

STUDY ON  
THE HUMAN RIGHTS SITUATION  
OF INTERSEX PERSONS  
IN AFRICA



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The Centre is an academic department of the Faculty of Law at the University of Pretoria, South Africa. It also doubles as a non-profit organisation (NPO) and think tank. It therefore functions as a teaching, training and research department as well as implementing human rights projects with external donor funding. The Centre's reach is within South Africa and beyond, particularly on the African continent. The Centre enjoys 'observer status' with the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child. The Centre has also submitted cases before the African Court on Human and Peoples' Rights. It, therefore, identifies itself as a pan-African organisation. It specialises in human rights law and human rights issues on the African continent, while linking these to global human rights knowledge streams and discourses from other regions of the world.

The principal research and drafting of this report was done by Tapiwa Mamhare, Project Officer, Centre for Human Rights, with the research assistance of LLM students: Sohela Surajpal, Sylvester Kazibwe, Micaela Carina, and Khalif Cideka. Additional editorial contributions were made by Professor Frans Viljoen (Director, Centre for Human Rights) and Dr Ayodele Sogunro (Manager, SOGIESC Unit).

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## SUMMARY

The study highlights the main challenges faced by intersex persons in Africa. Intersex persons face human rights violations in the form of unnecessary genital 'normalising' surgeries on minors, a lack of appropriate legal recognition and poor birth registration processes, discrimination in the justice system, infanticide, baby dumping and various forms of discrimination in other spheres of life. The existing legislative gap in African countries on the laws protecting intersex persons has contributed to the human rights violations. However, as a matter of law and principle, the human rights of intersex persons are effectively protected under the African Charter on Human and Peoples' Rights (African Charter). Progressive measures protecting intersex persons have been put in place by other regional human rights organisations, United Nations (UN) agencies and a number of countries in the world.

The African Commission on Human and Peoples' Rights (African Commission) has influenced legislative and policy changes in Africa since it came into existence in many domains. The study suggests that the African Commission, drawing inspiration from recent developments across the world, should as a matter of urgency expand this work to include a small but significantly disadvantaged segment of African society, which is intersex persons. The dearth of relevant legislation underlines the need for more normative guidance, including in national legislation. The report suggests that the African Commission, using its existing mandate, should develop some form of soft law standards on the human rights violations against intersex persons to guide states about the most appropriate measures they should put in place to protect the rights of African intersex persons.

## METHODOLOGY

This study is a result of a research process carried out by the Centre for Human Rights, University of Pretoria (Centre) in collaboration with intersex organisations in Africa. These organisations are Intersex Persons Society of Kenya (IPSK), SIPD- Uganda, Rainbow Identity Association (Botswana), Intersex Society of Zambia (ISZ) and Intersex Community of Zimbabwe (ICoZ). The study is designed primarily for advocacy purposes at the African Commission on Human and Peoples' Rights (African Commission) and other relevant regional and international platforms. This publication is meant to be a simplified read for an easier understanding of intersex persons and their plight on the African continent. The targeted audience includes the African Commission, state representatives, non-governmental organisations (NGOs) and any other interested stakeholders.

The report is based on desktop review of existing literature, supported by anecdotal evidence in the form of stories from self-identified intersex individuals from six African countries. The countries are South Africa, Botswana and Zimbabwe, Kenya, Uganda and Ghana. Some of the information was collected from various engagements, for example, meetings and workshops.

A total of 25 intersex persons were interviewed. Participants also included parents of intersex persons and experts working on intersex issues. However, the study is purely qualitative and does not focus on the number of intersex persons. Rather, it focuses on the strength of the stories to show evidence of human rights violations against intersex persons in Africa. Stories were collected through interviews after getting informed consent from the participants. Participants were recruited through snowballing and referrals from host organisations. All names of the interviewees were noted down. However, some requested to remain anonymous in the reporting due to fear of victimization.

## GLOSSARY OF TERMS

**Disorder of sex development** A medical term used to refer to conditions that cause intersex traits, 'DSD' is often used by medical practitioners (sometimes styled as 'Disorders of Sex Development'), but it is seen as stigmatizing by many intersex people.

**Intersex** An intersex person is a person born with sexual anatomy, reproductive organs and/or chromosome patterns that do not fit the typical definition of male and female.

**Gender identity** Social and cultural codes used to distinguish what a society considers 'masculine' and 'feminine' conduct and/or characteristics. Gender is also an identity and refers to a person's internal, deeply felt sense of being female, male, both, or something other than female or male. It does not necessarily correspond to the sex assigned or presumed at birth.

**Genital 'normalising' surgery** Surgical medical interventions performed to modify atypical or ambiguous genitalia and other sex characteristics, primarily for the purposes of making a person's appearance more typical and to reduce the likelihood of future problems

**Sex characteristics** Each person's physical features relating to sex, including chromosomes, gonads, sex hormones, genitals and secondary physical features emerging from puberty.

**Sexual orientation** Refers to a person's physical, romantic and/or emotional attraction towards other people.

**Pathology** Study of diseases processes involving examining the cause of illness, how it develops, the effect of the illness on cells and the outcome of the illness.

## CHAPTER 1: UNDERSTANDING INTERSEX

Intersex is an umbrella term that is used to describe a range of natural sex characteristics that cause individuals to be born with chromosomes, gonads or genitals that do not fit into the typical binary notions of male and female bodies.<sup>1</sup> The natural sex characteristics of intersex persons manifest at different stages in life. Some sex characteristics such as ambiguous or atypical genitalia are apparent at birth, while others such as gonads and chromosomes usually manifest at puberty.<sup>2</sup> Evidence from this study suggests that some intersex persons progress well into adulthood, unaware of their intersex characteristics.

Intersex is not a recent phenomenon. Intersex people have always existed in our African communities, often in fear and secrecy, leading to a number of human rights violations against them.<sup>3</sup> Intersex people have been traditionally referred to as 'hermaphrodites' and more recently as people born with disorders of sex development (DSD).<sup>4</sup> However, such terms have been challenged by intersex activists as stigmatising, derogatory and pathologising in nature, therefore perpetuating further discrimination.<sup>5</sup>

Our communities in Africa have always been aware of the existence of intersex persons. However, until recent years, no intersex people had been willing to come forward. With intersex persons still largely invisible, there is much misunderstanding, many misconceptions and even denial, in the sense of disputing the very existence of intersex people.

### 1.1 Misconceptions about intersex people

Many people misunderstand what intersex is. There are misconceptions, confusion and prejudices surrounding intersex bodies, leading to unjustified discrimination and other human rights violations. These misunderstandings could be avoided if people were better informed and educated. The participants to this research confirmed that people often conflate and commingle intersex persons with lesbians, gays, bisexuals and transgender persons (LGBT), and that this lack of clarity leads to further prejudice and discrimination against intersex persons. In fact, while intersex refers to sex characteristics, LGBT persons are grouped together based on their sexual orientation

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1 OHCHR Fact Sheet on Intersex, 'Free and Equal United Nations for LGBT equality' <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf> (accessed 2 June 2021).

2 Report of the Australian Senate community affairs references committee 'Involuntary or coerced sterilisation of intersex people in Australia (2013) 2.

3 A baseline survey carried out by SIPD Uganda in East-Africa found out that 2 intersex children are born every week. 'Baseline survey on intersex realities in east-Africa (Kenya, Uganda and Rwanda) 2015-2016 on page 2. 4 European Agency for Fundamental Rights issue paper 'The fundamental rights situation of intersex people' (2015) <https://fra.europa.eu/en/publication/2015/fundamental-rights-situation-intersex-people> (accessed 2 June 2021).

