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**Mini dissertation**

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Title: Law and silence of intersex status: A threat to human rights in Botswana.

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## Summary

The topic seeks to investigate the legal recognition of intersex persons in Botswana. The researcher will analyse domestic laws, regional and international laws in trying to locate whether intersex persons in Botswana are equally protected by law. In locating such a place, since intersex has been mainly medicalised and pathologised across the world, an assessment will be made into the health provisions of intersex persons and the health policies and laws in Botswana. An intersection of the health aspects and the right to fundamental human rights, non-discrimination based on sex, as enshrined in the constitution and equality as has been defined by the domestic and regional courts, will be used as a guide to advocate for the rights of intersex persons in Botswana. The researcher will conclude that Botswana has a track record of judicial activism, by way of case law on minority rights hence intersex persons can be protected in the absence of specific laws. The findings of the qualitative research conducted among civil society organisations, will be used to inform the narrative on activism and awareness of intersex human rights issues. It will be concluded that civil society with robust and effective lobbying strategies can be used to inform policy and law reform for intersex human rights. The strategies employed can locate the space at national policy level to accelerate the rights of intersex persons. Recommendations drawn will guide organisations, health professionals and policy makers in addressing and promoting intersex human rights issues locally.

## Declaration of originality

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Declaration

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1.2 declare that this mini dissertation is my own original work. Where other people's work has been used (either from a printed source, Internet or any source), this has been properly acknowledged and referenced in accordance with departmental requirements.

1.3 have not used work previously produced by another student or any other person to hand in as my own.

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Signature of student....



Signature of supervisor...



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## **Annexures**

Civil society questionnaire Annexure ‘**A1-A3**’

Ethical approval Annexure ‘**B**’

Letter of request to Ministry of Labour and Home Affairs ‘**C1-C2**’

Questionnaire to the Director of Birth and Death Registration Ministry of Labour and Home Affairs ‘**D**’

Annexure M Submission form

Annexure N Declaration of originality

Annexure G Title page

## Chapter 1

### 1 Introduction and background

The adoption and respect of fundamental human rights together with implementation of effective laws is fundamental to the enjoyment of human rights. One of the core elements of humanity is the right to identity and legal recognition, as it gives one a sense of belonging, individuality and security in the society. However, societal norms and practices have their stipulations which may disregard one's sense of identity and 'normalise the popular.'<sup>1</sup> A legal system can also contribute to the exclusion of persons who identify differently from normative social gender construction of male and female binaries. Identity is a word that has a place in everyday language in private and public<sup>2</sup> domain and it is used to affirm one's recognition of self.<sup>3</sup> Diamond states that gender identity is the recognition of the perceived social gender attributed to a person, where a male is seen as a boy or a man and a female, as girl or as a woman. In that context, there is an attachment of social and cultural meaning to the gender.<sup>4</sup> Society has over time depended on genetic, hormonal and sex characteristics to determine gender and gender roles.<sup>5</sup> Gender is one of the contested subjects because of its 'multiplicity.'<sup>6</sup> The multiplicity of gender includes gender minorities like intersex persons. Therefore, such minorities are questioned, 'managed,' and 'treated' so that they can conform to normative gender binaries.<sup>7</sup>

An intersex person is one born with physical characteristics that are both male and female. Intersex status is varied and comprises of undefined genitalia which does not fall into either male or female genitalia.<sup>8</sup> An individual may have XX chromosomes and male-like phallus or have XY chromosomes and not have a vagina, but a penis instead.<sup>9</sup> Intersex status has many variations and cannot be confined to a single group.<sup>10</sup> Intersex status is seen as disrupting<sup>11</sup> gender binaries and social construction of gender and that has created a space for struggle and politics.<sup>12</sup> The struggle is defined in socially approved gender role hierarchies, from the most conventional to the most despised hierarchies. The hierarchy includes individuals without

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<sup>1</sup>J Kaggwa 'Intersex the forgotten constituency' in S Tamale (ed) *African sexualities: A reader* 2011 231. Kaggwa explains the challenges of growing up and finding a space in gender normative environment in Uganda. While he was raised as a girl he felt a strong inclination at a later stage in his life that he was a man.

<sup>2</sup>R Murray 'A feminist perspective reform of the African human rights system' (2001) 1 *African Human Rights Law Journal* 219.

<sup>3</sup>M Diamond 'Sex and gender are different: Sexual identity and gender identity are different' (2002) 7 *Clinical Child Psychology and Psychiatry* 322.

<sup>4</sup>Diamond (n 3 above) 323.

<sup>5</sup>A Bolin & P Whelehan *Human sexuality: Biological, psychological and cultural perspectives* (2009) 141.

<sup>6</sup>S Linstead & A Pullen 'Gender as multiplicity desire displacement difference and dispersion' (2006) 9 *Human Relations* 1287.

<sup>7</sup>PM Nthumba & LL Carter *et al* 'Ambiguous genitalia in rural Africa and the complexities of management: Which way forward?' (2008) 1 *East and Central African Journal of surgery* 54.

<sup>8</sup>J van Lisdonk 'Living with intersex/DSD An exploratory study of social situation of persons with intersex /DSD' Netherlands Institute for Social Research August (2014) 9.

<sup>9</sup>Diamond (n 3 above) 326.

<sup>10</sup>Bolin & Whelehan (n 5 above) 143- 144.

<sup>11</sup>G Davis 'Giving sex: Deconstructing intersex and trans medicalization practices' (2016) 30 *Gender and Society* 494.

<sup>12</sup>A Miller & CS Vance 'Sexuality human rights and health' (2004) 7 *Health and Human Rights* 8.

names and identities.<sup>13</sup> Intersex persons may struggle where laws are not inclusive of intersex status, with acquiring official identity documents which may not support an individual's intersex status. As intersex status is mostly noticed at birth, medical professionals and parents or guardians are instrumental in determining the gender of an intersex infant. This can be based on medical and societal norms of normative gender. The identity at birth may be later rejected in life, when an intersex person finds their own identity and gender. It has been argued that although gender is fluid and consistently changing over time, it is a 'matter of political significance,'<sup>14</sup> thus gender can empower and disempower people. Therefore, the contested site of struggle for gender can be located in international human rights law, national legislations and the daily lived struggle of those who do not have a legally acknowledged or recognised gender.

The right to life, legal recognition, self-expression, autonomy and self-determination are examples of civil rights which can be used positively to grant recognition and self-identity in relation to gender. Gender binaries can limit some of those rights, which are used to differentiate persons.<sup>15</sup> It is these differentiations in the society that lead individuals to seek group identification rights because of their non-conforming status. Therefore, recognition may be sought by inclusion in laws or repealing laws that are unjust and unreasonable.<sup>16</sup>

The Constitution of Botswana of 1996 (the Constitution) provides for civil and political rights.<sup>17</sup> Botswana ratified the International Covenant on Civil and Political Rights (ICCPR) in September 2000.<sup>18</sup> Civil rights are empowering in society as they provide for freedoms and liberties that an individual should enjoy by virtue of being a human being. The Constitution provides for the right to life, right to be treated equally before the law and non-discrimination. While the Constitution recognises fundamental human rights, it does not expressly protect the rights of those who are outside the male and female gender binaries, including intersex persons. Section 44 of the Interpretation Act of Botswana<sup>19</sup> provides that 'words importing the male sex include female sex and words importing female sex includes male.' The wording in the Constitution refers to 'he' as a gender inclusive of she, and the Children's Act of 2009<sup>20</sup> defines a child as 'any' person under the age of 18. These definitions are selective and only recognise male and female persons.

Intersex status has overtime come to be known as a medical 'disorder', which can be treated and cured.<sup>21</sup> The term intersex, which is commonly used by activists and some medical

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<sup>13</sup>As above.

<sup>14</sup>S Hall Introduction: Who needs identity in S Hall & P. du Gray *Questions of cultural identity* 1996.

<sup>15</sup>Linstead & Pullen (n 6 above) 1301.

<sup>16</sup>Diamond (n 3 above).

<sup>17</sup>Constitution of Botswana of 1996 secs 1-15.

<sup>18</sup>GA res 2200 A (XXI), 21 UB GAOR Supp (No.16) at 49 UN Doc. A 1636 (1966) UNTS 3; 6 ILM 368 (1967) adopted on 16 December 1966 entered into force 3 June 1967.

<sup>19</sup>Act 20 of 1984.

<sup>20</sup>Act 8 of 2009.

<sup>21</sup>J Greenberg 'International legal developments protecting the autonomy of rights of sexual minorities; who should determine the appropriate treatment for an intersex infant?' in S E Sytsma (ed) *Ethics and intersex* (2006) 87.

doctors across the world, is an acceptable and an inclusive term, than hermaphrodite or disorders of sex development (DSD)<sup>22</sup>, which is still used although not as much as it was used in the 1990s.<sup>23</sup> DSD is discussed briefly later in this Chapter.

As a result of the way intersex is scrutinized socially, medically and legally, there are guideline approaches known as protocols which have been developed to determine whether a medical professional, parents and guardians, the child or a court can make a gender and sex choice for an intersex child.<sup>24</sup> The approaches are meant to eliminate the traumatic effects of gender normalizing medical interventions. The protocols are discussed in detail in Chapter Two.

Upon birth of an infant, the law requires that a child be registered and thereafter acquire a birth certificate. The law does not take cognizance of the variations of biological gender and systematically intersex persons are subject to experiences of prejudices, stigma and discrimination because of their sex characteristics and physical outlook.<sup>25</sup> Their enjoyment of civil and socio-economic rights is limited and violated. Therefore, intersex persons face social and legal challenges in terms of recognition of their gender and subsequent standing in the society.

A national study conducted in 2013, categorised babies born in that year as females and males without acknowledging intersex infants.<sup>26</sup> The absence of guidelines on intersex infants in Botswana and exclusion from birth statistics, and other national statistics, reports and surveys promotes normative standards and expectations by society and medical health care, in respect of gender binaries.

The Birth and Deaths Registration Act<sup>27</sup> (BDRA) does not provide any guidelines on how intersex infants and children can be protected because of their ‘biological difference.’ It is notable that the Ministry of Health of Botswana does not have any publicly known records of how health professionals deal with gender status of an intersex infant. It is also not clear whether the curriculum of local health training institutions is inclusive of intersex issues. Therefore, a challenge is posed when an intersex person applies for identity documents such as a national identity card, passport or a driver’s license. There is no known procedure on how intersex persons can have their intersex status recognised in all identity documents that use gender marker as a necessary formality for identification.

## 1.1 Problem statement

The laws of Botswana do not recognise any other gender variations outside of ‘male’ and ‘female,’ including intersex status. Such non-recognition is problematic as it does not take

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<sup>22</sup> Lisdonk (n 8 above) 15.

<sup>23</sup> As above.

<sup>24</sup> A Kennedy ‘Fixed at Birth: Medical and legal erasures of intersex variations’ (2016) 39 *University of New South Wales Law Journal* 820-822.

<sup>25</sup> Lisdonk (n 8 above) 17.

<sup>26</sup> CSO (2009) ‘Botswana Health Statistics Annual Report’ 143-144.

<sup>27</sup> Act 16 of 1998.

cognizance of the very fiber of civil rights enshrined in the Constitution. The rights to identity, autonomy, and sexuality are therefore disregarded. In Botswana protocols that are used for intersex gender assignment on infants are unknown, which makes intersex children vulnerable to intrusive genital surgeries and any other unnecessary surgeries. Intersex infants have been and are still subjected to constructive genital surgery worldwide, to align their gender with normative binaries as a result of societal expectations.<sup>28</sup>The medicalisation and pathologising of intersex persons has led intersex individuals and international organisations to advocate for and raise awareness around intersex status as a human rights issue. In this respect, the right to bodily-autonomy and freedom of choice are promoted, so that a child can choose their gender and sex at their own time.<sup>29</sup>Public advocacy and visibility of intersex human rights issues is needed in Botswana, as there is lack of transparency in the way the national health system approaches intersex status and issuing of national and international identification documents to intersex persons by the Ministry of Home and Labour Affairs. The researcher uses the term intersex as it is inclusive and has a human rights approach to it which the researcher believes is not discriminatory.

## 1.2 Research question

The study seeks to determine whether Botswana has laws, policies and procedures which recognise the human rights of intersex persons to gender identity and other rights pertinent to such an identity. In determining this questions the study:

- analyses domestic policies, practices and laws that impact on intersex persons with special reference to gender certification.
- analyses domestic policies, practices and laws that impact on the physical and psychosocial health of intersex persons.
- locates un-met rights of intersex persons in Botswana within a human rights framework.
- interrogates the role of civil society in advocating and promoting the human rights of intersex persons.
- draws lessons for Botswana from policies, practices and laws of other countries with progressive laws and policies on intersex human rights persons.

## 1.3 Methodology

The study uses the desktop review and an empirical study to interrogate the legal and policy systems of Botswana. A comparison of regional and international law is made in an effort to draw a conclusion and make recommendations on intersex human rights in Botswana. The study also reviewed comparative laws and literature on the legal recognition of intersex status.

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<sup>28</sup>Greenberg (n 21 above).

<sup>29</sup>Kennedy (n 24 above) 821.

The empirical study focused on four civil society organisations (CSOs), which informed the findings in respect to intersex rights awareness, challenges and activism in Botswana. All the participant organisations were interviewed by the researcher using a questionnaire comprising of fifteen standard questions.<sup>30</sup> The findings are fully discussed in Chapter Four. The empirical study was approved by the Ethics Committee of the University of Pretoria by a letter dated 1 September 2016.<sup>31</sup>

### 1.3.1 Limitations of the study

The researcher intended to interview the Director in the Ministry of Home and Labour Affairs (Ministry) who is the issuing authority of national identity documents by using a questionnaire as a guideline, but the request was declined.<sup>32</sup> The researcher had wanted to gather information on the processes that are undertaken by the Ministry when an intersex person requests change of identity documents. This was a limitation as the researcher also wanted to find out the number of such requests made by intersex persons over a period of time. The findings in Chapter Four lack the information and numbers that could have informed the researcher of the frequency of requests to change identity documents to reflect intersex status. The researcher did not interview any intersex persons for the empirical study. However, all four CSO's selected for the empirical study, advocate for and promote intersex human rights.

## 1.4 Literature review

The word 'intersex' was commonly used in the twentieth century as a category of those who were born as neither male nor female.<sup>33</sup> In a medical sense, intersex persons are generally diagnosed in four different ways: the make-up of chromosomes, external genitalia, hormonal status and internal reproductive organs.<sup>34</sup> This is due to the fact since 19<sup>th</sup> century intersex status, in the American society,<sup>35</sup> has been diagnosed as an abnormality that the medical fraternity could treat and cure,<sup>36</sup> so that intersex infants could fit into the society; gender wise. It is estimated that one in two thousand infants are born intersex worldwide,<sup>37</sup> with many variations of intersex.<sup>38</sup> The use of the word intersex was adopted, and spread across the world because of intersex rights activism language. However, WHO standards<sup>39</sup> classify intersex as disorder referred to as DSD, as already discussed briefly earlier in this Chapter. DSD classifies gender into male and female binaries. Botswana as a country applies and

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<sup>30</sup> Annexure 'A1-A3.'

<sup>31</sup> Annexure B.

<sup>32</sup> Annexure "C1-C2" and "D."

<sup>33</sup> M Carrera & R DePalma *et al* 'Sex/gender identity: Moving beyond fixed and 'natural' categories' (2012)15 *Sexualities* 997.

<sup>34</sup> Nthumba & Carter *et al* (7 above).

<sup>35</sup> Davis (n 11 above) 508.

<sup>36</sup> Carrera & DePalma *et al* (n 33 above) 998.

<sup>37</sup> Bolin & Whelehan (n 5 above) 144.

<sup>38</sup> As above.

<sup>39</sup> International Statistical Classification of Diseases and Related Health Problems 10<sup>th</sup> Revision (ICD-10) WHO Revision for; 2016 Chapter XVII Congenital malformation, deformations and chromosomal abnormalities (Q00-Q99).

follows WHO standards. This approach, therefore, reflects normative gender binaries.<sup>40</sup> In Africa, gender binaries are important for social and cultural inclusion and intersex is frowned upon and considered as abnormal.<sup>41</sup>

In the 1950s, John Money and his colleagues at John Hopkins Hospital, developed procedures of constructing genitalia of intersex infants to conform to the societal binaries of female or male.<sup>42</sup> More often this was done without the consent of parents and where parents consented to the construction of their child's genitalia, there was little information shared with them.<sup>43</sup> Money believed that a child will grow into the assigned role without challenges after surgery.<sup>44</sup> It is argued that this was an effort to 'correct' DSD and diminish intersex status.

