international human rights. The balancing of rights, especially seen within the liberal rights, of an autonomous identity and others' rights to live unmolested brings the thesis to consider what sorts of identities 'count' as worthy of Human Rights Law efforts to protect their active realization and full participation in society (presumably not serial killer) and how do we make those differentiations on the basis of anything besides 'vertical' prejudices? Have international human rights intended for identity to be based on status, or is that a carryover from a state interpretive basis of the problematic of identity? The next chapter will consider what foundation human rights are based. It will also consider the purpose of international human rights. The basis of international human rights is important if it is going to protect intersex people from invisibility and protect them from the harm caused by forcing them into identities that are not necessarily theirs. As seen above rights can be established and enforced through the two different horizons. However, it is through a relational rights which are situated within the horizontal horizon that enables intersex people.

CHAPTER 4: MORAL IDENTITY THROUGH HUMAN RIGHTS

The last chapter indicated that despite being possible to understand and recognise sex multiplicity and its becoming as a diversity, international law, and, in particular international human rights law, has not tended to do so. It has retained the situating of sex and its becoming in the vertical horizon. Sex as a binary of either male or female has been retained as status quo. Although there is a slow acceptance of more ‘identities’ – sexual orientation and gender identity (transgender) – they have been separated from the very base of sex as a binary. That is, they are additional to, and not incorporated within, sex.

Furthermore, sex, like other multiplicities, has been retained as a status. Sex, as a product of historical and political-cultural forces¹ has been the reproductive basis of society physically and symbolically.² The essences as either male or female³ as normative categories⁴ that are “static and fixed,” and have been seen as “immune or separate from forces of social construction.”⁵ These determine one’s personal

¹ John Stoltenberg *Refusing to be a Man: Essays on Sex and Justice* (UCL Press, London, 2000) at 25; Joan Roughgarden *Evolution’s rainbow* (University of California Press, Berkeley, California, 2009) at 23; Gayle Rubin “The Traffic in Women: Notes on the ‘Political Economy’ of Sex” in Rayna R Reiter (ed) *Toward an Anthropology of Women* (Monthly Review Press, New York, 1975) at 204.

² Lois McNay *Gender and Agency: Reconfiguring the Subject in Feminist and Social Theory* (Polity Press; Blackwell Publishers, Cambridge, UK: Malden, Massachusetts, 2000) at 90; Cordelia Fine *Testosterone Rex - Unmaking the Myths of Our Gendered Minds* (Icon Books Ltd, London, United Kingdom, 2017) at 14; Carlos A Ball “Martha Nussbaum, Essentialism, and Human Sexuality” (2010) 19 *Colum J Gender & L* 3 at 13.

³ Jillian Todd Weiss “Transgender Identity, Textualism, and the Supreme Court: What is the Plain Meaning of Sex in Title VII of the Civil Rights Act of 1964” (2009) 18 *Temp Pol & Civ Rts L Rev* 573 at 599–600; Virginia Braun and Sue Wilkinson “Vagina Equals Woman? On Genitals and Gendered Identity” (2005) 28 *Women’s Studies International Forum* 509 at 509.

⁴ Anne Becker “Identity Premised on Equality of Difference as a Fundamental Human Right” in Cornelia Roux (ed) *Safe Spaces* (Sense Publishers, 2012) 83 at 84.

⁵ Ball, above n 2, at 3; See also: John D DeLamater and Janet Shibley Hyde “Essentialism vs Social Constructionism in the Study of Human Sexuality” (1998) 35 *J Sex Res* 10 at 10; Francisco Valdes “Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & (and) Sexual Orientation to Its Origins” (1996) 8 *Yale JL & Human* 161 at 162.

identity. It is based on this identity (the immutable identity divested from its narrative identity), that one has a socio-political life including one's expression, relations, roles and functions, and thus, one's rights, duties and entitlements.⁶ Despite recognition that status identities as a 'what' has led to the many atrocities that has and still occurs around the world, this has been retained, especially when it comes to sex. Although discrimination based on status categories or identities was at the core of the violence and issues that people faced, especially women, there was little desire to remove these artificial barriers. Sex was still considered so immutable that it was natural and so consequential.

Although this has affected many people, this has been so instrumental in repression of intersex people. There is no recognition either socially or politically without reference as to sex, and as to that, only as male or female. According to the European Human Rights Commissioner's comment,⁷

"The social expectations for either a girl or boy at birth, or a woman or a man in society, are the source of the problems intersex people face. Society does not usually recognise a person without reference to their sex. Yet intersex individuals' chromosomal, anatomical, or gonadal characteristics do not belong exclusively to either sex. This is why intersex people encounter huge barriers to the enjoyment of their human rights."

That is, intersex people fail to enjoy human rights simply because society chooses to believe that there are only two sexes. Intersex people are still predominantly invisible, and sex is still seen as a binary status. They have been denied recognition

⁶ Jill Marshall *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers, Leiden; Boston, 2009) at 103; Cecilia L Ridgeway *Framed by gender* (Oxford University Press, New York, 2011) at 4; Rubin, above n 1, at 169–170; Jennifer M Protas "Divesting from 'The Apartheid of the Closet': Toward an Enriched Legal Discourse of Sexual and Gender Identity" (2007) 38 *McGeorge L Rev* 571 at 575.

⁷ Nils Muižnieks "A Boy or a Girl or a Person – Intersex People Lack Recognition in Europe" (9 May 2014) The Council of Europe Commissioner's Human Rights Comment <<http://humanrightscomment.org/2014/05/09/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-europe/>>.

as a being, and rather remain solely recognised as mistakes of nature. So, the question is what is the basis of an international human rights law person? Is it based on a status, or is it based on humanity as Ricoeur infers in his discussion of the subject of rights? The answer to this question will aid the understanding of whether international human rights can help intersex people gain a moral identity as described in chapter two.

Although there have been a few determinations in international law, much in relation to sex has been still been understood through assumption of what a male and female is and what it means to be male and female. This means little has changed in regards to sex equality. Moreover, intersex people have been used to reinforce the sex binary. Intersex people illustrate that status has been detrimental to their issues, rather than helpful. Ricoeur, through his work on the subject of right illustrated a system of rights that should enable human flourishing. The aim of this chapter is to determine whether international human rights, despite what has come through deliberations of sex in international human rights law, is centred on such a system as Ricoeur describes or whether a new system needs to be developed. This chapter argues that the current system, if held to its foundation and purpose does support human flourishing and thus a moral identity.

This chapter first reviews the establishment and moral basis of the new human rights system under the United Nations. It then investigates the foundation and basis of human rights which centres on the human personality based in dignity through equality. It will then consider the normative basis of such a development of this human personality through the fraternal situatedness for the development of personality. This has elements of duty to one another in reciprocity. Then chapter brings this together and argues this foundation and normative purpose is for one's moral identity. This will then show its interconnection with Paul Ricoeur's understanding of the subject of rights.

4.1 *New International Rights System and Foundation*

It was clear that although some moral systems and even the 'Bill of Rights' in various countries included natural law human rights, they were easily overridden, even by positivist legal means, and led to atrocities and violations of human rights.⁸ Moreover, there are two events that completely changed the status of individuals under international law at the termination of the Second World War. Louis Sohn wrote that:⁹

“The first event was the punishment of war criminals at Nuremberg and Tokyo; the second was the desire to prevent the recurrence of such crimes against humanity through the development of new standards for the protection of human rights.”

The violations and events have led to the desire to reduce such suffering and prevent violation of human rights in a situation of peace and security. The resultant is this desire for peace and security and prevention of human rights violations such as exclusion, discrimination, and torturous violence against fellow human beings. This then “laid the ground for a broad consensus that a new humanistic legal order would have to be established.”¹⁰

The new international order was the development of the UN. This occurred through four different law building stages: the UN Charter, the Universal Declaration of Human Rights (UDHR), the International Covenant of Civil and Political Rights (ICCPR), and the International Covenant of Economic, Social, and Cultural Rights (ICESCR), and “the adoption of some fifty additional declarations and conventions concerning issues of special importance, such as discrimination,

⁸ Asbjørn Eide and Gudmundur Alfredsson “Introduction” in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights: a Commentary* (Scandinavian University Press, Oslo : Oxford, 1992) at 10.

⁹ Louis B Sohn “New International Law: Protection of the Rights of Individuals Rather Than States, The” (1982–1983) 32 Am U L Rev 1 at 9–10.

¹⁰ Eide and Alfredsson, above n 8, at 10.

racial discrimination and religious intolerance.”¹¹ Joseph Slaughter states that “This goal is part of the UDHR’s larger intentions to facilitate ‘the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want’ (Preamble).”¹² It enabled the enjoyment from fear and want to achieve economic, social and cultural rights as well as civil and political rights.¹³

The purpose of this new organisation is carefully constructed alongside its contractual element. This is detailed in the Preamble of the Charter¹⁴ which is broken into two parts: its purpose and the contract. The purpose is “the maintenance of peace and international security and respect for human rights” and the contractual part is where the “government of these peoples¹⁵ have agreed to the Charter.”¹⁶ Although not all of the objectives and functions of the UN are listed in the Preamble,¹⁷ the three main pillars of the purpose are peace and security, development, and human rights.¹⁸ This was confirmed in the recent

¹¹ Sohn, above n 9, at 10.

¹² Joseph R Slaughter *Human Rights, Inc* (1st ed, Fordham University Press, New York, 2007) at 4.

¹³ UN Secretary-General *Document A/2929: Annotations on the Text of the Draft International Covenants on Human Rights* (Agenda 28-10th Session 1955) at 12.

¹⁴ “We, the peoples of the United Nations, determined: to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and; to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and; to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and; to promote social progress and better standards of life in larger freedom. And for these ends: to practice tolerance and live together in peace with one another as good neighbours, and; to unite our strength to maintain international peace and security, and; to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and; to employ international machinery for the promotion of the economic and social advancement of all peoples”: Charter of the United Nations, United Nations 1 UNTS XVI (signed 26 June 1945, entered into force 24 October 1945), Preamble.

¹⁵ The term peoples refers to the populations of the member states, see Bruno Simma and others *The Charter of the United Nations* (third ed, Oxford University Press, Oxford, United Kingdom, 2012) vol 1 at 103.

¹⁶ At 102.

¹⁷ Bruno Simma and others *The Charter of the United Nations: a Commentary (Vol 1)* (2nd ed, Oxford University Press, Oxford ; New York, 2002) at 33–34.

¹⁸ Simma and others, above n 15, at 67.

speech by the Secretary-General at the opening of the Human Rights Council where he stated that the “pillars of peace, development and human rights are inseparable and they are mutually reinforcing.”¹⁹ Often seen as the “pillar of glass” due to its fragility,²⁰ human rights are essential to achieving the goals of the UN²¹ as peace and development could only occur when there was faith in human rights – the dignity and worth of every human person and equal rights.²² The human right’s pillar was spelt out directly in the Preamble of the UDHR: “the recognition of the inherent dignity and of the equal and inalienable rights is the foundation of freedom, justice and peace in the world.”²³ The UN Commissioner supported this in his recent speech. He said, “only by first accepting fundamental human rights could all else – durable peace, and success in development – become possible.”²⁴ As will be seen later in this Chapter, human rights were conceived of as a duty “not only to respect human rights ourselves but also to promote their ‘universal respect’ and to ensure that they are observed throughout the globe.”²⁵

4.1.1 Morality of Human Rights Universality and Inalienability

From the very establishment of the Charter, there was a “demand to provide for a respect for human rights.”²⁶ After much discussion on inserting a bill of rights, it was decided to leave such a document to the organisation which operated through

¹⁹ United Nations Secretary-General “Secretary-General’s remarks to the Human Rights Council” (Geneva, Switzerland, 27 February 2017).

²⁰ Simma and others, above n 15, at 67.

²¹ Charter of the United Nations, Art. 1(3).

²² Charter of the United Nations, Preamble; Sohn, above n 9, at 14.

²³ Universal Declaration of Human Rights, UN General Assembly 217 A (III) (adopted May 1948, entered into force 10 December 1948), Preamble.

²⁴ Zeid Ra’ad Al Hussein and UN High Commissioner for Human Rights “Opening ceremony of the 34th session of the Human Rights Council in Geneva” (34th session of the Human Rights Council, Human Rights Council, Geneva, 27 February 2017).

²⁵ Sohn, above n 9, at 14.

²⁶ Simma and others, above n 15, at 103.

parts of Chapter IX and X of the Charter.²⁷ It was decided to be of a declaratory character: “the dignity and worth of the human person as well as the equal rights of men and women”²⁸ and is sometimes seen as a ‘mini’ human rights charter.²⁹ It continues with more than a dozen references to human rights³⁰ which then runs through it like a golden thread.³¹ The Commentary on the Charter highlights the importance for the protection of human rights:³²

“As far as the protection of human rights is concerned, Art. 1(3) has been invoked with respect to the improvement generally within the UN System of the effective enjoyment of human rights and fundamental freedoms.”

The UN delegated the Human Rights Commission (HRC) with oversight of human rights as the ‘conscience of mankind’.³³ This was given substance through the UDHR³⁴ and implemented through the two conventions of the International Bill of Rights (IBOR) and the many derivative conventions and resolutions.

The idea of human rights within the UN and the IBOR is a central element in the development of international morality.³⁵ It established a new moral set of rights, universal and inalienable, and not a set of legal rights.³⁶ This was the creation of the conscience of mankind, a universal morality through which states and society

²⁷ At 115.

²⁸ At 103.

²⁹ Simma and others, above n 17, at 35.

³⁰ Dinah Shelton *Advanced Introduction to International Human Rights Law* (Edward Elgar, Cheltenham, UK; Northampton, MA, USA, 2014) at 31.

³¹ At 30.

³² Simma and others, above n 15, at 119.

³³ Joseph Slaughter “The Textuality of Human Rights: Founding Narratives of Human Personality” [2004] *Interdisciplinary Law and Humanities Junior Scholar Workshop Paper* at 24.

³⁴ Manfred Nowak *UN Covenant on Civil and Political Rights* (NP Engel, Kehl, Germany; Arlington, Va, USA, 2005) at XX.

³⁵ John Eekelaar “Personal Rights and Human Rights” (2002) 2 *Hum Rts L Rev* 181 at 181.

³⁶ John Tasioulas “Human Rights, Legitimacy, and International Law” (2013) 58 *Am J Juris* 1 at 2; Eekelaar, above n 35, at 184.

would be obliged to uphold and protect. The new world organisation was the 'just institution' with human rights as its basis of the moral and legal duties.³⁷

This new source of authority enabled human rights as a universally valid moral principle.³⁸ This was made clear in the Charter, and through IBOR: "the inherent dignity and the equal and inalienable rights of all the members of the human family."³⁹ The concept of inalienability was less debated and generally accepted. Although debated, in particular, more recently, the basic philosophy, that these rights apply to everyone on the basis of being human remain.

Human rights are ostensibly inherent and inalienable and deducible.⁴⁰ Inalienability means that from the time that human beings exist, these rights exist, and may be violated but never taken away or transferred away, not even by a government.⁴¹ This interconnects the concepts of inalienability and equality together as a symbolic expression of equality in one's freedom as a dignified being together with everyone else.⁴² This will be expounded under the normative basis of human rights. However, although inalienability is generally accepted, the understanding of being universal has been debated, especially more recently. The

³⁷ Janne E Nijman "Paul Ricoeur and International Law: Beyond 'The End of the Subject' Towards a Reconceptualization of International Legal Personality" (2007) 20 *Leiden Journal of International Law* 25 at 46.

³⁸ Guyora Binder "Cultural Relativism and Cultural Imperialism in Human Rights Law" (1999) 5 *Buff Hum Rts L Rev* 211 at 212.

³⁹ Universal Declaration of Human Rights, Preamble; International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI) Resolution 2200A (XXI) (adopted 16 December 1966, entered into force 23 March 1976), Preamble; International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolution 2200 A (XXI) Resolution 2200 A (XXI) (adopted 16 December 1966, entered into force 3 January 1976), Preamble.

⁴⁰ Slaughter, above n 12, at 3.

⁴¹ Johannes Morsink *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press, Philadelphia, PA, USA, 2009) at 20.

⁴² Costas Douzinas "Identity, Recognition, Rights or What Can Hegel Teach Us About Human Rights?" (2002) 29 *Journal of Law and Society* 379 at 391.

two core critiques of the universalism of human rights are (1) generations of rights and (2) the universal and cultural relativism debate.

4.1.1.1 Generation of Rights

The 'generation of rights' is a schema⁴³ introduced by Karel Vasak when he wrote *30 Year Struggle*.⁴⁴ There has been a following who have continued such an argument or line of reasoning. It is possible to argue that legal rights in Europe and the USA may have been implemented in such generations. This is somewhat misleading, as Joseph Slaughter states:⁴⁵

“it is misleading when used to plot a neat, Eurocentric genealogy of contemporary human rights, or to intimate that civil and political rights (and have always been) divisible from and more fundamental than social, cultural, and economic rights.”

The division of the ICCPR and ICESCR Covenants was due to two factors: tensions between the Soviet Bloc and The Americans (USA) and also possible implementation issues. Ultimately, the idea of separating the two Covenants was due to implementation reasoning, not its purpose.⁴⁶ Prior to the drafting and post-drafting, the interdependency and indivisibility of human rights have remained constant: equal, indivisible, and interdependent.⁴⁷ Moreover, the depriving of any rights was considered not to “represent the human person whom

⁴³ “Vasak’s heuristic has been mythologized to describe a smooth evolution of human rights legislation from the eighteenth to the twentieth centuries; it has also regularly been invoked to celebrate the UN’s legislative activity as a process of consensus-building, and to naturalize, as part of a telos of human progress, the West’s prioritization of civil and political rights over social, economic, cultural, environmental, and solidarity rights.” See: Slaughter, above n 12, at 15.

⁴⁴ Karel Vasak “A 30-Year Struggle - the Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights” [1977] *The UNESCO Courier* at 29–32.

⁴⁵ Slaughter, above n 12, at 15–16.

⁴⁶ UN Secretary-General, above n 13, at 7.

⁴⁷ Nowak, above n 34, at XX.

the Universal Declaration regards as the ideal of the free man.”⁴⁸ Moreover, as will be demonstrated in the normative basis of rights, the so-called second and third generation of rights is actually the central and integral to the basis, interpretation and implementation of human rights and it is not secondary to it.

4.1.1.2 Universal/Cultural Relativism Debate

The other criticism is the universalism/cultural relativism debate.⁴⁹ Even more than the ‘generations of rights’, this has overshadowed and hampered the universality and inalienability of human rights. Although it surfaced in the 1980s and 90s,⁵⁰ there was warning of its possibility at the drafting of the UDHR.⁵¹ As will be seen, this does not focus on the foundation of human rights, but is the impositional understanding of a particular world view and reaction to it in particular from post-colonial nations who wanted to impose their own ideology.

The first side of this debate was that pushed by the liberal states. They saw the world through a universal worldview often referred to as ‘Universalism’.⁵² This has

⁴⁸ General Assembly - United Nations *Preparation of the Two Draft International Covenants on Human Rights* (1952) 543 (VI)-Sixth Session, Section E; UN Secretary-General, above n 13, at 4, 7.

⁴⁹ Jerome J Shestack “The Philosophic Foundations of Human Rights” (1998) 20 *Human Rights Quarterly* 201 at 228–233; Jack Donnelly “Cultural Relativism and Universal Human Rights” (1984) 6 *Human Rights Quarterly* 400; Elisabeth Reichert “Human Rights: An Examination of Universalism and Cultural Relativism” (2006) 22 *Journal of Comparative Social Welfare* 23; Elizabeth M Zechenter “In the Name of Culture: Cultural Relativism and the Abuse of the Individual” (1997) 53 *Journal of Anthropological Research* 319; Milos Bogicevic “Cultural Relativism and Human Rights” Year 3 Volume 3 *International Journal of Rule of Law, Transitional Justice and Human Rights* 151.

⁵⁰ Slaughter, above n 12, at 18–19; Karen Engle “Culture and Human Rights: The Asian Values Debate in Context” (1999–2000) 32 *NYU J Int’l L & Pol* 291 at 291.

⁵¹ The Executive Board of the American Anthropological Association Board “Statement on Human Rights” (1947) 49 *American Anthropologist* 539 at 539; Tracy E Higgins “Anti-essentialism, Relativism, and Human Rights” (1996) 19 *Harv Women’s L J* 89 at 92.

⁵² “a society in which is atomized and individualistic, a society of endemic conflict it presupposes a society of people conscious of their separateness and their particular interests and anxious to realize them. The legal right is a claim which the individual may make against other members of society, and simultaneously an obligation on the part of society to uphold this claim.” See: Claude Ake “The African Context of Human Rights” (1987) 34 *Africa Today* 5 at 5.

been critiqued as an essentialising of the abstract universal person⁵³ representing humanity at large⁵⁴ which has been imposed on other nations especially during imperialism.⁵⁵ This person is atomised or individuated, possessing certain ‘inalienable rights by nature’ and with particular interests.⁵⁶ This understanding of universal human rights reflects the Western libertarian⁵⁷ individualism which is foreign to some traditional and collectivist cultures.⁵⁸

In reaction to this, post-colonial nations rejected such an imposition and demanding their own ideological premises, a new view. This became known as cultural relativism. This originated primarily out of a rejection of colonial power and its ideology.⁵⁹ Broadly, it is acknowledged that all cultures are equally contingent and equally valid.⁶⁰ It believes that cultures should be in harmony and not divergent in interests.⁶¹ The imposed ideology was collectively imposed and hegemonically adhered to. This has not necessarily aided in further indigenous rights nor the general rights of the people within their jurisdictions. Moreover, it was made to feel natural and traditional although much of it was reactionary to

⁵³ Legal personhood, and thus capacity has been based on this universalised (essentialised) personhood or person.

⁵⁴ “The liberal individual is purported to be universal: raceless, sexless, classless, disembodied, and is taken to represent an abstract, generalized model of humanity writ large. Many philosophers have argued, however, that when we look more closely at the characteristics of the liberal individual, what we find is not a representation of universal humanity, but a historically located, specific type of person.” See Celeste Friend *Internet Encyclopedia of Philosophy* (online ed, 2017) Social Contract Theory <<http://www.iep.utm.edu/soc-cont/#SSH4a.ii>>.

⁵⁵ Reichert, above n 49, at 27.

⁵⁶ Slaughter, above n 12, at 18–19; Ake, above n 52, at 5; Zechenter, above n 49, at 320; Higgins, above n 51, at 95; Peter King “Housing as a Freedom Right” (2003) 18 *Housing Studies* 661 at 664.

⁵⁷ Sometimes authors have also called this liberal as well, however, in the strict sense, a liberal would not individuate a human being, but enable one’s good life.

⁵⁸ Slaughter, above n 12, at 18–19.

⁵⁹ Shestack, above n 49, at 229.

⁶⁰ Higgins, above n 51, at 95; Reichert, above n 49, at 28.

⁶¹ “We do not allow that the individual has any claims which may override that of the society. We assume harmony, not divergence of interests, competition, and conflict, we are more included to think of our obligations to other members of our society rather than our claims against them.” See: Ake, above n 52, at 5.

the colonial rule. Cultural relativism in both Western and non-Western nations alike has been used to violate human dignity and their free and full development. The atrocities and violations of human rights of individuals have been committed even sometimes in the name of rights to further the interests of those in power including arbitrary rule.⁶² It has led to a legacy of great harm, such as through horrific consequences of World War II. This relativism has permitted legitimate violations and shown the destructive nature that an individual culture can have without some overriding check.⁶³ Although it was in the name of culture, it had become a way to abuse power without an international check on the dignity and treatment of their own citizens.

This universalism-cultural relativist debate has side-lined the morality of human rights which are ostensibly inherent and inalienable and deducible and exist from the birth of every human being.⁶⁴ Neither side has recognised or supported the ‘human rights person’ of international human rights. Joseph Slaughter argues that the ‘human rights person’ is foreign to both ‘Western’ and many non-Western cultures and societies.⁶⁵ Both have defined their own ideological person of which neither is the human rights person or personality as will be described later. This has indicated that both Western and non-Western nations alike had situated rights in the vertical horizon. Vertical situated rights enabled the denial or rights or the re-interpretation of them that enabled the advancing of their interests. As earlier explained, many cultures both ‘Western’ and ‘non-Western’, had moral codes reflecting the universal values of the IBOR. For example, Stephen James referred to Samuel Murumba stating that “the notions of freedom, the rule of law, procedural justice, worker’s rights, representative democracy, egalitarianism,

⁶² Reichert, above n 49, at 26; For examples of such self-interest and arbitrary rule see: Donnelly, above n 49, at 411–414; Zechenter, above n 49, at 320; Higgins, above n 51, at 95.

⁶³ Reichert, above n 49, at 26.

⁶⁴ Slaughter, above n 12, at 3; Morsink, above n 41, at 20.

⁶⁵ Slaughter, above n 12, at 19.

‘political accountability’ of rulers, social welfare rights, and so forth,” were common to all civilisations.⁶⁶ For universality to succeed, human rights had to pre-exist culture and represent all human beings.⁶⁷ This has been represented in many philosophical moral codes, but not necessarily to that morality of states held at present. This indicates that where the rights were situated, whether it be horizontal or vertical, made a difference in what rights one has including their contents of those rights, as well as access to such rights.

The universality was required to protect human persons from such violations and indignity. Universality here is thus not the same universalism as mentioned above, but one that exists before and after culture and represents all human beings. Elisabeth Reichert stated that they universal in that they are “internationally agreed values, standards or rules regulating the conduct of states toward their own citizens and toward non-citizens.”⁶⁸ Johannes Morsink argues that the IBOR is universal. He outlines its universality thesis:⁶⁹

(1) people everywhere and at all times have rights that are not man-made, but inherent in the human person from the moment of birth; and (2) in any of the world’s villages or cities, people can come to know in a natural manner – unaided by experts – that people everywhere have the moral birthrights spoken of in the first.

Moreover, Joseph Slaughter argues that “[h]uman rights speak the language of universalism and absolutes written through the UDHR:⁷⁰

‘All human beings are born free and equal in dignity and rights’ (UDHR Article 1);
‘Everyone has the right to recognition everywhere as a person before the law’

⁶⁶ Stephen Andrew James *Universal Human Rights: Origins and Development* (LFB Scholarly Pub, New York, 2007) at 8.

⁶⁷ The Executive Board of the American Anthropological Association Board, above n 51, at 539.

⁶⁸ Reichert, above n 49, at 27.

⁶⁹ Morsink, above n 41, at 17.

⁷⁰ Slaughter, above n 12, at 3.

(Article 6); 'Everyone has duties to the community in which alone the free and full development of his personality is possible' (Article 29).

This universality of rights to every human being all over the world was twofold according to Simma et al in the Commentary on the UN Charter: all authorities are to respect human rights and all individuals should benefit equally from their protection of human rights.⁷¹ This was no longer according to a universalised person nor enforced by a particular culture. The IBOR applied to everyone simply as a human being whom international law now recognised as a subject of law.

Although the morality of human rights is universal, they are spelt out in various documents that interrelate and interconnect together. Primarily, these are through the IBOR, although they also have other associated conventions, regulations. This has been explained in the Vienna Declaration in 1993:⁷²

“In the World Conference on Human Rights in 1993 the Vienna declaration affirmed the “universal nature of these rights and freedoms is beyond question” and that “all human rights are universal, and interdependent and interrelated” The international community must treat human rights globally in a fair and equal manner on the same footing and with the same emphasis.”

As such these are not generational but must be understood together. These, as will be seen, are centred on the human person and not connected to status, positionality, or other instrumentality.⁷³ The universality and interdependence of human rights to develop as a dignified being belong to everyone. These are moral rights whether or not one has them as legal rights.

⁷¹ Bruno Simma and others *The Charter of the United Nations* (third ed, Oxford University Press, Oxford, United Kingdom, 2012) vol 2 at 1574.

⁷² Reichert, above n 49, at 28.

⁷³ At 27.

4.1.2 Human Rights Based from Natural Rights of the Human Being

Human rights were a reaction to the statist and legal positivist models of domestic and international law that is infused with particular ideals of society and have enabled inequality and the violations of human rights as mentioned above. However, it was also realised there needed to be a positivist law to make it binding. Joseph Slaughter highlighted this when he writes:⁷⁴

“Contemporary human rights is hybrid because it appropriates formal aspects of both eighteenth-century natural and nineteenth-century positive law without conscripting their substantiating metaphysics or institutionalizing the social, civil, and political force that underwrote those legal regimes.”

Although the UN gave force to human rights through as a positivist law, this did not come with the ‘baggage’ of the of the eighteenth or nineteenth centuries ideals, but with its own philosophy as will be outlined below. This postivised natural law basis of the IBOR, as established through the UN Charter, was not to be understood through traditional foundations.⁷⁵ They were not sufficient nor required in formulation and establishment of the Charter and the IBOR.⁷⁶ As such, there was a desire to return to a basis of natural law which contributed significantly to its drafting,⁷⁷ as pushed by human rights advocates, which was grounded “on a source of authority superior to the state.”⁷⁸ Louis B. Sohn argues that⁷⁹

“The United Nations’ concept of human rights embraces this concept of natural law concept of rights, rights to which all human beings have been entitled since

⁷⁴ Slaughter, above n 12, at 71.

⁷⁵ Jack Donnelly “Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights” (1982) 76 *The American Political Science Review* 303 at 305.

⁷⁶ Simma and others, above n 17, at 1.

⁷⁷ James, above n 66, at 9.

⁷⁸ Binder, above n 38, at 212.

⁷⁹ Sohn, above n 9, at 17.

time immemorial and to which they will continue to be entitled as long as humanity survives.”

Thus, the rights and freedoms were neither granted by the state nor are they the result of one’s status or actions as the determinants of rights,⁸⁰ rather, it was to be based on that of the human person.⁸¹ Human rights are rights to which all human beings have been entitled since time immemorial and to which they will continue to have. This became the new standard, the new legitimacy in international human rights.

4.2 *Foundation of Human Rights*

Dinah Shelton argues that human rights reflect the utilitarian approach. To understand this, it is first important to review utilitarianism. For Bentham, utility is the only legitimate guide to legal and social reform as “nature has placed mankind under the governance of two sovereign masters, pain and pleasure.”⁸² The principle of utility became as follows:⁸³

“Individuals rank alternative courses of action in terms of anticipated pleasures and pain and then attempt to maximise their overall balance of pleasure over pain.”

Mill considered morality as critical to human beings and sociality such as that illustrated in Chapter 2. In order to combat selfishness, the greatest source of social conflict, he sought to bring it within the dignity of free individuals and the prospect of a new and even better life together.⁸⁴ Although he supported the principle of utility, sought to locate it between the à priori moralists (Kantian ethics) and the ‘intuitive school’ of thinkers who maintained humans had a moral

⁸⁰ Donnelly, above n 75, at 305.

⁸¹ Morsink, above n 41, at 25.

⁸² John Stuart Mill and Scott Davis *Utilitarianism* (Barnes & Noble, New York, 2005) at viii.

⁸³ At viii.

⁸⁴ At x–xi.

sense of what is right and wrong.⁸⁵ He did so by connecting the à priori principle or first principle as the root of all morality,⁸⁶ and where there is several 'pleasures' and in conflict, having a principle or rule for determining between them which becomes self-evident.⁸⁷ Of all pleasures, the ultimate that a human being would not sink below or go without is fundamental. He attributes such an appellation to, or gives a name to, a sense of dignity⁸⁸

which all human beings possess in one form or other, and in some, though by no means in exact, proportion to their higher faculties, and which is so essential a part of happiness of those in whom it is strong, that nothing which conflicts with it could be, otherwise than momentarily, an object of desire to them.

Having established the a priori principle, Mill was able to fill in what he considered Immanuel Kant missed, utility when assessing pleasures based on the first principle of which is more valuable and desirable. He saw utilitarianism⁸⁹

the ultimate end, with reference to and for the sake of which all other things are desirable (whether considering our own good or that of other people), is an existence exempt as far as possible from pain, and as rich as possible in enjoyments, both in point of quantity and quality; the test of quality, and the rule for measuring it against quantity, being the preference felt by those who, in their opportunities of experience, to which must be added their habits of self-consciousness and self-observation, are best furnished with the means of comparison.

The comparison will always be that with the first principle, determining which is the most desirable. It is this that becomes the standard of morality⁹⁰

⁸⁵ At viii–ix.

⁸⁶ This is the Kantian fundamental principle becomes the common ground of obligation.

⁸⁷ Mill and Davis, above n 82, at 3.

⁸⁸ At 9–10.

⁸⁹ At 12.

⁹⁰ At 12.

which may accordingly be defined, the rules and precepts for human conduct, by the observance of which an existence such as has been described might be, to the greatest extent possible, secured for all mankind; and not them only, but so far as the nature of things admits to the whole sentient creation.

This provides the basis of one's morality and secures for all humanity. This rescued utilitarianism from the unrestraint and the possibility of the tyranny of the majority over the misery of the oppressed few. By establishing the first principle as the dignity of being, provides a humanitarian morality between all human beings.

It is within this understanding that it is possible consider Shelton's connection of utilitarianism with international human rights. She argues that:⁹¹

International legal texts such as the Preambles to the Universal Declaration of human Rights (UDHR) and the International Covenants on Human Rights partly reflect a utilitarian approach in mentioning that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,' but the Covenants add that 'these rights derive from the inherent dignity of the human person'.

These texts set out the *à priori* or first principle by which human rights are based and through which the assessment of the rights and freedoms within the texts are made. As such, the Mill utilitarian conceptualisation is seen through the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family." The *à priori* principle is the recognition of the inherent dignity of the human person. James Griffin argues that by "[g]rounding human rights in personality and dignity, enables human rights to be substantive, with a source or ultimacy, as opposed to mere formalism."⁹² By forming the

⁹¹ Shelton, above n 30, at 1–2.

⁹² James Griffin "First Steps in an Account of Human Rights" (2001) 9 *European Journal of Philosophy* 306 at 311.

legitimacy or foundation of human rights in dignity and equality of the human person, it enables a basis from which substantive application can be applied within states. All of the rights and freedoms are for the development of personality. However, sometimes these rights and freedoms are in conflict (especially when understood through negative freedom). When in conflict, it is possible to assess the highest value, or which takes precedence, according to this à priori principle. It is through such a substantive basis of morality that enables the foundation of freedom, justice and peace in the world. This approach reflects the moral basis of humanity as described in chapter 2. Such a basis transforms law from that of formalism to something that is able to be implemented and workable.

Under the new international UN regime, the natural law basis of human rights gained a new source or foundation and legitimacy. This has been clarified in the Preamble of the Charter of the United Nations: “to reaffirm the faith in fundamental rights, in the dignity and worth⁹³ of the human person, in equality and equal rights, in the equal rights of men and women, and of nations large and small.”⁹⁴ This is confirmed in, and foundational to, the Universal Declaration of Human Rights (UDHR)⁹⁵ and became the Preamble of the two Covenants of the International Bill of Rights (IBOR). This faith in human rights as the à priori principle or foundation of human rights is dignity of the human person and equality. This section will consider this in three sections: the dignity, the human person and equality. In understanding this, it then is possible to understand the foundation of human rights.

⁹³ The worth of the human person is also referred to as ‘the development of personality’ which is not the personality of emotions, but rather what makes up a person throughout the development process from birth to death as a narrative process.

⁹⁴ Charter of the United Nations, Preamble.

⁹⁵ Universal Declaration of Human Rights, Preamble, Art. 1, 2, and 29.

4.2.1 Dignity

The first of these three is dignity. Dignity⁹⁶ was core to the foundations of international human rights. It was not the creation of one society, culture, philosophy, or religious approach to life.⁹⁷ The protection of the dignity of the human person has visible traces of civilisation going back to the dawn of recorded history.⁹⁸ It is the story of human kind.⁹⁹ Thus, Jan Mårtenson suggests that human dignity is revolutionary in practice,¹⁰⁰ but not revolutionary in concept.¹⁰¹ It was returned to a position of natural law deriving “from the inherent dignity of the human person,”¹⁰² something that exists pre- and post-human rights.¹⁰³ Although in the abstract, it cannot be defined, recognition of its violation can be.¹⁰⁴ Charles Habib Malik proposed that the ‘dignity of man’ should be the ‘basic woof’ of the UDHR¹⁰⁵ and is the interpretive principle of the IBOR¹⁰⁶ as an essential condition

⁹⁶ Under international human rights law, in particular in the UN, dignity, worth, inherent worth, and inherent dignity, or combinations of them are used interchangeably. All of these interdependent meanings are referred to at the same time when dignity is used.

