

I`M A HUMAN BEING

WHAT ARE YOU?



R A I N B O W
I D E N T I T Y
A S S O C I A T I O N

LEGAL AUDIT

Vol 1

"TO DENY PEOPLE
THEIR HUMAN
RIGHTS IS TO
CHALLENGE THEIR
VERY HUMANITY"

How Protected are Human Rights of Transgendered and Intersex Persons in Botswana

Intersex is an umbrella term for a variety of conditions where a person is born with a body which combines biological traits of males and females or does not conform to expected biological norms for either gender. Due to the complexity of the conditions intersex can manifest at various stages throughout life: birth, puberty, in adulthood or on autopsy. Where intersex becomes apparent at birth or in childhood, it is not unusual for the child with the intersex condition to undergo medical treatment, either hormonal or surgical, to attempt to recreate a body that appears more male or female. It is important to note that most intersex conditions are not life threatening. Whether or not the person undergoes treatment, it is not certain that the individual with an intersex condition will identify with the gender assigned at birth and consequently recorded on the birth certificate. This can cause difficulties when official documentation does not correspond with the individual's gender identity.

Transgender is an umbrella term for people whose gender identify differs from the sex they were assigned at birth and/or whose gender expression do not match society's expectations with regard to gender roles. The term may include identities such as: transsexual, gender queer, gender nonconforming, Female To Male, Male To Female, and gender variant. Transgender people may or may not choose to alter their bodies hormonally and/or surgically.

Currently in Botswana there is not much legal protection for transgender and intersex persons, Lack of human rights protection for intersex people, and anti-discrimination laws are generally inadequate to protect intersex people from rights violations resulting from their intersex. For intersex people to have rights at all, they are required to submit to the myth that they are wholly male or wholly female.

This paper allows us to interrogate how we are boxed from birth by the society, how we allow the law to police our bodies and how we are allowing our struggle to be named in a way that limits the scope of the change we want to see.

Prepared by:

Onkokame Ratanang Mosweu

**Edited By:
Skipper Mogapi**

FOREWORD

Society, child welfare, and law enforcement agencies fail to recognize the efforts of battered and incarcerated transgender and intersex persons.

Sex is a biological fact which is determined by genitalia, internal reproductive organs, hormones, and chromosomes. A human being can be male, female or intersex.

Gender is a social construct which divides human beings into at least two groups, “men” and “women” (although other cultures can have more than two), and dictates how a human being must talk, dress, play, associate with, and what kind of tastes and attitudes they must adopt, in order to be in one or the other category.

By creating ideals of male and female bodies, masculine and feminine behavior, and sexuality, the law ensures that everyone is held to a strict standard of masculinity and femininity. Moreover, the law reinforces a belief in the “natural” binary of the sexes and enforces the concept of compulsory heterosexuality. It does so by creating strong incentives to comply with predominant standards of male bodies and masculine demeanour or female bodies and feminine demeanour, and by approving only of a certain type of sexuality.

Persons who fall outside the scope of accepted appearance or behavior – whether they identify as transgender, gender nonconforming or gender questioning – are all forced to comply with these often very oppressive standards. Whereas transgender or gender nonconforming people face more tangible repercussions in the case of noncompliance, such as the inability to qualify for a sex reassignment surgery or the loss of a job, gender conforming persons are subjected to more subtle, but equally oppressive rules. The law, by policing the boundaries of sex and gender in transgender cases thus ensures that no one can easily transgress from socially acceptable gender norms.

The focus on genitalia shows that it is really sexuality that is at stake: after all, these parts of the body usually remain hidden. But different genitalia are seen as vital to heterosexual sex, which is defined as the penetration of the vagina by penis. The focus on genitalia also ensures that stereotypical notions of male and female sexuality are perpetuated through the legal regulation of transgender persons.

At the same time as the obsession with a medical approach to intersex, there is still a widespread failure to take a human rights approach to the issue. Currently, worldwide, there is a complete lack of human rights protection for intersex people, and anti-discrimination laws are generally inadequate to protect intersex people from rights violations resulting from their intersex. For intersex people to have rights at all, they are required to submit to the myth that they are wholly male or wholly female.

