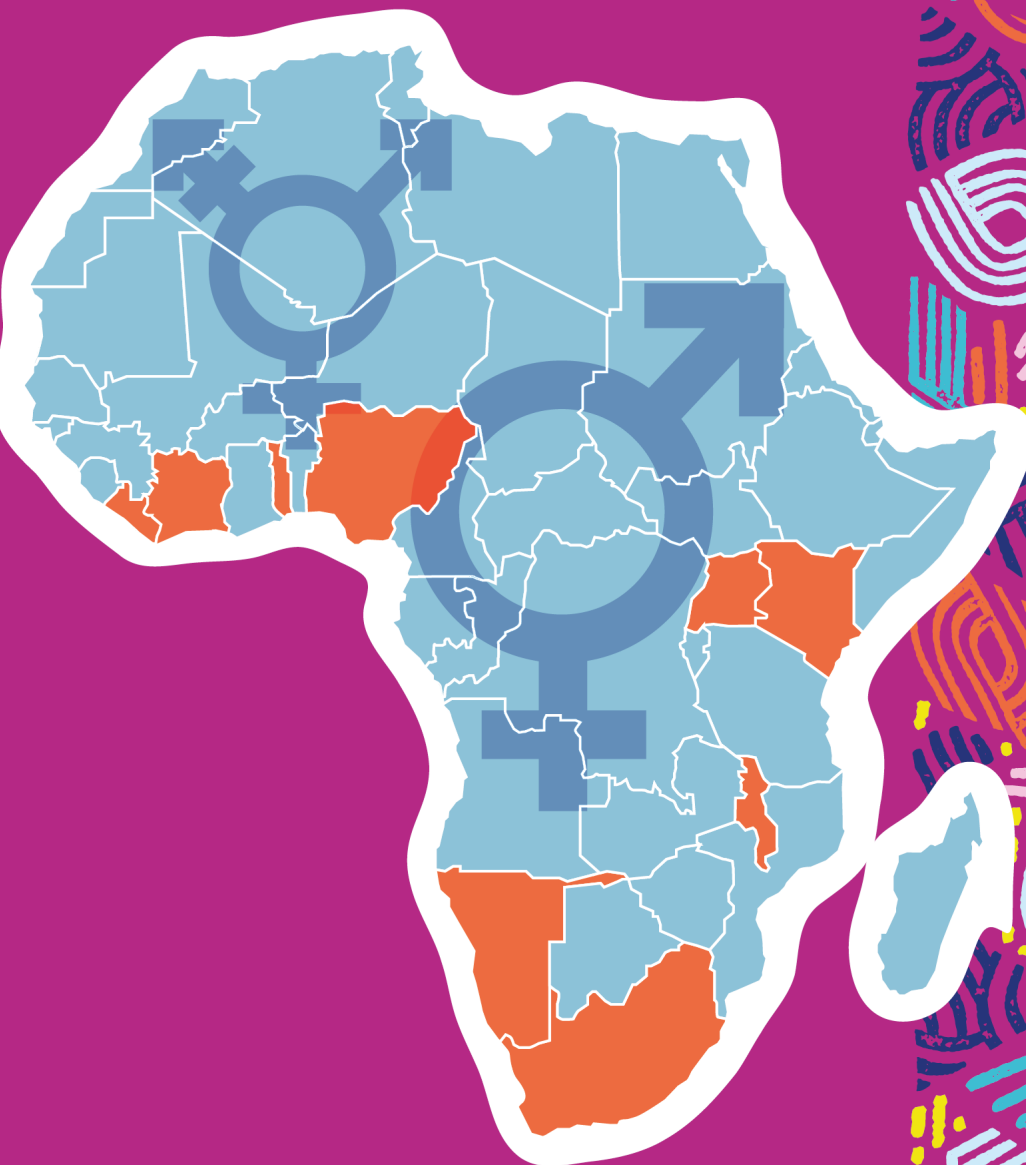


STATUS OF TRANSGENDER & INTERSEX PERSONS IN SELECTED AFRICAN STATES

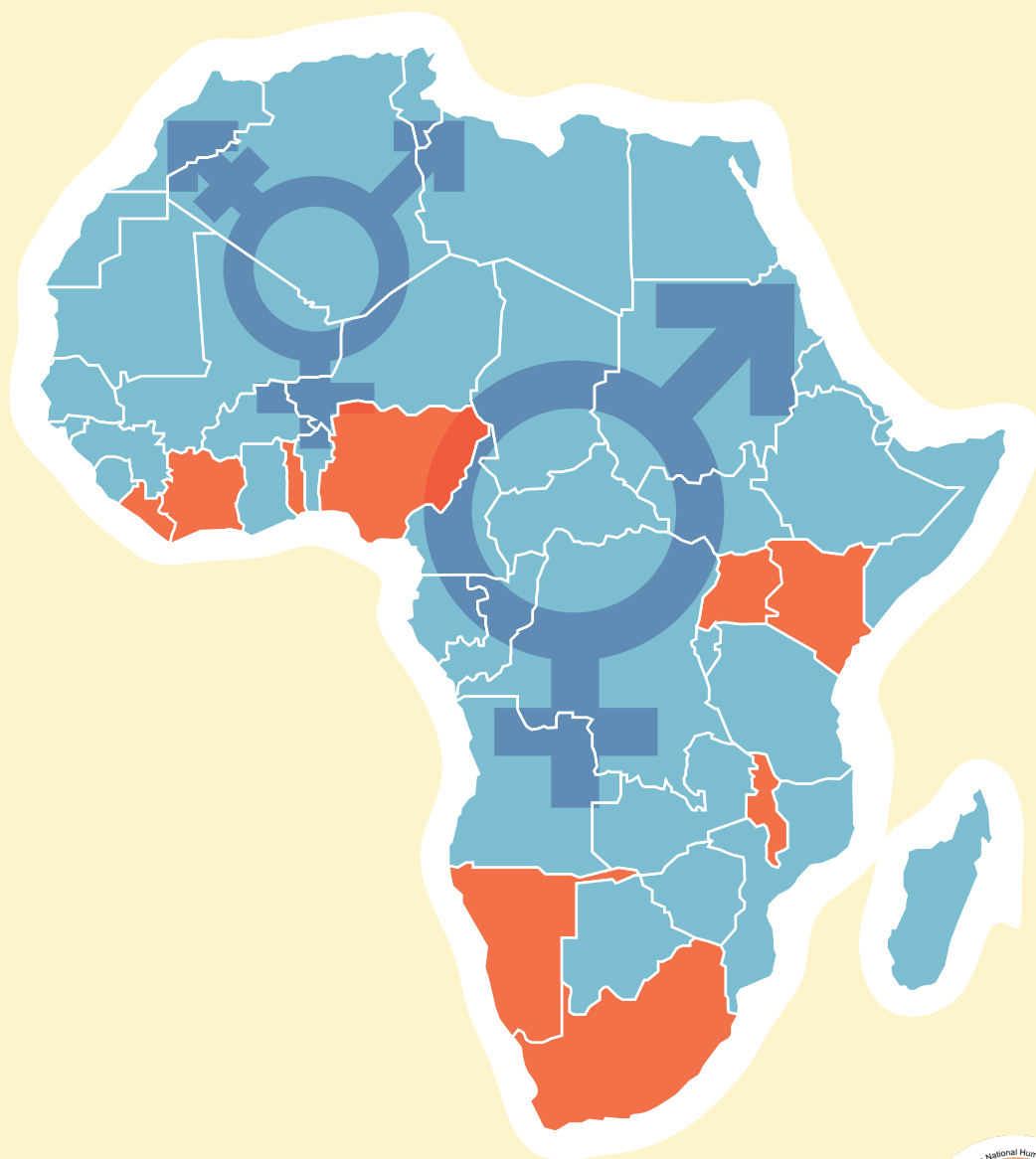


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This research was birthed from the gaps seen while implementing the SOGIESc project whose aims are to strengthen the capacities of NHRIs in responding to violence and discrimination meted out towards LGBTI persons and to foster ties between NHRIs, CSOs and other relevant stakeholders that work towards protection in Africa and beyond.

This research was financially supported by the Arcus Foundation, Wellspring Philanthropy Fund and Foundation for a Just Society.



PREFACE

The African continent continues to be celebrated for its rich diversity in language, colour, culture and landscapes. Amidst this vibrant mosaic that makes up the African Peoples, it is also evident that some voices, experiences, and stories are not fully explored resulting in their invisibilization within society and frameworks.

This report dubbed 'The Status of Transgender and Intersex Persons in Selected African States' takes us on a deep dive into the legal and social fabrics in 9 African countries. The report sheds light on the challenges and triumphs of transgender and intersex persons and movements in Africa illuminating the human face of legal protections and acceptance pieced together in African and International human rights frameworks. The report aims to foster a comprehensive understanding of gender identity and sexual characteristics, challenge discriminatory practices, and probe the strategic advocacy for inclusive legal, institutional, advocacy, and societal policies and frameworks that uphold the dignity and rights of all persons.

The research is greatly anchored and amplifies principles and obligations set forth by Resolution 275 on the 'Protection against Violence and Other Human Rights Violations on the basis of their real or imputed Sexual Orientation and Gender identity' during the 55th Ordinary Session and Resolution 552 – Resolution on the Promotion and Protection of the Rights of Intersex Persons during the 74th Ordinary Session. The research re-asserted Article 28 of the African Charter which prescribes that 'Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.'

The Network of African Human Rights Institutions (NANHRI) amplifies its role and voice in recognizing discrimination, stigma and violence perpetuated against persons, including non-citizens such as refugees based on their real or perceived sexual orientation, gender identity, expression and sexual characteristics (SOGIESC) within the continent. NANHRI's commitment to this emerging and critical human rights issue is also derived from international and regional obligations and principles that are anchored in National Human Rights Institutions' mandates of protecting the rights of all without discrimination.