The term DSD is regarded by intersex persons and activists to be discriminatory and stigmatising.<sup>45</sup> Intersex as categorised as DSD, is treated as a 'disorder' and 'illness.' It is argued that intersex status is only a difference in biology<sup>46</sup> and that it does not need any treatment and fixing. Intersex human rights activists have been advocating for the eradication of medicalisation of intersex persons since the 1980s.<sup>47</sup>

The medicalisation of intersex status and activism against medicalisation, has led to categorisation and development of protocols for intersex status. There are three protocols, being the traditional approach and two human rights based approaches.<sup>48</sup> The two human rights based approaches were developed as a result of intersex persons and activists started advocating and lobbying for the protection of intersex persons' human rights.<sup>49</sup> Money's approach to intersex status is referred to as the traditional dominant protocol, as it promotes genital surgery as a treatment for intersex status. The second protocol is based around parental consent in respect of genital surgery on intersex infants. Lastly, the third protocol is based on the right to the individual intersex person's right to bodily autonomy and freedom to make a decision in respect of undergoing medical interventions or not. The protocols are discussed in Chapter Two.

In the context of Botswana intersex human rights activism is almost non-existent. Rainbow Identity Association (RIA),<sup>50</sup> an organisation focusing on intersex and transgender human rights issues is creating space for visibility and activism of intersex human rights issues in

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<sup>40</sup> As above.

<sup>41</sup> Kaggwa (n 1 above) 231.

<sup>42</sup> AD Dreger AM Herdon 'Progress and politics in the intersex rights movement: Feminist theory in action' (2009) 2 *A Journal of Lesbian and Gay Studies* 15.

<sup>43</sup> Dreger & Herdon (n 42 above).

<sup>44</sup> Kaggwa (n 41 above).

<sup>45</sup> Carrera & DePalma (n 33 above) 999.

<sup>46</sup> As above.

<sup>47</sup> F Kerrigan *Getting to rights: The human rights of lesbian gay bisexual transgender and intersex persons in Africa* (2013) 36.

<sup>48</sup> T A Mattis 'Exceptions to the rule curing the law's failure to protect intersex infants' (2006) 21 *Berkeley Journal of Gender Law and Justice* 81.

<sup>49</sup> S Gross 'The chronicle of an intersexed activist's journey in S Tamale (ed) *African Sexualities: A reader* (2009) 236.

<sup>50</sup> [www.riabotswana.org](http://www.riabotswana.org) (accessed 14 December 2016).

nationally. There are no laws that have been developed specifically for the protection of the rights of intersex persons, to the extent that intersex status and the right to health are related. Botswana health policies are not inclusive or indicative as to how medical health deals with intersex status. The provisions of the Constitution of Botswana have been used on numerous occasions to test the law in respect of the protection of sexual minority rights and key some key populations. That being the case there has not been any case before the High Court nor the Court of Appeal on issues directly addressing intersex status except for *Thuto Rammoge v Attorney General*<sup>51</sup> which dealt specifically with the registration of a lesbian gay bisexual transgender and intersex (LGBTI) advocacy organisation.

On a global and regional level, there have been positive as well as negative developments on intersex human rights issues. A detailed comparative analysis of three countries, Malta, South Africa and Kenya which have made progress in intersex human rights will be discussed in Chapter Three. There is jurisprudence that is progressive in recognising and promoting intersex human rights issues as human rights. There is also jurisprudence that has failed to promote and protect those rights.

In 2003, in *Attorney General v Kevin*,<sup>52</sup> Australia recognised that intersex persons have the right to privacy and that an intersex person can marry according to their own chosen sex category. In relation to children, the Court has developed practice guidelines that prohibit surgery on intersex infants. The guidelines provide that surgery can be performed only until age of consent<sup>53</sup> and that the surgery must be in the best interest of the child.

In 1979 in *Marriage of C and D*,<sup>54</sup> an Australian family court annulled a marriage between an intersex man and his wife. C brought an application before the Court to determine whether D was a man. The Court found that D was neither a man nor woman, although he had altered his physical outlook with consistent surgery and hormonal therapy to match how he felt. The Court did not take into consideration D's right to self-autonomy and therefore, did not make a pronouncement to protect his status as an intersex person.

In *re Volling Regional Court of Cologne*,<sup>55</sup> a German Court held that the Plaintiff, who was intersex, did not consent to gender alteration surgery. She sued the state for irreparable harm, basing her argument on the fact that at the time, she did not consent to surgery performed on her. The Court decided in her favour and she was awarded damages. The *Re Volling* case therefore demonstrates judicial progress in protecting intersex persons' right to bodily autonomy and self-determination.

In *Baby 'A' (Suing through her mother EA) & another v Attorney General & 6 others*<sup>56</sup> case, The Kenyan Constitutional Court ordered that an intersex minor child who did not have a birth certificate be given a birth certificate as a form of legal recognition and identity. The

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<sup>51</sup>*Thuto Rammoge and Others v The Attorney General and Others* MALHLB 275 High Court.

<sup>52</sup>*R v Kevin* 2003 FLR 300 Family Court.

<sup>53</sup>As above.

<sup>54</sup>*In the Marriage of C and D (falsely called C)* 1979 28 ALR 542 Family Court.

<sup>55</sup>*Re Volling* Regional Court Cologne, Germany (6 February 2008).

<sup>56</sup>*Baby "A" (suing her mother E A) & others v Attorney General and 6 others* Petition 266 of 2013 Kenya High Court.

Court also ordered that the hospital where *Baby A* born, must provide the court with statistics of children born intersex and evidence of medical protocols used in determining the gender of the child at birth. Despite the lack of law on protecting intersex persons in Kenya, the Constitutional Court made a positive step in recognising that intersex persons also have a right to legal recognition and to be treated equally by law.

*Richard Muasya v The Honourable Attorney General*<sup>57</sup> case demonstrates the negative body perceptions and scrutiny that intersex persons may be subjected to people in general and also those in authority. RM was a criminal convict who was repeatedly subjected to bodily searches by prison warders in an attempt to find out about his genitalia. The Court acknowledged that the bodily searches were humiliating and RM was granted damages on the basis that he was subjected to degrading and inhuman treatment. The court however, disregarded his claim that he did not have identity documents because he was an intersex person.

Other countries have made progress in adoption of laws in the promotion and protection of intersex human rights. Malta was the first country in the world to enact specific laws on intersex human rights issues. In 2015, the country enacted the Gender Identity Expression and Sex Characteristics Act (GIESCA).<sup>58</sup> The Act provides for the right to identity, to change and amend identity documents and non-discrimination, among other rights.<sup>59</sup> Apart from the Act, the country has a policy that is directed at protecting children who are transgender, intersex and gender variant in schools.<sup>60</sup> The policy acknowledges that intersex status is not as rare as it is thought to be hence the need to put in place guiding policies to protect children who are born intersex. The Act has been hailed as a standard for promotion of anti-discrimination for intersex status in Europe and across the world that also provides for legal recognition and the right to health.<sup>61</sup> The GIESCA also provides for access to health and welfare services.<sup>62</sup> The GIESCA will be discussed fully in Chapter Three.

In South Africa, The Alteration of Sex Description and Sex Status Act (ASDSSA) recognises intersex persons as gender variant, and their right to non-discrimination and dignity.<sup>63</sup> There are other pieces of legislation which recognise the right to non-discrimination<sup>64</sup> of intersex persons in South Africa. Although there are laws in place, there are challenges experienced by intersex persons, such as denial to change their identity documents, discrimination and denial to get married.<sup>65</sup>

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<sup>57</sup>*Richard Muasya v The Honourable Attorney General* Kenya High Court.

<sup>58</sup>Gender Identity Expression and Sex Characteristics Act No XI of 2015 of Malta.

<sup>59</sup>(n 58 above) secs 4, 8 & 13.

<sup>60</sup>Trans, gender variant and intersex students in schools Policy Ministry of Education and Employment June 2015 Malta.

<sup>61</sup>M Szydowski 'Gender recognition and the rights to health and health care: Applying the principle of self-determination to transgender people' (2016) *International Journal of Transgenderism* 10.

<sup>62</sup>Szydowski (n 61 above) 8.

<sup>63</sup>The Alteration of Sex Description and Sex Status Act 49 of 2003 of South Africa.

<sup>64</sup>Promotion of Equality and Prevention of Unfair Discrimination Act 2000 of South Africa.

<sup>65</sup>T Klein 'Intersex and transgender activism in South Africa' (2009) 3 *Liminalis* 15.

As a result of the positive and negative developments around intersex human rights, United Nations (UN) has taken a position in various forums demanding for the protection of and promotion of intersex human rights. In 2011 in Costa Rica, the Committee on Elimination of Discrimination against Women reported and expressed concern that intersex women were subject to medical abuses.<sup>66</sup> In 2009, the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, encouraged states to put to an end to involuntary genital normalising surgeries. This is because such surgeries leave intersex persons with irreparable mental suffering and in most cases sterilization, which leads to infertility.<sup>67</sup> The current United National Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment Juan E Mendez, has noted that the genital normalising surgeries amount to human and degrading treatment.<sup>68</sup> This shows that intersex human rights issues are gaining momentum in international forums.

There are examples of local and regional organisations which advocate for the rights of intersex persons. In Botswana RIA<sup>69</sup> is the leading advocacy organisation for intersex rights. Lesbians Gays Bisexuals of Botswana<sup>70</sup> and Botswana Network on Ethics Law and HIV/AIDS<sup>71</sup> also have programmes which target intersex human rights. In South Africa, Transgender Intersex Africa (TIA) promotes the rights of transgender and intersex rights.<sup>72</sup> In East Africa, Support Initiative for People with Congenital Disorder (SIPD) in Uganda is making regional strides in advocating for awareness, understanding and protection of intersex persons.<sup>73</sup> One of the objectives of SIPD is to engage in regional meetings with other countries to create regional advocacy and awareness around intersex issues.

Intersex Society of North America (ISNA) and Organisation International Intersex (OII), are some of the examples of an internationally growing movement of organisations which have seen the need to bring to the forefront intersex human rights issues, so that protective laws are put in place.

The growth of positive legal precedence and enactment of legislation on intersex human rights globally and regionally is progressive. The violations against intersex persons also violate provisions of international instruments, for instance ICCPR<sup>74</sup> and the Convention on Children's Rights<sup>75</sup> (CRC). The right to life, privacy, informed consent, autonomy and being

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<sup>66</sup>UN Human Rights Committee (HRC), *Concluding Observations* on the forty ninth report of Costa Rica 11-29 July 2011 CEDAW /C/CRI/CO/5-6 para, 40.

<sup>67</sup>UN General Assembly 'Right of everyone to the enjoyment of the highest attainable standard of physical and mental health:' note /by the Secretary -General, 10 August 2009 A/64/272(2009) para 49.

<sup>68</sup> UN Human Right Council 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' 1 February 2016, A/HRC/22/53(2013) paras 77 and 88.

<sup>69</sup>n 50 above.

<sup>70</sup>[www.legabibo.org](http://www.legabibo.org) (accessed 14 December 2016).

<sup>71</sup>[www.bonela.bw](http://www.bonela.bw) (accessed 14 December 2016).

<sup>72</sup>[www.tia.co.za](http://www.tia.co.za) (accessed 14 December 2016).

<sup>73</sup>[intersexday.org/en/sipd-uganda-statement](http://intersexday.org/en/sipd-uganda-statement) (accessed 15 December 2016).

<sup>74</sup>999 UNTS 171 and 1057 UNTS 407[1980] ATS 23/6 ILM 368 [1967] adopted in December 1966 entered into force 23 March 1977.

<sup>75</sup>GA res 44/25 annex, 44 UN GAOR Supp. (No.49) at 167, UN Doc. A/44/49 (1989); 1577 UNTS 3, 2 28 ILM 1456 (1989) adopted in 1989 entered into force 2 September 1990.

treated equally are violated. More often the right to health, bodily autonomy and self-determination is largely emphasised because of the unnecessary surgeries which intersex persons are commonly subjected to.

### **1.5 Significance**

The study intends to fill a gap in the almost non-existent scholarly literature on intersex human rights in Botswana. The study will also serve as a basis for advocacy organisations and the intersex community to know more about the intersection between intersex status, legal and human rights especially, the right to legal recognition and the right to health. The findings of the research will inform the local, regional and international opportunities that can be used to promote awareness and visibility of intersex human rights issues in Botswana. Such opportunities can be used to guide and inform advocacy strategies, policy and law reform in Botswana.

### **1.6 Chapter outlines**

Following this Chapter, Chapter Two focuses on intersex status national health programming and the inclusion or exclusion of intersex human rights issues in public health institutions in Botswana. It further discusses the guidelines that are meant to counter the effects of gender normalising surgeries used on intersex persons. Chapter Three focuses on a comparative analysis of three countries being Malta, South Africa and Kenya which have made progress in protecting the rights of intersex persons by adoption of law and jurisprudence. Chapter Four provides the findings of the desktop review and empirical study on awareness and activism of intersex human rights in Botswana. Four local CSOs provided guidance on their knowledge of intersex human rights and violations in Botswana. Chapter Five contains a conclusion of the study and recommendations based on findings of Chapter Four. The recommendations are specific in respect of human rights organisations, change of law and policy, health practices and issuing of identity documents in Botswana.

## Chapter 2

### Health policies, laws of Botswana and the inclusion of intersex human rights issues in national health programming

#### 2.1 Introduction

This Chapter focuses on assessment of Botswana health policies as to whether they recognise health needs of intersex persons and their human rights. An assessment of various national health law and policies including, Long-term Vision for Botswana-Vision 2016 (Vision 2016)<sup>76</sup> will be undertaken to assist in identifying gaps. A selection of international and regional instruments are discussed in an attempt to draw a conclusion as to whether Botswana promotes and protects the rights of intersex persons, as encouraged by international and regional obligations.

Botswana is party to some international and regional obligations which aim to strengthen the right to health and access to health. The right to health is enshrined in the Constitution. However, because of free access to public health institutions, many Botswana have been able to enjoy health services at no cost. It is a right that has been tested by a vulnerable group before the High Court for determination.<sup>77</sup> The right to health is a right that is important in each nation and must be guarded, as it critical in achieving the right to life. As explained in Chapter One, intersex persons are subject to gender alteration and genital modification at the hands of medical professionals, in most cases without their full and informed consent.<sup>78</sup>

Since intersex is medicalised, the right to health becomes a core factor in unbundling the right to health in terms of the right to choice of sex and gender which an intersex person may want to assume at later stage.<sup>79</sup> More often, such a decision is left to medical professionals and parents at birth.<sup>80</sup> Since the right to health is not provided in the Constitution, international and regional laws have defined at different levels the right to health and the link between health and intersex human rights.

Article 12.1 of the Covenant on Economic Social and Cultural Rights<sup>81</sup> (CESCR) provides that States must respect the right of everyone to enjoyment of the highest attainable standard of physical and mental health. United Nations Committee on Economic Social and Cultural Rights (CESCR) 2000 General Comment No.14 provides that:

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<sup>76</sup>Botswana *Long Term Vision for Botswana-Vision 2016*.

<sup>77</sup>*Dickson Tapela and Others v Attorney General and Others* MAHGB-000057-2014 High Court.

<sup>78</sup>Kennedy (n 24 above).

<sup>79</sup>Kaggwa (n 1 above).

<sup>80</sup>Dreger & Herdon (n 42 above).

<sup>81</sup>GA res 2200 A (XXI), 21 UB GAOR Supp (No.16) at 49 UN Doc. A 1636 (1966) UNTS 3; 6 ILM 368 (1967) adopted on 16 December 1966 entered into force 3 June 1976.

Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.<sup>82</sup>

The right to health is not to be understood as a right to be healthy<sup>83</sup> but a right to enjoy access to quality health services and making free health related choices for themselves. The right to health comprises freedoms and entitlements 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. By contrast, the entitlements include the right to access quality and accessible health services on equal opportunities for people to enjoy the highest attainable level of health.<sup>84</sup>

As discussed in Chapter One intersex persons are subjected to harmful medical interventions, which are mostly performed to make intersex person conform to normative gender binaries. In so doing intersex persons may suffer from reoccurring and lifetime health complications. WHO through its publication<sup>85</sup> has clarified the connection between the right to health, violation of the right to choice and harmful medical interventions, in respect of intersex status as below:

A major concern for intersex people is that so-called sex normalizing procedures are often undertaken during their infancy and childhood, to alter their bodies, particularly the sexual organs, to make them conform to gendered physical norms, including through repeated surgeries, hormonal interventions and other measures. As a result such children may be subjected to medically unnecessary, often irreversible, interventions that may have lifelong consequences for their physical and mental health, including irreversible termination of all or some of their reproductive and sexual capacity. Medical procedures may sometimes be justified in cases of conditions that pose a health risk or are considered life-threatening. Such procedures, however, are sometimes proposed on the basis of weak evidence, without discussing and considering alternative solutions.