5 As above.

(which may be homosexual or bisexual), and on their gender identity (in respect of transgender persons).

There is no necessary correlation between being intersex and having a particular sexual orientation or gender identity. People naturally assume a person to be LGBT if they do not conform to the binary physical appearance of being male or female.<sup>6</sup> There is lack of understanding of the fact that intersex relates to natural biological sex characteristics, as opposed to sexual orientation or gender identity.<sup>7</sup> Sex characteristics are inherent and congenital, meaning that intersex persons sex characteristics are apparent from birth.

Many of the misconceptions and misunderstanding are fuelled by religious and cultural beliefs. In some communities it is believed that intersex persons are 'cursed' and that they can therefore not have the same social status as everyone who is considered to be 'normal'.<sup>8</sup>

## 1.2 Types of intersex sex characteristics

There are over 40 variations of intersex sex characteristics relating to genitalia, chromosomes and hormones. While there are scientific names for these variations, they can be summed up in non-technical language as follows:<sup>9</sup>

- External genitals that cannot be easily classified as male or female.
- Atypical development of the internal reproductive organs.
- Inconsistencies between the external genitals and the internal reproductive organs.
- Atypical development of the testes or sex related hormones.
- Over or underproduction of sex related hormones.
- Inability to respond normally to sex related hormones.

## 1.3 How many intersex people are there in Africa?

It is almost impossible at the moment to establish the number of intersex persons that exist in African countries. However, Kenya is the first and only country in Africa and globally to include the counting of intersex persons in a national census. A census conducted in 2019 managed to establish that there are 1524 intersex persons in Kenya out of a population of 47,6 million people.<sup>10</sup> While this may appear as a small number compared to the overall population, it may not be reflective of the actual numbers due

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6 J Behrmann & V Ravitsky 'Queer liberation, not elimination: Why selecting against intersex is not 'straight' forward' (2013) 13 American Journal of Bioethics 40

7 As above.

8 Kenya National Commission on Human Rights 'Equal in dignity' and rights promoting the rights of intersex persons in Kenya' (2018) 3.

9 American Psychological Association. Available at <https://www.apa.org/topics/lgbt/intersex.pdf> (Accessed 10 June 2019).

10 Kenya National Bureau of statistics <https://www.knbs.or.ke/?p=5621> (accessed 2 June 2021).



to a number of factors as discussed below. In any event, statistics should not be a limiting factor for intersex persons to enjoy the rights and freedoms provided for under the African Charter on Human and Peoples' Rights (African Charter) and other relevant international human rights treaties.

*Director of the advocacy group Intersex Persons Society of Kenya (IPSK), James Karanja, reiterated the importance of the inclusion of counting intersex persons in the Kenyan census:*

*In the past census, as intersex people we were counted differently from male and female. We had our own code as intersex. That was a milestone for us as the intersex community in Kenya. However, this milestone was achieved because we had an intersex movement within the country that helped spearhead that. Another factor is that we have a government that has been willing to assist us. The state has been willing to create a legal and policy framework for intersex people, but these legal frameworks cannot be created in a vacuum. We needed a number to at least say we are working with this number. So for us it was a huge win. Secondly, we were actually not such a huge number of intersex persons because of our cultural background and people not willing to be identified. Most of the people we have within our database were not counted and there were various reasons but ours is not even to justify why the number was high or low. Ours is to appreciate at least we have a working number that will help us draw policies and legal framework.*

There are a number of factors which contribute to the challenges of collating information and statistics on intersex persons. First, intersex persons are often very invisible due to the secrecy, fear and stigma associated with being openly intersex. Very few intersex persons come forward and publicly declare themselves to be intersex; it is therefore always going to be difficult to find access to intersex persons. Second, there is a wide variation of intersex sex characteristics posing a difficulty as to which of these are to be classified as intersex. Third, intersex persons may not identify as such, because they are unaware of these characteristics. Among participants to this research, there was a common trend confirming a lack of awareness that they are intersex until later in life. Fourth, even among intersex persons there may be confusion between being intersex and transgender, leading some intersex persons to view themselves as transgender rather than intersex.

Due to these factors, as well as the nature and frequency of intersex sex characteristics, it is quite difficult to establish reliable statistics about intersex persons in Africa. However, experts estimate that 1.7% to 4% of the population exhibit some form of intersex characteristics.<sup>11</sup> According to the UN Free and equal campaign, between 0.05% and 1.7% of the population is born with intersex traits.<sup>12</sup>

#### **1.4 Pathology and intersex sex characteristics**

Intersex sex characteristics are medical in nature, and are from a bio-medical point of view often viewed as disorders. This classification of intersex as a disease influences medical doctors to usually suggest corrective surgery or genital normalising surgeries as a first line solution. In some instances, intersex persons may be subjected to sterilisation or hormonal therapy. Genital 'normalising' surgeries often lead to 'irreversible medical procedures that can cause life-long psychological suffering, depression, permanent infertility, pain, incontinence and loss of sexual pleasure; without the young person concerned appreciating the decision-making which violates their right to physical integrity'.<sup>13</sup>

The World Health Organisation (WHO) recently adopted the revised International Classification of Diseases (ICD 11), which classifies intersex sex characteristics as 'malformative disorders of sex development'.<sup>14</sup> However, there are demands to review the diagnostic terminology to avoid unnecessary medicalisation that perpetuates surgical interventions. For example, instead of the IDC 11 terming intersex sex characteristics as 'malformative disorders of sex development', they can be re-termed to less pathologising terms such as 'congenital variations of sex characteristics'.<sup>15</sup>

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11 A Akre 'Hanging in the balance: the intersex child, the parent and the state' 5 *Tennessee Journal of Race, Gender & Social Justice* 39.

12 UN Fact sheet (footnote 1 above).

13 UN Fact Sheet (footnote 1 above).

14 M Carpenter 'Intersex Variations, Human Rights, and the International Classification of Diseases' *Health and Human Rights Journal* 205

15 As above.

## CHAPTER 2: HUMAN RIGHTS SITUATION AND EVIDENCE OF HUMAN RIGHTS VIOLATIONS ON INTERSEX PERSONS

Over the past decades, intersex persons worldwide have been silently suffering from human rights violations perpetrated against them. The human rights violations have often been associated with medicine, particularly non-consensual genital ‘normalising’ surgeries on minors, which are often unnecessary and cosmetic. However, in an African context, human rights violations against intersex persons are even more unique due to our cultural and religious beliefs. This study managed to establish that human rights violations against intersex persons in Africa stem from (i) coerced, uninformed and unnecessary genital ‘normalising’ surgeries and hormonal procedures (ii) lack of appropriate legal recognition and poor birth registration processes (iii) baby abandonment and infanticide and (iv) discrimination in schools, workplace, detention facilities, sports and other socio-economic and political spheres.

This study is premised on the power and strength of stories to bring about societal change. Through a collection of anecdotal stories from intersex persons and parents of intersex from Africa, this section of the study brings into perspective the nature of the human rights violations that intersex persons are facing. The anecdotal stories coming from the participants to this study show a common trend of human rights violations against intersex persons in African countries.

The stories are based on actual lived experiences drawn from some of the 25 participants to this study. The participants included intersex persons, parents of intersex persons and experts working on intersex issues from 6 countries in West, East and Southern Africa. The countries include South Africa, Zimbabwe, Botswana, Kenya, Uganda and Ghana. Some excerpts from the interviews will try and contextualize the nature and extent of the human rights violations against intersex persons. What follows are the human rights violations intersex persons are facing and their stories as narrated by them.