NANHRI's hope is for this groundbreaking and detailed report to catalyze meaningful change, inspiring Transgender and Intersex persons, NHRIs, CSOs, policymakers, and human rights advocates to take decisive action in promoting the rights and welfare of transgender and intersex persons. Together, we can work towards a future where every person, regardless of their gender identity or sex characteristics, is treated with respect and dignity.

Sincerely,
Gilbert Sebihogo
Executive Director
NANHRI



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LIST OF *ABBREVIATIONS*

ACERWC - African Committee of Experts on the Rights and Welfare of the Child

ACHPR - African Commission on Human and Peoples' Rights

ARV - Antiretroviral

ART - Antiretroviral Therapy

CESCR - Committee on Economic, Social and Cultural Rights

CSO - Civil Society Organisation

ECHR - European Court of Human Rights

GBV - Gender-Based Violence

HIV/AIDS - Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome

HRC - Human Rights Council

IAAF - International Association of Athletics Federations

IACHR - Inter-American Commission on Human Rights

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

LGBT - Lesbian, Gay, Bisexual, and Transgender

MSM - Men who have Sex with Men

NANHRI – Network of African National Human Rights Institutions

NHRC - National Human Rights Commission

NHRI - National Human Rights Institution

NIC - National Identity Card

OHCHR - Office of the United Nations High Commissioner for Human Rights

PrEP - Pre-Exposure Prophylaxis

SIPD - Support Initiative for People with atypical Development

SOGIESC - Sexual Orientation, Gender Identity, and Expression, and Sex Characteristics

SRHR - Sexual and Reproductive Health and Rights

UDHR - Universal Declaration of Human Rights

UN - United Nations

UNDP - United Nations Development Programme

UN HRC - United Nations Human Rights Committee

UPR - Universal Periodic Review

WHO - World Health Organisation



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CHAPTER



ONE



INTRODUCTION

1.1 Background

The global landscape is undergoing rapid transformation, marked by an increasing acknowledgment of diversity and the imperative of inclusion. In the contemporary discourse of international and regional human rights, discrimination, stigma, and violence against individuals based on their real or perceived sexual orientation, gender identity, and expression, as well as sex characteristics (SOGIESC) is a significant concern and acknowledged by several international and regional human rights mechanisms.¹ Intersex and transgender persons in Africa grapple with profound challenges rooted in societal perceptions of gender identity. Across the continent, prevailing socio-cultural norms often equate sex with gender, assuming a simplistic and binary understanding where individuals are deemed either distinctly male or female based solely on genitalia at birth.² This rigid framework fails to acknowledge the complexity of human biology and the diverse spectrum of gender identities.³ While legislation in many regions treats 'gender' and 'sex' as interchangeable terms,⁴ they hold distinct meanings: gender encompasses socially constructed characteristics, whereas sex pertains to biological and physiological differences.⁵

Transgender is an umbrella term for individuals whose gender identity, gender expression, or behaviour does not align with the sex they were assigned at birth, and hence they experience a misalignment between their physical attributes and internal gender identity. In many African countries, there are no legal protections for transgender persons. The absence of anti-discrimination laws leaves them vulnerable to violence, harassment, and arbitrary arrests. Moreover, the lack of legal recognition for gender identity means that transgender persons often face difficulties in obtaining identification documents that reflect their true selves, hindering access to essential services such as healthcare, education, and employment. The community frequently endure violence and other forms of human rights abuses, including physical assaults, sexual violence, and even murder. Hate crimes against transgender persons are often underreported and inadequately investigated, perpetuating a cycle of violence and impunity. Discrimination and lack of knowledge among healthcare providers about transgender health needs often result in inadequate or inappropriate



¹ See for instance <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/>.

² B Vanderhorst 'Whither lies the self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex' (2015) 9 Harvard Law Review 241-243.

³ JS Hyde and others "The Future of Sex and Gender in Psychology: Five Challenges to the Gender Binary" (2008) American Psychologist 171.

⁴ American Psychological Association "Guidelines for Psychological Practice with Transgender and Gender Nonconforming People" (2015) 70 American Psychologist 832-834.

⁵ The World Health Organization "Gender and Health" available at: https://www.who.int/health-topics/gender#tab=tab_1.



ate care. Consequently, many transgender persons face barriers to accessing gender-affirming treatments, including hormone therapy and surgeries, which can be essential for their mental and physical health. Transgender persons often experience social exclusion and economic marginalisation due to widespread prejudice and discrimination. Rejection by families and communities can lead to homelessness, while discrimination in education and employment limits their economic opportunities. This marginalisation increases their vulnerability to poverty and exploitation, making it difficult to achieve a stable and fulfilling life.

Intersex persons are born with atypical chromosomes or sex characteristics, making it difficult to categorise them strictly as male or female. Due to these distinctive characteristics, they have faced significant challenges and often undergo unauthorised medical interventions aimed at conforming them to societal norms, frequently beginning in infancy. The rights of intersex persons are an emerging issue in many African states, often unfamiliar and overlooked in legal and societal frameworks. Many African societies maintain rigid views on gender, often failing to acknowledge or comprehend intersex variations, resulting in pervasive stigma, marginalisation, and frequent human rights violations. Intersex infants and children commonly undergo non-consensual and medically unnecessary surgeries aimed at conforming to societal gender norms, causing enduring physical and psychological trauma. Legal systems in numerous African countries do not recognise intersex identities, compelling individuals to select a male or female gender marker on official documents, thereby disregarding their true identities and complicating access to healthcare, education, and employment. This lack of legal recognition exposes intersex persons to heightened risks of discrimination, while societal misconceptions and cultural beliefs contribute to their social exclusion, isolation, and diminished opportunities for personal and familial support.

Intersex and transgender persons face a range of sexual violence, including acts such as genital mutilation, forced sterilisation, and non-consensual medical interventions. Among these, intersex genital mutilation stands out as a particularly egregious violation, perpetuated by societal pressure to conform to binary gender norms.⁶ Both intersex and transgender persons often struggle to obtain legal recognition of their gender identity or intersex status. Many African countries lack legal frameworks that allow individuals to change their gender markers on official documents or recognise intersex variations. Inter-

⁶ Human Rights Watch "The Issue Is Violence" (2015) 26.

⁷ C Visser & E Picarra 'Victor, Victoria or V: A Constitutional Perspective on Transsexuality and Transgenderism' (2012) 28(3) South African Journal on Human Rights 510.

⁸ GLAAD Media Reference Guide - 11th Edition, available at: <https://glaad.org/reference/transgender>.





sex and transgender persons commonly experience stigma, discrimination, and violence based on their gender identity or intersex status. This discrimination can manifest in various forms, including exclusion from healthcare services, education, employment opportunities, and social ostracization.

The conflation of gender, sex, and sexual orientation⁷ perpetuate heteronormative standards⁸ and further marginalise persons who deviate from these norms. Sex is traditionally understood as the classification of individuals as male or female based on biological distinctions,⁹ while gender encompasses socially constructed characteristics, roles, and relationships. Intersexuality is not inherently tied to a person's gender identity, but rather to the biological sex characteristics with which they are born. These characteristics encompass a spectrum, ranging from external genitalia such as a vagina or penis, to internal reproductive organs like ovaries or testes, as well as sex chromosomes—the genetic blueprint defining biological sex. There is need to emphasise the diversity within intersex conditions, noting instances where individuals may possess XX chromosomes and ovaries typically associated with females but external genitalia typical of males, or XY chromosomes with external genitalia typical of females. Intersexuality is thus, not a sexual orientation nor a medical condition; rather, it represents a naturally occurring variation that may or may not be visibly apparent and may or may not present health concerns. Gender identity, on the other hand, refers to a person's deeply felt internal experience of gender, which may not align with their assigned sex at birth.¹⁰

Gender legal recognition involves providing transgender persons with identity documents that align with their gender identity or expression. Globally, transgender persons face significant risks of violence, harassment, and discrimination, including denial of essential services like healthcare, education, work, and housing.¹¹ Statistics and reports indicate thousands of transgender persons are killed or injured in hate-motivated attacks annually, with alarm-

⁹ R Sloth-Nielsen 'Failure to recognise a third gender option: unfair discrimination or justified limitation?' (2021) 25 Law democracy and development 93.

¹⁰ The Yogyakarta Principles (2006) available at: <https://yogyakartaprinciples.org/>.

¹¹ Transgender_Factsheet (UN Free & Equal) <https://www.unfe.org/en/know-the-facts/challenges-solutions/transgender>.

¹² 'Trans Murder Monitoring' available at <https://transrespect.org/en/trans-murder-monitoring/>.

¹³ WHO 'Gender equity and human rights' available at: https://www.who.int/health-topics/gender#tab=tab_1.

¹⁴ V Ravitsky 'Queer liberation, not elimination: Why selecting against intersex is not 'straight' forward' (2013) 13 American Journal of Bioethics 40.

¹⁵ V Ravitsky 'Queer liberation, not elimination: Why selecting against intersex is not 'straight' forward' (2013) 13 American Journal of Bioethics 40.

ing rates documented by projects like the Trans Murder Monitoring project.¹² Transgender persons are also frequently pathologised based on their gender identity, despite efforts to declassify transgender identity as a mental illness by organisations such as the World Health Organisation (WHO).¹³ Unfortunately, the right to legal recognition of gender identity is often denied or subjected to onerous requirements in many countries, violating international human rights standards.