Intersex status and the right to health are therefore multi-faceted from birth to adulthood. The intersection is varied for instance, the right to bodily autonomy and the right to consent especially with corrective surgery which alters one's life forever. Medical interventions as articulated above, may have devastating physical, emotional and psychological effects on intersex persons. Respecting an intersex persons' right to bodily autonomy, from birth is argued, decreases health complications.

## **2.1.2 Assessment of Botswana national health laws, policies and obligations in respect of intersex status and the right to health**

### **2.1.3 Introduction and background**

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<sup>82</sup>Cultural Economic Social and Cultural Rights General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art 12) Adopted at the Twenty –second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (E/C.12/2000/4) para 1.

<sup>83</sup>n 82 above, para 8.

<sup>84</sup>n 82 above, para 3.

<sup>85</sup>WHO Sexual Health, human rights and the law (2015) 26.

In Botswana, public health services are provided by the Ministry of Health (MoH)<sup>86</sup> which is also responsible for formulating national health policies and programmes.<sup>87</sup> The country is guided by the National Development Plan (NDP)<sup>88</sup> which is a reflection of the priorities that the Government of Botswana intends to achieve in different sectors of government and the nation within a ten-year period. The priorities amongst others include the national health agenda. Although there is no express right to health in Botswana except in the Children's Act,<sup>89</sup> it is evident that health is one of the sectors which the government of Botswana is significantly concerned about.<sup>90</sup>

## 2.2 Botswana law health policies and guidelines

There are various policies and laws that recognise and acknowledge the right to health as discussed, in Botswana. Botswana's Children's Act of 2009<sup>91</sup> is an adaptation of CRC.<sup>92</sup> It was adopted to protect children's rights, development and participation in Botswana and intended to protect vulnerable children in need of care and protection.<sup>93</sup> It recognises that children have a right to the highest attainable standard of health,<sup>94</sup> it however does not provide for intersex children. It is argued that the Children's Act has overlooked that not all children are born as female and male only. Therefore, the right to health provided for in the Children's Act, is specific to the normative binaries. This is a shortcoming as it will hinder children to enjoy fundamental rights as envisioned by the Act and international law.

The Essential Health Service Package for Botswana<sup>95</sup> (EHSPB) is a document which contains health protocols, standards and norms in Botswana. It has components on sexual reproductive health, child care and mental health.<sup>96</sup> One of its aims is to:

Enable each child to reach his or her maximum potential with the resources available and to enable as many children as possible to reach adulthood with their potential uncompromised by illness, disability, environmental hazard or unhealthy lifestyle.<sup>97</sup>

It also provides for the health needs of adolescents and access to relevant information as adolescents experience physical and psychological changes in their life at a high rate at that stage.<sup>98</sup> While the document is broad, it does not directly exclude protocols that are not harmful to infants after birth, in relation to their gender.

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<sup>86</sup>MOH National Health Policy 'Towards a healthier Botswana' 2012.

<sup>87</sup>As above.

<sup>88</sup>National Development Plan 2011 -2016.

<sup>89</sup>n 20 above, sec 15.

<sup>90</sup>NDP (n 88 above).

<sup>91</sup>n 20 above.

<sup>92</sup>n 75 above.

<sup>93</sup>n 20 above, sec 4.

<sup>94</sup>n 20 above, sec 15.

<sup>95</sup>MOH 'The Essential Health Service Package for Botswana' 2010 51.

<sup>96</sup>MOH (n 95 above) 14.

<sup>97</sup>MOH (n 95 above) 13.

<sup>98</sup>As above.

Section 150(1) of the Botswana Public Health Act<sup>99</sup> provides that in respect of medical procedures:

Where consent is needed for a child to undergo a medical procedure or receive treatment, and the parent or legal guardian of the child declines to grant the consent, the medical practitioner shall use his or her professional judgment and carry out the medical procedure or administer treatment.

The provision cited above provides that a medical procedure can be undertaken irrespective of whether consent is given or not, for a child to undergo a surgical or medical intervention. The approach absolves a medical practitioner from liability, even where a violation has occurred, it will be difficult for an intersex person or a guardian to take legal action against a medical practitioner.<sup>100</sup> This provision gives more rights to a medical practitioner than an intersex infant who may be violated with unnecessary medical interventions. The degree of consent, which must be full, free and informed,<sup>101</sup> is not provided for in the provision.

National Health Policy of 2011(NHP), recognises that health is not only the absence of disease or infinity but it is also about social well-being.<sup>102</sup> Theoretically, the NHP follows WHO guidelines<sup>103</sup> which have integrated the challenges and lived experiences of intersex persons and demands for intersex persons' fundamental human rights to be protected. The NHP has not yet adopted the WHO guidelines, these leaving intersex persons in Botswana with many challenges, in terms of their human rights. One of the objectives of the Second National Strategic Framework (NSF11) is to reduce HIV and AIDS infections in Botswana. Because of Botswana's struggle against HIV, there are sexual minorities which are a high risk of contracting HIV. Men who have sex with men (MSM)<sup>104</sup> as a risk adverse population, are listed to the exclusion of other sexual minorities and other status, as vulnerable to HIV in the NSF11. Intersex persons, like any other persons are affected by HIV and other diseases. The deliberate exclusion by the NHP and the NSF11 does not factor in the lived realities of intersex persons and how they are affected by HIV like any other person. There are demands to make HIV treatment inclusive of all populations especially the marginalised without discrimination for effectiveness.<sup>105</sup>

### **2.3 The system of capturing data for statistical and developments purposes**

The Ministry of Health periodically assesses statistics undertaken by the Central Statistics Organisation (CSO), to measure the country's and regional health achievements. The statistics in respect of infant live births and infant mortality<sup>106</sup> provides for female and male infants only. It is argued that the absence of data on intersex children reflects priorities of a health system which intentionally excludes those in the minority. It is argued that the health

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<sup>99</sup>Act 11 of 2013.

<sup>100</sup>n 99 above, sec 150(3).

<sup>101</sup>n 55 above.

<sup>102</sup>MOH 'National Health Policy' 2012 17.

<sup>103</sup>WHO (n 85 above).

<sup>104</sup>MOH 'Botswana Health Policy Project: How the decline in PEPFAR funding could affect key populations' 2016 4.

<sup>105</sup>n 82 above, para 12 (b).

<sup>106</sup>CSO 'Botswana demographics of live births' 2013.

system as it is, in Botswana, may reflect the stereotypes and cultural beliefs of the Botswana society, about intersex persons. Furthermore, that the country has also not adopted the WHO standards and position on the protection and promotion of intersex human rights as it is discussed later in this Chapter.

## **2.4 Inclusion of intersex persons' needs in health and human rights issues in local curriculum of health professionals and medical practitioners**

Botswana trains its health care personnel locally, regionally and internationally. Local nurses,<sup>107</sup> who comprise the larger part of the medical staff, are trained at the Institute of Health Sciences and the University of Botswana. The existence of the NHP and EHSPB does not provide for and neither does it specify obligations and standards that are used as standards and guidelines for intersex issues in Botswana. As the policies in place, the NHP and EHSBP, do not have any specific and clear guidelines, on the curricula of institutions in dealing with intersex issues. The lack of reference to intersex persons in the policies as mentioned, presents a problematic phase for intersex persons in Botswana, as they are likely to be subjected to a non-uniform treatment and their right to enjoy the highest attainable health is threatened and open to violation.

## **2.5 Assessment of international regional and sub-regional instruments which Botswana is party to**

The medicalisation of intersex has led to the discourse on intersex status to be viewed as a human rights issue and not a medical one, and as a right which must be protected. A few countries through legislation<sup>108 109</sup> and judicial precedence<sup>110</sup> have been able to recognise intersex as a biological variant, and that intersex persons deserve to be protected and granted legal recognition. It has been argued that the birth of an intersex child is treated like a psychological emergency, and that to create intersex recognition and citizenship there should be open discourse about it.<sup>111</sup> International, regional and sub- regional laws have adopted a human rights based approach to intersex and the right to health as discussed in Chapter One.

### **2.5.1 International instruments which Botswana is party to**

The discussion will include the Committee on Economic Social and Cultural Rights (CESCR) General Comment No. 14 on the Right to the Highest Attainable Standard of Health<sup>112</sup> together with General Comment No 22(2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and

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<sup>107</sup>N Sinha & G Onyatseng 'The nursing labour market in Botswana: An economic analysis' (2012) 26 *Botswana Journal of African Studies* 110.

<sup>108</sup>Malta adopted the Gender Identity and Sex Characteristics Act in April 2015.

<sup>109</sup> South Africa Parliament augmented the Bill of Rights with the Promotion of Equality and Prevention of Unfair Discrimination Act in 2000.

<sup>110</sup>n 56 above.

<sup>111</sup>E Grabham 'Citizen bodies Intersex citizenship' (2007) 1 *Sexualities* 29.

<sup>112</sup>n 82 above.

Cultural Rights)<sup>113</sup> on the right to sexual and reproductive health, which provides extensively for intersex persons' reproductive rights. The General Comments are instrumental in relation to intersex status and the right to health and the right to sexual and reproductive health. Both General Comments are based on Article 12 of the CESCR. The WHO publication on health and sexuality<sup>114</sup> demonstrate the progress that WHO is making in recognising intersex sexual and reproductive health rights in its mandate. The Convention on Elimination of all forms of Discrimination against Women<sup>115</sup> (CEDAW) and CRC<sup>116</sup> have taken a position in respect of intersex persons' right to health. The Yogyakarta Principles<sup>117</sup> are discussed as persuasive soft law to promote gender identity rights in Chapter Three. Botswana signed and ratified CEDAW in 1996. CRC together with CEDAW issued a joint statement condemning the injustices carried out against intersex children. The joint statement recognises cutting of genitalia in intersex infants, as genital mutilation, and encourages member states to protect children against such harmful practices with effective laws.<sup>118</sup>

The CESCR General Comment No.14 defines health<sup>119</sup> as follows:

Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as formulation of health policies, or the implementation of health programmes developed by the World Health Organisation (WHO). Moreover, the right to health includes certain components which are legally enforceable.

The right to health as interpreted is interdependent<sup>120</sup> on other rights to be realised and fully enjoyed. Paragraph 8 provides thus:

The right to be 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 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.

As discussed in Chapter One, intersex persons are subjected to medical interventions which lead to health complications in life. The surgeries are mainly corrective to make intersex persons to conform to gender binaries, which also may destroy the reproductive capabilities

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<sup>113</sup>UN Committee on Economic, Social and Cultural Rights (CESCR), General comment 22:1 May 2016 Right to sexual and reproductive health (*art 12 of the Covenant*) Doc E/C.12/GC/22.

<sup>114</sup>WHO (n 85 above).

<sup>115</sup> Convention of Elimination of All forms of Discrimination Against Women GA res 34/18, 34 UN GAOR Supp (No.46) at 193, UN Doc. A/34/46; 1249 UNTS 13:19 ILM 33 (1980) adopted 18 December 1979.

<sup>116</sup>n 75 above.

<sup>117</sup> The Yogyakarta Principles The application of human rights law in relation to Sexual Orientation and Gender Identity 2006.

<sup>118</sup> Joint general recommendation /General comment No.31 of the Committee of Discrimination against women and No.18 of the Committee on the Rights of the Child on harmful practices 14 November 2014 Doc CEDAW/C/GC/31-CRC/C/GC/18.

<sup>119</sup>Joint General Recommendation (n 113 above) para 1.

<sup>120</sup>Joint General Recommendation (n 113 above) para 3.

of an intersex person as well as sexual health. WHO defines sexual health<sup>121</sup> as a state of physical, emotional, mental and social well-being in relation to sexuality and further provides specifically for the challenges experiences by intersex persons as follows:

A major concern for intersex people is that so-called sex normalizing procedures are often undertaken during their infancy and childhood, to alter their bodies, particularly the sexual organs, to make them conform to gendered physical norms, including through repeated surgeries, hormonal interventions and other measures. As a result, such children may be subjected to medically unnecessary, often irreversible, interventions that may have lifelong consequences for their physical and mental health, including irreversible termination of all or some of their reproductive and sexual capacity. Medical procedures may sometimes be justified in cases of conditions that pose a health risk or are considered life-threatening. Such procedures, however, are sometimes proposed on the basis of weak evidence, without discussing and considering alternative solutions.

Therefore, sex normalising procedures have a negative impact on sexual and reproductive rights of intersex persons. Reproductive health entails capacity to reproduce and to make free and informed decisions.<sup>122</sup> General Comment No 22(2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)<sup>123</sup> provides that:

The right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health under article 12 of the Covenant.

There is an intersection between intersex human rights, the right to health and the rights to sexual and reproductive rights. As a result of the lack of recognition and the levels of multiple discrimination experienced by intersex persons, they are excluded from fully enjoying and accessing the right to health. Member states have an obligation to respect, promote, protect and fulfill<sup>124</sup> the right to health and the right to sexual reproductive health. As discussed in this Chapter, Botswana domestic policies are not inclusive in protecting the rights of intersex persons. Even though Botswana's health policies are aligned to WHO standards, the country has not yet adopted WHO position and standards on intersex status. The General Comments as discussed provide that where there is no discrimination in health systems, society and in the law, people are able to enjoy their rights without impediments. State parties are obliged to remove barriers that promote discrimination against intersex persons and the remedies provided must be effective.<sup>125</sup>

Paragraph 23 of the General Comment no 22 provides as follows on non-discrimination:

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<sup>121</sup>WHO (n 85 above) sec 1.1.

<sup>122</sup>ICPD chap 7.

<sup>123</sup>n 113 above, para 5.

<sup>124</sup>n 113 above, paras 40 –para 54.

<sup>125</sup>n 1113 above, para 61.

Non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, including lesbian, gay, bisexual, transgender and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status

One of the core obligations of states is to have professionally trained health care providers, who can effectively provide quality and respectful sexual and reproductive health services to all without discrimination.<sup>126</sup>

The provisions of CESCR, which Botswana is party to are also interdependent on other laws,, in this instance civil rights. General Comment No. 22 is extensive and broad in issues faced by intersex persons and therefore encourages state parties to break all barriers to promote equal enjoyment of sexual reproductive rights by intersex persons without any interference. It also promotes and encourages the rights of intersex persons to enjoy and live a fulfilling life. Therefore, the General Comments are applicable to Botswana and must be applied in promoting, protecting and fulfilling intersex human rights. Botswana must also align its policies to WHO position and standards and be inclusive of intersex sexual and reproductive rights in her laws, policies and health programming.

In February 2013, the United Nations Special Rapporteur on torture cruel and inhuman degrading treatment Juan E. Mendez, noted with concern that medical interventions are sometimes used inappropriately to inflict unnecessary pain on intersex persons in the following statement:<sup>127</sup>

.... Intersex persons are frequently denied medical treatment and subjected to verbal abuse and public humiliation, psychiatric evaluations, forced procedures such as sterilization, “conversion” therapy, hormone therapy and genital-normalizing surgeries under the guise of “reparative therapies”. These procedures are rarely, if ever, medically necessary, lead to severe and life-long physical and mental pain and suffering and can amount to torture and ill-treatment.

The General Comments of the Committee on the Rights of the Child on the right of children to enjoy the best attainable health recognises the need to protect children from harmful practices in the following statement:<sup>128</sup>

Children in disadvantaged situations and underserved areas should be a focus of the effort to fulfill children’s rights to health. States should identify factors at national and subnational level that create vulnerabilities for children or that disadvantages certain groups of children. These factors should be addressed when developing laws, regulations, policies, programs and services for children’s health and work towards ensuring equity.

The statement mentions two categories of children, the disadvantaged and vulnerable. It is argued that intersex children are also included as they are vulnerable and disadvantaged, as at birth the choice of their gender is often made for them. Vulnerability stems from that children cannot make an informed decision at an earlier stage in their life, regarding their gender and

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<sup>126</sup>General Comment 22 (n 113 above) para 15.

<sup>127</sup>UN Human Rights Committee, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, February (2013), Doc A/HRC/22/53, para 46.

<sup>128</sup>United Nations Committee on the rights of the child (CRC), General comment 15: *On the right of the child to the enjoyment of the highest attainable standard of health* (article 24) 17 April 2013, Doc CRC/C/GC/15, para 11.

genital surgeries, as their parents and guardians can exercise parental and or guardian consent and make decisions on their behalf.

Internationally, Yogyakarta Principles were drawn by human rights experts from different countries, as a guide and persuasive soft law to assist nations to protect and promote issues of sexual orientation and gender identity.<sup>129</sup> This was because of observed systematic attacks, discrimination and stigma around issues of sexual orientation and gender identity. The principles are global in their nature are meant to reach those legitimizing and illegitimizing them, because in some instances, some countries may not be receptive to promotion of sexual orientation and gender identity human rights. They have been applied in different forums<sup>130</sup> and cases<sup>131</sup> as persuasive authority in guiding courts in sexual orientation and gender identity human rights issues. When the office of the United Nations Expert on LGBTI<sup>132</sup> rights was set up in June 2016, the Principles were referred to and also formed an integral part of the agenda in setting up the office.