Intersex people are at the coalface of the state’s regulation of relationships. This is largely due to the problem of the sex binary and the fact that regulation of bodies is the first step in the regulation of relationships. The aim of normalisation of intersex people is to make us “marriage-ready”. If our bodies are unregulated, it is difficult to classify our relationships and society finds it difficult to see us as properly-married people when we are married.

RAINBOW IDENTITY ASSOCIATION LEGAL AUDIT

Rainbow Identity Association is the very first and remains the only organisation in Botswana to focus on the needs and rights of the transgender and intersex communities in Botswana. It was formed by a group of concerned activists in Botswana in 2008 to address the challenges faced by the transgender and intersex community in Botswana and to promote their rights, access to services and overall visibility that works to minimise stigma and discrimination in general society.

After a long and tiresome struggle, one of its biggest successes was its formal registration in 2010. It has since established an office where transgender and intersex persons and their allies can gather to benefit from its services, socialise, organise and collectively act.

At the moment RIA offers various services to its membership and those in need of it thereto which include:

- Advocacy
- Research
- Sports and recreation
- Legal aid referral
- Training & Education

This paper is a legal audit. It aims to provide an overview and analysis of the legal environment in Botswana with regard to the rights of sexual minorities in relation to both the inception and implementation of laws. In many instances legislation and policies have not been implemented correctly or effectively. This consequently undermines many international human rights norms.

This audit of present laws and legal instruments in relation to the rights of sexual minorities was done in order to investigate all applicable legal provisions and policies in Botswana as they relate to sexual minorities and as they relate to transgendered and intersex persons specifically. The results of this audit shall be used to inform advocacy campaigns and strategies as well as to contribute to the work of Rainbow Identity going forward. The audit focuses specifically on the following issues:

Furthermore, the structure of this audit is as follows:

First it looks at the applicable international law, which Botswana has ratified and domesticated (if Botswana is dualist and needs to domesticate such). Second it outlines the provisions from the Constitution that are applicable to the rights of sexual minorities. Third, it surveys legislative provisions and indicates their applicability to the focus area in question, or whether they have been used in such circumstances. This audit also looks at various policies issued by the Botswanan government, and how they relate to or impact upon sexual orientation and gender identity as well as the rights of sexual minorities.

Most laws and policies relating to sexual orientation and gender identity and expression in Botswana are vague at best, or more generally silent. It is worth noting that the legislative reforms and protocols in Botswana are often vague or not specifically applicable to issues faced by transgender

and intersex persons in Botswana. Sexual minorities face frequent human rights violations, as well as high barriers to services and limited avenues of recourse because of systemic disenfranchisement as well as social-economic marginalization and criminalization. This is further influenced by various laws in governing policies and pieces of the legislation, which are frequently misinterpreted or misunderstood in terms of the implementation of these laws.

This paper is aimed at urging legislative reforms in order to offer legal protection to transgender and intersex persons; as well as to ensure that the legislation is implemented in a manner that is tailored to their specific needs. Discriminatory policies and the lack of laws and policies speaks directly to the need for an audit such as this one as well as advocacy strategies which seek to transform laws that currently undermine the spirit and purport of the various international human rights instruments and mechanisms to which Botswana is a signatory.

There are a number of pieces of legislation which can be read as directly applicable to the rights of sexual minorities. The following extracts from these pieces of legislation highlight where gender is mentioned in Botswana's legislative provisions. This audit also aims to explore the extent to which a particular provision may be used for advocacy purposes.

1. Employment (Amendment) Act 2010

Section 23 cap 42: 01 a; b

*(a) Substituting for paragraph (d) the following new paragraph- "(d) the employee's race, tribe, place of origin, marital status, **gender**, sexual orientation, colour, etc..."*

The above provision prohibits anyone from losing their employment for, amongst other things, discrimination on the basis of a listed ground. The list of grounds is not a closed list, and includes both gender and sexual orientation. Although these grounds do not necessarily clearly or explicitly describe gender identity or gender expression, it is plausible that these grounds could be read or interpreted to offer protection to transgendered or intersex persons. Can this section be used to protect a transgender indentifying employee?