⁹⁷ Jan Mårtenson “The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Programme” in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights: a commentary* (Scandinavian University Press, Oslo : Oxford, 1992) at 17.

⁹⁸ At 17–18.

⁹⁹ At 18.

¹⁰⁰ At 17.

¹⁰¹ Human dignity is not the invention or the creation of one society, culture, philosophy, or religious approach to life. Protection of human dignity is a story of human kind with visible traces of civilisation going back to the dawn of recorded history through various societies, cultures, philosophies, and religions. See: At 17–18.

¹⁰² International Covenant on Civil and Political Rights, Preamble; International Covenant on Economic, Social and Cultural Rights, Preamble; UN Secretary-General, above n 13, at 12.

¹⁰³ Slaughter, above n 33, at 34–35.

¹⁰⁴ Oscar Schachter “Human Dignity as a Normative Concept” (1983) 77 *The American Journal of International Law* 848 at 849.

¹⁰⁵ Tore Lindholm “Article 1 - A New Beginning” in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights: a commentary* (Scandinavian University Press, Oslo : Oxford, 1992) at 34.

¹⁰⁶ Charter of the United Nations, Preamble; Universal Declaration of Human Rights, Preamble; International Covenant on Economic, Social and Cultural Rights, Preamble; International Covenant on Civil and Political Rights, Preamble; Ruth Macklin “Dignity Is A Useless Concept: It

of, while also a resultant of, each right or freedom. It underlines each sentence of each right.¹⁰⁷ Dignity became central to international human rights under the UN, and also the European Union,¹⁰⁸ and other international instruments. As such, dignity was essential to the basis of freedom, justice and peace in the world.¹⁰⁹

The importance of dignity to international human rights is understood from its history and meaning. It draws from its etymological root – ‘Dignitas’ – which refers to the worth/intrinsic worth of the one’s being.¹¹⁰ Basing human rights in dignity ensures the moral value of one’s being.¹¹¹ Value and worth are based on one’s humanity, not status, position or other factors. Value and worth are explicitly important to becoming a dignified being as its goals and purpose. One is valued solely on the basis of being human and not on one’s status or other cultural interests. Dignity infers nuanced meanings of “esteem, deference, a proper regard for, recognition of”¹¹² human beings. The intrinsic worth of one’s being is reflected in the esteem and recognition of another as a human being, one of value. According to Jan Mårtenson, the core meaning of ‘being’ within the international human rights regime refers to the “truths of human nature and the requirements

Means No More Than Respect For Persons Or Their Autonomy” (2003) 327 BMJ 1419 at 1419; Schachter, above n 104, at 849.

¹⁰⁷ Mårtenson, above n 97, at 21.

¹⁰⁸ The derivation of all human rights and fundamental freedoms “derive from the inherent dignity of the human person” also was central to the Helsinki Final Act declares in Principle VII which is what is now referred to as the European Union. Schachter, above n 104, at 853.

¹⁰⁹ Charter of the United Nations, Preamble; Universal Declaration of Human Rights, Preamble; International Covenant on Civil and Political Rights, Preamble; International Covenant on Economic, Social and Cultural Rights, Preamble.

¹¹⁰ Schachter, above n 104, at 849.

¹¹¹ David Mattson and Susan Clark “Human Dignity in Concept and Practice” (2011) 44 Policy Sciences 303 at 310.

¹¹² Schachter, above n 104, at 849.

of human dignity.”¹¹³ This dignity reflects one’s physical existence, intellectual and spiritual dimensions.¹¹⁴

Mattson and Clark explain dignity as “a condition signified by a sense of contentment, satisfaction, and wellness as an integrative evaluation of lives and circumstances.”¹¹⁵ At the third session of the 58th meeting of the drafting committee of the UDHR, Cassin stated that¹¹⁶

...they should be guaranteed certain elementary rights indispensable to their well-being and to their dignity.

Dignity reflects more than being an existential quality or fact of being, it is a sense of potentiality and flourishing, in the Aristotelian sense, which requires being part of a community (in the modern term having a public life).¹¹⁷ As Joseph Raz puts it, “respecting human dignity entails treating humans as persons capable of planning and plotting their future.”¹¹⁸ That is, they are responsible for and have the capacity to develop – narrate and become – their identity and make choices as a human person.¹¹⁹ Dignity is the ability to determine who one is and plot and develop one’s personality.

¹¹³ Mårtenson, above n 97, at 21.

¹¹⁴ At 21; Johann Neethling “Personality Rights: A Comparative Overview” (2005) 38 *Comp & Int’l LJ S Afr* 210 at 210; Merriam-Webster *Merriam-Webster.com* (online ed, 2015) Personality <<http://www.merriam-webster.com/dictionary/personality>>; *Oxford Dictionaries* (online ed, 2015) Personality <<http://www.oxforddictionaries.com/definition/english/personality>>.

¹¹⁵ Mattson and Clark, above n 111, at 313–314.

¹¹⁶ Slaughter, above n 33, at 30–31.

¹¹⁷ Mårtenson, above n 97, at 21; Neethling, above n 114, at 210; Merriam-Webster, above n 114.

¹¹⁸ Joseph Raz *The Authority of Law: Essays on Law and Morality* (second ed, Oxford University Press, Oxford ; New York, 2009) at 221; Jill Marshall *Human Rights Law and Personal Identity* (Routledge, Abingdon, Oxon; New York, NY, 2014) at 216.

¹¹⁹ Schachter, above n 104, at 850.

4.2.2 The Human Personality – Human Being

The second is the human person. The human person became front and centre of international human rights as the human personality. However, this person was reconceptualised from the legal person. There was nothing accidental about the reconceptualising¹²⁰ of the human person.¹²¹ Dinah Shelton refers to the inherency of such a human rights being:¹²²

The concept of human rights involves consideration of what ‘rights’ a person possesses by virtue of being ‘human’, that is, rights that human beings have simply because they are human beings, independent of the infinite variety of individual characteristics and human social circumstances.

This is supported by another writer on human rights, Jerome Shestack:¹²³

To speak of human rights requires a conception of what rights one possesses by virtue of being human. That does not mean human rights in the self-evident sense that those who have them are human, but rather, the rights that human beings have simply because they are human beings and independent of their varying social circumstances and degrees of merit.

Human rights do not determine someone as being human, but people have them because they are human. Joseph Slaughter argues the human person is both the premise and the promise of international human rights:¹²⁴

Ultimately, of course, these personalities are one and the same; underwriting and underwritten by human rights, the human personality is both natural and

¹²⁰ The human person or personality became front and centre as opposed to that of legal personality which was status-based. Joseph Slaughter indicates that the being is the qualities shared as a species of a persona as opposed to individual characteristics which indicate the ‘what’ of status based characteristics. For example, see: Slaughter, above n 33, at 5, 34.

¹²¹ Person is used interchangeably and referred to throughout the IBOR as the “human person” and “human being” and sometimes personality. Refer to: Universal Declaration of Human Rights, Art. 22, 26, 29; International Covenant on Economic, Social and Cultural Rights, Art. 13.

¹²² Shelton, above n 30, at 1.

¹²³ Shestack, above n 49, at 203.

¹²⁴ Slaughter, above n 12, at 79.

positive, pre-social and social, premise and promise. This double positioning, which occurs in the rhetoric modes of constation (confirmed as pre-text in the preamble) and declaration (affirmed as text in the articles) gives the legal tautology a temporal dimension and ploy trajectory.

In other words, the base or premise of human rights is the human person, the human being, yet at the same time it is a promise, when the potentiality of humanness is inhibited, human rights are a promise to enable humanity to its potentiality.

The human person is the mechanism and the product of our natural law endowment of human rights. Slaughter writes:¹²⁵

Articulating human personality as the engine and product of development, contemporary international law positivizes the inalienable, self-substantiating categories of natural-law endowment as transitive and reflexive projects of attaching human dignity to human dignity, the person to the person, 'man to man' – in effect, as teleological projects of tautologization.

For the United Nations, human rights “appertained to him as a human being and could not be alienated and that they constituted a law anterior and superior to the positive law of civil society.”¹²⁶ As such, this person had a reflexivity which signalled that a person was “both antecedent to human rights and consequent to human rights at the same time through their codification and observance.”¹²⁷ It is this person that has become normativised and naturalised in the international law of personality in the UDHR, and therefore the derived Conventions.¹²⁸ It is this personality that is the moral creature capable of bearing rights and duties and is both a legal and moral category.¹²⁹ However, it must be remembered that this

¹²⁵ At 79–80.

¹²⁶ UN Secretary-General, above n 13, at 12.

¹²⁷ Slaughter, above n 33, at 5.

¹²⁸ At 32.

¹²⁹ Slaughter, above n 12, at 17.

human person/personality is as foreign to the Western nations as it was to non-Western nations.¹³⁰ The human person was not an ideological person of either the Western or non-Western nations. It was not an essentialised person (Western) or a collectivised person (non-Western). This person was simply that of a dignified human being.

4.2.3 Equality

The last element of the foundation is equality. Although many jurisdictions apply equality on the basis of equal treatment of statuses, to be effective, equality had to be more than equal treatment and the various other forms that have been utilised by various states and regimes. These systems had legitimately justified violations of inequality and distinction, exclusion, and restriction within positivist legal systems in the past.¹³¹ As such, equality had to depart from the liberal and a socialist perspective of 'equal treatment' and be based on a different foundation.

Equality never featured as a term or a principle within the League of Nations.¹³² Since then, the inequality of both people and states has been realised as one of the great issues¹³³ which often lead to conflict and war and legally used to justify the exclusion or restriction of people.¹³⁴ Those within the UN realised that without inalienable and equal rights, there will continue to be a "disregard and contempt for human rights have resulted in barbarous acts which have outraged the

¹³⁰ At 19.

¹³¹ Matthew CR Craven *The International Covenant on Economic, Social, and Cultural Rights: a Perspective on its Development* (Clarendon Press ; Oxford University Press, Oxford : New York, 1995) at 155.

¹³² Sigrun Skogly "Article 2" in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights: a Commentary* (Scandinavian University Press, Oslo : Oxford, 1992) at 58.

¹³³ Inequality was one of the great issues of conflict and war as well as poverty, disease, ignorance, insecurity, unemployment, tyranny, and lack of human dignity.

¹³⁴ Simma and others, above n 15, at 3.

conscience of mankind.”¹³⁵ Equality, like dignity, became central to the UN and the IBOR.

The UN Charter articulated the importance of equality in the sense of “equal rights”¹³⁶ from the start in the Preamble. This was confirmed in the IBOR.¹³⁷ Equality within the UN institutions and instruments is equal rights for all peoples of all nations.¹³⁸ It became one of the two conditions of the ‘faith in human rights’ from the Charter. It is a ‘thread’ that runs through the heart of the Charter and IBOR and weaves them together.¹³⁹ More attention has been paid to equality than any other single category of human rights.¹⁴⁰ Its importance¹⁴¹ is indicated by its status as an interpretive principle,¹⁴² along with the dignity of the human person, throughout the IBOR.¹⁴³ Through the equality principle (EP) meant that no interpretation could be construed to exclude particular groups or individuals from freedoms and rights of the dignity of the human person as the foundation of human rights.¹⁴⁴ Equality was relational in that it enabled the dignified being of every member of the human family.

The EP under the UN had become both a universalising and relational principle initiated from the UN Charter. This was agreed at the San Francisco Meeting of the

¹³⁵ Charter of the United Nations, Preamble; Universal Declaration of Human Rights, Preamble.

¹³⁶ Charter of the United Nations, Preamble.

¹³⁷ International Covenant on Civil and Political Rights, Preamble; International Covenant on Economic, Social and Cultural Rights, Preamble ; Craven, above n 131, at 153.

¹³⁸ Charter of the United Nations, Preamble.

¹³⁹ Nowak, above n 34, at 600; Craven, above n 131, at 157.

¹⁴⁰ Skogly, above n 132, at 57.

¹⁴¹ At 59–60.

¹⁴² The equality principle was originally drafted in the Preamble, and is still there, but also holds place in the substantive Articles of 1 and 2. Altogether, these form the interpretive principles of the international human rights law. See: At 59–60.

¹⁴³ At 57–58.

¹⁴⁴ Lindholm, above n 105, at 35, 38–39.

Third Committee¹⁴⁵ where two key principles were laid out: for all individuals should enjoy basic rights, and those rights should be enjoyed without distinction as to race, sex, language, or religion.¹⁴⁶ The terms “for all (or all human beings)”¹⁴⁷ and “no (without) distinction”¹⁴⁸ are used throughout the Charter¹⁴⁹ in regards to being born free and equal in dignity and rights. It is clear that the UN through the Social and Economic Council aimed for the “universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.”¹⁵⁰ The EP held prime position starting from the Preamble, and several times¹⁵¹ throughout the substantive part of the UN Charter.¹⁵²

The EP became enshrined and written into the IBOR.¹⁵³ It runs through the heart of both Covenants – ICCPR and ICESCR.¹⁵⁴ As opposed to equality written into the positivist law in most states, equality was universalised “for all ... without distinction”. That was important as status was not relevant to the realisation of rights under the UN. The denial of rights in its essence is the denial of humanness

¹⁴⁵ Referring to the UNCIO Documents: p. iv.13.

¹⁴⁶ WA McKean *Equality and Discrimination under International Law* (Clarendon Press ; Oxford University Press, Oxford : New York, 1983) at 53.

¹⁴⁷ Charter of the United Nations, Preamble, Art. 1, Art. 76(d); Universal Declaration of Human Rights, Preamble, Art. 1; International Covenant on Economic, Social and Cultural Rights, Preamble, Art. 3.

¹⁴⁸ Charter of the United Nations, Art. 13, 55(c), and 76(c); Universal Declaration of Human Rights, Art. 2; International Covenant on Economic, Social and Cultural Rights, Art.2.

¹⁴⁹ Charter of the United Nations, Art. 1, 13, 55(c), 62(c), 68, and 76(c).

¹⁵⁰ United Nations *Yearbook of the United Nations 1946-1947* (1947 L 18 1948) at 467.

¹⁵¹ The most important provisions of non-discrimination in the Charter are Articles 1(3), 13(b), 55(c) and 76 (c) and (d).

¹⁵² Skogly, above n 132, at 59.

¹⁵³ At 57, 59; Craven, above n 131, at 157; Alex Conte “Privacy, Honour and Reputation” in Alex Conte, Scott Davidson and Richard Burchill (eds) *Defining Civil and Political Rights: the Jurisprudence of the United Nations Human Rights Committee* (Ashgate, Aldershot, Hants, England ; Burlington, VT, 2004) at 161.

¹⁵⁴ It is found or referenced in the Preamble of both Conventions and in the ICCPR in Articles 2(1), 3, 4(1), 20, 23, 24, 25, and 26, and the ICESCR in Articles 2(2), 3, 6, 9, and so on.

as a dignified human person. Under the UN, it was realised that the dignity of moral value is the only thing that exists universally and can be equally distributed socially.¹⁵⁵

4.2.3.1 For All without Distinction – Universalising Difference

The EP universalises equality. This is clearly understood in that it applies to everybody as through the term ‘for all’ which is used repeatedly through the Charter and the IBOR.¹⁵⁶ There are no exceptions, as opposed to positivist law where justifications could be made. Thus, dignity and equality were provided for all. It is in this sense the central principle of the UN became universal:¹⁵⁷ “the inherent dignity and the equal and inalienable rights of all the members of the human family,”¹⁵⁸ equal for everybody – for all peoples of all nations.¹⁵⁹ The dignity of the moral value of being human is the only thing that exists universally and can be equally distributed socially.

The EP requires respect of all human beings irrespective of who they are or their differences or variations. It took a positive viewpoint of humanity valuing all human beings as having dignity¹⁶⁰ and as such there was a requirement of ‘no distinction’ or being ‘without distinction’ of moral beings.¹⁶¹ This has been

¹⁵⁵ José Reinaldo de Lima Lopes “The Right to Recognition for Gays and Lesbians” (2005) 1 Sur 61 at 80.

¹⁵⁶ Charter of the United Nations, Preamble, Art. 1(3), 13(b), 55(c) and 76(d); Universal Declaration of Human Rights, Preamble and Article 2; International Covenant on Civil and Political Rights Preamble and Art. 1; International Covenant on Economic, Social and Cultural Rights, Preamble.

¹⁵⁷ United Nations, above n 150, at 467.

¹⁵⁸ Universal Declaration of Human Rights, Preamble.

¹⁵⁹ Charter of the United Nations, Preamble.

¹⁶⁰ International Covenant on Civil and Political Rights, Preamble; International Covenant on Economic, Social and Cultural Rights, Preamble.

¹⁶¹ Charter of the United Nations, Preamble, Art. 1(3), 13(b), 55(c) and 76(c); Universal Declaration of Human Rights, Preamble and Article 2; International Covenant on Civil and Political Rights Preamble and Art. 1; International Covenant on Economic, Social and Cultural Rights, Preamble and Art. 2.

confirmed in other UN documents such as the UN Yearbook.¹⁶² Although the IBOR has not clarified ‘no distinction’, this has since been clarified in Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination Against Women (CEDAW).¹⁶³ Within these Conventions, distinction is defined as¹⁶⁴

any distinction, exclusion, restriction or preference ... which has the effect of nullifying or impairing the recognition, enjoyment or exercise, on equal footing, of human rights and fundamental freedoms in the political, economic, social, or cultural or any other field of public life.

‘No distinction’ was not about treating everyone the same as in statuses or in the sense of equal treatment, but it was the consideration of all as human beings of worth. Put another way, no distinction means that everyone was of the same worth a dignified being. In fact, where inequality or injustice occurs, it permits the special measures to remedy inequality or injustice of socially deprived groups.¹⁶⁵

The EP maintains the philosophy of no distinction.¹⁶⁶ Statuses inherently create distinction. By stating without distinction as to particular statuses which were illustrative and not exhaustive,¹⁶⁷ it was a rejection of status as a basis for understanding and resolving inequality. The specific articles of the IBOR provide mechanisms for protection, sometimes referred to as ‘non-discrimination’.¹⁶⁸

¹⁶² United Nations, above n 150, at 467.

¹⁶³ International Convention on the Elimination of All Forms of Racial Discrimination, United Nations (adopted 21 September 1965, entered into force 4 January 1969); Convention on the Elimination of all Forms of Discrimination against Women, United Nations General Assembly Resolution 34/180 (adopted 18 December 1979, entered into force 3 September 1981).

¹⁶⁴ International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1; Convention on the Elimination of all Forms of Discrimination against Women, Art. 1.

¹⁶⁵ Marc J Bossuyt *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (M Nijhoff Publishers, Dordrecht ; Boston : Hingham, MA, 1987) at 55.

¹⁶⁶ Other Article provisions prohibit discrimination in specific situations.

¹⁶⁷ Skogly, above n 132, at 62–63.

¹⁶⁸ At 57–58.

These articles provided protection from interference in the free and full development of personality which impairs or nullifies a dignified being. The goal and purpose of human rights. Although discrimination has sometimes been interchangeably used with distinction, it was recognised that it has a different shade of meaning.¹⁶⁹ Many nation-states implement non-discrimination on a negative premise: one of equal 'protected status',¹⁷⁰ had to be treated equally, otherwise, the treatment would be considered discriminatory. As such, there have been a plethora of claims for protected status through identity politics. Without protected status, there was no protection of the law. However, without distinction does away with status, and any distinction marked one out for inequality. Any distinction that impairs or nullifies one's development of a dignified being is not in accordance with the principles of this set of rules.¹⁷¹ All human beings are of equal worth, and as such require the enabling to develop their personality as a dignified being. It is the equality of being dignified humans that binds us together¹⁷² as central to the formation of the human rights person.¹⁷³

4.2.3.2 *Equal Worth*

David Mattson and Susan Clark wrote that the "Gordian knot of outside morality or any other reasoning has been cut simply by declaring that all humans have dignity or by asserting the 'ultimate' value of dignity."¹⁷⁴ The declaring of dignity as the foundation of human rights as people of all equal worth cuts ties with the

¹⁶⁹ At 63; Bossuyt, above n 165, at 55; Craven, above n 131, at 155.

¹⁷⁰ A protected status is one of the statuses for which different treatment is prohibited.

¹⁷¹ Skogly, above n 132, at 57.

¹⁷² This must be differentiated from the universalism and cultural relativism debate. Within this debate, people argue that universalism imposes a particular Western centric standard on what people are and how rights should be interpreted. The argument of both sides do not sit within the EP. Status, whether universalised or understood within cultural relativism is not relevant to the EP.

¹⁷³ Sandra Fredman "Redistribution and Recognition: Reconciling Inequalities" (2007) 23 S Afr J on Hum Rts 214 at 226.

¹⁷⁴ Mattson and Clark, above n 111, at 307.

previous philosophies such as in the eighteenth and nineteenth centuries and traditional cultures that use status to make distinction between people. So, the question becomes what does it mean ‘to be of equal worth’ or ‘having dignity’? Dignity comes from the Latin root word: ‘dignitas’¹⁷⁵ which has the meaning of respect with “has nuanced meanings of “esteem, deference, a proper regard for, recognition of’.”¹⁷⁶ In other words, dignity is the recognition of, the esteeming or having proper regard for others. Dignity is thus respect of how one feels about and treats another.¹⁷⁷ It is the respect of others solely on being human, the worth of being human.¹⁷⁸ It reflects how much people care about public acknowledgement of their worth and being valued by others.¹⁷⁹

While status values one’s public worth¹⁸⁰ as a mere instrument of hegemonic systems,¹⁸¹ the EP values one’s dignity of being as a recognised and respected member of society.¹⁸² This is important as it is not just the right thing but becomes the moral thing to base rights on. As Nicholas Smith states, “basic equality such as that offered through distributive equality, may keep the peace, but a community of equals that respect each other as such can be friendlier, more cooperative, and recognise more eagerly what we all have in common.”¹⁸³ Having equality founded on being equally human,¹⁸⁴ it enables a community of equals who can develop their potentiality and flourish.

¹⁷⁵ Schachter, above n 104, at 849.

¹⁷⁶ At 849.

¹⁷⁷ At 849.

¹⁷⁸ Universal Declaration of Human Rights, Preamble.

¹⁷⁹ Cecilia L Ridgeway “Why Status Matters for Inequality” (2014) 79 *American Sociological Review* 1 at 2.

¹⁸⁰ At 2.

¹⁸¹ Schachter, above n 104, at 849.

¹⁸² Anne Bloom “Speaking Truth to Biopower” (2011–2012) 41 *Sw L Rev* 241 at 244.

¹⁸³ Nicholas Smith *Basic Equality and Discrimination: Reconciling Theory and Law* (Ashgate Pub, Farnham, Surrey, 2011) at 43.

¹⁸⁴ Rather than statuses that require equal treatment.

4.3 Normative Basis of Human Rights

The normative basis of human rights derives from its foundation – the dignity of the human person in equality. This human person was a reflexive person who is both antecedent to and consequent to human rights in dignity and equality.¹⁸⁵ The dignified person is not a final end result, but a state of being. That is, as one goes through life, there is a continuous need to remain in a dignified state. The dignity of this human personality central and foundational to international human rights interconnects in and through relationality.¹⁸⁶ This is supported by Oscar Schachter. He argues that dignity:¹⁸⁷

“embraces a recognition that the individual self is a part of larger collectivities and that they, too, must be considered in the meaning of the inherent dignity of the person.”

Moreover, Mattson and Clark argue that the interaction in and through the community shapes dignity not only through “our relationships with ourselves but also by our relationships with others as well as our interactions with the physical world.”¹⁸⁸ Dignity of this human person occurred in and through relationships with others and the surrounding world.

By legitimating human rights in such a foundation enables them to become substantive as opposed to mere formalism.¹⁸⁹ The human person results from the rights and freedoms were to enable one to freely and fully develop their personality. The development of this human person the “product and medium of social relations.”¹⁹⁰ The aim of development is well-being and potentiality as a

¹⁸⁵ Slaughter, above n 33, at 5.

¹⁸⁶ Marshall, above n 118, at 229.

¹⁸⁷ Schachter, above n 104, at 851.

¹⁸⁸ Mattson and Clark, above n 111, at 314.

¹⁸⁹ Griffin, above n 92, at 311.

¹⁹⁰ Slaughter, above n 12, at 48.

dignified being. The normative basis of international human rights through the IBOR, as well as other International conventions, centred on the development of one's personality within one's fraternity. This was reiterated by the Executive Board of the AAA who emphasised: (1) the respect for the personality of the individual, and (2) the right to the fullest development as a member of his society.¹⁹¹ In summary, the normative basis of human rights is the development of this personality in freedom and through and within a fraternity.

4.3.1 The Development of Personality

Although the foundation of human rights is the human person in equality and dignity, the purpose of human rights becomes the free and full development of personality. This personality that develops is the expression of the human person in equality and dignity which may be referred to as one's identity. Together this forms the moral basis of human rights. The development of personality occurs in and through relationality, also referred to as fraternity. For the development to occur, relationality must be enabling or in other words, there are some duties to enable development.

It became Article 29(1) of the UDHR states "Everyone has duties to the community in which alone the free and full development of his personality is possible."¹⁹² The free and full development of personality of this dignified human person was central to the IBOR. Joseph Slaughter stated that¹⁹³

[t]he drafters of the UDHR took it for granted that that their subject of central concern was the human person, and that the law should stipulate the fundamental civil, social, and political protections and privileges necessary for 'free and full development of the human personality'.

¹⁹¹ The Executive Board of the American Anthropological Association Board, above n 51, at 539.

¹⁹² Universal Declaration of Human Rights, Art. 29(1).

¹⁹³ Slaughter, above n 12, at 17.

They saw the important connection of the dignified being and the developed personality. Rene Cassin reminded the Committee that they were requested to prepare a draft of the UDHR that would "permit all to develop their personality."¹⁹⁴ This remained central to the UDHR throughout the drafting and is repeated throughout the IBOR.¹⁹⁵ Joseph Slaughter comments how remarkable this is considering it was "a document in which every word was debated and revised by the delegations of fifty-eight states over the course of three years."¹⁹⁶ Thus, the fact that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible"¹⁹⁷ became tautological within the UDHR.¹⁹⁸ As such, it entered into international law through social relations that one freely and fully develops.

The rights and freedoms in the IBOR are not for survival or as an existential being but for a moral human being.¹⁹⁹ They are for the sole purpose of the development of one's personality for the inherent dignity of the individual alone and on his/her relation to others and society.²⁰⁰ They provide the conditions of well-being and enable potentiality of a dignified being illustrating the interconnectedness of well-being and potentiality with dignity.²⁰¹ Well-being is the dynamic state, the conditions, by which one has the ability to pursue and fulfil one's personal and social goals²⁰² – potentiality. That is, all of the rights and freedoms are the

¹⁹⁴ Torkel Opsahl "Articles 29 and 30" in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights: a Commentary* (Scandinavian University Press, Oslo : Oxford, 1992) at 451.

¹⁹⁵ Universal Declaration of Human Rights, Art. 22, 26, and 29; International Covenant on Economic, Social and Cultural Rights, Art. 13.

¹⁹⁶ Slaughter, above n 12, at 17.

¹⁹⁷ Universal Declaration of Human Rights, Art. 29.

¹⁹⁸ Slaughter, above n 12, at 76,78.

¹⁹⁹ Marshall, above n 118, at 42.

²⁰⁰ Mårtenson, above n 97, at 20.

²⁰¹ Marshall, above n 6, at 90.

²⁰² Joseph Raz *The Morality of Freedom* (reprinted ed, Clarendon Press, Oxford, 2009) at 391; June Statham and Elaine Chase *Childhood Wellbeing: A brief Overview* (2010) at 2.

progressive affirmation of the dignity of the human in which the personality has been incorporated.²⁰³

Dignity, well-being and potentiality, is only possible and free when it is autonomous.²⁰⁴ Autonomy is the capability²⁰⁵ to determine both who one is and how one lives.²⁰⁶ Francisco Valdes states that this occurs through having “control over one’s capacity to experience and express the self; to shape and direct personality, both socially and sexually; and to realize one’s being and fate.”²⁰⁷ It requires the capability to make independent choices in the authoring of one’s life.²⁰⁸ It requires the willingly enacting and endorsing of the actions and or values that one expresses.²⁰⁹

Autonomy promotes and enhances well-being and potentiality.²¹⁰ As such, an autonomy-enhancing culture is more suitable for enabling and enhancing well-being.²¹¹ Well-being is central to the development of personality which ultimately

²⁰³ Slaughter, above n 33, at 38.

²⁰⁴ Chantal Levesque and others “Autonomy and Competence in German and American University Students: A Comparative Study Based on Self-Determination Theory” (2004) 96 *Journal of Educational Psychology* 68 at 68.

²⁰⁵ Agency is the capability to act. This can occur in either a heteronomous or autonomous environments. Enhanced well-being requires autonomous agency. Refer to Paul Ricoeur where he indicates that the capabilities: to speak, to act, to tell/narrate, and to promise. These capabilities autonomously enable one as an agent to author one’s life. Refer to: David Pallauer (translator) Paul Ricoeur *The Just* (University of Chicago Press, Chicago, 2000) at ch 1; Also see generally: Kathleen Blamey (translator) Paul Ricoeur *Oneself as Another* (University of Chicago Press, Chicago, Ill, 2008).

²⁰⁶ Davina Cooper “‘And You Can’t Find Me Nowhere’: Relocating Identity and Structure within Equality Jurisprudence” (2000) 27 *Journal of Law and Society* 249 at 250; Eekelaar, above n 35, at 185.

²⁰⁷ Valdes, above n 5, at 170.

²⁰⁸ Raz, above n 202, at 391; Marshall, above n 6, at 97.

²⁰⁹ Valery Chirkov and others “Differentiating Autonomy from Individualism and Independence: A Self-determination Theory Perspective on Internalization of Cultural Orientations and Well-being” (2003) 84 *Journal of Personality and Social Psychology* 97 at 98.

²¹⁰ Raz, above n 202, at 391; Marshall, above n 6, at 42; Chirkov and others, above n 209, at 97, 106; Ricoeur, above n 205, at 3; Eekelaar, above n 35, at 185.

²¹¹ Raz, above n 202, at 391.

achieves potentiality as a dignified being. Well-being is best described by Vicki Grieves as:²¹²

the social, emotional, and cultural wellbeing of the whole community in which each individual is able to achieve their full potential as a human being, thereby bringing about total wellbeing of their community.

Well-being is thus the platform to reach potentiality. Potentiality is the need “to experience satisfaction in exercising and extending one’s capabilities” and in doing so, people “naturally seek out challenges that are optimal for their level of development.”²¹³ It can be referred to as the “successful attainment of life’s goals and its consequences for well-being [as] a function of exploring and committing to choices.”²¹⁴ This is the progressive affirmation of the dignity of the human person²¹⁵ and the purpose of human rights. Thus, when the well-being and potentiality of every individual increase, so does that of the community. The extent of well-being and potentiality is a barometer of a flourishing society.

The development of personality aims for potentiality in well-being. It is the autonomous capable and moral being as described in Chapter 2. Mill writes in relation to such a development:²¹⁶

Human nature is not a machine to be built after a model, and set to do exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing.

²¹² Vicki Grieves “What is Indigenous Wellbeing?” in Joseph Selwyn Te Rito (ed) *Mātauranga Taketake - Traditional Knowledge: Indigenous Indicators of Well-being: Perspectives, Practices, Solutions, 2006* (Ngā Pae o te Māramatanga, Auckland, NZ, 2007) at 109.

²¹³ Levesque and others, above n 204, at 68.

²¹⁴ Marshall, above n 6, at 92.

²¹⁵ Slaughter, above n 33, at 38.

²¹⁶ John Stuart Mill *On liberty* (Dover Publications, Mineola, NY, 2002).

Development is not a linear process, but innate and relational. It requires the exercise of all of its faculties including the physical, psychological, spiritual and relational. However, for this to be full development, it must also be a free development. This enables the flourishing of both individuals and the community.²¹⁷

4.3.2 Freedom

The development of one's personality requires freedom. Freedom is a foundation value of the IBOR, along with dignity and equality, as equal partners in the inalienable faith in human rights of the human family.²¹⁸ Joseph Slaughter indicates this freedom is integral to the development of personality between free human beings. He wrote that the "free development of the human passions ... leads to a harmonious personality and to harmonious co-operation between free men."²¹⁹ Freedom is the ability to grow and develop relationally as dignified human beings.

Before explaining freedom in context of the IBOR, it is important to define freedom. John Stuart Mill considers liberty or freedom as essential to human society. He refers liberty as comprising of:²²⁰

first the inward domain of consciousness; ... Secondly, the principle requires liberty of tastes and pursuits; framing the plan of our life to suit our own character; of doing as we like subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them even though they should think our conduct is foolish, perverse, or wrong. Thirdly, from the liberty of each individual follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any

²¹⁷ Marshall, above n 118, at 220.

²¹⁸ Becker, above n 4, at 84.

²¹⁹ Slaughter, above n 12, at 6.

²²⁰ Mill, above n 216, at 10.

purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

Freedom thus requires three things, the consciousness of mind, the ability to plan and suit one's own life, and the relationality among others. Mill, though, places the balance or proviso of weighing one's pursuits with the possibility of harming others. This harm must not be taken as what one thinks as foolish, perverse, or wrong. Before going into how freedom is understood within human rights, it is first important to explain the two types of freedom, as Isaiah Berlin describes – negative freedom and positive freedom.²²¹

He describes negative freedom as the “area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons.”²²² Negative freedom emphasises on the prevention of the role of external barriers.²²³ It becomes an absence rather than a presence²²⁴ of interference. At its extreme, being free when left alone permits one “to do whatever one wants” without interference²²⁵ leaves people at the whims of society. Such freedom is often seen as innately separate, individualistic, unconnected, rights-oriented, and even possibly antagonistic.²²⁶

Positive freedom is “what or who is the source of control or interference that can determine someone to do, or be, this rather than that.”²²⁷ Whereas positive

²²¹ Isaiah Berlin *Four Essays on Liberty* (Oxford University Press, New York, USA, 1971) at ch 3.

²²² At 121–122.

²²³ Marshall, above n 6, at 16.

²²⁴ Eithne McLaughlin “From Negative to Positive Equality Duties: The Development and Constitutionalisation of Equality Provisions in the UK” (2007) 6 *Social Policy and Society* 111 at 112.

²²⁵ Marshall, above n 6, at 16.

²²⁶ At 16.

²²⁷ Berlin, above n 221, at 121–122.

freedom is a wish to be one's own master of one's life and decisions and not through external forces of any kind.²²⁸ It refers to a person that has²²⁹

a wish above all to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by reference to my own ideas and purposes. I feel free to the degree that I believe this to be true and enslaved to the degree that I am made to realise that it is not.

It is to be the source of control or interference that can determine someone to do, or be, this rather than that."²³⁰ It seeks "to prevent and pre-empt inequality, by requiring and encouraging certain potentially preventative behaviours and practices."²³¹ In the extreme, it has the potential to be paternalistic and over-bearing upon one's life, even deterministic. Both of these in the extreme can violate human rights.

Freedom is repeated inserted throughout the IBOR. Freedom is integral to two key interpretive articles of the UDHR – Articles 1 and 29. This is echoed throughout the Charter and the IBOR. Human rights recognise that one is born free. This is stated in Article 1 of the UDHR: "All human beings are born free and equal in dignity and rights."²³² Although everyone may be born free and equal in human rights, this freedom may be inhibited or denied at any time through one's development. This inhibition or denial of freedom violates one's dignity of being. So while one may be born free, dignity is a state that must be maintained, and it is not automatic. According to the Conventions of the IBOR, "the ideal of free human beings" can only be achieved if conditions are created whereby everyone may enjoy one's

²²⁸ At 131.