Since their adoption in 2007, there has been a significant progress in addressing sexual orientation and gender identity rights, more especially at United Nations forums. Although many countries and United Nations have embraced the Principles, they have also attracted criticism from other countries.<sup>133</sup> Their applicability has been referred to as a ‘minefield’ as other countries have not accepted them. In 2011 when the United Nations Human Rights Council held a panel discussion on discrimination based on sexual orientation, gender and identity. The Organization of Islamic Cooperation (IOC), protested and walked out of the meeting.<sup>134</sup> Countries like Pakistan and the Vatican expressed their displeasure at the applicability and promotion of the Principles at UN. The protesting countries viewed the Principles as disrupting heterosexual binaries and therefore did not see the need to support the applicability of the Principles. They argued that the objectives of the Principles were against their faith and religious convictions.<sup>135</sup>

Principle 17 provides that States must provide the highest attainable health without discrimination. This Principle as linked with the right to consent to any medial surgeries and alterations,<sup>136</sup> is often overlooked in intersex persons at birth. Therefore, this necessitates the right to protect intersex persons from medical interventions. In Botswana, there is no known and available documentation of intersex births by Ministry of Health. It is argued that a

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<sup>129</sup>The Yogyakarta Principles (n 117 above).

<sup>130</sup>A/HRC/22/53 (n 117 above) the Special Rapporteur United Nations Human Rights Council appointed an Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity in June 2016 based on the Principles objectives.

<sup>131</sup>*Naz Foundation v Government of NCT of New Delhi & Others* WPC (C) No. 7455/2001 See also *Shiv Ani Bhat v State of NCT of Delhi & Others* W.P. (CRL) 2133/2015. The Courts in the two cases relied extensively on the Principles in respect of the rights to respect and recognise diverse identities. The cases also demonstrate the willingness of Courts to apply international soft laws in an effort to protect fundamental human rights. Notably the cases dealt with the rights of gay and transgender persons’ rights in India.

<sup>132</sup>n 130 above.

<sup>133</sup>J McJill ‘SOGI...So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations’ (2014) 3 *Canadian Journal of Human Rights* 8.

<sup>134</sup>As above.

<sup>135</sup>McJill (n 133 above) 19.

<sup>136</sup>The Yogyakarta Principles (n 117 above).

challenge maybe presented when health care professionals are not adequately trained to address intersex issues from birth and to their right to sexual reproductive needs in health care.<sup>137</sup>

Principle 18 is applicable in case of intersex persons as it provides that no one should be subjected to medical abuse. It emphasises that intersex is not a ‘medical condition’ that needs to be treated, cured or suppressed. It encourages states to take all necessary legislative, administrative and other measures to ensure that no child’s body is irreversibly altered by medical procedures to impose a gender identity without the full, free and informed consent of the child. States are encouraged to;

- (a) ‘Establish child protection mechanisms whereby no child is at risk of or subjected to medical abuse;’
- (b) ‘Ensure protection of persons of diverse sexual orientation and gender identities against unethical or involuntary medical procedures or research, including in relation to vaccines, treatments or microbicides for HIV/AIDS or other diseases;’
- (c) ‘Ensure that any medical or psychological treatment or counseling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical condition to be treated cured or suppressed.’

Despite the Principles being inclusive, other countries have rejected the advancement of sexual orientation and gender identity human rights at international forums, arguing that they are meant to disturb the ‘normal’ societal set up. This is as a result of political and cultural environment, which leads to gender identity issues being sidelined and ignored.<sup>138</sup>

### **2.5.2 Regional instruments which Botswana is party to and some which are persuasive to intersex human rights issues**

The African Charter on Human and Peoples’ Rights (ACHPR)<sup>139</sup> provides for the right to the best attainable state of physical and mental health,<sup>140</sup> fundamental human rights<sup>141</sup> equality<sup>142</sup> and equal protection by the law.<sup>143</sup> While ACHPR has not specifically provided for the right to health and human rights of intersex persons in the region, it issued a statement that urged member states to protect sexual minorities, based on their orientation and gender identity. The 55th Ordinary session of the African Union at Angola adopted Resolution 275<sup>144</sup> as a plea to protect sexual minorities in Africa. Clause 4 of the Resolution obliges all member states to;

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<sup>137</sup>Sinha & Onyatseng (n 107 above).

<sup>138</sup>Miller & Vance (n 12 above).

<sup>139</sup>African Charter on Human and Peoples’ Rights, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev, 1520 UNTS 217.

<sup>140</sup>African Charter (n 139 above) art 16.

<sup>141</sup>African Charter (n 140 above) art 2.

<sup>142</sup>African Charter (n 140 above) art 3.

<sup>143</sup>African Charter (n 140 above) art 3(2).

<sup>144</sup>275 Resolution on Protection against violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity adopted 28 April 12 May 2014 Luanda Angola.

Punish all forms of violence by enacting and effectively applying appropriate laws prohibiting all forms of violence including those targeting persons on the basis of their sexual orientation or gender identities, ensuring proper implementation and diligent prosecution of perpetrators and establishing judicial proceedings, responsive to the needs of victims.

It is argued that intersex persons' rights can be read in to the categories as provided by the Resolution to be protected by law. Although the Resolution is not specific to intersex persons, it is argued that it is inclusive as intersex person's rights to gender are violated by gender altering interventions. The Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa<sup>145</sup> (Maputo Protocol) has defined itself as a leading instrument which provides for holistic rights of women's sexual reproductive rights in Africa.<sup>146</sup> One of the fundamental principles of human dignity is bodily autonomy and self-determination. Durojaye argues that reference to sexual rights, is defined in the context of heterosexuality.<sup>147</sup> Although explained in heterosexual terms, reference to sexual reproductive rights can include the right to be protected from unnecessary surgery and 'medical intervention' which is commonly performed on intersex persons at birth or at a later stage in their life. It is argued that such 'surgeries' are a denial of the right to reproductive rights for intersex persons.<sup>148</sup>

A lesson to be drawn from the Maputo Protocol is that it encourages member states to eliminate all forms of practices and enact legislature against medicalization, para-medicalisation of all types of female genital mutilation and to raise awareness about such harmful practices.<sup>149</sup> It is hoped that such education and awareness-raising, will include intersex as part of genital mutilation. It will be an important aspect of the intersex human rights discourse as it will disseminate knowledge and information about intersex human rights which at most times is politicised,<sup>150</sup> hence the lack of specific recognition even in such an important Protocol. It is argued that provision of education will assist in changing perceptions and mindsets, which can lead to acceptance and promotion of intersex person's human rights. The creation of platforms, laws and policies which are inclusive of intersex persons and their sexual, reproductive and health needs is critical.<sup>151</sup> While the Maputo Protocol does not specifically refer to intersex persons, the right to dignity,<sup>152</sup> non-discrimination and the elimination of harmful practices can be read together to sufficiently and advocate for the inclusion of intersex persons.

The African Youth Charter<sup>153</sup> provides a ray of hope in the promotion of human rights of intersex persons. Article 2 provides grounds for non-discrimination and 'other status' is a ground for non-discrimination. In Botswana where only female and male binaries are

<sup>145</sup> AHG/Res.240 (XXX1) adopted 11 July 2003 entered into force 25 November 2005.

<sup>146</sup> A Rudman 'The protection against discrimination based on sexual orientation under the African human rights system' (2015) 15 *African Human Rights Law Journal* 14.

<sup>147</sup> E Durojaye & LN Murungi 'The African Women's Protocol and sexual rights' (2014) 18 *The International Journal of Human Rights* 883.

<sup>148</sup> WHO (n 85 above) 27.

<sup>149</sup> Maputo Protocol, art 5(b) &(c).

<sup>150</sup> Grabham (n 111 above) 35.

<sup>151</sup> Durojaye & Murungi (n 147 above) 891.

<sup>152</sup> Maputo Protocol (n 149 above) art 4.

<sup>153</sup> The African Youth Charter adopted 2 July 2000 entered into force 8 August 2006.

recognised, ‘other status’ may cater significantly for those who are not legally recognised according to normative gender binaries. Intersex persons are vulnerable and disadvantaged because of medicalisation and societal expectations for a child to be either a boy or a girl at birth.<sup>154</sup> States parties are encouraged to protect all youth against discrimination and this can be used to promote the right to health of intersex youth. It is argued that the provision excludes and discourages youth being subjected to damaging and intrusive genital alterations to conform to the social construction of gender.

In promoting and using regional instruments, Rudman argues that the African Charter, Maputo Protocol and the African Children’s Charter have unique provisions that can be used generously to eliminate the discrimination experienced by intersex persons. This will afford intersex persons the right to enjoy their fundamental human rights with dignity<sup>155</sup> also to enjoy the highest attainable health<sup>156</sup> which is integral to the right to a quality life.

### 2.5.3 Sub-regional instruments which Botswana is party to

Botswana is a member of the Southern African Development Committee (SADC) comprising of southern African member countries, which was formed by a way of a Treaty in 1992 in Windhoek, Namibia.<sup>157</sup> In 1999 SADC member states signed the Protocol on Health in the Southern African Development Community<sup>158</sup> (Health Protocol), its objective is to promote the health of the member countries holistically. In 1998 in Mauritius, member states agreed to improve the standards of member states population dynamics and good health, in accordance with international law. Article 3 of the Health Protocol provides that member states will develop common strategies in respect of women children and other vulnerable groups. Article 22 of the Health Protocol provides for the development of mental health legislation, which can be useful for Botswana, as intersex persons can develop dire psychological health issues, as a result of unnecessary surgical interventions. Article 16 provides for reproductive rights which are also an integral part of bodily autonomy and self-determination. It further provides that member states to reduce genetic and congenital disorders which may lead to birth defects.<sup>159</sup>

This provision is problematic, in the case of intersex persons, as variance of internal and sexual characteristics of intersex persons are noted as birth defects by the Health Protocol. Grabham argues that intersex persons are subjected to unnecessary surgeries and objectifying medical procedures in an attempt for them to be in the normative binary.<sup>160</sup>

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<sup>154</sup>Kaggwa (n 41 above).

<sup>155</sup>Youth Charter (n 153 above) art 5.

<sup>156</sup>Youth Charter (n 153 above) art 16.

<sup>157</sup>The Treaty of the Southern African Development Committee 32ILM 116, 5AJICL 418

[www.sadc.int/english/document/legal/treaties/amended\\_declaration\\_and\\_treaty\\_of\\_sadc.php](http://www.sadc.int/english/document/legal/treaties/amended_declaration_and_treaty_of_sadc.php)

<sup>158</sup>Protocol on Health in the Southern African Development Community 1999 signed 18 August 1999 entered into force 18 August 2004 Maputo Mozambique.

<sup>159</sup>Youth Charter (n 153 above) art 16 (c).

<sup>160</sup>Grabham (n 111 above) 34.

Botswana as a member state and signatory to the Health Protocol risks excluding and discriminating against intersex persons, who are noted as born with ‘defects’ by the Protocol. The phrase ‘defective births’, as used, provides for an inhumane classification of a person. In respect of child and adolescent health, the Protocol is silent on the provision of health protocols and protection of those who are born outside the female and male normative binaries.<sup>161</sup> Therefore the position of Botswana at a regional level on intersex human rights is clear, as it does not recognise intersex persons as equals like other persons before the law.

The Protocol on Gender and Development Southern African Development Committee<sup>162</sup> (Gender Protocol) emphasises the need for equality and non-discrimination.<sup>163</sup> The objectives of the Gender Protocol were targeted to be achieved in 2015 where all state parties would have harmonised their local laws with international obligations in recognising gender equality.<sup>164</sup> It is argued that the Gender Protocol focused only on the social gender binaries of female and male. It provides that gender is a social construction of roles as provided by cultural and social norms,<sup>165</sup> to the exclusion of others. The adoption of social construction of gender shows that SADC is inclined to support an inclusive interpretation of gender than a biological stand of categorization of the normative genders of female and male only, which has led to medicalisation of intersex persons. Its construction is advantageous to intersex persons in respect of their gender which is argued, should not be construed in the normative binary. This interpretation as adopted by the Gender Protocol is favourable to those who support the notion that intersex persons must not be treated as ‘‘emergencies’’ but as human beings who deserve equal protection of the law.<sup>166</sup>

## **2.6 Protocols that have been identified as a result of intersex status at an international level**

As introduced in Chapter One, there are various guidelines which have been developed by case law and by soft law to promote and protect the rights of intersex persons. These have been because of the activism on human rights of intersex persons. Since the growth of intersex activism, many have called for the abolition of intrusive medical interventions. The medical intervention approach and human rights approaches are referred to as protocols and are categorised into three. The traditional dominant approach which was developed by John Money, involves gender normalising surgery<sup>167</sup> and has far more devastating physical and emotional consequences. It involves secrecy and frequent medical interventions to make one conform to normative gender binaries. As a result of the traditional approach intersex persons, medical doctors and soft laws have provided guidelines on the human rights based approaches that should be used. The approaches are also based on the right to health, sexual

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<sup>161</sup>Youth Charter (n 153 above) art 16 (d) 12.

<sup>162</sup>Protocol on Gender and Development Southern African Development Committee signed 17 August 2008 entered into force 22 February 2013 Johannesburg South Africa.

<sup>163</sup>Gender Protocol (n 162 above) art 2.

<sup>164</sup>Gender Protocol (n 162 above) art 3.

<sup>165</sup>Gender Protocol (n 162 above) art 1.

<sup>166</sup>Gross (n 49 above) 235.

<sup>167</sup>Miller & Vance (n 12 above).

reproductive rights,<sup>168</sup> bodily autonomy, and self-determination, free, full and informed consent<sup>169</sup> as well as the best interest of the child.<sup>170</sup> Gender normalising medical interventions have also been referred to as intersex genital mutilation (IGM)<sup>171</sup> because of its effects as already discussed in this Chapter. The CRC concluding observations on the second periodic report of South Africa urged the country to eliminate harmful practice,<sup>172</sup> and guarantee bodily integrity autonomy, and self-determination of all children intersex children, by avoiding unnecessary medical or surgical treatment during infancy or childhood.<sup>173</sup>

Therefore, the intersection between IGM and the approaches developed to eliminate IGM were discussed in the Colombian Constitutional Court where the Court dealt with two cases of intersex minor children.<sup>174</sup> Parents of the minor children had agreed with physicians that their infants should undergo genital surgery, which was categorised by Court as IGM. As a result of the doctors' future liability they then sought the assistance of the Court as to how to proceed based on parental consent. The Court held that surgery at such an early stage is not necessary and may subject intersex infants to lifelong untreatable and irreversible medical conditions. The Court emphasised that the principle of the best interest of the child should be followed in determining whether a surgery is necessary or not. The Court as a result of the cases formulated legal procedures to safeguard the rights of intersex infants.

The procedures that the Court proposed are known as protocols, which have been contested in both medical and legal fields.<sup>175</sup> There are still debates about which protocols to be used in determining sex and gender of the intersex persons. John Money<sup>176</sup> made alteration sex organs of intersex infants common especially in the United States, as he believed that children will grow into the allocated gender at birth. Medically there are 'accepted' sexual physical characteristics which determine whether a child is a boy or a girl. In the absence of 'normal' sexual characteristics, the organs for instance a penis less than the 'accepted length' will be cut or a labia which is considered to be long to be a vagina maybe turned into a penis by surgery.<sup>177</sup> This method is known as the dominant traditional and is largely criticized as lacking a human rights approach, because it is focused on confirming normative gender binaries. The traditional dominant method is still practiced in some jurisdictions, for instance, in the United States physicians are divided as to which protocols to use on intersex persons. Others favour the traditional dominant protocol and others prefer the modern protocols of informed consent.<sup>178</sup> This method has not proved what it was meant to achieve, instead it has

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<sup>168</sup>General Comment 22 (n 113 above) para 5.

<sup>169</sup>As above.

<sup>170</sup>CRC (n 75 above) art 18.

<sup>171</sup>UN Committee on the Elimination of Discrimination against Women (CEDAW), 'Sixty fifth session, Periodic review of Switzerland and New Zealand,' *Palais des Nations*, 2-18 November 2016, CEDAW/C/CHE/CO/4-5 and CEDAW/C/NLD/CO/16, recommended that Switzerland and New Zealand must stop IGM by adopting effective laws to protect intersex persons.

<sup>172</sup>UN Committee of the Rights of the Child: 19 September 2016 Concluding observations on the second periodic report on South Africa' UN Doc CRC/CZAF/CO/2, para 37.

<sup>173</sup>UN Committee on the Rights of the Child (n 172 above) para 38.

<sup>174</sup>YY Court Constitutional 23 October 1995 and *Sentencia* SU 337-99 Constitutional Court of Colombia 1995.

<sup>175</sup>Carrera & DePalma (n 33 above).

<sup>176</sup>As above.

<sup>177</sup>Bolin & Wheleban (n 5 above) 142.

