



THE IMPACT OF THE LEGAL AND POLICY FRAMEWORK ON THE HUMAN RIGHTS OF INTERSEX PERSONS IN UGANDA

October 2019

In collaboration with:



SIPD Uganda



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LIST OF ACRONYMS

CAT	Convention Against Torture
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
DHO	District Health Officer
DSD	Difference of Sex Development
HRAPF	Human Rights Awareness and Promotion Forum
ICCPR	International Covenant on Civil and Political Rights
ICD	International Statistical Classification of Diseases and Related Health Problems
ICESCR	International Covenant on Economic, Social and Cultural Rights
LGBT	Lesbian, Gay, Bisexual, Transgender
MoES	Ministry of Education and Sports
MGLSD	Ministry of Gender, Labour and Social Development
MoH	Ministry of Health
NIRA	National Identification Registration Authority
SIPD	Support Initiative for People with congenital Disorders
SOGIESC	Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics
UDHR	Universal Declaration on Human Rights
UPF	Uganda Police Force

EXECUTIVE SUMMARY

Introduction

Globally, intersex persons are subject to discrimination in various spheres of life, including access to education, healthcare, employment and housing. In Uganda, people who deviate from the standard expected by society in their gender identity and sexual orientation face severe stigma and rejection from society. The actual experiences of intersex persons in the Ugandan context, and the extent of violations which they would typically suffer, have not been documented in depth. There has also not been any study which sets out the legal framework that impacts upon the human rights of intersex persons in Uganda.

HRAPF and SIPD have partnered to undertake a study, which investigates the legal framework and considers the impact of this legal framework on the human rights of intersex persons in Uganda. The objective of this study is to examine the impact of the legal and policy framework on the human rights of intersex persons in Uganda. The study also aims to identify gaps and opportunities within this legal and policy framework and to make recommendations on how the legal and policy framework on the protection of intersex persons can be improved.

Methodology

The study was qualitative in nature. Secondary data was collected through desk review of the legal and policy framework on the protection of intersex persons in Uganda, Uganda's domestic laws and policies, as well as data on three other

countries that are known to have taken progressive steps in their protection of rights of intersex persons: Kenya, Malta and South Africa.

Primary data was collected through In-Depth Interviews and Key Informant Interviews. A total of 10 intersex individuals and 8 parents of intersex persons were interviewed in Gulu in the Northern Region of Uganda; Tororo in the Western Region and Masaka and Mukono in the Central Region. Fourteen Key Informant Interviews were also held with policy-makers, government officials, civil society representatives and representatives of schools and hospitals.

Findings

1. There is limited protection for intersex persons under the law: Whereas international law is increasingly protective of intersex persons, in the areas of freedom from prejudice and discrimination on the basis of sex characteristics and real or perceived sexual orientation and/or gender identity; medically unnecessary surgeries performed without free, full and informed consent and recognition by the law, domestic law is less protective. Only the Registration of Persons Act, 2015, specifically mentions intersex persons with respect to change of particulars on birth certificates, albeit while referring to them using the pejorative term 'hermaphrodites.' Again, no specific policy mentions intersex persons. Even the National Orphans and Other Vulnerable Children Policy does not recognise intersex children as vulnerable. This causes a situation of legal invisibility and therefore lack of specific protection.

2. The legal invisibility of intersex persons leads to violations of the rights of intersex children and adults. The rights of children specifically violated are:
 - a. **Right to education:** Intersex children face discrimination and bullying while in school leading many to abandon education. The state usually does not interfere to ensure that the bullying and discrimination stops. It is a structural problem.
 - b. **Right to health:** Many intersex persons are subjected to surgeries that have not been consented to. These surgeries usually occur when they are too young and consent is given by their parents, and yet it is them to live with the impact of the surgeries. The state also does not provide access to gender-affirming surgeries for intersex persons and this is a big barrier to their enjoyment of the right to health.
 - c. **The child's right to be cared for by parents:** Intersex children experience discrimination at a family and community level. At its worst, this discrimination leads to infanticide or abandonment of intersex infants. Mothers are often left to care for intersex children by themselves, without any support from the child's father, their communities or extended families.
 - d. **The child's right to freedom from inhuman and degrading treatment:** The violation of this right mainly arises out of medically unnecessary surgeries that are done without the child's consent. Where medically unnecessary surgeries are undertaken before the child is able to participate in the decision-making process the child's right to dignity is violated.

The following violations are suffered by intersex adults in particular:

- a. *The right to equality and non-discrimination:*** This violation is experienced in the absence of legal recognition of a third gender. While children in Uganda can have their gender markers changed to reflect the gender they identify with, adults cannot, and there is no provision for a third gender besides male or female. Intersex adults also experience structural discrimination in the difficulties faced in securing and maintaining employment.
- b. *Freedom from inhuman and degrading treatment:*** For adult intersex persons, this usually manifests in the area of incarceration. When the police arrest intersex persons, they are usually queried about their sex and then detained in cells where they may be subjected to sexual abuse.

Recommendations

The study makes the following recommendations:

To Parliament

Amend section 38 of the Registration of Persons Act, 2015 to allow intersex adults to also change their particulars in the births register if they wish; delink the availability of the option of changing the particulars in the births register from surgery and to replace the term 'hermaphrodite' with intersex.

To the Ministry of Gender, Labour and Social Development

Include intersex children in the review of the National Policy on Orphans and Other Vulnerable Children.

To the Ministry of Education and Sports

- Include intersex children within education policies in Uganda as vulnerable children.
- Protect intersex children from discrimination based on sex.

To the Ministry of Health

- Adopt a protocol which stops surgeons from performing medically unnecessary surgeries on intersex children and infants without their free, full and informed consent.
- Allocate a portion of the Ministry's budget toward subsidising surgeries and hormone treatment for intersex persons.
- Train medical practitioners on how to treat intersex patients.
- Sensitise health workers on how to protect the privacy and dignity of intersex patients.

To the Uganda Police Force

- Adopt guidelines to instruct station commanders on how to handle cases of intersex arrestees. Such guidelines could include to detain intersex persons in separate facilities.
- Continue training and awareness-raising among police officers of different ranks in all regions of the country.

To the Equal Opportunities Commission

- Monitor and investigate the situation of intersex persons.
- Include intersex people's issues in the annual reports to Parliament.

To the Uganda Human Rights Commission

- Investigate and monitor human rights abuses committed against intersex persons.
- Include intersex issues in the annual reports to Parliament.

To mainstream civil society organisations

- Deliberately target intersex persons in programming.

To intersex persons and organisations working on intersex persons

- Undertake advocacy campaigns to raise awareness about the existence of intersex persons in Uganda and their particular human rights concerns.
- Join/identify support groups and reach out to other intersex persons and parents of intersex children in order to overcome isolation and secrecy.
- Participate in the development of policy and adoption of laws, which potentially affect intersex persons or could better ensure the realisation of their rights.

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INTRODUCTION, BACKGROUND AND METHODOLOGY

1.1 Introduction and Background

An intersex person is someone with an atypical reproductive and sexual system. The body and reproductive organs of an intersex person cannot be typified as either ‘male’ or ‘female’ according to the definition and standards of society.¹ Intersex characteristics can manifest in a very broad variety of ways. It is possible for an inconsistency to occur between the internal and external sexual anatomy of an intersex person.² In some cases, an intersex person’s genitalia will be neither clearly male nor female.³ Some intersex conditions may only become apparent when a child reaches puberty.⁴ About 0.05% - 1.7% of the world’s population are born with intersex characteristics.⁵

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1 M Carpenter ‘The human rights of intersex people: Addressing harmful practices and a rhetoric of change’ (2016) 24:47 *Reproductive Health Matters* 74.

2 JA Greenberg ‘Health care issues affecting people with an intersex condition or DSD: Sex or disability discrimination?’ (2012) 45 *Loyola of Los Angeles Law Review* 853.

3 As above at 854.

4 As above.

5 United Nations Office of the High Commissioner of Human Rights (UN OHCHR) ‘Free and Equal Fact Sheet’ (2015) https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf (accessed 17 May 2018).

This number cannot be pinned down more accurately due to the differences in parameters within which ‘intersexuality’ as defined by different medical experts.⁶

Globally, intersex persons are subject to discrimination in various spheres of life, including access to education, healthcare, employment and housing.⁷ The actual experiences of intersex persons in the Ugandan context, and the extent of violations which they would typically suffer, have not been documented in depth in Uganda. In 2014, Human Rights Awareness and Promotion Forum recorded that intersex children are often subjected to medically unnecessary surgical operations and that the side-effects of such surgeries may make it impossible for them to attend school.⁸ Other distinct difficulties faced by intersex persons come into play in cases of arrest and incarceration: Uganda does not make particular provision for this group to be placed in police and prison cells separate from other inmates, which exposes them to harassment and even assault while detained.⁹ Human Rights Awareness and Promotion Forum had dealt with one case in which in an intersex person who had been accused of committing a crime was placed on remand in a men’s prison.¹⁰ The accused in question faced ridicule from inmates, but escaped more serious afflictions because the prison authorities had purposed to protect him.¹¹

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⁶ Greenberg (n 2 above) *Review* 854.

⁷ UN OHCHR, n 5 above.

⁸ Human Rights Awareness and Promotion Forum (HRAPF) ‘Uganda Report of Violations Based on Sexual Orientation and Gender Identity’ (2014) 31-33.

⁹ Section 29 of Uganda’s Prisons Act, 2006, makes provision for the segregation of male and female prisoners. The Act, however, is silent on the placement of intersex individuals.

¹⁰ The client was remanded in Rukungiri Prison, Criminal Case No. CRB 1688/2015.

¹¹ On record with HRAPF.

Limited research has been done into the lived realities of intersex persons in Uganda. The most relevant and recent research on this issue was conducted by the Support Initiative for People with congenital Disorders (SIPD) in 2016. The organisation carried out a baseline survey on the realities faced by intersex persons in East Africa and gave a brief overview of the human rights framework that is applicable to them.¹² However, there is a need for detailed and in-depth research to be carried out on the impact of the legal framework on the human rights of intersex persons in Uganda on the daily lives of intersex persons, and their access to social services and the nature and extent of human rights violations that they face.

HRAPF and SIPD have therefore partnered to investigate the impact of the legal framework on the human rights of intersex persons in Uganda. The study seeks to answer the questions concerning which human rights concerns intersex people in Uganda face and how these concerns can be addressed.

1.2 Problem statement

Intersex persons are a minority group that is internationally known to suffer discrimination in various spheres of life and also other human rights violations.¹³ These violations are exacerbated in situations where there are minimal legal protections. In Uganda, there are minimal explicit legal protections of intersex persons, and as such there is need to establish the extent to which the legal and policy framework

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¹² Support Initiative for People with Congenital Disorders (SIPD) 'Baseline survey on intersex realities in East Africa – Specific Focus on Uganda, Kenya and Rwanda' (2016) <http://sipduganda.org/baseline-survey-on-intersex-realities-in-east-africa-specific-focus-on-uganda-kenya-and-rwanda/> (accessed 12 July 2018).

¹³ UN OHCHR, n 5 above.

protects intersex persons, and how this impacts on their rights. This study seeks to fill this gap by inquiring into how the legal framework impacts the lived realities of intersex persons in Uganda.

1.3 Objectives of the Study

The objective of this study is to examine the legal and policy framework concerning intersex persons in Uganda and how this impacts on the human rights of intersex persons in Uganda. The study also aims to identify gaps and opportunities within the legal and policy framework impacting on intersex persons in Uganda and to make recommendations on how the legal and policy framework on the protection of intersex persons can be improved.

1.4 Literature review

Globally, the question of intersex rights and the protection of the rights of this group has been discussed. In 2012, Greenberg published a paper which considers the legal frameworks developed by the feminist movement, LGBT activists and disability rights activists respectively and how each of these could be utilised by the intersex movement.¹⁴ The United Nations Development Programme published a study on the most common and cross-cutting human rights challenges which intersex persons face in Eastern Europe, particularly Albania, Bosnia, Herzegovina, the former Yugoslav Republic of Macedonia and Serbia.¹⁵ The study finds that medical protocols on intersex patients are not common in Europe and

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¹⁴ See Greenberg, n 2 above.

¹⁵ UNDP 'Intersex research study: Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia and Serbia' (2017).

that the major human rights concerns of intersex persons in the countries under consideration are the performance of medically unnecessary 'gender affirming' surgeries; a lack of legal recognition and discrimination in education and healthcare.¹⁶ Human Rights Watch and InterAct have also published a study which finds that medically unnecessary surgeries are carried out on infants and young children without their informed consent and calls for a moratorium to be placed on such surgeries pending the development of clear guidelines to clinicians.¹⁷ Mamhare has explored the framework providing legal recognition of intersex persons in Malta and considers that the absence of a similar inclusive framework in Kenya leads to the violation of fundamental rights and freedoms of intersex persons.¹⁸

For Uganda, there is little research in the area of intersex persons generally. In 2013, Heinrich Böll Stiftung Foundation released a preliminary study considering the medical practices and the legal and social situation of intersex persons in 12 countries, including Uganda.¹⁹ The study, however, is solely based on questionnaires filled out by two organisations working with intersex persons in Uganda and is therefore limited to the knowledge of these two organisations and the social and legal situation as at 2012. The recent developments in the legal and policy framework in Uganda, as well as the impact of the establishment of a national registration authority and the adoption of a civil status register on intersex persons has not

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¹⁶ As above.

¹⁷ Human Rights Watch and InterACT 'I want to be like nature made me: Medically unnecessary surgeries on children in the US' (2017).

¹⁸ T Mamhare 'The place of legal recognition at birth in enhancing the rights of intersex persons: A comparative analysis of Kenya and Malta' LLM Thesis, University of Pretoria (2016).

¹⁹ DC Ghattas Human rights between the sexes: a preliminary study on life situations of inter* individuals (2013) 34 Heinrich Böll Stiftung Publication Series on Democracy.

yet been explored. The baseline survey conducted by SIPD in 2016 which considered the lived realities of intersex people in East Africa has a broader scope.²⁰ Though the study does touch upon legal provisions and human rights instruments impacting upon intersex persons in Uganda, it paints with a very broad brush. Legal provisions are not considered in-depth and are not directly linked to the lived realities of intersex adults and children in Uganda. The baseline survey does provide valuable information on the most prevalent concerns of intersex persons living in Uganda and this study aims to build on the findings of the survey.