### **2.1 Coerced, uninformed and unnecessary genital ‘normalising’ surgeries on minors**

As noted above, one of the foremost human rights violations against intersex persons are genital ‘normalising’ surgeries. The surgeries are a common practice in medical settings when a child is born with apparent ambiguous genitalia. The majority number intersex individuals interviewed under this study have experienced some form of surgery or medical intervention. Such surgeries are often performed on intersex minor children without their consent, with the aim of altering the genitals to suit the acceptable societal standards of ‘male’ and ‘female’.<sup>16</sup> In almost all cases genital ‘normalising’ surgery on the intersex individuals was cosmetic and not medically urgent; instead, it was based on social, psychological considerations and fear of stigmatization. Given a choice now, the intersex individuals would not have opted to be surgically altered.

Often medical professionals give a sense of false urgency to justify surgery; do not give adequate information on the needs for surgery; encourage parents to conceal the treatment to the child and society, and fail to advise on the possibility of rejection of the assigned sex.<sup>17</sup>

The Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment confirms that genital ‘normalising’ surgeries are taking place and condemns the procedure: ‘Children who are born with atypical sex characteristics are often subjected to irreversible sex assignment, involuntary sterilisation, involuntary genital ‘normalising’ surgery, performed without their informed consent, or that of their parents, ‘in an attempt to fix their sex’, leaving them with permanent, irreversible infertility and causing severe mental suffering’.<sup>18</sup> Such undesirable effects of genital ‘normalising’ surgeries which impair the physical integrity and bodily autonomy of intersex persons can be confirmed by stories that were compiled under this study.

*Ronika Zuze, an intersex person from Zimbabwe, speaks of the challenges they have been facing due to non-consensual genital ‘normalising’ surgery performed on them as a minor. Ronika who is now 42 years old lives with pain up to this day as a result of surgery which was performed on them as a minor without consent:*



*Ronnie Zuze*

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16 S Benson 'Hacking the gender binary myth: recognizing fundamental rights for the intersexed' (2005) 12 *Cardozo Journal of Law and Gender* 36.

16 G Beh & M Diamond 'An emerging ethical and medical dilemma: should physicians perform sex assignment surgery on infants with ambiguous genitalia' (2000) 7 *Michigan Journal of Gender and Law* 38.

18 Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Report (1 February 2013) A/HRC/ 22/53, para 76.

*My name is Ronnie . I am 42 years old from Zimbabwe. I was born and raised as a boy until 16. But at puberty I started developing female reproductive features. My parents relocated me to another city. In this city, I started living as a girl. I could tell in my teens that I have ambiguous genitalia it was different from boys and girls but I could not put a name on it. I got confused as to why a boy could develop breasts. I have 12 intersex friends in Zimbabwe. But we have different stories.*

*My aunt who worked at a medical institution suggested that I should be normalised and fit into society. They did tests to see which sex characteristics were dominant. This was done at Harare hospital then I was transferred to Parirenyatwa hospital where the surgery was done. They did not remove the ambiguous part of my genitalia but made a vaginal opening and gave me a dildo-like stick so that the artificial opening would not close. I could not use that dildo-like stick for long because it was very painful and traumatic. I feared going to the toilet. It was very painful. When I urinated, the urine would burn that wound. It was just so painful. So I just stopped using it. When I went for review I told the doctor I could not use it. The doctor then suggested that I can stop the surgeries until I am ready for marriage or sexual activity. My family were worried that the reconstructed vaginal opening would close.*

*I was not involved in all decisions that were made on me. My guardians did not receive the correct information. If they were given the correct information, I believe they would not have taken that decision.*

*I now have trauma and fear of going to a hospital. I felt like a medical experiment because lots of people would come to see me, opening me up and taking notes. I guess they were medical students. I felt violated. I still have chronic pain up to now. Given a choice, I would have never have gone through the surgery. I have become homeless at some point, battled alcohol addiction, suicidal thoughts and depression.*

Ronika's story confirms the concern raised UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Ronika has lived their whole life experiencing excruciating pain and suffering as a result of the irreversible genital 'normalising' surgeries performed on them without consent. Ronika's story further brings out a mental health dimension as they are experiencing depression and anxiety as a result of this experience.

Ronika's story is not the only story from Zimbabwe. Another intersex individual, Yvonne (25) narrated of how genital 'normalising' surgeries were performed on him without consent:



Yvonne

*My name is Yvonne, I was born in 1992. I was born in Chihota rural area in Zimbabwe. I have a diploma in teaching but currently I am unemployed. I only knew I am intersex last year when I turned 24 years old. Growing up, I was taken to different doctors who always abandoned surgery at last minute maybe because there was not enough studies on intersex. When I turned 15 years old, members from my church took me to a doctor who recommended surgery. One day they just came and took me from school to St Anne's Hospital in Avondale Harare where the surgery was performed on me. They removed the male part and re-corrected the female part. This was not my decision, it was parents consenting on my behalf. All my parents wanted was for me to fit into society...*

Yvonne's story is further evidence of how intersex persons are subjected to non-consensual genital 'normalising' surgeries whether it is in a public or private institution. In 2019, a government hospital in Zimbabwe, launched a futile campaign to correct the genitalia of intersex persons to 'restore normalcy in a bid to help intersex persons deal with the issue and avoid future psycho-social problems they may encounter regarding sexuality.'<sup>19</sup>

Evidence of genital 'normalising' surgeries can also be noted in East African countries of Kenya and Uganda. While Kenya is the leading country in Africa on championing the human rights of intersex persons, a number of intersex persons had already experienced genital 'normalising' surgeries prior to the government supported awareness raising. A report by a government-constituted taskforce on policy, legal, institutional and administrative reforms regarding intersex persons in Kenya found out that 34 intersex persons participating in the study had been subjected to genital 'normalising' surgeries.<sup>20</sup> As a result of awareness raising in Kenya a number of intersex persons and parents of intersex persons were confident enough to come out and share their stories with us, without fear of victimization.

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<sup>19</sup> 'Just in: Mpilo Hospital sets up registry for people born with ambiguous genitalia' *Chronicles Newspaper*. Available at <https://www.chronicle.co.zw/just-in-mpilo-hospital-sets-up-registry-for-people-with-ambiguous-genitalia/> (accessed 22 June 2019).

<sup>20</sup> Available at <https://www.knchr.org/Portals/0/INTERSEX%20TASKFORCE%20FREPORT-Abridged%20Version.pdf> (accessed 22 June 2019).



*Mr Peter Mainge Kagai*

*One relatable story from Kenya was narrated by a parent of an intersex person Mr Peter Mainge Kagai whose child was subjected to genital 'normalising' surgeries and is suffering from the irreversible effects of genital 'normalising' surgeries:*

*My child was subjected to a genital 'normalising' surgery which left our child with leaky urine. They could not do further surgery on my child because they do not have the expertise to do further surgeries. We were referred to a hospital in Boston, United States. I cannot afford to take my child for surgery in the US. I have spent much of my savings over the past years trying to get help for my child. Some people have suggested to me and my wife to kill our child because they regard it as a curse to the family.*

Some scholars have equated genital 'normalising' surgeries to female genital mutilation (FGM) and have suggested that genital 'normalising' surgeries must be prohibited by law as with FGM.<sup>21</sup> Genital 'normalising' surgeries and hormone treatment carried out on intersex children who are not able to give informed consent is in breach of children's best interests as provided for under Article 4 of the African Children's Charter and Article 3 of the Convention on the Rights of the Child (CRC). It violates intersex children's right to be heard and to take part in decisions relating to them as provided for under Article 12 of the CRC and their rights to be protected against physical or psychological duress as provided for under Article 19 of the CRC. Genital 'normalising' surgeries can be classified as harmful social cultural practices prohibited under Article 21 of the African Children's Charter.