<sup>178</sup>Mattis (n 48 above).

created more problems.<sup>179</sup> Those who have come out to talk about their intersex status have also called for its abolition<sup>180</sup> and had recourse before the Courts.<sup>181</sup>

The other protocol as guided by Colombian Courts<sup>182</sup> advocates for sharing of information by medical professionals with parents of an intersex infants, so that they are informed about intersex status. It is argued that in that way parents can make a decision based on the best interest of the child. The case therefore raised the standard of consent as the emphasis is that the information given to parents must be consistent; consent must be in writing and be acquired over a period of time.<sup>183</sup> It has been argued that presumption of consent by parents is also suspect and lacks free and informed choice, as parents may be under pressure by societal norms and doctors' recommendations to make a decision.<sup>184</sup> This protocol is seen as problematic as a child may never have to make that choice. The question that arises is whether the processes as broad and wide as they are, can they ultimately protect the best interest of an intersex child.<sup>185</sup>

The third protocol is a holistic approach that allows an intersex child, to choose what they desire with their sex and gender later in life and is most preferred by activists<sup>186</sup> and international law.<sup>187</sup> Lloyd argues that the third protocol allows one to be in control of their bodily, sexual and reproductive rights. She further argues that just like in other medical cases where children are allowed to make decisions, intersex infants must also be allowed to do the same. In *Gillick v West Norfolk and Wisbech Health Authority*<sup>188</sup> the Court stated as follows:

Parental right to control a minor child deriving from parental duty was a dwindling right which existed only in so far as it was required for the benefit and protection that the extent and duration of that right could not be ascertained by reference to a fixed age, but depended on the degree of intelligence and understanding of that particular child and a judgment of what was best for the welfare of the child, the parent's right to determine whether a child under sixteen should have a medical treatment terminated when the child achieved sufficient intelligence and understanding to make that decision itself.

Therefore, General Comment No 22 encourages member states to break societal norms and beliefs that negate enjoyment of sexual and reproductive rights, by allowing intersex persons to make choices regarding how they want to live with their intersex status.<sup>189</sup> It is argued that autonomy and participation in development of a child, is part of CRC and it will only be appropriate that the best interest of the child and *Gillick* principles are applied in respect of intersex children. In *Diau v Botswana Building Society* it was held that:

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<sup>179</sup>M Newbould 'Medicine and intersex legal and ethical issues surrounding genital and gonadal surgery' A thesis submitted to University of Manchester for the Degree of Philosophy in the Faculty of Humanities, 2016 Unpublished.

<sup>180</sup>Kaggwa (n 1 above) Gross (n 49 above).

<sup>181</sup>*Re Volling* (n 55 above).

<sup>182</sup>n 174 above.

<sup>183</sup>As above.

<sup>184</sup>Mattis (n 48 above).

<sup>185</sup>*Re Volling* (n 55 above).

<sup>186</sup>As above.

<sup>187</sup>See discussions in sub para 2.

<sup>188</sup>[1986] AC 113-114.

<sup>189</sup>n 168 above.

Informed consent is premised on the view that the person to be tested is the master of his own life and body...The purpose of informed consent is to honour a person's right to self-determination and freedom of choice.<sup>190</sup>

The Colombian cases as discussed were also instrumental in the adoption of the Consensus Statement<sup>191</sup> which has been followed by many countries to protect and promote intersex human rights. The Statement acknowledged that parental consent and child consent were a step in the right direction in allowing children to exercise autonomy in respect of their bodies. The Statement was adopted by over fifty international experts who specialise in the field of 'DSD' and intersex rights.<sup>192</sup>

## 2.7 Conclusion

The international instruments discussed which Botswana is party to promote self-determination, autonomy, bodily integrity and the right not to be subjected to medical abuse. It is only appropriate that Botswana should follow the progressive standards in protecting rights of intersex persons. Critically, the African human rights system must be taken heed of, while not focusing on intersex persons but the provisions of the African Charter, Women's Protocol and the African Youth Charter, are a point in case that the protection of the human rights of intersex persons can be achieved.

The domestic policies assessed indicate that Botswana does not have guidelines and policies on the right to health of intersex persons. In the absence of in-country norms and standards, Botswana, normally and as matter of practice adopts WHO norms and standards. Therefore, where Botswana does not have her own set standards and guidelines, the WHO standards take precedence. In that case since WHO classifies intersex as a 'disease', it is highly likely that Botswana will adopt the same position. The policies to this extent cement the injustices prevalent in the society of treating intersex persons as "bad omen" and unacceptable.<sup>193</sup>

It is through comprehensive and inclusive programmes that intersex persons will be accorded targeted specific health needs. The absence of specific reference to intersex human rights as human rights issues in the national health policies and programming, leaves the approach to the discretion of medical personnel and parents. This poses risks of immeasurable human rights violations taken by medical doctors and parents on intersex infants. Botswana should adopt the protocol which promotes an intersex person's right to make a choice later in life about their gender and or sex, as it is now being championed by activists and international law. Mattis sums it by stating that, 'many intersex people have experienced enormous personal tragedies at the hands of their doctors with the consent of their parents.'<sup>194</sup> Furthermore, persons whose rights are violated should be able to approach courts

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<sup>190</sup>[2003] 2 BLR 409 IC. The case discussed the right to consent in terms of pre-employment HIV testing.

<sup>191</sup>Ahmed, SF, Houk, H & Lee, PA 'Consensus statement on management of intersex disorders' (2006) *Archives of Disorders of Children* 554.

<sup>192</sup>Ahmed & Houk *et al* (n 191 above).

<sup>193</sup>Kaggwa (n 1 above).

<sup>194</sup>Mattis (n 48 above) 83.

for legal remedies without barriers in law, as it is provided for in the Botswana Public Health Act.

Botswana health policies and laws must be drawn and harmonised to reflect the changes that are taking place regionally and internationally on the protection of intersex persons' right to health and bodily autonomy amongst others. The CESCR General Comments and the position taken by WHO in clarifying intersex human rights, places Botswana in a position which it can no longer ignore, thus it must undertake to respect, promote, protect and fulfilling intersex human rights.

## Chapter 3

### Comparative analysis of legal recognition of intersex persons and issuance of identity documents in Malta, South Africa and Kenya

#### 3.1 Introduction

This chapter focuses on a comparative analysis of three countries Malta, South Africa and Kenya. Malta and South Africa have made progress in adopting laws which protect intersex persons. In Kenya, the High Court determined two cases, which demonstrated the challenges and experiences faced by intersex persons and the opportunities that can be used in respect of national laws and policies in promoting, protecting and fulfilling intersex human rights.

In April 2015, Malta became the first country globally to adopt specific laws on intersex person human rights. This was as a result of persuasion by the Council of European Union<sup>195</sup> which encouraged member states to make targeted legislative reforms to protect intersex persons. It was also because of rigorous litigation against the country by a transgender person.<sup>196</sup>

Post the apartheid era in South Africa and beyond, South Africa adopted progressive, liberal laws and policies. As a result of that, Botswana has relied on such developments especially in her jurisprudence. Both South Africa and Botswana also share a similar common law system, of Roman Dutch Law. The Constitution of South Africa recognises and guarantees that every person has the right to fundamental human rights.<sup>197</sup> The rights to dignity, non-discrimination and equality, are defined in legislature and case law in South Africa, to promote fundamental human rights.

The Kenyan High Court has determined two intersex cases, one brought by an adult male intersex person and another by a guardian of a minor intersex child. Both cases highlighted issues of legal recognition and the challenges faced by intersex persons in Kenya. While there is no specific adopted law in Kenya like in Malta and South Africa, the interpretation of the provisions of Kenyan Constitution and the provisions of the Universal Declaration of Human Rights<sup>198</sup> were used in both cases. Therefore, the judgements are a positive step in protecting the rights of intersex persons in Kenya.

Legal recognition in this Chapter refers to issuing of birth certificates and other identification documents, used nationally and internationally. This occurs at birth and when individuals seek to change their gender on their identity documents, to indicate and embrace a preferred

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<sup>195</sup>Council of the European Union Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons Foreign Affairs Council Meeting, Luxembourg 24 June 2013. Available at [www.consilium.europa.eu/uedocs/pressdata/en/foraff/137584.pdf](http://www.consilium.europa.eu/uedocs/pressdata/en/foraff/137584.pdf) (accessed 14 December 2016).

<sup>196</sup>*Joanne Cassar v Malta* (Application No. 36982/11) ECHR.

<sup>197</sup>South African Constitution Act 108 of 1996.

<sup>198</sup>Universal Declaration of Human Rights GA Res 217 A (111) A, GAOR UN Doc. 8/810 at (1948).

gender, other status or gender non-conforming.<sup>199</sup> Intersex persons are a minority in many societies and are generally excluded from legal recognition laws as their gender is more often than not, chosen for them at birth. Article 16 of the ICCPR provides that everyone is entitled to legal recognition and to equal protection before the law. This Chapter strives to find commonalities and challenges in respect of Malta, South Africa and Kenya and how Botswana can learn how to best protect and promote human rights of intersex persons in Botswana.

### 3.2 Malta

In 2015 Malta became the first country in the world to grant intersex persons legal recognition and protection from medicalisation and discrimination. It adopted the Gender Identity Expression and Sex Characteristics Act<sup>200</sup> (GIESCA). It is argued that the adoption of the Act was encouraged by a series of events and litigation that occurred in Malta as well as in Europe.

In 2011 Joanne Cassar, a transgender woman, launched a court case<sup>201</sup> before the European Court of Human Rights (ECHR), against Malta. The application was made by Joanna Cassar, a transgender person who wished to get married, without success as a result of Malta's restrictive law on gender identity.<sup>202</sup> A transgender person could not get married without having gone through surgery to affirm their acquired and preferred gender. In 2013, when the case was still active before the ECHR, the government of Malta pursued Cassar to amicably settle the matter out of Court. Cassar withdrew the matter and both parties advised the Court that negotiation processes were under way. Malta as part of negotiations, made an undertaking that it will present a Bill before Parliament with a specific focus on respecting and promotion of transgender persons human rights, and their right to marry. It is argued that Cassar's legal demands influenced the adoption of GIESCA which is inclusive of intersex human rights.

The Third International Intersex Forum (Forum) was hosted by Malta in 2013. At the Forum, various demands were made by intersex human rights organisations, activists and individuals. The Malta Declaration<sup>203</sup> which detailed comprehensive recommendations, made by attendees on the rights of intersex persons, was adopted at the Forum. The Malta Declaration amongst many demands, called for an end to genital-normalising surgical interventions meant to align intersex persons to normative gender binaries. It demanded that intersex persons be given the right to make choices and decisions regarding their bodies. The Malta Declaration echoed what many intersex persons had been advocating for; harmonising laws to stop the pathology

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<sup>199</sup>International Commission of Jurists *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* (2011) 137.

<sup>200</sup>Gender Identity Expression and Sex Characteristics Act X1 of 2015 of Laws of Malta.

<sup>201</sup>*Cassar* (n 196 above).

<sup>202</sup>Marriage Act Chapter 255 of Laws of Malta.

<sup>203</sup>The Malta Declaration [www.kaleidoscopeaustralia.com/about-us/intersex-inclusion-policy](http://www.kaleidoscopeaustralia.com/about-us/intersex-inclusion-policy) (accessed 13 December 2016).

of intersex variations in the medical field and World Health Organisation International Classification of Diseases standards.<sup>204</sup>

In the same year, the Council of Europe Parliamentary Assembly through Resolution 1952,<sup>205</sup> made a statement of the right of children to physical integrity. It encouraged members to protect intersex children against discrimination and unnecessary genital medical interventions. At international level the United Nations issued an interagency statement on intersex human rights in 2014<sup>206</sup> to support and encourage member states to adopt laws which will protect intersex children.

The Commissioner for Human Rights of the Council of Europe issued and presented a paper in 2014 titled: A boy or a girl or person Intersex people lack recognition in Europe.<sup>207</sup> The paper illustrated the legal, medical and social challenges faced by intersex children in Europe. The Parliament of Malta in 2014 discussed a Bill on Gender Identity Expression and Sex Characteristics, which was later in 2015 adopted as law. It is these series of events which led Malta to adopt law to protect intersex persons holistically.

The GIESCA provides that a gender marker is the ‘identifier which classifies persons within a particular sex category. A gender marker is generally used in identification documents describing sex or gender. The categories will then be either male or female where there is no provision for intersex persons. It is argued that the law must be in harmony with the identity documents that are required apart from a birth certificate and birth registry.<sup>208</sup> Malta has also adopted law that provides for intersex and transgender children in schools.<sup>209</sup> This also gives validity and promotes an institutional set ups to recognise the existence of intersex children. The Men and Women Equality Act<sup>210</sup> and the Civil Code Act,<sup>211</sup> which deals with laws of persons and acquisition of things, were amended to reflect the changes made in the GIESCA. Malta therefore harmonised its laws to make them inclusive of intersex person’s human rights.

Section 3 of the GIESCA grants legal recognition to persons and citizens in Malta and accords them the right to freely develop their gender identity.<sup>212</sup> Therefore there is no pressure especially in law to adhere to the standard of the normative binary. The Act also provides for the right to bodily autonomy and integrity and that gender identity must be

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<sup>204</sup>WHO ICD-10 (n 39 above).

<sup>205</sup>Council of Europe Parliamentary Assembly Resolution 1952(2013) on Children’s right to physical integrity October 2013 para 7.5.3.

<sup>206</sup>‘Eliminating, forced coercive and otherwise involuntary sterilization’ An Interagency Statement, OHCHR, UN Women, UNAIDS, UNDP, UNFPA World Health Organisation 2014.

<sup>207</sup>A boy or a girl or person Intersex people lack recognition in Europe.[www.coe.int/en/web/commissioner/-/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-euro-1?inheritRedirect=true](http://www.coe.int/en/web/commissioner/-/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-euro-1?inheritRedirect=true) (accessed 13 December 2016).[www.coe.int/en/web/commissioner/-/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-euro-1?inheritRedirect=true](http://www.coe.int/en/web/commissioner/-/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-euro-1?inheritRedirect=true) (accessed 13 December 2016).

<sup>208</sup>Gender Identity Expression and Sex Characteristics Act, sec 2.

<sup>209</sup>Trans, Gender Variant and Intersex Children Policy Malta 2015.

<sup>210</sup>The Men and Women Equality Act CAP 456 Malta.

<sup>211</sup>Civil Code Act CAP 16 Malta.

<sup>212</sup>GIESCA (n 208 above) sec 3(1).

respected by everyone,<sup>213</sup> including public authorities. The right to privacy and confidentiality is guaranteed by GIESCA as authorities who deal with applications, are barred from sharing information with third parties, to protect individuals who wish to change their names and gender markers in official identity documents and other documents to reflect their identity.<sup>214</sup> Upon application for change of name and gender the applicant does not need any confirmation or tests from a professional to confirm their gender.<sup>215</sup> The provision protects the right to privacy, as one is not subjected to degrading treatment of going through medical burdensome tests to be legally recognised.

Minors who are less than the age of 18, wishing to change their gender are also considered, if the application is brought before a Civil Court for determination. The provision also factors in the best interest of the child and level of maturity in making an order for change of gender.<sup>216</sup> This does not leave children out of any matters that affect them and are given a right to participate in the choice of their identity. Therefore, a child can make an informed choice and consent later in life for surgery or none at all.<sup>217</sup> It is argued that the provision is a protective measure which will ensure that a balance is achieved when intersex children make their gender choices as they will have the support and backing of the law. The GIESCA provides for the right to integrity and that once the certificate of birth is amended, one can apply for other identity, employment and educational documents to be altered.<sup>218</sup>

The provisions of the GIESCA have factored in fundamental human rights and international law on legal recognition, the right to be protected equally before the law, and the right to bodily autonomy and freedom of choice. It is a law that encompasses respect for human rights and universality, as it does not exclude any person who the society assumes is different from the normative binaries. GIESCA is instrumental in making the rights of intersex persons a lived reality in legal recognition, promotion and protection of their rights. It therefore validates equality of persons in the society regardless of their gender and identity. It is also in accordance with the Yogyakarta Principles which promotes the rights of sexual minorities and gender identity.

While Malta has led the championing of protection of intersex persons by adopting GIESCA, there are concerns as how effective the law will be, taking into consideration the requirements for public birth registry, consent of the child and of the parents and the medical interventions of genital alteration. The Act provides that in terms of surgery for genital alteration, parental consent and decision making should not be social but be fully medical.<sup>219</sup> The question that arises is how is ‘social’ going to be avoided as intersex normalising surgeries are mostly based on social factors of gender conformity.<sup>220</sup> However the strict tone of the provisions on high care and the attention of numerous specialists may be an

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<sup>213</sup>GIESCA (n 208 above) sec 3(1) (d).

<sup>214</sup>GIESCA (n 208 above) sec 12.

<sup>215</sup>GIESCA (n 208 above) sec 3 (4).