The correlation between being intersex and one's sexual orientation or gender identity is not inherent.¹⁴ When individuals deviate from the typical binary physical appearance of male or female, they are often assumed to be part of the Lesbian, Gay, Bisexual, Transgender (LGBT) community.¹⁵ However, regardless of being straight, gay, transgender, or gender-diverse, intersex persons frequently endure discrimination, oppression, and violence due to societal fears of their differences, particularly their unique sex characteristics. Society often views intersex persons as abnormal or in need of correction, just like perceptions faced by the LGBT communities. Intersex persons, like their LGBT counterparts, seek basic human rights such as self-determination, bodily autonomy, health, and well-being. Despite intersex issues overlapping with children's rights, women's and reproductive rights, and disability rights, most support for intersex rights has come from the LGBT movement. Particularly, transgender persons were among the first to align with early intersex activists, and much of the funding for intersex activism has been provided by LGBT movement funders.

However, it is crucial to acknowledge the differences: unlike many LGBT people, intersex persons often face discrimination and harmful practices from infancy, before they can even express themselves.¹⁶ As a result of the lack of recognition of intersex as a distinct sex category, intersex persons have endured human rights abuses¹⁷ including coerced and uninformed genital surgeries and hormonal treatments, inadequate legal recognition and birth registration processes, instances of baby abandonment and infanticide, and discrimination



¹⁶ Kenya National Commission on Human Rights 'Equal in dignity' and rights promoting the rights of intersex persons in Kenya' (2018) 3.

¹⁷ 'Study on the human rights situation of intersex persons in Africa' available at https://www.chr.up.ac.za/images/researchunits/sogie/documents/Intersex_Report/Intersex_report_Oct_Sept_2022.pdf.

¹⁸ See for example: <https://www.knchr.org/our-work/special-interest-groups/intersex-persons-in-Kenya>.

¹⁹ 'Darlington Statement' (Intersex Human Rights Australia, 2017) available at <https://ihra.org.au/darlington-statement/>.

²⁰ 'Unnecessary Surgery on Intersex Children Must Stop' (Physicians for Human Rights, 2017) available at <https://phr.org/news/unnecessary-surgery-on-intersex-children-must-stop/>.

²¹ 'First, Do No Harm: ensuring the rights of children born intersex' (Amnesty International, 2017) available at: <https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/>.

²² Mj Elders, D Satcher & R Carmona 'Re-Thinking Genital Surgeries on Intersex Infants' (Palm Centre, 2017) available at: <https://www.palmcenter.org/wp-content/uploads/2017/06/Re-Thinking-Genital-Surgeries-1.pdf>.

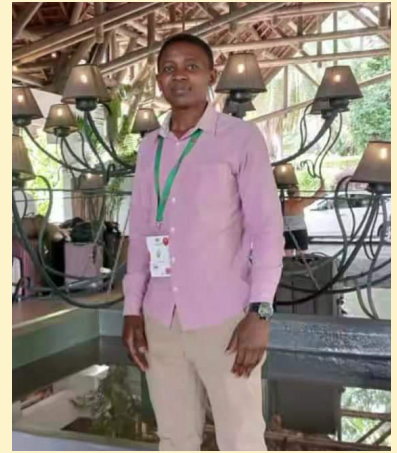
²³ 'I Want to Be Like Nature Made Me' Medically Unnecessary Surgeries on Intersex Children in the US (Human Rights Watch, 2017) available at: <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>.

across various societal domains such as education, employment, detention facilities, sports, and political spheres.¹⁸

For decades, advocacy groups representing intersex persons,¹⁹ along with various medical²⁰ and human rights organisations,²¹ have been vocal about their concerns. Despite a growing consensus²² against medically unnecessary intersex surgeries globally and progress towards banning them, some parents still face pressure from surgeons to opt for these procedures for their young children, who are unable to participate in such decisions.²³ The movement advocating for intersex justice arises from both social and human rights advocacy and as a political stance within the broader context of identity politics. It stresses the significance of acknowledging, respecting, and protecting the rights and well-being of intersex persons, who have historically endured social, political, and legal discrimination.

While progress have been made over the past couple of decades, as exemplified by the decriminalisation of same-sex sexual acts in Mozambique, Cape Verde, Botswana, Namibia, Mauritius, and legal gender recognition for transgender and intersex persons in Eswatini,²⁴ Kenya, and South Africa,²⁵ significant pockets of resistance still remain across the continent, with at least thirty African states still having on their statute books provisions that criminalises or is understood to criminalise same-sex relations and other forms of non-heteronormative behaviours. This resistance has recently been bolstered by the new 'civilising' mission of global evangelical groups who are continuously reinstating hatred and violence against sexual and gender minorities in a similar manner as their ancestors did to colonial African societies.²⁶

In light of these challenges, it is imperative to foster a comprehensive understanding of gender diversity, challenge discriminatory practices, and advocate for inclusive policies that uphold the rights and dignity of all persons, irrespective of their SOGIESC.



²⁴ Southern African Litigation Centre (SALC) 'An analysis of law and policy in the context of international best practice' (2022) available at: https://www.southernafricalitigationcentre.org/wp-content/uploads/2022/12/Research-brief_Legal-gender-recognition-web.pdf.

²⁵ See for example Triangle Project 'A step-by-step guide to applying to alter gender markers and forenames in terms of South African law' (2023).

²⁶ See AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 African Human Rights Law Journal 263; M Ananyev & M Poyker 'Christian missions and anti-gay attitudes in Africa' (2021) 184 Journal of Economic Behavior & Organization 359; Human Dignity Trust 'Criminalising homosexuality and understanding the right to manifest religion' (2015).



National Human Rights Institutions (NHRIs) have an important role to play in the promotion, protection and fulfilment of the rights of intersex and transgender persons. This study contributes to the vital discourse of the rights of intersex and transgender persons in Africa by examining the experiences, key issues, and challenges faced by transgender and intersex persons in Ivory Coast, Kenya, Liberia, Malawi, Namibia, Nigeria, Uganda, Togo and South Africa, and provide recommendations to National Human Rights Institutions (NHRIs) and civil society organisations (CSOs) for advancing human rights and promoting inclusivity within these communities.


1.2 Methodology

The study employed a comprehensive qualitative methodology to address the multifaceted aspects of the lived realities and the challenges that transgender and intersex persons encounter in the selected African states. The methodology comprised several interconnected stages aimed at gathering in-depth insights and facilitating informed advocacy efforts.

The study commenced with an extensive review of existing laws, policies, and literature pertinent to transgender and intersex rights within the selected African states. This review was instrumental in identifying gaps and shortcomings in the current legal and policy frameworks intended to safeguard the rights of transgender and intersex persons. To complement the information obtained through desk review, a survey questionnaire was disseminated among the NHRIs of nine selected countries, transgender and intersex persons, as well as activists, across the selected countries. The questionnaire, designed with mainly multiple-choice questions, with options for participants to elaborate on their responses, sought to elicit additional information regarding the legal status and lived experiences of these marginalised communities. A minimum of 10 respondents were targeted in each project country to ensure a diverse representation of perspectives .

Given the inherent challenges associated with identifying transgender and intersex persons and their representative organisations, a purposeful sampling method employing the snowball technique was utilised. Initial participants were identified through the NANHRI Secretariat and other relevant activists and CSOs within the researchers' networks. Participants were selected based on their recognised expertise in transgender and intersex activism, ensuring the survey adequately addressed the research objectives. A total of 31 interlocutors responded to the questionnaire on the rights intersex persons while 11 responded to the questionnaire on transgender persons. Given this limited participation, the insights drawn from the study relies predominantly on desk review of publicly available documentation on the rights of intersex and transgender persons in the selected countries.

As indicated earlier, in addition to the primary research conducted with transgender and intersex persons and representative organisations, a separate survey was administered to NHRIs in the project countries. This survey aimed to assess the current programming on transgender and intersex rights within NHRIs, identify challenges faced in advocacy efforts, and explore future advocacy opportunities. Insights gathered from NHRI surveys informed recommendations for strategic advocacy, drawing on both African and global best practices.



Despite a growing consensus against medically unnecessary intersex surgeries globally and progress towards banning them, some parents still face pressure from surgeons to opt for these procedures for their young children, who are unable to participate in such decisions.

The study also employs a human-rights based approach, prioritising self-determination, bodily integrity and non-discrimination for intersex and transgender persons. The research methodology focused on a community-centred perspective, enabling a comprehensive understanding of the everyday issues the community faces. The study examines several interconnected areas, such as the medical system, doctors' awareness, social stigma, and family attitudes towards intersex and transgender persons, and the extent of support provided by legal systems in these countries. This methodological approach facilitated a comprehensive understanding of the status of transgender and intersex persons in the selected African states, thereby informing evidence-based advocacy and policy interventions to promote and protect their rights.



“

It is imperative to foster a comprehensive understanding of gender diversity, challenge discriminatory practices, and advocate for inclusive policies that uphold the rights and dignity of all persons, irrespective of their SOGIESC.

”



CHAPTER



TWO





HUMAN RIGHTS OF INTERSEX AND TRANSGENDER PERSONS

The human rights of intersex and transgender persons are integral to the broader struggle for equality, dignity, and non-discrimination. Through an analysis of international and regional human rights standards and the pronouncements of human rights mechanisms, this chapter aims to contextualise the human rights situation of intersex and transgender persons within broader legal, social, and cultural frameworks.

2.1 International human rights system

The international human rights landscape concerning the rights of intersex and transgender persons has witnessed significant developments in recent years, reflecting a growing recognition of the need to address discrimination, violence, and harmful practices based on SOGIESC. Within the United Nations (UN) system, various agencies and bodies have condemned human rights violations against intersex and transgender persons and called for legal reforms to protect their rights. Additionally, in terms of articles 60 and 61 of the African Charter on Human and Peoples' Rights (African Charter) the African Commission on Human and Peoples' Rights (ACHPR) is enjoined to seek guidance from international law and even domestic legislative and policy frameworks that advance human and peoples' rights, in its interpretation of the African Charter.