²²⁹ At 131; Also written in Marshall, above n 6, at 16.

²³⁰ Berlin, above n 221, at 122.

²³¹ McLaughlin, above n 224, at 115.

²³² "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights, Art. 1.

rights and freedoms which derive from the “inherent dignity of the human person.”²³³ This freedom underlines the equality and dignity of being.

Freedom is the ability to fully develop one’s personality. This is a duty of everyone according to the IBOR.²³⁴ It incorporates two sides of freedom: negative freedom is the ‘freedom from’ inhibition and denial and the positive is the ‘freedom to’ enable²³⁵ the development of one’s personality as a dignified human being. This correlates freedom with dignity and empowerment.²³⁶ As such, freedom is tied to the enabling, and protection of such development and also indicative of whether one has dignity. State, and non-state parties, must ensure the conditions for one development are sufficient. In other words, as indicated in Chapter 2, there are adequate choices to enable one to freely and fully develop. Moreover, the state may need to interfere when conditions permit or others to violate one’s dignity of being and inhibit or deny one’s development of personality. Jill Marshall notes that²³⁷

States are increasingly responsible for human rights violations in failing to ensure that people have the enabling conditions to live their lives in peace, in safety, with clean water, with a roof of some type over their heads.

From the perspective of the IBOR, the state is not a bystander watching but proactive ensuring the conditions are favourable to the free and full development. Only then can there be dignity of being.

²³³ International Covenant on Civil and Political Rights, Preamble; International Covenant on Economic, Social and Cultural Rights, Preamble.

²³⁴ “Everyone has duties to the community in which alone the free and full development of his personality is possible” Universal Declaration of Human Rights, Art. 29(1).

²³⁵ Marshall, above n 6, at 16.

²³⁶ Marshall, above n 118, at 216.

²³⁷ At 17.

From a 'liberal' perspective, freedom is commonly associated with 'being left alone'.²³⁸ It rests on the idea of a pre-social self of being by nature free and unconstrained.²³⁹ The individual, if left alone, will self-realise what one is²⁴⁰ as according to the determination of the pre-social self. Jill Marshall writes in relation to this negative freedom and development:²⁴¹

Underlying the notion of a person being free, and a person's rights being preserved if left alone, not being interfered with, usually by the state. It implies that human rights laws are needed to stop state action from abusing individual rights. On this view, personal identity will develop absent from state interference, this largely corresponds to an idea of negative freedom. Yet when probed, we see that human rights law goes much further than this. With the growth of positive obligations, there is an understanding that individuals' rights are not protected when left alone. If this happened from birth, we would not live very long.

The developed personal identity within such freedom is that of the problematic of identity as described in Chapter 2. One is left alone, but physically, psychologically and spiritually, one is not fully developed if left alone. As human beings, development requires relationality, in particular that of support and guidance.

For that reason, the freedom as demanded by the IBOR is autonomous-enhancing. Freedom indicates that one has autonomy²⁴² to create one's own story line and being loyal to that.²⁴³ Mill refers to the importance of this freedom to autonomy in the development of one's personality. He writes:²⁴⁴

²³⁸ Marshall, above n 6, at 16.

²³⁹ At 16.

²⁴⁰ At 16.

²⁴¹ Marshall, above n 118, at 17.

²⁴² Autonomy is sometimes referred to as self-determination such as in this text.

²⁴³ Marshall, above n 6, at 16.

²⁴⁴ Mill, above n 216, at 49.

He who lets the world, or his own part of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation. He who chooses his plan for himself, employs all his faculties. He must use observation to see, reasoning and judgment to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold to his deliberate decision.

It permits one can ask “whether a person is free to ask how he or she is ‘in the world’ or whether or not he or she is involved in the world truthfully.”²⁴⁵ This freedom is irrespective of repugnancy of others of their moral sense.²⁴⁶ It is something derived internally,²⁴⁷ innately connected, communitarian, even selfless, concerned with responsibility.²⁴⁸ Freedom suggests active processes, that is to make someone free. For example, to make people free, there is an emphasis on growth and learning and the reliance on one’s environment.²⁴⁹ Being left alone or left to one’s own devices is not sufficient on developing their human potential and capacities. This freedom means social pressures need to be removed and other social conditions improved if individuals are to develop their human potential and capacities to the full.²⁵⁰ The freedom in the IBOR is active and intentional. The goal of such freedom is to enable full development of personality.

In this perspective, it is now possible to understand that Mill’s describing a particular type of freedom as freedom. Freedom may have different names and conceptualisations, but for Mill:²⁵¹

²⁴⁵ Richard N Williams “The Human Context of Agency” (1992) 47 *American Psychologist* 752 at 757.

²⁴⁶ Mill, above n 216, at 10; Charles Taylor *Sources of the Self: the Making of the Modern Identity* (Harvard University Press, Cambridge, Massachusetts, 1989) at 12.

²⁴⁷ Marshall, above n 6, at 16.

²⁴⁸ At 16.

²⁴⁹ At 17.

²⁵⁰ At 17.

²⁵¹ Mill, above n 216, at 10.

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental or spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

This freedom is essential to the development of personality. It gives one autonomy over both who one is and how they come to be. Moreover, it enables people to relate together and ensure that each person is equally able to develop as a dignified being.

4.3.3 The Duty of Fraternity

The freedom to development one's personality cannot occur outside of one's community in which one lives. Mill argues that freedom is not only a necessary part, but conditional to a society. He writes that:²⁵²

free development of individuality is one of the leading essentials of well-being; that it is not only a coordinate element with all that is designated by the terms of civilization, instruction, education, culture, but it is itself a necessary part and condition all of those things.

The freedom to develop personality leading to well-being is integral to having the right to the fullest development as a member of his society.²⁵³ The desire is to live in and through a community as a fraternity or a solidarity. Fraternity is relational that enables the "free and full development of one's personality."²⁵⁴ Such development required support and guidance. During the establishment of the IBOR, it was realised that the free and full development of this person could not

²⁵² At 47.

²⁵³ The Executive Board of the American Anthropological Association Board, above n 51, at 539.

²⁵⁴ Universal Declaration of Human Rights, Art. 22, 26, 29; International Covenant on Economic, Social and Cultural Rights, Art. 13.

develop outside of the community.²⁵⁵ This was recognised by Alexei Pavlov of the USSR in the drafting of the UDHR and became the most persuasive argument even against that of the “Enlightenment heuristic of natural man.”²⁵⁶ This was also central in the submission that the American Anthropological Association (AAA) made to the drafting Committee of the UDHR. It argued that “groups are composed of individuals, and human beings do not function outside of the societies of which they form a part.”²⁵⁷ It went on to say that the Committee must²⁵⁸

formulate a statement of human rights that will do more than just phrase respect for the individual as an individual. It must also take into account the individual as a member of the social group of which he is a part, whose sanctioned modes of life shape his behaviour and with whose fate his own is thus inextricably bound.

Fraternity²⁵⁹ became an interpretive principle of UDHR together with dignity and equality that was incorporated through the Preamble, and Articles 1, 29, and 30. This is explained by Jan Mårtenson describing the spirit and philosophy of the UDHR. He writes that although rights were focused “on the individual, the rights necessary to the inherent dignity of the individual alone, and on his/her relation to others and society.”²⁶⁰ It is this respect as equals, as equal beings of value, which creates the moral value of human rights. It acknowledges both one’s own and other’s moral value as a human being as a part of a shared humanity.²⁶¹

²⁵⁵ Schachter, above n 104, at 850–851.

²⁵⁶ Slaughter, above n 12, at 48; Slaughter, above n 33, at 3.

²⁵⁷ The Executive Board of the American Anthropological Association Board, above n 51, at 539.

²⁵⁸ At 539.

²⁵⁹ Friendship and mutual support within a group, such as ‘the ideals of liberty, equality and fraternity’: *Oxford Dictionaries* (online ed, 2015) Fraternity <<http://www.oxforddictionaries.com/definition/english/fraternity>>.

²⁶⁰ Mårtenson, above n 97, at 20.

²⁶¹ Bloom, above n 182, at 244.

A fraternity is difficult when one places oneself above others. Although human rights centre on the dignified being, it is far from being the rights of individualism. Human rights were not intended for selfish gains. During the drafting at the Third Committee of the UDHR, the Chinese delegate, Chang,²⁶²

felt that the aim of the United Nations was not to ensure selfish gains of the individual but to try and increase man's moral stature. It was, therefore, a necessity to proclaim the duties of the individual, for it was a consciousness of his duties which enabled man to reach a high moral standard.

Rather, human rights were there to increase the moral stature of human beings. As referred to in Chapter 2, the moral basis of esteem and respect revolves around the dignified being. This involves considering others as oneself. Abdullahi Ahmed An-Na'im writes that "in placing oneself in the position of the other, one should not impose one's own perceptions on the other's position."²⁶³ This requires the respecting of oneself and others in the aim of development of one's personality. In doing so, while developing one's personality, one will consider actions in terms of their consequences for other human beings.²⁶⁴ This regulates one's being to take account of others and not just the promptings of his own egoism.²⁶⁵ This connects the principle of reciprocity to fraternity. Albie Sachs refers to this principle from the African understanding of Ubuntu. He states:²⁶⁶

I am a person because you are a person; that I can't separate my humanity from an acknowledgement of your humanity. It presupposes that I don't strengthen

²⁶² Johannes Morsink *Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press, Philadelphia, PA, USA, 2000) at 240.

²⁶³ "For example, it should not be open to Muslim to say that since he accepts for himself to be subject to Islamic law (Shari'a), he would conform with the principle to reciprocity in imposing Shari'a on Non-Muslims." See: 'Abd Allāh Aḥmad Na'īm "Problems of Universal Cultural Legitimacy for Human Rights" in 'Abd Allāh Aḥmad Na'īm and Francis Mading Deng (eds) *Human Rights in Africa: Cross-cultural Perspectives* (Brookings Institution, Washington, DC, 1990); repeated in: Morsink, above n 41, at 115.

²⁶⁴ FJ Ayala "The Difference of Being Human: Morality" (2010) 107 PNAS 9015 at 9018.

²⁶⁵ Émile Durkheim *The Division of Labor in Society* (Macmillan, Basingstoke, 1991) at 331.

²⁶⁶ Albie Sachs "Liberty, Equality, Fraternity: Bringing Human Solidarity Back Into the Rights Equation" (2012) 4 J Human Rights Practice 365 at 378.

my personality through isolating myself from you; but on the contrary, I benefit from my association with you.

It recognises the dignity of another as well as one's own one and that through such associations enables the development of each one's personality. It is this principle of reciprocity, that Johannes Morsink refers to as the Golden Rule is written into the IBOR. The Articles of the IBOR are deduced from the understanding of reciprocity in light of Article 1 and the Preamble.²⁶⁷ This sense of reciprocity was indicated in Article 1 of the UDHR with the insertion of 'endowed with reason and conscience' which was a Westernised translation of 'ren' as "two-mindedness or in ordinary English terms 'consciousness of his fellow man or sympathy'."²⁶⁸ That is, there is a duty to enable others to develop their personality and in developing one's own, one must also take into account others ability to freely and fully develop.

Edward J Eberle wrote that as a human family we are "bound by a sense of moral duty, a sense of social need, personal responsibility, and human solidarity."²⁶⁹ The recognition of such a duty or responsibility to one another was written into the IBOR. This was made clear by Rene Cassin who noted in preparing for the UDHR that the²⁷⁰

task of society being to permit all to develop their personality, without one being sacrificed for others, on man's dependence on society and thus duties towards it, and on limitations on everyone's rights by those of others.

This duty and responsibility was included within key interpretive parts of the UDHR and then woven into the derived Conventions. They are referred to in Article 29(1)

²⁶⁷ Morsink, above n 41, at 113.

²⁶⁸ Lindholm, above n 105, at 33.

²⁶⁹ Edward J Eberle "Human Dignity, Privacy, and Personality in German and American Constitutional Law" (1997) 1997 Utah L Rev 963 at 973.

²⁷⁰ Opsahl, above n 194, at 451.

of the UDHR which states: “Everyone has duties to the community in which alone the free and full development of his personality is possible.” This is stated in Article 1 of the UDHR²⁷¹ that states: all human beings ... “should act towards one another in a spirit of brotherhood.”²⁷² Article 1 was written into a key position of the interpretive Preamble of both Conventions of the IBOR – the ICCPR and ICESCR:²⁷³

Recognizing that these [equal and inalienable] rights derive from the inherent dignity of the human person,...having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.

The Preambles of both the ICCPR and ICESCR clearly indicate such duties in the phrasing: “duties to other individuals and to the community to which he belongs.”²⁷⁴ Such duties have also been included in other international human rights conventions.²⁷⁵ As a member of the human family, there is a moral duty to one another. It is this duty that Sandy Farquhar writes is “duty-bound in asking

²⁷¹ For a larger discussion of the drafting of Article 1, refer to Lindholm, above n 105, at 31–55.

²⁷² Universal Declaration of Human Rights, Art. 1.

²⁷³ International Covenant on Civil and Political Rights, Preamble; International Covenant on Economic, Social and Cultural Rights, Preamble.

²⁷⁴ International Covenant on Civil and Political Rights, Preamble; International Covenant on Economic, Social and Cultural Rights, Preamble.

²⁷⁵ For example, See, African Charter on Human and Peoples’ Rights, (adopted 27 June 1981, signed 27 June 1981, entered into force 21 October 1986), s Art 29: The individual shall also have the duty: (1) To preserve the harmonious development of the family and to work for the cohesion and respect of the family; To respect his parents at all times, to maintain them in case of need; (2) To serve his national community by placing his physical and intellectual abilities at its service; (3) Not to compromise the security of the State whose national or resident he is; (4) To preserve and strengthen social and national solidarity, particularly when the latter is strengthened; (5) To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to his defence in accordance with the law; (6) To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society; (7) To preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society; and (8) To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity. African Charter on Human and Peoples’ Rights, (adopted 27 June 1981, signed 27 June 1981, entered into force 21 October 1986), Art. 27.

one human being to consider the humanity of the other before one's self."²⁷⁶ This enables the blossoming of respect "for others and for 'oneself as another,'" and extend respect "to anyone who has the right to expect his or her just share in an equitable distribution."²⁷⁷ It becomes a morality as part of a shared humanity²⁷⁸ which was reflected in the IBOR. This is demonstrated through the process of conferring of rights on a dignified being or person.²⁷⁹ This obligation is to enable the free and full development of 'all the members of the human family'.²⁸⁰

4.3.4 Summary

The normative basis of human rights centres on the enabling of the development of one's personality. Enabling is essential to remain in a dignified state. This enabling of one's personality moves the moral rights and freedoms from mere formalism to something substantive, something with meaning and significance. This requires freedom and fraternity. Development is a product of human relations.²⁸¹ Freedom and fraternity enable the fullest development as a member of his society.²⁸²

The focus of the IBOR is the free and full development of the personality of the dignified being. All of the rights and freedoms are there for such a purpose and foundation. Article 30 of the UDHR states:²⁸³

²⁷⁶ Sandy Farquhar *Ricoeur, Identity, and Early Childhood* (Rowman & Littlefield Publishers, Lanham, Md, 2010) at 2.

²⁷⁷ Ricoeur, above n 205, at 203–204.

²⁷⁸ Bloom, above n 182, at 244.

²⁷⁹ At 244.

²⁸⁰ Lindholm, above n 105, at 34–35.

²⁸¹ Slaughter, above n 12, at 48.

²⁸² The Executive Board of the American Anthropological Association Board, above n 51, at 539.

²⁸³ Universal Declaration of Human Rights, Art. 30.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

However, this does not indicate that development has free reign irrespective of the effect on others. There are limitations on rights and freedoms. These limitations are to ensure the recognition and respect of others and oneself within a society, a fraternity. This is clarified in Article 29(2) of the UDHR:²⁸⁴

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

These limitations may inhibit some pleasures and interests where they may conflict or inhibit others' ability to develop their personality as a dignified being. Despite such limitations, they must be kept in context. They must not be interpreted inhibiting one's dignity. Torkel Opsahl wrote: "Article 29 should be interpreted in accordance with Article 30, that is, not limit the human rights of the individual."²⁸⁵ Moreover, the exercise of one's rights shall not be contrary to the foundation of human rights – the equal dignified human person. This is contained within Article 29(3) of the UDHR states: "These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."²⁸⁶ They are there to be exercised in the developing one's personality and maintaining the dignity of oneself and others. In doing so, there will be a balancing of certain pleasures or interests to ensure an equality of dignity of being. The limitations noted in Article 29(2) again reflect the principle of reciprocity and positive freedom required to enable all human beings to develop and flourish.

²⁸⁴ Universal Declaration of Human Rights, Art. 29(2).

²⁸⁵ Opsahl, above n 194, at 454; Universal Declaration of Human Rights, Art. 30.

²⁸⁶ Universal Declaration of Human Rights, Art. 30(3).

4.4 *Foundation and Purpose for One's Moral Authored Identity*

Paul Lauren articulates well that the “issue of human rights addresses the age-old and universal questions about the relationship between individuals and their larger society, and thus is one that has been raised across time and across cultures.”²⁸⁷ He sums it up well describing the differing world views:²⁸⁸

Instead of seeing the best in human nature, they saw the worst and had much history to support them. Rather than the universal, or what people share in common, they stressed the particular, or what divides them.... In place of rights, they demanded obedience. Instead of justice, they wanted privilege. Rather than change, they pressed for tradition and continuity.... Instead of being a keeper of all brothers and sisters, they frequently looked no further than themselves or their own exclusive group.

This quote illustrates the two sides or interpretive view points on life and also on rights. One, the vertical interpretive frame was negative based. The horizontal was positive based. Within the vertical rights and freedoms will be negative based and confrontational. There is the aim for maximisation of oneself and one's resources. There is little desire for reciprocity unless there is a benefit for oneself. This is a universal within strong more authoritarian type) or weak (more democratic type) collectives. The rules and regulations dictate life, what one is, and how one should be. One makes choices from the choices that are available and is committed to them. Human rights do not fit successfully within a vertical interpretive horizon. Negative freedom²⁸⁹ is where there is a duty not to be interfered with.²⁹⁰ It may lead to a sense that one's interests are of more importance than others. Non-

²⁸⁷ Paul Gordon Lauren *The Evolution of International Human Rights: Visions Seen* (University of Pennsylvania Press, Philadelphia, 2003) at 12.

²⁸⁸ At 21.

²⁸⁹ This often is associated with libertarianism due to its which has an individualist value separate from the community.

²⁹⁰ Fredman, above n 173, at 226; Na'im, above n 263, at 397.

interference is not always in one's best interest. It may not always protect rights and enable the development of personality. Peter King argues:²⁹¹

We might, if we are selfish, see our interests as more important than those of others, and therefore ours should take precedence. However, once we appreciate that our selfishness is likely to be reciprocated, and consequently all this boils down to is power relations, we might wish to return some recognition that the interests of others count as much as our own.

The vertical system though is based on power relations and status. Thus, the selfishness is the inherent maximisation of those who benefit from such systems. It centres on the recognition of interests who counts. Maximising will always cause harm.

The horizontal is centred on the dignified being at the centre who must have esteem and respect to enable one's capabilities in togetherness. This horizon operates through principles with the main one of reciprocity. It centres on what required for well-being and reaching potentiality while at the same time enabling others to do the same. It does not define one but recognises each one for who they are building each one into constitutive and constructive members of the community. This is summed up by John Stuart Mill as a flourishing life:²⁹²

It is not by wearing down into conformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and freedoms of others, that human beings become the noble and beautiful object of contemplation; and as the work partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to.

²⁹¹ King, above n 56, at 662.

²⁹² John Stuart Mill *On Liberty* (The Pennsylvania State University, Hazleton, PA, USA, 1998) at 74.

This flourishing life exists through positive life where everyone is enabled to live their good life.

The foundation and purpose of international human rights have been defined in above. The foundation and purpose are reflexive occurring interdependently. Through this, the human person is front and centre as the subject of human rights. This is summed up by Joseph Slaughter:²⁹³

Like the Eighteenth-century counterparts, the Universal Declaration enlists the human person in its legitimizing activity with the exhortation that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive ... to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

This is summed up as: The rights and freedoms of the IBOR protect the dignified being and enables the development of their personality. This foundation of the human person in dignity and equality of the IBOR cannot be overemphasised in the interpretation and implementation of human rights.

The concept of dignity is central to the human condition. It is the interconnected human capability to author one's being. Dignity is ultimately autonomous in reckoning and not based on position, status, or merit or other such basis. Sandra Fredman illustrates this in connection with well-being and potentiality:²⁹⁴

Dignity is "based on what people say and do, dignity seems to be a condition signified by a sense of contentment, satisfaction, and wellness – an integrative evaluation of our lives and circumstances. Inherent to the very notion of dignity is the idea that dignity is ultimately reckoned by each individual for him or herself. Dignity is shaped by our relationships with ourselves, but also by our relationships with others as well as our interactions with the physical world.

²⁹³ Slaughter, above n 12, at 88.

²⁹⁴ Mattson and Clark, above n 111, at 313–314.

Viewed in this way, each person's experience of dignity is inextricably coupled with that of others through the health and vigour of the commonwealth which may arise, in part, from the unique extent to which human biological fitness is contingent on the institutions that we develop."

This is supported by Oscar Schachter who connects dignity with identity, autonomy and responsibility:²⁹⁵

a complex notion of the individual. It includes recognition of a distinct personal identity, reflecting individual autonomy and responsibility.

Any loss of dignity leads to a loss of self-respect undermines the aim for the good life which is the basis of a dignified life of the human person. The loss of self-esteem and self-respect undermines what is valuable and worthwhile.²⁹⁶

Equality and dignity arise as having shared characteristics of the human family and this demands equal respect which is part of the social bond operating within human rights law. This is expressed by Matthew Craven:²⁹⁷

The idea that humans have some basic shared characteristics and as a result should be viewed as members of a human race rather than members of a particular group; recognition of the shared qualities gives rise to the principle of equality which requires all members to be treated with equal respect; certain forms of state or governmental behaviour which consistently exploit or degrade men and deny both the possession of the shared humanity and the moral claims that arise from these by certain groups while conceding and indeed recognising them in the case of others should be excluded.

The bonds of human rights are there to protect human persons from state and governmental behaviour, exploitation and degradation that prevent them from being part of a shared humanity. These bonds did not push one particular ideology,

²⁹⁵ Schachter, above n 104, at 851.

²⁹⁶ Pauline Chazan "Self-esteem, Self-respect, and Love of Self: Ways of Valuing the Self" 26 *Philosophia* 41 at 54.

²⁹⁷ Craven, above n 131, at 154.

bar the dignity of the human person and its free and full development. As Joseph Slaughter writes:²⁹⁸

International human rights law consists of principles by which states parties agree to abide for the promotion and protection of the rights of their own citizens, calibrating the limits of legitimate state power by the abstract (moral) anthropometrics of the 'inherent dignity' and 'worth of the human person' and its capacity for free and full development.

It was based on this foundation – the equal dignified person that the purpose could be enabled the free and full development of personality – and these are both circulatory in nature in that they cannot occur without the other. These human rights are more than a list of rights, freedoms and obligations. Rather, all of the rights and freedoms affect the foundation and purpose of human rights: the human person in solidarity. It is in this respect that Richard Gardiner states in relation to the interpretation and understanding of human rights:²⁹⁹

Elements can only be taken up one at a time, but they are to be evaluated together." The claim of protection or enablement may come through an article but must be interpreted in light of the IBOR as a whole.

All human rights must be interpreted through and in accordance with the purpose and intention of human rights and their principles. Only then will human rights function as to their foundation and purpose.

Human rights are thus the social bond between peoples and more importantly between peoples and the state to enable people to flourish in free and full development as a dignified being. It is these rights that the capable subject of rights requires as part of a shared humanity to develop a moral identity. These rights are imputed on the capable subject. As Ricoeur states,³⁰⁰

²⁹⁸ Slaughter, above n 12, at 88–89.

²⁹⁹ Richard K Gardiner *Treaty Interpretation* (Oxford University Press, Oxford, 2010) at 30.

³⁰⁰ Ricoeur, above n 205, at 3.

the ethico-juridical imputation of rights and duties can only be imputed on an autonomous person who has power over bodily members, and through them, and on the course of things to author one's life.

The subject of rights becomes one of imputation through the ethico-juridical plane as an autonomous capable being authoring one's life.³⁰¹ It is this human person as part of a shared humanity through dignity, equality and reciprocity.

The influence from a legal positivist model of rights based on one having a right and the duty of society to uphold that right may tempt us to overlook this very important connection of the foundation and purpose of human rights being central to any interpretation of the rights and freedoms in the IBOR. For this reason, the aim of this chapter was to demonstrate that international human rights are not a list of things people can claim in grievance, but actually are a set of requirements to protect on one hand and enable on the other the moral human person. Human rights as a whole are there to enable a moral being to write a narrative identity that will reveal a personal identity as a moral identity.

The dignified being author's one's own moral world. This requires that the adequate choices are available to independently and autonomously make commitments and be loyal to them in forming that moral world. For this very reason, the IBOR was established to provide the rights and freedoms that enable development of the dignified being. Personal freedom is the notion of universal right that everyone should have the right and capacity to be themselves, and as such, there is a requirement that every person's personal autonomy and identity require recognition by others.³⁰² This freedom is essential to the developing of a dignified being. However, there is no dignity if persons are "perceived or treated

³⁰¹ David Pellauer (translator) Paul Ricœur *Reflections on the Just* (University of Chicago Press, Chicago, 2007) at 74; Paul Ricoeur "Capabilities and Rights" in Séverine Deneulin, Mathias Nebel and Nicholas Sagovsky (eds) *Transforming Unjust Structures: the Capability Approach* (Springer, Dordrecht, The Netherlands, 2006) 17 at 20.

³⁰² Marshall, above n 6, at 91.

merely as instruments or objects of the will of others,”³⁰³ whether it is by states or other collectives in forming their moral world as this would lead to a violation of human rights.

4.5 *Intersex Hermeneutic Justice*

The history and current issues facing intersex represent hermeneutic injustice. Hermeneutic injustice is the prevention of someone with a lived experience from making sense of their own experience.³⁰⁴ Miranda Fricker describes hermeneutic injustice as³⁰⁵

someone is trying to make sense of a social experience but is handicapped in this by a certain sort of gap in collective understanding – a hermeneutic lacuna whose existence is owing to the relative powerlessness of a social group to which the subject belongs.

Morgan Holmes illustrates this sense of hermeneutic injustice. She writes: “knowledge of myself and where I fit in is what was stolen from me by being medicalised and by having my body altered against my will.”³⁰⁶ The feeling of a stolen life for intersex people is common. They desire to reclaim their moral identity.

Identity is much more than an immutable identifier as understood within the problematic of identity as described in chapter two. Identity cannot be separated from a moral life, a life of esteem and respect as a capable being forming an autonomous good life in and with others. This is one’s moral identity. It is to this that intersex people aspire. A moral identity requires living in truthfulness and

³⁰³ Schachter, above n 104, at 849.

³⁰⁴ Morgan Carpenter “Intersex Rights and Freedoms” [2015] 9 Ct of Conscience at 31.

³⁰⁵ Miranda Fricker “On Miranda Fricker’s Epistemic Injustice: Power and the Ethics of Knowing: Précis” (2008) 23 *Theoria Revista de Teoría, Historia y Fundamentos de la Ciencia* 69 at 61; Carpenter, above n 304, at 31.

³⁰⁶ Morgan Holmes *Intersex: a Perilous Difference* (Susquehanna University Press, 2008) at 224; Also see: Catherine Harper *Intersex* (Berg, Oxford; New York, NY, 2007) at 35.

integrity, and in the case of intersex people, this requires them to live the sex they are – male, female both or neither – and have autonomy over how they come to be.³⁰⁷

As a human rights person, an intersex person requires a state of dignity. For this to occur, they must be able to freely and fully develop as to who they are and how they come to be. This does not arrive automatically. It requires one to make sense of oneself. Referring to a Socrates phrase: “an unexamined life is not worth living.”³⁰⁸ For intersex people, the examining of one’s life to find meaning and significance is the fight for human rights. A moral identity for an intersex person is the autonomous capability to be who they are both internally and externally and have autonomy over the capability of how one comes to be, even if it be later in life. This may be the acknowledging of the uniqueness of one’s sex in the developing of personality. The goal of a moral being with a moral identity is human flourishing. It is to this end, to use John Stuart Mill words, one becomes the “perfection of human nature.”³⁰⁹

The next three chapters will evaluate some of the many rights and freedoms that enable an examined life for intersex people to live a moral life and reveal a moral identity. The next chapter will consider the enabling of who one is and how one comes to be through the right to privacy. However, for this to happen, it requires well-being. The state of well-being, so critical to a dignified being, and issues of well-being for intersex people will follow in chapter 6. The last chapter, chapter 7 will return to a focus of identity and recognition. Recognition is both a cause and a solution to intersex issues. These chapters while not covering all areas of rights and freedoms for the good life of intersex people, it brings together some key

³⁰⁷ Marshall, above n 6, at 91.

³⁰⁸ Ricoeur, above n 205, at 178.

³⁰⁹ Mill, above n 292, at 91.

components to enable them to live a good or accomplished life with a moral identity.

CHAPTER 5: THE RIGHT TO AUTONOMOUSLY SHAPE ONE'S LIFE AND IDENTITY

First and foremost, the key issue for intersex people is to have control over who they are as a sex – whether it be male, female, both or neither – and the power over how they come to be. Chai Feldblum writes that intersex people desire control “over the definition of one’s existence and over their anatomy, identity and expression from physicians, parents and society at large.”¹ This is core to intersex people’s rights. They desire the ability to have a moral life with self-esteem and self-respect. This cannot occur without the dignity to autonomously become the sex one is. This requires the autonomous capabilities of humanness to enable one to become who they are which will reveal the sex one is. This is the basis of international human rights.

Although sex at international law has commonly still been understood within the interpretive horizon as a status, international human rights law argues that it is through and for the dignified human being, not that of status or other utilities, that international human rights must be applied. Furthermore, to maintain the dignified being, the human person must be enabled to freely and fully develop. Referring back to status identities such as sex as it is currently assumed, denies the very purpose and foundation for which human rights were created. They were created to overcome statuses that had denied people the freedom to freely and fully develop as a dignified being. It also denies one’s moral identity.

A moral identity is central to the human rights person. A central place where this is found in human rights law is through the ‘right to privacy’. The right to privacy protects the core areas that enable the dignity of the human person in becoming

¹ Chai R Feldblum “Right to Define One’s Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People, The” (2006) 7 *Geo J Gender & L* 115 at 116.

who one is such as autonomy, identity, personal development and relationships, the integrity of the person and dignity. Together these are representative of what is required for the capable being to autonomously become who one is. This chapter will first understand what is the right to privacy before applying it to intersex people who aim to make sense of themselves which is central to one's self-esteem and self-respect as a dignified being.

5.1 *Ordinary Meaning of Privacy*

The common interpretation and assumption has been the classical understanding of privacy. The classical understanding took a classical right through a negative freedom understanding of such rights in in constitutional and tort law such as the protection from others "to gain, disseminate, or use information about oneself."² Such an interpretation guarantees freedom from the "inviolability of home and correspondence and the classical problem of unreasonable searches of the body."³

This understanding had been understood by some state parties coming before the HRC. For example, in *Toonen v Australia*, the Federal Government, after reviewing the travaux préparatoires of article 17, subscribed to the view of privacy/private as: "matters which are individual, personal, or confidential, or which are kept or removed from public observation."⁴ Here, the State inferred the meaning to be that of the negative freedom classical understanding. The Oxford Dictionary has defined privacy as "A state in which one is not observed or disturbed by other people" or "The state of being free from public attention."⁵ This has continued the

² Jed Rubenfeld "The Right of Privacy" (1989) 102 Harvard Law Review 737 at 740.

³ Oliver Diggelmann and Maria Nicole Cleis "How the Right to Privacy Became a Human Right" (2014) 14 Human Rights Law Review 441 at 441.

⁴ *Toonen v Australia* UN Human Rights Committee UN Doc CCPR/C/50/D/488/1992, 31 March 1994 at [6(2)].

⁵ *Oxford Dictionaries | English* (online ed, 2017) Privacy <<https://en.oxforddictionaries.com/definition/privacy>>.

classical understanding of privacy. Furthermore, in a commentary on the ICCPR, it has listed some of the common suggested definitions:⁶

It has been categorised as a choice, a function, a desire, a right, a condition and/or a need. It has also been defined as the desire of individuals for solitude, intimacy, anonymity, and reserve. It has also been defined as a right to be left alone and narrowly as a right to control information about one's self.

The above definitions have retained the classical view of protecting information. It also infers 'to be left alone' and seclusion or being private and away from other people. The ordinary meaning as the 'right to be left alone' or the 'right to control information about oneself' is about access to and control of information rather than the right to privacy as will be seen below.

However, if the right to privacy is not that as described within the classical meaning of privacy, then what was it intended to mean? Why was it included the first place of the Article? What did it mean as an umbrella term and what does it include? Given that elements of the classical meaning are already included in the Articles of the different Declaration/Conventions, it is obvious that it meant something else.

5.2 *The Right to Privacy*

The right to privacy is an important article in the IBOR though relatively unknown. It was established in Article 12 of the UDHR and repeated in Article 17 of the ICCPR. The articles are almost identical except the ICCPR had also included the phrase "or unlawful". Article 17 of the ICCPR states:⁷

⁶ Sarah Joseph, Jenny Schultz and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, Oxford ; New York, 2000) at 348–349.

⁷ International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI) Resolution 2200A (XXI) (adopted 16 December 1966, entered into force 23 March 1976), Art. 17(1).

No one shall be subjected to arbitrary or unlawful⁸ interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

It is interesting to note that during drafting the terms privacy and private life were used interchangeably⁹ with no discussions as to why particular forms were chosen.¹⁰ A similar article was part of the European Convention of Human Rights (ECHR) in Article 8¹¹ however, the drafters of the ECHR chose private life and not privacy. Prior to the drafting of the International Bill of Rights,¹² few countries had a right to privacy as identity included in any state constitution.¹³ Even today, it is not a commonly utilised part of the IBOR.

⁸ Added into the ICCPR Article 17, but not in the UDHR Article 12.

⁹ The UDHR Art.12, and ICCPR Art. 17 eventually settled on privacy, while ECHR Art. 8 settled on private life. This chapter will use privacy unless it is a quote from European law.

¹⁰ International Covenant on Civil and Political Rights, Art. 17; European Convention on Human Rights, Council of Europe (adopted 3 September 1953, signed 4 November 1950), Art. 8; Manfred Nowak *UN Covenant on Civil and Political Rights* (NP Engel, Kehl, Germany; Arlington, Va, USA, 2005) at 385; Diggelmann and Cleis, above n 3, at 441.

¹¹ “1. Everyone has the right to respect for his private and family life, his home and his correspondence; 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”: European Convention on Human Rights, Article 8.

¹² The drafting history of the UDHR Article 12 and ICCPR Article 17 indicate that the fundamental question of whether or not to include such an umbrella term, or of the implication of such a step did not take place. It is clear that privacy is a contested subject, but there was no clarification why or how this concept was to be defined and possibly any understanding of its implications. With regards to the UDHR, John Humphrey (United Nations Director of Human Rights) supplied the ‘working paper’ for the drafting committee, Article 11 read as follows: Working paper version of Article 11 - “No one shall be subjected to arbitrary searches or seizures, or to unreasonable interference with his person, home, family relations, reputation, privacy, activities, or personal property. The secrecy of correspondence shall be respected.” This covered the classical privacy topics. During the drafting stages, privacy/private life was included and eliminated several times, however, the final draft read as follows: “no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks (emphasis added). The same occurred with the ICCPR Article 17 with no debate. The wording was identical with the UDHR except there was the inclusion of ‘and unlawful’ after arbitrary. This indicated that it covered a wider area of interference. Refer to: Diggelmann and Cleis, above n 3, at 441.