<sup>216</sup>GIESCA (n 208 above) sec 7 (2).

<sup>217</sup>Newbould (n 179 above) 137.

<sup>218</sup>GIESCA (n 208 above) sec 10 (2).

<sup>219</sup>As above.

<sup>220</sup>Kaggwa (n 1 above).

answer in avoiding parental consent based on social grounds.<sup>221</sup> The GIESCA provides for delay in birth registration to eliminate medical assignment of a ‘preponderant’ sex, which may be female and male.<sup>222</sup> Thus the delay may aggravate stigma and discrimination which the GIESCA is trying to curb. In respect of age of consent and parent as guardians, the European Agency is of the view that parents and medical professionals will continue to play a vital role in the determination of the gender of a minor child. Despite that Malta has adopted the GIESCA, there are known cases of intersex surgical interventions in Malta of which numbers are unknown.<sup>223</sup> Therefore the right of an intersex child to make a choice in respect of their gender may be a far-fetched provision, considering at the protocols coupled with unknown surgeries that are performed. It remains to be seen how children are going to exercise such decisions without influence from medical professionals. The GIESCA although progressive will need to factor in such shortcomings upon interpretation.

In her article Goessl,<sup>224</sup> questions the applicability and confirmation of the gender marker<sup>225</sup> provision to non-Maltese nationals. She further assesses whether the Maltese national law or public international law will apply in such a case. In her opinion, public international law will be better applicable than national law. Goessl reckons that a non-Maltese intersex citizen, may experience difficulties once they are outside Malta should they invoke GIESCA provisions in acquiring their identification documents.<sup>226</sup> It is argued that the principles of international law should be adhered to in according an intersex person the dignity and respect they deserve.

Szlowdinsky states that GIESCA is an embodiment and reflection of the Yogyakarta Principle,<sup>227</sup> which are inclusive and promote the right to gender identity. The law also promotes non-discrimination as gender and or sex are listed as grounds for non-discrimination.<sup>228</sup> It is suggested that it should be used as a template and benchmark for any gender recognition and antidiscrimination legislation,<sup>229</sup> specifically that intersex persons’ experience challenges in respect of gender and discrimination in their daily lives. While the GIESCA is relatively new it will be seen how it will be implemented, as theoretically, its unique and ground-breaking.

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<sup>221</sup>GIESCA (n 208 above) .

<sup>222</sup>European Union Agency for Fundamental Rights ‘The Fundamental Rights situation of intersex people Austria’ 2015 4 [www.fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf](http://www.fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf) (accessed 16 December 2016).

<sup>223</sup>Agency for Fundamental Rights (n 222 above) 7.

<sup>224</sup>Susanne L Goessl ‘From question of fact to question of law to question of private international law: the question whether a person is male, female or...?’ (2016) 12 *Journal of Private International Law* 226.

<sup>225</sup>GIESCA (n 208 above) sec 9.

<sup>226</sup>Goessl (n 224 above).

<sup>227</sup>Szydłowski (n 61 above) 8.

<sup>228</sup>As above.

<sup>229</sup>Szydłowski (n 61 above) 10.

### 3.3 South Africa

As a result of injustices suffered by South Africans during the apartheid era,<sup>230</sup> after apartheid South Africa, adopted one of the world's most inclusive and liberal constitutions. The Constitution of South Africa<sup>231</sup> provides for equality, equal treatment of all persons and the right to protection and benefit of law.<sup>232</sup> Equality is described as "equal enjoyment of all rights and freedoms."<sup>233</sup> The Constitution lists sex and gender as grounds for non-discrimination. Both sex and gender are critical in the intersex discourse, as the words are sometimes used interchangeably.

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and promoted. Dignity is arguably a fundamental principle that can give everyone the recognition that they deserve as a human being, free from discrimination on the basis of sex, gender and identity. Section 36 provides for limitation of rights, which at the same time provides for a less restrictive approach in the application of the right to dignity. The approach was laid down in *S v Manamela and Another*;<sup>234</sup>

Ultimately the question is one of the degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available in our country at this stage but without losing sight of the ultimate values to be protected. There can accordingly be no absolute standard for determining reasonableness.

Dignity has been interpreted in South Africa in various cases. In *S v Makwanyane and Another*,<sup>235</sup> the Court stated that the right to life and dignity are the most important of all human rights and the source of other personal rights. Goolam<sup>236</sup> argues that dignity is an essential principle that should come before equality and it is part of the 'trinity' of fundamental human rights. Dignity can also be used as a propeller to realise the rights of the marginalised in bridging inequalities.<sup>237</sup> Judge Arthur Chaskalson stated that:<sup>238</sup>

In light of our history the recognition and realization of the evolving demands of human dignity in our society – a society under transformation is of particular importance for the type of society we have in the future.

The South African Constitution is specific on the right to dignity, equality and non-discrimination, Section 9(3) provides that;

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<sup>230</sup>TW Bennett 'Ubuntu: An African equity' (2011) 14 *Potchefstroom Electronic Law Journal* 32.

<sup>231</sup>South African Constitution (n 197 above).

<sup>232</sup>South African Constitution (n 197 above) sec 9.

<sup>233</sup>South African Constitution (n 197 above) sec 1.

<sup>234</sup>2005 (5) BCLR 491 CC para 30.

<sup>235</sup>1995(3) SA 391 CC.

<sup>236</sup>N MI Goolam 'Human dignity our supreme constitutional value' (2000) 4 *Potchefstroom Electronic Journal* 1.

<sup>237</sup>As above.

<sup>238</sup>The Third Bram Fischer Memorial Lecture (2000) 16 *South African Human Rights Journal* 193.

The state may not unfairly discriminate directly against anyone one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture language.

South African courts have developed and interpreted equality in various case law in a quest to build a ‘democratic and tolerant nation.’<sup>239</sup> In her article Smith distinguishes between formal and substantive formality which is applied to achieve equality.<sup>240</sup> According to Smith, formal equality is equality that:

Requires that all persons who are in the same situation be accorded the same treatment and that people should not be treated differently because of the arbitrary characteristics such as religion race or gender<sup>241</sup> and as long as there is consistency in treatment there is no discrimination.

This is in contrast to substantive equality which Smith explains in the following manner:

It is concerned with eliminating barriers which exclude certain groups from participation. With the emphasis on the impact of laws or policies and the move beyond consistency to substance, the substantive equality approach incorporates indirect discrimination in its analysis.<sup>242</sup>

It is submitted that substantive equality is the preferred applicable equality as provided for in the Constitution and in judicial cases. It incorporates consistency in the application of laws and practices, equally among people and the restoration of dignity. Formal equality has its shortcomings as it must be consistent in its application but does not emphasise on non-discrimination and dignity.<sup>243</sup> In the celebrated case of *National Coalition for Gay and Lesbian v Minister of Justice and Others*<sup>244</sup> it was held that;

To understand ‘the other’ one must try, as far as is humanly possible, to place oneself in the position of ‘the other. It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet as soon as we say any...group is less deserving and unworthy of equal protection and benefit of the law all minorities and all...society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of different race, or religion, or colour or sexual orientation are less worthy.

Constitutional equality is not only recognised through judicial decisions, but it is also through legislation and policy. Therefore, the recognition of intersex persons can be read into the Constitution because of developed jurisprudence and on the interpretation of the Bill of Rights.

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<sup>239</sup> A Smith ‘Equality constitutional adjudication’ (2014) 14 *South Africa African Human rights Law Journal* 625.

<sup>240</sup> As above.

<sup>241</sup> Smith (n 239 above) 611-612.

<sup>242</sup> Smith (n 239 above) 613.

<sup>243</sup> See *Prinsloo v Van Der Linde & Another* 1997(6) BCLR756 CC and *Jordan & Others v S* 2002 (6) SA 642 CC.

<sup>244</sup> 1999 (1) SA 6 CC para 66.

While the Constitution does not specifically define intersex status, Section 2 of the Alteration of Sex Description and Sex Status Act (ASDSSA)<sup>245</sup> defines intersex as any person whose congenital sexual differentiation is atypical to whatever degree. The ASDSSA recognises the existence of intersex persons and the Constitution's obligations, that where there is discrimination and inequality, laws must be enacted to protect any particular group of people to grant them inherent dignity. The adoption of the ASDSSA led to the amendment of the Births Deaths and Registration Act,<sup>246</sup> to reflect changes as provided for in the ASDSSA, as a result of being inclusive of intersex status.

The ASDSSA provides for the processes to be undertaken by intersex persons in seeking legal recognition and issuing of birth certificates by authorities. Intersex persons are required to submit<sup>247</sup> a confirmatory report by a medical practitioner confirming that the person is intersex, together with a report from a psychologist or social worker stating that an individual has been in that gender role for a period of two years or more. Upon complying with the requirements of the process, one must file an application before a Magistrate requesting for change of gender marker in their identity documents. It is only then that an applicant can be issued with a birth certificate by the Director General.<sup>248</sup>

The provisions are not clear as to what procedure should be followed by professionals who are mandated to issue a report in reaching their conclusion in respect of intersex status. The requirement to seek confirmation of being in one gender for a specified time period is unfair, and does not echo the spirit on dignity and equality as emphasised by the Constitution. The burdensome processes that are required, apply the formal equality approach, rather than substantive equality which its tenets are non-discrimination, respect and dignity. The processes therefore do not accord intersex person the rights to dignity and to privacy.

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)<sup>249</sup> also defines intersex. It intends to eradicate<sup>250</sup> and 'stamp out'<sup>251</sup> systematic, social and structural discrimination. Section 2 provides that its objective is to give effect to the spirit of the Constitution and specifically for people to enjoy their rights and freedoms.<sup>252</sup> PEPUDA was passed by Parliament to argument the Bill of Rights in issues of inequality and discrimination which were left behind in terms of section 9 and 10 of the Constitution.<sup>253</sup>

As a result of South Africa's obligations to international law, practices and treaties, PEPUDA strengthens the intention of South Africa to adhere and give effect to those obligations. It gives guidance on measures to be undertaken in advancing human rights of those disadvantaged by discrimination in the society. PEPUDA provides that the state and the

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<sup>245</sup> Alteration of Sex Description and Sex Status Act 49 of 2003 South Africa.

<sup>246</sup> Births Deaths and Registration Act 51 of 1992 South Africa.

<sup>247</sup> n 245 above, sec 27.

<sup>248</sup> As above.

<sup>249</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 South Africa.

<sup>250</sup> n 249 above, sec 2(c).

<sup>251</sup> B Pityana Joan Church Lecture UNISA Faculty of Law 15 October 2002 *Codicillus* XLIV No/NV1 6.

<sup>252</sup> n 249 above, sec 2 (b) (i) and (iii).

<sup>253</sup> n 249 above, sec 2(b) (iv).

society should make a difference in promoting the realisation of equality among all people.<sup>254</sup> Its provisions are inclusive in terms of intersex persons and give a selection of protection of legal recognition. Those in the authority and holding public office<sup>255</sup> are mandated to implement it for the benefit of people. It therefore accords intersex persons who may have challenges with being issued with birth certificates, to be able to hold the public authority accountable where there are violations.

The South African Human Rights Commission (SAHRC)<sup>256</sup> is a body set up by the Constitution and is mentioned in the PEPUDA, as a human rights institution which provides an opportunity to those who have experienced discrimination and inequality the right to be heard. It was instrumental in effecting change of law and provides guidance to achieve equality and non-discrimination of intersex persons in South Africa.<sup>257</sup>

Although the South African law recognises intersex persons, there are gaps that need to be addressed for intersex persons to be protected, and enjoy the right to dignity. The SAHRC is a pivotal institution where not only the Constitutional provisions are interpreted, but the provisions of the PEPUDA are used to grant those in the minority recourse. Gender Dynamics, an organisation that advocates for transgender and intersex rights in South Africa, has outlined that the implementation of ASDSSA does not cater for intersex persons as it does not have an option for gender non-conforming or other status.<sup>258</sup> It is argued that provisions which provide for male and female binaries cement the societal discrimination experienced by those who are outside the normative binary. Lack of access to information, health services and economic disparities may be a challenge to intersex persons who may want to change their identity from an assumed and allocated gender at birth.

The right to privacy is violated as there is a requirement to undergo gender affirmation tests with professionals to determine their gender, as provided by the ASDSSA. It is argued that the process as outlined is a tedious process which is not necessary and may promote stigma and discrimination that intersex persons are already experiencing in the society. While South African law is progressive, there are areas of law that need to be amended to protect intersex persons without giving and taking their rights away. The law must reflect the changes that are made in the 'social and medical communities' globally,<sup>259</sup> and the tenets of the Constitution.

### 3.4 Kenya

The Kenyan High Court have dealt with two cases in determining legal recognition of intersex persons in *Richard Muaysa v The Honourable Attorney General and 4 Others*<sup>260</sup> and *Baby "A" (Suing through her mother E A) v Attorney General and Others*.<sup>261</sup>

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<sup>254</sup> n 249 above, sec 24.

<sup>255</sup> n 249 above, sec 26.

<sup>256</sup> n 249 above, sec 184.

<sup>257</sup> B Deyi *et al Briefing paper Alteration of Sex Description and Sex Status Act No 49 of 2003* Legal Resources Centre and Gender Dynamics 2014 20-23.

<sup>258</sup> As above.

<sup>259</sup> Deyi (n 257 above) 21.

<sup>260</sup> 2010 eKLR Kenya High Court.

<sup>261</sup> Petition 266 of 2013 Kenya High Court (Constitutional and Human Rights Division).

### 3.4.1 **Richard Muaysa v Attorney General and 4 Others**<sup>262</sup>

*Richard Muaysa* was as a result of criminal proceedings and the *Baby 'A'* case was brought before the court as a result of Baby A not having been issued with a birth certificate from birth. Both Muaysa and Baby A did not have birth certificates which bearers a gender marker and are critical to legal recognition of any person. *Muaysa* claimed that his fundamental human rights as enshrined in the Constitution of Kenya and Section 2 of Kenyan Birth and Death Registration Act,<sup>263</sup> were violated. The Petitioner did not have identity documents and therefore could not enjoy his fundamental right to movement, as he did not have travel documents. He argued that as a result of his intersex status, he missed out on educational, employment and marriage opportunities.

The case raised the following issues for determination by the Court

- (1) Whether the petitioner was an intersex person and if so;<sup>264</sup>
- (2) Whether the petitioner had suffered lack of recognition because sections 2(b) and 7 of the Birth and Death Registration Act, and if so whether the provisions are inconsistent with the principle of equality and non-discrimination enshrined in section 82 of the Constitution;<sup>265</sup>
- (3) Whether an intersex person has the right to determine their gender and sexual identity;<sup>266</sup>
- (4) Whether the petitioner has suffered violation of his fundamental right against torture, cruel inhuman degrading treatment provided under section 74 of the Constitution.<sup>267</sup>

In determining the issues, the court found that the Petitioner's rights were violated only to the extent of being placed in the same cells as males as it was eventually found that the Petitioner had both male and female genitalia. He was also consistently subjected to body searches by prison warders. In that respect the petitioner's dignity was violated and subjected to inhuman, cruel and degrading treatment. On the issue of legal recognition, the court stated that the Petitioner was not denied legal recognition as the law in Kenya especially the Constitution recognised everyone including intersex persons. It emphasised that everyone in Kenya ought to have a legal recognition documents despite their gender. The Court was of the opinion that, although intersex was not provided in the Constitution, every person in Kenya had a right to be recognised as a person.

It further stated that Kenya recognised intersex person as section 70 and 82 of the Constitution, and the provisions are in accordance with the provisions of ICCPR on legal

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<sup>262</sup>n 260 above.

<sup>263</sup>Birth and Death Registration Act Chapter 149 Kenya.

<sup>264</sup>n 260 above, para 96 (iii).

<sup>265</sup>n above, para 96 (iv).

<sup>266</sup>n 260 above, para 96 (v).

<sup>267</sup>n 260 above, para 96(xiv).

recognition and equality.<sup>268</sup> The Court recognised that while South Africa has enacted provisions in law specifically for intersex persons under PEPUDA, it was because of its historical inequalities, and that could not be done in Kenya as it was not acceptable. The Court stated that to do that will be against the cultural and social norms of Kenya.<sup>269</sup>

In respect of self-determination and recognition of other status, the Court was of the opinion that the Kenyan society was not ready to recognise intersex person,<sup>270</sup> a clear contradiction of averments made by the same Court. The court ordered that the Petitioner did not suffer discrimination as he never applied for an identity card, and therefore could not claim non-recognition and loss of opportunities as a result of his intersex status.<sup>271</sup> The fundamental rights to equality and equal treatment of everyone were not considered by the Court. It is argued that the reluctance of the Court to make pronouncements against discrimination faced by intersex persons indicated that the Court did not apply itself in noting the claims by the Petitioner.