With genital 'normalising' surgeries there is also an aspect of discrimination, which constitutes a violation of Article 2 of the African Charter in that normalisation procedures are based on the theory that intersex genitalia is unacceptable and therefore there is a difference in the way in which intersex genitalia and others are treated. Article 2 of the African Charter provides that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.'

Noting the potential harmful effects that genital 'normalising' surgeries have on intersex persons and the possible defective informed consent given by parents on behalf of their intersex children, a moratorium or statutory sanction should be put in place on genital 'normalising' surgeries which are cosmetic and not urgent until such a time as the concerned minor is capable of consenting and can take part in the decision-making process. Genital 'normalising' surgeries must only be performed on a minor intersex if it is

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<sup>21</sup>Stop IGM Shadow Report to the 7th and 8th Report of Germany on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 'Intersex genital mutilations; Human rights violations of children with variations of sex anatomy' [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/DEU/INT\\_CEDAW\\_NGO\\_DEU\\_26316\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/DEU/INT_CEDAW_NGO_DEU_26316_E.pdf) (accessed 10 August 2017).

medically necessary, urgent and if there is a real risk to the life of the concerned minor if the genital ‘normalising’ surgery is not performed immediately.

## **2.2 Lack of appropriate legal recognition and poor birth registration processes**

Challenges affecting intersex persons are not only present at childhood but also occur in the life of the concerned intersex person as they grow older. One of the challenges relates to the lack of appropriate administrative processes to accommodate for the legal recognition of intersex persons. The African Charter provides that ‘all persons are equal before the law’.<sup>22</sup> Further, the Children’s Charter provides that ‘every child shall be registered immediately after birth’.<sup>23</sup> Many registration processes for the purposes of acquiring a birth certificate impose a gender or sex requirement which is male or female. It becomes a challenge when the sex of the child is ambiguous and does not fit into the biological classifications of male or female. What it means is that the concerned intersex minors cannot acquire a birth certificate unless they identify as either male or female.

For minors who have been unable to acquire a birth certificate, as reflected in the Kenyan case of *Baby A v Attorney General*,<sup>24</sup> it means that they will not be able to enjoy the rights and benefits that accrue from possessing a birth certificate. For intersex adults who were assigned the wrong sex or gender marker at birth, it means that they will be stuck in that gender or sex for the rest of their lives since there are no easy administrative processes to allow easy amendment of identity documents to reflect their true sex.

Some of the intersex persons who participated in this study narrated of incidents they have come across as a result of lack of legal recognition of intersex persons. *James Karanja shared some of the challenges he has faced as a result of lack of appropriate registration processes to amend his documents.*



*James Karanja*

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<sup>22</sup> Art 3(1).

<sup>23</sup> Art 6(1).

<sup>24</sup>*Baby A and Another v Attorney-General and Others* Petition 266 of 2013.



*...I initially received a birth certificate with a female sex marker in Naivasha, Nakuru County. All the documents that I received included my female name Mirwei. This included my primary school certificate, my secondary school certificate. However I had managed to get a National Identity under the name James Karanja which is a male name. So I ended up having documents with different names. This presented a number of challenges to me. One for example of accessing the very simple things like student financial assistance or a student bank account. I was denied these services because of when they requested my school certificates they were written Mirwei, yet my ID was now written James Karanja. I have also been accused of impersonation several times because of the difference between the names of my certificates and my ID.*

James' story highlights the importance of having processes in place which allow intersex persons to easily amend their documents to suit their preferred name and sex category.

*Ryan also had a story similar to that of James. Raised as girl and named Ruth, Ryan narrates some of his challenges when it comes to legal recognition.*

*I had an encounter in a bank. My ID still recognises me as a female. I gave my ID to the teller. Instead of that teller to serve me, the teller raised an alarm to the security team, saying there is someone here trying to fraud or maybe impersonate. The police came. They did not give me a chance to explain. They started beating me up. When they were beating me up there was a lady who restrained them that is how they stopped. I tried to explain to them that I was intersex and they wanted proof for that. I had to be searched and that meant removing my clothes. It was dehumanising but I could not report that to anyone because even if I try to report they will still want me to prove that indeed I am intersex.*



*Ryan seated on the left with one of our researchers Tapiwa Mamhare*

Ryan's story further shows the challenges intersex persons are facing as a result of lack of legal recognition and appropriate civil registration processes to allow intersex persons to amend their birth certificates.

For such challenges faced to be solved, states should adopt legislative or other measures as may be necessary to ensure that the right to legal recognition of intersex persons is protected in order to address specific challenges relating to lack of administrative processes to accommodate for the legal recognition of intersex persons. Less emphasis should be placed on the sex or gender requirement on birth certificates or national identity documents. Intersex individuals must be allowed to register and leave the sex marker blank in circumstances where the sex is ambiguous. An easy administrative process should be in place, to allow the concerned individual to revoke their assigned gender or sex and amend their birth certificate or identity documents to reflect the true sex or gender.

### **2.3 Discriminatory social attitudes**

Another challenge that intersex persons face is discrimination in almost all spheres of life. Socially intersex persons and their families face extreme social rejection and violence from their communities. Owing to fear of stigmatisation by the community, some parents go the extent of abandoning their children.<sup>25</sup> Further, some cultural taboos compel parents to abandon their children as intersex children are believed to be a curse. The mother of the child is frowned upon by society and due to the feeling of being a social outcast this results in infanticide.<sup>26</sup> According to a report by Irantí on the National dialogue on the protection and promotion of the human rights of intersex people in South Africa, an informal research carried out by Northern Cape LGBTI organisation LEGBO between 2008 and 2010 discovered that of the 90 traditional birth attendants and midwives interviewed 88 admitted to having 'gotten rid of' ostensibly intersex children after their birth.<sup>27</sup>

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25 SIPD baseline survey on intersex realities in East-Africa 14.

26 As above.

27 Report by Irantí and Intersex South Africa . 'National dialogue on the protection and promotion of the human rights of intersex people' 13. Available at <http://www.justice.gov.za/vq/lgbti/2018-NationalIntersexMeetingReport.pdf> (accessed 22 June 2019).

One intersex person from Uganda had this to share about his experience.

*I always wondered why my mother was always crying and trying to keep me away from playing with other children. I started asking myself why do I look different from other children and at some point I started blaming my mom because I could not understand why my mom, my grandmother and the doctors and everyone could have named me and taken me as a girl even if they know that I was not.*

*After that you know children don't know how to a keep secret, they went on sharing this in school and with other children so it became a problem for me then to attend school because it became a whole school affair. Every time I tried to go to the toilet, the whole school would follow me wanting to see how I looked like. They wanted to see whether I squat or I stand. It was hard for me to remain in class so I started the habit of like running away from school, hiding out there. My mother would even take me to the police so that I get punished for refusing to go to school.*

*I dropped from school when I was very young. I also remember one instance whereby an elderly man accused me very badly and saying like I'm a curse. I'm the reason why my area was facing a drought at that time and I was supposed to be stoned to death. They even beat me thoroughly. I ran away from that area. I started staying like a street child.*

This story resonates with the stories of many intersex persons who took part in this study. In the most unfortunate situation where an intersex child is born in a poor family, witchdoctors and traditional healers are approached for solutions, which in most cases yield very detrimental outcomes. According to a report by the NGO SIPD, 'intersex minors are separated from siblings and put in remote huts in the periphery of the homestead further than where animals are kept. They argue that if this child is left to stay with siblings it is very easy for this child to pass on the bad luck to other children in the family that are considered as normal'.<sup>28</sup>

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<sup>28</sup> As above.