¹³ At 441.

The right to privacy is not the name of the Article, but the first identified right¹⁴ in this article.¹⁵ It has been considered as an umbrella term within this Article in both the UDHR and the ICCPR.¹⁶ It has likewise been considered in the ECHR. This indicates a difference between privacy and other items such as correspondence and home with inference of property. Given the heated debate over every word it is no accident that there is a separation of these items even if we are not told the intended meaning. We do know that if privacy included the non-interference of correspondence and so on, the other items would not have been separate items. As they are separate items, this chapter is not concerned with non-interference of “family, home or correspondence, nor to unlawful attacks on his honour and reputation, but solely focuses on the right to privacy. This rest of this chapter will show, it has been interpreted to incorporate a purpose to protect one’s definition of who they are and how they come to be. This is a core article in the enabling of the human rights person with a moral identity.

5.2.1 Digging out the ‘Meaning’ or Rather the Purpose of Privacy

Privacy was not included in the first draft presented to the Drafting Committee. When it was included during the drafting stages, the drafting process did not indicate or give any clues as to why it was included or to its meaning. Moreover, the General Comment on the Article 17 also provides no source of interpretation

¹⁴ Its importance is seen both in its location and also in its protection from arbitrary and unlawful interference, for example, as compared with ‘honour and reputation’ which has less protection, the ‘freedom from attacks’. See: International Covenant on Civil and Political Rights, Art. 17(1); Nowak, above n 10, at 381.

¹⁵ Alex Conte “Privacy, Honour and Reputation” in Alex Conte, Scott Davidson and Richard Burchill (eds) *Defining Civil and Political Rights: the Jurisprudence of the United Nations Human Rights Committee* (Ashgate, Aldershot, Hants, England ; Burlington, VT, 2004) at 148.

¹⁶ Universal Declaration of Human Rights, UN General Assembly 217 A (III) (adopted May 1948, entered into force 10 December 1948), Art. 12; International Covenant on Civil and Political Rights, Art. 17; Diggelmann and Cleis, above n 3, at 447.

or understanding.¹⁷ It is for this reason the right to privacy has been left to much debate, and often been considered through the thought of ‘to be left alone’ in the sense of negative freedom.

It is for this reason, that it is necessary to turn to case law at the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR). However, unlike other Articles which have been defined in general comments or case law, the case law has specifically indicated that it does not intend to provide a specific meaning. This was noted in the dissenting opinion of Mr Herndt in *Coeriel et al v the Netherlands*.¹⁸ The same was discussed in several cases at the European Court of Human Rights (ECtHR). These cases stated that it “does not consider it possible or necessary to attempt an exhaustive definition of the notion private life.”¹⁹ This suggests that the term privacy is deliberately left broad and purposely has not been narrowed to one particular meaning.

Article 17 of the ICCPR states that “No one shall be subjected to arbitrary or unlawful interference with his privacy.”²⁰ This indicates a protection and thus the question becomes a protection of what? What is being protected through the right to privacy is demonstrated through the cases of the HRC and the ECtHR. They demonstrate that the right to privacy has been utilised to protect one’s autonomous right to become who they are. This includes the keys factors in becoming a moral being with a moral identity: autonomy, identity, personal

¹⁷ UN Human Rights Committee (HRC) *CCPR General Comment No 16: Article 17 (Right to Privacy) - The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988).

¹⁸ *Coeriel et al v the Netherlands* Human Rights Committee Communication 453/1991, 9 December 1994 at [Appendix 2(a)].

¹⁹ *Bensaid v the United Kingdom* (2001–I No 44599/98) 6 February 2001 at [47]; *Case of Van Kück v Germany* (35968/97) 12 September 2003 at [69]; *Case of Niemietz v Germany* (13710/88) 16 December 1992 at [9].

²⁰ International Covenant on Civil and Political Rights, Art. 17.

development and relationships, the integrity of the person, and dignity.²¹ Jill Marshall has referred to this as developing jurisprudence on the concept of an autonomous identity.²² As will be seen through the case law, the role of the right to privacy is to protect the role of autonomy to shape and form who one is and how one comes to be.

Central to the right to privacy is the protection of the integrity of being of one's identity. Cases of the right to privacy arise when integrity is at stake. For example, as stated in the *Case of X and Y v The Netherlands*, issues of integrity arise where "fundamental values and essential aspects of private life are at stake."²³ Integrity is autonomy over who one is and how one come to be. Without integrity, identity and being become instrumental values of little worth to human beings.

First, the case law on the right to privacy highlights the importance of autonomy. An earlier connection to the right to autonomy over who one is and how one comes to be. A dissenting opinion in the *Case of Sheffield and Horsham v The United Kingdom* connected autonomy with private life in a case relating to the transition of transgender applicants and the importance of autonomy. The Judge wrote:²⁴

Thirdly, and most importantly, what is at stake here is the fundamental right to self-determination: if a person feels that he belongs to a sex other than the one originally registered and has undergone treatment to obtain the features of that other sex to the extent medically possible, he is entitled to legal recognition of the sex that in his conviction best responds to his identity. The right to self-determination has not been separately and expressly included in the Convention, but is at the basis of several of the rights laid down therein,

²¹ *Case of Van Kück v Germany*, above n 19, at [69].

²² Jill Marshall *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers, Leiden; Boston, 2009) at 104.

²³ *Case of X and Y v The Netherlands* (8978/80) 26 March 1985 at [27].

²⁴ *Case of Sheffield and Horsham v The United Kingdom* (31-32/1997/815-816/1018-1019) 30 July 1998 at [Dissenting Opinion-Judge van Dijk-5].

especially the right to liberty under Article 5 and the right to respect for private life under Article 8.

This was the first case connecting autonomy with the right to privacy. Autonomy is implicit in the ECHR in especially certain Articles including Article 5 and 8 as it is in the UDHR and the ICCPR. It was emphasised that at stake within this right is the “fundamental right to self-determination”. It underlines the importance of such an element in regard to the right to privacy.

The same importance of autonomy was seen in a case of assisted dying. In the *Case of Pretty v the United Kingdom*, the Court held that:²⁵

although no previous case has established as such any right to self-determination as being contained in Article 8, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.

This case re-affirmed autonomy as a guarantee of the right to privacy. This was also supported in a later *Case of Van Kück v Germany*.²⁶ These cases indicated that self-determination in the sense of autonomy was central to the right to privacy. This is supported by one of the main commentaries on the ICCPR. Manfred Nowak commented that “the right to privacy protects that particular area of individual existence and autonomy that does not reach upon the sphere of liberty and privacy of others.”²⁷ This indicates that autonomy was an important principle within the right to privacy.

The importance of autonomy in the right to privacy is there to enable the free and full development of personality. This includes the right to autonomously ‘establish details’ of who one is. This was indicated by the ECtHR. The ECtHR stated in the *Case of Mikulić v Croatia* that “respect for private life requires that everyone

²⁵ *Case of Pretty v The United Kingdom* (2346/02) 29 April 2002 at [61].

²⁶ *Case of Van Kück v Germany*, above n 19, at [69].

²⁷ Nowak, above n 10, at 385.

should be able to establish details of their identity as individual human beings.”²⁸ These details are what it means to be who one is – one’s personality. It is for this reason, the Court argues “that an individual’s entitlement to such information is of importance because of its formative implications for his or her personality.”²⁹ Various cases have illustrated examples of details of what it means to establish one’s personality such as name, heritage, and sex which will be outlined in the following passages. Although one requires access to information and knowledge about such details for one’s development, the right to privacy is not about keeping details from public observation nor about being left alone. It is simply the autonomy over how one comes to be who one is - freely and fully developing one’s personality as a dignified being. The details are important as they give value, meaning and significance to the dignified being.

A person’s name is one of the first identifying features in recognising someone. Having a word to call someone is crucial for social relations. In the modern world, this also becomes a legal necessity including some first name(s) and a family or surname. In *Coeriel et al v The Netherlands*, a case regarding the ability to change one’s surname, the Committee stated that “A person’s surname constitutes an important component of one’s identity.”³⁰ Even the dissenting opinion of Mr Herndt concurred that a person’s name is an important part of one’s identity which is central to Article 17.³¹ In other words, a name, first or surname, is critical to one’s identity. This case highlighted the importance of surnames, as with first names, to a person’s life. Although people do not usually choose their name as they are usually given (first names) and or inherited (surnames) at birth, most people retain the name given them. Having autonomy means the power to retain,

²⁸ *Case of Mikulić v Croatia* (53176/99) 7 February 2002 at [54].

²⁹ At [54]; refer also to: *Case of Gaskin v the United Kingdom* (10454/83) 7 July 1989 at [39].

³⁰ *Coeriel et al v the Netherlands*, above n 18, at [10(2)].

³¹ At [Appendix 2(a)].

to change or amend as suits the development of one's personality. It is for this reason, the Court stated in that case:³²

A person's surname constitutes an important component of one's identity and that the protection against arbitrary or unlawful interference with one's privacy includes the protection against arbitrary or unlawful interference with the right to choose and change one's own name. For instance, if a state were to compel all foreigners to change their surnames, this would constitute interference in contravention of article 17.

The right to privacy includes the non-interference with the retaining or the changing of one's name. This includes limiting what one's name may be. The Committee in that case found:³³

The State party based its refusal of the request also to change their surnames on the grounds that the authors had not shown that the changes sought were essential to pursue their studies, that the names had religious connotations and that they were not 'Dutch sounding'. The Committee finds the grounds for so limiting the authors' rights under article 17 not to be reasonable. In the circumstances of the instant case the refusal of the authors' request was therefore arbitrary within the meaning of article 17, paragraph 1, of the Covenant.

Although there may be reasonable grounds for certain limitations, as the above case demonstrated, such limitations should not be arbitrary. Limiting one's name like any area of life is possible, but public grounds are related primarily to those that may cause harm to society such as indecency. Apart from that, the State has limited grounds by which to limit the ability for one to change a name, and in the above case, it was found unreasonable and arbitrary. The state may demand to record one's name or any changes to it, but not interfere with it within the reasonable limitations. One's name, whether it is retained from birth or changed is critical to one's free and full development of the human person.

³² At [10(2)].

³³ At [10(5)].

Sex is another detail of one's life that is important to one's free and full development of personality. It is strongly connected to who one is and in many senses important to the ability to live even socio-legally. Today, this is commonly referred to as gender. Sex and gender identity are "one of the most intimate areas of a person's private life"³⁴ and are intrinsic to who one is – one's identity.³⁵ Sexual identity has been developed within the ECtHR case law of Article 8.³⁶ The dissenting Judge in the *Case of Sheffield and Horsham v The United Kingdom* highlights that one is "entitled to legal recognition of the sex that in his conviction best responds to his identity."³⁷ This indicates autonomy over one's sex identity, rather than an immutable determinative sex. This is irrespective whether one's assigned sex matches or not with who one is. It indicates the importance of having autonomy over their sex identity. In *Bensaid v The United Kingdom*,³⁸

The court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere and protected by Article 8.

This has been supported in other cases.³⁹ No matter what one's sex (identity) is or whether it changes over time, one must have autonomy over one's sex. Sex, including one's gender, is more than a biological determination, it is part of who one is as a moral being. Interference with one's sex violates one's right to privacy.

³⁴ *Case of Van Kück v Germany*, above n 19, at [56].

³⁵ Marshall, above n 22, at 95.

³⁶ At 104.

³⁷ *Case of Sheffield and Horsham v The United Kingdom*, above n 24, at [Dissenting Opinion-Judge van Dijk-5].

³⁸ The applicant was attempting to appeal the immigration order of removal on the basis that it would cause him a relapse in his mental health and would amount to inhuman and degrading treatment. *Bensaid v the United Kingdom*, above n 19, at [47].

³⁹ At [47]; *Case of Van Kück v Germany*, above n 19, at 69; *Case of Pretty v The United Kingdom*, above n 25, at [61].

A further example is detail such as heritage in the development of one's personality. Heritage is integrally interconnected with who one is and how one comes to be. This is illustrated in a case, *Francis Hopu and Tepoaitu Bessert v. France*, of a hotel being built on ancestral burial grounds. In that case, it was considered that the "relationship to their ancestors [was] an essential element of their identity" and it played "an important role in their family life."⁴⁰ The Committee accepted that connections with ancestors, such as through traditional burial grounds are part of an individual's identity.⁴¹ The connections with family, past and present, are bonds to their essence of being and essential to development. These bonds give value and meaning to one's life. Ignoring or separating such bonds from one's development interfere with the shaping of one's being and forming or development of one's personality and thus one's right to privacy.

One last example for the development of personality is the interconnectedness of relationality. This becomes important to human existence and development as a relational dignified being. Development is shaped in and through relationships whether alone or with others. No one exists or becomes in isolation. In this sense, relations are central to one's dignity and development. Nowak in his commentary on the ICCPR wrote that the right to privacy views that autonomy may be exercised "alone or together with others."⁴² It must, therefore, comprise the right to establish relationships with other human beings.⁴³ The Human Rights Committee of the ICCPR in *Coeriel et al v The Netherlands*⁴⁴

⁴⁰ *Francis Hopu and Tepoaitu Bessert v France* ICCPR Human Rights Committee Communication No 549/1993 (CCPR/C/60/D/549/1993/Rev1), 29 December 1997 at [10(3)].

⁴¹ At [10(3)].

⁴² Nowak, above n 10, at 388.

⁴³ *Case of Mikulić v Croatia*, above n 28, at [53]; *Case of Niemietz v Germany*, above n 19, at [29].

⁴⁴ *Coeriel et al v the Netherlands*, above n 18, at [10(2)].

considers that the notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it entering into relationships with others or alone.

This understanding was supported in *Niemietz v Germany*.⁴⁵ The Court stated that⁴⁶

It would be too restrictive to limit the notion to an 'inner circle' in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.

This relationality includes the close and wider connections of people interconnected with one's free and full development of one's personality. In *Bensaid v The United Kingdom*, the Court reiterated the right to privacy protects the "right to establish and develop relationships with other human beings and the outside world."⁴⁷ This connection with the outside world includes not only people but also with other things such as the land.⁴⁸ Connections with others and the surrounding environment are critical to becoming who one is or the free and full development of one's personality and a dignified being.

Becoming who one is, and having the power and autonomy over how one comes to be, is essential and critical. It enables the free and full development of one's personality which is the purpose of human rights. As is illustrated above, the right to privacy is not secrecy or keeping details from public observation and not about

⁴⁵ This is a case regarding German law enforcement authorities searched the law office premises of the applicant to find the identity of someone who had written an insulting letter under a false name, which was a criminal offense in Germany.

⁴⁶ *Case of Niemietz v Germany*, above n 19, at [29].

⁴⁷ *Bensaid v the United Kingdom*, above n 19, at 47; *Case of Van Kück v Germany*, above n 19, at [69].

⁴⁸ See in relation to burial grounds, but this would also relate to ancestral land: *Francis Hopu and Tepoaitu Bessert v France*, above n 40.

being left alone, but it is about enabling the development of one's being, the shaping of one's life. As such, the ECtHR considers that the right to privacy protects the right to development.⁴⁹ Joseph et al describe it as:⁵⁰

The sphere of individual autonomy has been described as the field of action [that] does not touch upon the liberty of others where one may withdraw from others, to shape one's life according to one's own egocentric wishes and expectations.

This right to development, through the establishment of who one is,⁵¹ is important "because of its formative implications for his or her personality."⁵² This connects the right to privacy back to the purpose of human rights the 'free and full development of personality'. Development within the right to privacy enables one to form a dignified being.

Central to the right to privacy is not only elements of being, but also the integrity of being. Integrity requires a moral being of esteem and respect (a set of principles) that in the face of challenge – such as non-favourable challenges or difficulty due to social hegemonic pressures – uphold one's moral being for the right reasons.⁵³ The right reasons are living one's truthfulness – truthful to one's being⁵⁴ and being involved in the world truthfully⁵⁵ – as an autonomous capable being – a dignified being. It is through integrity that one can exercise to the fullest

⁴⁹ *Odièvre v France* (Application No 42326/98) 13 February 2003 at [29]; *Bensaid v the United Kingdom*, above n 19, at 47; *Case of Van Kück v Germany*, above n 19, at [69].

⁵⁰ Joseph, Schultz and Castan, above n 6, at 349.

⁵¹ establish details of their identity as individual human beings

⁵² *Case of Mikulić v Croatia*, above n 28, at [54]; refer also to: *Case of Gaskin v the United Kingdom*, above n 29, at [39].

⁵³ This is a reworked definition of Lynne McFall's definition of "integrity". For her definition refer to: Lynne McFall "Integrity" (1987) 98 *Ethics* 5 at 9.

⁵⁴ This includes one's physical, psychological, social and moral being.

⁵⁵ Richard N Williams "The Human Context of Agency" (1992) 47 *American Psychologist* 752 at 757–758.

truthful social and moral participation.⁵⁶ Any interference with one's integrity devalues one's being and thus one's dignity.

Integrity requires the protection of the interconnectedness of one's being. This includes that of the physical, psychological, social, and sexual being. For example, the ECtHR indicated that integrity includes the person's physical, psychological, and sexual integrity and can sometimes embrace aspects of an individual's physical and social identity.⁵⁷ Integrity requires autonomy over one's being, including one's body. The case of *Y.F. v Turkey* confirms that a person's body is the most intimate aspect of private life.⁵⁸ The body is an intimate part of one's being and central to who one is, and so interfering with another's body, affects their integrity of being. This is something that transgender and intersex people face. Their bodies are either prevented from treatment and change even with autonomous consent (transgender people) or forced sex normalisation treatment without their consent (intersex people). Either way this is interference with one's autonomy over their intimate being and their integrity. This interference can also occur within one's socio-political life interfering with one's intimate being. In the *Case of Sheffield and Horsham v. The United Kingdom*, the Court stated:⁵⁹

the applicants, just as much as Miss B., daily find themselves in a situation which, taken as a whole, is not compatible with their right to identity and to respect for their private life.

The right to privacy clearly indicates that integrity is critical to the shaping of one's being and identity. Interference with such integrity impacts on one's autonomous

⁵⁶ At 758.

⁵⁷ *Case of Van Kück v Germany*, above n 19, at [69]; *Case of YF v Turkey* (24209/94) 22 July 2003 at [33]; *Case of X and Y v The Netherlands*, above n 23, at [22]; *Case of Mikulić v Croatia*, above n 28, at [53].

⁵⁸ *Case of YF v Turkey*, above n 57, at [33].

⁵⁹ *Case of Sheffield and Horsham v The United Kingdom*, above n 24, at [Case of Sheffield and Horsham v The United Kingdom, above n 18, at [3(c) Partly Dissenting Opinion-Judge Casadevall]].

being and the ability to develop a free and full personality. It prevents one from being true to oneself and who one is. It may also impact on one's becoming.

The purpose of the 'right to privacy' is the development of one's personality and thus the revealing of one's identity. As such, the ultimate goal or purpose of this right is one's identity. This is described in a dissenting opinion in *Coeriel et al v The Netherlands*. Mr Herndt in that case stated that "privacy protects the special individual qualities of human existence and a person's identity."⁶⁰ This is supported by a later case. In *Odièvre v. France*⁶¹ at the ECtHR, the Court stated that "Article 8 protects a right to identity."⁶² At face value, the 'individual qualities of human existence' of a person's identity' could infer protection of immutable status characteristics of one's personal identity, that is, the identity divested of one's narrative identity as an immutable personal identity as described earlier. However, a joint dissenting opinion of *Odièvre v. France* took this even further. It stated:⁶³

We are firmly of the opinion that the right to an identity which is an essential condition of the right to autonomy and development is within the inner core of the right to respect for one's private life.

As such, identity and autonomy are inseparable and central to the free and full development of the dignified being. This indicates that the autonomy over one's existence and development is not the maintenance of facts of what one is (a person of status identities), but the capability to become a moral being. Understood in the context of human rights, the right to privacy protects the identity of the person – a dignified being with the ability to freely and fully develop

⁶⁰ *Coeriel et al v the Netherlands*, above n 18, at [Appendix 2(a)].

⁶¹ The applicant was attempting to retrieve information regarding her birth mother who had been allowed to remain anonymous under French law. The decision did not permit the breaking of the seal, but it did expounded important discussion on the right to identity.

⁶² *Odièvre v France*, above n 49, at [29].

⁶³ At [11].

one's personality. This indicates the narrative identity, not the divested immutable personal identity. As such, the right to privacy protects one's right over autonomy and therefore over one's existence meaning one has power over both who they are and how they come to be.

Ultimately the purpose of the right to privacy returns to the foundation of human rights – dignity. Dignity is the basis upon why there is need for the protection of one's identity and its free and full development (a narrative identity). The connection of dignity to the right of privacy is highlighted in the *Case of Sheffield and Horsham v The United Kingdom* where two transgender applicants brought issues under Article 8 of the ECHR (respect for their private life). The case highlights the inhibition to the claimants' narrative identity denying autonomy over who they are, as illustrated in this case, that autonomy over one's sex – an interference with the dignity of being. In a dissenting opinion connecting autonomy to identity and its importance to the dignity of being through the right to privacy, the Judge wrote:⁶⁴

Moreover, it is a vital element of the "inherent dignity" which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.

Autonomy is a vital element of dignity. This highlighted that autonomy of who one is and how one comes to be – one's identity – is central to one's dignity. This wording is important as it highlights that autonomy and dignity are correlative. This was strengthened in a later transgender case. In the *Case of Van Kück v. Germany* the Court stated:⁶⁵

⁶⁴ *Case of Sheffield and Horsham v The United Kingdom*, above n 24, at [Dissenting Opinion-Judge van Dijk-5].

⁶⁵ *Case of Van Kück v Germany*, above n 19, at [69].

Moreover, the very essence of the Convention being respect for human dignity and human freedom, protection is given to the right of transsexuals to personal development and to physical and moral security.

The foundation of human rights and its very essence is dignity. Dignity is critical to enable the right to privacy of the free and full development of personality – becoming who one is – as one’s narrative identity. Ultimately, the right to privacy concerns the upholding of one’s integrity of being to enable the free and full development of personality – a dignified being. This moves privacy away from the concept of ‘keeping details from public observation and not about being left alone’. Rather, it centres the right in the autonomous being developing a personality which results in an identity. As such, the right to privacy and its purpose (enabling development of personality) centre this right to the foundation of international human rights.

5.2.2 Summary – Right to Privacy

Privacy here is not about being left alone, separateness or secrecy. However, if there is a restriction on information, such as through secrecy, it impacts on relationality and the ability to author one’s being in and with others. This may apply to other parts of the Article, but through analysing the right to privacy in case law, secrecy would be counter-productive. The right to privacy is impacted by an isolated environment and it restricts the autonomous development of who one is and as such it affects one’s integrity.

The right to privacy does not require a meaning as indicated by the HRC and the ECtHR. Rather, this right requires an understanding of what is protected from interference. If there was interference, it must be lawful, not be arbitrary, and be in accordance with the provisions, aims and objectives of the Conventions.⁶⁶ The protection from interference certainly was not the normal elements often

⁶⁶ *Coeriel et al v the Netherlands*, above n 18, at [10(4)].

considered as they were already detailed in the article. Rather, as indicated from case law at the HRC and the ECtHR, it was a sphere, an area of being and becoming. This sphere included: autonomy, identity, personal development and relationships, the integrity of the person and dignity.⁶⁷ This is summed up by two different cases. In *Coeriel et al v. the Netherlands*, the Committee stated that the⁶⁸

notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone.

And, in a joint dissenting opinion of *Odièvre v. France* they stated:⁶⁹

We are firmly of the opinion that the right to an identity which is an essential condition of the right to autonomy and development is within the inner core of the right to respect for one's private life.

Privacy can thus be summed up as the protection of the very sphere in which the right to autonomous free and full development of one's personality in integrity occurs be it by entering into relationships with others or alone as a dignified being. This reveals one's narrative identity. This connects the right to privacy with the purpose and foundation of international human rights. It also provides protection from unlawful and overbearing control over such an identity.

5.3 Shaping Moral Intersex Identity – Making Sense of Oneself

The right to privacy on face value would seem an intriguing place to begin in human rights law to make sense of oneself and establish a moral identity. However, the case law has demonstrated that it is. This is centred around the integrity of being oneself and making sense of who one is. It argues that this provides for the right to establish details of their identity as individual human

⁶⁷ *Case of Van Kück v Germany*, above n 19, at [69].

⁶⁸ *Coeriel et al v the Netherlands*, above n 18, at [10(2)].

⁶⁹ *Odièvre v France*, above n 49, at [11].

beings (who they are) and for the development of themselves (how they come to be). This interconnects with the basis for international human rights. Dignity is the foundation of international human rights and is a state of being. Interference of or the violation of one's sphere of becoming affects one's moral being of self-esteem and self-respect and inhibits one's ability to live the accomplished life in and with others. Human rights and freedoms are there to enable one to return to the state of dignity as a moral being. In other words, all of the rights and freedoms must be interpreted for and according to this principle.

In this case, the right to privacy is essential to a dignified being for an intersex person. They require the integrity so they can autonomously define who they are and shape how they come to be. The right to privacy provides the right to shape how an intersex person comes to be. Dignity is either enabled or disabled depending on the protection and enabling of one's autonomous free and full development in integrity as a dignified being. As such, the right to privacy draws identity back to the first two chapters relating to identity to a narrative identity (one's free and full development of personality) and a moral identity (the dignity of the human person). These two are inseparable. Alya Kahn articulates the importance of one's narrative identity to making sense of one's being. She writes:⁷⁰

“If my personal identity is a narrative identity then I make sense of myself (as opposed to simply referring to myself) only in and through my relation to others. I must achieve my selfhood – and this is dependent on the regard, words and actions of others, as well as on material conditions. So I am a social being, and a being that finds myself in the world of experiences, telling the story of my life, along with other story tellers. I articulate my story in language, and in so doing I bear witness to who I am both to myself and others. But my narrative is never complete, it's never the whole story – it is always in the process of becoming what it is. It's therefore, always open to change and development.”

⁷⁰ Alya Khan “Using Ricoeur's Oneself as Another: Narrative Identity, Gender and Relational Autonomy” (paper presented to Thinking Gender - The Next Generation, United Kingdom, 2006) at 14.

Relationality is central to making sense of oneself. Becoming is dependent upon one's and others' capabilities as well as on material conditions. This is encompassed within a narrative identity which is never competing and always open to development and is transformable. Such an identity contrasts with the immutable identity that one simply 'refers back to'. It is not relational and has a pre-determined story to it.

The article indicates the importance of defining who one is and how one comes to be for one self – one's own good life. This is reflected in Anne Becker's writing when she says: "They were free to define themselves in the equality of their difference by who they were by confessing their individual autobiographies."⁷¹ Moreover, Kim Atkins writes that our lives must be "taken as one's own and integrated into one's identity and self-understanding."⁷² This was clearly illustrated in the *Case of Sheffield and Horsham v. The United Kingdom*, the Court argued, referring to the case of a transgender person, that this was not an issue of "minorities, but rather as one of privacy: everyone's right to live one's life as one chooses without interference."⁷³ In the *Case of Christine Goodwin and the United Kingdom*, The Court wrote:⁷⁴

Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.

⁷¹ Anne Becker "Identity Premised on Equality of Difference as a Fundamental Human Right" in Cornelia Roux (ed) *Safe Spaces* (Sense Publishers, 2012) 83 at 86.

⁷² Kim Atkins *Internet Encyclopedia of Philosophy* (2015) Ricoeur, Paul <<http://www.iep.utm.edu/ricoeur/>>.

⁷³ *Case of Sheffield and Horsham v The United Kingdom*, above n 24, at [Dissenting Opinion-Judge van Dijk-2].

⁷⁴ *Case of Christine Goodwin v The United Kingdom* (28957/95) 11 July 2002 at [90].

The right to privacy is the protection of the private sphere to enable one to establish a sense of who they are as a human being and this includes one's sex.

However, as yet, this is not a right afforded to the majority of intersex people. Their sense of physical, and psychological being has been interfered with restricting this ability granted to them through this right. Due to the socio-legal structures, Ghattas writes that⁷⁵

It is barely possible to develop an identity as a person (e.g. inter*woman or man) with an intersex body that has a right to remain unmodified, even if the respective individual so wishes.

The interference with one's body and psychology inhibits development and sense of being. As indicated in the *Case of Affaire A.P., Garçon et Nicot v. France*, interference with one's bodily integrity such as sterilisation or in the case of intersex people sex-normalising treatment breaches the guarantee of the right to privacy.⁷⁶ This interference denies intersex people the ability to develop a sense of being as to who they are, not only due to the assigned sex but as to the other issues to do with that assigned socialised sex including the effects of the sex-normalising treatment. Cabral continues by saying:⁷⁷

I want to tell you a story of how prejudices about how bodies should be sexed or gendered can lead to the surgical mutilation of children...These mutilating

⁷⁵ Dan Christian Ghattas *Human Rights between the Sexes - a Preliminary Study on the Life Situations of Inter*Individuals* (Volume 34 2013) at 17–18.

⁷⁶ This has been translated from the French version of the case: "Partant, le rejet de la demande des deuxième et troisième requérants tendant à la modification de leur état civil au motif qu'ils n'avaient pas établi le caractère irréversible de la transformation de leur apparence, c'est-à-dire démontré avoir subi une opération stérilisante ou un traitement médical entraînant une très forte probabilité de stérilité, s'analyse en un manquement par l'État défendeur à son obligation positive de garantir le droit de ces derniers au respect de leur vie privée. Il y a donc, de ce chef, violation de l'article 8 de la Convention à leur égard.": *Affaire AP, Garçon et Nicot v France* (équêtes nos 79885/12, 52471/13 et 52596/13) 6 April 2017 at [135].

⁷⁷ Mauro Cabral "ILGA - UN 2004 - NGO statement: Intersexuality" (27 May 2004) International Lesbian, Gay, Bisexual, Transsexual and Intersex Association <<http://ilga.org/ilga/en/article/61>>.

surgeries, aimed at transforming intersex bodies into culturally acceptable ones, violate our autonomy of decision as well as our bodily integrity.

They are denied the ability to be protagonists in their own story. They have been forced to live a life not of their own making in a sex that may or may not match who they are and a physical and psychological integrity that has been interfered with. The secrecy and shame around intersex people and their lives deny them the ability to author their lives. The very denial to the right to autonomy over their sex and one's sex becoming in how it shapes one's life affects the very sphere which is protected by the right to privacy. As such, this violates the right to privacy.

Moreover, the right to privacy is not about efficiency, group status or any other matter. It is about the autonomous development of one's identity. This development is referred to in the IBOR as the 'free and full development of personality'. This includes one's physical, mental or psychological and spiritual development. The fact intersex people only make up a small population, does not weaken their argument.⁷⁸ The claim to the free and full development as a dignified being is universal for everyone.

Intersex people have been denied this ability to free and full development. The very actions performed and the process in do so denies and even violates their ability to develop that most people take for granted. Dan Ghattas wrote, they⁷⁹

“are, for the most part, denied the development of a gender identity of their own which may be located between the socially dominant bipolar sex/gender model of male or female.”

⁷⁸ *Case of Sheffield and Horsham v The United Kingdom*, above n 24, at [Dissenting Opinion-Judge van Dijk-2].

⁷⁹ Ghattas, above n 75, at 7.

The enforcement of sex status which is so entrenched in society has impacted severely on intersex people. They have lives, but their self-esteem and self-respect have been diminished. Mauro Cabral writes:⁸⁰

“Medical secrecy also violates our right to identity, to our personal history and to our status as subjects entitled to all human rights, protagonists and not victims of our own history.”

As subjects of human rights, intersex people have been deprived of the basic human capacity to narrate their lives within their own history. They are writing a history on their body of a life that is not theirs.

Ultimately, the right to privacy concerns one’s dignity, the foundation of human rights. The result of one’s dignity is dependent upon the ability for personal development and also physical and moral security.⁸¹ The denial of the autonomous ability to write one’s own story and freely develop within it denies one the state of dignity. As autonomy and dignity are correlative, when autonomy is denied to intersex people over who they are and how they come to be, they are also denied dignity.

This dignity is critical to the development of their being. However, as indicated earlier, well-being is an indicator of dignity. If well-being has been impacted, then it also impacts on one’s dignity. As indicated in this chapter, there has been a devastating impact on many intersex people’s life and well-being. As will be seen in the next chapter, this impact denies the right to privacy and impacts on the very foundation of human rights – the dignity of the human person.

⁸⁰ Cabral, above n 77.

⁸¹ *Case of Van Kück v Germany*, above n 19, at [69].

CHAPTER 6: WELL-BEING FOR DEVELOPMENT OF DIGNIFIED BEING

The right to privacy on face value would seem an intriguing place to begin in human rights law to make sense of oneself and establish a moral identity. However, the case law has demonstrated otherwise. In the last chapter, privacy was summed up as “the very sphere in which the right to autonomy and (free and full) development of one’s (personality) identity occurs be it by entering into relationships with others or alone through the integrity as a dignified being.” In other words, the right to privacy is critical to the integrity of being oneself and making sense of who one is. As the last chapter indicated, the right to privacy provides protection for the becoming who one is – one’s moral identity. Dignity and integrity protect the autonomy of who one is and also over how one comes to be. It is through this that one’s narrative identity is written and revealed as a temporal singularity of personal identity.

The dignity of being infers human flourishing which is indicated through one’s state of well-being. However, as indicated at the end of the last chapter, intersex people do not have such an ability to freely and fully develop their personality. As Dan Ghattas writes, “It is barely possible to develop an identity as a person (e.g. inter*woman or man) with an intersex body that has a right to remain unmodified.”¹ This indicates that the right to privacy has been interfered with at the very least, and at most denied. Their dignity of being is impaired. Mauro Cabral continues by saying that the mutilation of intersex bodies “transforming intersex bodies into culturally acceptable ones, violate our autonomy of decision as well as our bodily integrity.”² This inhibits the human flourish of intersex people

¹ Dan Christian Ghattas *Human Rights between the Sexes - a Preliminary Study on the Life Situations of Inter*Individuals* (Volume 34 2013) at 17–18.

² Mauro Cabral “ILGA - UN 2004 - NGO statement: Intersexuality” (27 May 2004) International Lesbian, Gay, Bisexual, Transsexual and Intersex Association <<http://ilga.org/ilga/en/article/61>>.

affecting their well-being. The secrecy and shame around intersex people and their lives deny them the ability to author their lives. This violates the right to privacy.

This chapter focuses on well-being as the basis of dignity as human flourishing as illustrated through the issues of intersex people. It defines how the level of flourishing or accomplished life is seen through one's well-being. A dignified being indicates a life which is good for them, developing as a sex whether it be male, female, both or neither in a way that is good for them. But for intersex people, this is not usually the case. As such, this chapter highlights some of the key issues are rights to life, health, and being free from torture and ill-treatment. This affects their well-being, and thus inhibits their human flourishing.

6.1 Dignity through Flourishing and the State of Well-being

This first section will refresh the connections between dignity, human flourishing and well-being. These three are not only essential for an individual but also for the community. The flourishing of a community is diminished when the flourishing of one or more of its members are inhibited. By improving the well-being for each member enhances the well-being of the community at large and enables the greatest potential of human flourishing. It is through well-being that one is enabled to pursue human flourishing and be a dignified being.

The state of dignity infers human flourishing and well-being. According to Jan Mårtenson, the core meaning of 'being' within the international human rights regime refers to the "truths of human nature and the requirements of human dignity."³ Summing up from earlier chapters, dignity refers to the intrinsic worth

³ Jan Mårtenson "The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Programme" in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights: a commentary* (Scandinavian University Press, Oslo : Oxford, 1992) at 21.

of a human being.⁴ It incorporates “esteem, deference, a proper regard for, recognition of”⁵ human beings. This dignity reflects one’s physical existence, intellectual and spiritual dimensions.⁶ This dignity is the moral value (or worth) of one’s being⁷ based on one’s humanity, not status, position or other factors including or other cultural interests.

