



POLICY BRIEF

RAINBOW IDENTITY ASSOCIATION

ABOUT RAINBOW IDENTITY ASSOCIATION (RIA)



Rainbow Identity Association is a legally registered nonprofit making organization based in Gaborone. It is an association of transgender and intersex people. The organization aims at exploring ways of challenging trans phobic laws and trans phobia in Botswana, thereby advocating for the rights of transgender and intersex people.

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TERMINOLOGIES

Biological sex refers to a range of biological characteristics including chromosomes, hormones, reproductive capacity, and external genitalia. Not everyone is born with characteristics that fit neatly into just two binary categories, either totally ‘male’ or totally ‘female.’

The terms **sex** and **gender** are used inconsistently both within and between countries. They are considered to be identical terms in some legal systems or languages. In this document the distinction being made is between someone’s assigned or recorded sex at birth and their affirmed or preferred gender.

The term **intersex** is used in this document to refer to people born with variations in physical sex characteristics (such as chromosomes, gonads, and genitals) that are considered to be either male or female at the same time, only partially male or partially female, or neither male nor female. While some people with intersex variations also describe their sex or gender identity as non-binary, most are either male or female.

Intersex people are born with **sex characteristics** (including genitals, gonads and **chromosome patterns**) that do not fit typical binary notions of male or female bodies. Intersex is

an **umbrella term** used to describe a wide range of natural bodily variations.

While many animal species are known to be hermaphroditic, for humans the term **hermaphrodite** is no longer considered polite or **politically correct**. Those with these male-female combinations of characteristics prefer to be known as intersexed or persons with intersex conditions.

Definition of intersex

An intersex person is one born with physical characteristics that are both male and female. Intersex status is varied and comprises of undefined genitalia which does not fall into either male or female genitalia.¹ An individual may have XX chromosomes and male-like phallus or have XY chromosomes and not have a vagina, but a penis instead.² Intersex status has many variations and cannot be confined to a single group.³ Intersex status is seen as disrupting⁴ gender binaries and social construction of gender and that has created a space for struggle and politics.⁵

*Some parts of the paper are from the writer's Master of Laws dissertation titled: Law and silence of intersex status: A threat to human rights in Botswana.

¹J van Lisdonk 'Living with intersex/DSD An exploratory study of social situation of persons with intersex /DSD' Netherlands Institute for Social Research August (2014) 9.

² M Diamond 'Sex and gender are different: Sexual identity and gender identity are different' (2002) 7 *Clinical Child Psychology and Psychiatry* 322326.

³Bolin & Whelehan (n 5 above) 143- 144.

⁴G Davis 'Giving sex: Deconstructing intersex and trans medicalization practices' (2016) 30 *Gender and Society* 494.

⁵ A Miller & CS Vance 'Sexuality human rights and health' (2004) 7 *Health and Human Rights* 8.

The World Health Organization (WHO),⁶ classifies intersex as a disorder, known as disorders of sex development (DSD) that can be treated and cured.⁷ This is clearly against international law on human rights. WHO through its publication⁸ has explained a connection between the right to health, violation of the right to choice and harmful medical interventions, in respect to intersex status as below:

A major concern for intersex people is that so-called sex normalizing procedures are often undertaken during their infancy and childhood, to alter their bodies, particularly the sexual organs, to make them conform to gendered physical norms, including through repeated surgeries, hormonal interventions and other measures. As a result such children may be subjected to medically unnecessary, often irreversible, interventions that may have lifelong consequences for their physical and mental health, including irreversible termination of all or some of their reproductive and sexual capacity. Medical procedures may sometimes be justified in cases of conditions that pose a health risk or are considered life-threatening. Such procedures, however, are

⁶International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10) WHO Revision for; 2016 Chapter XVII Congenital malformation, deformations and chromosomal abnormalities (Q00-Q99).

⁷ J Greenberg ‘International legal developments protecting the autonomy of rights of sexual minorities; Who should determine the appropriate treatment for an intersex infant?’ in S E Sytsma (ed) *Ethics and intersex* (2006) 87.

⁸WHO ‘*Sexual Health, human rights and the law*’ (2015) 26.

sometimes proposed on the basis of weak evidence, without discussing and considering alternative solutions.