In its 2014 'Uganda Report of Violations Based on Sexual Orientation and Gender Identity' (2014), the Civil Society Coalition on Human Rights and Constitutional Law (CSCRCL) et al, recorded that intersex children are often subjected to medically unnecessary surgical operations and that the side-effects of such surgeries may make it impossible for them to attend school.²¹ In 2015, SIPD published a report on the violations suffered by intersex children and adults in Uganda which includes discrimination in the health and education sector, lack of legal protection and surgeries performed without full and informed consent.²² Both HRAPF and SIPD's violations reports were restricted to observations about surgeries and exclusion from certain spheres of life and did not contain in-depth analysis of the legal and policy framework and its impact on the rights of intersex persons.

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²⁰ SIPD *Baseline survey on intersex realities in East Africa, with specific focus on Kenya, Rwanda and Uganda 2015-2016* (2017).

²¹ Civil Society Coalition on Human Rights and Constitutional Law, Human Rights Awareness and Promotion Forum (HRAPF) et al 'Uganda Report of Violations Based on Sexual Orientation and Gender Identity' (2014) 31-33.

²² Support Initiative for People with Congenital Disorders Uganda Report of violations to children and people born intersex or with Disorders of Sex Development (2015) 8-12.

1.5 Methodology

The study was qualitative in nature. Secondary data was collected through desk review. This was on the legal and policy framework on the protection of intersex persons in Uganda, Uganda's domestic laws and policies, as well as data on three other countries across the globe that are known to have taken progressive steps in their protection of rights of intersex persons: Kenya , Malta and South Africa.

Primary data was collected through In-Depth Interviews (IDIs) with intersex adults and parents of intersex children, and Key Informant Interviews with key actors in this field. IDIs were done with 12 intersex individuals and 8 parents of intersex persons in Gulu, in the Northern Region of Uganda; Tororo in the Western Region and Masaka and Mukono in the Central Region. A total of 14 KIIs were held with policy-makers, government officials, civil society representatives and representatives of schools and hospitals. Two District Health Officers, one Officer in Charge of a Police Station and one Principal of a school attended by an intersex child were interviewed. In-depth interviews were furthermore held with representatives of the Uganda Human Rights Commission (UHRC); the National Identification and Registration Authority (NIRA); the Human Rights and Legal Affairs Directorate in the Uganda Police Force; the Ministry of Health (MoH), the Ministry of Gender, Labour and Social Development (MGLSD) and the Ministry of Education and Sports (MoES). A representative of MARPI Mulago, which provides medical services to intersex persons as well as two local Non-governmental Organisations which provide support and services to intersex persons, namely HRAPF and SIPD, were interviewed. A project officer of World Vision Uganda, an international humanitarian aid organisation which supports advocacy and services to intersex persons in Tororo, was also interviewed. Information was furthermore obtained from a representative of the Equal Opportunities Commission via e-mail.

These interviews served to obtain information about the legal and policy framework concerning intersex persons in Uganda; their lived realities in terms of medical treatment, acceptance by the community, access to education and employment and civil status registration as regulated by this policy and legal regime; as well as steps taken to raise awareness and address issues that intersex persons face through legislation, policy and other means.

1.6 Data analysis

Recurring themes and issues were identified in the qualitative data collected through interviews and were coded making use of NVivo software. Quotes were extracted from the data in order to illustrate emerging issues and to support the choice of themes selected for analysis. In the analysis of the data, attempts were made to link the current legal and policy framework to the realisation and limitation of human rights of intersex persons.

1.7 Ethical considerations

All participants were required to give their informed consent prior to participating in the study. Participants were asked to either sign forms confirming their informed consent or recordings were made of their verbal consent. Potential participants were informed of the potential risks, benefits and purposes of the study. Where participants were not fluent in English, the services of a translator were employed. Participants were informed that their information will not be published without their permission.

1.8 Limitations of the study

The greatest limitation of this study is the fact that many government officials and policymakers are not informed of the basic facts surrounding intersexuality and how this group is distinct from other groups under the LGBTI umbrella. This challenge was addressed in part by providing much needed information on intersexuality to the participants, which stimulated conversation about the potential roles which various ministries and institutions could play to improve the lives of intersex persons in Uganda.

HUMAN RIGHTS CONCERNS FOR INTERSEX PERSONS

2.1 Introduction

This section considers the meaning and manifestations of intersexuality, as well as the most prevalent human rights concerns affecting intersex persons globally in order to give an overview of the issues which a legal and policy regime is ideally to address. The section also considers the various facets to dealing with intersexuality as a human rights matter.

2.2 A human rights based approach to intersexuality

The medical approach to intersexuality is in many respects contrary to the human rights approach. Medical science defines intersex conditions as 'Disorders of Sex Development', which denotes a view of intersexuality as deviating from what is normal and desired.²³ All United Nations member states use the International Statistical Classification of Diseases and Related Health Problems (ICD) to diagnose intersex conditions.²⁴ The

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²³ The Consensus defines 'Disorders of Sex Development' as 'congenital conditions in which development of chromosomal, gonadal, or anatomical sex is atypical'. IA Hughes et al 'Consensus statement on management of intersex disorders' 91:7 *Archives of Disease in Childhood* (2006) 554.

²⁴ UNDP (n 15 above)

ICD creates a medical standard which diagnose over 40 types of intersex variations, which manifest in differences in anatomy, genes, chromosomes and hormones.²⁵ The most common diagnoses of intersexuality include: Androgen Insensitivity Syndrome (AIS);²⁶ Congenital Adrenal Hyperplasia (CAH);²⁷ Klinefelter syndrome;²⁸ Turner syndrome;²⁹ and Hypospadias.³⁰

A diagnosis of an intersex condition can be extremely stigmatising to the individual involved and affect their emotional well-being.³¹ The diagnosis of 'abnormal' sex development is considered to contribute to the stigma and discrimination

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²⁵ World Health Organization (WHO) *Sexual health, human rights and the law* (2015) 26.

²⁶ People with AIS are partially or completely insensitive to male hormones (androgen) which results in the development of ambiguous genitalia. People with complete AIS have female external genitalia and male internal sex organs (undescended testes).

²⁷ CAH refers to a condition where a person's adrenal glands, in the process of producing cortisone, produces an abnormally high level of hormones which results in the development of male characteristics; it does not cause the development of ambiguous genitalia, JA Indyk 'Disorders/differences of sex development (DSDs) for primary care: the approach to the infant with ambiguous genitalia' 6:4 *Translational Pediatrics* (2017)324 and UNDP (n 15 above) 46-48.

²⁸ Klinefelter syndrome affects one in 600 to 700 men. The syndrome causes men to produce insufficient testosterone to enter puberty at the expected time or to complete puberty. Boys with this syndrome develop less muscle mass and could also develop breasts. See DA Griffiths 'Shifting syndromes: Sex chromosome variations and intersex classifications' 48:1 *Social Studies of Science* (2018) 131-132 and UNDP (n 15 above) 46-48.

²⁹ Turner syndrome affects women and girls in the productions of sex hormones and the attainment of physical sexual maturity, as above. See Griffiths (n 26 above) 131 and UNDP (n 15 above) 46-48.

³⁰ Hypospadias is a condition in which the opening of a boy's urethra is not at the tip of his penis but rather at another place along the length of the penis, where the penis and scrotum comes together or behind the scrotal sac, see UNDP (n 15 above) 46-48.

³¹ UNDP (n 15 above) 15.

which intersex persons face and justifies efforts to ‘fix’ or ‘normalise’ intersex bodies – once again through medical intervention.³² The human rights movement strongly opposes medical interventions that are performed on infants, children and adolescents and are motivated by parents’ desire for their children to fit cultural norms and gender stereotypes.³³ Internationally, the practice of performing extremely invasive and often irreversible procedures on intersex persons who do not have the capacity to consent to this is decried.³⁴

The human rights approach, contrary to the medical approach, places its focus on the recognition and equal protection of intersex persons. In the first place, in terms of definition, the human rights-based approach refers to intersex conditions as ‘Differences in Sex Development’, rather than ‘Disorders of Sex Development’ as defined by the medical approach.³⁵ From a human rights perspective, the terms ‘Disorders of Sex Development’ suggests that intersex bodies are unhealthy, undesirable and defective.³⁶

On the international front, consensus documents, statements by treaty bodies and declarations on intersex rights have only seen the light within the past seven years.³⁷ From 2012 onwards,

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³² As above.

³³ As above at 16.

³⁴ OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO ‘Eliminating forced, coercive and otherwise involuntary sterilization’ An interagency statement (2014) 7.

³⁵ Open Society Foundations ‘What are intersex rights?’ April 2019, available at <https://www.opensocietyfoundations.org/explainers/what-are-intersex-rights> (8th May 2019).

³⁶ As above.

³⁷ In 2012, the European Commission published a report titled ‘Discrimination against trans and intersex people on the grounds of sex, gender identity and gender expression’, which was the first study to examine the situation of intersex people in Europe, UNDP (n 15 above) 21.

the human rights of intersex persons have increasingly received attention on the international human rights front.³⁸

For the purposes of human rights advocacy, intersex persons are often grouped with other sexual minorities such as lesbians, gay men, bisexual and transgender persons, even though their particular challenges are mostly very different from those of the other groups. Considering that intersex persons face discrimination due to gender stereotypes just as LGBT persons do, there is a measure of logic and practicality in lumping them together for purposes of advocacy. There is much more visibility of LGBT issues in general than intersex issues on their own. Intersex adolescents and adults whose physical appearance and dress does not present a gender identity which is obviously male or female could easily be taken to be transgender or homosexual and will therefore be susceptible to the same discrimination that these groups would typically face. Intersex persons could therefore benefit from advocacy efforts to decriminalise same-sex conduct in jurisdictions where this is criminalised and sensitisation aimed at law enforcement authorities on dealing with cases involving 'gender non-conforming' individuals.

The negative side of having 'intersex' *'thoughtlessly tacked-on to the end of the LGBT acronym'*³⁹ is that it causes greater confusion about the way in which intersexuality differs from homosexuality, bisexuality and transgenderism. Intersex organisations have

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³⁸ Almost every UN monitoring body has made Concluding Observations and Recommendations in respect of the protection of intersex rights, see for example the Concluding Observations and Recommendations made by the UN Human Rights Committee, the CEDAW Committee, the CAT Committee and the Committee on the Rights of the Child discussed in section 3.1.2 to 3.1.6 below.

³⁹ JB Alotta, Executive Director of Astraea Lesbian Foundation, quoted in Astraea Lesbian Foundation for Justice *We are real: The Growing movement advancing the human rights of intersex people* (2016) 3.

raised concerns that countries which recognise the rights of LGBT persons, nevertheless allow medically unnecessary surgeries on intersex children to continue. The term used by intersex activists to describe this phenomenon of states to conflate issues of lesbian, gay, bisexual, transgender and intersex persons in their reporting to international human rights bodies, while often ignoring issues of medically unnecessary surgeries performed on intersex children and infants, as 'pinkwashing'.⁴⁰ Intersex advocates warn against the danger of failing to address the particular issues facing intersex persons, especially the matter of gender-assignment and medically unnecessary surgeries performed on intersex persons who are too young to consent to this themselves, which is essentially a children's rights issue.

2.3 Prevalent human rights concerns of intersex persons

This section sets out the three major human rights concerns affecting intersex persons globally:

2.3.1 Prejudice and discrimination

Intersex persons face discrimination that, in certain contexts, stems from homophobia and transphobia.⁴¹ In other settings, cultural beliefs and the fear of what is not known and understood lead to rejection and banishment from communities.⁴² Intersex

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⁴⁰ STOP Genital Mutilations in Children's Clinics 'Pinkwashing of intersex genital mutilations at the UN – CCPR120' 6th July 2017, available at <http://stop.genitalmutilation.org/post/Pinkwashing-of-Intersex-Genital-Mutilations-at-the-UN-CCPR120> (accessed on 8th May 2019).

⁴¹ DC Ghattas 'Standing up for the rights of intersex people – how you can help' ILGA Europe (2015) 23.

⁴² As above.

persons are vulnerable to suffer discrimination in various spheres of life, including education, healthcare, employment and detention.⁴³ In school settings, discrimination against intersex persons have various layers including bullying by other students and the absence of measures which support intersex children to ensure that they are able to complete their schooling, despite the challenge of being 'different' from other students.

Participation in competitive sports also proves challenging to intersex persons or persons suspected to have intersex characteristics. In 2009, South African athlete Caster Semenya was subjected to sex verification tests after she won the women's 800 meter world championships in Germany – on the basis of the fact that she was suspected to have intersex characteristics.⁴⁴ The International Association of Athletics Federations (IAAF) has recently adopted new Eligibility Regulations for the Female Classification, which prevent women with 'higher than typical natural testosterone levels' from competing in the female category unless they medically reduce their testosterone levels.⁴⁵ These regulations are criticised as discriminatory on the basis of sex and sex characteristics and were made in the absence of clinical evidence that women with higher blood testosterone levels have a significant performance advantage.⁴⁶ The rules were challenged by Semenya before the

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⁴³ Centre for Human Rights 'Fact sheet on intersex persons' available at <http://www.chr.up.ac.za/model-law-on-intersex-person> (accessed on 13th May 2019).

⁴⁴ M Block 'The sensitive issue of intersex athletes' *National Public Radio* 16th August 2016. Available at <https://www.npr.org/sections/thetorch/2016/08/16/490236620/south-african-star-raises-sensitive-questions-about-intersex-athletes> (accessed on 27th April 2019).

⁴⁵ Human Rights Watch 'Revoke discriminatory athletics gender regulations' 26th July 2018. Available at <https://www.hrw.org/news/2018/07/26/revoked-discriminatory-athletics-gender-regulations> (accessed 27th April 2019).

⁴⁶ As above.

Court of Arbitration for Sports, on the basis that the Rules were unfair, discriminatory and posed a health risk.⁴⁷ The Court of Arbitration for Sports held that the new Rules were ‘necessary, reasonable and proportionate’ in order to ensure fair competition in women’s sport.⁴⁸ The case illustrates the exclusion and institutional discrimination which intersex persons face in a world which has been designed to serve a clear male/female binary.