Having dignity infers human flourishing. Human flourishing is living the accomplished life for both an individual and the community. It is the highest human good as recognised through Aristotelian philosophy. As human flourishing is the goal, the achieving of the accomplished life, as Richard Kraut writes, requires a “fuller understanding of what it is to flourish.”⁸ Using Aristotelian philosophy, Erik Ostenfeld provides a definition of human flourishing. He writes:⁹

“The flourishing man or woman to Aristotle is a person who is well-adapted and well-functioning socially and psychologically, and who lives a rich life in the sense that he or she uses all human potentialities, i.e. not restricted to immediate pleasure seeking from e.g. television watching, beer-drinking and easy sex, and not even more calculated pleasure seeking, but involving intellect and feelings that are special to man.”

⁴ Oscar Schachter “Human Dignity as a Normative Concept” (1983) 77 *The American Journal of International Law* 848 at 849.

⁵ At 849.

⁶ Mårtenson, above n 3, at 21; Johann Neethling “Personality Rights: A Comparative Overview” (2005) 38 *Comp & Int’l LJ S Afr* 210 at 210; Merriam-Webster *Merriam-Webster.com* (online ed, 2015) Personality <<http://www.merriam-webster.com/dictionary/personality>>; *Oxford Dictionaries* (online ed, 2015) Personality <<http://www.oxforddictionaries.com/definition/english/personality>>.

⁷ David Mattson and Susan Clark “Human Dignity in Concept and Practice” (2011) 44 *Policy Sciences* 303 at 310.

⁸ Richard Kraut “Aristotle’s Ethics” in Edward N Zalta (ed) *The Stanford Encyclopedia of Philosophy* (spring 2016 ed, 2016).

⁹ Erik Ostenfeld “Aristotle on the Good Life and Quality of Life” in Lennart Nordenfelt (ed) *Concepts and Measurement of Quality of Life in Health Care* (Springer Netherlands, 1994) 19 at 31.

Flourishing is one who is well-adapted and well-functioning socially and psychologically with a full rich life aiming to and using one's potentialities. It is not centred on short term pleasures. Human flourishing is predicated on the reasoned reflection, action, and actualising of one's own potentials.¹⁰ It requires the cultivation and exercising of virtues that include personal growth, autonomy, and self-acceptance.¹¹ The focus is on reaching a richer sense of life, and thus not focusing on short-term pleasures, of autonomously becoming who one is.

Flourishing is a "life marked by contentment; doing well and living well."¹² In other words, human flourishing is indicated through well-being or it is a barometer of the human flourishing of a dignified being. It indicates whether the state of the dignified being is enhanced or diminished. Mattson and Clark explain dignity as "a condition signified by a sense of contentment, satisfaction, and wellness as an integrative evaluation of lives and circumstances."¹³ The purpose is to remain in a dignified state of being. When such a state is inhibited, interfered with, diminished or even denied, there is a loss of dignity. The goal is to remedy the issue and to return one to the state of dignity. By understanding one's well-being, it is possible to determine one's state of dignity.

Well-being is commonly thought of as physical and psychological health issues, but it includes far more than that.¹⁴ It is an objective state, a barometer, of one's flourishing. John Eekelaar writes, including¹⁵

¹⁰ Dana S Dunn and Clint Brody "Defining the Good Life following Acquired Physical Disability" (2008) 53 *Rehabilitation Psychology* 413 at 414.

¹¹ At 414.

¹² At 414.

¹³ Mattson and Clark, above n 7, at 313–314.

¹⁴ Jill Marshall *Human Rights Law and Personal Identity* (Routledge, Abingdon, Oxon; New York, NY, 2014) at 42.

¹⁵ John Eekelaar "Personal Rights and Human Rights" (2002) 2 *Hum Rts L Rev* 181 at 185.

“physical and mental health, the opportunity to establish and maintain important relationships, the ability to benefit from educational, social, and economic activity, to integrate into society and to achieve life plans.”

This thought has very traditional roots. Many traditional societies have a wide conceptual view of well-being. Vicki Grieves describes well-being as not just physical well-being, but¹⁶

“the social, emotional, and cultural wellbeing of the whole community in which each individual is able to achieve their full potential as a human being, thereby bringing about total wellbeing of their community.”

Well-being can be summarised as the physical, social, mental/emotional, and cultural ability of each individual to achieve their full potential, their life plans, as a human being, thereby bringing about total wellbeing of their community.¹⁷ As such, well-being is key to flourishing.¹⁸ It is key to the enabling autonomy over who one is and how one comes to be.

As Joseph Raz stated, “a person enjoys a high degree of well-being if his life is good in a way which is good for him.”¹⁹ It is through everyone being in a state of well-being that brings about the well-being of the community. Well-being “includes physical and mental health, the ability to establish and maintain important personal relationships, the ability to benefit from educational social and economic activity, to integrate into society and to achieve life plans.”²⁰ Well-being is the key

¹⁶ Vicki Grieves “What is Indigenous Wellbeing?” in Joseph Selwyn Te Rito (ed) *Mātauranga Taketake - Traditional Knowledge: Indigenous Indicators of Well-being: Perspectives, Practices, Solutions, 2006* (Ngā Pae o te Māramatanga, Auckland, NZ, 2007) at 109.

¹⁷ Eekelaar, above n 15, at 185; Grieves, above n 16, at 109.

¹⁸ Marshall, above n 14, at 220.

¹⁹ Joseph Raz *The Morality of Freedom* (reprinted ed, Clarendon Press, Oxford, 2009) at 270.

²⁰ Eekelaar, above n 15, at 185.

to a flourishing life²¹ and as such, it becomes a barometer of a flourishing life of individuals and communities.

The above understanding of well-being is not foreign to international human rights. Well-being covers all of the aspects that relate to well-being and development of one's personality. It is encapsulated throughout the rights and freedoms but is highlighted within some articles of the IBOR. The UDHR articulated this as:²²

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

This was transferred to several articles in the ICESCR: the right to social security in Article 9, the right to an adequate standard of living in Article 11(1), and the right to health and well-being in Article 12. Article 11(1) of the ICESCR incorporates the right to the adequate standard of living. It states:²³

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

This covered the basics of subsistence living or that which is required to maintain a basic quality of life. The adequate standard of living was incorporated in the

²¹ Marshall, above n 14, at 220.

²² Universal Declaration of Human Rights, UN General Assembly 217 A (III) (adopted May 1948, entered into force 10 December 1948), Art. 25(1).

²³ International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolution 2200 A (XXI) Resolution 2200 A (XXI) (adopted 16 December 1966, entered into force 3 January 1976), Art. 11(1).

Convention on the Rights of the Child (CRC) as “States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.”²⁴ This interconnects adequate living with that of well-being.

Article 12 incorporates the right to health and well-being stating that: “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”²⁵ Health in this article did not refer to the restricted sense of disease, but the wider sense of well-being. This understanding was replicated in the Constitution of the World Health Organisation (WHO)²⁶ that states:²⁷ “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” This has also been confirmed by Paul Hunt, the UN’s Special Rapporteur on the Right to Health in 2004. He wrote in regards to sexual health that health is “a state of physical, emotional, mental and social well-being related to sexuality, not merely the absence of disease, dysfunction, or infirmity.”²⁸ This has been encapsulated within the General Comment on the Right to Health. It encompasses a wide scope of the right to Health. It notes:²⁹

The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from

²⁴ Convention on the Rights of the Child, UN General Assembly Resolution 44/25 (adopted 20 November 1989, entered into force 2 September 1990), Art. 27(1).

²⁵ International Covenant on Economic, Social and Cultural Rights, Art. 12(1).

²⁶ UN Secretary-General *Document A/2929: Annotations on the Text of the Draft International Covenants on Human Rights* (Agenda 28-10th Session 1955) at 111.

²⁷ World Health Organisation “Constitution of WHO: principles” WHO <<http://www.who.int/about/mission/en/>>.

²⁸ Paul Hunt and Special Rapporteur *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health* (E/CN4/2004/49 2004) at 8; Sonia Corrêa, Rosalind P Petchesky and Richard G Parker *Sexuality, Health and Human Rights* (Routledge, London, 2008) at 212.

²⁹ UN Committee on Economic, Social and Cultural Rights (CESCR) *CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)* (2000) E/C12/2000/4 at [8].

torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

Both Articles 11(1) and 12(1) of the ICESCR refer to and interconnect through well-being. They indicate back to the core *raison d'être* of international human rights the free and full development of the dignified human being. Core to one's well-being is the human capabilities that enable one to be worthy of esteem and respect through one's physical, mental, spiritual, moral and social spheres. Any diminishing or restriction on well-being affects one's autonomy in becoming or being who one is. In other words, autonomy enhances well-being.³⁰

Rights are often considered protect the interests of the rights-holder.³¹ John Eekelaar argued that though this be true, he "would refer to the well-being rather than the interests of the rights-holder."³² For intersex people, their well-being as a rights-holder has been affected by many other areas including that of health, housing, social security, employment and more. However, there are two central issues of well-being that limit their ability and power over who they are and how they come to be. There are two prongs relating to health and the prevention of torture and ill-treatment:³³

"(i) avoiding involuntary and unconsented treatment and interventions that have negative lifelong consequences to their physical and mental health, (ii) having access to general health services that are appropriate, adequate and respectful of their bodily diversity."

³⁰ Marshall, above n 14, at 42; Eekelaar, above n 15, at 185; Valery Chirkov and others "Differentiating Autonomy from Individualism and Independence: A Self-determination Theory Perspective on Internalization of Cultural Orientations and Well-being" (2003) 84 *Journal of Personality and Social Psychology* 97 at 97, 106.

³¹ Eekelaar, above n 15, at 185.

³² At 185.

³³ Commissioner for Human Rights and Silvan Agius *Human Rights and Intersex People* (2015) at 32.

They desire well-being like all other human beings, but they do not want forced impositions of what their sex should be unless they decide it is what is best for them. This requires them to decide what health means to them and have access to necessary information and services that enable their health and well-being. It also requires that they must not undergo any treatment in regards to sex-normalising procedures unless they consent or it is life-threatening. Without their consent, such treatment has the possibility to be considered as torture and ill-treatment which is prohibited even in times of emergency. These desires of well-being are opposite to what occurs generally around the world. Due to the forced treatment upon the majority of the intersex people, they have a reduced ability to live in well-being. There have been numerous reports and case studies demonstrating the ill-effects and the long-term effects of the sex-normalising treatments. This has been physical, psychological, and sexual.

6.2 Health

Health is central to well-being. However, one must be careful not to restrict this concept to that of a biomedical term – the absence of disease. Health is ensuring that one has an environment that is supportive of and enhances well-being. These demands knowledge and education and access records to give them power over their health. Research and data must be managed in such a way not to diminish people's autonomy while still promoting health and well-being. It is also required that the individual have power and autonomy over what happens to them and not parents or medical professionals except in cases of emergency, in particular when it relates to parts of their health such as their sex of which the procedures will have life-long impacts. When intersex people are claiming the right to health, they are in effect claiming the wider context relating more to well-being. They desire control over how they are and how they come to be. Improving well-being must be responsive to the needs of the individual concerned. Research and data should be for well-being, of a flourishing society. This indicates that it should be autonomy-centred. Finally, non-disease issues should be pathologised to return dignity to one's being.

6.2.1 Responsive to Needs

Despite the negative effects that many intersex people have faced within the medical system, they do not reject the system completely. They demand like all people a system that is responsive to them and their needs rather than a paternalistic system. Although they are purportedly done for well-intended reasons or benevolence, they actually have no medical or therapeutic purpose.³⁴

The Report on Torture stated that “health-care providers must be cognisant of, and adapt to, the specific needs of lesbian, gay, transgender, and intersex people.”³⁵ It is not sufficient just to provide a system, but it must be suitable to the population. Moreover, it must be provided on an equal basis as others. The World Health Organisation has recently stated:³⁶

“States parties’ obligations to respect the right to health requires that they abstain from imposing discriminatory practices. This includes an obligation to respect the rights of ... intersex persons, who also have the right to retain their fertility and the right to have access to sterilization and other family planning services on an equal basis with others.”

Intersex people have a right to resources as others and on an equal basis. Access to health services should not be according to discriminatory basis such as on a binary basis. Intersex people have a need that includes both male and female aspects which may not always be sided one way or the other. Equality and access to health also include that of fertility and reproduction which is essential to a person’s future development.³⁷ Any treatment without their consent may lead to

³⁴ Erik Schneider *An Insight into Respect for the Rights of Trans and Intersex Children in Europe* (2013) at [144, 145].

³⁵ Juan E Méndez and Human Rights Council *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (A/HRC/22/53 2013) at [38].

³⁶ World Health Organisation *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization* (An Interagency Statement OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO 2014) at 10–12.

³⁷ Commissioner for Human Rights and Agius, above n 33, at 32.

interference with their fertility and reproduction, even if there may only be a slim chance. Each person must have the right to how they see sexual and reproductive health, as an autonomous decision, not one forced upon them.

Central to any health system is access to medical records. Although these are held by institutions, the information equally belongs to the individual concerned. Many intersex people have noted the withholding of records, or in some cases the destruction of records.³⁸ Mauro Cabral writes that in general, as intersex people,³⁹

[we] are not told about the surgeries performed on us during our early childhood, or we receive misleading information about it. We do not often have access to our medical records: they are hidden or destroyed.

The WHO noted the issue in its report on sterilisation. The report stated “Censoring, withholding, or intentionally misrepresenting information about sterilization can put health and basic human rights in jeopardy.”⁴⁰ However, withholding or destroying records does more than putting health in jeopardy. It impinges on one’s dignity as a human being as with intersex people. Furthermore, it prevents the free and full development of personality as fundamental to international human rights. The locking of such information by whatever means inhibits the right to privacy and therefore also violates that right including one’s right to autonomy and integrity.

Responsive and supportive health systems would be knowledgeable and accepting of the diversity of sex. This includes expertise and services available. This expertise should include multidisciplinary teams that have the knowledge and expertise to enable intersex people.⁴¹ Where centres are small, they should have the ability to

³⁸ Ghattas, above n 1, at 15.

³⁹ Cabral, above n 2.

⁴⁰ World Health Organisation, above n 36, at 10.

⁴¹ Senate Community Affairs References Committee and Australian Government *Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013) at 73.

use technology to interact with such teams. These teams are for the good life of the individual and not for the social good. These teams should operate in accordance with a human rights framework, in particular, focusing on the individual's autonomy and consent. The Report on *Involuntary or Coerced Sterilisation of Intersex People in Australia* recommended:⁴²

“The committee recommends that all medical treatment of intersex people take place under guidelines that ensure treatment is managed by multidisciplinary teams within a human rights framework. The guidelines should favour deferral of normalising treatment until the person can give fully informed consent, and seek to minimise surgical intervention on infants undertaken for primarily psychosocial reasons.”

These teams are there to enable, not disable one's development inclusive of health as articulated in the right to health. These medical teams are not there to shape an intersex person's life, but support them if they need their support and service.

Important in the health and well-being of intersex children and adults is the supportive and accepting community. For a new born, health and well-being require a supportive enabling environment including a supportive, caring, and accepting family. This may involve the counselling of those caring for and surrounding intersex children with education and an understanding regarding the diversity of sex and its needs. This aids in the free and full development of the young infant and helps to avoid stigma and help the family with an understanding of their new child's diversity. An advocate group argues that “a focus on family counselling rather than surgical options, and supported changes to the basis on which medical management of intersex is approached.”⁴³ Erik Schneider writes that “a major campaign should be run to raise awareness about the existence of intersex children in a society polarised by the gender dichotomy and it is important

⁴² At xiii.

⁴³ At 70.

to devise specific parenting aids.”⁴⁴ This will help prevent negative effects and enable the child to adjust positively in the society as who they are as an intersex child without having to undergo sex-normalising treatment unless they choose to later in life.

6.2.2 Research and Data

There are several issues relating to data on intersex people. The first issue relates to getting data on intersex people. The estimated size of the population and the actual population do not match. Erik Schneider highlights in his report the issue of doing research to support the needs of intersex people:⁴⁵

“With regard to research on intersex people themselves, there is a methodological problem which should be highlighted. Given that a large number of people do not know that they may be considered intersex because of the incomplete information given to them by doctors, it is difficult to establish contact with them”

Moreover, Dan Ghattas reported that⁴⁶

The amount of data available on individual countries for this preliminary study depends on the efforts of NGOs to collect cases and identify the number of cases.”

As most intersex people do not even know they are intersex, there are methodological issues in finding people to do research.⁴⁷ This leaves main subjects of research of any kind are those who have ‘come out’ or publicly acknowledged themselves as intersex.

⁴⁴ Schneider, above n 34, at [177].

⁴⁵ At [208]; Referring to: SM Creighton and LM Liao “Changing Attitudes to Sex Assignment in Intersex” (2004) 93 *BJU International* 659.

⁴⁶ Ghattas, above n 1, at 15.

⁴⁷ Schneider, above n 34, at [208].

Medical research that is done has bias due to populations size. This type of bias was noted in the *Involuntary or Coerced Sterilisation of Intersex People in Australia* inquiry report:⁴⁸

Study bias or methodological problems are frequently encountered. Studies may experience poor patient participation or low numbers because these disorders are so rare. Selection bias is likely to be problematic because of the rare prevalence of the conditions or of the complexities of accruing research subjects.

This limited access to data affects intersex people who do not know about themselves and also the ability for health systems to be responsive to intersex people's needs.

However, the major issue is relating not only to intersex but biomedical research in general. There are two major flaws that affect biomedical research today. The first is the bias on subjects by only recognising two sexes and excluding variation of sex.⁴⁹ The second assumption is that the assigned sex at birth is congruent with all of the 'biological factors'. Unless this is checked, it would leave the results questionable. Due to these assumptions, from which most biomedical studies are done, it leaves the real validity in debate and the true usefulness for health open to question. The results leave the possibility of a distorted picture of society. Furthermore, it excludes the possibility of critical information that intersex people may need help to explain for their health and well-being. The standardising of groups to male and female restricts the ability of health systems to support well-being. This is especially true for intersex people who are looking for services and resources suitable for who they are and not what they should be.

Despite the fact of doing such normalising treatment for well over 60 years, there has been no solid evidence or medical data on its benefits to intersex people, and

⁴⁸ Senate Community Affairs References Committee and Australian Government, above n 41, at 111.

⁴⁹ Schneider, above n 34, at [207].

as such it remains experimental,⁵⁰ even stated by the medical associations themselves.⁵¹ There is a “striking lack of independent quantitative and qualitative research worldwide.⁵² Despite the continued recommendation and use as a standard of care for most intersex variations, there has been little research undertaken in this area. Creighton et al state that this includes the lack of data not only concerns of medical treatment, such as guidance for best timing and surgical approach but also non-medical dimensions of intersex life.⁵³ Medical professionals have carried out few, if any, long-term studies of the effects on their patients. The medical respondents in the Australian Report admitted that:⁵⁴

“Current international guidelines recommend long-term follow-up of children with DSD who have early surgery. This does not occur in Australia, as there is no co-ordinated registry regarding the management and outcomes for people with DSD.”

This was also reflected in Erik Schneider’s report:⁵⁵

“There is also a need to take stock of the normalising surgery and hormone treatment being carried out in Europe and its long-term effects. Such studies should be centred on the perception of their treatment by the persons concerned and not just on that of their doctors.”

⁵⁰ Senate Community Affairs References Committee and Australian Government, above n 41, at [6(2)]; Sarah Creighton and others “Timing and Nature of Reconstructive Surgery for Disorders of Sex Development – Introduction” (2012) 8 *Journal of Pediatric Urology* 602 at 603; IA Hughes and others “Consensus Statement on Management of Intersex Disorders” (2006) 2 *Journal of Pediatric Urology* 148 at 158; Senate Community Affairs References Committee and Australian Government, above n 41, at 111–112.

⁵¹ “Even in the 2006 Consensus Statement, through which much of the new medical protocols are based, admit “The consensus has clearly identified a major shortfall in information about long term outcome”: Hughes and others, above n 50, at 158; Senate Community Affairs References Committee and Australian Government, above n 41, at 111–12.

⁵² Ghattas, above n 1, at 15.

⁵³ Creighton and others, above n 50, at 603.

⁵⁴ Senate Community Affairs References Committee and Australian Government, above n 41, at 112.

⁵⁵ Schneider, above n 34, at [209].

Creighton et al also state that there “is little obvious moves towards a global programme of research.”⁵⁶ Most research that has been done is on the methodology and quality of surgery. Despite treatment being performed for so long, the medical professionals do not appear concerned with the quality of life due to non-necessary cosmetic surgery. Although little research has been done by medical professionals and the groups doing the treatment, there have been some done by sociologists and advocate and human rights groups. The studies and reports have indicated serious and life-long effects as noted by the World Health Organisation (WHO).⁵⁷

Research is important for the well-being of intersex people, but the incorporating of sex diversity in general research could also benefit all of society. However, any further research, as Erik Schneider states, must:⁵⁸

“Because of the lack of widespread knowledge on the subject, it is imperative that such studies: (1) adopt a participatory approach involving intersex organisations with long experience in the field; (2) be independent from the medical community so as to guarantee that the information collected is not biased; and (3) be devised outside the gender dichotomy framework as, otherwise, intersex children could effectively be excluded from them or there is a risk that their situation will not be properly reflected.”

It must allow the participant, such as the intersex person, be participatory and have a voice. To improve well-being, taking account of the above factors are critical if health and well-being are to mean something for whose life it is.

6.2.3 Depathologising

Finally, well-being requires medical support for biomedical issues such as disease. Having intersex variations in itself is not a disease. there is no health issue from

⁵⁶ Creighton and others, above n 50, at 608.

⁵⁷ World Health Organisation, above n 36, at 7.

⁵⁸ Schneider, above n 34, at [210].

being a sex not recognised. That is a social issue that needs socio-legal change. There are some rare diseases connected with a few intersex variations. Dr Susan Stred, a professor of paediatrics, said there are “two rare instances where surgery is required.”⁵⁹

“One is where the internal organs are on the outside of the body as if they were turned inside out. And the other one would be to ensure there is a way for urine to leave the body. Any other surgery on the external genitalia of a new born is cosmetic surgery and is not medically necessary.”

Any surgery outside of this is not necessary and can wait until the child is old enough to make informed decisions on their own. This includes all forms of cosmetic surgery on genitals or any removal of gonads.

The making of intersex as an abnormality, even a pathology, means they are treated as something abnormal or as a disease.⁶⁰ This marks them as a disease and not a human being with sex variations. As such it becomes discriminatory. For example, a male is not considered as a disease simply because he is a man. He is simply a man. So why is an intersex person considered a disease just to make them a man or woman? Furthermore, normalising surgery presupposes that there is an abnormality in need of correction.⁶¹ It marks intersex variations as a disease, an abnormality. Such marking can cause discrimination as well as stigmatisation. The presence of intersex variations has marked the presence of disease and abnormality, rather than variation.⁶² This is despite the fact, in most cases, no

⁵⁹ Human Rights Watch and InterACT “US: End Irreversible Genital Surgeries on Intersex Infants” (USA, 2017) <<https://www.youtube.com/watch?v=KeAVdOJOfKk>>.

⁶⁰ Ghattas, above n 1, at 17.

⁶¹ Senate Community Affairs References Committee and Australian Government, above n 41, at 69.

⁶² Georgia Warnke “Intersexuality and the Categories of Sex” (2001) 16 *Hypatia* 126 at 129.

medical intervention is required.⁶³ This stigmatises intersex, and due to the normalising and concealing of records makes intersex invisible.

To improve health and well-being for intersex people, intersex variations must be depathologised. Prior to 2006, they were referred to as intersex disorders, but that name was changed from intersex disorders, to 'disorders of sexual development' or (DSD) after a 2006 professionals of the Endocrine Society decided on the 'Consensus Statement on the management of Intersex Disorders'.⁶⁴ Although there may be sometimes an associated health condition, the intersex variations themselves are not. Any pathological term is only used for just that – a pathology."⁶⁵ This avoids the prevention of harm to physical health of those variations that do not necessarily require medical intervention.⁶⁶ For this reason, the Australian Senate inquiry recommends that "governments and other organisations use the term 'intersex' and not use the term 'disorders of sexual development'."⁶⁷ As intersex people like other male and females, they desire respect and dignity of who they are. This is essential to their well-being.

6.3 Intersex Normalisation as Torturous Treatment

The dignity and integrity of the human have been a fundamental goal of human rights. 'Torture' is "most serious of violation of the human right to personal integrity and dignity presupposes a situation of powerlessness, whereby the victim is under the total control of another person."⁶⁸ To insure against the atrocities of

⁶³ At 129.

⁶⁴ Commissioner for Human Rights and Agius, above n 33, at 22; Gerald N Callahan *Between XX and XY* (Chicago Review Press, Chicago, Ill, 2009) at 115, 116.

⁶⁵ Senate Community Affairs References Committee and Australian Government, above n 41, at xiii.

⁶⁶ At xiii.

⁶⁷ At viii.

⁶⁸ *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (A/HRC/22/53 2013) at [31]; *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note* (A/63/175 2008) at [50]; *Civil and Political Rights, Including the*

WWII and that they were not repeated, the drafters included Article 7 of the ICCPR which is derived from Article 5 of the UDHR. It states⁶⁹

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

Its purpose is to “protect the dignity and the physical and mental integrity of the individual.”⁷⁰ Other International instruments/conventions have also included such an article such as the ECHR. There is no definition of the concepts covered by Article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.⁷¹

Torture and ill-treatment, though, has been expanded within a separate convention: The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). This Convention has given a clarification of what is meant by torture and ill-treatment. According to Article 1(1) of the Convention against Torture:⁷²

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or

Questions of Torture and Detention: Report of the Special Rapporteur on the Question of Torture (E/CN4/2006/6 2005) at [39].

⁶⁹ International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI) (adopted 16 December 1966, entered into force 23 March 1976), Art. 7.

⁷⁰ CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), para 2 (1992).

⁷¹ CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), para 4.

⁷² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations General Assembly Resolution 39/46 (adopted 10 December 1984, entered into force 26 June 1987), Article 1(1).

is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

In summary, torture in relation to this thesis means any act which (1) creates severe physical or mental pain or suffering (2) intentionally inflicted, including being based on discrimination, and (3) by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. These three prongs must be present to constitute torture. A person's physical and psychological/mental integrity comes under the definition of torture, or cruel, inhuman or degrading treatment when its purpose is discriminatory in the hands of statutory authorities. It does not count as torture when pain and suffering arise inherent or incidental to lawful sanctions.

This is an absolute as well as a non-derogable right in both the ICCPR and the CAT. The ICCPR Committee reaffirms that even in the case of a public emergency such as those referred to in Article 4 of the Covenant, no derogation from the provision of Article 7 is allowed and its provisions must remain in force.⁷³ The Committee observes that no justification or extenuating circumstances may be invoked to excuse a violation of Article 7 for any reasons, including those based on an order from a superior officer or public authority.⁷⁴

The treatment of intersex people will be used to illustrate the various characteristics of the parts that comprise torture. In February 2013, Juan E. Méndez *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or*

⁷³ CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), para 3.

⁷⁴ CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), para 3.

Degrading Treatment or Punishment discussed the issue of sex-normalising treatment in the context of torture.⁷⁵ The report focuses on certain forms of abuses in health-care settings that may cross a threshold of mistreatment that is tantamount to torture or cruel, inhuman or degrading treatment or punishment and it identifies the policies that promote these practices and existing protection gaps.⁷⁶ This is set out by Juan E. Méndez in his report on torture in health care settings:⁷⁷

“The UN Special Rapporteur on torture pointed out that intersex children are often subject to irreversible sex assignment, involuntary sterilisation and/or genital-normalising surgery, performed without their informed consent or that of their parents “in an attempt to fix their sex” as they fail to conform to socially constructed gender expectations. This leaves intersex children with permanent, irreversible infertility and causes severe mental suffering.”

This has been supported by a number of other reports. One such report is the latest WHO report.⁷⁸

6.3.1 Prong 1- Suffering

The first prong is that it creates “severe physical or mental pain or suffering”. This is confirmed by the General Comment on Torture.⁷⁹ The case of *LNP v Argentina* also supports this. In that case, the author suffered and endured being questioned about her sexual life and morality superfluous to the sexual assault.⁸⁰ The

⁷⁵ “Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, above n 68.

⁷⁶ At 1.

⁷⁷ Méndez and Human Rights Council, above n 35, at [77]; Commissioner for Human Rights and Agius, above n 33, at 31.

⁷⁸ *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization* (2014).

⁷⁹ CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), para 5.

⁸⁰ *LNP v Argentina*, No Communication No 1610/2007, slip op ¶ 13(6) (United States CCPR Human Rights Committee 18 July 2011).

Committee concludes that the author was a victim of treatment of a nature that is in breach of Article 7 of the ICCPR⁸¹ regarding⁸²

“the constant inquiries by the social worker, medical personnel, and by the court into the author’s sexual life and morality constitute arbitrary interference with her privacy and an unlawful attack on her honour and reputation, all the more so because those inquiries were not relevant to the rape case and related to a minor.”

Moreover, in *VDA v Argentina*, a case where the state forced a mentally impaired person to continue with a pregnancy, despite legal provisions allowing her to abort,⁸³

“The Committee considers that the state parties omission, in failing to guarantee LMR’s right to termination of pregnancy, as provided for under art. 86(2) of the Criminal Code, when her family so requested, caused LMR physical and mental suffering a violation of Article 7 of the ICCPR that was made especially serious by the victim’s status as a young girl with a disability.”

Pain and suffering can also occur when the state or its delegated authorities omit or refuse to uphold a person’s integrity. This is demonstrated in *K.L. v Peru*, where a girl was forced to continue with a pregnancy that not only had a danger to the foetus but also endangered the girl’s life. In this case, “the omission on the part of the state in not enabling the author to benefit from a therapeutic abortion was, in the Committee’s view, the cause of the suffering she experienced,” and as such a violation of Article 7.⁸⁴ These mentioned cases initially had physical and mental suffering was exacerbated by the treatment of the state authorities. Thus, torture

⁸¹ At para 13(6).

⁸² At para 13(7).

⁸³ *VDA v Argentina*, No Communication No 1608/2007, slip op ¶ 9(2) (United States CCPR Human Rights Committee 29 March 2011).

⁸⁴ *KL v Peru*, No Communication No 1153/2003, slip op ¶ 6(3) (United States ICCPR Human Rights Committee 24 October 2005).

is the mental and physical suffering at the hands of authorities or delegated authorities, such as through the government health systems.

Intersex people have suffered from sex-normalising treatments., It includes both mental, physical and even sexual pain and the interference with one's dignity. For example, it leaves intersex children with permanent, irreversible infertility and causes severe mental suffering.⁸⁵ Juan E. Méndez wrote in his report on torture in health care settings:⁸⁶

This has been clearly as expressed as avoiding involuntary and unconsented treatment and interventions that have negative lifelong consequences to their physical and mental health.

This is supported by the WHO that commented: "Children are being subjected to irreversible interventions that have lifelong consequences for their physical and mental health."⁸⁷ The treatment affects all parts of an intersex person's well-being.

In more detail, these procedures are rarely medically necessary; can cause scarring; loss of sexual sensation, pain, incontinence and lifelong depression; can potentially be harmful; and contributes to stigma.⁸⁸ It has also been criticized as being unscientific.⁸⁹ This has been demonstrated through several national or provincial, or shadow reports which include

A Human Rights Investigation into the Medical "Normalization" of Intersex People - A Report of a Public Hearing by the Human Rights Commission of the

⁸⁵ Méndez and Human Rights Council, above n 35, at [77]; Commissioner for Human Rights and Agius, above n 33, at 31.

⁸⁶ Commissioner for Human Rights and Agius, above n 33, at 32.

⁸⁷ World Health Organisation, above n 36, at 7.

⁸⁸ Méndez and Human Rights Council, above n 35, at [76].

⁸⁹ At [76].

City & County of San Francisco”⁹⁰ in 2005, the report “On the Management of Differences of Sex Development - Ethical Issues relating to Intersexuality”⁹¹ in 2012, the “Involuntary or Coerced Sterilisation of Intersex People in Australia”⁹² in 2013, and various NGOs such as Zwischengeschlecht (Human Rights NGO).⁹³

As illustrated above, the sex-normalising treatment on intersex people creates ‘severe physical or mental pain or suffering’ constituting the first prong of torture.

6.3.2 Prong 2 - Intention and Purpose – Intersex Discrimination

Although suffering may be horrific, there are situations when people suffer which do not constitute torture. Many operations have suffering, some even severe, but do not constitute torture. This is illustrated by Manfred Nowak.⁹⁴ After analysis of the travaux préparatoires of CAT, ICCPR and the associated rulings, he pointed out that torture is “more than the intensity of the pain or suffering inflicted, concerns the purpose of the conduct and the powerlessness of the victim.”⁹⁵ This introduces the second prong the purposeful intentional infliction of treatment. Intention and purpose is defined as:⁹⁶

“is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.”

⁹⁰ *A Human Rights Investigation into the Medical “Normalization” of Intersex People - A Report of a Public Hearing by the Human Rights Commission of the City & County of San Francisco* (2005).

⁹¹ *On the Management of Differences of Sex Development - Ethical Issues relating to “Intersexuality”* (Opinion Number 20/2012 2012).

⁹² *Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013).

⁹³ *Intersex Genital Mutilations - Human Rights Violations of Children with Variations of Sex Anatomy* (2014).

⁹⁴ Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment - Mr. Manfred Nowak, (Austria), 2004 - 31 October 2010.

⁹⁵ “Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur on the Question of Torture”, above n 68, at [39].

⁹⁶ above n 72, Art 1(1).

Intentionally infers knowingly or purposely rather than accidental. One of the indications of intentionality is when it is involuntary. This is illustrated for intersex people by a statement of the World Health Organisation. It states:⁹⁷

“Intersex persons may be involuntarily subjected to so-called sex-normalising or other procedures as infants, or during childhood, which in some cases, may result in termination of all or some of their reproductive capacity.”

Intentional infliction indicates torturous or ill-treatment occurs without their choice. Although usually thought of as occurring through ‘bad intentions’, this is not always the case. Often intentional treatment occurs because of good intentions. This is most clearly seen within the health care or medical context. This is especially so in dealing with vulnerable groups by medical authorities.⁹⁸ Méndez in his report defined intent, as required under Article 1 of the Convention against Torture, effectively being⁹⁹

“implied where a person has been discriminated against on the basis of disability. This is particularly relevant in the context of medical treatment, where serious violations and discrimination against persons with disabilities may be defended as ‘well intended’ on the part of health care professionals.”

Especially in the health care setting, treatment can occur in a paternalistic manner seen as doing the right thing for the person, irrespective of that person’s desire. Most often this occurs to vulnerable groups such as young, mentally vulnerable and the disabled. For intersex people, the treatment is often phrased in ‘good intentions’ for the person upon whom it is performed. However, good intentions of normalising cannot justify mutilation because it never normalises but does the opposite.¹⁰⁰ It stigmatises intersex as a monstrosity, a mistake of nature. Despite

⁹⁷ World Health Organisation, above n 36, at 7.

⁹⁸ “Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note”, above n 68, at [49].

⁹⁹ “Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, above n 68, at [20].

¹⁰⁰ Cabral, above n 2.

'good intentions' it is still treatment that is forced upon someone for some purpose.

Intention requires a purpose of which there are various ones listed in the definition above. There is no sufficient space to discuss them, all, and thus will concentrate on the purpose that relates to intersex people – discrimination. The intentional treatment occurs purely due to discrimination fulfilling this prong of torture.¹⁰¹ Many policies and practices that lead to abuse in health-care or other statutory settings are due to discrimination targeted at persons who are marginalised.¹⁰² In the case of intersex people this discrimination is because of sex. It is discriminatory because this treatment is only performed on those who have sex characteristics that cannot be clearly defined as male or female and non-ambiguous babies and infants do not meet the same consequences.