Intersex status is perceived differently across the world. In other countries intersex infants are not subjected to genital construction to confirm to either male or female binaries. They are allowed to make a choice at a certain age. In other countries parental consent with medical counseling and intervention is allowed. It has increasingly become urgent that no surgeries should not be performed on intersex children, unless if surgery is to save a life, and not to ‘correct’ gender, as explained by WHO.⁹

International law¹⁰ has come to classify surgery on intersex persons as genital mutilation, hence countries are called to protect the rights of intersex persons. The surgeries to conform to the social construction of female and male, have been found to be devastating, on all areas of life for intersex persons. The Public Health Act¹¹ does not protect intersex babies at birth against genital mutilation. The impact of genital mutilation at birth

⁹ n 8 above.

¹⁰ See General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/22 International Covenant on Civil and Political Rights GA res 34/180, 34 UN GAOR Supp (no 46) at 193, UN doc A/34/46, adopted 18 December 1979, entered into force 3 September 1981.

¹¹ No 23 of 2013.

example is Case X¹², who his genitalia was butchered at birth, in a local hospital so to allocate a normative gender penis. The operation has impacted on his sexual and reproductive rights as he cannot get an erection, (*ga a tsogelwe*). Critically another point here is that parents, guardians, and / or care givers are not given psycho social support, as when the child reaches puberty as the hospital only monitor the child from 0-5years.

The surgeries subject intersex persons to inhuman and degrading treatment, bodily harm and discrimination. Intersex persons,¹³ civil societies,¹⁴ medical bodies¹⁵ have called out against unnecessary surgeries.

Challenges faced by intersex persons in Botswana

Legal recognition: At birth a birth certificate is issued, as a form of recognition and documentation. This is a general global practice. In Botswana, the national identity card; *Omang*, educational documents, drivers's license are

¹² Case X was born intersex at a Scottish Livingstone Hospital in Molepolole and is now of legal age. His life is a constant struggle, emotionally, physically and sexually.

¹³ Kaggwa 'Intersex the forgotten constituency' in S Tamale (ed) *African sexualities: A reader* 2011 231. Kaggwa explains the challenges of growing up and finding a space in gender normative environment in Uganda

¹⁴ See www.fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf www.tia.co.za

¹⁵ <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>.

among the struggle areas for intersex persons, as they bear only female and male gender binaries. Therefore, it is a site for discrimination and inequality, as intersex persons struggle to have an appropriate gender allocated for them. The Births and Registration Act (BDRA),¹⁶ provides only for female and male binaries, for securing identity documents in Botswana. It is therefore disconnected to the reality of those in the gender margins. It needs to be reviewed and amended to include those who do not conform to the normative binaries. However, the same act allows for change of gender descriptor, on the legal document the procedure is only known by those working in the office of *Omang* and it is a ‘discretionary’ privilege.

There have been a few cases where intersex persons, have managed to change their identity cards, to suit the gender they identify with,¹⁷ albeit without any publicly known processes. This also presents a problematic view and assumption, that, change of gender status, maybe seen as a privilege for some and leaving others out. An example is Case Y who was asked Kgosi to write a letter to the National Register to change their *Omang*, while others were sent to Princess Marina hospital for test. The process must be made clear and not disadvantage others, where multiple discrimination already exists.

¹⁶ Act 16 of 1998.

¹⁷ Rainbow Identity Association is aware of many cases regarding the plight and difficulties of intersex persons.

Access to health services

As stated, international law classifies surgeries performed on intersex persons, to conform to either male or female as genital mutilation. Access to health and health services is amongst the struggles and challenges that intersex person's face. The challenges are attributed to the unnecessary surgeries that are performed on intersex children. Reproductive health, enjoyment of sexual are greatly compromised. In terms of fertility, the surgeries, may lead to sterility and infertility. Therefore where intersex children are subjected to surgeries, they are denied the right to best attainable health, which is a fundamental human right.¹⁸

Stigma and discrimination

As a result of the biological difference of intersex persons, and that it has been kept a secretive¹⁹ and face challenges in their communities, homes and school and professional environments. It could be an issue of physical outlook, use of ablutions and in a school environment, boarding facilities and shared accommodation, maybe problematic. Intersex students suffer in boarding schools as in the case of Z, who was in a boarding school and had to wake at 4am, everyday during winter to bath before everyone

¹⁸ n 10 above.