*A psychologist working with SIPD confirmed this position. The counsellor also narrated the psychological problems intersex persons and their parents usually present:*

*The mental issues intersex people face start with the parents themselves. We experience issues like depression, anxiety, bipolar and other mental health problems. The mothers of intersex persons are usually scared about what society will perceive about their children. They are usually scared about society discriminating, stigmatising and naming their children. Most cases intersex children are given names that are abominable. Names that someone does not deserve to have in a lifetime. That greatly affects their mental health and even that of the child.*

Intersex persons also face discrimination in almost all spheres of life. They are discriminated against in competitive sports because of their ambiguous sex characteristics. Schools are not accommodating and friendly to the needs of intersex persons. Intersex persons are bullied and harassed in school because of their 'unusual' sex characteristics, resulting in many school drop-outs amongst the intersex community. Skipper a participant from Botswana confirmed discrimination in schools:

*In school it was a huge challenge for me. I was discriminated. I was more of a boy. We have mixed schools here. There is a separate register for sexes so when teachers were calling the names in the morning and my name is on the other end I would look on the other side. I would ask myself what is going on here. If the class teacher is very accommodative and is not making a fuss about me wearing a boys school uniform I would stay in that uniform. If the teacher has an issue I would move from that school to another. So I ended up changing schools so many times.*

Discrimination is not limited to schools but also occur in other environments like the work place and detention facilities. Due to their sex characteristics inmates who are intersex are harassed and ridiculed within the prison facilities.<sup>29</sup> Kenya's Supreme Court judge apologised to an intersex person who was appealing against his earlier sentencing. While making his remarks, judge Lenaola said: 'I apologise to you RM for failing you. My inaction saw you suffer shame, ridicule, and embarrassment at the hand of the inmates yet I was supposed to protect you.'<sup>30</sup>

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29. *Mv Attorney-General and Others* Petition 705 of 2007

30' 'Lenaola apologises to intersex person for detention with men' *The Star Newspaper* <https://www.the-star.co.ke/news/2019-04-22-lenaola-apologises-to-intersex-person-for-detention-with-men/> (accessed 22 June 2019). A copy of the appeal matter could not be obtained.

Some inmates due to lack of understanding of their sex characteristics are placed in facilities which do not conform to their preferred sex. This exposes such intersex persons to all sorts of abuse from members of the opposite sex. Prison facilities must be conducive and accommodative of intersex persons and that intersex persons are treated fairly and without discrimination or harassment on grounds of their sex characteristics.



*Delphine Barigye and Tom Makumbi, directors at SIPD-Uganda.*

## CHAPTER 3: PROTECTION OF THE HUMAN RIGHTS OF INTERSEX PERSONS UNDER THE AFRICAN CHARTER AND RECENT GLOBAL DEVELOPMENTS

The stories in the previous chapter of this study have shown the nature of human rights violations that intersex persons are facing on the African continent. Such a precarious situation requires urgent legal protection both at a domestic and regional level to ensure that the violations are curtailed and eventually eradicated. It is fortunate that the existing legal framework in the African human rights system contains legal provisions that protect the human rights of intersex persons. The African Charter if effectively implemented may eradicate all forms of discrimination against intersex persons.

Intersex persons have the right to claim protection under the African Charter by virtue of Article 2, which entitles every individual to enjoy rights and freedoms under the African Charter without any form of distinction. Intersex persons are also protected under Article 3(3) on equal protection of the law. Intersex persons can be afforded equal protection of the law in the form of legal reforms that ensure that laws are in place to protect intersex persons from all forms of discrimination. Article 5 on protection from torture, cruel, inhuman and degrading punishment and treatment protects intersex persons from non-consensual genital 'normalising' surgeries on minors.

Intersex persons can also claim protection under the African Charter through Article 16 on the right to enjoy the best attainable state of physical and mental health. This provision protects intersex persons from the harmful effects of genital 'normalising' surgeries, hormonal treatment and other issues that arise with bodily autonomy and physical integrity. Further intersex persons may also claim protection under Articles 10 and 12 of the African Charter which provides for the right of intersex persons to organize as it provides for the right to association and assembly.

Article 60 of the African Charter provides that the African Commission shall draw inspiration from international law on human and peoples' rights with the sources coming from international and regional human rights. The rights of intersex persons are already provided for under the existing human rights instruments. Although there is no specific human rights instrument protecting intersex persons, numerous positive developments have taken place at an international and domestic level. Some of the best practices guided by the existing international human rights law framework are discussed below.

### 3.1 Developments from outside of Africa

Some of the developments which have happened outside of Africa include a resolution that was adopted by the European Parliament in 2019.<sup>31</sup> The resolution condemns genital ‘normalising’ surgeries and commends countries in Europe which have prohibited such surgeries such as Malta and Portugal.<sup>32</sup> The resolution stresses the importance of flexible birth registration procedures and deplores the lack of recognition of sex characteristics as a ground of discrimination across the European Union (EU).<sup>33</sup> The Council of Europe Parliamentary Assembly adopted a resolution on promoting the human rights of and eliminating discrimination against intersex persons.<sup>34</sup>

In the American human rights system, the Inter-American Commission on Human Rights (IACHR) has a special rapporteur on LGBTI persons. While this may lead to conflation of intersex with issues of sexual orientation and gender identity this remains a positive development. In 2017, the IACHR in a press statement urged states to end violence against intersex persons.<sup>35</sup> The IACHR also observed that, because of society’s lack of awareness about intersex persons, intersex persons and their families generally had profound feelings of shame and fear, which often contribute to keeping the issue invisible and secret. The IACHR urged States to urgently prohibit surgeries and medically unnecessary procedures on intersex children. The IACHR further urged States to respect the autonomy of all intersex persons and all dimensions of their right to health, their right to physical and psychological integrity, and their right to live free from all forms of violence and discrimination, and should prevent all inhuman and degrading treatment. It also urged States to structure themselves and their services to be able to provide intersex persons of all ages with complete information about their health so that they are free to decide about their bodies and life plans. States were also urged to act with due diligence to provide training to officials in healthcare, the justice system, and other relevant sectors about the realities faced by intersex persons and the need for full respect of all their human rights.

At the level of the United Nations (UN) a number of developments have taken place. Several UN agencies have condemned human rights violations against intersex persons, for example, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment confirmed that ‘...children who are born with atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilization, involuntary genital ‘normalising’ surgery, performed without their informed consent, or that of their parents, ‘in an attempt to fix their sex’, leaving them with permanent,

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31 Available at the website of the European Parliament [http://www.europarl.europa.eu/doceo/document/TA-8-2019-0128\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/TA-8-2019-0128_EN.html?redirect) (accessed 25 April 2019).

32 Section 2 of the European Resolution

33 Section 9 & 10 of the Resolution.

34 Available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24232&> (accessed 25 April 2019).

35 Available at the website of the IACHR [http://www.oas.org/en/iachr/media\\_center/PReleases/2017/189.asp](http://www.oas.org/en/iachr/media_center/PReleases/2017/189.asp) (accessed 25 April 2019).

irreversible infertility and causing severe mental suffering.<sup>36</sup>

The Office of the High Commissioner for Human Rights (OHCHR) has conducted extensive research on the human rights of intersex persons. Amongst other recommendations it has directed to states, the OHCHR encourages states to prohibit medically unnecessary surgery and procedures on the sex characteristics of intersex children, protect their physical integrity and respect their autonomy.<sup>37</sup>

The UN mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Working Group on the issue of discrimination against women in law and in practice have condemned the IAAF regulations which to seek to exclude hyper-androgenic female athletes from participating in competitive sports unless they reduce their testosterone hormones to acceptable female levels.<sup>38</sup> The UN Human Rights Council also passed a resolution condemning the IAAF regulations on hyper-androgenic female athletes.<sup>39</sup>

The regulations have affected some elite athletes, for example, Caster Semenya from South Africa. The validity of the regulations was upheld by the Court of Arbitration for Sports (CAS) and the Swiss Federal Supreme Court. Caster Semenya is currently against these judgements at the European Court for Human Rights. The regulations infringe on the human rights of intersex persons as provided for under international law and also the Yogyakarta Principles (YP+10) that were updated in 2017 to include sex characteristics in the application of international human rights. The regulations entrench the violation of the right to bodily autonomy, physical integrity and freedom from non-discrimination.