As far as Intersex people, sex discrimination underlies the treatment violations that they face.¹⁰³ The prejudices and stigmatisation of not fitting within the male-female binary require that one be forcefully manipulated within the system. As such, the discriminatory treatment occurs “in an attempt to fix their sex” as they “fail to conform to socially constructed gender expectations.”¹⁰⁴ Treatment is supposed make them as the ideological or essentialised form of male or female as they have been assigned. For example, Creighton et al write that its purpose is “to improve the cosmetic appearance of the genitals, to allow for vaginal-penile intercourse, and to achieve an unobstructed, sex-typical manner for urination (i.e. standing for male).”¹⁰⁵ These are essential elements of the social constructed

¹⁰¹ Méndez and Human Rights Council, above n 35, at [37].

¹⁰² “Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, above n 68, at [37].

¹⁰³ At [37].

¹⁰⁴ Méndez and Human Rights Council, above n 35, at [77]; Commissioner for Human Rights and Agius, above n 33, at 31.

¹⁰⁵ Creighton and others, above n 50, at 603.

society of what it means to be human – a male or female – and any variation will confuse society. Furthermore, it is couched terms of reducing stigmatisation of the individual to make others around them more comfortable and help them fit into the social structure. It reduces “the stigmatization of living with genital ambiguity” for the patient and family.”¹⁰⁶ Schneider writes:¹⁰⁷

Such procedures are based on the idea that they are enabling children to have a good quality of life. [They are] given the following advice by a doctor: ‘Just bear in mind that if anyone hears about it, it will be the end for your child, from a social viewpoint. Think of school, sport or swimming!’

The good quality of life is to overcome the social stigma. Without such treatment, it is considered that one will have a 'legacy of shame', difficulties within the child's family unit, adult personal and psychological distress, sexual anxieties, and uncertainty about personal and gender identity.¹⁰⁸ The treatment improves the bonding with parents and family. The *Involuntary or Coerced Sterilisation of Intersex People in Australia* Report refers to the reasoning for treatment:¹⁰⁹

“To the extent that this refers to facilitating parental acceptance and bonding, the child's avoidance of harassment or teasing, and the child's body self-image, there is great danger of this being a circular argument that avoids the central issues. Those issues include reducing parental anxiety and ensuring social awareness and acceptance of diversity such as intersex. Surgery is unlikely to be an appropriate response to these kinds of issues.”

Although there maybe discrimination in society, support from family and loved one’s can help overcome this. This treatment rather than overcoming the discrimination with family support, it changes a person’s body to match societies expectations so others around the person does not feel uncomfortable. In doing

¹⁰⁶ At 603.

¹⁰⁷ Schneider, above n 34, at [145].

¹⁰⁸ Senate Community Affairs References Committee and Australian Government, above n 41, at 69.

¹⁰⁹ At 74.

such treatment it has the potential to disassociate one's being and self from one's determined sex and its social identity. Even if one is comfortable with the sex expression one was assigned, there are still elements of one's being one's has lost involuntarily.

6.3.3 Prong 3 – Done by Authority

The third prong is that torture and ill-treatment is 'at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.¹¹⁰ It is commonly thought to be under the auspices of security, however, it can also be in other fields of statutory authority such as in medical facilities. In the health-care context, which in most jurisdictions fall under statutory authority, clearly, comes under this requirement. Juan Méndez in his report made it clear that States are obligated to prevent torture not only by public officials, such as law enforcement agents, but also doctors, health-care professionals and social workers.¹¹¹ Further, he connects state-sponsorship with such treatment¹¹²

"State-sponsored forcible anal examinations for the prosecution of suspected homosexual activities, and invasive virginity examinations conducted by health-care providers, hormone therapy and genital-normalizing surgeries under the guise of so called 'reparative therapies'."

Such state sponsored treatment is illustrated through understanding that it is 'standard practice', such as with intersex people undergoing genital-normalising under the guise of 'reparative therapies'.¹¹³ Being standard practice limits liability

¹¹⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations General Assembly Resolution 39/46 (adopted 10 December 1984, entered into force 26 June 1987), Art. 1(1).

¹¹¹ "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", above n 68, at [24].

¹¹² Méndez and Human Rights Council, above n 35, at [76].

¹¹³ "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", above n 68, at [76].

of the medical professionals in civil and or criminal cases. Standard practice does not necessarily prevent the treatment from being evaluated as torture.

The medical authority often occurs through the 'doctrine of necessity'. This allows treatment to be carried out under legal protections of 'emergency' and therapeutic privilege. If an emergency, it can even be done without consent in extreme cases. This can obscure torture in health-care settings. In his report on torture and ill-treatment in medical settings, Méndez states:¹¹⁴

The doctrine of necessity continues to be an obstacle to protection from abuses in health-care settings. It is therefore important to clarify that treatment provided in violation of the terms of the Convention on the Rights of Persons with Disabilities – either through coercion or discrimination – cannot be legitimate or justified under the medical necessity doctrine.

The doctrine of necessity leads to involuntary treatment. For example, intersex people, these are done as a psycho-social emergency.¹¹⁵ Such treatment usually occurs in infancy or as soon as possible. This is argued, as Creighton et al in their article point out, to "maintain that the procedures are easier to perform and the results better in the young child."¹¹⁶ Dan Ghattas writes that¹¹⁷

"as a rule, Western medicine aims to allocate intersex individuals to one or the other of the two sexes/genders as quickly as possible and to apparently normalise, that is, conceal the intersex body, using surgical and other medical means."

As such intersex children are still pathologised as abnormal in need of medical care of which parents are urged to do as early as possible.¹¹⁸ With treatment forced

¹¹⁴ At [35].

¹¹⁵ Warnke, above n 62, at 129; Senate Community Affairs References Committee and Australian Government, above n 41, at 74.

¹¹⁶ Creighton and others, above n 50, at 603.

¹¹⁷ *Human Rights between the Sexes - a Preliminary Study on the Life Situations of Inter*Individuals* (Volume 34 2013) at 17.

¹¹⁸ At 7.

upon someone with or without informed consent. This may not even have therapeutic purpose.

To avoid being classed as torture, the authority such as in medical or health care settings rely on concepts such as capacity and consent. Capacity is the ability to exercise free will and informed consent of some treatment and as such it has legal effect as an agent.¹¹⁹ This is a fundamental feature of guaranteeing the respect of an individual's autonomy, self-determination and human dignity in an appropriate service or care such as within health-care services.¹²⁰ Any incapacity which is a rebuttable presumption that must be proven before a person can be designated as incapable of making choices,¹²¹ passes the decision-making to others on one's behalf such as with children or the disabled.¹²² The intimate link between forced medical interventions based on discrimination and the deprivation of legal capacity has been emphasised both by the Committee on the rights of Person with Disabilities and the previous Rapporteur on the Question of torture.¹²³ Substitutive consent, such as that from one's parents in the best interests of the child may not be sufficient to prevent it from constituting torture. There are cases, where it could still constitute torture. In the report for the Human rights Committee on Torture, it recognised that¹²⁴

“medical treatments of an intrusive and irreversible nature, when lacking therapeutic purpose, may constitute torture or ill-treatment when enforced or

¹¹⁹ “Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, above n 68, at [27].

¹²⁰ At [28].

¹²¹ At [27].

¹²² At [31]; “Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note”, above n 68, at [50].

¹²³ “Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, above n 68, at [30].

¹²⁴ At [32]; “Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note”, above n 68, at [40, 47].

administered without free and informed consent of the person concerned, in particular when performed on patients from vulnerable groups.”

When there are situations of incapacity, substitute must ensure it is for a therapeutic purpose and in the child’s best interest which is a high threshold.

Manfred Nowak noted this as the Special Rapporteur for Torture:¹²⁵

“States must ensure that health professionals carry out such interventions only if they serve a therapeutic purpose, are in the best interests of the child, and are based on the free and informed consent of the parents (though parental consent must be disregarded if the treatment is not in the best interest of the child).”

Even in cases where substitutive informed consent has been obtained, there are still three important factors to prevent it constituting torture. It must be in the child’s best interest and it must be therapeutic and have informed consent. The doctrine of necessity is only in extreme life-threatening circumstances.

People are often powerless and vulnerable to any type of physical or mental pressure.¹²⁶ In other words, it would be impossible, or near impossible, to resist even for those in power to give substitute consent. For example, in the *Case of YF v Turkey*, although the State submitted that a gynaecological examination without consent of the person, the Court determined that,¹²⁷

“in the circumstances, the applicant’s wife could not have been expected to resist submitting to such an examination in view of her vulnerability at the hands of the authorities who exercised complete control over her throughout her detention.”

¹²⁵ Manfred Nowak and Secretary-General *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note (A/63/175 2008)* at [59].

¹²⁶ “Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur on the Question of Torture”, above n 68, at [39].

¹²⁷ *Case of YF v Turkey*, No Application no 24209/94, slip op ¶ 34 (United States European Court of Human Rights 22 July 2003).

This vulnerability is worsened through structural inequalities, such as the power imbalance between doctors and patients, exacerbated by stigma and discrimination, resulting in individuals from certain groups being disproportionately vulnerable to having informed consent compromised.¹²⁸ This is the case for intersex children. As reports have indicated (refer to the reports list under prong of suffering), few parents had sufficient information¹²⁹ and few were in the capacity¹³⁰ to make a decision that would have such impact on their child's life. Intersex people have to live with interference with the integrity of their body and psychological being and the life-long effects. This affects their well-being and inhibits one's human flourishing. Most of all it denies one dignity the central focus of international human rights.

6.3.4 Intersex treatment as Torture

The prohibition against torture and ill-treatment is an absolute, as well as a non-derogable right. There is no justification or extenuating circumstances. Health care settings are not immune from this right. In summary, there are three prongs to constitute particular treatment as torture: any act which (1) creates severe physical or mental pain or suffering (2) intentionally inflicted, including being based on discrimination, and (3) by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. All three prongs must be present to constitute torture.

¹²⁸ "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", above n 68, at [29].

¹²⁹ Parents were only informed about cosmetic successes, and not the reason that it is done to maintain a heterosexual society. They are also not told that doctors are taking a 'best guess' at the child's possible sex (gender). The parents are also not told of the side-effects detailed in numerous reports that could, and often do, have life-long effects.

¹³⁰ Most parents when confronted by the medical staff are in an emotional state in legal terms would be dubious at best as meeting the capacity to consent. In a state of trauma, unless life or death, it would be hard to justify meeting the conditions of consent.

For intersex people, this sex-normalising treatment has been cloaked in benevolence. Medical professionals often argue such treatment as preventing discrimination and enhancing the lives of the child and the family. They also argue that calling the treatment as mutilation or torture is unhelpful. The question must be asked: unhelpful to who? For intersex people who have to live with and after such treatment it is torture and mutilation, as Mauro Cabral refers, it is “the surgical mutilation of children.”¹³¹ Even though some have come to accept the sex designated them, few accept or believe that the treatment should have occurred without their consent. In such cases substitutive consent is not sufficient. Most intersex people continue to live with the pain and suffering. They also live with the effect of the denial of their being and the sex-normalising treatment on their identity.

For intersex people, sex-normalising treatment violates autonomy and integrity as it is non-therapeutic and it is without the consent of the individual of concerned. This is set out by Juan E. Méndez in his report on torture in health care settings:¹³²

“The UN Special Rapporteur on torture pointed out that intersex children are often subject to irreversible sex assignment, involuntary sterilisation and/or genital-normalising surgery, performed without their informed consent or that of their parents “in an attempt to fix their sex” as they fail to conform to socially constructed gender expectations. This leaves intersex children with permanent, irreversible infertility and causes severe mental suffering.”

This has now been supported by the WHO report.¹³³ This treatment constitutes torture as it satisfies each of the three prongs as identified below.

¹³¹ Cabral, above n 2.

¹³² Méndez and Human Rights Council, above n 35, at [77]; Commissioner for Human Rights and Agius, above n 33, at 31.

¹³³ “Eliminating Forced, Coercive and Otherwise Involuntary Sterilization”, above n 78.

First, as demonstrated above, there are numerous reports and studies demonstrating the suffering and the physical and mental pain of such treatment. The sex-normalising treatment is more than suffering of necessary medical treatment because of disease. Moreover, the second prong has also been demonstrated. The sex-normalising treatment is intentionally performed for a discriminatory purpose. The treatment has minimal therapeutic value. The WHO stated that these procedures are done “on the basis of weak evidence, without discussing alternative solutions that would retain the ability to procreate.”¹³⁴ Rather, intersex people generally have healthy bodies, the cosmetic purposes¹³⁵ “solely serve to socially adapt the intersex individual to the socially dominant corset of two sexes/genders.”¹³⁶ This ensures all bodies conform to the sex binary of male and female. Furthermore, these are performed by medical professionals who, as the third prong, is at the “instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” The UN Special Rapporteur on torture Juan E. Méndez pointed out many of the treatments of intersex people are “performed without their informed consent or that of their parents”¹³⁷ The medical professionals are performing such treatment to ensure conformity to the socio-legal norms of sex without consent and as such becomes forced treatment or torture. Understood together, this constitutes the prongs of torture especially when it is it has little therapeutic effect while discriminatory interfering with one’s integrity of being to ensure conformity to the binary of male and female without the consent of the person concerned.

As demonstrated, the pathologising of intersex variations is purposeful. It provides a way to medically fix a social issue. The sex-normalising treatments fixing the

¹³⁴ World Health Organisation, above n 36, at 7.

¹³⁵ Schneider, above n 34, at [144].

¹³⁶ Ghattas, above n 1, at 17.

¹³⁷ Méndez and Human Rights Council, above n 35, at [77]; Commissioner for Human Rights and Agius, above n 33, at 31.

social issue is often done in the guise of benevolence. Even if the sex expression that one is assigned matches who one is, the effect of such treatment has its legacy whether physical psychological, sexual or a combination of them. While treatment continues, even in the name of benevolence, this does not take away the issue of loss of dignity through the violation of autonomy and integrity. As this treatment satisfies the three prongs, it may constitute torture or cruel, inhuman or degrading treatment.¹³⁸ Merely using substitutive consent to enable early for a treatment of a social issue is at a minimum, questionable. This violates the integrity of who one is and inhibits their free and full development of personality. This dehumanises an intersex individual and removes their dignity of being. It is these very reasons that torture, and ill-treatment, has long been considered non-derogable under international law and especially under international human rights law.

Without preventing torture and ill-treatment it denies the dignity of being having autonomy over one's sex becoming which is central to international human rights. In order to prevent torture, Juan Méndez in his report on torture and ill-treatment summarises the importance and necessity of informed consent and autonomy in medical settings. He states¹³⁹

Safeguard free and informed consent on an equal basis for all individuals without any exception, through the legal framework and judicial and administrative mechanisms, including through policies and practices to protect against abuses. Any legal provisions to the contrary, such as provisions allowing confinement or compulsory treatment in mental health settings, including through guardianship and substituted decision-making, must be revised. Adopt policies and protocols that uphold autonomy, self-determination and human dignity. Ensure that information on health is fully available, acceptable, accessible, and of good quality; and that it is imparted and comprehended by means of supportive and protective measures such as a wide range of community-based services and

¹³⁸ "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note", above n 68, at [59].

¹³⁹ "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", above n 68, at [85(e)].

supports (A/64/272, para. 93). Instances of treatment without informed consent should be investigated; redress to victims of such treatment should be provided.

Firstly, he emphasises the importance of informed consent with no exception. The state must ensure systems are in place to protect against such abuses. Information must be supplied to ensure full informed consent of the person concerned and those significant one's around them such as one's parents. Secondly, he emphasises autonomy over how one comes to be. Autonomy requires that if treatment occurs, it must have therapeutic benefit, be in the child's best interest, and have the consent of the person concerned. Where not life-threatening, substitutive consent would not be sufficient for treatment of psycho-social reasons.

Another important point made by Méndez is prevention of such treatment to the enacting or amending of law and policy. Laws and policies must change to give effect to well-being and integrity. At present, only Malta has legislation in place to protect intersex from such treatment:¹⁴⁰

It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention can be deferred until the person to be treated can provide informed consent.

Few other countries have amended policies and laws to protect intersex people. The purpose of law is prevent unwanted treatment being performed that create life-long suffering on persons to simply uphold some discriminatory purpose. Such laws as in Malta need to be enacted in more nations. This protects one's autonomy over one's being and becoming while also protecting one's dignity. This also protects the right to privacy which is critical to the integrity of being oneself and making sense of who one is.

¹⁴⁰ Chapter 540 - Gender Identity, Gender Expression and Sex Characteristics Act No XI of 2015 2015 (Malta), s 14.

6.4 Conclusion

Privacy is the sphere in which the right to autonomy and (free and full) development of one's (personality) identity occurs be it by entering into relationships with others or alone through the integrity as a dignified being. A dignified being is one aiming to achieve one's potentialities and well-being- human flourishing. Well-being is critical to human flourishing and the sphere of the right to privacy in having autonomy in becoming who one is. For this reason, this chapter illustrates some of the needs of intersex people and key issues that prevent their well-being. This moves discussion beyond that of property rights to that of the foundation and purpose of human rights – the dignified being and the autonomy to freely and fully develop it. It is only through this one has a moral identity.

While health has the potential to improve well-being, for intersex people, health and the State health systems and the social ideology associated with it create well-being issues rather than enhancing it. As intersex people's well-being is impacted, it affects the dignity and integrity of one's autonomy over who they are and how they come to be. As already point out, and eloquently written by Dan Ghattas: "It is barely possible to develop an identity as a person (e.g. inter*woman or man) with an intersex body that has a right to remain unmodified."¹⁴¹ This prevents the very sphere of the right to privacy in which one develops one's sex or becomes one sex. The mutilation of intersex bodies "into culturally acceptable ones, violate our autonomy of decision as well as our bodily integrity."¹⁴² This fails dignity as it inhibits or denies the enabling achieve one's potentialities and well-being- human flourishing.

¹⁴¹ Ghattas, above n 1, at 17–18.

¹⁴² Cabral, above n 2.

This chapter highlighted key issues that enable and enhance well-being and some that inhibit or deny the well-being or the pursuing of one's potentialities. Regarding the health of intersex people and health services they have access to, the key issues are as follows:¹⁴³

- (i) avoiding involuntary and unconsented treatment and interventions that have negative lifelong consequences to their physical and mental health, (ii) having access to general health services that are appropriate, adequate and respectful of their bodily diversity.

Although these may seem fair requests they are not easily provided for due to discriminatory understanding of sex as a male-female binary and the manner in which the system is based on such a discriminatory understanding. This makes intersex people invisible to themselves and others degrading them as a dignified human being. This is discriminatory. The Committee on Economic, Social, and Cultural Rights has indicated that the ICESCR prohibits any discrimination that "has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health" in access to health-care and the underlying determinants of health.¹⁴⁴

Sex-normalising treatment that occurs soon after the assignment to a 'best-fit' sex severely impacts on one's well-being. This simply occurs due to the discriminatory nature of understanding sex in the socio-legal world and is enforced within biomedicine. This discriminatory treatment nullifies and impairs an intersex person's physical, mental, and sexual health. Thus, as the Senate community

¹⁴³ Commissioner for Human Rights and Agius, above n 33, at 32.

¹⁴⁴ CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12), para 18 (2000); "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", above n 68, at [38].

report on *Involuntary or Coerced Sterilisation of Intersex People in Australia* wrote:¹⁴⁵

The argument that normalising surgery is required to protect the child from discrimination was strongly contested. Rather than altering the child, it was submitted that societal attitudes are in need of reform.

Changing a child's features to satisfy society in an area such as one's genitalia without that person's informed consent is pure discrimination. There is no health reason for it at all. Any associated health needs do not require sex-normalising surgery nor removal of gonads. It is far more appropriate to educate the public about the diversity of sex than discriminate against intersex people simply because they do not fit social norms of the binary.

But this goes further than just discrimination, it also constitutes torture and ill-treatment as described above. The current standard of treatment in most states is still experimental despite its operation for more than 60 years. There are few, if any, studies legitimately supporting its use. This has come to the attention of the Special Rapporteur on Torture. Juan Mendez recommends that¹⁴⁶

all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, 'reparative therapies' or 'conversion therapies,' when enforced or administered without the free and informed consent of the person concerned. He also calls upon them to outlaw forced or coerced sterilization in all circumstances and provide special protection to individuals belonging to marginalized groups.

The call upon states has even till today not been taken up. Only Malta has implemented legislation to protect intersex children from such treatment. A

¹⁴⁵ Senate Community Affairs References Committee and Australian Government, above n 41, at 70.

¹⁴⁶ "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", above n 68, at [88].

Resolution at the Council of Europe has also indicated that Children have a right to bodily integrity, but the resolution falls short of banning it.¹⁴⁷ Intersex organisations around the world are calling for the ban on such treatment without the consent of the person concerned. For example, Truffer and Bauer in *Intersex Genital Mutilations - Human Rights Violations of Children with Variations of Sex Anatomy* write:¹⁴⁸

In Switzerland, like in every intersex community, meanwhile several generations of intersex persons, their partners and families, as well as NGOs and other human rights and bioethics experts, have again and again described IGM as a human rights issue, as harmful and traumatising, as a western form of genital mutilation, as child sexual abuse, and have called for legislation to end it.

This needs to be taken as serious as it is and can only be so by calling it what it is – torture. Reducing to benevolent terms as the bio-medical profession so often does covers the effect and impact it has on intersex people. In the Truffer and Bauer on Intersex Genital Mutilation, they refer to Mauro Cabral’s Statement in 2004 to the CESCR on the effects of such normalising treatment:¹⁴⁹

Genital mutilation of intersex children damages genital sensitivity in irreversible ways; it causes postsurgical trauma and the internalization of brutal prejudices denying or stigmatizing the diversity that in reality, human bodies show. [...] The difference in genitalia cannot justify, under any pretext whatsoever, ethical and political hierarchies: cannot justify mutilation, because it never normalizes but does the opposite. For us, mutilation creates a permanent status of human rights violation and inhumanity.

Torture through sex-normalising treatment creates a permanent status of human rights violation and inhumanity. Intersex people desire well-being like all other

¹⁴⁷ Children’s Right to Physical Integrity, Resolution 1952 (2013).

¹⁴⁸ Markus Bauer and Daniela Truffer *Intersex Genital Mutilations - Human Rights Violations of Children with Variations of Sex Anatomy* (2014) at 21.

¹⁴⁹ At 21.

human beings, but they do not want forced impositions of what sex and the sex-normalisations of that sex should be unless they decide it is what is best for them.

If intersex people are to have well-being and any ability to pursue potentiality, then it is time to protect them to such violations and enhance their well-being. Mauro Cabral writes that in the light of what the right to health means, “we advocate a review of medical practices around intersexuality and the adoption of concrete measures to eliminate genital mutilation of intersex children.”¹⁵⁰ Intersex advocates acknowledge there are instances of necessity for emergency treatment, but only when life-threatening, that is, in preserving of life, of which sex assignment and normalising surgeries is not one. In this case, well-being, for most intersex people, is the prevention of normalising treatment without their (the individual concerned) free and full informed consent.¹⁵¹ One change that the Australian Inquiry recommended was requiring the consent of the Court:¹⁵²

The committee recommends that all proposed intersex medical interventions for children and adults without the capacity to consent require authorisation from a civil and administrative tribunal or the Family Court.

Such changes, as this, may be necessary until society itself comes to embrace people of all diversities of sex. Intersex people desire the health and well-being, as do all other people, which includes the right to freely and fully develop as who they are and determine how they come to be. This results in a dignified being. They desire the ability to develop in the sex that matches who they are as a male, female, both or neither.

¹⁵⁰ “ILGA - UN 2004 - NGO statement: Intersexuality” (27 May 2004) International Lesbian, Gay, Bisexual, Transsexual and Intersex Association <<http://ilga.org/ilga/en/article/61>>.

¹⁵¹ Commissioner for Human Rights and Agius, above n 33, at 8.

¹⁵² Senate Community Affairs References Committee and Australian Government, above n 41, at xiii.

Health and well-being are essential to the ability to freely and fully develop as a dignified being. Inhibiting one's well-being inhibits one's pursuit of potentiality. Well-being requires the "right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation."¹⁵³ These are all current issues for intersex people. It is time to return to a system of well-being based on human rights. This puts the dignity of the human being first. This needs a reform based on a human rights approach where all treatment that is non-life-threatening requires the consent of the individual concerned. This is critical to enable them to freely and fully develop their personality inclusive of one's sex without discrimination.

They need the protection of the law. But for this to happen they also need to be recognised before the law. Intersex people, having sex diversity or variations that make it difficult to clearly define someone as male or female, requires the ability to develop a sex which is good for them – whether it be male, female, both or neither – and the ability to develop in that sex or amend it as one's narrative of life changes. This indicates that through the recognition of one's autonomously defined sex is a dignified being achieved.

However, in the past recognition of one's sex has been through a determined sex. This sex has been considered as immutable and biological in nature. This is despite the many variations intersex people's bodies highlight, society and the law are still restricted to binary status of sex which is reflected on a birth certificate, although there are slowly a few states that are slowly recognising a space for non-binary. To become visible, intersex people need to be recognised as who they are, not who they have been determined to be. This is critical as a human rights being with dignity.

¹⁵³ UN Committee on Economic, Social and Cultural Rights (CESCR), above n 29, at [8].

CHAPTER 7: NON-RECOGNITION OF THE DIGNITY OF (INTER)SEX

The dignity of the human being is central to international human rights. The enablement and protection of such a dignified being is seen through the right to privacy. Privacy is the “sphere in which the right to autonomy and (free and full) development of one’s (personality) identity occurs, be it by entering into relationships with others or alone through the integrity as a dignified being.” The integrity of such a moral being requires human flourishing as indicated by one’s well-being as described in the last chapter. The right to privacy is critical to the integrity of being oneself and flourishing. It is essential to making sense of who one is one’s moral identity.

Recognition is critical to the dignity of the human person through one’s moral identity. It is central to the organisation and structure of societies and thus is central to the revealing of who one is and how one comes to be as a human being. The social bond through recognition includes the idea of reciprocity, a “consideration of alterity connected to the self-assertion of the subject of capabilities.”¹ However, if one’s moral identity is not recognised, it is difficult, if not impossible, to get protection to freely and fully develop one’s personality through a narrative identity of one’s dignified being. Moreover, non-recognition also affects the claim on rights affecting one’s moral being of self-esteem and self-respect² and the effective relations from that of familial to that of the juridical level.³ The struggle for recognition is at the heart of modern social relations.⁴

¹ Paul Ricoeur “Capabilities and Rights” in Séverine Deneulin, Mathias Nebel and Nicholas Sagovsky (eds) *Transforming Unjust Structures: the Capability Approach* (Springer, Dordrecht, The Netherlands, 2006) 17 at 21.

² Jill Marshall *Human Rights Law and Personal Identity* (Routledge, Abingdon, Oxon; New York, NY, 2014) at 189.

³ Paul Ricoeur “Becoming Capable, Being Recognized” at 4.

⁴ At 4.

In brief, protection comes through recognition. It is recognition that ties back to the beginning of this work. Identity since time immemorial is about recognition of oneself and others. One's being, and thus, identity is only recorded status when it has recognition from others.⁵ However, as the earlier chapters have illustrated, recognition (or non-recognition) produces vulnerabilities when it divests the personal identity as a form of recognition from one's narrative identity. This has occurred through taking identity as immutable characteristics (essentialised attributes) as one's status. People become recognised not for who they are but according to and by one's statuses. This impacts on one's dignity and personal freedom.

Central to claims for justice is that of recognition. This is at the heart of every call for minority rights as part of one's socio-legal personhood.⁶ Non-recognition causes significant impact on the hermeneutic injustice of intersex people. In the case of intersex people, being mislabelled and mis-determined is no doubt a challenge to one's identity development and stability.⁷ Due to the invisibility of who they are, it prevents the free and full development of their dignified being, and thus prevents the protection of the law. If well-being rights fail, then the rights for the previous chapter also fail. This is not an interest right but a right to freely and fully develop as a dignified human person. As long as the issues that affect intersex people's well-being are not socially recognised, then they are not given their rights. The call is to be recognised for who they are, with an expression that matches their sex and an identity that respects how they come to be.

Recognition as an autonomous human being is not only a good thing, it is the moral right of every human being. Rights and access to them are interconnect to socio-

⁵ Jill Marshall *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers, Leiden; Boston, 2009) at 90.

⁶ Lauren Leve "Identity" (2011) 52 *Current Anthropology* 513 at 513.

⁷ Sharon E Preves *Intersex and identity* (Rutgers University Press, New Brunswick, NJ, 2003) at 4.

legal recognition. John Eekelaar argues that “people have rights to the extent that their own identification of what enhances their well-being is socially recognised.”⁸ This is not always the reality. Most people have access to rights to the extent they are socio-legally recognised which may or may not enhance one’s well-being. This demonstrates a difference in the reality of rights and the foundation and purpose of international human rights. The former enhances the status of individuals while the latter enhances the human rights dignified being. This difference is critical. While international human rights were about removing status as a distinction of human being, much of human law still applies rights law through status distinction.

The chapter will first concentrate on registration at birth, in particular, sex registration, before turning to recognition before the law. The chapter will conclude by considering how recognition before the law can be positive to enable the human rights person. This enables the intersex person to be who they are and autonomously how they come to be as a moral being. Recognition both socially and legally begins through registration at birth. Non-recognition before the law and society is the cause while recognition is the solution to many of the issues intersex people face.

7.1 Sex Registration and Recognition before the Law

Intersex people in most countries are only recognised as either male or female as they have been determined at birth. Few countries recognise somebody as a variant sex, that is one other than male or female. At most today, there are few states beginning to permit non-binary sex. This indicates the non-recognition of who they are and the misrecognition through the assigned sex. This has not only caused indignity of being but issues in relation to integrity and well-being. Their becoming has been truly restricted due to recognition issues. The birth certificate has more impact on one’s life than many people may assume.

⁸ John Eekelaar “Personal Rights and Human Rights” (2002) 2 Hum Rts L Rev 181 at 185.

This has resulted from the identifier on the birth registration. Almost universally, birth registration includes sex. This registration which includes sex is central to one's socio-political life, and without it, life would be near impossible. Registration not only recognises that being, but also the statuses of that being, such as sex, place of birth, and parentage.⁹ Protection of the law extends to one's statuses. The importance of registration is to 'preserve the historical record of facts'.¹⁰ The state uses these records of facts for a number of reasons. Julia Epstein writes:¹¹

"For the state, there has been several reasons for requiring that newborns be registered with a name and a sex designation at the time of birth: to establish a means of social organisation and to prevent fraud; to regulate the granting of different privileges and responsibilities according to sex; and most crucially to regulate morality and family life by prohibiting sex acts and marriages involving persons of the same sex."

Although one reason is that of legal personhood, registration also performs many administrative and protective functions. Furthermore, it provides certainty of identity. As such, this registration is not only for identification, but also for recognition before the law and to enable protection of the law.

It is accepted in the modern state that accuracy of registration records must be kept to prevent issues such as fraud and help to rectify them when they go wrong. Therefore, what is at issue here is not the keeping of records but the are those records about one's status or humanness, one's autonomy over those records and the one's ability to change the records. These very questions are central to intersex human rights issues. First, this section on registration will consider the issue of registration at birth before considering the issue of sex registration.

⁹ Marshall, above n 2, at 7.

¹⁰ *Case of Sheffield and Horsham v The United Kingdom* (31-32/1997/815-816/1018-1019) 30 July 1998 at [54].

¹¹ Julia Epstein "Either/Or-Neither/Both: Sexual Ambiguity and the Ideology of Gender" (1990) 7 *Genders* 99 at 101.

7.1.1 Birth Registration and International Law

Birth registration, in particular, was noted as a human rights issue at the time of drafting the ICCPR. It was noted that some countries did not register some infants which meant that they went through life undocumented. As such, this was considered as an essential right which enabled protection of the law. Manfred Nowak writes that:¹²

The right of each newborn child to immediate registration of his or her name in a State register of births is closely related to the right of every person to his or her own identity, which follows from the protection of privacy, and the right to recognition as a person before the law guaranteed by Art. 16.

The right to registration at birth is recognised as an essential interconnector with the right to recognition before the law. Nowak notes that it is “only through such registration that the existence of a newborn child is legally recognised.”¹³ It is through such documentation interconnecting with the right to privacy that provides one a right to an identity.

Registration focused on recognising the child as it entered the world. This ensures recognition before the law throughout one’s life. It has been a central element of children’s rights. It is the basis of their identity. Article 24 of the ICCPR states:¹⁴

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

¹² Manfred Nowak *UN Covenant on Civil and Political Rights* (NP Engel, Kehl, Germany; Arlington, Va, USA, 2005) at 559–560.

¹³ At 560.

¹⁴ International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A (XXI) Resolution 2200A (XXI) (adopted 16 December 1966, entered into force 23 March 1976), Art. 24.

The aim of this article was to recognise, due to the vulnerability of age, children would be protected by law. They did not have the own ability instead relying on others for support and protection. Moreover, it ensured that every child had an identity and that this was protected.¹⁵

This was illustrated in *Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario v. Argentina (Mónaco de Gallicchio v Argentina)*.¹⁶ The Committee considered that the national courts had respected Ximeno's identity rights in issuing her papers according to her identity at birth not affecting her recognition before the law.¹⁷ However, they also stated that¹⁸

While these circumstances do not raise an issue under article 16 of the Covenant, the initial denial of Mrs Mónaco's standing effectively left Ximena Vicario without adequate representation, thereby depriving her of the protection to which she was entitled as a minor. Taken together with the circumstances mentioned in paragraph 10.5 below, the denial of Mrs Mónaco's standing constituted a violation of article 24 of the Covenant.

¹⁵ International Covenant on Civil and Political Rights, Art. 24(1).

¹⁶ Facts of the case: Ximeno Vicario's parents were apprehended by police in 1977 and never seen again. The National Commission on Disappeared Persons investigated the disappearance in 1983, but the parents' whereabouts were never established. Ms. Monaco, the grandmother of Ximeno, launched her own investigation and found her granddaughter living with a nurse, S.S.. Ms. Monaco was granted temporary guardianship over Ximeno and S.S. was granted visitation rights while an investigation was undertaken as to whether to bring criminal charges against her. Ms Monaco sought to end the visitation rights of S.S. on the basis that they were having a negative effect on her granddaughter, but was denied the standing to do so as she was not the child's parent or permanent guardian. Ms. Monaco also tried to apply for identity papers to be issued under Ximeno's birth name but, again, this lacked standing. Ms. Monaco made the complaint on behalf of her granddaughter and herself alleging, inter alia, that Ximeno was denied her right to be recognised as a person (art. 16), that the forced visits of S.S. amounted to an arbitrary interference with her and her granddaughter's right to privacy (art. 17) and that the ambiguous situation was harmful to the integrity of the family (art. 23). Before the complaint was addressed by the Committee, Ms. Monaco was granted full guardianship of Ximeno, the visits of S.S. ended according to Ximeno's express wishes as she had then turned 18: *Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario v Argentina* CCPR Human Rights Committee Communication No 400/1990, 27 April 1995.

¹⁷ At [10(2)].

¹⁸ At [10(3)].

In this case, the HRC recognised that the state did rectify the issue of the child not being registered, yet highlighted the period of time in which the child was without registration the child lacked the protection of the law. As such, this case also highlighted the interconnection of Art. 24 with that of Art. 16 of the ICCPR.¹⁹ The Committee at the HRC stressed the importance of Art.24 in promoting recognition before the law and the State's obligation to facilitate this. It stated:²⁰

Bearing in mind the suffering already endured by Ms. Vicario, who lost both of her parents under tragic circumstances imputable to the State party, the Committee finds that the special measures required under article 24, paragraph 1, of the Covenant, were not expeditiously applied by Argentina, and that the failure to recognize the standing of Mrs. Mónaco in the guardianship and visitation proceedings and the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality.

The purpose of registration, as highlighted in this case is to recognise everyone as a person before the law from the time of birth, irrespective of their capacity to act. This ensures that it complies with Article 16 of the ICCPR. This then not only recognises the child before the law, but also gives the child the protection of the law.

The purpose of birth registration is to recognise the new human being before the law and enable protection of the law. Like Article 16, this Article is not concerned with the capacity to act, but recognition of the new human being into the world. Recognition is interconnected with dignity. Nonrecognition or misrecognition creates a state of indignity.