2.3.2 Subjection to medically unnecessary surgeries

Doctors often advise the parents of intersex children to opt for surgeries or other medical interventions to make their bodies appear to be gender-conforming.⁴⁹ Such interventions are often medically unnecessary and have the potential to severely affect the intersex person later in life. Globally, the medical practice is to assign an intersex individual to either the male or the female gender as early as possible and to use surgical and other medical means to ‘normalise’ intersex bodies.⁵⁰ Such surgeries are performed without the informed consent of the minor. The surgeries often risk severe side effects such as infertility, chronic pain, chronic metabolic imbalances, incontinence and diminishment of sexual sensation.⁵¹ Moreover, there is a real likelihood that intersex adults could reject the sex that were

.....
⁴⁷ ‘Semenya loses landmark legal case against IAAF over testosterone levels’ *The Guardian* 1st May 2019 available at <https://www.theguardian.com/sport/2019/may/01/caster-semenya-loses-landmark-legal-case-iaaf-athletics> (accessed on 8th May 2019).

⁴⁸ As above.

⁴⁹ Ghattas(b) (n 41 above) 9.

⁵⁰ Ghattas(a) (n 19 above) 17.

⁵¹ M Elders et al ‘Re-thinking genital surgeries on intersex infants’ (2017) Palm Centre. Available at <http://www.palmcenter.org/wp-content/uploads/2017/06/Re-Thinking-Genital-Surgeries-1.pdf> (accessed 3rd May 2019).

assigned to them at birth or as children.⁵² In cases where the procedure is irreversible, the consequences are nothing short of devastating and is likely to lead to mental suffering and depression.

2.3.3 Legal recognition

Legal recognition refers to the right of intersex persons to amend their sex or gender details on official documents where these details are inaccurate and do not reflect their sex or gender identity.⁵³ Due to the great variation in the manifestation of intersex characteristics, an argument is made that it is not accurate to categorise intersex persons as ‘a third sex’ or ‘other’ in relation to the categorisations of male and female. Intersex persons could be identified as men, as women, as both or as neither.⁵⁴ Creating such a ‘third category’ without giving the intersex persons involved the choice of how they would prefer to be classified could risk stigmatisation of intersex persons and could also reveal the fact that they have intersex characteristics where this could otherwise have been kept private. Some intersex persons do however believe that identification documents which state their sex as ‘other’ or ‘intersex’ would help them to navigate through the difficulties of life in a society designed for males and females only.⁵⁵

In most jurisdictions, intersex persons tend to face difficulty in acquiring or amending their birth certificates to reflect their sex,

.....
⁵² It is estimated that the wrong gender is determined in 8.5% to 38% of cases. PS Furtado et al ‘Gender dysphoria associated with disorders of sex development’ 9 *Nature Reviews Urology* (2012) 626.

⁵³ Asia Pacific Forum of National Human Rights Institutions *Promoting and protecting human rights in relation to sexual orientation, gender identity and sex characteristics* (2016) 80.

⁵⁴ UNDP (n 15 above) 11.

⁵⁵ Interview with intersex person in Mukono, 26th October 2019.

gender or even names of choice. Intersex adults could encounter difficulties in obtaining national identification documentation and other official documentation which reflect their sex and/or gender of choice, where this does not accord with their birth certificates. In some jurisdictions, the same legal recognition provisions apply to intersex and transgender people and are sometimes framed around physical transition through surgery and/or hormone therapy.

2.4 Conclusion

This section considers intersexuality and the challenges and concerns of intersex persons as a human rights matter. The medical approach to intersexuality as opposed to the human rights based approach is explored. It also considered the three most common human rights concerns of intersex persons globally, namely freedom from prejudice and discrimination on the basis of sex characteristics and real or perceived sexual orientation and/or gender identity; medically unnecessary surgeries performed without free, full and informed consent and recognition by the law.

UGANDA'S LEGAL AND POLICY FRAMEWORK IMPACTING INTERSEX PERSONS

3.1 Introduction

This section sets out the particular laws and policies which are currently in place and which have a bearing on the rights of intersex persons in Uganda. Uganda's legal and policy measures are assessed in relation to the three major human rights concerns of intersex persons globally; prejudice and discrimination, medically unnecessary surgeries performed without informed consent and legal recognition; which were discussed in section II. In order to identify gaps in Uganda's existing legal and policy framework as far as deliberate steps to protect the rights and interests of intersex persons are concerned, a comparison is drawn with three other countries across the globe which have taken progressive steps to recognise and protect the rights of intersex persons in the three identified areas of concern: Kenya, South Africa and Malta.

3.2 The international law framework impacting on human rights of intersex persons in Uganda

Uganda is bound by international human rights instruments that it has ratified.⁵⁶ Domestic law is thus supposed to align with the state's international obligations. Over the past decade, protection for intersex persons within the international human rights framework has been steadily developing. There are no provisions in international human rights instruments specifically addressing matters of concern to intersex persons. However, bodies that have the mandate to interpret the rights in the various international instruments have made specific observations and recommendations in respect of the rights of intersex persons, particularly in the area of regulation of medically unnecessary medical procedures to 'normalise' sex characteristics to conform to the male/female binary. A number of soft law instruments have been adopted to address human rights challenges that are typically faced by intersex persons. These soft law instruments, as well as general provisions in international instruments which are of particular relevance to intersex persons, are discussed in detail in this section.

3.2.1 The Universal Declaration on Human Rights

The Universal Declaration on Human Rights (UDHR) lays down international norms on human rights some of which have crystallised into customary international law and which are therefore binding on all states.⁵⁷

.....
⁵⁶ This is especially where the state has domesticated the particular international instrument, but also under the principle of *pacta sunt servanda* which requires states to be bound by their signatures in good faith.

⁵⁷ V Dimitrijevic *Customary law as an instrument for the protection of human rights* ISPI Working Papers, Working Paper 7 (2006) 8-10 discusses the UDHR as customary international law.

The UDHR in its Article 1 provides that:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

This provision recognises the personhood and dignity of all people, including intersex persons. The UDHR also declares that the *everyone* is entitled to the rights and freedoms that it sets out, regardless of their race, colour, sex and other characteristics.⁵⁸ The UDHR also recognises the equality of all before the law.⁵⁹ Other provisions under the UDHR that are relevant to the rights of intersex persons are the right to protection against arbitrary interference with privacy⁶⁰ and protection against torture or cruel, inhuman and degrading treatment or punishment.⁶¹ Both of these rights speak to intersex persons' right not to be subjected to enforced, involuntary surgical procedures and genital mutilations.

3.2.2 The International Covenant on Civil and Political Rights

Uganda acceded to the International Covenant on Civil and Political Rights (ICCPR) in 1995. The ICCPR is the primary international instrument providing for the protection of civil and political rights to all. Like the UDHR, the ICCPR also protects the right to equality and non-discrimination,⁶² the right to privacy⁶³ and the right to freedom from torture and cruel, inhuman and

.....
⁵⁸ Art 2.

⁵⁹ Art 7.

⁶⁰ Art 12.

⁶¹ Art 5.

⁶² Arts 2(1) and 26.

⁶³ Art 17.

degrading treatment or punishment.⁶⁴ The ICCPR furthermore protects the rights to liberty and security of person⁶⁵ and has a specific provision guaranteeing children's right to freedom from discrimination and to have a name and be registered immediately after birth.⁶⁶

The UN Human Rights Committee monitors the implementation of the ICCPR and issues 'Concluding Observations' and 'Recommendations' in response to reports submitted by member states on how they are implementing the Treaty. This Committee, in its Concluding Observations on the fourth periodic report of Switzerland, stated that it remains concerned about the performance of surgical procedures on intersex children, which causes physical and mental suffering and is not strictly regulated.⁶⁷ It also noted that surgeries conducted without consent had not yet given rise to any sanction, reparation or inquiry.⁶⁸ The Committee recommended to Switzerland to:

'(a) take all necessary measures to ensure that no child undergoes unnecessary surgery intended to assign sex;

(b) see to it that medical records are accessible and that inquiries are launched in cases where intersex persons are subjected to treatment or surgical procedures without their effective consent; and

(c) ensure that psychological assistance and reparation, including compensation, are provided for victims of needless surgical procedures.'

.....

⁶⁴ Art 7.

⁶⁵ Art 9.

⁶⁶ Art 24(1) and (2).

⁶⁷ Human Rights Committee 'Concluding Observations on the fourth periodic report of Switzerland' CCPR/C/CHE/E/4 (2017) at par 24.

⁶⁸ As above.

Similar Recommendations were made to Australia on the basis that infants and children born with intersex variations are sometimes subjected to irreversible and invasive medical interventions for the sake of gender assignment.⁶⁹ The Committee noted that such surgical operations are often based on stereotyped gender roles and are carried out before the intersex persons involved are in a position to give their free and fully informed consent. According to the Committee, this practice implicates the rights to equality, freedom from torture and cruel and inhuman treatment or punishment, the right to liberty and security of person,⁷⁰ unlawful interference with privacy and children's rights.⁷¹ The Committee recommended to Australia to move to end irreversible and medically unnecessary treatment on infants and children who are not yet able to provide fully informed and free consent.⁷²

3.2.3 The International Covenant on Economic, Social and Cultural Rights

The ICESCR came into force in 1976 and Uganda acceded to it on 21st January 1987. The Covenant, protecting economic, social and cultural rights, is interpreted by the Committee on Economic, Social and Cultural Rights. The Covenant requires of states to ensure that the rights which it sets out are exercised without discrimination of any kind on grounds including race, sex, language or other status.⁷³ This treaty confirms that all people have the right to a decent standard of living, education, and the highest attainable standard of mental and physical health, among other social, economic and cultural rights.⁷⁴

.....
⁶⁹ Human Rights Committee 'Concluding Observations on the sixth periodic report of Australia' CCPR/C/AUS/CO/6 (2017) paras 25.

⁷⁰ Art 9.

⁷¹ As above, para 25.

⁷² Para 26.

⁷³ Art 2.

⁷⁴ Arts 11, 12 & 13.

3.2.4 The United Nations Convention Against Torture (CAT)

This Convention aims at prohibiting torture and inhuman and degrading treatment or punishment. The treaty defines standards of what amounts to torture, or inhuman treatment or punishment. It was ratified by Uganda in 1986 and came into force in 1987. The CAT has various provisions that are highly relevant to the protection of the rights intersex persons when it comes to the performance of medically unnecessary surgeries that are carried out to 'normalise' the sex characteristics of intersex infants of children. The Convention is monitored by the Committee Against Torture, which has made the following Recommendations in respect of the rights of intersex persons to the Netherlands in 2018:⁷⁵

(a) Take the legislative, administrative and other measures necessary to guarantee respect for the physical integrity and autonomy of intersex persons and to ensure that no one is subjected during infancy or childhood to non-urgent medical or surgical procedures intended to decide the sex of the child without his or her informed consent;

(b) Guarantee impartial counselling services and psychological and social support for all intersex children and their parents, so as to inform them of the consequences of unnecessary and non-urgent surgery and other medical treatment to decide on the sex of the child and the possibility of postponing any decision on such treatment or surgery until the persons concerned can decide by themselves;

(c) Guarantee that full, free and informed consent is ensured in connection with medical and surgical treatments for intersex persons and that

.....
⁷⁵ Committee against Torture 'Concluding Observation on the seventh periodic report of the Netherlands' CAT/C/NLD/CO/ (2018) par 53.

non-urgent, irreversible medical interventions are postponed until a child is sufficiently mature to participate in decision-making and give effective consent;

(d) Undertake investigation of instances of surgical interventions or other medical procedures performed on intersex persons without effective consent and prosecute and, if found responsible, punish perpetrators. It should also ensure that the victims are provided with redress including adequate compensation.⁷⁶

The Committee has taken a clear stance on the practice of performing ‘normalising’ surgeries on intersex infants and children who are not yet capable of making a decision on whether or not such surgeries should be undertaken.⁷⁷ The guidance provided by this Committee is that carrying out such surgeries without full, free and fair consent of the intersex person involved disrespects their physical integrity and autonomy.⁷⁸

The Committee, on an earlier occasion, has emphasised the obligation on states to protect minority and marginalised individuals especially at risk of torture and to ensure that protective laws are applied to all persons, regardless of sexual orientation, transgender identity or any other status or adverse distinction.⁷⁹

.....
⁷⁶ As above at para. 52.

⁷⁷ As above at sub-para. a).

⁷⁸ As above at sub-para. c).

⁷⁹ UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at: <https://www.refworld.org/docid/47ac78ce2.html> (Accessed 22 August 2019).

3.2.5 Convention on the Elimination of all forms of Discrimination Against Women

This Convention can be described as ‘the International Bill of Rights for women’ as it focuses on protecting the rights of women. The CEDAW came into force in 1981 and was ratified by Uganda in 1985. It defines ‘discrimination against women’ as ‘any distinctions, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women ...’⁸⁰

The Committee on CEDAW recognises that women are prone to suffer intersecting discrimination on the basis of their sexual orientation and gender identity, along with the fact of being women. The Committee has urged States Parties to legally recognise and prohibit intersecting forms of discrimination which negatively impact women.⁸¹ In 2010, the Committee made Recommendations to Uganda to ‘provide effective protection from violence and discrimination against women based on their sexual orientation and gender identity, in particular through the enactment of comprehensive anti-discrimination legislation covering, inter alia, the prohibition of multiple forms of discrimination against women on all grounds, including on the grounds of sexual orientation and gender identity’.⁸² While the Committee did not expressly include ‘sex characteristics’ as a ground on the basis of which discrimination should be

.....
⁸⁰ Art 1.

⁸¹ Committee on the Elimination of Discrimination Against Women *Concluding Observations of the Committee on Turkey* CEDAW/C/TUR/CO/6 (2010) Para 38; CEDAW Committee *General Recommendation No 28 on the core obligations of states parties under Article 2 of the CEDAW*, Para 18

⁸² Committee on the Elimination of Discrimination Against Women *Concluding Observations of the Committee on Uganda* CEDAW/C/UGA/CO/7 (2010) para 43-44.

prohibited, the enactment of anti-discrimination legislation would serve to protect women with intersex characteristics, along with lesbian, bisexual and transgender women. Furthermore, considering that intersex persons are often confused with other LGBT sub-categories in Uganda, any steps taken to combat discrimination against LGBT persons would also benefit the intersex population.