¹⁹ Kenya Human Rights Commission (2011) Study "The Outlawed Amongst Us" Kenya.

wakes as he was scared they will recognize that he has long clitoris than other girls. Also he was forced to stay in female dormitory and wear dress, the discomfort caused the intersex student not to perform well in school.

In prison facilities,²⁰ an intersex person may be faced with scrutiny and shamed for their difference. Stigma and discrimination is multi sectional and deprives intersex persons the quality of life that they must be able to enjoy as they must be. One of the other harmful practices is in initiation schools, which some local tribes are still practicing. Intersex persons are subjected to violence during initiation school due to the fact that it remains secret and circumcision has robbed many intersex sexual rights and the right to self determination and bodily autonomy.

Specific laws protecting intersex

Botswana does not have any specific laws to protect intersex persons, who are a gender minority. It remains one of the issues that are not talked about, from a medical, social and gender perspective in Botswana, save except for organizations like Rainbow Identity Association (RIA). It is therefore very clear that intersex human rights are not a priority for the government of Botswana. There is no awareness to expectant mothers on the possibility of

²⁰*RM v The Honourable Attorney General & 4 Others* eKLR Petition no 705 of 2007 High Court of Kenya.

giving birth to an intersex baby. The lack of public discourse and awareness by the Ministry of Health, further increases the discrimination against intersex persons.

Laws that can be used to protect intersex persons

Constitution, Bill of rights: right to equality, non-discrimination, equal protection of the law. In many cases, the Courts have ordered that the Constitution must be interpreted broadly and widely, to protect human rights. Although dignity is not enshrined in the Constitution, the cases of *Dow v Attorney General*²¹, *Tapela v Attorney General*²² and the *Thuto Rammoge case*, commonly known as the *LeGaBiBo registration case*²³ case, dealt with constitutional issues of equality and non discrimination. Hence, precedents can be used to accelerate the rights of intersex persons in Botswana. To deny one legal recognition and the right to in their own gender, is discriminatory.

Children's Act²⁴ which is an adoption of the Convention on the Rights of the Child (CRC) because the surgeries, are usually performed at birth. It is a critical legislation

²¹ 1991 BLR 233.

²² MAHGB-000057.

²³ Thuto Rammoge & 19 Others v Attorney General of Botswana
MAHGB-000175-2013

²⁴ Act No 8 of 2009.

which provides for the right to legal recognition and that all children must have a birth certificate.

International law on intersex human rights and how Botswana can use her obligation to protect intersex persons

The customary laws on Sexual Orientation and Gender Identity (SOGI), promote the right of identity, choice and free will. While the rights of intersex persons are sometimes conflated with LGBT rights, the challenges and difficulties faced are similar. SOGI rights are developed to include intersex rights and for countries to recognize intersex persons by enacting specific laws that protect them.

The Yogyakarta Principles²⁵ are a guide in terms with SOGI human rights and what countries should be doing to promote rights of intersex persons. The provisions of the African Youth Charter (AYC) and the African Charter on Human and People's Rights (ACHPR) and can be used as a guide to treating every person individually. The ACHPR provides for equality, non-discrimination and best attainable standard of health and the AYC, provides for non-discrimination of other status. Botswana can use

²⁵ The Yogyakarta Principles The application of human rights law in relation to Sexual Orientation and Gender Identity 2006.

its international obligations in fulfilling the right to quality, legal recognition.

What should be done

One of the greatest challenges faced by intersex persons in Botswana is legal recognition. Legal recognition has fundamental bearings on one's identity, social standing, and the quality of life that one can enjoy. While the right to health is not enshrined in the Constitution, the right to life encapsulates the overall rights that human beings are inherently entitled to.