That said, the Universal Declaration of Human Rights – the cornerstone of the global international human rights architecture – in its foundational principles, provide in article 1 that '[a]ll human beings are born free and equal in dignity and rights'. Article 2 guarantees that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status', while article 7, enshrines that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination'.

The International Covenant on Civil and Political Rights (ICCPR) provides a foundation for equal civil and political rights for all individuals through article 2 and 26 (Right to equality and non-discrimination), article 6 (right to life), article 7 (Right to be free from torture, cruel, inhuman and degrading treatment or punishment) article 9 (Right to liberty and security of person), article 17 (right to privacy), and article 19 (Right to freedom of expression). While the ICCPR does not specifically mention discrimination based on a person's gender identity or sexual orientation, it offers protection against discrimination based on 'sex' and 'other status'. The United Nations Human Rights Committee, tasked with interpreting the ICCPR, has called on governments²⁷ to guarantee the rights of transgender persons, including legal recognition of their gender identity, while urging the repeal of abusive requirements for gender recognition.²⁸ Thus, the delineation of prohibited grounds for discrimination within the ICCPR and other human rights treaties is not exhaustive, as highlighted by the deliberate inclusion of the term 'other status' by the architects of these agreements. This understanding has been employed by UN human rights committees to extend protection against discrimination based on gender identity and sexual orientation. In 1994, the UN Human Rights Committee asserted that states are obliged to shield persons from discrimination rooted in 'sex', a designation encompassing 'sexual orientation'.²⁹ Furthermore, the United Nations Committee on Economic, Social and Cultural Rights (CESCR), in elucidating the right to non-discrimination in the International Covenant on Economic, Social and Cultural Rights (ICESCR), stressed the importance of a flexible approach to the category of 'other status' to address instances of differential treatment lacking reasonable and objective justification, yet analogous to the explicitly recognised grounds in Article 2 of the ICESCR.³⁰ The CESCR acknowledged various other prohibited grounds in a non-exhaustive list, including health status, age, disability, nationality, marital and family status, sexual orientation, and gender identity.³¹

Besides the general human rights framework that protect all persons including transgender and intersex individuals, various international and regional bodies have made specific pronouncements on the rights of transgender and intersex persons, some of which are briefly summarised below.



2.1.1 Development in intersex rights

The UN Special Rapporteur on torture has highlighted the harm caused by non-consensual surgeries and interventions on intersex children,³² while the Office of the High Commissioner for Human Rights (OHCHR) has recommended prohibiting forced or coerced medical interventions without full, free, and informed consent.³³ The OHCHR has also released a technical note, endorsing the prohibition of 'forced or coerced medical interventions related to intersex characteristics, including non-urgent medical procedures conducted without full, voluntary, and informed consent', citing numerous recommendations from treaty bodies.³⁴

The regulations set forth by World Athletics, formerly known as the International Amateur Athletic Federation (IAAF) aiming to bar hyper-androgenic female athletes from competitive sports unless they lower their testosterone levels to conform to prescribed female norms have drawn criticism from several UN mandates and the UN Human Rights Council.³⁵ These include the Special Rapporteur on the right to the highest attainable standard of physical and mental health, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on discrimination against women in law and in practice. Furthermore, the UN Human Rights Council has passed a resolution denouncing the regulations adopted by World Athletics.³⁶ In 2019, the Human Rights Council adopted a resolution on discrimination in sports, acknowledging the rights of women with differences in sex development.³⁷

In the progression of UN efforts regarding the human rights of intersex persons, several significant milestones have been reached. In 2016, a collaborative effort involving UN human rights experts, the ACHPR, the Inter-American Court on Human Rights, and the Council of Europe emerged, advocating for an end to violence and harmful medical practices against intersex individuals.³⁸ The United Nations Committee on the Elimination of Discrimination against Women (CEDAW) has played a crucial role in advocating for intersex rights, recognising the impact of patriarchy on violations of intersex person's human rights. CEDAW was the first Treaty Body to issue a specific recommendation on intersex issues and has become a significant advocate for intersex rights. In 2009, in its concluding observations for Germany, CEDAW recommended engaging in dialogue with intersex persons and NGOs to better understand their needs and take effective action to protect their human rights.³⁹ The Committee has approached intersex issues through a gender equality lens, focusing on stereotypes and harmful practices, highlighting the importance of addressing these issues to advance intersex rights globally.

²⁷ 'Concluding observations on the fourth periodic report of Ireland' CCPR/C/IRL/CO/4 (2014) available at: <https://undocs.org/Home/Mobile?FinalSymbol=CCPR%2FC%2FIRL%2FCO%2F4&Language=E&DeviceType=Desktop&LangRequested=False>.

²⁸ 'Concluding observations on the fourth periodic report of Ireland' CCPR/C/IRL/CO/4 (2014) available at: <https://undocs.org/Home/Mobile?FinalSymbol=CCPR%2FC%2FIRL%2FCO%2F4&Language=E&DeviceType=Desktop&LangRequested=False>.

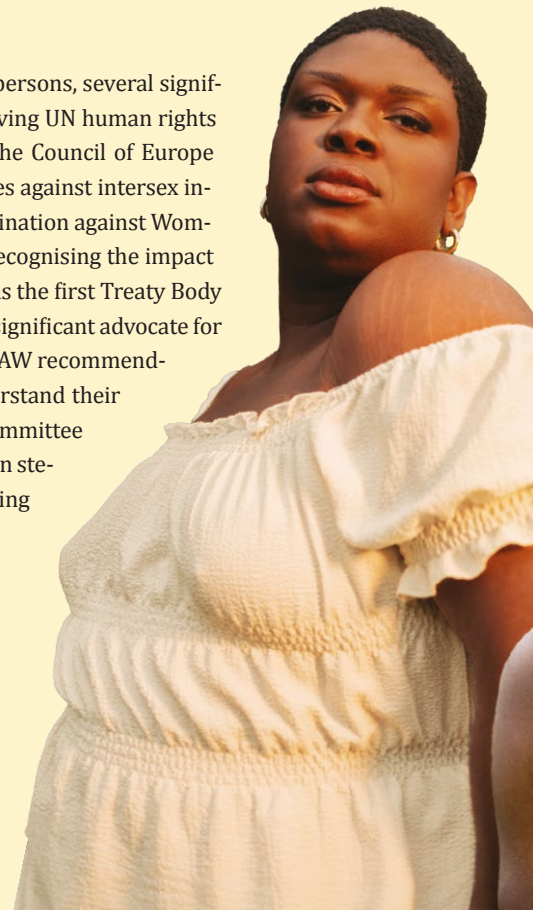
²⁹ *Toonen v Australia* (CCPR/C/50/D/488/1992).

³⁰ Committee on Economic, Social and Cultural Rights, General Comment No 20, para 27.

³¹ Committee on Economic, Social and Cultural Rights, General Comment No 20, paras 28-35.

³² A/HRC/22/53, para 76.

³³ UN Free and Equal Campaign Fact sheet. Available at <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>.



Intersex persons often face significant human rights abuses, particularly during childhood when they are unable to advocate for themselves. The United Nations Committee on the Rights of the Child (CRC) has emerged as a key defender of intersex rights within the Treaty Bodies

In 2016, the CRC explicitly condemned forced surgeries and treatments on intersex adolescents, urging States to protect intersex children from violence, discrimination, and bullying.⁴⁰ Although intersex minors experience violations of multiple child rights, including the principles of the best interests and evolving capacities of the child,⁴¹ the right to identity, freedom of expression in matters affecting them, and health rights,⁴² the CRC's observations frequently emphasise protection against physical and mental violence. The Committee's comprehensive recommendations advocate for ensuring that intersex children are not subjected to unnecessary medical or surgical interventions, upholding their rights to bodily integrity, autonomy, and self-determination.

Again, in September 2020, a coalition of 35 UN Member States issued the first joint statement specifically addressing the human rights of intersex persons.⁴³ Subsequent years saw continued advocacy, including reports from the OHCHR on discrimination in sports and joint statements from UN Member States and CSOs, culminating in the co-organisation of events aimed at mapping good practices and discussing intersex rights.⁴⁴ In October 2023, a pivotal event at the Human Rights Council, co-organised by various advocacy groups and supported by OHCHR and several Permanent Missions, focused on the rights of intersex persons.⁴⁵

Ultimately, on 4 April 2024, the UN Human Rights Council adopted its first-ever resolution⁴⁶ on '[c]ombating discrimination, violence and harmful practices against intersex persons' directly addressing discrimination, violence, and harmful practices against intersex persons. Proposed by Finland, South Africa, Chile, and Australia, the resolution urges states to work toward ensuring the highest attainable standard of physical and mental health for intersex persons.⁴⁷ It also mandates the preparation of a report by the OHCHR, slated for discussion in September 2025, examining discriminatory laws, acts of violence, and best practices for persons with innate variations in sex characteristics. Notably, the resolution was not opposed,



³⁴ 'OHCHR technical note on the human rights of intersex people: human rights standards and good practices' available at: <https://www.ohchr.org/sites/default/files/2023-11/ohchr-technical-note-rights-intersex-people.pdf>.

³⁵ 'Internal Communication Clearance Form' (2018) available at: https://www.ohchr.org/Documents/Issues/Health/Letter_IAAF_Sept2018.pdf.

³⁶ A/HRC/40/L.10 (2016) available at: <https://undocs.org/A/HRC/40/L.10/Rev.1>.

³⁷ 'First UN resolution on the rights of intersex persons: un calls to end discrimination of women and girls in sports, including women born with variations of sex characteristics' (Human Rights Council, 2023) available at: <https://ilga.org/news/first-un-resolution-rights-intersex-persons-women-sport/>.

³⁸ 'Intersex Awareness Day – Wednesday 26 October' (OHCHR, 2016) available at: <https://www.ohchr.org/en/press-releases/2016/10/intersex-awareness-day-wednesday-26-october?LangID=E&NewsID=20739>.