The Committee on the CEDAW has also made express efforts to protect the rights of intersex children. It made Concluding Observations to Nepal in 2017, in which it expresses concern about infanticide, forced marriage and the conduct of medically unnecessary procedures on Nepali intersex infants and children, before they are able to give their full and free informed consent.⁸³ The State was recommended to adopt legislative provisions that explicitly prohibit the performance of unnecessary surgical or other medical procedures on intersex children before they reach the legal age of consent. It was also recommended that the state train medical and psychological professionals on the rights of intersex persons.⁸⁴

3.2.6 Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) entered into force in 1990 and was ratified by Uganda in the same year. The Convention was adopted for purposes including addressing the need for special safeguards and care to children, which is needed due to their physical and mental immaturity.

The Convention has various provisions which speak to the specific needs and challenges faced by intersex children, such

.....
⁸³ Committee on the Elimination of Discrimination Against Women 'Concluding Observations on the sixth periodic report of Nepal' CEDAW/C/NPL/CO/6 (2017) para 18(3).

⁸⁴ As above at para. 19.

as the right to non-discrimination, privacy and protection of their rights by the state.⁸⁵ The Convention provides that the best interest of the child need to be the primary consideration when decisions are made affecting the child.⁸⁶ Children also have the right to have their views respected and to be free from violence, which is relevant to address the practice of medically unnecessary surgeries performed on young children.⁸⁷ Also relevant to intersex children is the right to education, which right can often be limited by the discrimination which intersex students face in a school setting.

The Committee on the Rights of the Child has recommended Belgium to prohibit ‘the performance of unnecessary medical or surgical treatment on intersex children whose procedures can safely be deferred until children are able to provide their informed consent’.⁸⁸ The State was also urged to ensure that intersex children and their families have access to counselling and support.

3.2.7 Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities was adopted with the purpose ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities’.⁸⁹ The Convention applies to intersex persons with disabilities. This is not to insinuate that living with intersex characteristics should be classified as having a disability, but rather to protect the rights of

.....
⁸⁵ Arts 2, 16 and 4.

⁸⁶ Art 3.

⁸⁷ Arts 12 and 19.

⁸⁸ Committee on the Rights of the Child ‘Concluding Observations on the combined fifth and sixth reports of Belgium’ CRC/C/BEL/CO/5-6 (2017) para 26(b).

⁸⁹ Art 1.

intersex persons who are living with disabilities, either because of their intersex characteristics, unsuccessful surgeries that had been performed on them or due to any other physical impairment.

The Committee on the Rights of Persons with Disabilities has noted that intersex persons with disabilities in the United Kingdom of Great Britain and Northern Ireland are subjected to involuntary medical treatment, including forced sterilisation and conversion surgeries.⁹⁰ The Committee recommended to the State to 'repeal all types of legislation, regulations and practices allowing any form of forced intervention or surgery, and ensure that the right to free, prior and informed consent to treatment is upheld ... and safeguards are provided'.⁹¹

3.2.8 Soft law instruments

A number of soft law instruments have been developed which set out the particular concerns of intersex persons or address particular concerns of intersex persons along with other matters. These instruments are not binding on states but do provide guidance on the interpretation of treaties and could also influence future developments in international law. The soft law instruments adopted by international groups of intersex advocates include the Malta Declaration and the Vienna Statement. The UN Inter-Agency statement on forced sterilization and the Yogyakarta Principles Plus 10 contain particular provisions that are relevant to intersex persons.

.....
⁹⁰ Committee on the Rights of Persons with Disabilities 'Concluding Observations on the initial report of the United Kingdom of Great Britain and Northern Ireland' CRPD/C/GBR/CO/1 (2017) par. 40.

⁹¹ As above at para. 41.

a) The UN Inter-agency statement

In 2014, seven UN Bodies namely the Office of the High Commissioner for Human Rights, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO adopted an interagency statement on eliminating forced, coercive and otherwise involuntary sterilisation.⁹² The Statement recognises that intersex persons are sterilised without their full, free and informed consent and this is sometimes required in order for them to have birth certificates and other legal documents.⁹³ The statement also recognises that sex ‘normalising’ surgeries which intersex children are subjected to often terminates their reproductive capacity.⁹⁴ The statement sets out various guiding principles for the provision of sterilisation services, such as autonomy in decision-making, provision of information and support, access to medical records, ensuring non-discrimination in the provision of sterilisation services and accountability.

b) The Yogyakarta Principles plus 10

In 2006, a committee of experts developed a set of principles aimed at summarising existing international law norms and how they apply to issues of sexual orientation and gender identity. These principles are titled ‘The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity’ (Yogyakarta Principles). They make recommendations to both state actors and non-state actors on how the enjoyment of rights of LGBTI persons can be improved through the implementation of existing international

.....
⁹² United Nations Interagency Statement on the Elimination of forced, coercive and otherwise involuntary sterilisation (2014) available at http://www.who.int/reproductivehealth/publications/gender_rights/eliminating-forced-sterilization/en/ (accessed 3rd May 2019).

⁹³ As above at 1-2.

⁹⁴ As above at

law norms. These guidelines, however, were criticised for their failure to comprehensively engage with the application of international law to intersex persons in particular.⁹⁵

On 10 November 2017, 'Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' were adopted. The recognition that there is a distinction between gender identity and sex characteristics, is one of the motivation behind the adoption of the additional principles.⁹⁶ These additional principles are shortened as 'Yogyakarta Principles plus 10' and sets out 9 Principles and 111 State Obligations, which are to be added to the Yogyakarta Principles.

The Yogyakarta Principles Plus 10 recognise the right to bodily and mental integrity.⁹⁷ It is made clear that no one should be subjected to 'invasive and irreversible medical procedures that modify sex characteristics without their free, prior and informed consent' unless this is necessary to avoid serious irreparable harm. In this regard, an obligation is placed on the State to ensure that the informed consent of children is obtained before any modifications of their sex characteristics is undertaken.

Under the Principle of Non-Discrimination and Equality, the

.....
⁹⁵ Asia Pacific Forum of National Human Rights Institutions *Promoting and protecting human rights in relation to sexual orientation, gender identity and sex characteristics* (2016) 138.

⁹⁶ 'Introduction' *The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* 10th November 2017.

⁹⁷ Principle 32.

Yogyakarta Principles Plus 10 reiterate additional obligations on states to promote equality and eliminate discrimination including ensuring that individuals can participate in sport without discrimination on the basis of their sex characteristics and eliminating the practice of prenatal selection on the basis of sex characteristics.⁹⁸ Additional state obligations in respect of the right to treatment with humanity while in detention include adopting policies which allow persons of all sex characteristics to participate in decisions regarding facilities in which they are detained.⁹⁹

c) The Sustainable Development Goals~~100~~

The SDGs are goals adopted globally which aims to end poverty, protect the environment and ensure peace and prosperity for all by 2030.¹⁰¹ The SDGs follow the Millennium Development Goals, which guided development in nations across the world from 2000 to 2015. There are 17 SDGs. The one most relevant to intersex persons is SDGs 16 on promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable and inclusive institutions at all levels. Specific targets under this goal are to 'provide legal identity of all, including birth registration' and to 'promote and enforce non-discriminatory laws and policies for sustainable development.'

.....
⁹⁸ Principle 2.

⁹⁹ Principle 9.

¹⁰⁰ United Nations Development Programme 'Sustainable Development Goals' available at <https://www.ug.undp.org/content/uganda/en/home/sustainable-development-goals.html> (Accessed 12th October 2019)).

¹⁰¹ As above.

3.3 The regional human rights framework impacting on intersex persons

At the regional level, Uganda has ratified a number of regional human rights instruments, including the African Charter on Human and Peoples' Rights (the African Charter), the Protocol to the African Charter on the Rights of Women (the Maputo Protocol), the African Charter on the Rights and Welfare of the Child and the African Youth Charter. While none of these instruments address intersex rights directly, a number of their provisions do have bearing on intersex persons. These provisions are discussed in turn.

3.3.1 The African Charter on Human and Peoples' Rights (African Charter)

The African Charter on Human and Peoples' Rights was adopted in 1986 and it has a wide range of rights provisions for all persons. Uganda ratified the African Charter on 10th May 1987. The rights protected in the Charter that are particularly relevant to intersex persons are the rights to equality and non-discrimination,¹⁰² the right to dignity and freedom from torture and cruel, inhuman and degrading treatment,¹⁰³ and the right to life.¹⁰⁴

The African Charter does not expressly prohibit discrimination on the grounds of sexual orientation, gender identity or sex characteristics. However, the African Charter expressly states that the rights enshrined in the Charter are recognised and guaranteed to 'every individual' without distinction. Also, the listed grounds on which discrimination is prohibited, such as

.....
¹⁰² Arts 2 & 3.

¹⁰³ Art 5.

¹⁰⁴ Art 4.

race, colour and ethnic group, do not form a closed list – the provision makes it clear that discrimination on ‘any other status’ is also prohibited.

The right to dignity speaks to the autonomy of intersex persons to make decisions about whether or not to undergo sex-altering surgery. Where such surgeries are performed without the full and free consent of the intersex person involved, this impairs the dignity of the person the right to be free from cruel, inhuman and degrading treatment.

The African Commission on Human and Peoples’ Rights (the African Commission) is the body responsible for interpreting and implementing the African Charter as well as the Maputo Protocol. The African Commission has adopted a Resolution calling for ending violence against persons based on their real or imputed sexual orientation and/or gender identity.¹⁰⁵ In this Resolution, the African Commission acknowledges that the violence on these grounds would be a violation of among other rights, the right to freedom from torture, cruel, inhuman and degrading punishment contrary to Article 5 of the Charter.

The protection of the right to life creates an obligation on States to take measures to prevent the deprivation of life of intersex persons which is necessary in order to protect babies born with intersex characteristics from infanticide.

.....
¹⁰⁵ The African Commission on Human and Peoples’ Rights *Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity*: Adopted at the African Commission on Human and Peoples’ Rights meeting at its 55th Ordinary Session held in Luanda, Angola, from 28 April to 12 May 2014, Available at <http://www.achpr.org/sessions/55th/resolutions/275/>.

3.3.2 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

The Protocol on the rights of women in Africa (the Maputo Protocol) is a treaty adopted in addition to the African Charter, and specifically focuses on the realisation of the rights of African women. The Maputo Protocol entered into force in 2005. It places obligations on States Parties to put in place legal, cultural and policy frameworks that do not discriminate against women. This protection would extend to women with intersex characteristics.¹⁰⁶ The Maputo Protocol also requires of States Parties to implement measures to ensure the protection of every woman's dignity and protection from all forms of violence.¹⁰⁷ It also protects the right to life of every woman along with the security of her person. States Parties are to prohibit all forms of violence against women.¹⁰⁸

The Maputo Protocol obliges states to protect women's lives and integrity by preventing, among other things, violence against them. The Protocol lists such examples to include verbal and sexual violence. Intersex persons live with the constant risk of being subjected to violence both due to the prevailing negative public attitudes and prejudice. This Article protects them against such violence.

3.3.3 Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child was adopted to protect the rights of persons under the age of 18 in Africa.¹⁰⁹ It was ratified by Uganda in 1994. Unlike the African

.....
¹⁰⁶ Art 2.

¹⁰⁷ Art 3(d).

¹⁰⁸ Art 4.

¹⁰⁹ The African Children's Charter was adopted on 11th July 1990 in Addis Ababa, Ethiopia and entered into force on 29th November 1999.

Charter and the Maputo Protocol, the African Children's Charter makes provision for the protection of the right to privacy.¹¹⁰ The Charter makes expansive provision for the protection of the right to education, which is of importance to intersex children who are often forced to leave school due to bullying and discrimination.¹¹¹ The best interests of the child standard is of importance when it comes to decision-making in terms of sex altering surgeries and other 'gender normalising' measures in respect of intersex children.¹¹² Other provisions of importance to intersex children are: protection against harmful social and cultural practices;¹¹³ protection against child abuse and torture;¹¹⁴ non-discrimination;¹¹⁵ health and health services;¹¹⁶ as well as parental care and protection.¹¹⁷

3.3.4 African Youth Charter

The African Youth Charter came into force in 2009 and was ratified by Uganda in 2008.¹¹⁸ The African Youth Charter defines 'youth' and 'young people' as people between the ages of 18 and 35.¹¹⁹ The Charter protects the private life, stating that no

.....
¹¹⁰ Art 10.

¹¹¹ Art 11.

¹¹² See Art 4 of the African Children's Charter and A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protection the human rights of sexual minorities in contemporary Africa* (2017) 273.

¹¹³ Art 27.

¹¹⁴ Art 16.

¹¹⁵ Art 3.

¹¹⁶ Art 14.

¹¹⁷ Art 19.

¹¹⁸ The African Youth Charter was adopted in Banjul, The Gambia. African Union website 'African Youth Charter status list' available at https://au.int/sites/default/files/treaties/7789-sl-african_youth_charter_1.pdf (accessed 6th May 2019).

¹¹⁹ Preamble.

young person shall be subjected to the unlawful interference of their privacy, residence or correspondence.¹²⁰ This provision is relevant to young intersex persons, who do face threats to their privacy from curious community members and even public officials. The rights to non-discrimination, development, education and skills development are also protected.¹²¹ The Charter has expansive protection of the right to health which includes an obligation to involve youth in developing programmes to respond to the reproductive and health needs of vulnerable and disadvantaged youth in particular.¹²² The operationalization of such a provision is promising for young intersex persons as programming addressing their particular reproductive and health needs are usually not addressed in national policies. The Charter furthermore calls on states to eliminate harmful social and cultural practices.

3.4 Uganda’s laws and policies impacting upon intersex persons

There are a number of Ugandan laws and policies affecting intersex persons. These will be discussed in accordance with the hierarchy of laws, with the highest being the Constitution, followed by statutes made by Parliament, subsidiary legislation made under the delegated authority of Parliament and then policies made by ministers and other authorities.

3.4.1 The Constitution and the rights of intersex persons

The Constitution of Uganda in the National Objectives and Directive Principles of State Policy requires the state to fulfil

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¹²⁰ Art 7.

¹²¹ Arts 2, 10 and 13.