The Amended Act continues to stipulate as follows;

"(e) any other reason which does not affect the employee's ability to perform that employee's duties under the contract of employment"

The above provision seeks to protect employees from losing their employment based on any reason other than one which directly affects that employee's ability to perform the duties and responsibilities applicable to their job, as outlined in the job description in their employment contract.

Does this section hold any argument or power over individual organisations or company policies that may prohibit one to comfortably express their gender without possibilities of losing their employment?

On the face of it, these provisions seem to be inclusive and progressive. Furthermore, they do not seem to provide any loopholes or reasons by which someone could be dismissed simply for expressing their gender identity or sexual orientation. That is, one should not lose their employment position provided they perform as expected and agreed upon in terms of their employment contract. However, there may also be gaps to these provisions as, in practice, the system allows for individual institutions and organisations to implement policies which could potentially set adverse working conditions or conditions of employment for those transgender and intersex persons. If such a policy were implemented by a private company, then workers at that company would have to comply with “organisational policies” which could, and often are, influenced by societal norms and expectation. Therefore, the legislative provisions specifically cannot offer the full range of protections that should be afforded to transgender and intersex persons.

RECOMENDATION:

It is recommended that the Government of Botswana looks into the Employment Act and aims reforms at addressing the issue of Gender Identity and Gender Expression specifically. These specific amendments or reforms should clearly outline a stance on the issue. This can be achieved through consultative meetings which should include all stakeholders, including civil society organisations, labour organisations and organisations working on gender identity and gender expression issues.

TRANSGENDER PERSONS AND FAMILY

1. Family Act, Children’s Act, Adoption Act

The impact of this piece of legislation on intersex and transgendered persons is predominantly focusses around the limitations on the freedoms of starting a family. These impact of these laws is also felt in terms of the infringement on the right to family life, which is articulated in the African Charter.

The legislation described below speaks directly to Family, Children and Adoption. The Penal Code is also important here as it does not address issues specific to transgender and intersex persons. The abovementioned legislation also covers the category of persons who may and may not adopt children, this specifically relates to transgender and intersex persons as they are excluded from adopting children.

The Adoption Act states any person of legal age may adopt a child. It further stipulates that in order for this person to qualify to adopt, they should have a stable, dependable and legal form of income in order to sustain him or herself as well as the child. The Act designates the Social Welfare Department as the state department tasked with carrying out the necessary character and morality of the person applying to adopt.

On the face of it, the Act seems simply follows a ‘tick-box’ approach in terms of what is expected of an applicant wanting to adopt. However, there is a great deal of discretion left to the Social Welfare Officer who carries out the assessment. Furthermore, issues of ‘morality’ and ‘character’ are terms that are widely debated and as criteria for adoption they hold the potential of being open to abuse as it is a subjective assessment done by the Social Welfare Officer concerned.

In many instances transgender persons are treated with injustice. That is, the law does not say much about the rights of transgender persons. Thus, many people in society make assumptions or tend to associate any difference in terms of gender identity or sexual orientation as being akin to moral decay. In many cases this tends to lead to rejection of applications to adopt if the applicant is a transgender person.

Some school of thoughts have in previous times highlighted and/or argued that morality and law are two different things which must both be understood in order for each to serve its mutual purpose. How does a person's gender expression or identity stop him/ her or them from taking care of a child?

The continuous marginalization and criminalization of people with different sexual orientations or gender expressions should not be codified by the law. The articulation of this marginalisation and discrimination within pieces of legislation, or through the application of the law (particularly when that application is based on a subjective interpretation by a specific official) represents a failure of the law to adequately protect transgender persons from discrimination. It also indicates a level of institutionalised discrimination and a failure of the legislative framework to protect the dignity and fundamental human rights of transgender persons.