³⁹ CEDAW/C/DEU/CO/6 para. 62.



On 4 April 2024, the UN Human Rights Council adopted its first-ever resolution on ‘combating discrimination, violence and harmful practices against intersex persons’ directly addressing discrimination, violence, and harmful practices against intersex persons.

but several African countries abstained – namely Benin, Cameroon, Ivory Coast, Eritrea, The Gambia, Malawi, Morocco, and Sudan, whereas Ghana and South Africa voted for its adoption. This landmark resolution signals a significant step forward in international recognition and protection of the human rights of intersex persons.

Outside the UN, other regional human rights bodies have taken a stand on the rights of intersex persons. For instance, in a resolution passed in 2019, the European Parliament condemned genital ‘normalising’ surgeries and urged European countries to ban such procedures. The European Parliament also placed emphasis on the significance of adaptable birth registration protocols, while criticising the European Union (EU) for its failure to acknowledge sex characteristics as a prohibited ground for discrimination.⁴⁸ Additionally, the Council of Europe Parliamentary Assembly adopted its own resolution aimed at promoting human rights and combating discrimination against intersex persons.⁴⁹

On 15 May 2024, the Grand Chamber of the European Court of Human Rights (ECHR) convened to consider the case of **Caster Semenya v Switzerland**.⁵⁰ Switzerland had appealed to the Grand Chamber after a prior ECHR ruling in July 2023 favoured Semenya, recognising violations of her rights under the European Convention on Human Rights, which include provisions for non-discrimination, respect for private life, and access to effective remedies. The outcome of this case is highly anticipated, given its potential implications for how international sports organisations uphold human rights, especially concerning intersex persons and athletes from the Global South competing in international events.

⁴⁰ CRC/C/GC/20 para 6.

⁴¹ CRC Article 3(1)

⁴² CRC Article 24.

⁴³ ‘Joint Statement led by Austria on the Rights of Intersex Persons’ (Human Rights Council, 2020) available at: <https://www.dfat.gov.au/international-relations/themes/human-rights/hrc-statements/45th-session-human-rights-council/joint-statement-led-austria-rights-intersex-persons>.

⁴⁴ ‘53 states call to protect the human rights of intersex people at the united nations’ (Human Rights Council, 2021) available at: <https://ilga.org/news/51-states-call-protect-intersex-persons-human-rights-united-nations/>.

⁴⁵ ‘HRC54 SIDE EVENT | HUMAN RIGHTS OF INTERSEX PERSONS: MAPPING GOOD PRACTICES AND ADDRESSING THE GAPS’ (2023) available at: <https://ilga.org/news/hrc54-event-human-rights-intersex-persons/>.

⁴⁶ A/HRC/55/L.9 ‘Combating discrimination, violence and harmful practices against intersex persons’ available at: <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F55%2FL.9&Language=E&DeviceType=Mobile&LangRequested=False>.

⁴⁷ ‘Follow-up and implementation of the Vienna Declaration and Programme of Action’ (2023) available at: https://finlandabroad.fi/web/geneve/current-affairs/asset_publisher/h5w4iTUjhNne/content/general-debate-item-8/384951.



Semenya's case has attracted a broad spectrum of submissions from entities such as UN bodies, Human Rights Watch, the International Commission of Jurists, Athletics South Africa, and numerous African-based NGOs, highlighting its profound impact on global human rights discussions .

Outside of Europe, significant developments have also occurred in the Americas. In 2014, the Inter-American Commission on Human Rights established the Rapporteur on the Rights of Lesbians, Gays, Bisexuals, Trans, and Intersex Persons, reflecting a growing recognition of the rights of gender diverse persons in the region. Following this, in 2015, the Commission released a report titled 'Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas', highlighting critical issues facing intersex persons. The report urged States to amend laws and medical protocols to prohibit unnecessary medical procedures on intersex persons without their free, informed consent. It also recommended the formation of multidisciplinary groups to support intersex children and their families, the training of medical personnel, and the implementation of awareness-raising and educational campaigns to sensitise the public about intersex issues, thereby promoting understanding and protection of intersex rights.⁵¹

In 2017, the IACHR urged states to end violence against intersex persons and recommended prohibiting medically unnecessary surgeries on intersex children, emphasising respect for autonomy and bodily integrity, alongside fundamental rights to health, physical and psychological integrity, freedom from violence and discrimination, and protection against inhuman and degrading treatment.⁵²

⁴⁸ Section 9 & 10 of the Resolution.

⁴⁹ 'Promoting the human rights of and eliminating discrimination against intersex people' Resolution 2191 (2017), available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTMLen.asp?fileid=24232&>.

⁵⁰ Grand Chamber hearing in the case of Semenya v. Switzerland.

⁵¹ 'Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas' (Inter-American Commission on Human Rights, 2015) p 119-120, available at https://www.oas.org/en/iachr/media_center/preleases/2015/143.asp



2.1.2 Developments in transgender rights

The United Nations Human Rights Council has repeatedly condemned acts of violence and discrimination based on sexual orientation and gender identity. In 2016, it established a special mandate to investigate and report on such abuses. Additionally, the United Nations Office of the High Commissioner for Human Rights (OHCHR) has consolidated international human rights norms and underscored five primary legal obligations for all UN member states concerning the protection of the human rights of LGBT individuals. These obligations include:

- i. Safeguarding individuals from homophobic and transphobic violence.
- ii. Preventing torture and other forms of cruel, inhuman, or degrading treatment against LGBT persons.
- iii. Decriminalising homosexuality and repealing laws that criminalise LGBT individuals.
- iv. Prohibiting discrimination based on sexual orientation and gender identity.
- v. Upholding freedom of expression, association, and peaceful assembly for LGBT individuals.

The Committee against Torture, in its General Comment No. 2, reaffirms the obligation of state parties to protect individuals with diverse gender identities from torture and ill-treatment.⁵³ On their part, Principles 4 and 5 of the Yogyakarta Principles call for states to halt state-sponsored attacks on the lives of persons with diverse gender identities, thoroughly investigate and prosecute perpetrators of such attacks, and ensure that a victim's gender identity is not used to justify or mitigate violence. Principle 10 urges states to take measures to protect individuals with diverse gender identities from torture, cruel, inhuman, or degrading treatment, provide necessary medical and psychological support to victims, and conduct awareness campaigns among law enforcement and other state actors to prevent such acts. The UNGA acknowledges that the lack of legal recognition exposes persons with diverse gender identities to violence and discrimination. It urges states to develop measures allowing individuals to change their gender in official documents.⁵⁴ Similarly, the UN has called upon member states and other stakeholders to ensure the legal recognition of transgender person's gender identity without imposing abusive requirements, recognising it as an effective means of combating violence against this group.⁵⁵

Today, countries worldwide are moving towards more inclusive legal frameworks and practices that uphold the rights and dignity of intersex and transgender persons. Recent years have witnessed a notable trend in the removal of burdensome requirements for legal gender recognition in several countries. Countries such as Argentina⁵⁶, Belgium,⁵⁷ Denmark,⁵⁸ Ireland⁵⁹, Luxembourg⁶⁰, Malta⁶¹, Norway⁶², Portugal⁶³, Spain⁶⁴, and Uruguay⁶⁵ have implemented simple administrative processes for legal gender recognition based on self-declaration, without requiring medical or psychological evaluations. This shift towards straightforward administrative procedures aligns with international medical consensus and human rights standards, which recognise that barriers to gender recognition, such as diagnostic requirements, can harm the physical and mental health of transgender persons.⁶⁶

⁵² 'IACHR Urges States to End Violence and Harmful Practices against Intersex Persons' (2017) available at: http://www.oas.org/en/iachr/media_center/PReleases/2017/189.asp.

⁵³ UN Committee Against Torture (CAT) General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008 UN Doc CAT/C/GC/2.

⁵⁴ UNGA "Report of the United Nations High Commissioner for Human Rights: Discriminatory Laws and Practices and Acts of Violence against Individuals based on their Sexual Orientation and Gender Identity" (17 November 2011) GE 11-17075 para 73.

⁵⁵ Joint UN statement on ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, available at: <https://www.ohchr.org/en/issues/discrimination/pages/jointlgbtstatement.aspx>.

⁵⁶ Argentina's Gender Identity Law as approved by the Senate of Argentina (2012) available at: <https://globalhealth.usc.edu/wp-content/uploads/2017/03/english-translation-of-argentina-s-gender-identity-law-as-approved-by-the-senate-of-argentina-on-may-8-2012.pdf>.

⁵⁷ 'lois, decrets, ordonnances et reglements' (2017) available at: https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2017062503&table_name=loi.

⁵⁸ 'L 182 Proposition de loi modifiant la loi sur le registre central des personnes' available at: <https://www.ft.dk/samling/20131/lovforslag/1182/99/367/afstemning.htm>.

⁵⁹ Gender Recognition Act 2015, available at: <https://www.irishstatutebook.ie/eli/2015/act/25/enacted/en/html>.

⁶⁰ 'Loi du 10 août 2018 relative à la modification de la mention du sexe et du ou des prénoms à l'état civil et portant modification du Code civil, available at: <https://legilux.public.lu/eli/etat/leg/loi/2018/08/10/a797/jo>.

⁶¹ K Knight 'Dispatches: Malta's Inspiring Gender Recognition Law' (Human Rights Watch, 2015) available at: <https://www.hrw.org/news/2015/04/01/dispatches-maltas-inspiring-gender-recognition-law>.

⁶² 'Agir sur le changement de sexe légal' available at: <https://www.stortinget.no/no/Saker-og-publikasjoner/Saker/Sak/?p=64488>.

⁶³ 'Décret de l'Assemblée de la République 203/XIII' available at: <https://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheDiplomaAprovado.aspx?BID=20780>.