¹⁹ "(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State; (2) Every child shall be registered immediately after birth and shall have a name; (3) Every child has the right to acquire a nationality.": International Covenant on Civil and Political Rights, Art. 24.

²⁰ *Mónaco de Gallicchio v Argentina*, above n 16, at [10(5)].

7.1.2 Sex Registration

According to international law, birth registration is mandatory. It provides the basis for socio-legal recognition and access to rights and freedoms. The mandatory fields are name and nationality. However, in most jurisdictions, the field of sex is almost a universal ‘identity marker’ on official birth registration.²¹ Few jurisdictions recognise a person without reference to their sex.²² The sex marker is utilised in administrative matters of the state. Once recorded, it is then utilised in all areas of one’s life within the administrative state. In that sense, sex is central to one’s socio-legal personality.²³

The sex marker was determined at birth. All infants were assigned a sex. However, when intersex variations (usually referred to as conditions or disorders) are identified, they attempt to discover one’s ‘true sex’ and assign that the sex of either male or female, furthermore, in most cases to ensure adherence to and conformity to that sex, mandatory (almost everywhere) sex-normalising treatment is performed to ensure the genitals matched one’s assigned sex. This assignment has been considered a historical fact irrespective of the acknowledgement of the sex diversity of that person.

The assignment was considered a natural process. The assignment has been considered a matter of ‘labelling something of nature. As such it was seen as a fact of what one was as a historical record in the administration of the state. For

²¹ Commissioner for Human Rights and Silvan Agius *Human Rights and Intersex People* (2015) at 37.

²² Nils Muižnieks “A Boy or a Girl or a Person – Intersex People Lack Recognition in Europe” (9 May 2014) The Council of Europe Commissioner’s Human Rights Comment <<http://humanrightscomment.org/2014/05/09/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-europe/>>.

²³ Marshall, above n 5, at 103; Leve, above n 6, at 513; Lawrence M Friedman “The Concept of the Self in Legal Culture” (1990) 38 *Clev St L Rev* 517 at 517; Cordelia Fine *Testosterone Rex - Unmaking the Myths of Our Gendered Minds* (Icon Books Ltd, London, United Kingdom, 2017) at 14.

example, in *Sheffield and Horsham*, the State continued to rely on these justifications for²⁴

preserving the register of births as a historical record of facts subject neither to alteration so as to record an entrant's change of sex nor to abridgement in the form of an extract containing no indication of the bearer's registered gender.

This line of argument continued in the *Rees* and *Cossey* cases.²⁵ The argument was this 'recorded sex' was a record of fact and not one's identity.²⁶ Moreover, this fact had been determined at birth. The linking to the fact was on the biological nature of which it was determined. In the *Case of Cossey v The United Kingdom* the State argued sex is determined on 'biological criteria' – chromosomal, gonadal, and genital sex:²⁷

the criteria for determining sex of the person was not laid down in the act nor in any regulation made under it. However, the practice of the Registrar General is to use exclusively the biological criteria: chromosomal, gonadal and genital sex.

However, as bought up in the case, this 'biological criteria' was not a legal criterium but a 'norm'. Case law, especially that derived from *Corbet v Corbett*²⁸ onwards, has enforced such a norm.

Furthermore, States have been reluctant to make amendments to records or adaptations to the sex registration system. Change in many States was only permitted in cases of mistakes such as administrative error, for example, or wrong

²⁴ *Case of Sheffield and Horsham v The United Kingdom*, above n 10, at [54].

²⁵ *Case of Rees v The United Kingdom* (9532/81) 17 October 1986 at [21]; *Case of Cossey v The United Kingdom* European Court of Human Rights Strasbourg 10843/84, 27 September 1990 at [18].

²⁶ "All people can be clearly designated as belonging to either of the provided categories" – "the 'F' and 'M' dichotomy.": Commissioner for Human Rights and Agius, above n 21, at 37; European Agency for Fundamental Rights *The Fundamental Rights Situation of Intersex People* (2015) at 4.

²⁷ *Case of Cossey v The United Kingdom*, above n 25, at [20].

²⁸ *Corbett v Corbett* [1971] P 83 (United Kingdom).

'determination at birth'.²⁹ This upholding of the system as it was claimed in the public interest. For example, the *Sheffield and Horsham* case stated:³⁰

The Government have relied in continuing defence of the current system of births registration on the general interest grounds which were accepted by the Court in its Rees and Cossey judgments as justification for preserving the register of births as a historical record of facts subject neither to alteration so as to record an entrant's change of sex nor to abridgement in the form of an extract containing no indication of the bearer's registered gender.

The public interest claim centred on preserving the record as it was a historical record of fact. The state argued that any change or exceptions to the system undermine the system and its function.³¹ In the case of Rees, the State claimed that requesting the State to permit amendments for transgender people is "tantamount to asking that it should adopt a system in principle the same as theirs for determining and recording civil status."³² This they were suggesting was interfering with state sovereignty. Furthermore, they also claimed that it would cause other administrative flow on effects in "in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance."³³ This, in essence, would put complications on the system if such changes were permissible despite the fact that people can change one's name on birth records. Due to their insistence on the immutability of sex, it is difficult, near impossible to amend causing significant disadvantages for the person concerned.³⁴ This has affected both transgender and intersex people.

²⁹ *Case of Cossey v The United Kingdom*, above n 25, at [20].

³⁰ *Case of Sheffield and Horsham v The United Kingdom*, above n 10, at [54].

³¹ *Case of Christine Goodwin v The United Kingdom* (28957/95) 11 July 2002 at [86].

³² *Case of Rees v The United Kingdom*, above n 25, at [42(a)].

³³ *Case of Christine Goodwin v The United Kingdom*, above n 31, at [91].

³⁴ Commissioner for Human Rights and Agius, above n 21, at 37.

This 'fact' labelled on the birth certificate has denied intersex people existence and the purpose of registration according to international law, protection of the law. The very insistence on sex marker, not an international human rights law requirement, as factual and immutable indicates the importance of sex status. This historical fact based on biological criteria in reality for most infants is a determination made by quick look between their legs.³⁵ Although the argument is on biological criteria, few children ever get tested for congruence between their chromosomal, gonadal and genital sex. In other words, sex assignment is arbitrary.

However, this arbitrary assignment has a greater impact on intersex people than the average child. Unlike most children who they can guess from a quick look, in some cases, they do tests on intersex children to find their 'true sex'. Furthermore, along with the assignment, there is often sex-normalising treatment. This denies any autonomy not only over who they are but also how they come to be. This is a violation the many human rights, especially the ones mentioned in the last two chapters. As registration at birth is so important to one's socio-legal recognition, it is important to consider the right to recognition before the law. This is a universal and non-derogable right. As registration is important to recognition before the law and the protection of the law, it is important to clarify what it is and what it means to intersex people.

7.2 Recognition before the Law

The importance of socio-legal recognition was noted at the creation of the IBOR. There were numerous examples of where nonrecognition or misrecognition had led to the lack of access to rights and resources to live a public life freely and fully. History has demonstrated non-recognition of people, such as women, children and slaves. What has not been so widely recognised was the misrecognition of intersex people. Although they exist in the modern world, they exist in a

³⁵ At 13.

misrecognised form. They exist in a sex that is assigned to them as either a male or female, whether or not it matches who they are, and they have undergone normalising treatment to ensure compliance with the assigned sex.

Therefore, given the importance of being recognised before the law, the drafters of the IBOR constructed this right within both the UDHR and the ICCPR. It is commonly recognised as the ‘right to be recognised before the law’. The purpose is to formally ensure that everyone is recognised before the law. It is included in the UDHR as Article 6 stating “Everyone has the right to recognition everywhere as a person before the law.”³⁶ This was the same was included in Article 16 of the ICCPR: “Everyone shall have the right to recognition everywhere as a person before the law.”³⁷ There is one notable difference in the later which has a difference in the verb – ‘shall have’ instead of ‘has’ – which imposes an obligation, a duty, as opposed to a statement. It has also been included in other international instruments.³⁸ It has not been an article that is widely applied nor articulated within international law. It has had limited discussion even when evoked before the HRC.

7.2.1 Defining Recognition before the Law

There were two key elements of discussion regarding this article. One centred on the capacity to act and its connection to this right (this is discussed later in this

³⁶ Universal Declaration of Human Rights, UN General Assembly 217 A (III) (adopted May 1948, entered into force 10 December 1948), Art. 6.

³⁷ International Covenant on Civil and Political Rights Art. 16.

³⁸ Universal Declaration of Human Rights, Art. 6; It has also been included within the American and African Charters: African Charter on Human and Peoples’ Rights, (adopted 27 June 1981, signed 27 June 1981, entered into force 21 October 1986), Art. 5; American Convention on Human Rights, Organisation of American States (OAS) - International Conference of American States (signed April 1948, entered into force 18 July 1978), Art. 3; however, the European Convention took a different approach by assuming that it is deduced from the other articles in the Convention. See: Nowak, above n 12, at 369; Sarah Joseph, Jenny Schultz and Melissa Castan *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, Oxford ; New York, 2000) at 201.

section). The other main discussion was with reference to who was to be recognised before the law. As illustrated earlier in the thesis, due to different interpretive horizons, there has been a difference of focus between the 'what' and the 'who'. This difference of what and who became central to this discussion of this article.

It was clear in some of the early drafts of the IBOR that some nations were pushing for their focus on the legal person or 'juridical person'. However, it was recognised that this "did not have a well-defined meaning in some systems of law."³⁹ It was a creation in and through law and did not necessarily have an existence independent of the law, as corporate entities or associations have.⁴⁰ Person or personhood was jurisdictional dependent, and as such, the language was not the same from place to place. Even where it is used the language and meaning were sufficiently clear and precise.⁴¹

³⁹ UN Secretary-General *Document A/2929: Annotations on the Text of the Draft International Covenants on Human Rights* (Agenda 28-10th Session 1955) at 46.

⁴⁰ Michael Bogdan "Article 6" in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights: a Commentary* (Scandinavian University Press, Oslo : Oxford, 1992) at 112.

⁴¹ This right was drafted 'juridical personality' but was not considered as sufficiently clear and did not have a well-defined meaning in some systems of law. This was modified through a Philippines initiative to "recognition as a person before the law." The only substantial objections came from Anglo-American delegates as there was no equivalent in Anglo-Saxon law. Latin America and Eastern Bloc countries spoke of the importance of the concept, as did some like 'Western' states like Germany who were not represented at the UN. For example, Germany had included the 'human person' in its Constitution. They argued that the Commission should not be afraid to make an innovation just because it is not established usage in the 'Commonwealth' based countries. However, the Latinite versions of the UDHR retain the term juridical personality, while the compromise language in English as 'person before the law' was accepted by Roosevelt's delegation. Despite the reassurance from the UK delegation, the committee voted to change everyone and every person to every human being to distinguish from legal person, however, the English and French text still bear the unmodified term 'person'. This resulted in human rights in some language versions of the UDHR such as German, formalising it as the civil person through personality: UN Secretary-General, above n 39, at 46; Nowak, above n 12, at 371; Joseph Slaughter "The Textuality of Human Rights: Founding Narratives of Human Personality" [2004] *Interdisciplinary Law and Humanities Junior Scholar Workshop Paper* at 31, 36, 48.

Furthermore, some of the early drafts discussed the ability to exercise rights where there has been a 'deprivation of the legal person'.⁴² There were a couple of reasons: one the legal person did not necessarily include every human being and the other is the use of the language was imprecise. As far as exclusion, it had been recognised that the 'juridical person' had not always recognised every human being before the law. Some people had been degraded to mere outlawed objects,⁴³ or as slaves⁴⁴ and sometimes resulted in 'civil death'.⁴⁵ Other people such as women, children, and slaves were only recognised through their husbands, fathers, or masters respectively, and in such cases, were without their own legal personality.⁴⁶ This deprived them of legal rights and obligations⁴⁷ and gave no protection of the law. In the sense of the juridical person, it would not achieve the aims and purposes of the IBOR.

Through the interpretation of international human rights law, it requires that the 'person' referred to in Article 6 (UDHR) and Article 16 (ICCPR) be interpreted in the ordinary meaning in their context and in light of its object and purpose. There was a general agreement during the drafting of the ICCPR, that every human being would be a subject, not an object of the law.⁴⁸ This signalled along with the foundation and purpose of the IBOR that it was the human person or the human being, and not status or legal personhood that was to be 'recognised before the law'.⁴⁹ This human person, the dignified being, was to be the "potential bearer of

⁴² UN Secretary-General, above n 39, at 46; Nowak, above n 12, at 370.

⁴³ Nowak, above n 12, at 369.

⁴⁴ This was the case with slaves under Roman law, during colonial periods, and Jews under Nazi rule.

⁴⁵ Bogdan, above n 40, at 112; Nowak, above n 12, at 369; Slaughter, above n 41, at 32.

⁴⁶ Nowak, above n 12, at 369.

⁴⁷ At 369.

⁴⁸ Marc J Bossuyt *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (M Nijhoff Publishers, Dordrecht ; Boston : Hingham, MA, 1987) at 336.

⁴⁹ Nowak, above n 12, at 369.

legal rights and obligations.”⁵⁰ As the Secretary-General stated regarding the draft of the ICCPR⁵¹

the expression of a ‘person before the law’ was meant to ensure recognition of the legal status of every individual and of his capacity to exercise rights and enter into contractual obligations.

It affirms that every human being holds and exercises human rights from birth to death which is indispensable to any jurisdiction operating under the rule of law.⁵² This indicated that though these rights from birth, they may be interfered with or violated by the state or other actors which affect one’s ability to exercise such rights.

The other major discussion was that of ‘capacity to act’. Discussion varied as to whether this was central or not to the focus of this article. Some of the early drafts provided for exceptions to this person as to whether it applied.⁵³ The parties, in so doing, were referring to the capacity to act – the ability⁵⁴ to “handle one’s affairs.”⁵⁵ Within such a conceptualisation, some people would still be excluded from recognition before the law. However, drafters and the General Committee were well aware that ‘capacity to act’ and ‘recognition before the law’ were not the same, and that formulating the ‘capacity to act’ was beyond the ability of an internationally binding treaty to incorporate such a right.⁵⁶ The recognition before the law would exist irrespective of capacity to act. Any lack of capacity would not

⁵⁰ Bogdan, above n 40, at 111.

⁵¹ Nowak, above n 12, at 370.

⁵² At 369, 372; Michael Galchinsky “Quaint and Obsolete: The ‘War on Terror’ and the Right to Legal Personality” (2013) 14 Int Stud Perspect 255 at 256.

⁵³ Minors, those of unsound mind/insane, and those convicted of certain crimes. Refer to: UN Secretary-General, above n 39, at 46; Nowak, above n 12, at 370.

⁵⁴ If one does not have the capacity to act, then one requires a representative of legal personality. Refer to: Bogdan, above n 40, at 112.

⁵⁵ At 112; Bossuyt, above n 48, at 336; Nowak, above n 12, at 369.

⁵⁶ Nowak, above n 12, at 370.

dissolve the one's rights and obligations as a human rights being.⁵⁷ Thus, Joseph Slaughter wrote:⁵⁸

Nonetheless 'so obvious a principle' entered the UDHR in its characteristic tautological form; the preamble already recognises the inherent 'dignity and worth of the human person' that Article 6 prescribes to every person as a right.

The 'capacity to act' was not in consideration within this article, and hence something for each jurisdiction to consider. What was essential, irrespective of the 'capacity to act' was that everyone was recognised before the law as a human person with rights and responsibilities. As such, the purpose of this article was clear. To have the protection of the law, one had to be recognised before the law, or be treated as a person in the eyes of the law.⁵⁹ If someone was not recognised before the law, the law could not protect their rights and obligations.

The last important element of definition regarding this article was that of application. The purpose was that everyone was to be recognised before the law irrespective of the capacity to act. The past has demonstrated that this has sometimes been denied or taken away from people at certain times in different jurisdictions. As such, there was the need to make this article non-derogable. Non-derogable means that even in times of emergency, there is a prohibition of the restriction or suspension of the right to recognition for any reason. It contractually and universally covers everyone both within and across all territories.⁶⁰ This is clarified under Article 4(2) of the ICCPR where it states that Article 16, 'recognition before the law', is non-derogable due to factors such as nationality, race, religion,

⁵⁷ At 370; Jessica Berg "Of Elephants and Embryos: A Proposed Framework for Legal Personhood" (2007) 59 *Hastings LJ* 369 at 373; Galchinsky, above n 52, at 256.

⁵⁸ Joseph R Slaughter *Human Rights, Inc* (1st ed, Fordham University Press, New York, 2007) at 77.

⁵⁹ Bogdan, above n 40, at 111.

⁶⁰ Slaughter, above n 41, at 32; Galchinsky, above n 52, at 256.

or sex.⁶¹ The non-derogable nature of this Article does not permit anyone to be invisible, erased, or removed from being recognised before the law. Despite what one has done, for example, a criminal act which may require some form of discipline, punishment, or rectification, that human being is still to be recognised before the law.

7.2.2 Invisibility and Mis/non-recognition before the Law

Non-recognition and misrecognition are central to issues facing intersex people. They are both non-recognised and misrecognised at the same time. They are not recognised as an intersex person. They are assigned a sex at birth, and based on that assignation, whether or not that is who they are, they are recognised before the law. This becomes an issue for intersex people, as if they are not recognised as who they are before the law, then they have no protection of the law as to who they are. In other words, they only have protection based on and according to the ‘determined identity’. Many of the issues they face are not in the recognised sex, but the invisible sex that is not recognised. As intersex people are invisible in most societies, despite the fact they exist, the invisibility leads to no or little protection of the law.

Such invisibility is not unique to intersex people. In the past women and slaves were invisible before the law, even though they physically existed. Invisibility is where one exists in society, but there is no trace of them, especially legally, but sometimes also socially. There is limited case law in this area, but there is some in an analogous one – enforced disappearances. Enforced disappearances are⁶²

considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by

⁶¹ Nowak, above n 12, at 369; Galchinsky, above n 52, at 256.

⁶² International Convention for the Protection of All Persons from Enforced Disappearance, (signed 20 December 2006, entered into force 23 December 2010), Art. 2.

a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

It is important to note here that the analogy with intersex people differs in one major respect. Unlike in enforced disappearance there where is a detention element, this does not occur in the invisibility of intersex people. Rather they live in a state of socio-legal invisibility while still living in society. This is a major difference between the two cases. The cause of the analogy and that of intersex people differ. The cause of both in a different way has led to violations. Those of enforced disappearances have often been illegally detained, with other violations sometimes quite horrific, but often the whereabouts never discovered. Intersex people, for different reasons primarily socio-legal, have been made invisible through elements including that of torture as described last chapter. However, what both of these cases have in common is not the cause, but the effect of being invisible before the law. Both occur at the hand of the state, or through the authorization, support or acquiescence of the state. Due to their concealment, they have limited access to and protection of the law.

Invisibility not only hides the person from view but also makes many of their issues invisible too no matter how grave they might be. For that reason, it is difficult for both society and the law to know what social issues they face and what rights and freedoms they require. However, in both cases, there are some who have recovered from the invisibility. For example, when there is the fortunate case of rescuing someone who has been through an enforced disappearance, their story enables us to have a window on what has occurred and what is required to prevent it from occurring again.

In the case of intersex people, escaping invisibility utilises a term borrowed from the LGBT community – coming out. Coming out is where intersex people publicly reveal themselves as intersex, irrespective of the sex expression as male, female, both or neither. Despite the estimated population size of intersex people, this is

still a limited number of the overall population indicating that the majority are still socio-legally invisible. However, those who have come out have revealed stories of pain, suffering, and consequences that will continue for the rest of their life. Much of these stories and effects have been covered in the last chapter. Due to their invisibility, they had no access to the law and no protection of the law.

7.2.2.1 *Case Law*

With regard to Article 16 of the ICCPR before the HRC, the majority of cases are due to enforced disappearances. In such cases, as with two from Libya, the HRC emphasised the important connection between ‘recognition before the law’ and ‘protection of the law’. The Committee⁶³

reiterates its established jurisprudence according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a denial of his or her right to recognition as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to effective remedies — including judicial remedies (art. 2, para. 3, of the Covenant) — have been systematically impeded.

Importantly, the HRC states that “removing a person from the protection of the law for a prolonged period of time may constitute a denial of his or her right to recognition as a person before the law.” The issue is not the length of time, short or long, but the removal of the person from the protection of the law. Even if the State party was not involved in the disappearance directly, the failure of the State party to provide information as to the invisibility or disappearances enables non-

⁶³ *Mufteh Younis Muftah Al-Rabassi v Libya* ICCPR Human Rights Committee Communication No 1860/2009, 18 July 2014 at [7(7)]; *Youcif Almegaryaf and Hisham Matar v Libya* ICCPR Human Rights Committee Communication No 2006/2010, 21 March 2014 at [7(8)].

recognition before the law and thus violated Article 16.⁶⁴ This demonstrates that a person can existentially exist, yet not be recognised before the law.

The above cases demonstrate that if the person is invisible before the law, there is no protection of the law. Such cases highlight the necessity for the non-derogation of this Article. One had to be recognised before the law to have any protection of the law and to exercise one's rights and obligations. In other words, when one is anonymous or invisible, there is no ability to enforce one's political, civil, and social rights.⁶⁵

7.2.2.2 Rendering of Intersex Invisibility

A difference with enforced disappearances is that they know they have been taken even if those around them may not. This is completely different with the majority of intersex people. Few know who they are, whether or not they have come to make peace with their sex expression. In some cases, parents may know, but in many cases, even parents do not know. They have been officially concealed into a new identity that the state recognises. This is a unique form of invisibility that cannot even be compared with that of enforced disappearances.

Intersex people, due to different reasons, yet still directly and indirectly through state involvement have been rendered invisible before the law through social, medical and legal means and had limited or no protection of the law. Even today, few people recognise that they even exist.⁶⁶ As Philip Ebels writes "intersex people

⁶⁴ *Mufteh Younis Muftah Al-Rabassi v Libya*, above n 63, at [7(7)]; *Youcif Almegaryaf and Hisham Matar v Libya*, above n 63, at [7(8)].

⁶⁵ Serge Gutwirth "Beyond Identity?" (2009) 1 IDIS 123 at 125.

⁶⁶ Commissioner for Human Rights and Agius, above n 21, at 14; Dan Christian Ghattas *Human Rights between the Sexes - a Preliminary Study on the Life Situations of Inter*Individuals* (Volume 34 2013) at 7.

in the EU live largely in the dark.”⁶⁷ As Barbara Unmüßig and Jana Mittag remark,⁶⁸ the

physical and gender diversity of inter* individuals are marginalised, if not invisible, even in the concept of gender identity – a conceptual void.

Many intersex people remain invisible both socially and legally. Even if they do come out socially, legally they predominantly remain invisible. Intersex is a legal and conceptual void that leaves people existing yet invisible at the same time.

Historically, in some places, there was non-recognition as they did not exist because they were killed. Although it still occurs in some places,⁶⁹ a different non-recognition occurs today. They are medically made invisible. However, the medical treatment does more than erase parts of the body. It also reconstructs some new ones. As reported in the Australian Government report, *Involuntary or Coerced Sterilisation of Intersex People in Australia*,⁷⁰

“normalisation surgery is more than physical reconstruction. The surgery is intended to deconstruct an intersex physiology and, in turn, construct an identity that conforms with stereotypical male and female gender categories.”

Sex-normalisation is not simply fixing what is there, it is an essentialising of the body to conform to the status categories society accepts. As such, along with the physical deconstruction/reconstruction is a whole psychological education programme to ensure the child complies with the gender. It is a “preventive

⁶⁷ Philip Ebels “Intersex People in EU: Ashamed and Invisible” *EUobserver.com* (12 June 2012) <<http://euobserver.com/890/116578>>.

⁶⁸ Ghattas, above n 66, at 8.

⁶⁹ At 7, 24; but also in history, see: Alice Domurat Dreger *Hermaphrodites and the Medical Invention of Sex* (Harvard University Press, 1998); Epstein, above n 11; Elizabeth Reis *Bodies in doubt* (Johns Hopkins University Press, Baltimore, 2009).

⁷⁰ Senate Community Affairs References Committee and Australian Government *Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013) at 69.

psycho-sexual normalisation.”⁷¹ The reconstruction of the bodies maintains the belief that there are only two sexes to uphold the social structure of society.

The normalisation into social male or female renders them invisible medically, socially, and legally. They only have recognition, thus, protection, in the form of sex they have been normalised into. The effects of this invisibility of intersex people are numerous. The report *Human Rights and Intersex People* notes that invisibility impacts in many areas of an intersex person’s early life:⁷²

The invisibility of intersex people in society is another serious problem. Their life experience is often shrouded in secrecy and shame, also as a result of their frequently being unaware of the surgeries or treatments that were performed on them early on in their life. Access to medical records is often rendered very difficult, as is access to personal history, including childhood pictures and other memories. Intersex individuals who are discovered later on in life may experience the same invasive treatment – without their free and informed consent – as intersex individuals who are identified during childhood.

This result is an intersex person living in an altered body they did not choose which results in life-long serious physical and mental issues in a registered sex that may or may not match who they are. Being intersex is thus invisible, possibly even to themselves, and definitely to the socio-legal world around them. This has slightly different facts to a disappearance case, but the principle is the same. It is the very denial of the existence of human persons with a sex that is different to the male-female binary. This erases a part of one’s person and as such affects, one’s right to privacy as discussed in Chapter 5.

Many intersex people are unaware of their uniqueness of their biological variations due to their history and medical interventions that have been hidden

⁷¹ Ghattas, above n 66, at 10.

⁷² Commissioner for Human Rights and Agius, above n 21, at 14.

from them.⁷³ This prevents them from finding the support of others like them. This invisibility prevents not only identity but also connectedness of others who are intersex. It also prevents support networks for protection before the law. As Ghattas states:⁷⁴

The resulting invisibility of intersex individuals prevents community-building among intersex individuals. In addition, intersex individuals frequently experience massive psychological and physical problems due to medical interventions and discrimination in everyday life. These aspects prevent or impede intersex self-organisation and activist work.

Due to the fear of stigmatisation and exclusion, many “stay “in the closet”, even when they become aware of their sex.”⁷⁵ This leaves intersex people invisible, but those who do come out face discrimination and stigma. Due to the strong stigma and taboo, when people come out, they face structural⁷⁶ and verbal discrimination and also face violence and life-threatening situations.⁷⁷ As Dan Ghattas wrote:⁷⁸

Inter[sex] individuals are socially barely visible worldwide, since intersex is still a strong taboo. For fear of stigmatisation and social exclusion, many inter* individuals do not come out. If it becomes known, in rare cases, they are not only exposed to verbal and structural discrimination, but also experience physical violence and lifethreatening situations.

The invisibility prevents recognition before the law and inhibits their ability to have the protection of the law because they are not recognised, it diminishes the

⁷³ Erik Schneider *An Insight into Respect for the Rights of Trans and Intersex Children in Europe* (2013) at [164].

⁷⁴ Ghattas, above n 66, at 15.

⁷⁵ Commissioner for Human Rights and Agius, above n 21, at 14.

⁷⁶ Structural discrimination refers to the “policies of dominant race/ethnic/gender institutions and the behavior of the individuals who implement these policies and control these institutions, which are race/ethnic/gender neutral in intent but which have differential and/or harmful effect on minority race/ethnic/gender groups.” See: Fred L Pincus “Discrimination Comes in Many Forms: Individual, Institutional, and Structural” (1996) 40 *American Behavioral Scientist* 186 at 186.

⁷⁷ Ghattas, above n 66, at 7; Commissioner for Human Rights and Agius, above n 21, at 14.

⁷⁸ Ghattas, above n 66, at 7.

violation against them which often may be devastating. The stigma and exclusion are simply a result of non-recognition and devaluing of difference.

7.2.3 Summary

There are no cases in international law on intersex issues. The domestic law around the world has minimal cases too. Most of them are in Colombia. Few of them discuss recognition before the law. It is for this reason, the closest cases that have some resemblance to intersex issues regarding recognition before the law are those of enforced disappearances. Although some elements of enforced disappearances differ from the situation of intersex invisibility, the result of both cases is similar. They are both invisible to the law, and thus have little or no protection of the law.

7.3 *Recognition of (Inter)Sex before the Law*

Registration at birth is an important part of being recognised before the law. This recognition is important to have the protection of the law. These two go hand in hand. The purpose of Article 24 gives children recognition, an identity, to protect children their vulnerability due to age and size and so on so that they can be protected by the law.⁷⁹ The capacity before the law is different yet interconnected. Their vulnerability indicates that they need support and protection for the very reason that they do not have 'capacity to act'.

Due to the 'historical nature' of the sex registered at birth, intersex people are first confronted with a legal issue at birth when their biology is not recognised before the law, and as such they get assigned as a 'male' or 'female'.⁸⁰ The sex is recognized only as a pathology, an object to be assigned, by usually medical staff,⁸¹

⁷⁹ International Covenant on Civil and Political Rights, Art. 24(1).

⁸⁰ European Agency for Fundamental Rights, above n 26, at 4.

⁸¹ In the modern era, prior to any assignment, 'tests' may be done to help medical professionals decide upon a sex they feel best fits that individual.

as sex that is recognised by law. The “medical identification of a ‘preponderant’ sex” leads to the “legal imposition of a ‘male’ or ‘female’ sex” which more often includes normalising treatment on very young intersex children.⁸² This assignment of sex is usually accompanied by medical treatment to ensure one’s ‘sexual characteristics’ matches the assignment.⁸³ This assigned sex at birth then becomes one’s sex for life.

However, for intersex people, despite being registered, they are not recognised for who they are and do not have protection over their autonomy of how they come to be. At present in most States, intersex people must meet various legal requirements in order to fit into one of the two possible categories of gender/sex.⁸⁴ Rights are only afforded once a person has legal recognition. Because recognition is still primarily gender focused, intersex people are still invisible. Moreover, the binary prevents any recognition of those outside. This illustrates that the current ‘gender’ conceptualisation prevents intersex human rights. Therefore, ‘recognition as a person before the law’ is at the heart of the claim for rights for intersex people.⁸⁵ Their claim for recognition is complex in that while they want recognition of their biology, they don’t want to be mis-sexed in

⁸² European Agency for Fundamental Rights, above n 26, at 4.

⁸³ This normalising treatment transforms one’s sex anatomy to what the medical profession determine as this infant/child’s ‘real sex’. It denies the person any autonomy (or self-determination) of one’s own being. As such it becomes torture and inhumane treatment. Despite presumption that this was done under the auspices of the ‘best for society and that child’, it does not take into account the autonomy of the child nor the long-time effect on the child’s health. Moreover, it removes the ability for that child to freely and fully develop into a constructive and constituent member of society.

⁸⁴ Silvan Agius and Christa Tobler *Trans and Intersex People: Discrimination on the Grounds of Sex, Gender Identity and Gender Expression* (2012) at 5.

⁸⁵ Leve, above n 6, at 513.

the sense that all intersex bodies assuming are a third sex.⁸⁶ What they do want is the autonomy to be recognised as either male, female, both or neither.⁸⁷

7.3.1 Recognition of Sex before the International Law

Nonrecognition affects people's lives and leads to vulnerability, humiliation and anxiety, especially where sex is of legal relevance and distinctions are made between men and women⁸⁸ and even more so when your sex is invisible. It is for this reason that recognition of one's sex is important, not to classify, but to recognise them as who they are and protect and enable who they are.

Chapter 3 highlighted the way that sex had been interpreted and adopted by some bodies in international law. There was a trend to retain the binary sex status of male and female, and anything else was considered 'other'. This has even been included in the general comment of the ICESCR body on non-discrimination.⁸⁹ This very process of classing as the other, a problem facing women for many years is discriminatory. Intersex people are human beings with a sex but not a clearly classifiable one. Sex is actually as elusive in international law as it is in most jurisdictions. As it is not defined, it is important to understand according to basic principles. Given the impetus of international human rights to focus on the dignity of the human person, not one's status, it is intriguing that sex status still remains so important critical as defined above. The question becomes has sex been used for definitive or illustrative purposes?

⁸⁶ OII Australia and Morgan Carpenter *Submission to the Australian Human Rights Commission: Sexual Orientation, Gender Identity and Intersex Rights Snapshot Report* (2015) at 2.

⁸⁷ At 2.

⁸⁸ *Case of Christine Goodwin v The United Kingdom*, above n 31, at [76–77].

⁸⁹ UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 20: Non-discrimination in economic, social and cultural rights (Art 2, paragraph 2, of the ICESCR)* (2009) E/C12/GC/20 at [32].

At the time of compiling the UN Charter and the IBOR, knowledge and awareness of sex diversity was limited, or possibly even unheard of. Few people had connections with sex diverse people at that time. Due to social exclusion, the chance of meeting someone was minimal. To envisage the inequality, discrimination and violations they faced were impossible at that time. Intersex people were invisible and few LGBT people were 'out' in public. Although homosexuals were among the many sent to death camps, this was often overlooked during the drafting, of the IBOR, or at least it appears so as there has never been any mention of them.

Moreover, from a textual understanding, when the Charter and the IBOR refer to "the equal rights of men and women,"⁹⁰ it is referring to the gendered organisation of society – socio-political sex status – and not one's 'biological sex'. The reason equal rights of men and women were specifically mentioned in the Preambles in the Charter and the IBOR was due to the great inequality that they faced which was acknowledged at the time of drafting such documents. Moreover, the Conventions within the IBOR contained a special Article, Article 2, specifying the equality of men and women. Again, this was key in the issues as stated above in the establishment of the Sub-Commission on the Status of Women. The equality of men and women was thus about the relational environment, not the biological sex makeup.

Furthermore, from the very time of the formation of the UN, and in particular the IBOR, statuses or status categories were a barrier to the equality of human beings. Rather than utilising statuses, the equality principle (EP) regarded that there should be no distinction, especially due to the statuses. To uphold the foundation and achieve the purpose of human rights, statuses would be a barrier. From a human rights perspective, human life is irreducible to attributive status

⁹⁰ Charter of the United Nations, United Nations 1 UNTS XVI (signed 26 June 1945, entered into force 24 October 1945), Preamble; Universal Declaration of Human Rights, Preamble.

identities.⁹¹ Holding onto the sex status would set human rights up for failure. The effect of status and its denigration or denial of the dignity of the human person and the restriction of the free and full development of personality was acknowledged during the drafting and a reason for the shifting the foundation from the legal person to the human person under international human rights.⁹² The categories were examples of statuses that had denigrated of the dignity of the individual, a denial of a person's capacity to choose and act on his or her responsibility.⁹³ As mentioned in Chapter 4, the purpose of the equality and non-discrimination was to remove the inequality by focusing on the dignity of the person as a whole rather than on a single status element of a person.

Finally, the listing in the IBOR, like in many treaties, it was not possible to capture all areas, so the lists were indicative of the purpose of the article, rather than an exhaustive list of contents. There has been careful wording through the use of phrases 'such as' or other such terms. In the majority of these cases, these have been purposely as an illustration. What the delegates were aware of as issues at that time were noted and illustrated through the use of phrases "such as," "and the like," "and other status" indicated that the lists were not exhaustive.⁹⁴

Sex is not defined in international law. To maintain the position of sex status in international human rights law goes against the very basis for which it was established. It was acknowledged that statuses were the basis of inequality and as such there shall be no discrimination as to the statuses. The wording is clear. The basis of rights was to remove status as an identifying and discriminating point and base rights back in the human person. Autonomy is central to human rights and

⁹¹ Davina Cooper "'And You Can't Find Me Nowhere': Relocating Identity and Structure within Equality Jurisprudence" (2000) 27 *Journal of Law and Society* 249 at 251.

⁹² Refer to Chapter 4 for more detail.

⁹³ Oscar Schachter "Human Dignity as a Normative Concept" (1983) 77 *The American Journal of International Law* 848 at 850.