¹²² Art 16(b).

the fundamental rights of Ugandans to social justice and economic development, which includes ensuring access to health services, while Objective XX provides that the state shall ensure provision of basic medical services. These are relevant to intersex persons as access to life saving and emergency medical interventions is an important concern for many. Article 8A of the Constitution arguably makes the NODPSP enforceable in courts of law.¹²³

Article 21 of the Constitution provides that all people are equal before and under the law and shall enjoy equal protection of the law. The Article also prohibits discrimination on the basis of - among other grounds - sex.¹²⁴ The ground of 'sex characteristics' is thus not explicitly mentioned, however, it can be argued that it is included under 'sex'. The Constitution places positive obligations on the state to promote the equal participation of marginalised groups in society.¹²⁵ However, more explicit protection would be needed for effective protection of intersex persons. In Kenya and South Africa, for example, the grounds for non-discrimination are open ended, meaning that it would be easier to read 'sex characteristics' into the provision as an analogous ground.¹²⁶ Indeed the High Court of Kenya has emphasised in a case concerning an intersex infant that Article 27(4) of the Constitution of Kenya is an 'inclusive provision ... not exhaustive of all the grounds specifically mentioned therein,

.....

¹²³ See for example the judgment of Kisaakye JSC in *CEHURD v Attorney General* Constitutional Appeal No.1 of 2016, in which she stated that the petition raised issues for constitutional interpretation, including interpretation of Article 8A. Also see C Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' (2009) Human Rights and Peace Centre Working Paper No. 24.

¹²⁴ Art 21(2) of the Constitution of the Republic of Uganda, 1995.

¹²⁵ See Art 27(6) of the Constitution of Kenya, 2010 and Section 9(4) of the Constitution of the Republic of South Africa, 1996.

¹²⁶ See Art 27(4) of the Constitution of Kenya, 2010 and Section 9(3) of the Constitution of the Republic of South Africa, 1996.

including sex.¹²⁷ The High Court went on to explain '[t]hat finding will therefore have to mean that intersexuals (sic) ought not to be discriminated against in any way including in the issuance of registration documents such as a birth certificate.'¹²⁸

The Constitution also protects other relevant rights for intersex persons including right to be free from torture and cruel, inhuman and degrading treatment or punishment,¹²⁹ the right to privacy,¹³⁰ and the right to liberty.¹³¹

Article 32 of the Ugandan Constitution provides for affirmative action measures in favour of 'groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition, custom, for the purpose of redressing imbalances'.¹³² One such a positive constitutional obligation includes the establishment of an Equal Opportunities Commission and the adoption of an Act to govern its powers, functioning and composition.¹³³ Article 36 protects the rights of minorities to participate in decision-making processes, and to have their views and interests taken into account in the making of national plans and programmes.

Article 34 specifically protects children's rights, and seeing that many of the violations against intersex persons occur when they are still children, this is an important provision for them. The Constitution calls for the child's right to basic education

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¹²⁷ Lenaola J in *Baby 'A' (Suing through the Mother E A) & Another v Attorney General & 6 Others* [2014], eKLR Petition 266 of 2013 at par 61.

¹²⁸ As above.

¹²⁹ Art 24.

¹³⁰ Art 27.

¹³¹ Art 23.

¹³² Art 32(1).

¹³³ Art 32(3) & (4).

to be protected,¹³⁴ which protection would certainly include protection against bullying and school dropout due to bullying. It also emphasises that children should not be denied access to among others medical treatment on the basis of among others, social or other beliefs.¹³⁵ This also has relevance to intersex children as they may be denied treatment on the basis that it is a waste of time. Most significantly however, the Constitution calls for the protection of orphans and 'other vulnerable children'.¹³⁶ Although it does not mention intersex children, they would certainly fall under this category due to their unique challenges.

Therefore, the Constitution protects intersex persons, even though there is no specific mention of them or their rights. The Constitution is the supreme law of the land, and any other laws that is inconsistent with it is void to the extent of its inconsistency.¹³⁷ However, express protection within the Constitution would go a long way in protecting the rights of intersex persons.

3.4.2 Legislation and policies affecting intersex persons in Uganda

Ugandan legislation and policies are largely silent about intersex persons. The only law that specifically addresses intersex issues is the Registration of Persons Act, but also very briefly and in a way that is disparaging. The laws and policies are analysed in a thematic way following the three major concerns of intersex persons discussed in Section II above:

.....
¹³⁴ Article 34(2).

¹³⁵ Article 34(3).

¹³⁶ Article 34(7).

¹³⁷ As above, article 2.

a) Laws and policies ensuring legal recognition of intersex persons

This is at two levels: that of recognition of a person's intersex status, through provision for a third gender or change of gender markers, and at the level of where intersex persons are incarcerated while in detention.

i) Gender markers on official documents

The right of intersex persons to amend their sex or gender details on official documents where these details are inaccurate and do not reflect their sex or gender identity is a matter to be regulated by law.¹³⁸ In terms of Article 18 of the Constitution of Uganda, the state is to register every birth which occurs in the country. Uganda has also adopted the Registration of Persons Act, 2015 to establish a national identification register and to provide for the registration of individuals.¹³⁹ This Act takes a step toward the protection of the rights of intersex persons as it allows persons over the age of 18 to change their names.¹⁴⁰ It also allows parents or guardians of children under the age of eighteen to change the names of their children.¹⁴¹ The law thus facilitates the process of name change for both intersex adults and children if they wish to choose a different name which better reflects their gender identity.¹⁴²

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¹³⁸ Asia Pacific Forum of National Human Rights Institutions *Promoting and protecting human rights in relation to sexual orientation, gender identity and sex characteristics* (2016) 80.

¹³⁹ Long title of the Act.

¹⁴⁰ Sec 36.

¹⁴¹ Sec 37.

¹⁴² Human Rights Awareness and Promotion Forum (HRAPF) *A guide to the normative legal framework on the human rights of LGBTI persons in Uganda, Revised Edition* (2019) 24.

Section 38 of the Act is titled 'Registration of a child born a hermaphrodite' and it provides as follows:

'If a child born a hermaphrodite, after being registered, through an operation, changes from a female to a male or from a male to a female and the change is certified by a medical doctor, the registration officer shall, with the approval of the Executive Director of the Authority upon application of the parents or guardian of that child update the particulars of the child, which appear on the register.'

This provision allows for the details of an intersex child to be changed in the birth register if the child had undergone surgery to change their sex and their parents or guardians have made an application as required. While it is a positive step that the Ugandan legislature has considered intersex children and adopted a provision to address their needs, the law nevertheless has shortcomings. For one thing, it links the availability of changing one's particulars in the birth register to undergoing surgical procedures during childhood. As such the provision enforces the negative notion that decisions about whether an intersex child should identify as male or female should be made as early as possible. The provision does not extend to intersex adults, and adds a sense of urgency to the decision-making about whether or not to undergo 'gender affirming' surgery. The provision also uses the pejorative term 'hermaphrodite' instead of the preferred term of 'intersex'.¹⁴³

Uganda can borrow a leaf from Malta and South Africa. The Maltese law on Gender Identity, Gender Expression and Sex Characteristics sets a progressive example in this regard as it provides that all citizens of Malta will be treated according to their gender identity in their identity documents and that a

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¹⁴³ As above at 25.

person need not provide proof of a surgical procedure or genital reassignment in order to exercise their right to gender identity.¹⁴⁴ The right is also accorded to both adults and children to request the Director for Public Registry to change a person's recorded gender and/or first name in order to reflect the person's self-determined gender identity.¹⁴⁵

South Africa also provides a progressive example in that the Alteration of Sex Description and Sex Status Act 49 of 2003 allows intersex persons to apply to the Department of Home Affairs to have their sex description on their birth register altered.¹⁴⁶ This application, however, has to be accompanied by a report of a medical practitioner which confirms that the applicant is intersex and a report from a psychologist or social worker which confirms that the applicant has lived stably in a gender role that corresponds with the sex description to which they seek to be registered for a period of two years.¹⁴⁷

Therefore, although there is provision for change of sex particulars in the birth register for intersex children, this is not enough in terms of recognition.

ii) Cells where intersex persons are detained

Like any other persons, intersex persons do get in conflict with the laws, including criminal laws. A matter of concern to intersex persons is the question of places of detention when they had been arrested or imprisoned. Intersex persons run a risk of facing violation of their rights by curious fellow inmates and police officers. There is furthermore the question of whether an

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¹⁴⁴ Arts 3(1)(c) and 3(4).

¹⁴⁵ Art 4(1) and 7(1).

¹⁴⁶ Sec 2(1) and 2(2)(d).

¹⁴⁷ As above.

intersex person should be placed with male or female detainees.

In Uganda, there is no specific law or policy which guides police and prison officials on how intersex persons should be treated in detention. Section 37 of the Prisons Act, provides for separation of male and female prisoners. It has no guidance on intersex persons.

For the Uganda Police, a representative of the Uganda Police Force, Directorate of Human Rights and Legal Services, confirmed that there is no provision for separate cells for intersex persons, but that there is now greater awareness among police officers of the human rights of *all* people. In his view, the human rights trainings which police officers have received in recent years equips them to make protective choices and find solutions on the rare occasion that an intersex person is detained, even in the absence of a clear policy to this end:¹⁴⁸

...What has been coming out from awareness sessions on LGBT rights we have been having with police officers is the general ignorance of the people on matters of sexuality ... When these people come, it is important to keep in mind firstly this is a human being. If you do not have a facility, these people are likely to be abused. So the challenge is on the commander of the unit: how do you deal with that? So now, going forward we should start putting special cells for unique categories of people. We need to be coming up with new facilities. We follow what we call 'Initiative to Protect Interest'. We need to be innovative and to improvise a special facility to protect the interests of arrestees. As management, we have officially communicated to the units: no more parading of suspects. No unit is supposed to

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¹⁴⁸ Interview with representatives of the Uganda Police Force Directorate of Human Rights and Legal Services, 12th February 2019.

take pictures of any persons. We have a Directorate here called the Directorate of Human Rights and Legal Services. Back in the day it was called the Legal Department. So by redesigning it and introducing this component of human rights – it was on purpose in order to entrench our operations on human rights. We have moved away from taking photos which is a positive move. We have also been empowering our officers to understand that they are addressing *the case* and not the sexuality of the person involved. This is our message and it has been cross-cutting.

In this respect, Uganda could pick a leaf from Malta. The Maltese legislation addresses this matter in providing that a person detained in any gender-segregated facility can confirm their ‘lived gender’ with an affidavit, which will have the effect of guiding the decision on whether intersex persons should best be placed with male or female detainees.¹⁴⁹ Kenya has adopted the Persons Deprived of Liberty Act No. 23 of 2014 which requires of an institution holding a person in detention to keep a register used to record the physical condition and medical history of the person.¹⁵⁰ The fact of a person being intersex ought to be identified at this point which should result in the persons being treated with respect and dignity.¹⁵¹ The Act allows an intersex person to decide the sex of the person who carries out a body search on them.¹⁵² The Act also provides that an intersex person will have reasonable accommodation, separate from

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¹⁴⁹ Art 9A of the Gender Identity, Gender Expression and Sex Characteristics Act, 2015.

¹⁵⁰ Sec 3.

¹⁵¹ Republic of Kenya Office of the Attorney General and Department of Justice Report of the Taskforce on policy, legal, institutional and administrative reforms regarding intersex persons in Kenya (2018) 138.

¹⁵² Sec 10(3).

other persons.¹⁵³ While this Act is progressive and exemplary to a certain extent, its definition of an intersex person limits its applicability: The definition of an intersex person only extends to someone who has been certified by a medical practitioner to have both male and female organs and does not cover the wide variety of intersex manifestations.¹⁵⁴

b) Laws and policies relevant to equality and non-discrimination against intersex persons

The Children Act Cap 59 provides for the rights of the child and these include: freedom from discrimination on among other grounds, gender.¹⁵⁵ It also provides for children with special needs. These are entitled to being assessed as early as possible 'as to the extent and nature of their ... special needs; offered appropriate treatment; and afforded facilities for their rehabilitation and equal opportunities to education'.¹⁵⁶ Such children also have the right to 'access to education suitable to address their ... special needs.' They are supposed to be protected against discrimination.¹⁵⁷ The National Children Authority is required to give first priority to such children and not to divert funding for such children.¹⁵⁸ This provision was introduced by the 2016 amendment to the Children Act and it is a progressive provision that would cover intersex children. Section 42A protects children from violence including genital mutilation and neglect and this would cover non-consensual surgery against intersex children. Duties and obligations are imposed upon different state organs to ensure that children

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¹⁵³ Sec 12.

¹⁵⁴ Republic of Kenya (n 188 above) 138.

¹⁵⁵ Children Act, section 4(1)(j).

¹⁵⁶ Children Act, section 9.

¹⁵⁷ Above, 9(4).

¹⁵⁸ Above 9(6).

with special needs are protected.¹⁵⁹ The Act domesticates the rights in the UN CRC and the African Children's Charter.¹⁶⁰ The Act is therefore largely protective even without mentioning the word 'intersex'. However, even the authorities are not aware that the Act recognises intersex children, since this is not express. There is thus need for express inclusion of intersex children into the provisions of the Act, if protection is to be effective.

At the policy level, the National Orphans and Other Vulnerable Children Policy (2003) introduced the human rights approach to programming, and it has a specific focus on the most vulnerable children.¹⁶¹ It defines vulnerability as: A state of being or likely to be in a risky situation, where a person is likely to suffer significant physical, emotional or mental harm that may result in their human rights not being fulfilled.¹⁶² This would certainly qualify intersex children as vulnerable. Its principles are focused on promoting gender equity,¹⁶³ involving such children in decisions affecting them, and ensuring that they are not subjected to discrimination and stigma.¹⁶⁴ It seeks to do this through ensuring education, psychosocial support, health and child protection among others.¹⁶⁵ However, the policy identifies its target groups as: orphans and orphans' households; children affected by armed conflict; children abused or neglected; children in conflict with the law; children affected by HIV/AIDS or other diseases; children in need of alternative family care; children affected by disability; children in 'hard-to-reach' areas; children living under the worst forms of

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¹⁵⁹ Above.

¹⁶⁰ Above, section 4(1)(l).

¹⁶¹ National Orphans and Other Vulnerable Children Policy, 2010, para 2.3 and 2.4.

¹⁶² Above, Para 9.

¹⁶³ Above, para 2.6.

¹⁶⁴ Above, para 2.7 and 2.8.

¹⁶⁵ Above, para 5.

labour and children living on the streets.¹⁶⁶ It is an inflexible list, however intersex children can, in certain cases, fall under the categories of 'children in need of alternative family care'; and 'children affected by disability'.