On a domestic level some of the countries outside Africa that have protected the rights of intersex persons include Malta through the *Gender Identity, Gender Expression and Sex Characteristics Act* (GIGESC Act).

Australia has provided intersex status as a stand-alone ground protected against discrimination. Through the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act (2013) of the Sex Discrimination Act 1984*, intersex persons now enjoy protection from discrimination in the workplace, education, land, goods, services amongst a number of grounds.

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<sup>36</sup>Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Report (1 February 2013) A/HRC/ 22/53, para 76.

<sup>37</sup> UN Free and Equal Campaign Fact sheet. Available at <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf> (accessed 25 April 2019).

<sup>38</sup>[https://www.ohchr.org/Documents/Issues/Health/Letter\\_IAAF\\_Sept2018.pdf](https://www.ohchr.org/Documents/Issues/Health/Letter_IAAF_Sept2018.pdf)

<sup>39</sup>Available at website of the OHCHR <https://undocs.org/A/HRC/40/L.10/Rev.1>



In Malta and Iceland intersex persons may place an X on their identity documents (ID) if they do not now want to register as male or female.<sup>40</sup> The Netherlands government is also working towards having gender free IDs by 2025. The governments seeks to remove 'unnecessary of gender requirements where it is irrelevant.'<sup>41</sup>

## 3.2 Developments in Africa

While countries outside Africa have been progressive when it comes to the rights of intersex persons, progress has been minimal in Africa. However, there are exceptions. African states like South Africa and Kenya have been flag bearers in the protection of the rights of intersex persons.

### 3.2.1 South Africa

South Africa allows alteration of sex description on birth certificates of intersex persons as provided for under section 2 of the Alteration of Sex Description and Sex Status Act No 49 of 2003. Sex description on a birth certificate may be altered provided that a person is intersex and presents a medical certificate and a certificate from a psychologist.<sup>42</sup> Further, in terms of Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA) the definition of sex is interpreted to include intersex persons.<sup>43</sup> The South African government has also published a draft Identity Management Policy for public consultation in the government gazette.<sup>44</sup> The policy also includes areas relating to intersex persons in which the South Africa government suggests can be included in the policy. In terms of chapter 7 of the policy,

[t]he Identification Act and Births and Deaths Registration Act do not cater for the birth registration of children who are born intersex. Such children are assigned either a male or female sex status at birth. Some social groups are discriminated against in the current identity management system. This is because the identity number that we use is not gender neutral. The identity number recognises and accommodates only two categories, namely, male and female. The ID system does not differentiate between the distinct concepts of sex and gender. The World Health Organisation defines sex as 'the different biological and physiological characteristics of males and females' and gender as 'the socially constructed characteristics of women and men'.

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40 <https://www.ilga-europe.org/blog/mfxother-6-countries-pushing-non-binary-registration-europe> (accessed 5 June 2021)

41 As above.

42 As above.

43 Section 1 of PEPUDA.

44 Available of website of the government of South Africa on [https://www.gov.za/sites/default/files/gcis\\_document/202101/44048gon1425.pdf](https://www.gov.za/sites/default/files/gcis_document/202101/44048gon1425.pdf) (accessed 5 June 2021).

Whereas gender is traditionally thought of as a binary attribute (male vs. female), a third gender is now being increasingly considered (intersex). If an individual transitions to a new gender, the ID system should be updated. In fact, the Identification Act refers to gender and not sex.<sup>45</sup>

While the policy is still in draft form, these are positive and encouraging developments which show that South Africa is striving to ensure that its identity management systems, conform with global best practices which take into account the advancing and protection of the human rights of intersex persons.

### 3.2.2. Kenya

Kenya is the leading country in Africa advancing the human rights of intersex persons. The process in Kenya has seen a commitment from all the judiciary, executive and legislature all participating in ensuring that the rights of intersex persons are protected in Kenya. The process in Kenya has also seen a commitment by the National Human Rights Institution (NHRI) in Kenya and high level advocacy from CSOs primarily working on intersex rights advocacy.

*The R.M v Attorney General & Others* case pioneered public interest litigation on the challenges faced by intersex persons.<sup>46</sup> This case resulted in the court prompting the principles of intersex persons being free from inhumane, cruel and degrading treatment or punishment, especially during arrest and search.<sup>47</sup> Another case of *E. A & Another v Attorney General & Others* (also known as the 'Baby A' case), made key determinations including the need to develop the legal framework governing issues of intersex children, the needs to collect data on intersex children and persons in Kenya, and the need to formulate guidelines to inform the treatment of intersex persons.<sup>48</sup>

In 2017 in Kenya a petition was presented to the Kenyan Parliament against the human rights violations of intersex persons, and arguing for the recognition and the rights of intersex persons. It was later forwarded to the National Assembly committee on the administration and national security, which made strong recommendations to protect intersex persons.

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45 As above.

46 *R.M v Attorney General & others* Petition 705 of 2007

47 As above.

48 *Baby A and Another v Attorney-General and Others* Petition 266 of 2013

The Kenya National Commission on Human Rights (KNCHR) further did research on the plight of intersex persons published in 2018.<sup>49</sup> It is also important to note that the *RM* case contributed to the constitution of Kenya 2010 having an expanded non-discrimination provision. In terms of Article 27, all persons should not be discriminated against on the basis of sex, among other factors. Further, it also led to the inclusion of a definition of intersex persons, and Section 12 in the Persons Deprived of Liberty Act 2014, Section 2 of the National Police Service, Standing Orders chapter 15, which provide for the right of arrested persons who are intersex to choose whether they will be searched by a female or male, and where they are detained in an appropriate and separate facility. The *Baby 'A'* case also led to the formation of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons.

When interviewed for this study, Mr John Chigiti, the lawyer involved in both cases had this to say:

*I was involved in both the RM case and Baby A case. We did not get what we wanted in the RM case, however the judge in the baby A case managed to understand some of the arguments that we were putting forward to the court. The judge in the Baby A case said we need information on the intersex persons if at all we are going to make them walk with other members of our society. So what did the judge do? He made an order that the Attorney-General must generate the numbers or the data around the intersex persons. The conversation then moved from the judiciary. It was in the public domain, came to the judiciary, then it moved from the judiciary into the executive's hands, so what happened at the executive level, the Attorney General set up a taskforce to look into the human rights situation of intersex persons.*

As stated by Mr Chigiti, the Attorney-General of Kenya constituted the Taskforce on Legal, Policy, Institutional and Administrative Reforms regarding Intersex Persons in Kenya. Primarily the work of the taskforce was to investigate and make recommendations aimed at addressing the plight of intersex persons in Kenya. The taskforce came up with a report which was presented to the government.<sup>50</sup> One of the recommendations of the taskforce was the collection of accurate and verifiable statistics on intersex persons through the Kenya National Bureau of Statistics and to include intersex as a third sex category in disseminating statistics data. This recommendation was taken by the government which culminated in the 2019 census that also counted intersex persons as a third sex category.