⁶⁴ CG Cabrera 'Victory in Fight for Gender Recognition in Spain' (Human Rights Watch, 2023) available at: <https://www.hrw.org/news/2023/02/16/victory-fight-gender-recognition-spain-0>.

⁶⁵ 'Décret n°104/019 du 29/04/2019' available at: <https://www.impo.com.uy/personastrans/>.

⁶⁶ 'WPATH Identity Recognition Statement' (World Professional Association for Transgender Health, 2017) available at: <https://www.wpath.org/media/cms/Documents/Web%20Transfer/Policies/WPATH%20Identity%20Recognition%20Statement%2011.15.17.pdf>



Legal precedents set by international human rights bodies further affirm the rights of intersex and transgender persons. For instance, the European Court of Human Rights ruled in *Goodwin v. United Kingdom*⁶⁷ that the lack of legal recognition of a person's gender identity constitutes a serious interference with private life. Subsequent rulings by the court have deemed various requirements for gender recognition, such as sterilisation and medical interventions, as violations of human rights. The European Union's LGBTIQ Equality Strategy underscores the importance of accessible legal gender recognition based on self-determination, without age restrictions, as a human rights standard within the member bloc. Similarly, Principle 3 of the Yogyakarta Principles emphasises that each person's self-defined gender identity is integral to their personality, dignity, and freedom, reaffirming the importance of self-determination in gender identity.⁶⁸ As the international community continues to advance efforts to protect the human rights of intersex and transgender persons, it is imperative for states to uphold their obligations under international human rights law and take concrete steps to eliminate discrimination, violence, and harmful practices based on SOGIESC.

2.2 African human rights system

The African Union (AU) operates through three primary mechanisms to safeguard human rights: the African Court on Human and Peoples' Rights⁶⁹ (African Court), the African Commission on Human and Peoples' Rights⁷⁰ (ACHPR), and the African Committee of Experts on the Rights and Welfare of the Child⁷¹ (Children's Committee). The cornerstone treaty guiding these efforts is the African Charter on Human and Peoples' Rights⁷² (the African Charter), supplemented by various specific instruments that enhance its provisions.

The African Charter which came into force in 1986, serves as a cornerstone of African human rights legislation, outlining the essential human rights endorsed by nations across the continent. The African Charter ensures human rights protection for intersex and transgender persons chiefly through articles 2, 3, 19 (right to equality and non-discrimination), article 4 (right to life), article 6 (right to liberty and security of person), the right to privacy, article 5 (right to be free from torture, cruel, inhuman and degrading treatment or punishment), and article 9 (right to freedom of expression). Article 2 of the Charter guarantees that every individual is entitled to enjoy the rights and freedoms recognised and guaranteed therein, without any form of discrimination, including based on race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, or other status. Notably, gender and gender identity are not explicitly delineated as protected categories against discrimination. Nevertheless, in the case of *ACHPR v The Republic of Kenya*⁷³, the African Court interpreted the phrase 'other status' to encompass 'instances of discrimination unforeseen at the time of the Charter's adoption'.

⁶⁷ *Christine Goodwin v. the United Kingdom* European Court of Human Rights, 28957/95.

⁶⁸ 'Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity' (2006).

⁶⁹ Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (adopted 10 June 1998, entered into force 25 January 2004).

⁷⁰ Article 30 of the African Charter establishes the African Commission..

⁷¹ The African Committee of Experts on the Rights and Welfare of the Child draws its mandate from articles 32-46 of the African Charter on the Rights and Welfare of the Child.

⁷² African Charter on Human and People's Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217.



Intersex persons being perceived different has led to a lot of abuse, from forced marriages, curiosity on how intersex bodies look and in some communities using intersex people as ritual objects, resulting to increased levels of sexual assault.

2.2.1 Developments in transgender rights in the African human rights system

The Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), codifies the human rights of African women. Of particular relevance to the protection of transgender women is Article 1(k) of the Protocol, which defines women as individuals of the female gender, rather than solely the female sex. Furthermore, when considered in conjunction with other pertinent rights enshrined in the Maputo Protocol, such as article III(1), which asserts every woman's entitlement to the acknowledgment and safeguarding of her human and legal rights, it can provide protection to African transgender women. Rudman and Snyman advocate for a teleological interpretation of the term 'female gender' in treaty interpretation, arguing that it encompasses transgender women since gender identity, not biological sex, determines one's gender.⁷⁴ Nevertheless, neither the African Court nor the ACHPR has had the opportunity to address the issue of gender identity and the legal recognition of individuals whose gender identity

does not align with their assigned sex at birth. The closest the African Commission has come to pronounce itself on the rights of sexual and gender minorities in its jurisprudence was in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, where the Commission mentioned that article 2 of the African Charter guarantees 'equality of treatment for individuals irrespective of ... sexual orientation'.⁷⁵ Additionally, article 4 of the Maputo Protocol safeguards individuals' security and mandates states to outlaw, forestall, eliminate, and penalise all manifestations of violence against women, including those committed against transgender women.

Additionally, the Advisory Opinion of the African Court relating to vagrancy offences⁷⁶, though not directly focused on sexual and gender minorities, provides important guarantees for the protection of the rights of intersex and transgender persons. Notably, the African Court highlighted that vagrancy laws which often criminalise the status of individuals rather than particular conducts, are incompatible with the African Charter and other human rights instruments. The African Court also highlighted that petty offences are often used against poor and marginalised communities and are disproportionate to any legitimate aim they may seek to pursue and therefore incompatible with the African Charter

⁷³ Application No. 006/2012, 138.

⁷⁴ A Rudman & TC Snyman "Protecting Transgender women within the African Human Rights System Through an Inclusive Reading of the Maputo Protocol and Proposed GBV Model Law" (2022) 30.

⁷⁵ *Zimbabwe Human Rights NGO Forum* (2006) AHRLR 128 (ACHPR 2006) para 169.

⁷⁶ Advisory Opinion No 001/2018 On the compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and other human rights instruments applicable in Africa, requested by Pan African Lawyers Union (PALU) (2020).



and other African human rights instruments. Though not specifically based on SOGIESC rights, this advisory opinion enhances the normative framework for the protection of intersex and transgender persons who often have their status criminalised and who are often harassed by law enforcement officers using vagrancy laws.

This decision was preceded by and complements the African Commission's Principles on Decriminalisation of Petty Offences in Africa (2017), which urges African states to decriminalise petty offences which disproportionately affect vulnerable communities.⁷⁷ The Principles on Decriminalisation of Petty Offences in Africa specifically acknowledges that '[I]aws that create petty offences are inconsistent with the principles of equality before the law and non-discrimination on the basis that they either target, or have a disproportionate impact on, the poor; vulnerable persons, key populations or on the basis of gender'.⁷⁸ The Principles on the Decriminalisation of Petty Offences in Africa further define 'vulnerable persons' and 'key populations' to include transgender persons and persons marginalised on the basis of sexual orientation or gender identity.⁷⁹

The African Commission's General Comment No. 4 addressing Article 5 of the African Charter, emphasises the imperative for states to tackle violence against transgender and intersex persons.⁸⁰ States are also obliged to undertake various measures, including identifying the root causes and repercussions of gender-based violence (GBV) and implementing strategies to prevent and eliminate these causes.⁸¹ Similarly, the Committee for Prevention of Torture in Africa urges African states to take decisive action to halt and penalise perpetrators of violence targeting individuals based on perceived or actual sexual orientation or gender identity.⁸² The 2017 Guidelines on Combating Sexual Violence and its Consequences in Africa defines 'sexual violence' to encompass 'corrective rape', a homophobic practice targeting women based on their real or perceived homosexuality. Again, the African Commission's General Comment No. 4 explicitly included 'gender identity' as a protective ground against discrimination.⁸³ Furthermore, the General Comment emphasises that sexual and gender-based violence can affect individuals regardless



⁷⁷ African Commission 'Principles on the Decriminalisation of Petty Offences in Africa' (2017) available at <https://achprau.int/en/node/846>.

⁷⁸ As above, para 6.

⁷⁹ As above, para 1.

⁸⁰ General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) (2017) para 59.

⁸¹ Para 61.

⁸² ACHPR "Statement on the Occasion of the International Day in Support of Victims of Torture" available at: <https://reliefweb.int/report/world/statement-occasion-international-day-support-victims-torture-26-june-2014>

⁸³ General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) (2017) para 20.

⁸⁴ As above, para 59.

⁸⁵ As above.



of their gender identity, noting a widespread prevalence of such violence targeting women, girls, men, boys, persons with psychosocial disabilities, and persons identifying as lesbian, gay, bisexual, transgender, or intersex.⁸⁴ The ACHPR underscored the equal importance of addressing acts of sexual violence against all these groups and emphasised the responsibility of State Parties to address such violence effectively and adequately.⁸⁵

Again, in its efforts to address access to reproductive and sexual healthcare, the ACHPR established a Committee on the Protection of the Rights of People Living with HIV in 2010, tasked with integrating a gender perspective and providing special attention to vulnerable groups, including women, children, sex workers, migrants, men having sex with men, drug users, and prisoners. Additionally, in a 2018 report, the ACHPR defines 'key populations' to include gay men and other men who have sex with men, male and female sex workers and their clients, transgender persons, prisoners, and people who inject drugs.⁸⁶ The report emphasises the disproportionate impact of HIV on these marginalised groups, highlighting the adverse effects of criminalisation on healthcare access. It also underscores the heightened vulnerability of transgender women to HIV, being more likely to live with HIV than other adults of reproductive age.

In its Guideline for the Implementation of Economic, Social and Cultural Rights, adopted in 2011, the ACHPR explicitly acknowledged intersex and transgender persons as belonging to the group of vulnerable and disadvantaged populations who encounter significant obstacles in exercising their rights.⁸⁷ Similarly, in 2015 the ACHPR participated in a joint dialogue with the Inter-American Commission on Human Rights and the OHCHR on issues related to gender identity, sexual orientation, and intersex matters.⁸⁸ In their final report, they observed that these issues have received limited attention within the African human rights system.