The issue of morality also puts the parent who is transgender into a negative position if they are ever involved in a custody battle. Can the law be used against a transgender parent on the basis of his or her gender identity and expression?

An interpretation of a piece of legislature and its strict application serves to entrench discrimination within the letter of the law. It would be more beneficial to make an analysis, for the purposes of adoption, that places the social welfare and best interests of the child at the centre. The use of subjective interpretations of someone's 'moral fibre' as a measurement in order to apply a piece of legislation is both unfair, and open to abuse. It also means that there is no equality of outcomes in the interpretation and application of the legislation.

Transgender persons interviewed during the course of this research indicated that they do fear losing their children through the discriminatory and subjective application of the provisions of the Adoption Act. Furthermore, the piece of legislation itself does not offer protection or recourse to transgender person. It is also unclear about the meaning of gender identity or expression and does not adequately link any potential impact or nexus between sexual orientation and gender identity to one's ability to care for, protect, and sustain a child.

The Children's Act was enacted in 2009 and represents Botswana's efforts to domesticate the UN Convention on the Rights of the Child which it ratified prior to the enactment of the domestic legislation. Although Botswana has made progress with regard to the domestication of this international instrument, a concern is that the implementation of the Children's Act has been slow. This slow progress is largely due to capacity problems within government and among civil society organisations. The Children's Act, like other pieces of legislation does not directly address transgender or intersex children. However, it does make reference to freedom of the child as a

being. This act states that there shall be protection of the child in order to enable the development of physical and mental but how does one grow or develop physically and mentally when their genitals have been operated and they develop characteristics of the opposite sex? Most of the intersex persons who have been operated at birth do face challenges once they reach puberty and their right to freedom and dignity is washed away by the fact that they know show different characteristics from the assigned sex. Freedom to choose not to undergo any surgery and the freedom to keep intersex as sex is been violated.

Section 20(1) and (2) (a) – (c) of the Children’s Act clearly outlines and highlights the child’s freedom to expression and opinions. Thus it highlights the importance of the child being allowed to act, behave and be themselves as well as the freedom of thought and mind. On the face of it, these provisions could be interpreted as being all-inclusive. However, if one reads further the provisions outline that the child should be afforded this freedom within the guidance of a parent in cognisance of the *‘societal beliefs and practices of what is acceptable or unacceptable’*. What this means is that, again, a subjective element of what is interpreted as morality can be used to circumscribe the wide and most progressive interpretation of this Act. Ideally, ‘societal beliefs’ should be determined objectively and in a non-discriminatory manner.

Thus, again the battle between **morality and legality** surfaces. The law does not give or provide guiding principles as to what factors should be taken into account when determining or interpreting what morality is or is not. However, it does bring up the notion of something being acceptable or unacceptable to society generally. This is a dangerous standard to use as it relies on a subjective interpretation and leaves scope for the adjudicator to put his or her own moral beliefs into the decision rather than use an objective and independent set of standards.

The above-mentioned provisions in the Children’s Act, if given a strict and subjective interpretation, can effectively limit a child’s ability to fully express themselves and all facets of their identity. It also narrows the platform for children to have access to adequate and correct information regarding sexual orientation and gender identity as the very systems which are meant to provide education and awareness are discriminatory and in most instances lacking in terms of this information.

An important question with regard to the Children’s Act asks who the Act really seeks to protect. Does it protect the child (with regard to this specific provision) or does it seek to protect conventional and conservative societal views, beliefs and opinions. A broader conversation or dialogue about this issue would be instructive. Thus it is recommended that in order to ensure that children are afforded broad freedom of thought, opinion and expression, that this right is interpreted as broadly as possible and that it is interpreted so as to include a child’s right to freedom of gender expression and identity.

RECOMMENDATION: *“most people do not have the capacity to fully implement the programmes, which had resulted in lack of meaningful child participation in decision-making” said United Nations Children’s Fund (UNICEF) Country Representative, Vidhya Ganesh explaining some of the problems faced by the act itself*

The right to bodily and psychological integrity of the person which includes the right to make decision concerning reproduction and the right to security in and control over their bodies

It is against this background that recommendations come from the ministry in charge of implementation of the Act to educate and raise awareness regarding children's rights, as well to engage civil society in advocacy campaigns related to freedom of expression for children.