⁹⁴ UN Committee on Economic, Social and Cultural Rights (CESCR), above n 89, at [15].

this includes over one's sex irrespective of whether one's sex be male, female, both or neither. A human rights person is irrespective of sex yet still respects and enables one's sex at the same time.

7.3.2 Intersex, Registration and Recognition

The human rights person is not a dependent upon one's sex. Despite the current interpretation sex is still part of social and legal recognition but does not have to be controlled by it. Moreover, status was not the goal of human rights, but the issue it was trying to resolve. The human rights person respects who one is whether male, female, both or neither. As such recognition and registration must be autonomously controlled, even though it is administered by the State.

The purpose of recognition before the law is to enable everyone access to the law and also the protection of the law. One of the important elements to this is birth registration. The ultimate purpose is to ensure every child is recognised before the law, irrespective of their capacity to act and thus enable them to have legal protection.

In spite of such a goal by international human rights, for intersex people, this is still elusive. Although they are registered, it is through a sex determined and normalised process which interferes with their right to privacy and has affected their very well-being. The report *Human Rights and Intersex People* notes:⁹⁵

The classification of a 'boy' or a 'girl' indicates just "how fundamental sex and gender classifications are to our society, as well as the binary manner in which the human sexes are categorised. It also demonstrates our limited understanding of sex, given that the rigid line with which we separate the sexes into two mutually exclusive categories does not have a parallel in nature.

⁹⁵ Commissioner for Human Rights and Agius, above n 21, at 13.

The current classifications currently in place are so fundamental that they appear natural. This provides strict rigid categories within society that many cannot see past. Its prejudicial norms focused on the binary, as Agius and Tobler write, mean that “[p]eople who do not easily fit these norms, such as trans and intersex people, encounter numerous difficulties, both at the practical level of everyday life and at the legal level.”⁹⁶ Dan Ghattas refers to the invisibility of intersex within the administrative system:⁹⁷

“Problem areas arise from the legal situation of intersex individuals. Their gender is legally and administratively non-existent due to the worldwide dominance of the gender binary. This codified invisibility is supplemented by invisibility in everyday life, the taboo on intersex and the experience of discrimination and violence.”

This pressure leads many parents and medical professionals to ensure the child is both socially and legally unambiguous,⁹⁸ that is they are either male or female. However, at the same time, it has made intersex people invisible both socially and legally.

The registration systems around the world do not normally provide space for diversity. There are some that give temporary time to determine one’s true sex such as in Germany and New Zealand.⁹⁹ Germany has recently amended the law to enable the sex designator to be left blank at the time of birth,¹⁰⁰ but this only amounts to an existence at birth, it does not protect the right to physical integrity.¹⁰¹ There are some that permit changes to birth certificates from one sex to another but that is usually after a medical sex change. However, some now

⁹⁶ Agius and Tobler, above n 84, at 9.

⁹⁷ Ghattas, above n 66, at 10.

⁹⁸ Commissioner for Human Rights and Agius, above n 21, at 37; Ghattas, above n 66, at 24.

⁹⁹ Ghattas, above n 66, at 24.

¹⁰⁰ Schneider, above n 73, at [200].

¹⁰¹ At [202].

accept such changes without medical intervention such as Denmark, Argentina and Malta.¹⁰² There are few that have open categories or do not require sex at all. Furthermore, there are some that permit non-binary option 'X', for example, on secondary documents such as passports and drivers licences in places like Australia, New Zealand, Malaysia, Nepal, and South Africa.¹⁰³

However, even if the state has a provision for a neutral or non-binary sex designation, this does not mean that intersex people are visible, although it is an important step. Without control of medical normalisation and education of diversity, rather than binary, the invisibility will remain. For example, Dan Ghattas notes:¹⁰⁴

“Inter* individuals encounter legal obstacles in many countries when registering their sex/gender for a critically important birth certificate, which needs to be acquired a few weeks after birth. In Germany, it is only with a birth certificate that, for example, parental pay can be applied for, health insurance coverage can be granted, separate fatherhood can be recognised and a childcare place can be reserved. The pressure on parents to have their child surgically assigned to an ‘unambiguous’ sex at an early age is high.”

As such, sex registration even if providing for the difference may not benefit the child if those surrounding the child are not ready to accept difference.

Therefore, until society changes, many intersex advocate groups argue for a temporary designation as ‘male’ or ‘female’ that is easily amendable by the individuals as their sex identity develops.¹⁰⁵ Another option could be that this is left blank for all children,¹⁰⁶ thus not stigmatising any child. This was supported in

¹⁰² Commissioner for Human Rights and Agius, above n 21, at 39–40.

¹⁰³ At 40.

¹⁰⁴ Ghattas, above n 66, at 7.

¹⁰⁵ Schneider, above n 73, at [201 and 204]; Commissioner for Human Rights and Agius, above n 21, at 39; Markus Bauer and Daniela Truffer *Intersex Genital Mutilations - Human Rights Violations of Children with Variations of Sex Anatomy* (2014) at 20.

¹⁰⁶ Schneider, above n 73, at [204].

the final statement made by the intersex advocates from around the world in relation to sex registration at the Third Intersex Forum:¹⁰⁷

- To register intersex children as females or males, with the awareness that, like all people, they may grow up to identify with a different sex or gender.
- To ensure that sex or gender classifications are amendable through a simple administrative procedure at the request of the individuals concerned. All adults and capable minors should be able to choose between female (F), male (M), non-binary or multiple options. In the future, as with race or religion, sex or gender should not be a category on birth certificates or identification documents for anybody.

For intersex people, even if there are alternative categories, several issues remain: they should not be forced into one category or another; they must be autonomously chosen; the category should not be stigmatising by imposing the ‘third’ sex’ on all intersex people; and lastly, it must be in conjunction with the prohibiting of sex-normalising treatment and procedures without that fully informed person’s consent.¹⁰⁸ The aim of intersex people is to have space to identify who they are – male, female, both or neither – while having autonomy and integrity over their body.

7.3.3 Recognition and Dignity of Intersex People

Recognition is core to dignity. The failure to recognise one as an equal human being debases one’s dignity. Jan Mårtenson argues that the spirit and philosophy of the UDHR are “on the individual, the rights necessary to the inherent dignity of the individual alone, and on his/her relation to others and society.”¹⁰⁹ These are expressed through the rights and freedoms within the IBOR. Dignity is

¹⁰⁷ “3rd International Intersex Forum Concluded” (2 December 2013) ILGA Europe <http://www.ilga-europe.org/home/news/latest/intersex_forum_2013>.

¹⁰⁸ OII Australia and Morgan Carpenter, above n 86, at 2.

¹⁰⁹ Jan Mårtenson “The Preamble of the Universal Declaration of Human Rights and the UN Human Rights Programme” in Asbjørn Eide and others (eds) *The Universal Declaration of Human Rights: a commentary* (Scandinavian University Press, Oslo : Oxford, 1992) at 20.

relational,¹¹⁰ in respecting one another as equal human beings, and, as Oscar Schachter argues, dignity:¹¹¹

“embraces a recognition that the individual self is a part of larger collectivities and that they, too, must be considered in the meaning of the inherent dignity of the person.”

Mattson and Clark argue that the interaction in and through the community shapes dignity not only through “our relationships with ourselves but also by our relationships with others as well as our interactions with the physical world.”¹¹²

The right to dignity as a human being is reflected by the physical and the intellectual and spiritual dimensions of what it means to be human - personality.¹¹³ It is the recognition of the person as a physical and spiritual-moral being that guarantees their enjoyment of his own sense of enjoyment.¹¹⁴ These very dimensions are critical for intersex people to enable their well-being and to enable the right to privacy to establish and shape autonomously who they are and how they come to be.

They need the protection of the law due to not only the effects of the normalising treatment but when they do identify themselves as intersex, the discrimination and issues they face. A report in the Netherlands in 2014 found that “virtually all of the intersex people interviewed encountered problems in their social situation.

¹¹⁰ Marshall, above n 2, at 229.

¹¹¹ Schachter, above n 93, at 851.

¹¹² David Mattson and Susan Clark “Human Dignity in Concept and Practice” (2011) 44 Policy Sciences 303 at 314.

¹¹³ “The physical existence of each individual is protected by the proclamation of the right to life, to food, housing, health, medical care and necessary social services, to liberty and security of person, to freedom from slavery and torture and from arbitrary arrest, among other rights. The intellectual and spiritual dimensions of the human person are proclaimed through the right to freedom of thought, conscience, and religion, freedom of opinion and expression, the right to education and to take part in the cultural life of the community.”: Mårtenson, above n 109, at 21.

¹¹⁴ Johann Neethling “Personality Rights: A Comparative Overview” (2005) 38 Comp & Int’l LJ S Afr 210 at 210.

They talked about being lonely and experiencing shame and embarrassment.”¹¹⁵ It leads to difficulties and anomalies in the daily life of intersex people, as with transgender people.¹¹⁶ Intersex people face the same issues.

Recognition and protection of the law must free them from the current bind of sex status. This has already caused them significant impact on their life. The foundation of human rights cannot be upheld as a dignified person while people such as intersex people are forced invisible as who they are and forced into some pseudo-identity the state wants them to be as some sex status. Ellen Feder writes:¹¹⁷

Surely it is a measure of how entrenched the prevailing views of sexual difference remain that the recognition of bodies that do not clearly show how to the stand for male and female could seem to require the creation of new categories or constitute an argument for the abolition of sexual difference itself.

This indication of the strength is the fact that many intersex groups have resisted the fight for this and stop at ending the surgeries.¹¹⁸ However, as Feder notes, freedom and dignity will only ensue when the freedom to define exists. Catherine Harper supports this point when she writes:¹¹⁹

With the subject as the ultimate governor of ‘his’ or ‘her’ sex identification, and with the self-identificatory tool being the psyche rather than the physical manifestation of the body, there is real potential for liberation from the binary and a completely fresh approach to how sex is constituted or indeed – in more radical discourse – how many sexes there actually might be.

¹¹⁵ European Agency for Fundamental Rights, above n 26, at 3.

¹¹⁶ *Case of Christine Goodwin v The United Kingdom*, above n 31, at [89]; *B v France* (13343/87) 25 March 1992.

¹¹⁷ Ellen K Feder *Making Sense of Intersex* (Indiana University Press, USA, 2014) at 206.

¹¹⁸ At 204.

¹¹⁹ Catherine Harper *Intersex* (Berg, Oxford; New York, NY, 2007) at 79.

This indicates the issue is not the recording itself, but whether one has autonomy over who they are, the freedom to make changes as and when necessary as one shapes one's own good life in and with others. Although the fight to prevent sex-normalising surgery, unless the individual concerned agrees through informed consent, is a just fight, this is not sufficient. Liberation and dignity will only result when the binary of sex status is gone. This does not mean male and female do not exist, they still will but in many forms, as well as people who see themselves as both or neither as well.

The claiming of intersex identity is a means of claiming dignity. It is a means of a sense of being, regaining a mark of power over their narrative identity, something that had been taken away. Catherine Harper reports about one of the interviews of the book named Chris:¹²⁰

Chris is reclaiming an intersex identity from societal insistence on binarism as a way of acknowledging and strengthening his/her identity...'I personally had felt differently for years, feeling more feminine than I did male, yet neither one nor the other – ever since I was a very young child...A real mixture of both in almost every respect, but who would believe or understand me."

This interviewee is not alone. Many intersex people feel the same. This does not mean that all intersex people claim an intersex identity but may still claim their intersex diversity as part of who they are. It is high time for international human rights to enable such recognition so intersex people can freely write their story of becoming.

It is at this juncture, it is important to relate recognition, such as that of intersex people on the basis of the thesis. Recognition, as defined in the introduction of the thesis, is about making sense of oneself – who and how one comes to be – that enables self-esteem and self-respect and relationally give esteem and respect to

¹²⁰ At 152.

others. This gives meaning and purpose to each one's life and enables them to relate to others around them in society. This recognition occurs through one's narrative identity. Anne Becker writes that the human ability to freely confess their narratives has a twofold relevance to identity construction and human rights:¹²¹

In the **first** place, it emphasizes the freedom and responsibility which every individual has to the sharing of his or her unique life-story as being of irreplaceable value to the constitution of reality and construction of the world. **Secondly**, in sharing individual narratives, humans confess who they are and not what they are and where they belong. In narrating individual life-stories and experiences, every individual through his or her autobiography individuates himself or herself as an equal and dignified partner in constituting reality and constructing the world.

Enabling every human being to narrate is enabling the basic capabilities of humanness as Paul Ricoeur argues – to speak, to act, to narrate and to impute. This enables intersex people to be who they are without having to construct themselves in some system. The responsibility Becker discusses derives through human imputability. This is a responsibility to share one's story, and in so doing reciprocates esteem and respect upon other moral beings. This reveals one's moral identity. As each one reveals their life story, their personal identity, they demonstrate they are an equal and dignified partner in constituting reality and constructing the world. No matter who one is as a sex and what variations they may have. A flourishing society must equally respect each person enabling them to their potentiality irrespective of the role one had in the society

7.4 Conclusion

This Article is not accidental to this thesis, but actually is the link to identity as discussed in the early chapters. The right to be recognised before the law and the

¹²¹ Anne Becker "Identity Premised on Equality of Difference as a Fundamental Human Right" in Cornelia Roux (ed) *Safe Spaces* (Sense Publishers, 2012) 83 at 86.

protections it gives is essential to be a human rights person – a dignified member of society. This right to recognition is not the abstract person of law, but the human person which is the foundation of international human rights. Joseph Slaughter connects this to recognition before the law:¹²²

'Personality' is the technical term that means the quality of being equal before the law – to put it tautologically, the quality of being a person. It is the basis of law's symmetrical disposition to each human being. Thus, 'person' is the legal vehicle of human dignity, what is common to each of us a social human beings and as theoretically equal subjects – subjects of the legal and literary interest like and other, possessing equal capacity to be represented within the law and literature.

The person, the dignified being, is the vehicle that becomes freely and fully developed. The invisibility of intersex people before the law and society is a violation of Article 16 of the ICCPR. Even if they have the ability to register as through Article 24 in an open sex marker or have freedom of choice to a sex marker, this has little meaning while they remain invisible generally within society. Legal personality is the vehicle of the human person through fraternity in liberty and equality by which the dignified human person can freely and fully develop. Thus, they must have the autonomous capability to author their sex as male, female, both or neither and have the control of their natural variations that are recognised before the law.

One's existence must be recognised by the law,¹²³ and if the state, including the law, does not recognise one, then one may exist, but in effect is invisible. The right to recognition as a person before the law reconciles one's existential (physical and spiritual) being with one's legal or juridical being. The right to recognition as an existential sex before the law is essential to intersex people. The imposition of a

¹²² Slaughter, above n 58, at 17–18.

¹²³ Nowak, above n 12, at 369.

sex, and not providing a method to permit change violates international human rights law, in particular, Article 16, 24, and 26 of the ICCPR.

Although there have only been a few rights and freedoms highlighted in this thesis, it does not mean that the other rights and freedoms do not apply. As mentioned earlier, all of the rights and freedoms are for the duty, the purpose, to permit all human beings to freely and fully develop their personality as an equally dignified human being. Many of the other rights and freedoms are to enable well-being and potentiality, and any restriction or denial of them inhibit well-being and potentiality of one as a dignified being. The three chapters here were identified to specifically illustrate how 'identity', as defined in the introduction, has been provided for and protected by the IBOR. There has been no need for a separate Article mentioning 'identity' as what is required to have autonomy over who one is and how one comes to have already been provided for.

Paul Ricoeur argues that recognition of the human being as a subject of rights is "intimately connected with personal and collective identity."¹²⁴ The right to privacy enables such a subject of rights to produce a moral identity. It is within this identity is possible then to read one's own story and be held impute for it. Denial or inhibition of one's autonomy over how one comes to be, and especially over who one is, violates the right to privacy and one's well-being. This is illustrated clearly in the lives of intersex people who very sense of being is violated, and furthermore, their ability to freely and fully develop has been violated and debased their dignity as a human being. Recognition results from a moral being through one's own good life who shapes who they are and how they come to be in and with a constitutive reciprocal society. It is this recognition that is to be recognised before the law and protected by the law not that of determined statuses, such as sex. It is this reason that intersex people demonstrate the reality

¹²⁴ David Pallauer (translator) Paul Ricœur *The Just* (University of Chicago Press, Chicago, 2000) at 2.

of the fight for identity as recognition of who they are – male, female, both or neither – and the autonomy over how they come to be. Both the State and society have a duty to enable such an identity.

CONCLUSION

The issues resulting from the history of intersex people and their recognition, or not, through time and societies has led to this thesis. Some societies that have accepted sex diversity, and as such, sex-diverse people became part of the social organisation fulfilling their roles and functions as who they are. They did not necessarily have a special term for intersex variation as it was covered within a broader concept such as two-spirited people. This has not always been the case though. Some societies such as the Greeks did not accept them even sacrificed them. The modern history of intersex people is no less frightening. This led me on a journey of intersex and identity, what identity means and whether international human rights could protect intersex people's identity.

I purposely used a story quoted from John Stoltenberg in the introduction of my thesis even though it is longer than most quotes are. This story, though seeming fantastical, represents the basis of my thesis. This is a story of the living contradictions of reality. Through that story, one can see a society where sex was important to the functioning and relationality of the society, yet not a determinant of a being nor the society. The beings were recognised for who they were and permitted to become who they considered themselves to be. Yet this recognition did not come at a cost of categorising and making one group or another inferior. Each being was equally needed and equally respected irrespective of the role one had in the society.

That story is an important introduction to the meaning of identity as conceived in this thesis. Recognition is about first making sense of oneself and then being recognised by others. To be recognised is the reciprocity of esteem and respect. One cannot give esteem and respect unless one has self-esteem and self-respect. Such recognition enabled society to function and operate through a system of respect for others, their needs of development and support while living in and with

others. The thesis recognises that societies although not all societies had a term for identity, in the above sense, identity has always been important to societies.

Intersex, identity and human rights was a huge topic to comprehend. To break it down, I started my thesis asking some questions as written in the introduction.

These were as follows:

- How do the elements of personal identity connect to be what or who one is including one's sex?
- Is identity something that just is, or is it deeper? Is there a morality of identity?
- How sex had been viewed and interpreted within international law?
- What is the basis and purpose of human rights and what is the interconnection or understanding of identity in international human rights law or not as the case may be?
- If applied to intersex issues, could they aid intersex people in forming a moral identity?

These questions eventually became critical to the structure of the thesis. After beginning in this journey, I began to understand that personal identity was not necessarily so simple to understand. This eventually has been set out over the first couple of chapters. I have known that identity is interconnected with human rights issues. However, I was aware that international human rights did not refer to or state identity. As such, to understand how identity was reflected, I had to understand the basis of identity in a moral form and not just an administrative one. Like many traditional or indigenous cultures, there was no term for identity. Identity was the result of who one was and how one came to be. It was only by understanding this, that I could apply it to human rights and the issue of intersex people.

The term identity is a new term, as well as being an elusive and ubiquitous one.¹ Recognition of one another has always been important for societies, but not

¹ Philip Gleason "Identifying Identity: A Semantic History" (1983) 69 The Journal of American History 910 at 910.

necessarily in the sense that identity is used today. Today, identity is conceptualised through a positivist-Cartesian model as an immutable identity something that does not change throughout time, irrespective of what one makes of their life.² As such it is the identity of what one is. This is illustrated through the definition of identity in the Oxford Dictionary: ‘identity’ is the fact of being who or what a person or thing is.”³ This identity remains constant and is interpreted and understood through identity makers (often referred to as identities)⁴ or multiplicities.⁵ These are the attributes that make up who or what one is.⁶ It is these identity markers by which people are recognised. A moral person, an equally dignified being, must have autonomy over who one is and how one comes to be.

The becoming of (inter)sex as with one’s being is a becoming. It is a process, a development rather than a state of being. This becoming is understood in and through narratives.⁷ Narratives thus indicate the sense of belonging and grounding

² Paul Ricoeur “Narrative Identity” (1991) 35 *Philosophy Today* 73 at 75; Gleason, above n 1, at 911.

³ Oxford *Oxford Dictionaries* (online ed, 2015) Identity <<http://www.oxforddictionaries.com/definition/english/identity>>.

⁴ It is not a singular identity, fixed and immutable as a political identity would like to presuppose or as reductionist technology imposes. The multiple and sometimes contradictory or unresolved identities are inclusive of attributes, roles and memberships that are representative of that person and make up one’s Self including aspects such as race, culture, social class, and sexual orientation, are constructed in sociocultural and socio-political contexts. See: Susan R Jones and Marylu K McEwen “A Conceptual Model of Multiple Dimensions of Identity” (2000) 41 *Journal of College Student Development* 405 at 410–411.

⁵ The multiplicities are sometimes referred to as multiple ‘identities’ singled out as a person’s identity such as sex, race, gender, class, job, religious affiliation, national origin, height, ethnicity, social group affiliation, sports team loyalty, family, profession, artistic preferences, culinary preferences, and place of origin and so on. See: Avner Ben-Ner and Claire A Hill “Negative Dimensions of Identity: A Research Agenda for Law and Public” (2008) 9 *Minn JL Sci & Tech* 643 at 643.

⁶ Jill Marshall *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers, Leiden; Boston, 2009) at 93; David R Maines “Narrative’s Moment and Sociology’s Phenomena: Toward a Narrative Sociology” (1993) 34 *The Sociological Quarterly* 17 at 22; M Montserrat Guibernau *Belonging: Solidarity and Division in Modern Societies* (Polity Press, Cambridge, UK, 2013) at 18.

⁷ Paul Ricoeur “Life in Quest of Narrative” in *Narrative and Interpretation* (Routledge, London, UK, 1991) at 20.

of everyone.⁸ As such, the interpretation of narratives will require the understanding of the interaction and involvement with others.⁹ Therefore, to understand life, and the individuals within it, one must understand both the collective and the individual narratives that make it up. This requires a process of interpretation, a task as Gadamer says, is never fully completed.¹⁰ Interpretation is a hermeneutic task of wholes and parts and finding meaning and significance.¹¹ This task occurs through either vertical or horizontal interpretive horizons.¹²

Regarding sex, becoming occurs through and in either the horizontal or vertical interpretive horizons. Through the horizontal horizon, it is a mediated becoming of who one is, whether it be male, female both or neither. This mediated becoming continues throughout one's life and is transformable at various points in one's life. As a mediated becoming, intersex variations are part of one's existence, yet are not marked out as it is recognised for who one is and not by what one is. The vertical horizon, on the other hand, begins by a determining of what one is. Despite what mediated existence occurred prior to birth, it is interpreted as a linear development as either a male or female. This is considered a fact determinable at birth. This continues a linear development from that point upon which one constructs a narrative identity upon. Sex, together with the other parts of who we are understood within one's narrative identity, the story written through their life. This narrative identity reveals their personal identity the temporal form of one's narrative identity.

⁸ Ben-Ner and Hill, above n 5, at 643.

⁹ Hans Georg Gadamer *Truth and Method* (second revised ed, Continuum, New York, 2003) at 271.

¹⁰ At 269.

¹¹ Georgia Warnke *Debating Sex and Gender* (Oxford University Press, New York, 2011) at 109.

¹² This is adapted from this work: Valery Chirkov and others "Differentiating Autonomy from Individualism and Independence: A Self-determination Theory Perspective on Internalization of Cultural Orientations and Well-being" (2003) 84 *Journal of Personality and Social Psychology* 97.

Identity is a mediation of two forms: idem (sameness) and ipse (self). While it can be understood as a mediation of these two through the narrative identity as it is revealed in one's personal identity, commonly the two have become separated. It is through the separation of the two sense or forms of identity that the problematic of identity arises. The problematic arises as the self of the narrative identity is separated from the personal identity which becomes one's an immutable status identity, an identity. It bases one's identity on the idem immutable structure as to what one is. This has now become the common understanding of identity and the way it is most commonly interpreted. However, this separation of the two identities leaves the human being vulnerable. Furthermore, it affects one's autonomous capabilities. However, human beings are called on to be autonomous.¹³ This demands a moral identity. A moral identity is what is revealed from living a moral life – the good life in well-being aimed towards human flourishing in self-esteem and self-respect in and with others. This moral life demands autonomy and capability.

Although human rights have been established, sex remains understood through the sex status lens or the vertical interpretive horizon. Sex becoming, especially in the modern era, has been within a vertical interpretive horizon where one has their sex determined at birth, and then authored hegemonically within that horizon. This in most societies has limited sex and its authorship to a heterosexual male-female binary. This specifies the bounds upon which a sex is authored. Roger Adkins argues that the¹⁴

“specific notions of my own gender, sex, and sexual orientation—as given to me by such cultural actors as family members, friends, peers, teachers, and religious leaders—were products of a power structure in and through which the authority

¹³ David Pellauer (translator) Paul Ricœur *Reflections on the Just* (University of Chicago Press, Chicago, 2007) at 73.

¹⁴ Roger Adkins “Where ‘Sex’ Is Born(e): Intersexed Births and the Social Urgency of Heterosexuality” (1999) 20 *Journal of Medical Humanities* 117 at 118.

of certain dominating classes is everywhere (even in me and my actions) legitimated and deployed as natural.”

This limits the self-esteem and self-respect possible in authoring one’s sex as a dignified human person. Rather, than amoral sex, it is a determined sex whereby one then authors a life with a personal identity. There is a question of what esteem and respect is possible in such cases as required by international human rights law.

Although this is constricting to everyone, whether it appears to conflict with their life or not, for those LGBTI people, it affects more than most. Intersex people, like others in the LGBTI community, face numerous inhibitions and violations all over the world. This is detailed in a UN Multi-agency Statement:¹⁵

The United Nations and others have documented widespread physical and psychological violence against LGBTI persons in all regions - including murder, assault, kidnapping, rape, sexual violence, as well as torture and ill-treatment in institutional and other setting. LGBTI youth and lesbian, bisexual and transgender women are at particular risk of physical, psychological and sexual violence in family and community settings. LGBTI persons often face violence and discrimination when seeking refuge from persecution and in humanitarian emergencies. They may also face abuse in medical settings, including unethical and harmful so-called “therapies” to change sexual orientation, forced or coercive sterilization, forced genital and anal examinations, and unnecessary surgery and treatment on intersex children without their consent. In many countries, the response to these violations is inadequate, they are underreported and often not properly investigated and prosecuted, leading to widespread impunity and lack of justice, remedies and support for victims. Human rights defenders combatting these violations are frequently persecuted and face discriminatory restrictions on their activities.

However, intersex people who have the same ‘genders’ and ‘sexual orientations’ as everyone else, are more often forgotten in the whole picture. Everyone has

¹⁵ Statement from International Labour Organisation and others “Joint UN statement on Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People” (September 2015).

some form of sexual orientation and gender identity¹⁶ and sex characteristics. Although intersex people are at the intersection of every part of sex – sex characteristics, social sex expression (gender), and sexual orientation – they remain invisible to society. Although there is still a stigma to being LGBT, they somewhat still fit into the binary, while intersex people do not. They have always caused much distress for those who attempt to maintain such a binary system.

As the enforcement of rigid male/female dichotomy has assumed an unquestioned status as biologically natural, it has affected intersex people whose anatomy did not conform as well as those whose bodies were considered normal.¹⁷ This has left them invisible both to themselves and to others around them and society at large. This invisibility, except for a few nations around the earth where the infants are still killed, leaves a shell of the individual as a living being while the sexual characteristics require fixing to the male-female norms. They are forcibly ‘fixed’ through sex-normalising procedures without consent from the person concerned to conform to the cultural norms of male and female.¹⁸ These procedures are not a physical reconstruction, but a deconstruction of intersex physiology that is then constructed into the stereotypical form of male and female gender categories.¹⁹ These procedures are done in the name of the benevolence of the person and society. However, these procedures lead to serious violations of well-being – physically, mentally/psychologically, and sexually – that amount to torture and ill-treatment.

¹⁶ Vitit Muntarbhorn - Special Rapporteur(SOGI) and Human Rights Committee *Report of the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity* (A/HRC/35/36 2017) at [2].

¹⁷ Elizabeth Reis “Impossible Hermaphrodites: Intersex in America, 1620-1960” (2005) 92 J Am Hist 411 at 414–415.

¹⁸ Juan E Méndez and Human Rights Council *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (A/HRC/22/53 2013) at [77].

¹⁹ Senate Community Affairs References Committee and Australian Government *Involuntary or Coerced Sterilisation of Intersex People in Australia* (2013) at 69.

This issues and violation that intersex people face hit at the heart of foundation and purpose of human rights. The result is an intersex person is living in an altered body they did not choose which results in life-long serious physical and mental issues in a registered sex that may or may not match who they are trying to live a life they may never comprehend. This has led to a two-fold harm of the individual: one is the loss of well-being, and the other is the loss of the ability to value to pursue happiness according to one's conception of the good life.²⁰ This inhibits their ability to author a moral life. This not only violates many of the rights and freedoms, but also means that the community and the state have failed the basic duty of the IBOR: to enable one to author their being, including that of their sex, through the free and full development as a dignified being – the foundation and purpose of human rights.

Human rights centred on the human person as “anterior and superior to the positive law of civil society”²¹ and reflexively “antecedent to human rights and consequent to human rights.”²² This, James Griffin argues, “enables human rights to be substantive, with a source or ultimacy, as opposed to mere formalism.”²³ This was foreign to Western and non-Western nations alike²⁴ yet at the same time found in most major philosophies around the world. This human person is both the premise and the promise of human rights. The human person was both equal and dignified. Human rights articulated this through the EP as universality – for all

²⁰ Paul Ricoeur “Becoming Capable, Being Recognized” at 5.

²¹ UN Secretary-General *Document A/2929: Annotations on the Text of the Draft International Covenants on Human Rights* (Agenda 28-10th Session 1955) at 12.

²² Joseph Slaughter “The Textuality of Human Rights: Founding Narratives of Human Personality” [2004] *Interdisciplinary Law and Humanities Junior Scholar Workshop Paper* at 5.

²³ James Griffin “First Steps in an Account of Human Rights” (2001) 9 *European Journal of Philosophy* 306 at 311.

²⁴ Joseph R Slaughter *Human Rights, Inc* (1st ed, Fordham University Press, New York, 2007) at 19.

without distinction²⁵ – and the equal value of all human beings. The dignity of the equal human person is demonstrable through the authored narrated being. In summary, human rights exist because one exists yet also are there to enable the well-being and potentiality of one's existence as one becomes within their narrative identity. This requires the free and full development of personality - as the premise and promise of human rights. These rights to be a dignified being or human person exist from one's entry to the world. As such, it is possible to violate them but never taken away or transferred away, not even by a government.²⁶

The dignified human person results from human worth, that of esteem and respect. Positive self-esteem is to be a lover of one-self or to value oneself.²⁷ It acknowledges one's uniqueness while being at ease with oneself, positive self-regard.²⁸ Respect correlates with the love of oneself and of others. It is the recognition and acceptance of who one is and how one comes to be. This recognition and acceptance of one another become the basis of social relations and social bonds. Esteem and respect encompass one's moral form enabling a worthy subject.

The focus of international human rights is to enable and protect the authorship of the dignified human person. This is the sole function of each of the rights and freedoms within the IBOR. It does assume that there are "national and regional particularities," but that there are universality and indivisibility in regard to its foundation and purpose.²⁹ Vitit Muntarbhorn, the Special Rapporteur for Sexual

²⁵ This removed status as the category of distinguishing and marking one from another. While many national positivist systems retained such a system, within human rights, this was seen as violating the EP and as discriminatory.

²⁶ Johannes Morsink *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (University of Pennsylvania Press, Philadelphia, PA, USA, 2009) at 20.

²⁷ Pauline Chazan "Self-esteem, Self-respect, and Love of Self: Ways of Valuing the Self" 26 *Philosophia* 41 at 50.

²⁸ At 49, 50.

²⁹ Muntarbhorn - Special Rapporteur(SOGI) and Human Rights Committee, above n 16, at [8].

Orientation and Gender Identity (SOGI) reiterated this as written in the Vienna Declaration and Programme of Action:³⁰

Recalling that the Vienna Declaration and Programme of Action affirms that all human rights are universal, indivisible and interdependent and interrelated, that the international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis, and that while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

If one's well-being and/or potentiality has been inhibited or violated, then it interferes with the state of the dignity of being. The States duty is to protect against such violations. This has been illustrated through a few of the rights and freedoms in relation to intersex people as dignified beings: the right to privacy, recognition before the law and well-being. These rights have been denied to intersex people. They have been denied the very basis to autonomously author their identity of which sex is a part and even if they could in most places this would not be recognised before the law. Furthermore, the well-being has been left in a state that has life-long consequences affecting all parts of their life. This results in no or low self-esteem and self-respect that leaves intersex people living in a state of indignity.

Intersex people demand that they have a right to a dignified life in the state of well-being and potentiality of sex that they determine as who they are – male, female, both or neither – and how they come to be. At the Third Intersex

³⁰ At [8]; UN Human Rights Council *Resolution adopted by the Human Rights Council on 30 June 2016 (A/HRC/RES/32/2 2016)*, Preamble ; Vienna Declaration and Programme of Action, UN General Assembly A/CONF157/23 (entered into force 12 July 1993), Preamble .

International Forum, the group produced a public statement with a significant first sentence:³¹

We affirm that intersex people are real, and we exist in all regions and all countries around the world.

Making them invisible harms them and harms society as a whole. It restricts the diversity of humanity. The last three chapters discussed three key areas central to the formation of and the protection of one's identity. The right to privacy provides for the right to autonomously shape who one is and how one comes to be or the free and full development of personality. It correlates this right to the central foundation of human rights - dignity. However, this dignity is impinged upon or violated when there is inhibition or restriction on one's well-being. This chapter demonstrated the devastating effects and some of them have been mentioned above. To protect intersex people, it requires the protection of the law, but for that, one must be recognised before the law. Due to the strength of the binary system, this has been restricted, especially through the registration system of sex to male or female. However, according to the basis for human rights, while protecting sex, the human rights person - the foundation – does not require a particular sex. The purpose is to recognise every human person before the law. As such intersex people need freedom from the binary to enable the application of an autonomous being as provided for through the right to privacy. The Special Rapporteur on SOGI stated that there needs to be a respect for diversity of sex:³²

The report is anchored on the belief that while the diversity among human beings on the basis of sexual orientation and gender identity should be recognized (“diversity in humanity”), it is essential to harness and reinforce, from a young age, mutual respect, tolerance and understanding, compliance with

³¹ “3rd International Intersex Forum Concluded” (2 December 2013) ILGA Europe <http://www.ilga-europe.org/home/news/latest/intersex_forum_2013>.

³² Muntarbhorn - Special Rapporteur(SOGI) and Human Rights Committee, above n 16, at [Note by the Secretariat].

human rights, and a sense of humanity and inclusivity inherent in that diversity (“humanity in diversity”), to accord protection for all and to all.

This respect is to recognise an intersex person as who they are. This enables them to have a moral identity and John Stuart Mill’s words, results in the ‘perfection in human nature’. This recognition, as demonstrated through (inter)sex is important to the functioning and relationality of the society, yet not a determinant of individuals nor the society.

My history highlights the similar plight that many intersex people face. As their history is invisible, often to themselves, as well as others around them, it has been impossible for them to make sense of who they are. Like me, many have lived in a state of confusion and a low self-esteem and self-respect. They have lost autonomy and control over their life over who they are as a sex, what has happened to their bodies (sometimes conflicting with what they have been told, if they have been told at all), and how they have come to be as a sex. As such, intersex people have suffered a hermeneutic injustice. Taking back power over who one is and how one comes to be is liberating, but this requires recognition before the law and protection of the law. Only then can intersex people be dignified human beings as provided for by international human rights.

Human rights must fulfil their promise to enable all people to have autonomy over who they are and over how they come to be, such as described in the example here of intersex people, who at the same time have many other intersecting multiplicities. This requires the free and full development of personality. This is the subject of rights a capable moral being. Human rights are essential to a society of solidarity - a just and moral society. This requires education to understand the diversity of life, including the diversity of sex, so that all humans are recognised and accepted in society as who they are and not as some determined status. This I believe will result in peace and harmony, both within oneself and society at large.

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