The Court missed an opportunity to lay down grounds of non-discrimination and give effect to change of law in Kenya to protect intersex persons. The interpretation of sec 70 and 82<sup>272</sup> were left to imagination, because they do not offer protection to intersex persons. It failed to invoke Article 2 of the Universal Declaration of Human Rights which provides for ‘other status’, the reason being that the Kenyan society was not ready to recognise intersex persons. The Court in this instance therefore opted to assume and endorse public opinion than protect the right of private individual rights.

The court in *RM* case applied the principles in *Corbett v Corbett*.<sup>273</sup> In *Corbett*, the question was whether a wife was intersex, when her husband wanted a divorce. The Court dealt with medical, legal and social evidence to reach a conclusion. The Court held that the wife was born male chromosomes and was therefore a male. The Court held that gender was determined at birth and could not be altered or changed medically later in life and surgery cannot alter her true sex. Therefore, the Court ordered that sex is determined by the features of the body.<sup>274</sup>

It is argued that the Court in *Muaysa* case applied a stereotypical approach of gender which compounds normative social standards. It failed to approach the matter forehand and deal with non-discrimination, equality, dignity and equal protection of all persons. The court avoided to make intersex persons’ legal recognition a possibility and to close a gap that the legislature had omitted. It is argued that where the legislature does not provide for protection

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<sup>268</sup>n 260 above, para 132.

<sup>269</sup>n 260 above, para 130.

<sup>270</sup>n 260 above, para 133.

<sup>271</sup>As above.

<sup>272</sup>n 268 above.

<sup>273</sup>1971 (2) All ER 83.

<sup>274</sup>n 273 above, 104.

of people, the court itself<sup>275</sup> can make orders to grant rights to those who are not recognised and protected by the law, in this case, intersex persons.

### 3.4.2 **Baby ‘A’ (suing through her mother EA) and another v Attorney General and Others**<sup>276</sup>

In *Baby ‘A’* case the Petitioner, a mother of a minor intersex child brought before the court an application on the basis that the minor child lacked legal recognition in terms of section 2 and 7 of the Kenyan Birth and Deaths Registration Act. The main issue for determination was whether *Baby A* was denied legal recognition by virtue of being intersex as she did not have a birth certificate.

The Court was of the opinion that while there was no record of the minor child being denied registration, it acknowledged that there is silence of intersex human rights issues in Kenya.<sup>277</sup> The Court was of the opinion that the word sex is not defined anywhere in Kenyan statutes and it did not exclude intersex persons, as they are human beings with the right to be equally protected by law.<sup>278</sup> It further pronounced that issues that are faced by intersex persons are fundamental and that tradition<sup>279</sup> should not be used to silence their right to be protected as a marginalised group.<sup>280</sup> The Court also emphasised the need for enactment of law that will specifically deal with intersex sex human rights issues. At the same time, it was of the opinion that the mandate of enacting law was the responsibility of the legislature. The Court ordered that *Baby A* should be given a birth certificate so that she is legally recognised.<sup>281</sup> The Court ordered that the respondents should provide it with data on intersex persons<sup>282</sup> and statutes that dealt with the place of intersex persons in Kenya.<sup>283</sup> The approach by Court was involving and demonstrated the willingness of the Court to canvass issues where there are claims of violation of fundamental human rights, in comparison to the *Muaysa* case.

The *Baby A* judgment reflects the aspirations of international law that seeks to promote the rights of those whose gender and legal recognition are side-lined. It gave the public a view of intersex persons’ challenges in the Kenyan society. In both *Muaysa* and *Baby A* cases, denial of legal recognition is evident as both Petitioners were not issued with birth certificates at birth as required. As there are no records to indicate records of intersex infants and adults, authorities can be taken to task to give courts, evidence of how they provide intersex children birth certificates.

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<sup>275</sup>Dingake OBK Rethinking the Constitution of the Republic; A paper presented at a conference on Constitutional Reforms in Botswana held at Gaborone International Convention Centre on 11 November 2011 [www.lawsociety.org.bw/news/Justice Key Dingake Adress.pdf](http://www.lawsociety.org.bw/news/Justice%20Key%20Dingake%20Adress.pdf) (accessed 16 December 2016).

<sup>276</sup>n 261 above.

<sup>277</sup>n 260 above, para 69.

<sup>278</sup>n 261 above, para 53.

<sup>279</sup>n 261 above, para 68.

<sup>280</sup>As above.

<sup>281</sup>n 261 above, para 71 (iii).

<sup>282</sup>n 261 above, para 71 (ii).

<sup>283</sup>n 261 above, para 71 (iv).

In 2011, Kenya Human Rights Commission undertook a study namely, *The Outlawed Amongst us*, to study human rights violations and abuses among lesbians, gays bisexual and intersex persons. The study found that there is stigma and exclusion of intersex children in Kenyan families and the society. Being born intersex was found to be a bad omen and that intersex children could be killed or abandoned by their families.<sup>284</sup> The study found out that the laws in Kenya do not recognise intersex persons which forces people to identify with the gender that they do not want and that the lack of recognition was a form of state sponsored homophobia.<sup>285</sup> The study acknowledges the needs of intersex persons and that the State must enact laws that will give legal recognition, access to services and equality to intersex persons in Kenya.<sup>286</sup>

### 3.5 Conclusion

Botswana can learn from Malta in adopting inclusive laws so as to transform its absent law on intersex human rights in line with the GIESCA, to reflect legal recognition of intersex persons. Botswana can also learn from the documentation and birth certificates of children who are born intersex. Policies and law can be promulgated which will not make it an obligation for intersex infants to be registered immediately after birth. This will enable those who are born intersex to identify as they wish to be identified as, whether intersex, other, or gender non-conforming.

National issuing of birth certificates and *Omang* (national identity card) is provided for under the Birth and Death Registration Act (BDRA),<sup>287</sup> and allows only for one to add and alter of forenames and surnames.<sup>288</sup> *Omang* is a document that is used in almost every process that needs identification, for citizens in Botswana. In the acquisition of drivers' license, passport and in many cases seeking employment, an *Omang* is needed to process a request or application. National identification becomes problematic for intersex persons as more often their *Omang* represents a different person from who they are in their adult stage because their birth certificate is used to acquire other identity documents.

The provisions of the BDRA allow a 21-year-old, to bring an application before the Registrar, for change of names. For an under 21 person, parents and guardians are required to be the ones seeking the change of names. The amendment provides that only new names can be added and the old ones must remain as they are.<sup>289</sup> This will prove as a challenge to intersex persons who may want to change their names and the gender marker in their identity and official documents. Botswana can learn a lesson from Malta which allows children to participate in making decisions regarding their identity with the assistance of law.

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<sup>284</sup> Kenya Human Rights Commission *The Outlawed Amongst Us* (2011) 25.

<sup>285</sup> n 284 above, 43.

<sup>286</sup> n 284 above, 53.

<sup>287</sup> Botswana Birth and Death Registration Act 16 of 1998.

<sup>288</sup> n 287 above, sec 13.

<sup>289</sup> n 287 above, sec 13(3) (a).

The South African Courts have adopted substantive equality<sup>290</sup> as a measure for protecting holistic human rights and classes of persons who have been excluded in the society and law to some extent. It is argued that the same preference is derived from Botswana case law<sup>291</sup> and the consistency by the courts in preferring to interpret the constitution generously and broadly.<sup>292</sup> It is argued that with the attitude of the South African Courts, intersex human rights issues can be achieved as cases relating to sex and gender status have been determined positively. South African jurisprudence shows a strong disposition to substantive equality and non-discrimination, and a commitment towards a human rights approach which affirm that all people are equal. While the law is not developed in Botswana in respect of intersex rights, a lesson that Botswana can take from South Africa is to adopt laws that will not exacerbate the stigma and discrimination that intersex persons are already experiencing. For instance, in South Africa, intersex persons are required to submit medical proof as part of an application for change of gender marker. In its absence one cannot be assisted. This is one of the lessons that Botswana can use and omit from its law so that the process of changing a gender marker is specific and less burdensome. Such process also promotes multiple<sup>293</sup> discrimination as the proof sought may make one feel dejected and violated to go through the process.

The Courts in Botswana have determined cases on equality<sup>294</sup> non-discrimination based on sex and gender, like South Africa. In *Mmusi and Others v Ramantele and Others*,<sup>295</sup> a distinction was made between substantive equality and formal equality. Formal equality required uniformity of treatment to all people.<sup>296</sup> Substantive equality requires the law to ensure equality outcome and is prepared to tolerate disparity of treatment to achieve the goal.<sup>297</sup> The Court went further to state that substantive equality needs a thorough assessment of whether social and economic rights of individuals have been violated, to determine whether the right to equality has been breached.<sup>298</sup> Deliberating on equality, Judge Dingake stated that;

The principle of equality attempts to make sure that no member of society should be made to feel that they are not deserving of equal concern, respect and consideration.<sup>299</sup>

As shown from the comparative analysis of three countries on intersex human rights, intersex persons are not treated equally with those in the gender binary. Comparatively in Botswana like Kenya, there are no publicly available records for intersex persons, be it in medical or national census data. The courts as custodians of law and justice can use an opportunity like this to make equal and inclusive laws. *Baby 'A'* case is a precedent which can be useful to

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<sup>290</sup>Smith (n 239 above).

<sup>291</sup>*Student Representative Council of Molepolole College of Education v The Attorney General* 1995 BLR (1) 178 High Court.

<sup>292</sup>As above.

<sup>293</sup>General Comment 22 (n 113 above) paras 30-31.

<sup>294</sup>*Kamanakao v Attorney General & Another* 2002 1 BLR 110 High Court.

<sup>295</sup>MAHLB 000836- 2010 High Court.

<sup>296</sup>n 295 above, para 65.

<sup>297</sup>As above.

<sup>298</sup>n 295 above, para 66.

<sup>299</sup>n 295 above, para 72.

Botswana jurisdiction where birth certificates of intersex babies and subsequent national documents are based only on the normative binary. This case indicates that the courts must also be proactive in protecting the rights of gender minorities.

From the comparative analysis in this Chapter and Chapter 2, Botswana law privileges male and female gendered bodies to be recognised without discrimination. Pityana said that ‘only when human beings recognise the inherent humanity of others imbued with *dignitas*, will they understand that inequality is a contravention of dignity.’<sup>300</sup> Therefore since Botswana laws are inconsistent with constitutional provisions in respect of intersex human rights issues, international soft law and custom should be used to influence the protection and promotion of the human rights of intersex persons.<sup>301</sup>

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<sup>300</sup>Pityana (n 251 above).

<sup>301</sup>A Rudman ‘The protection against discrimination based on sexual orientation under the African human rights system’ (2015) 15 *African Human Rights Law Journal* 9.

## Chapter 4 Qualitative research findings

### 4.1 Introduction

This Chapter analyses the findings of a qualitative research conducted by the researcher. The empirical study was conducted in Gaborone, Botswana, in four local civil society organisations, which advocate for human rights. The findings capture the understanding of intersex human rights issues, among the chosen civil society organisations (CSOs). Since there is a gap in the available literature on intersex issues in Botswana, the organisations through the empirical study, provided with in-depth, the lived reality of intersex persons in Botswana. The research also provided the researcher with practical information which will form the basis of the overall conclusion and recommendations of the study.

#### 4.1.2 Methodology

A quantitative study was conducted in Gaborone in four CSOs. Each organisation appointed one person to participate in the interview. A questionnaire comprising fifteen standard questions, was used to guide the interview.<sup>302</sup> The researcher sent a letter of request to the organisations including the ethical stipulations of the study. Only one person as chosen by the organisation was required to participate. An oral interview which lasted not more than 45 minutes was conducted, for all the four people on different dates. The questions as asked formed various themes, which the researcher will focus on Sub Chapter 4.3.

### 4.2 Profiles of participant organisations

Participant organisations are coded as X1, X2, X3 and X4 in no particular order.

X1 is an organisation which specifically deals with issues of transgender and intersex in Botswana. The mandate of X1 is to lobby, raise awareness, inform policy and law reform of transgender and intersex person's human rights in Botswana. X2 is an organisation whose mandate is two pronged, in approach. It provides health and services to lesbians, gays, bisexuals, and transgender and intersex persons (LGBTI). It also creates an enabling environment by raising awareness of LGBTI human rights issues, by educating and capacitating different groups, individuals, organisations and stakeholders.

X3 is a human rights organisation, with a mandate to make human rights a reality in Botswana. Its specific programming is human rights, health literacy and advocacy. X4 is a sex worker led organisation, which exists to strengthen the voice of sex workers in Botswana and provides evidence of sex worker rights violations. It also lobbies for law reform for sex work and sex worker human rights. It provides health, legal and services and legal empowerment services to sex workers. X4 is not a legally registered organisation and is therefore nested by X3, to continue with its mandate.

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<sup>302</sup> See Annexure A1-A3.

## 4.3 Findings

### 4.3.1 Definition of intersex among participants and local name for intersex

The participants were requested to define intersex and to explain whether there is a common name that is used to define intersex in *Setswana* ( a common language spoken in Botswana) language. The intention was to gauge whether participants had a demonstrated knowledge and appreciation of intersex status. Three participants gave similar answers that intersex meant that a person has ambiguous genitalia at birth. One participant with a different answer stated that:

Intersex means both male and female, because issues of intersex are not commonly known, we are also learning from intersex persons who we interact with for better understating.

From the interviews the researcher noted that intersex is called *trassie* in Setswana and *pharamesising*.<sup>303</sup> Only one participant acknowledged that they did not know whether intersex was defined in *Setswana*. While the three provided that / the same answer, the spelling of *trassie* and meaning were different. Two participants did not know whether it was *trassie* or *trassie*. X1 informed the researcher that:

*Trassie* is a borrowed word from Afrikaans, which in Setswana means that it is not known whether the person is a female or male. Then there is *pharamesising*<sup>304</sup> where the physical outlook does not collate with the identity. For instance, someone who acts feminine but their genitalia is not defined.

X2 said that *trassie* meant that ‘the sexes are combined’

### 4.3.2 Programmes targeting intersex persons

The question posed to the participants was whether they had specific programmes that targeted intersex human rights issues. The question was asked so that the researcher could measure organisational visibility in respect / it terms of specific inclusion of intersex human rights issues.

Since 2008, X1 has been advocating and lobbying for the inclusion intersex human rights in law and policies. X3 indicated that they do not have specific programmes that target to intersex rights and that since 2007 intersex human rights issues, are lumped with together with LGBT issues. X4 informed the researcher that they do not have any specific programmes around intersex human rights issues. However, since 2012 they have been dealing with intersex human rights issues, which they refer directly to other organisations as and when they encounter them.

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<sup>303</sup> Loosely translated means a male who has feminine physical outlook and is always in and around the company of females

<sup>304</sup> As above.

### 4.3.3 Domestic and legal challenges that intersex persons face in Botswana

To understand whether there is a need for protection of intersex persons in Botswana the researcher asked whether there were any domestic and legal challenges faced by intersex persons. The domestic challenges that were indicated by all the participants are that intersex issues are still kept secret and hidden in Botswana. It was explained that children who are born intersex, are expected to conform to normative binary by their families. Participant X2 stated that:

There is so much stigma and in the studies we have conducted intersex is seen as a bad omen. This leads to family breakdowns where mothers are mostly blamed for the birth of an intersex child. It becomes difficult to share with the immediate family that a new born is intersex for fear of stigma.

Participants X1, X2 and X3 stated that the feedback they receive for their provision of services, indicated that intersex students especially in boarding schools, experience major challenges. They stated that the accommodation arrangements in boarding schools, violated their right to privacy, because an intersex student maybe placed in wrong hostel based, on their physical outlook,<sup>305</sup> which in others cases has resulted in violence and school drop outs.<sup>306</sup>

X3 said that:

Children who are intersex cannot relate to the environment and they become introverts since shared spaces do not allow them their own privacy. It is also difficult to relate to them at a personal level and this could be a mechanism for them cope and protect themselves from people who may want to know more about them or who are inquisitive about them.

Participant X1 stated that intersex persons find it difficult to come out and seek their services which are for free. One of the ways that they come out is that they first identify as transgender. Since X1 provides psychological support directly, it is at those safe spaces that intersex persons gradually begin to identify as intersex with time.

Another legal gap noted by participants was the lack of guidelines and policies from the Ministry of Health, on processes and procedures used on intersex infants.<sup>307</sup> Participants showed concern about medicalisation of intersex, which they assigned to lack of guidelines. Participants X1 and X3 stated that they work with people from the age of eighteen upwards, and the complaints they have received so far, show that they were subjected to genital surgery at birth. It is noted that it is this very challenge that forces intersex persons to conform to the binary and for parents to force their children to conform to societal pressure and expectations of being male or female.<sup>308</sup> X3 stated that:

There are no pronounced laws to address such issues on health, identity status on official documents for instance birth certificate, *Omang*, passports and other general identification documents

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<sup>305</sup> Participant X1.