Stakeholders such as social workers and child psychologists must also be involved in crafting legislation and regulations which ensure that there is a holistic approach to addressing children issues, including their emotional and psychological wellbeing.

Immigration Act and Prisons Acts

"Sir, why does your ID/passport say female, from whom did you steal this passport from, stop telling me those stories".

This could easily tell a story of a transgender person in transit. The pain, discrimination, and humiliation potentially faced by transgender persons in Botswana escalates to the public arena. This is as a result of transgender persons being able to legally change their identity documents so that the gender marker reflected in those documents corresponds to their lived reality and their gender expression or identity.

The Immigration Act of the Republic of Botswana does not speak or make any reference to issues of gender identity and gender expression. Thus, when a person has to navigate everyday life situations that require the use of their official identity documents, they may be unfairly discriminated against because the person that they are does not correspond to the person that an official expects to see before them based on the information contained in that identity document. This infringes on a person's dignity and it also impinges on their ability to live free of potential abuse from officials.

Without recognition of the intersex person on identity documents it makes it even harder for intersex person when they have committed crime to be arrested or detain. Upon admission of the inmate there is registration which the inmate has to produce identity cards and which then means that the person is either entered as male or female. When it is time to separate the inmates male from females then again it is a challenge for the intersex person to be searched by either male or female when they do not conform to that gender.

RECOMEMNDATION : A strong recommendation to influence policy reform to allow for a third gender which will enable transgender and gender non-conforming individuals and citizens of Botswana the freedom to be themselves.

It is also a recommendation that advocacy and training should be conducted with officials in government departments regarding sensitivity around issues of gender and gender identity.

The Prisons Act simply states that persons in Botswanan prisons are there as a result of prosecution before the courts of Botswana. It is silent on the issue of a detainee's sexual identity or gender expression being something that may need to be considered when remanding a person in state custody.

However in an unofficial conversation with one of the Botswana Prisons officials who preferred to remain anonymous, a lot of transgendered individuals who are put in prison cells according to their national documentation gender marks often go through intense and systematic abuses from fellow inmates with no way or platform to report or seek assistance.

RECOMENDATION: It is important for the Government of Botswana to have an intense and in-depth needs assessment with all relevant stakeholders to interrogate the abuses happening to transgendered persons in prisons. While collecting this data, it is strongly recommended that alternatives are found for those transgendered persons who are currently in detention.

Birth and Death Act

The Birth and Death Act dictates that in the event that an individual wants to change the gender mark, he or she must submit comprehensive paperwork to the High Courts of. However this will only work in the event that it is only "correcting" an error which was performed at birth. What is important to note is that gender and sex are regulated by the law. A person once born into one sex, is legally forced to live within that sex description. Sex reassignment surgery or the reassignment of a sex or gender marker in official documents is not yet legally recognized in Botswana. Thus the binary classification of gender into the biological sex terms of male and female, fails to recognise any further gender categories, such as intersex, transgender, or others. The rigidity of the law is further exemplified in the fixing of sex at birth as the sex for all subsequent legal transactions.

Official identification cards provide civil personhood. Among the instruments by which the Botswana state defines civil personhood, identity based on sex is crucial and unavoidable category. These identification documents include one's birth certificate, identity card, and passport. These documents are necessary in order for a person to enter into variety of relationships, either civilly or in official capacities. These include marriage, obtaining a driver's licence, a bank account, or accessing other services.

The lack of a legal mechanism by which a person can change their gender markers on official documents is extremely limiting for individuals in Botswana. It makes it difficult for those persons to transition or undergo any type of transition process that is then reflected in law. This then impacts upon that person's basic human rights, including the right to health and also impacts upon their ability to access information and resources regarding the choices that they make whether they are health choices or other.