Indeed, because intersex children are not specifically mentioned in the policy, the representative of the MGLSD did not think they were covered. They stated:

I have not seen a law specifically talking about that ... we have not yet passed the (reviewed) National Children Policy. It is about 80% ... maybe we when I remember when we have started the business of reviewing it, we shall have to point it out ... But I have not seen a law I must be straight to you. In the Children's Act it's not there, in the ... Policy it's not there.¹⁶⁷

Therefore although the laws do cover marginalisation and vulnerability among children, they do not specifically deal with discrimination based on sex characteristics and this leads to the invisibility of intersex children.

Another area of concern is education. The Education (Pre-Primary, Primary and Post-Primary) Act, 2013 requires all children to attend school and obtain at least basic primary education. It is an offence to refuse to take a child to school.¹⁶⁸ Section 2 defines Universal Primary Education as:

Statefunded universal primary education programme where tuition fees are paid by Government where the

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¹⁶⁶ Above, Para 6.

¹⁶⁷ Interview with representative of the Ministry of Gender, Labour and Social Development, Kampala, 23rd January 2019.

¹⁶⁸ The Education (Pre-Primary, Primary and Post-Primary) Act, 2013 section 51.

principle of equitable access to conducive, quality, relevant and affordable education is emphasized for all children of all sexes, categories and in special circumstances.

This implies that children regardless of their sex characteristics ought to attend school under the Universal Primary Education Programme. As such barriers to their obtaining an education ought to be removed. Still however, there is no explicit mention of intersex children or vulnerable children for that matter. The Gender in Education Policy 2016 only covers males and females and there is no mention of intersex persons. It largely focuses on women and girls and only includes 'other vulnerable/disadvantaged groups' under the sub sector goals for higher institutions of learning, also without elaboration.¹⁶⁹

About the absence of explicit laws and policies concerning intersex children in education, a representative of the Ministry of Education and Sports had this to say:

There is no specific education policy addressing intersex children and their education. A very small percentage of school children are intersex, honestly the numbers are marginal. The law protects the rights of children and the right to education. As long as you are a child you are included. This is the case with for instance the Education Act. The challenge is the secretive nature of intersexuality. It is difficult for you to know whether there are children who have this need. In all my career I have only come across one such a case. There was a child at a school in Mubende. He was having a beard but putting on a skirt ... You do a policy for people you know. We

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¹⁶⁹ Ministry of Education and Sports 'Gender in Education Policy 2016' 2016 <https://www.education.go.ug/files/downloads/GENDER%20IN%20EDUCATION%20SECTOR%20POLICY.pdf> (accessed 30 July 2019).

need to sensitise communities so these people will come out. These minorities are negligible. We need data and evidence – our decisions will be informed by actual numbers. A multi-sectoral research is needed. If the Ministry of Gender invites us to join, we will get on board.¹⁷⁰

As such, there seems to be no resistance to inclusion of intersex people from the state, but there is need for activists to bring these issues to the attention to the law and policy makers. In the absence of any advocacy efforts and voices expressing need for policies to specifically address the plight of intersex students, the Ministry is bound to assume that the Education Act and other education policies are adequately addressing the concerns of intersex students, or that intersex students form such a small minority that it would not be reasonable to adopt a policy on their behalf.¹⁷¹

Uganda can learn lessons from Malta, which has recognised the importance of state programming to ensure that intersex children are able to attend school. In 2015, the Maltese Ministry of Education and Employment adopted the Trans, Gender Variant and Intersex Students in Schools Policy with the aim of fostering 'a school environment that is inclusive, safe and free from harassment and discrimination for all members of the school community, regardless of sex, sexual orientation, gender identity, gender expression and/or sex characteristics'.¹⁷² The Policy recognises the issues faced by intersex students as gender stereotypes; lack of well-being due to discrimination, bullying and other unfair treatment; exclusion from sports and other gendered activities; unease with gendered uniforms,

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¹⁷⁰ As above.

¹⁷¹ As above.

¹⁷² Ministry of Education and Employment 'Trans, Gender Variant and Intersex Students in Schools Policy' (2015) 5.

toilets and other gendered spaces; minority stress and social isolation; decreased attention during school time and absenteeism due to lack of safety in schools.¹⁷³ The needs of intersex students are identified as privacy and confidentiality; persons to advocate for their rights and well-being; adequate facilities; inclusive policies; the option of amendments of gendered characteristics in documentation on student's file and counseling.¹⁷⁴ Malta is the forerunner in the protection of the rights of intersex students and most of the countries in the world, including Uganda, are yet to follow suit.

c) Laws and policies on medical treatment of intersex persons

Considering the severe mental and physical implications on intersex persons who had undergone surgeries to 'normalise' their sex characteristics to make them fit into either the 'male' or 'female' category, it can be expected that surgeries performed on intersex infants and children ought to be strictly regulated by the law. As illustrated in section 2 above, most of the international treaty bodies are at pains to put an end to these practices worldwide. Most regrettably, very few countries have taken any measures to prevent or regulate surgical procedures performed on intersex persons.

In Uganda, there are a number of Acts of Parliament which regulate medical practice through the creation of oversight bodies. One such Act is the Medical and Dental Practitioners Act, which establishes the Medical and Dental Practitioners Council.¹⁷⁵ The Council enforces professional medical ethics, supervises medical practice and exercises disciplinary authority

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¹⁷³As above at p.12.

¹⁷⁴As above.

¹⁷⁵Sec 2 of the Medical and Dental Practitioners Act,

over medical practitioners.¹⁷⁶ Another such Act is the Nurses and Midwives Act of 1996 which establishes the Nurses and Midwives Council for regulating the conduct of nurses and midwives and to exercise disciplinary authority over them.¹⁷⁷ These laws do not give specific guidance on the treatment of intersex patients to doctors and nurses. Uganda, like most other countries across the globe, does not guide medical practitioners in dealing with intersex patients in particular in any law, policy or protocol.¹⁷⁸ Surgeries performed on minors, which are not medically necessary and to which the child or infant is too young to consent, are not prohibited or regulated in any way.¹⁷⁹

Uganda's laws do have one provision which suggests that gender-affirming surgeries should take place during childhood. Section 38 of the Registration of persons Act, 2015, allows for the details of an intersex child to be changed in the birth register if the child had undergone surgery to change their sex and their parents or guardians have made an application as required. A similar procedure for changing details is not available to intersex adults. The harmful notion that an intersex child's gender must be 'determined' and affirmed with surgery as early as possible is enforced through this Act.

The Ministry of Health, however, has taken note of the absence of guidance to intersex patients and parents of intersex children on receiving treatment. The Ministry's Technical Working Group on Maternal and Child Health has noted that most intersex patients resort to traditional healers since there are no clear avenues of treatment and assistance available within the

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¹⁷⁶ Sec 3 of the Medical and Dental Practitioners Act,

¹⁷⁷ As above at Secs 2 and 3.

¹⁷⁸ Telephone interview with representative of Ministry of Health (focal person for Key Populations), 16th January 2019.

¹⁷⁹ As above.

healthcare sector. The Working Group commissioned an expert team of paediatricians, surgeons and members of civil society to develop a policy guideline on treating intersex patients. The Working Group was tasked to develop a document which will be able to guide clinicians in the classification of intersex conditions and also to put a referral system for intersex patients in place. The team of experts is yet to report back to the Technical Working Group to present the draft policy guideline which they have developed. After the development of these policy guidelines, a number of further steps will be placed into motion such as training of clinicians, budgetary provisions and systemic adjustments. The eventual adoption of such a policy guideline would facilitate awareness raising which would also address and combat stigma.¹⁸⁰

Uganda could look to Malta's 2015 Gender Identity, Gender Expression and Sex Characteristics Act, which makes it illegal to perform any unnecessary medical treatment on the sex characteristics of a person without their consent.¹⁸¹ The law, which is revolutionary at a global level, prohibits sex assignment surgery where this can be deferred until a time that the person involved is able to give their informed consent.¹⁸²

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¹⁸⁰ Interview with member of Ministry of Health Technical Working Group on Maternal and Child Health, 9th October 2019.

¹⁸¹ Sec 14(1).

¹⁸² Sec 14(1).

3.5 Conclusion

Uganda's legal and policy framework exists within a regional and international human rights framework which is steadily moving towards the recognition and protection of the rights of intersex persons. Uganda's Constitution protects fundamental human rights and creates the basis for the adoption of laws and policies which specifically address the issues and concerns facing intersex persons. At this stage, there is only one law which specifically addresses a matter of concern to intersex persons and this is the Registration of Persons Act, 2015, which provides that intersex children's particulars in the births register may be altered under certain limited circumstances. Uganda's legal and policy regime does not directly offer intersex persons protection against non-discrimination; protection against invasive and medically unnecessary sex assignment surgeries performed without their consent; guidance to educators to ensure that intersex students are accommodated; or guidance to law enforcers on how to protect the rights of intersex persons in detention. There is need to expand the legal and policy framework in Uganda, in line with the examples from Malta, South Africa and to some extent Kenya in order to provide progressive recognition and protection of intersex persons in Uganda.

THE HUMAN RIGHTS IMPLICATIONS OF UGANDA'S LEGAL AND POLICY FRAMEWORK ON INTERSEX PERSONS

4.0 Introduction

The overall silence of the legislature and policymakers on the issue of intersexuality feeds into the lack of awareness on the existence and challenges of intersex persons in Uganda. Lack of awareness was cited over and over again as the major cause of challenges for intersex persons in Uganda. Where there is no awareness, there can be no policy. Where there is no policy, there can be no law, guideline or programme specifically designed to address the challenges that intersex persons face. This section of the study considers the implications of Uganda's legal and policy regime on intersex persons, in light of the fact that there are barely any specific laws and policies making provision for their needs. Various human rights which are implicated are each discussed separately.

4.1 Human rights implications of the current legal and policy framework on intersex persons

The most commonly violated rights for intersex persons are: children's rights to education, health, and to be cared for by their parents. The others are: the right to equality and freedom from discrimination; the right to privacy; and the right to freedom from inhuman and degrading treatment. These rights are discussed in details below:

4.1.1 Children's rights

Generally, intersex children face the greatest extent of human rights violations that can be attributed to the legal and policy framework. This is because intersex persons are most vulnerable when they are young as they may not have the capacity or freedom to make their own decisions, and decisions about their medical treatment and bodies could be made on their behalf. The different rights violated are:

a) The right to education

Exclusion from education is a major issue among intersex persons in Uganda. Almost every intersex person interviewed shared that they experienced discrimination or bullying at school due to the fact that they are intersex. Many decided to leave school to escape the ridicule. Some of the intersex persons and parents of intersex children shared the following experiences:

At school, I had some challenges. That is when I was in boarding. The school could not provide for my privacy so at some point I gave up. Of course, I

would try to hide a bit, people did not see me well, but it's not easy. You're bathing in a pool of people. People could see you and ask, "What's wrong?" I say, "I was produced like this." I let it go, but I don't know. Maybe people, maybe my fellow agemates were thinking otherwise.¹⁸³

Another intersex person interviewed shared this experience:

And another challenge, during my studying time from S.1 to S.4 I had those breasts. So it was a challenge to me, to boys, my fellow boys bathing with them so they could laugh at me. That was a very big challenge for me. And I reached that stage and I could ask myself why God, will I be like a normal man because they could laugh at me and I feel I was segregated.¹⁸⁴

One mother described the experience of her intersex child in school as follows:

'In primary, yes. Even he was challenged by other kids and he was discriminated a little bit. He had even started hating school. He had started missing days in school, he would not go because there was a lot of bullying and stuff, but when he went to secondary school, the operation had already gone through so not a lot of people got to know about it so now, he is back in school, no discrimination, but I have talked to his father to talk to the teachers so that they can know his situation because he does not need to stay in a condition where he wants to pee for long. Once he gets the urge to use the bathroom, he needs to

.....
¹⁸³ Intersex person interviewed in Gulu, 18th October 2019.

¹⁸⁴ Intersex person interviewed in Mukono, 26th October 2018.

go immediately.¹⁸⁵

Another intersex person interviewed in Masaka shared about the way in which he was ridiculed by fellow students who came across his medical documents which indicated that he had intersex characteristics:

My former school where I completed Senior 6, one of my friends came across my documents, my health documents of Nsambya [Hospital] then he went to the girls because my documents were a girl's. Then he started telling them that 'That one is an intersex' being an intersex you have two organs, because he has two organs he cannot, even though you love him there is nothing he can do. Then the girls started disturbing me, 'we love you, do for us this one and this one, let us get for you time like that'. It confuses my brain.¹⁸⁶

Eventually, this intersex student decided to leave school because he could not deal with the torment and ridicule any longer. Another intersex person shared that she often experienced ridicule and 'othering' from her fellow students:

when we are learning about reproduction and people in class started pointing at me. They were like really who are you are you- a boy are you a girl? ... there is nothing on my chest. So I just kept quiet I kept going to school but it ... affected me. Actually ... I was performing very well I was among the best in class, but since I knew that I am not like other girls it affected me a lot and I started performing badly in class. When I joined secondary ... I was in a day school, that one it was easy for me because life was

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¹⁸⁵ Parent of intersex child, interviewed in Mukono, 26th October 2018.

¹⁸⁶ Intersex person, AB, interviewed in Masaka, 23rd October 2018.

not that hard. But it would be hard when this time of checking girls to see if they are pregnant - if they have like other complicated issues. So when they call my name then people started shouting 'Why are you checking her why is she-- she doesn't have even breasts, she does not even go in periods. why do you check her do you think she is pregnant? So the nurse who was checking ... was so concerned about why people are [sic] shouting about me.¹⁸⁷

In one case an intersex person was forced to drop out of school after an altercation with another student. He narrated that he used to bathe by himself while he was in boarding school even though the other children of the same sex bathed together. On one occasion, one of the other students peeped at him while he was showering. The intersex student responded with such anger at this invasion of his privacy that he assaulted the student who spied on him. After that incident he was expelled from school.¹⁸⁸

Ideally, teachers and school heads should receive training on how to best deal with cases of intersex students, especially in a boarding school arrangement. Such training and guidance would be grounded in a policy from the Ministry of Education and Sports. However as discussed in the section above, the Ministry of Education and Sports has not yet been persuaded that the issue of accommodation of intersex students in schools is more than a fringe issue affecting a negligible number of students but an issue which needs to be addressed through policy.