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<sup>49</sup>Report of the KNCHR. Available at [https://www.knchr.org/Portals/0/GroupRightsReports/Equal%20In%20Dignity%20and%20Rights\\_Promoting%20The%20Rights%20Of%20Intersex%20Persons%20In%20Kenya.pdf?ver=2018-06-06-161118-323](https://www.knchr.org/Portals/0/GroupRightsReports/Equal%20In%20Dignity%20and%20Rights_Promoting%20The%20Rights%20Of%20Intersex%20Persons%20In%20Kenya.pdf?ver=2018-06-06-161118-323) (accessed 29 June 2019).

<sup>50</sup> Report of the taskforce on policy, legal, institutional and administrative reforms regarding the intersex persons in Kenya <https://www.knchr.org/Portals/0/INTERSEX%20TASKFORCE%20FREPORT-Abridged%20Version.pdf> (accessed 7 June 2021).

The measures which are been taken in South Africa and Kenya are a first in protecting the rights of intersex persons on the African continent. If other countries take an initiative coping the best practices from these two countries as well as other countries from outside of Africa, human rights violations can be minimised and eradicated.

## **CHAPTER 4: WHAT HAS BEEN DONE? ENGAGEMENT AT THE AFRICAN COMMISSION AND OTHER FORUMS**

The state of intersex organising in Africa is still in its infancy stages due to factors such as the lack of funding, invisibility of intersex persons and difficult sociolegal environments. Previously, much of the advocacy around intersex issues was done by civil society organisations (CSOs) working broadly on LGBTI issues. However, the inclusion of intersex by CSOs broadly working on LGBTI issues has been contentious, the debate been that intersex is inherent, biological and relates to sex characteristics as opposed to the other issues which relate to sexual orientation and gender identity. On the other, the issues have been mixed together due to ally ship, similarity of struggles between intersex and LGBT groups and lack of dedicate funding for intersex programs. This has seen the recent emergence of CSOs primarily working on the rights of intersex persons. There is now a strong presence of CSOs working on intersex issues in Kenya, SA, Uganda, Zambia and Uganda which has resulted in a number of developments engagements with the government. Some of the intersex led organisations have been part to this study and conducting advocacy activities at the African Commission.

### **4.1 Advocacy at the African Commission**

Intersex issues have largely been invisible at the sessions of the African Commission. Due to lack of funding, most intersex activists do not have the capability of accessing funds to participate at sessions of the African Commission. Advocacy strategies at the African Commission so far have been aimed at raising awareness among activists and state delegates and also engaging the African Commission to take urgent measures to avert the human rights violations taking place against intersex persons.

Since 2017 a number of side-events have taken place on the sidelines of African Commission sessions. The events have been hosted by the Centre for Human Rights and Irandi, based in SA, and SIPD based in Uganda and largely working in East-Africa. IPSK-Kenya, Intersex Society of Zambia and Intersex Community of Zimbabwe have also been engaged in advocacy activities at the African Commission. Further in July 2019, this study was initially presented the 26<sup>th</sup> extra-ordinary session of the African Commission after which feedback was on the report was given by the Commissioners. The study was developed further to its current form for presentation during an ordinary session of the African Commission.

At sessions in Banjul, in November 2017, former Commissioner L. Mute was a guest panellist. Commissioner Mute acknowledged that, in light of the nature of human rights violations against intersex persons, work had to be done at the national level, and that clearly the African Commission had a role to play in setting the minimum standards that guide legislative and policy development at the domestic level. One of the avenues is the institutional practice of the African Commission of issuing soft law standards on human rights issues that require its attention.

Commissioner Mute was also concerned by the conflation of intersex and other LGBT issues: 'You have to do a lot of work in clarifying and explaining what intersex is all about. There is a lot of conflation maybe arising from the acronym LGBT.' He gave an example of the case *R.M v Attorney-General and Others* Petition 705 of 2007 in Kenya, in which the judge delved into issues dealing with other sexual minorities when clearly the person in the case was an intersex person.

The Centre for Human Rights also hosted the first-ever side event on intersex children at a session of the Committee of Experts in Addis Ababa. The session was on the sexual and reproductive health rights of intersex persons in an African context and as provided for under the Children's Charter. Subsequently, the IPSK has also engaged in a number of advocacy activities at the Committee of Experts in Addis Ababa. While the protection against intersex human rights violations may seem to be provided for under the African Children's Charter, it is limiting as it only covers children and not intersex adults. This has motivated the multi-faceted approach to the institutions of the African Commission and the African Committee of Experts on the Rights and Welfare of the Child.



*Intersex Persons Society of Kenya*

## **4.2 Advocacy at the African Committee of Experts on the Rights and Welfare of the Child**

In 2018, Centre for Human Rights hosted the first-ever side event on intersex children at a session of the Committee of Experts in Addis Ababa. The session was on the sexual and reproductive health rights of intersex persons in an African context and as provided for under the Children's Charter.

The subject on intersex children was relatively new to the ACERWC CSO Forum. The aim of the session was to build knowledge and awareness on the subject, ignite informed debate on legislative and policy changes that are necessary countries that have ratified the African Charter on the Rights and Welfare of the Child (Charter), and encourage the ACERWC to exercise its mandate to protect and promote the rights of intersex children.

The Centre also made a statement at the opening of the ACERWC's ordinary session on 12 November 2018, which noted among other things, the plight of intersex children on the continent. The Centre called on the ACERWC to devote time to discuss the concern in further detail, and to provide guidance to African States on how to respond to stop further violations of the affected children. Specifically, the Centre recommended that the ACERWC collaborates with the African Commission on a joint Resolution on the Status of Intersex Persons on the African continent, which is already under discussion at the Committee. Emphasis was also made on the need for urgent pan-African research which can generate evidence for advocacy purposes.

Subsequently, the IPSK has also engaged in a number of advocacy activities at the Committee of Experts in Addis Ababa. While the protection against intersex human rights violations may seem to be provided for under the African Children's Charter, it is limiting as it only covers children and not intersex adults. This has motivated the multi-faceted approach to the institutions of the African Commission and the African Committee of Experts on the Rights and Welfare of the Child.

## CHAPTER 5: WHAT INTERVENTIONS CAN BE IMPLEMENTED BY THE AFRICAN COMMISSION?

The precarious situation of intersex persons in Africa requires urgent address by the African Commission. It is evident that the current legislative and policy gaps in respect of protecting intersex persons in African countries is one of the factors exacerbating the human rights violations against intersex persons. Legislation is very important in societies, in protecting the plight of the marginalised. With adequate legal protection, the human rights violations can be minimised.

The African Commission is a supranational body that can act as a useful vehicle in influencing legislative and policy changes in African countries through norm setting, for example, by way of the elaboration and adoption of soft law standards. We assume that soft law adopted by the African Commission will permeate the national level and fill the legislative gap in African countries.

In the past the African Commission has employed its practice of passing soft law standards like resolutions, model legislation, general comments, principles and guidelines, declarations and plans of actions. The interventions which may be considered to address the plight of intersex persons, will be discussed below.

The African Commission has already made progress when it comes to sexual and gender minorities when it adopted Resolution 275 on the Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity. However, Resolution 275 focuses on sexual orientation and gender identity, which is not related to sex characteristics of intersex persons. Further, the Resolution focuses primarily on violence. While issues related sexual orientation and gender identity and those concerning intersex often overlap, some issues are completely distinct. Examples are genital 'normalising' surgery, intersex genital mutilation by traditional birth attendants, infanticide and baby dumping. These issues, which are pertinent to intersex person only, require specific focus and elaboration.