Identity Documentation; National Registration Act sections 14, 15 and 16, Deaths and Birth Registration Act section 16

RECOMENDATION: the birth and death departments and immigration department must develop and clearly define protocols and processes to be followed in the case of changing the gender mark on identity documentation.

A working engagement with Civil Society Organisations working with gender identity and gender expression may also be beneficial in addressing these issues going forward and gathering ideas around making these processes user-friendly and with a human rights-based approach in mind.

- **The Customary Law** does not speak with reference to gender identity and gender expression. However, in a conversation with the Old Naledi Customary Court President he highlighted that the Kgotla could not be engaged in these conversations as traditionally there only is only a man and a woman and nothing else.

RECOMENDATION: there needs to be a conversation, a practical and urgent conversation with custodians of culture in order to ensure that all people are accepted and recognised using basic principles which Botswana is formed on such as Botho and Love.

Constitution of Botswana

This is the highest piece of legislature in the land. However, this it does not explicitly address the issue of gender identity or gender expression and it does not explicitly offer protection from discrimination based on the ground of ones gender identity.

However, certain sections and captions from the Constitution advocate for tolerance and freedom.

Chapter 3 sub section 12.01

“Except with his or her own consent, no person shall be hindered in the enjoyment of his or her freedom of expression, that is to say, Freedom to hold opinions without interference, [...]freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference”

The freedom to express one’s opinions as stipulated in the above section seems rather like a farfetched conversation, particularly in light of some of the pieces of legislation outlined above. In light of this, it is clear that a paradigm shift is necessary within Botswana. This paradigm shift could be done with the Constitution as a starting point, and through advocacy regarding freedom of expression and dignity as founding concepts upon which a society built on tolerance and understanding can be structured

The constitution also speaks against any discrimination on the following extract;

Section 15 sub section1 and 2,

“(1) Subject to the provision of subsections (4) (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in it effect.

(2) Subject to the provision of subsection (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority”

The expression “**discriminatory**” means affording different treatment to different persons, attributable wholly or mainly to their respective description or a listed ground.

In conclusion, The Constitution of the Republic of Botswana, which is treated as the legislative masterpiece, protects all citizens of Botswana. However, it is in other policies and pieces of legislation that there is a disjuncture between these protections and the lived reality experienced by persons on a day-to-day basis. Thus, there is a profound mismatch between implementation and interpretation.

The country of Botswana, to its credit, has enacted many laws and policies that try to protect the rights of ALL Botswana people. However with new developments and knowledge it is equally important to review the current policies in order to ensure that they are in line with international human rights standards as well as the Constitution of Botswana.

In the last Universal Periodic Review the Republic of Botswana accepted recommendation to raise awareness amongst the public and people of Botswana on Issues of Sexuality and Gender. However, to date, nothing has been done in this regard.

Rainbow Identity Association Botswana strongly condemns the government of the Republic of Botswana on its silence regarding addressing issues of gender identity and gender expression. RIA also calls on the government to take action to ensure the protection of transgender and intersex persons in Botswana.

While the existing legal frameworks can sometimes be read to ensure that transgender and intersex persons are entitled access rights like any other citizen of Botswana, in practice this is not the case and there are broad changes that need to be effected in order for transgender and intersex persons’ rights to be realised effectively. Furthermore, there has been limited engagement with the transgender and intersex community in Botswana. This includes engagement with the law. The law, as well as social attitudes, remain one of the largest obstacles to empowerment of this minority group. Changes in existing legal frameworks can take three routes:

1. Campaigning for progressive law reform
2. Judicial interpretation
3. Use of progressive international legal developments

Rainbow Identity Associations emphasis that the need to address the concerns that have been highlighted and analysed in this audit report are of paramount importance

SILENCE OF TRANSGENDER AND INTERSEX HUMAN RIGHTS IS VIOLENCE

However, law too, as a socially authoritative discourse capable of making successful claims to truth, has an important role to play in undoing the damage wrought upon gender-variant individuals such as transgender and intersex persons.



**RAINBOW IDENTITY ASSOCIATION
P O BOX 502328 Gaborone
Botswana
Tel: +267 3905493**