<sup>306</sup> *The Outlawed Among Us* (n 284 above) 32.

<sup>307</sup> n 306 above.

<sup>308</sup> As above.

None of the participants informed the researcher of any known violence against intersex persons and killing of intersex babies at birth. However, intersex persons suffer discrimination in the work place and in others areas children drop out of school as a mechanism to protect themselves from interrogation about their gender and sex.<sup>309</sup> As a result of those circumstances intersex persons may not access services and to some extent, education because of the stigma associated with their identity.<sup>310</sup>

#### **4.3.4 The process of changing of identity documents and whether intersex status must be included in identity documents as other status**

The researcher wanted to find out whether intersex persons are allowed by law or any policy, to change their identity documents. The question asked was whether the organisations are aware of law, policy and other processes to effect such changes.

The process of changing *Omanq* and other identity documents is largely unknown to participants save except for X1. X2 explained that when an intersex person seeks advice on change of gender, they are referred to a *pro bono* attorney for assistance. X3 and X4 refer their clients to X1 for assistance when needed. In another instance, X3 had once sought to engage with the Director of Births and Registrar, on the same subject, but it did not yield any fruitful response. X1 stated that:

It is a complex process which sometimes takes a very long time but we have a few cases where four intersex persons were assisted to get their *Omanq* to reflect their gender. We refer them to the Director of Births and Deaths Registrar who then refers an intersex person to Princess Marina Hospital.<sup>311</sup> The process is that from the hospital they are referred to the Attorney General who then agrees that they can be granted change of name and gender marker in their identity and official documents.

There should be inclusion of intersex and or other status on birth<sup>312</sup> and national identity documents. While there is a possibility that there can be change of identity documents as drawn from participant X1, it would seem that the process is long, undefined and remains a secret. It is argued that intersex persons who are not privy of the services and assistance that they can get from X1 are left out from benefiting from the process. It is noted that since state authorities can collaborate and grant a change of gender or sex on identity documents, then it should be extended to all at national level, so that it reaches as many intersex persons as possible. It will also give a projection of the population of intersex persons in Botswana and how the state can comprehensively protect them by including their needs in guidelines, policies and laws.

#### **4.3.5 Engagement with intersex persons, traditional leaders' policy and law makers in addressing and advocating for policy and law reform for intersex persons**

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<sup>309</sup>Participant X1.

<sup>310</sup>*The Outlawed Amongst Us* (n 306 above).

<sup>311</sup>A state referral hospital in Gaborone, the capital city of Botswana.

<sup>312</sup>Participant X4.

Since the participant organisations have a similar mandate the researcher enquired how they engaged with policy and decision makers. The question was asked so that the researcher can make a conclusion on whether beyond providing services to intersex persons, there could be a collective broader strategy to engage with policy and decision makers to improve the rights of intersex persons in Botswana.

Participants highlighted that they work with policy and law makers, religious and traditional leaders to raise awareness on intersex human rights issues. X1 and X2 informed the researcher that they have activities and campaigns on intersex human rights issues, which they use to reach out to intersex persons, collaborating partners, traditional leaders and policy law makers to empower, advocate, sensitize and influence policy on intersex human rights issues.

X3 said that:

Since we have lumped issues of LGBT with intersex human rights issues, we raise awareness through prominent international days, for instance, International Day Against Homophobia and Transphobia, international AIDS day and women's day.

X2 indicated that they have a specific campaign called Looking in Looking Out, which began in 2013, meant to address issues of diversity. She indicated that it is through the campaign that there was a realisation that there are many issues of intersex human rights violations. As a result, they formed a support group solely for intersex persons, to be able to share amongst themselves the challenges they face and their lived realities. As a result of challenges documented from the support group meetings, they intend to raise awareness through a book.

X2 stated that:

The book will give courage to others and as well as creating awareness, we will publish a book called *Dipolelo tsa rona*<sup>313</sup> (Our stories) to reach as many intersex persons as possible. The book is meant to compile the stories of intersex, the disregard of their identity and for people to understand diversity and not to subject intersex to binary norms. Another reason is that we want to give intersex persons courage for them to know that there are safe spaces to express themselves. It is also meant to deconstruct the myths about intersex.

X1 said that they have an intersex children parent and guardian support group, which serves as a support structure for those who seek their assistance. X1 stated that they are currently involved in two national campaigns;

We are currently engaging with the Ministry of Health to have discussions with expectant women in different clinics and hospitals to sensitize them about intersex issues and how to deconstruct myths about intersex infants and their health challenges they may face from birth to adulthood.

X1 stated that one of the critical role players in bringing intersex human rights issues in the open and making them visible, are traditional leaders, because they have broad access to communities and families. Participant X1 stated that:

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<sup>313</sup>At the time of submitting the mini dissertation the book was already published and is available at <https://legabibo.files.wordpress.com/2016/10/dipolelo-tsa-rona.pdf> (accessed 16 December 2016).

Our intention is to hold dialogues with traditional leaders and elders in our upcoming Initiation Campaign so that they can assist us in defining intersex in Setswana, because in that manner, it will be easier we believe, to get a buy in with policy and law makers to make changes to include and accommodate intersex human rights issues.

Both X1 and X3 provide lecturers and workshops upon request at the University of Botswana and at public functions to sensitize the general public about intersex human rights issues. The approach used by the participant organisations, will provide a platform for recognition of intersex human rights in Botswana.

#### 4.4 Discussion

All participant organisations indicated that there are challenges of legal recognition status of intersex persons,<sup>314</sup> and that intersex status remains a secret in Botswana.<sup>315</sup> The researcher observed from the findings of the study that although there is awareness about intersex human rights issues, there is need for more knowledge and capacity. Comparatively, one organisation understood intersex to be a combination of two sexes, which shows that capacity and enhanced knowledge are needed for service providers.

It is worrisome that all the participant organizations' interviewed, also provided that even intersex persons find it very difficult to access services from the organisations for many reasons. Cook *et al* argue that for a violation to be recognised it must be named for people to understand that it does not have a place in the society.<sup>316</sup> Therefore capacity and information packaging for the organisations are needed, so that there is improved service uptake by beneficiaries.

Globally the movement for the protection of intersex persons is steadily growing and gaining momentum at international forums.<sup>317</sup> The participant organisations in promoting and raising awareness about intersex issues indicated that there is no representation of intersex issues at national level, for instance no legislator has been approached to table a motion before parliament about the plight of intersex persons to Botswana Parliament, a law-making body. It is argued that this limits the scope and effectiveness of inclusion of intersex human rights in the national policy.<sup>318</sup> As long as there are no strategies in place to approach legislators to advocate for the rights of intersex persons, their rights will continue to be left behind. Cook *et al* argue that where human rights violations are not named, the assumption is that the conduct and exclusion is justified. It is argued that, that will be the case for the rights of intersex in Botswana as intersex human rights violations are not being named and labelled. Additionally,

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<sup>314</sup>See sub para 4.2.4 above.

<sup>315</sup>See sub para 4.2.3 above.

<sup>316</sup>Cook *et al* Naming gender stereotyping in 'Gender Stereotyping Transnational Legal Perspectives' 2010 University of Pennsylvania Press 39.

<sup>317</sup>N B Asher 'The necessity of sex change: A struggle for intersex and transsex liberties (2006) 51 *Harvard Journal of Law & Gender* 62-63.

<sup>318</sup>Eastern Africa National Networks of AIDS and Service Organisations Guidelines for effective civil society representation in national decision-making processes and platforms 2015.

without naming violations, the stigma, discrimination and ‘otherizing’ of intersex persons will not stop.<sup>319</sup>

Advocacy strategies and effective activism can bring change or resistance. In Malta, for instance, it took an individual transgender person to litigate against her country for lawmakers to see the need to enact protective law. Individual intersex activists also champion the course so that they can see change in the laws and policies of their countries. Sally Gross was known across the world as an intersex person, who shared her personal story and advocated for the rights of intersex persons and the need for countries to stop medicalisation of intersex children at birth.<sup>320</sup> From the empirical research findings, there are no planned advocacy strategies by participant organisations that can make legislators to adopt laws and make policies to protect intersex persons.

As drawn from the findings, it was found that intersex status in Botswana is medicalised and that upon age of majority, one can be able to change the gender of their identity documents, without defined laws and guidelines. Intersex persons run a risk of not being assisted adequately as the process is also done in secret, and the general public is not aware of it. The participant organisations need to find an approach that will accelerate legal recognition of intersex persons. The current approaches used by the participant organisations are passive, which may not yield fruitful results as in other jurisdictions.<sup>321</sup> The approach needs to be effective to bring laws to speed and for policy makers to embrace diversity and to make inclusive and protective laws.<sup>322</sup> They must also take advantage of the courts which have interpreted substantive equality, dignity, non-discrimination and the right to equal protection before the law in local cases of *Mmusi*<sup>323</sup> and *Rammoge*.<sup>324</sup> As Dingake J stated:<sup>325</sup>

It is the role of the judiciary and the lawyers to ensure that no human being is treated less favourably because of their social standing in the society. To that end, the judiciary must advance the right to equality and other human rights through proper interpretation of the law and the development of common and customary law-and, in that process, the courts must be vigorous in exploring and using foreign and international law as a guide.

#### 4.5 Conclusion

The role of the participant organisations is to advocate for the acceleration, recognition and protection of intersex persons’ human rights. A place for the ‘misrecognised party as a full member of the society capable of participating on a par with the rest,’<sup>326</sup> must be created and sought after. This will uphold the dignity of fundamental human rights of intersex persons in

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<sup>319</sup>RJ Cook ‘Structures of discrimination’ 2012 (28) *Macalester International* 34.

<sup>320</sup>Gross (n 49 above).

<sup>321</sup>See para 4.1 discussion above.

<sup>322</sup>See Chapter 3 on the discussions on the progress made by Malta and South Africa in adopting progressive and protective laws for intersex persons.

<sup>323</sup>*Mmusi* (n 295 above).

<sup>324</sup>*Rammoge* (n 51 above)

<sup>325</sup>OBK Dingake The Role of the judiciary and the legal profession in protecting the rights of vulnerable groups in Botswana Key note address at the Judicial Colloquium on the rights of the vulnerable groups held at Lansmore Hotel, Gaborone, on Botswana 28-29 March 2014 24 [www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/3/pdf](http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2014/12/3/pdf) (accessed 16 December 2016).

<sup>326</sup>N Fraser ‘Rethinking recognition’ (2000) 3 *New Left Review* May June 113.

Botswana. Lastly, to identify and name intersex persons as a group in need of rights and recognition to ensure that it is not subjected to erasure<sup>327</sup> is critical.

The limitations experienced in the research were a set back as the findings lack the experiences and process undertaken by the Ministry which is responsible for issuing identity documents in Botswana. It left the gap that the researcher wanted to fill, which was to learn and address how authorities deal with intersex status. This limitation, indicates the stigma and discrimination that intersex persons' face on a daily basis. The participant organisations provided useful information for the empirical study, but could not provide conclusive details on the processes undertaken by the Ministry to address the plight of intersex persons in Botswana. Only the Ministry could have explained it in detail for the study and for the benefit of intersex persons in Botswana.

Section 3 and 15 of the Constitution promotes equality of all persons in Botswana. The provision should be used as a basis for effective legal protection of intersex persons as equally as other individuals in the society. It is argued that in other countries because of presence of human rights institutions,<sup>328</sup> there are ongoing discourses about intersex, which are placed before law makers to consider. Human rights institutions act as gate keepers for human rights protection and can be able to influence policy and law reform. Botswana currently does not have a human rights institution, only courts are used seek protection of human rights.

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<sup>327</sup>S Hall Introduction: Who needs identity in '*Questions of cultural identity*' 1996 S Hall & P. du Gray (eds) 4.

<sup>328</sup>Newbould (n 179 above) and (249 above) as discussed in the Second Chapter of this study.

## Chapter 5 Conclusion and Recommendations

### 5.1 Introduction

This Chapter focuses on the conclusion reached from the desktop review and empirical research undertaken by the researcher. The conclusion reached has enabled the researcher to make recommendations in this Chapter. It is evident that Botswana law is silent on intersex human rights issues; hence intersex persons are open to human rights violations. From the study conducted five people who were surgically operated to conform to normative binaries at birth, were allocated a different gender at birth. They are currently seeking assistance with X1 to change their gender markers on official identity documents. The empirical research findings in Chapter 3, showed that there are challenges encountered by intersex persons in changing gender markers on their identity documents.<sup>329</sup> X1 informed the researcher that the processes to change gender on identity documents depend on each request. Other intersex persons did not have challenges in changing their gender markers, while for others it is a challenge.<sup>330</sup> It is therefore concluded that intersex is medicalised in Botswana and change of gender marker applications remain a secret. Advocacy and human rights organisations can work together to make a greater impact in the lived realities of intersex persons, to break the gap that excludes and makes intersex persons faceless in health and education policies.

The participant organisations interviewed demonstrated a key underlying role which can be strengthened to the advantage of intersex persons and the nation at large. While it is evident that there is a working relationship especially on partnerships and referrals among participant organisations, there is need for a robust visibility of proper channels of seeking promotion of intersex human rights. Since intersex persons are identified as *trassie* in *Setswana*, it could be used as a starting point for people to understand that intersex persons also have equal rights like everyone and must be respected.

It is concluded that the High Court of Botswana and the Botswana Court of Appeal have previously made pronouncements on vulnerable groups and human rights, therefore intersex human rights activist may use the existing case law, for instance *Thuto Rrammoge*,<sup>331</sup> *Mmusi Ramantele*<sup>332</sup> and *Tapela*<sup>333</sup> cases to argue for recognition of intersex human rights.<sup>334</sup> As a thought, it maybe an opportune time that a public interest case is lodged before the High Court, to determine the status and recognition of intersex persons at 50 years of independence of Botswana. The tenents of sections 3(a) and 15(4) and the jurisprudence as cited provide a glimpse of hope which can be used to advance the right to respect, protect, promote and fulfil intersex rights as human rights in Botswana.

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<sup>329</sup>See Chapter 4 sub para 4.3.4.

<sup>330</sup>As above.

<sup>331</sup>*Rammoge* (n 51 above).

<sup>332</sup>*Mmusi* (n 295 above).

<sup>333</sup>*Tapela* (n 77 above).

<sup>334</sup>Goolam (n 236 above).

## 5.2 Recommendations

Through the empirical study, and desktop review, the researcher learnt that intersex human rights in Botswana are left behind, in that intersex persons' rights are excluded from laws and policies. For instance, intersex persons face challenges in trying to change identity documents. Although the Constitution provides for fundamental human rights, it must also include specific and enforceable rights. The researcher observed that the organisations that were selected for the empirical study, have a similar mandate and can form a strong collaborative effort to accelerate the recognition of intersex human rights in Botswana.

### 5.2.1 Laws and policies

- It is recommended that the right to dignity and equality must be included in the Constitution.
- It is recommended that the Birth and Death Registry Act must be amended to include intersex, other status and gender non-conforming which can be indicated in national identity documents as a gender marker.
- It is recommended that the Birth and Death Registry Act must allow for change of name and gender with clear processes laid in the law, without the burden of medical reports and assessment.
- The Interpretation Act which conflates sex and gender should be amended to make a distinction and also add other status so that intersex persons are included and recognised in law.
- The Children's Act must be amended to reflect the aspirations of the Constitution and international law obligations of the right to non-discrimination, equality, dignity and the right to be equal before the law.
- It is recommended that the Children's Act must be amended to include intersex, other status and gender non-conforming, so that it promotes and protects the right of children to development and growth without being confined to gender normative binaries.
- It is recommended that legislators must undertake bench marking exercises so that Parliament can be able to move towards equal protection of all persons in Botswana.

### 5.2.2 Health and education guidelines and curriculum

- It is recommended that the Ministry of Health must draft guidelines on intersex and how they deal with intersex status at birth and intersex persons health needs.

- It is recommended that protocols which are used in determining the gender of intersex children born in Botswana be made public.
- It is further recommended that the statistics of live births of children, the public census and any other statistics which many include children, must state intersex status or others status, as a way of including children who do not fall within the normative gender binary.

### **5.2.3 Intersex activism in Botswana**

- It is recommended that there is need for capacity building so that there is a common understanding of intersex human rights issues among participant organisations.
- It is recommended that organisations should collaborate to raise awareness in Botswana about intersex human rights issues.
- It is recommended that the civil society organisations must actively take advantage of the extensive access that they have to different key populations in different districts to rigorously raise awareness of intersex human rights issues.

### **5.2.4 Public interest litigation**

- It is recommended that the Constitution and the High Court rules<sup>335</sup> should be amended to make it accessible to any interested person to bring a public interest case to court like in South Africa.
- It is recommended that the civil society organisations and interested persons must take the issue of legal recognition of intersex persons as a public interest matter before the courts to test the law.

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<sup>335</sup>Order 18 of the High Court Rules of Botswana.

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