Prior to the adoption of the above report, the ACHPR in 2014 adopted Resolution 275 'Resolution on Protection against Violence and other Human Rights

⁸⁶ African Commission on Human and Peoples' Rights 'HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses' (2018) x, available at https://www.unaids.org/sites/default/files/media_asset/HIV_Law_AfricanHumanRightsSystem_en.pdf.

⁸⁷ African Commission 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (2011) 8, available at <https://achprau.int/index.php/en/node/871>.

⁸⁸ Ending Violence and other human rights violations based on sexual orientation and gender identity: A joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations' (2016), available at https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGL_dialogue_EN.pdf.



Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity', a crucial step towards protecting individuals against violence and other human rights violations based on their actual or perceived sexual orientation and gender identity. The Resolution draws on articles 2, 3, 4 and 5 of the African Charter, the rights to freedom from discrimination, equality, life, and dignity respectively, to condemn and call on States to end violence, persecution and other human rights violations of persons on the basis of their sexual orientation or gender identity. Through Resolution 275, the ACHPR also expressed deep concern about the escalating violence and other human rights abuses, including murder, rape, and assault experienced by sexual and gender minorities, including transgender and intersex persons. It urged states to halt such violence and take necessary measures to ensure adequate remedies for victims.

2.2.2 Developments in intersex rights in the African human rights system

In addition to some of the references that have been made with regards to the protection of intersex rights in the African human rights system in the preceding section, African human rights bodies have taken very specific measures aimed at the promotion and protection of the rights of intersex persons. Before touching on these measures, it is pertinent to note that the Maputo Protocol calls for the cessation of genital mutilation and advocates for the promotion of bodily autonomy and reproductive health choices, including those of intersex women.⁸⁹

That said the African Committee of Experts on the Rights and Welfare of the Child has urged state parties to ensure that the rights of intersex children are protected. For instance, in its concluding observations following Kenya's second-period state report, the Committee acknowledged and commended the efforts of the government of Kenya to protect the rights of transgender and intersex children. The Committee urged the government of Kenya 'to consider and effectively implement the report of the National Taskforce on Policy, Legal, Institutional and Administrative Reforms regarding Intersex Persons in Kenya to boost the registration processes of intersex children'.⁹⁰

On its part, the ACHPR in 2023 passed Resolution 552 'Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa', aiming to advance and safeguard the rights of intersex persons across Africa. This resolution provides explicit guidelines urging states to implement both administrative and legislative measures to shield intersex persons from violent harassment within various spheres including home, educational institutions, workplaces, and broader societal contexts. It underscores the importance of sensitising members of the judiciary, immigration authorities, law enforcement agencies, healthcare and educational professionals, as well as traditional and religious communities, to ensure equal treatment and protection of intersex persons devoid of discrimination or bias. Additionally, it emphasises the imperative recognition and safeguarding of intersex movements and human rights advocates, enabling them to organise freely without fear of reprisal, while also demanding that perpetrators of harm against intersex persons face legal consequences.

The resolution explicitly denounces non-consensual and unnecessary genital normalisation procedures, likening them to irreversible consequences like genital mutilation. Additionally, the resolution condemns discrimination against intersex persons in competitive sports, particularly addressing the discriminatory policies of World Athlet-

⁸⁹ See for instance articles 4, 5 and 14 among others.

⁹⁰ African Committee of Experts on the Rights and Welfare of the Child 'Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Second Periodic Report of the Republic of Kenya, on the Status of the Implementation of the African Charter on the Rights and Welfare of the Child' (2020) para 32, available at <https://www.knchr.org/Portals/0/Concluding-Observation-on-Kenya-2nd-Periodic-Report-to-the-ACERWC.pdf>.

ics, which disproportionately affect African women subjected to 'sex testing'. This resolution aligns with the efforts of national institutions in India, Australia, and South Africa highlighting the need for protective measures to uphold the dignity and autonomy of individuals born with diverse bodily characteristics.

Aside this, Intersex persons are entitled to protection under the African Charter, as per Article 5, addressing protection from torture and other forms of inhuman treatment, prohibits non-consensual genital 'normalising' surgeries on minors, thereby safeguarding intersex persons from such practices. Furthermore, Article 16 of the African Charter guarantees the right to enjoy the highest attainable state of physical and mental health, protecting intersex persons from the adverse effects of genital 'normalising' surgeries, hormonal treatments, and other issues related to bodily autonomy and physical integrity. Intersex persons may also seek protection under articles 10 and 12 of the African Charter, which provide for the right to organise and associate, respectively, ensuring their rights to association and assembly.

Thus, within the framework of the African human rights system, the protection of intersex and transgender persons is gradually gaining recognition and legal safeguards. While the African Charter and its associated instruments explicitly forbid discrimination and violence against all individuals, including those with intersex and transgender identities, it is evident that these individuals lack adequate protection due to the socio-legal refusal to recognise their gender identities.

However, the provisions of the African Charter allowing limitation of rights on the basis of preserving African cultural values, collective security, morality, and common interests pose a significant obstacle to the legal recognition of intersex and transgender persons. This is illustrated by the seemingly contradictory stands of the ACHPR on these issues. The ACHPR has made consistent efforts in admonishing states to refrain from enacting or enforcing legislation or adopting administrative practices that restrict the enjoyment of human rights or condoning the violation of the rights of sexual and gender minorities by non-state actors, drawing inspiration from international law. Consequently, the recent practice of the African Commission refusing to grant observer status to organisations advocating for issues relating to sexual orientation and gender identity on the basis of African values mark a dent in what has been an otherwise progressive development of the law to enhance the protection of everyone irrespective of their SOGIESC.⁹¹ The African countries selected for this study represent a diverse range of socio-cultural, political, and legal contexts within the continent. Each nation grapples with its unique set of challenges and opportunities concerning the recognition and protection of the rights of transgender and intersex persons and offers a nuanced understanding of the regional dynamics shaping the pursuit of equality and justice for all individuals, regardless of SOGIESC. The individual country analyses are framed under four sub-headings, name a general situational analysis, advances that have been made towards the protection of intersex and transgender persons in law, policy and practice, retrogressive measures that have occurred within the state (if any), and the opportunities for intervention for NHRIs. This framing allows for a comprehensive evaluation of the lived realities of intersex and transgender persons, identifying the relevant legislative and policy gaps as well as the measures that may be adopted by NHRIs to advance the rights of these communities.

⁹¹ ACSE 'African Commission's Rejection of Observer Status Applications by Three Human Rights Organizations Threatens its Ability to Discharge its Mandate to Promote and Protect Human Rights for All' (2022) available at https://www.chr.up.ac.za/images/researchunits/sogie/documents/English_-_JOINT_STATEMENT_ON_DECISION_OF_ACHPR_AT_THE_73RD_SESSION_OF_ACHPR.pdf.



CHAPTER

THREE



LIVED REALITIES OF INTERSEX AND TRANSGENDER PERSONS IN SELECTED COUNTRIES



3.1 Ivory Coast (Côte d'Ivoire)

A) General Situational analysis

In Ivory Coast, organisations advocating to the rights of transgender persons have been historically active, with records dating back to the early 1990s, though their presence likely predates this period.⁹² The documentary 'Woubi Chéri'⁹³ shed light on the lives of transgender persons in Ivory Coast, gaining global recognition through various film festivals. Despite this visibility, funding for activism shifted towards HIV/AIDS initiatives targeting men who have sex with men (MSM), sidelining the efforts of transgender communities.⁹⁴ Today, despite facing daily stigma and violence, transgender activists remain committed to advocating for transgender rights, seeking to create safe spaces and support networks for their community.⁹⁵ The Ivorian laws concerning sodomy and unnatural sexual acts don't apply to consensual adult relationships. Thus, since independence, sexual relations between consenting adults of the same sex have not been criminalised.⁹⁶ Recent reforms in the Penal Code in 2019 have removed discriminatory provisions regarding the punishment for acts like public indecency.⁹⁷ It is therefore noteworthy that Cote d'Ivoire has not received any SOGIESC-related recommendation from UN Treaty Bodies since 2016.

⁹² The exact founding date is not clear, but according to different sources, the Association has existed since the early 1990s.

⁹³ Woubi Cheri documentary, available at: https://www.imdb.com/title/tt0210390/?ref=tt_mv_close

⁹⁴ Woubi Cheri documentary, available at: <https://www.proquest.com/openview/2a1dba55f5933196442cb6f7ed4d4373/1?pq-origsite=gscholar&cbl=27056>

⁹⁵ The Global Fund 'in Côte d'Ivoire, transgender communities break down barriers in the fight against HIV' (2024) available at: <https://globalfund.exposure.co/in-cote-divoire-transgender-communities-break-down-barriers-in-the-fight-against-hiv>

⁹⁶ UNDP 'Inclusive Governance Initiative: Côte d'Ivoire Baseline Report' (2022) available at <https://www.undp.org/sites/g/files/zskgke326/files/2022-07/igi-cote-d-ivoire-baseline-report.pdf>.

⁹⁷ UPR 2015, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler>.

⁹⁸ M Grisot 'En Côte d'Ivoire, une « homophobie silencieuse »' (Le Monde Afrique, 2014) available at: https://www.lemonde.fr/afrique/article/2014/02/14/en-cote-d-ivoire-unehomophobiesilencieuse_4366455_3212.html.

⁹⁹ 'RAPPORT PÉRIODIQUE DE LA CÔTE D'IVOIRE Présenté à la 52ème Session Ordinaire de la Commission en Octobre (2012) available at: <http://www.pplateforme-elsa.org/wp-content/uploads/2017/02/ACHPR-Rapport-alternative-Cote-dIvoire-LGBT.pdf>.