The head of a school in Mukono expressed that even in the absence of a policy or guidelines to help schools to support and

.....
¹⁸⁷ Intersex person interviewed in Kampala, 26th October 2018.

¹⁸⁸ Interview with intersex person TK, in Masaka, 23rd October 2019.

protect intersex students, plans were made to accommodate the one intersex student attending the school. The teachers were instructed to always ensure that other students were not given permission to use the washrooms while the intersex student was using the washrooms, in order to protect his privacy.

A parent of another intersex child, also based in Mukono, shared that she had made an arrangement with her intersex child's school according to which they allow him to go home whenever he tells them that 'he is sick with malaria'. The school is aware of the fact that the child has intersex condition which causes him severe pain at times. This arrangement has made it possible for the child's privacy to be protected and he does not suffer bullying because the other students are not aware of his intersex characteristics.¹⁸⁹

One of the intersex adults interviewed expressed that due to a very strict policy which prohibited teasing on any grounds, she was never teased or bullied in school, even though the other students knew that she had intersex characteristics.¹⁹⁰ Others expressed that support from the school and policies and guidelines to accommodate the intersex student would not necessarily be sufficient to address the discrimination which intersex children and youth face from their peers. One intersex person interviewed expressed that the differential treatment of an intersex student may raise questions and spark curiosity, which would lead to an invasion of privacy despite the availability of separate facilities:

... they had special bathrooms for girls who would go in their menstruation periods ... So for my case I would always utilise those. It caused questions

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¹⁸⁹ Interview with parent of an intersex child, Mukono, 26th October 2019.

¹⁹⁰ Interview with intersex person in Gulu, 18th October 2019.

because why is it that every time I use those special bathrooms? So that is how I managed but then it would really irritate me so much, I would be feeling so bad when people would try to peep at me, I would feel like dying at that particular moment, it would really make me feel bad. But even in the dormitories and in the classrooms the teachers would always ask “Is this student male or female?” They would always have such questions.¹⁹¹



Another parent expressed that protection of intersex students need to extend beyond the school grounds:

Even if I talked to the principal it wouldn't have helped him. Because even on the streets as he was coming back from school, they still would attack him, really try to find out exactly how he appears to be different from them and stuff like that.¹⁹²

It is clear that there is need for greater guidance to school heads and teachers in order to create a favourable environment for intersex students that does not depend on the magnanimity or level of awareness of a particular principal. A clear policy on the treatment of intersex students, along with sensitisation of educators and students is needed to ensure that intersex children are able to exercise their right to education.

b) The right to health

The ICESCR imposes immediate obligations on the state with regard to the right to health and these are: to ensure that the right to health will be exercised without discrimination of any kind; and to take deliberate, concrete steps towards the realisation of

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¹⁹¹ Intersex person interviewed in Masaka, 24th October 2018.

¹⁹² Interview with parent of intersex child in Masaka, 24th October 2018.

the right to health.¹⁹³ At the very least, the minimum core should be provided with respect to the right to health, even in situations of limited resources.¹⁹⁴ Essential, life saving surgery and treatment therefore ought to be provided to intersex children by the state. This is indeed the whole important of section 9 of the Children's Act as amended on vulnerable children. The study however finds that the state does not provide for specialised treatment for intersex conditions, thereby leading to permanent complications.

There are a number of hospitals within Uganda, Kampala and in other districts, that have the capacity to perform surgeries on intersex persons. These hospitals include CoRSU Rehabilitation Hospital, St. Francis Hospital Nsambya, Mulago National Referral Hospital and Gulu Regional Referral Hospital. MARPI Mulago, which is an initiative of the Ministry of Health, also provide counselling and psychosocial support services to intersex persons.¹⁹⁵ Specialised surgeries that are not available in Uganda can be obtained in South Africa or India. The greatest barrier to obtaining both medically necessary and gender-affirming surgeries is the availability of funds as state-funded surgeries in government hospitals are not available:

... I went to Mulago [Masaka] Hospital, they told me my testes are not normal size, one of them is damaged and it is going to cause cancer. They told me they can't help me, that I should go to these big hospitals but I lack funds for the medication and the operation.¹⁹⁶

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¹⁹³ Article 2 of the ICESCR. Also see BK Twinomugisha *Protection of the right to health care of women living with HIV/AIDS (WLA) in Uganda: The case of Mbarara Hospital*' HURIPPEC Working Paper No.5, April 2007, 15.16.

¹⁹⁴ See Committee on Social, Economic and Cultural Rights 'General Comment 14, 'The Right to the Highest Attainable Standard of Health', Twenty Second Session, 25 April-12 May 2000, Para 43.

¹⁹⁵ Telephone interview with representative of MARPI Mulago, 16th January 2019.

¹⁹⁶ Intersex person interviewed in Masaka, 24th October 2019.

Government hospitals do not undertake particular programmes for intersex persons, as narrated by a District Health Officer:

We do not have specific programs for that because it is a very ... rare condition ... we wouldn't discriminate such a child, we would imagine that that child fits into our system - referral system because when we get a child like that we consider that as a unique case which should be referred to either a regional referral hospital or a national referral facility for support because we do not have specialists in the district to handle childhood sort of variations or abnormalities.¹⁹⁷

Again, there is a lack of expertise and understanding among general medical practitioners of intersex conditions. In rural areas, intersex persons do not find doctors who understand their cases and can attend to them adequately.¹⁹⁸

I finally went to Masaka Referral Hospital but then I could not afford the costs there so it never succeeded. And here [at Kalisizo Hospital] there are no competent doctors so still it was no work done because much as I came I never got the service I wanted ...¹⁹⁹

In one instance, an intersex person based in Masaka was wrongly operated on to address hernia, when the condition he was complaining of actually related to his intersex characteristics.²⁰⁰ This happened because the surgeons at the hospital that he visited did not have the specialised skills to deal

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¹⁹⁷ Interview with District Health Officer, Buikwe District, 26th October 2018.

¹⁹⁸ Interview with intersex person, AB, in Masaka, 23rd October 2018.

¹⁹⁹ Intersex person interviewed in Masaka on 23rd October 2018.

²⁰⁰ Interview with intersex person, BN, in Masaka, 23rd October 2018.

with intersex patients.²⁰¹

The first operation was not successful ... one night I found swelling on the scrotum. Going to the government hospital, Kakuuto, they did not do anything like examining, they just took me to the theatre [and] they started operating. Then after operating[on] me they said “No you come to Kalisizo Hospital” ... They operated on me there twice then one of the doctors told me “This is not hernia, there is someone in Kampala called Makumbi Tom (from SIPD) he may know about your health.” ... But there were complications, I got problems, I started urinating non-stop to the extent of using the catheter. Even that challenge now can happen within a month I can face that problem. Like when I am seated here upon standing you will find the trouser is wet.²⁰²

In almost all instances, the intersex persons interviewed who had undergone surgery had financial support from international donors.²⁰³ A considerable number of intersex adults interviewed desired to undergo surgeries, either to affirm their gender of choice, to enable them to have sex or to relieve them from chronic pain they are suffering due to their sex characteristics.

I had gone for the first surgery. I was still supposed to go for the review but I have not gone. I am 36 now. I am not putting in my own money. My doctors, it is them putting in their money. So I have to wait for them. The operation was good for me. I used to be in a situation where I felt a lot of pain. Now I feel okay. Only that I need to go for a review.²⁰⁴

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²⁰¹ As above.

²⁰² As above.

²⁰³ Interview with intersex person, AM, in Tororo, 9th October 2018.

²⁰⁴ As above.

Another mother in Tororo narrated as follows:

When the other person came in the picture, he provided the financial aid that we needed so we went for the surgery and they corrected the hypospadias condition and the child was okay for some time, but recently ... like one year ago, it went a little bit bizarre. Now the child is seeing some new development with his urinating ... Sometimes he does not feel the urine coming, he just sees his pants wet, and sometimes he gets a lot of pain.²⁰⁵

Another mother interviewed in Mukono expressed her challenges in ensuring medical care for her intersex child:

'The issue at hand right now is the fact that he needs some medical attention and I cannot afford it. I do not have the money to take the child to hospital and yet the child says ... it is hard for him to urinate sometimes. That is my biggest challenge right now... we don't have the money to keep on medicating these kids. When I went to hospital, the doctors there only told me that it is a place for treating people, not healing. So it is up to you to go and not come back or to come back each and every year which I cannot afford to keep on doing because I not have the money for it. My only urge is so that we can find a place or a hospital where our children can get free medical attention.'²⁰⁶

The challenges in obtaining medical treatment were also explained by an intersex adult:

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²⁰⁵ Interview with parent of intersex child in Tororo, 9th October 2018.

²⁰⁶ Interview with parent of intersex child in Mukono, 26th October 2018.

Then we do some tests then the tests came out as I'm a girl but they need to do a surgery on me. But the surgery is very complicated they cannot just do it so they need to first study the case very well and they see if they can do the surgery. So then they were suggesting that I have to started taking the pill - hormones. They are for developing breasts then I started taking them they were like I have to take them for the rest of my life. But they are too expensive I could not manage because every month they are for 60 [60,000 Uganda shillings].²⁰⁷

There are some doctors who are from Egypt, they were in Kibuli hospital they were doing some camp there. And they wanted to see some women who have some complicated issues. So she was like you just go there and see those doctors maybe they can. So I went there and saw them they were like yes we can do the surgery but we cannot do it from here. You have to come to Egypt and we do it from that side.'²⁰⁷

An intersex person, interviewed in Gulu explained that they accepted to have 'normalising' surgery performed, simply to be either male or female. This opportunity came up when European surgeons were visiting a hospital in Gulu and provided certain procedures to intersex persons free of charge. The tragedy of this particular situation is that the person identifies as male, yet agreed to undergo surgery to have more female characteristics, simply because that was the only surgery which could be performed by the surgeons who offered the free service. In view of this intersex person, it was better to have sex characteristics of the gender that you do not agree with than to not 'fit' within the male/female classification.

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²⁰⁷ Interview with intersex person TM in Kampala, 26th October 2018.

Mentally I do not feel like a female to be sure but I took the operation to look like a female because I didn't have a choice as in all my body was looking like female, everything so I have to be like this, my mother also couldn't let me, so I had to take the operation as female.

They narrated an experience of a friend who found themselves in a similar situation:

The operation happened but they did what she didn't want. They forged the vagina she didn't want it and the operation she wanted they could not afford it and they didn't have it here that's why she has to take what is presented... It didn't fulfill her, the operation did not satisfy her because she doesn't feel male.²⁰⁸

There is a definite access barrier to needed surgeries for intersex persons due to the absence of funds. Apart from surgeries, intersex persons are also in need of general health services within rural areas by practitioners who know how to treat intersex patients. There should be deliberate efforts by the state to provide funding for such life saving surgeries, as well as sensitisation of doctors so that they only do what is medically necessary for the person to surviving into adulthood where they can make the final decision as sexual assignment.

c) The child's right to be cared for by parents

Intersex children do experience discrimination at a family and community level. At its worst, this discrimination leads to infanticide or abandonment of intersex infants.²⁰⁹ In cases where the parents are not affected by cultural beliefs or community

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²⁰⁸ Interview with intersex person in Gulu, 18th October 2019.

²⁰⁹ Interview with representative of SIPD, Kampala, 25th January 2019.

expectations to the extent of abandoning or murdering their intersex newborns, the birth of an intersex baby often leads to conflict between the parents of the child. The study finds that there are many cases where the fathers of intersex children would abandon the child and their mother. The mothers are left to care for the intersex children by themselves, often without any support from their communities or extended families.²¹⁰ This phenomenon was expressed by one of the research participants who works within government:

... if you produce a child with two private organs, this one is going to be seen as an outcast in the family. And now this one also implies that this child is likely to be neglected, to be denied love and compassion. To be denied the basic necessities of life because the father and mother especially the father in most cases is not willing to be associated with a disabled child of that kind.²¹¹

Stigma at community level also extends to exclusion from communal and family land, which infringes upon the right to property of intersex persons and their parents:

I have no support whatsoever from relatives and the reason for that is because of land wrangles. They wanted to chase us off the kibanja. The family members are all against me and the fact that I have an intersex child so it even exaggerates the situation.²¹²

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²¹⁰ Interview with parent of intersex child (DN) in Mukono, 26th October 2018;
Interview with parent of intersex child (MK) in Mukono, 26th October 2018;
Interview with parent of intersex child in Tororo (PO), 9th October 2018.

²¹¹ Interview with representative of the Ministry of Gender, Labour and Social Development, Kampala, 23rd January 2019.

²¹² Interview with parent of intersex child, Masaka, 24th October 2018.

The legal aid clinic at Human Rights Awareness and Promotion Forum (HRAPF) has also provided mediation services in a case where the mother of an intersex child and the child faced eviction from the land left to her by her late husband from his family members.²¹³

There is need for measures to address cultural and social attitudes that lead to abandonment of children who are intersex.

d) The child's right to freedom from inhuman and degrading treatment

The violation of this right mainly arises out of medically unnecessary surgeries that are done without the child's consent. SIPD recorded one case in which a young intersex child had undergone cosmetic surgery which was not medically necessary.²¹⁴ The outcome of that case was that the penile reconstruction failed and the child was left in a situation where his body is constantly discharging puss with a strong smell.²¹⁵ The doctor who performed the surgery had left Uganda and other surgeons who are capable of performing such surgeries are not willing to operate on the child following the failed surgery.

SIPD's preferred model for advising parents of intersex children is described as 'best guess, non-surgical'. SIPD advises parents of intersex children to delay gender-affirming surgery until the child is old enough to participate in the decision-making. MARPI Mulago also advises parents of intersex children who make use of their psychosocial and counselling services to delay any medically unnecessary surgery up to the time that the child is

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²¹³ Interview with representative of the Access to Justice Unit, Human Rights Awareness and Promotion Forum, 19th January 2019. The case was handled in 2017.

²¹⁴ Interview with representative of SIPD, Kampala, 25th January 2019.

²¹⁵ As above; interview with parent of intersex child in Tororo, 9th October 2019.

able to be consulted about the decision and in some cases, after they have gone through puberty. CORSU hospital handles their intersex patients on a case-by-case basis, but advises parents to delay any surgeries which would affirm the child's gender until a time at which the child is able to participate in the decision-making process.²¹⁶ Unnecessary gender reaffirming surgeries violate the child's right to dignity.