Intersex persons must have adequate, quality and effective access to health services. There should be a transparent guide by MoH on how they are dealing with intersex births. It is common cause that some intersex persons are subjected to unnecessary genital surgeries. The consequence of which are fatal; emotionally, physically and mentally and health wise. More research must be conducted by the MoH in the lived lives of intersex persons in Botswana.

Get more specialists and make guidelines public so that intersex persons know how to access services especially in public hospitals. The only way change can be effected is when there is an open dialogue and understanding what intersex is. This will also give way for awareness, so that intersex does not remain a hidden and shameful gender and life.

Recognition of non-binary genders is urgent and must be made a priority. The Omang only specifies female and male as the existing genders in Botswana. This is consistent in many enacted laws. The lack of reference to intersex is in fact subjecting it to erasure. The law provides for equality before the law and non-discrimination. It is therefore a violation of the constitutional rights, that identity documents do not reflect their appropriate and not assumed and or forced gender.

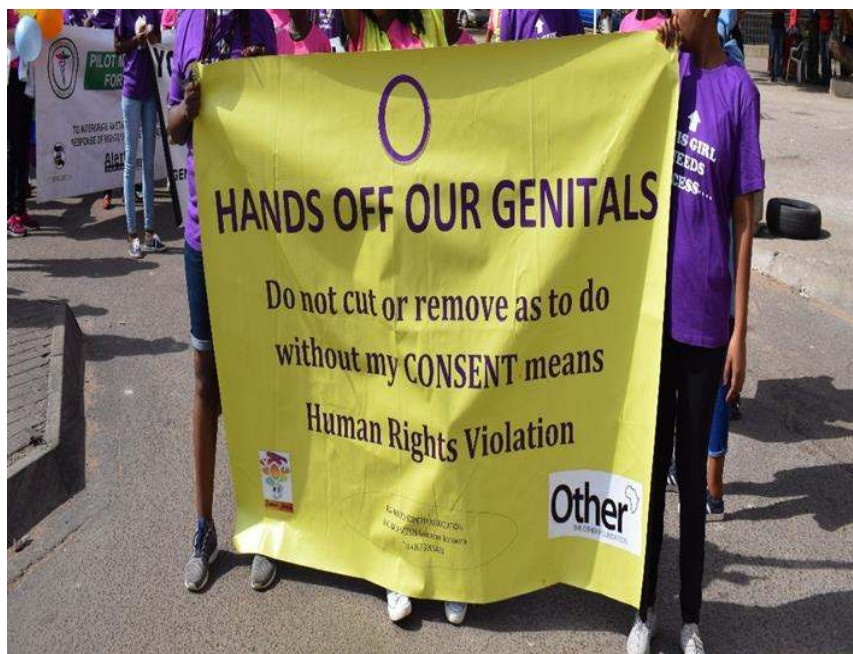
The MoH together with the Ministry of Home Affairs must liberate and include intersex persons in granting their rights to identity. It is unfortunate and sad that an intersex person may be returned back home by another countries immigration, because their identity documents do not match their physical outlook. In including intersex status and any mark as maybe appropriate, is to validate the right to identity and a secure environment. Therefore both Ministries must work together to protect the rights of intersex persons.

There should be capacity training for all those who interact with infants. The public health per natal and post-natal programmes must factor in intersex births. The dialogue on intersex must be approached with a human rights based approach and as well that will decrease stigma and discrimination associated with intersex persons.

Other countries, for example South Africa²⁶ and Malta²⁷ have enacted laws which protect, promote, respect and fulfill intersex human rights. They will be resourceful understudies for change of law in Botswana. Open dialogue on intersex human rights and using a human rights approach to intersex human rights, will also see Botswana as prioritizing one of the basic fundamental rights of equality and the right to legal recognition and identity.

²⁶ Alteration of Sex Description and Sex Status Act No 49 of 2003.

²⁷ Gender Identity Expression and Sex Characteristics Act No X1 of 2015.



I AM INTERSEX

***AM NOT A BOY NEITHER AM I A
GIRL***

This is the summary of the gaps Rainbow Identity Association identified and recommendations for policy makers in relation to people who are born intersex.

Thanks to the COC Netherlands for the support



“If you are right and you know it, speak your mind. Even if you are a minority of one, the truth is still the truth”.