It is with this in mind that the African Commission may adopt a resolution or declaration noting the various human rights violations against intersex persons, and recommending states to put measures in place to avert continued violations from taking place. A resolution will provide precision and would be able to capture the salient issues. It will be relevant particularly in urgent matters. Such a resolution of the Africa Commission in place can influence states to institute legislative and policy changes at a domestic level. Further the resolution will be an important advocacy tool to raise awareness and engage governments to make legal reform on issues relating to intersex persons. A draft resolution on intersex persons has been attached to this study and this can form a basis upon which the rights of intersex persons are protected in Africa.



Apart from adopting a resolution the African Commission may also develop principles and guidelines on the rights of intersex. Principles and guidelines are a more comprehensive and elaborate way of highlighting the issues affecting intersex persons. The principles and guidelines may be a first line intervention by the African Commission or may be informed by a resolution which is already in place.

Lastly, the African Commission may also develop a model legislation providing for the protection and promotion of the rights of intersex persons. Such a model legislation may be adopted by African countries to fill in the legislative gaps. With such a law in place, policy changes will be influenced in the respective countries.

## CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

The study highlighted the main challenges faced by intersex persons on the African continent. Intersex persons are facing human rights violations in the form of unnecessary genital 'normalising' surgeries on minors, lack of appropriate legal recognition and poor birth registration processes, discrimination in the justice system, infanticide, baby dumping and discrimination in other spheres of life. The existing legislative gap in African countries on the laws protecting intersex persons has contributed to the human rights violations. However, as a matter of law and principle the human rights of intersex persons are effectively protected under the African Charter. Progressive measures protecting intersex persons have been put in place by other regional human rights organisations, UN agencies and a number of countries in the world.

The African Commission has influenced legislative and policy changes in Africa since it came into existence in many domains. It should now, drawing inspiration from recent developments across the world, as a matter of urgency expand this work to include intersex persons. The African Commission should institute its long practice of passing soft law standards on a number of human rights issues of concern. The soft law standard should capture all the human rights violations against intersex persons and measures that states should put in place. Regardless of the form of soft law standard (resolution, model legislation, principles and guidelines, general comment, declarations and plans of action) the African Commission will see best suited to address the issue of intersex persons, we encourage the African Commission to consider the following issues:

1. Prohibition of non-consensual and deferrable medical interventions, including surgical, hormonal and sterilisation interventions that alter sex characteristics of intersex persons, and ensure the protection and respect for physical integrity and autonomy regarding intersex persons;
2. Putting an end to non-consensual sterilisation of intersex people; infanticide and abandonment of intersex children;
3. Prohibiting discrimination on the basis of intersex traits, characteristics or status including in education, healthcare, employment, competitive sports, access to public services, and address such discrimination through relevant anti-discrimination initiatives;

4. Providing healthcare personnel with training on the health needs and human rights of intersex persons and the appropriate advice and care to give to parents and intersex children, being respectful of the intersex person's autonomy and psychological integrity;
5. Including intersex education in antenatal counselling and support; and provide healthcare personnel with training on the health needs and human rights of intersex persons and the appropriate advice and care to give to parents and intersex children, being respectful of the intersex person's autonomy, psychological integrity and sex characteristics;
6. Enacting enabling laws and institutionalising administrative processes allowing intersex persons to amend sex markers on birth certificates and other official documents;
7. Ensuring that intersex people have the right to full information and access to their own medical records and history;
8. Ensuring that human rights violations against intersex persons are investigated and alleged perpetrators prosecuted, and that victims of such violations have access to an effective remedy, including redress and compensation;
9. Raising awareness around intersex issues and the rights of intersex people in communities and society at large; and
10. Ensuring that members of the judiciary, immigration officers, law enforcement officers, healthcare officials, education and other officials and personnel are trained to respect and provide equal treatment to intersex people.

## ANNEXTURES

### **(Draft) Resolution on the protection of the rights of intersex persons in Africa**

The African Commission on Human and Peoples' Rights

**Recalling** its mandate to protect and promote human and peoples' rights in Africa under the African Charter on Human and Peoples' Rights (African Charter);

**Further recalling** that Article 2 of the African Charter prohibits discrimination of the individual on the basis of distinctions of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status;

**Noting** that Article 3 of the African Charter entitles every individual to equal protection of the law, and that Article 5 guarantees recognition of legal status and prohibition of torture, cruel, inhuman and degrading treatment;

**Further noting** that Article 16 entitles individuals to the right to enjoy the best attainable state of physical and mental health; and that Article 9 entitles every individual to the right to receive information, for example, access to medical records and history;

**Considering** that Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and Article 21 of the African Charter on the Rights and Welfare of Children prohibit harmful social and cultural practices;

**Recognising** that intersex persons, who are born with a reproductive or sexual anatomy that does not seem to fit the typical definitions of female or male, exist in all societies;

**Further recognising** that non-consensual and unnecessary genital normalising surgery or treatment in a medical or non-medical setting may cause life-long psychological suffering, depression, permanent infertility, pain, incontinence and loss of sexual pleasure, without the young persons concerned appreciating the decision-making which violates their right to physical integrity;

**Further recognising** that the above non-consensual and unnecessary genital normalising surgery or treatment has irreversible consequences similar to and constituting genital mutilation;

**Concerned** by the human rights violations against intersex persons, which include non-consensual and deferrable medical surgical and hormonal interventions that alter the sex characteristics of intersex people without their consent; infanticide and child abandonment; the lack of appropriate legal recognition and administrative processes which impede intersex persons from acquiring or amending identity documents; unfair discrimination in schools, health care facilities, competitive sports, work, and access to public services; and detention;

**Further concerned** by the invisibility and lack of awareness of the plight of intersex persons in African communities;

**Recalling** that state parties have an obligation to recognize the rights, duties and freedoms enshrined in the African Charter by adopting legislative or other measures to give effect to them;

**Noting** that most member states do not have legislative, policy and other appropriate measures to protect the rights of intersex persons;

The African Commission calls upon member states to:

1. Prohibit any non-consensual and deferrable medical interventions, including surgical, hormonal and sterilisation interventions that alter sex characteristics of intersex persons, and ensure the protection and respect for physical integrity and autonomy regarding intersex persons;
2. Put an end to non-consensual sterilisation of intersex people; infanticide and abandonment of intersex children;
3. Prohibit discrimination on the basis of intersex traits, characteristics or status including in education, health care, employment, competitive sports, access to public services, and address such discrimination through relevant anti-discrimination initiatives;
4. Provide health care personnel with training on the health needs and human rights of intersex persons and the appropriate advice and care to give to parents and intersex children, being respectful of the intersex person's autonomy and psychological integrity;
5. Include intersex education in antenatal counselling and support; and provide health care personnel with training on the health needs and human rights of intersex persons and the appropriate advice and care to give to parents and intersex children, being respectful of the intersex person's autonomy, psychological integrity and sex characteristics;
6. Enact enabling laws and institutionalise administrative processes allowing intersex persons to amend sex markers on birth certificates and other official documents;
7. Ensure that intersex people have the right to full information and access to their own

- medical records and history;
8. Ensure that human rights violations against intersex persons are investigated and alleged perpetrators prosecuted, and that victims of such violations have access to an effective remedy, including redress and compensation;
  9. Raise awareness around intersex issues and the rights of intersex people in communities and society at large; and
  10. Ensure that members of the judiciary, immigration officers, law enforcement officers, health care officials, education and other officials and personnel are trained to respect and provide equal treatment to intersex people.

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