4.1.2 The right to equality and non-discrimination

Not only intersex children face a violation of their right to equality and non-discrimination but also adults. These violations are in the form of:

a) Lack of legal recognition of third gender

Whereas other persons can be classified as male or female, some intersex persons may not identify as either and would require a third gender identification. Currently, whereas children in Uganda can have their gender markers changed to reflect the gender they identify with, adults cannot, and there is no provision for a third gender besides male or female.

According to a representative of the National Identification and Registration Authority (NIRA), there has not been a single case of a person demanding to be registered under a third gender.²¹⁷ The NIRA official interviewed shared the view that Uganda is a long way off from recognising a third sex or allowing a person to indicate their sex on their National Identity cards as 'intersex'.

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²¹⁶ Communication with representative of the Department of Plastic and Reconstructive Surgery, CORSU hospital, 2nd February 2019.

²¹⁷ Interview with Manager of Legal and Advisory Services, NIRA, Kampala, 12th February 2019.

However, they also stated that they are developing a system where new born babies can be registered as either male, female or unknown, thus making provision for children with ambiguous genitalia.²¹⁸

Also in practice, since NIRA has been established only recently and the issuance of national Identification cards is a new practice, intersex persons have the practical advantage of registering their preferred sex, but again not necessarily a third gender. There is an understanding on the part of NIRA that not all Ugandans have birth certificates and therefore applicants for national IDs need not produce their birth certificates.²¹⁹ This practice was confirmed by an intersex person interviewed in Masaka, whose birth certificate indicates 'female' as his gender, while his National ID indicates the gender he identifies with, which is male.²²⁰ According to this respondent, there was no need for him to show his birth certificate when he applied for his National ID.²²¹

Some of the intersex persons interviewed said that they would like their National Identity Cards to show their sex as 'intersex' or as 'other' since this will help them to avoid discrimination in certain spaces and to also obtain differential treatment where this is necessary:

You go somewhere after school like the boarding section, when it reaches time to bathe you face some problems. Which means that when I have a document showing that I am an intersex it could be better for me so that I can get a separate bathroom for me, such that my fellow students don't become aware that I am intersex because when they become

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²¹⁸As above.

²¹⁹As above.

²²⁰Interview with intersex person in Masaka, 24th October 2018.

²²¹As above.

aware that I am intersex they can stigmatize me.²²²

A view was also expressed that a National Identity Card revealing a person's intersex status may do more harm than good in a society that is highly homophobic and ignorant about gender identities, sexual orientations and sex characteristics which do not conform with the norm. In the words of one of the intersex persons who participated in the study:

... it's also a challenge when you come like when you are asking for a job and you take there your National ID saying intersex. The human resource who is registering ... guys are not. yet sensitised about the intersex persons. So when you go to the human resource and you tell him that you are an intersex they tell you that you are a ... homosexual. They don't differentiate a homosexual guy and an intersex person so that's a challenge to us. When you go with your ID that says intersex they will actually interpret you in a different way, they will say that you're a homosexual.²²³

Therefore, not recognising intersex persons' preferred sex and not allowing for a third gender for intersex persons, may constitute a violation of the right to freedom from discrimination.

b) Discrimination in employment

Intersex persons interviewed reported difficulties in finding and maintaining employment.²²⁴ The discrimination experience in this regard is structural rather than direct as it is a consequence

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²²² Intersex person interviewed in Masaka, 23rd October 2018.

²²³ Interview with intersex person in Mukono, 26th October 2019.

²²⁴ Interview with intersex person in Gulu, 18th October 2018; interview with intersex person in Tororo, 9th October 2018; interview with intersex person in Masaka, 23rd October 2018.

of the discrimination they face in education, healthcare and from families and communities. The discrimination which intersex students face in the education system often leads to underperformance or compels them to drop out.²²⁵ Due to the general difficulty in finding employment in Uganda, many people support themselves by small-scale farming. Even this option is not always available to intersex persons, either because they have been excluded from having a share in the family land or because medical complications related to their intersex characteristics and barriers in accessing needed medical care make it difficult to perform the hard labour involved in farming. One intersex person interviewed explained that before he was able to access needed surgery related to his sex characteristics, he faced difficulty in performing sustenance farming:

The operation was good for me. I used to be in a situation where I felt a lot of pain. Now I feel okay. Only that I need to go for a review. My life has changed after the surgery. The life before it was hard. You cannot even go to the garden digging. When you go to the garden [and] you carry something very heavy, you come back and the pain is there. After the surgery, at least you can carry something heavy and not feel pain.²²⁶

Another intersex person interviewed in Masaka sought to support himself and pay for his university studies by preparing food for a school. His particular role was to mingle a large pot of posho which is a strenuous task and negatively affected his health:

... the urine just comes like that, when I see that it is too much I go to the hospital to get the catheter

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²²⁵ Interview with representative of SIPD, Kampala, 25th January 2019.

²²⁶ Interview with intersex person in Tororo, 9th October 2019.

to help me so that I can overcome the problem. Because I myself am an orphan, I am the one who pays the school fees, even this tuition of University I am the one - mingling posho, preparing porridge for the school to get the tuition fee. When I get someone who can help me I can concentrate such that my body gets free because the work I am doing is too much. My body can't withstand that work I am doing because getting a mingling stick, getting forty kilogrammes of posho, that is too much on my health. I can't mingle posho when I have a catheter. That is the only problem I have and yet I have brothers that I am supposed to cater for, to look for their food.²²⁷

According to the Equal Opportunities Commission, few cases of the denial of equal opportunities by intersex persons have reached the Commission.²²⁸ The lack of use of the EOC by intersex persons could be evidence of the fact that discrimination against intersex persons is structural rather than direct. It could also indicate that there is need for greater awareness to be raised about the Commission among intersex persons. The Commission has not seen the need to undertake research to investigate intersex persons' equal access to opportunities.²²⁹

SIPD is addressing the barriers to employment opportunities by undertaking empowerment projects in various districts which equips intersex persons and their parents with skills to generate an income and to form saving schemes. However, the efforts of civil society alone are not sufficient in addressing the structural barriers to employment faced by intersex persons.

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²²⁷ Interview with intersex person in Masaka, 23rd October 2018.

²²⁸ E-mail communication with Equal Opportunities Commission Commissioner, 15th January 2019.

²²⁹ As above.

4.1.3 Freedom from inhuman and degrading treatment

For adult intersex persons, this usually manifests in the area of incarceration. When the police arrest them, they are usually queried about their sex and then detained in cells where they may be subjected to sexual abuse. HRAPF's legal aid clinic has dealt with a case of an intersex person who was accused of murder and was placed on remand along with male prisoners. The client reported that he suffered ridicule by other prisoners while in detention, and he was not asked in which cell he preferred to be incarcerated.²³⁰

The trainings of law enforcers on LGBTI rights that are undertaken by civil society organisations in collaboration with the Uganda Human Rights Commission serve an important purpose as stated by the representative of the Directorate of Legal and Human Rights in the Uganda Police Force.²³¹ A police officer in Tororo confirmed that police stations will usually be able to accommodate intersex persons who had been arrested by placing them in a separate cell or by transferring them to another police station which has a wider range of options:

We have separate cells for men and women and where it is not available you devise a plan. We do not put men and women in cells together neither do we put children and adults together ... We cannot lack what to do to keep an intersex person in custody. We can create a separate space for them. Our response will also depend on the gravity of the crime. If need be we can take arrestees to CPS (Central Police Station) because we know that they have facilities.

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²³⁰ HRAPF case handled in Mbarara in 2017, interview with representative of Human Rights Awareness and Promotion Forum, Kampala, 28th January 2019.

²³¹ Interview with representatives of the Uganda Police Force Directorate of Human Rights and Legal Services, 12th February 2019.

We do not have money for fuel but we do our work on our own initiative.²³²

4.2 Conclusion

Intersex persons face violations of their human rights with the rights of children most affected. The right to education is a key concern for children as many suffer ridicule and bullying that makes them to drop out of school. Adults face challenges mainly arising from the failure to recognise a third gender thus making them subject to violations of the right to dignity and freedom from inhuman and degrading treatment, Although seen as a small minority, each individual person matters, and their issues ought to be addressed. The invisibility of intersexuality in the laws and policies is the biggest cause of the violations. The state of Uganda, by failing to put in place laws that protect intersex people against violation and discrimination, fails in its obligations to protect, fulfil and to respect the rights if such persons. Considering that intersex children's rights are mostly violated, the state cannot argue limited resources as protection of such vulnerable persons from discrimination and violation is part of the minimum core package for social-economic rights. Unregulated medical practices upon such children are also a big issue leading to a violation of their right to freedom from inhuman and degrading treatment.

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²³² Interview with police officer in Tororo, 9th October 2018.

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

This study set out to examine the impact of the legal and policy framework on the human rights of intersex persons in Uganda, including their access to health services and education. The study sought to make recommendations on how the legal and policy framework on the protection of intersex persons can be improved.

It was found that Uganda is placed within a progressive regional and international framework as far as intersex rights are concerned and that the country has ratified various human rights instruments that have provisions that speak to the rights and concerns of intersex persons. Uganda's national legal and policy framework is found to fall short of the best practice examples on protecting the rights of intersex persons as found in Malta, Kenya and South Africa. Uganda does not have a clear law or policy to guide educators on how to accommodate intersex students, nor are there specific policy provisions that addresses the medical needs and concerns of intersex persons or medical protocols to protect them from medically unnecessary surgeries performed without their informed consent. Uganda's laws do not prohibit discrimination on the basis of sex characteristics.

In terms of impact of the legal and policy regime, the study finds that intersex persons face severe stigma at family and

community level which threatens their right to life. Intersex persons find major challenges in exercising their right to education due to the fact that they can easily fall subject to ridicule in a school-setting and educators do not have clear guidance on how to accommodate intersex students. Intersex persons also suffer the violation of their right to health in that medical practitioners in smaller health facilities are not well-versed with their medical concerns. While there are hospitals within Uganda and its neighbouring countries that can perform both medically necessary and cosmetic surgeries on intersex persons, many intersex persons nevertheless face a financial barrier which prevents them from accessing the surgeries they require. Intersex persons also face discrimination in legal recognition in that only minors who have undergone surgical procedures to alter their sex are able to apply for an alteration of their particulars in the births register. Intersex persons also risk the abuse of their rights while in custody since there is no clear guideline to law enforcement officials on how to handle cases of incarceration of intersex persons.

5.2 Recommendations

The study makes the following recommendations:

To Parliament

- Amend section 38 of the Registration of Persons Act, 2015 to allow intersex adults to also change their particulars in the births register if they wish; delink the availability of the option of changing the particulars in the births register from surgery and to replace the term 'hermaphrodite' with intersex.

To the Ministry of Gender, Labour and Social Development

- Include intersex children in the review of the National Policy on Orphans and Other Vulnerable Children.

To the Ministry of Education and Sports

- Include intersex children within education policies in Uganda as vulnerable children.
- Protect intersex children from discrimination based on sex.

To the Ministry of Health

- Adopt a protocol which stops surgeons from performing medically unnecessary surgeries on intersex children and infants without their free, full and informed consent.
- Allocate a portion of the Ministry's budget toward subsidising surgeries and hormone treatment for intersex persons.
- Train medical practitioners on how to treat intersex patients.
- Sensitise health workers on how to protect the privacy and dignity of intersex patients.

To the Uganda Police Force

- Adopt guidelines to instruct station commanders on how to handle cases of intersex arrestees. Such guidelines could include to detain intersex persons in separate facilities.
- Continue training and awareness-raising among police officers of different ranks in all regions of the country.

To the Equal Opportunities Commission

- Monitor and investigate the situation of intersex persons.
- Include intersex people's issues in the annual reports to Parliament.

To the Uganda Human Rights Commission

- Investigate and monitor human rights abuses committed against intersex persons.
- Include intersex issues in the annual reports to Parliament.

To mainstream civil society organisations

- Deliberately target intersex persons in programming.

To intersex persons and organisations working on intersex persons

- Undertake advocacy campaigns to raise awareness about the existence of intersex persons in Uganda and their particular human rights concerns.
- Join/identify support groups and reach out to other intersex persons and parents of intersex children in order to overcome isolation and secrecy.
- Participate in the development of policy and adoption of laws, which potentially affect intersex persons or could better ensure the realisation of their rights.

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ABOUT HRAPF

Background

Human Rights Awareness and Promotion Forum is a voluntary, not for profit, and non-partisan Non-Governmental Organisation. HRAPF works for the promotion, realisation, protection and enforcement of human rights through human rights awareness, research, advocacy and legal aid service provision, with a particular focus on minorities and disadvantaged groups. It was established in 2008 with a vision of improving the observance of human rights of marginalised persons in Uganda.

Legal Status

HRAPF is incorporated under the laws of Uganda as a company limited by guarantee.

Vision

A society where the human rights of all persons including marginalised persons and Most at Risk Populations are valued, respected and protected.

Mission

To promote respect and protection of human rights of marginalised persons and Most at Risk Populations through enhanced access to justice, research and advocacy, legal and human rights awareness, capacity enhancement and strategic partnerships.

HRAPF's Objectives

1. To create awareness on the national, regional and international human rights regime.
2. To promote access to justice for marginalised persons and Most at Risk Populations groups
3. To undertake research and legal advocacy for the rights of marginalised persons and Most at Risk Populations groups.
4. To network and collaborate with key strategic partners, government, communities and individuals at national, regional and international level.
5. To enhance the capacity of marginalised groups, Most at Risk Populations and key stakeholders to participate effectively in the promotion and respect of the rights of marginalised persons'.
6. To maintain a strong and vibrant human rights organisation.

Our target constituencies

1. Lesbian, Gay, Bisexual and Transgender (LGBT) persons
2. Intersex Persons
3. Sex Workers
4. Women, girls and service providers in conflict with abortion laws
5. People who use drugs
6. People Living with HIV and TB (PLHIV/TB)
7. Poor women, children and the elderly with land justice issues

HRAPF Values

- Equality, Justice and Non-Discrimination
- Transparency, Integrity and Accountability
- Learning and Reflection
- Quality and Excellence
- Teamwork and Oneness
- Passion and Drive
- Networking and Collaboration

Slogan

Taking Human Rights to all

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