¹⁰⁰ The Global Fund 'in Côte d'Ivoire, transgender communities break down barriers in the fight against HIV' (2024) available at: <https://globalfund.exposure.co/in-cote-divoire-transgender-communities-break-down-barriers-in-the-fight-against-hiv>; US Department of State '2023 Country Reports on Human Rights Practices: Côte d'Ivoire' (2024) available at <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/cote-divoire/>.

¹⁰¹ United Nations Office of the High Commissioner for Human Rights, 'OHCHR and COVID-19', available at: <https://www.ohchr.org/en/covid-19>.

¹⁰² UNDP (n 91 above).



Yet transgender and intersex persons still face discrimination and abuse,⁹⁸ documented in reports submitted to human rights bodies.⁹⁹ Key concerns include violence and harassment,¹⁰⁰ unemployment, discrimination in housing including forced evictions, poverty, and marginalisation, worsened by the COVID-19 pandemic.¹⁰¹ Transgender persons, especially those involved in sex work are at heightened risk of harassment from law enforcement officers.¹⁰² Legal gender recognition is absent, with transgender associations seeking to address this gap.¹⁰³ However, existing legal provisions pose obstacles to changing gender markers, reflecting rigid interpretations of civil status laws. The absence of legal status recognition means that transgender and intersex persons struggle to obtain identification and voting documents that conform with their identity.¹⁰⁴ While official documents touch upon sexual and reproductive health and rights (SRHR) topics,¹⁰⁵ there remains a notable absence of a comprehensive legal framework addressing all aspects of SRHR. Despite the existence of a draft law, parliamentary enactment is pending. Furthermore, there is a lack of national clinical guidelines specifically catering to the SRHR needs of intersex and transgender persons, such as reproductive health counselling and hormone therapy management.¹⁰⁶ Additionally, the absence of visibility for intersex persons both at the organisational and individual levels have resulted in a situation where intersex persons are not recognised as part of 'key populations' which has led to their exclusion from technical and financial assistance from development partners, especially with regards to funding geared towards advocacy on HIV.¹⁰⁷

¹⁰³ 'Indisponibilité de l'état des personnes' available at: https://fr.wikipedia.org/wiki/Indisponibilit%C3%A9_de_l%27%C3%A9tat_des_personnes.

¹⁰⁴ US Department of State (n 95 above).

¹⁰⁵ DSSR/PF advocacy guide, p 14.

¹⁰⁶ SK Jischvi 'Soigner les LGBTIQ+ de Côte d'Ivoire, un défi pour la Clinique de Confiance' (BBC, 2019) available at: <https://www.bbc.com/afrique/region-50309174>.

¹⁰⁷ UNDP (n 91 above).

¹⁰⁸ UNDP (as above).

B) Advancement towards protection

The 2016 Constitution of Ivory Coast guarantees rights and freedoms without discrimination based on various grounds. The rights and freedoms outlined in articles 2–27 encompass essential human entitlements such as the right to life, dignity, and legal recognition, protection against discrimination, prohibition of cruel treatment, autonomy in medical decisions, fair access to justice and education, non-discriminatory employment opportunities, freedom of association and movement, and access to information. Article 4 specifically asserts the equality of all Ivorians before the law, prohibiting discrimination based on various factors including race, ethnicity, gender, religion, and physical or mental condition. This non-discrimination provision has been extended to the workplace through article 4 of the Labour Code, which prohibits discrimination in any form that may affect the employment relationship.¹⁰⁸ Additionally, in terms of article 123 of the Constitution '[t]reaties or agreements that have been duly ratified have, from the time of their publication, an authority superior to that of the laws...'. This enables the use of international human rights treaties to be utilised to protect the rights of intersex and transgender persons.

Besides, the government has enacted a specific law safeguarding personal data, namely Law No. 2013-450 of 19 June 2013, which among others is important for the protection of the privacy of transgender and intersex persons. Additionally, through statutes like the Penal Code and Law No. 2019-574 of 26 June 2019, the State extends legal protection to transgender and intersex persons, shielding them from various forms of violence, including gender-based violence such as rape and physical assault. Additionally, Law No. 2014-430 of 14 July 2014 relating to the prevention and treatment of HIV guarantees access to HIV related care to everyone without discrimination of any kind.¹⁰⁹

The survey results also revealed that in 2022 the National Human Rights Commission (NHRC) mapped SOGIESC organisations and has since maintained regular interactions with these groups through various activities. As a case in point, in June 2023, the NHRC organised a consultation workshop with transgender organisations to address the issue of identity cards. As part of its mandate, the NHRC prepared an advocacy note for the Minister of the Interior and the relevant authorities. Through this initiative, the Commission conducted interviews with 13 transgender persons. These discussions were instrumental in understanding the lived experiences of the transgender community and highlighting these realities to decision-makers. The NHRC has also designated a focal point to facilitate interaction with the sexual and gender minority community, ensuring their voices are heard and their concerns addressed. The NHRC has formally integrated structures specifically dedicated to addressing



¹⁰⁹ UNDP (n 91 above).

¹¹⁰ Alliance Côte d'Ivoire 'Report of the Study for the identification of specific needs in terms of prevention and management of STIs/HIV and AIDS among transgender people in Abidjan' (2020).

¹¹¹ Judgement No. 589/16 Public Prosecutor's Office v XX and YY, accused of public indecency.

¹¹² Public Prosecutor's Office v XXX (transgender sex workers), accused of extortion, 2020.



the rights of transgender and intersex persons. This inclusion is part of the Commission's broader mandate to engage with all civil society organisations, including those working on SOGIESC rights. This collaborative approach signifies the commitment of the NHRC to inclusivity and comprehensive human rights advocacy in Ivory Coast.

C) Regressive steps

Transgender persons in Ivory Coast face legal uncertainty, particularly regarding laws against solicitation by sex workers. A study in Abidjan revealed that a significant portion of transgender persons engage in transactional sex, exposing them to violence and arrests under ambiguous legal provisions.¹¹⁰ However, there is a scarcity of reported cases or court decisions directly addressing the rights of transgender and intersex persons. Typically, they find themselves implicated in cases related to general criminal activities rather than those explicitly linked to their sexual orientation or gender identity. Before the reform of the Penal Code in July 2019, due to the absence of explicit criminalisation of homosexuality, one notable court decision was based on the repealed article 360, resulting in the conviction of individuals perceived as homosexuals under charges of 'public indecency consisting of indecent or unnatural act with an individual of the same sex'.¹¹¹ Since this conviction, there have been no known court decisions directly related to sexual or gender identity, as the express reference to same-sex relationships was removed through the 2019 Penal Code reform. However, transgender persons, particularly those who have been detained often face charges such as soliciting, assault and battery, or blackmail, particularly impacting those engaged in sex work.¹¹²

D) Opportunities for intervention by NHRC

In view of the above, there is an observable movement towards the advancement of sexual and reproductive health and rights. National HIV prevention and care guidelines do cover areas like Pre-Exposure Prophylaxis (PrEP) for transgender persons, as well as the treatment of sexually transmitted infections (STIs). The survey results also revealed that the NHRC is currently grappling with challenges related to hormone therapy and antiretrovirals (ARVs). A critical issue is the need for clarity on drug interactions, which can complicate HIV/AIDS treatment for transgender persons. Addressing these medical complexities calls for well-informed interventions and advocacy.

In terms of sex education policies, the current school health policy lacks adequate inclusion of sexual and gender diversity and overlooks human rights issues related to gender identity and sex characteristics. This partial approach underscores the need for more comprehensive efforts to address equality and universality of individual freedoms and human rights without discrimination, particularly for transgender and intersex persons. Despite these challenges, ongoing efforts such as the revision of gender policies by the Ministry of the Family, Women, and Children offer opportunities to address specific issues faced by intersex and transgender persons.

While civil society organisations, particularly those involved in HIV response, consistently support transgender and intersex persons inclusion, broader intersectional approaches to gender equality are lacking in government spaces. For instance, the National Observatory for Equality and Gender does not formally recognise intersex and transgender persons, thereby constraining the scope of human rights inclusion and their right to equality. This presents an opportunity for the NHRC to advocated for the recognition of transgender and intersex persons as communities that are entitled to express legal recognition and protection. This should ideally aim to ensure that there is legal gender recognition for transgender and intersex persons within legislative and policy frameworks in conformity with constitutional and international human rights obligations which are part and parcel of the Ivorian legal system.



Moreover, since 2017, Cote d'Ivoire has received several recommendations focused on improving the protection and rights of sexual and gender minorities, notably during the 3rd Universal Peer Review (UPR) cycle in May 2019. These recommendations from countries such as Germany, Czechia, Iceland, Ireland, Netherlands, Chile, the United States, Argentina, and Australia, urged Cote d'Ivoire to expand non-discrimination laws to include sexual orientation and gender identity, repeal discriminatory provisions in the Criminal Code, particularly article 360, and protect LGBTI persons from violence, discrimination, and harassment. Despite these recommendations being noted, there remains a significant call for legislative amendments and concrete actions to ensure the safety and equality of sexual and gender minorities in Cote d'Ivoire. The NHRC can play a vital role in advocating for the protection of LGBTI persons as against violence and the specific recognition of such violence as a hate crime with enhanced criminal sentences.

Survey results also revealed that there is a lack of understanding and education among healthcare professionals with regards to hormonal therapy for transgender persons, which impedes their ability to access inclusive healthcare. This situation requires the intervention of the NHRC, which can play a role in the capacity strengthening relevant healthcare officials to ensure that transgender persons are able to access the right to health.

The survey results also revealed that the NHRC has limited capacity on transgender and intersex rights. To strengthen its efforts, the NHRC needs to build specific capacity and have dedicated staff who deal with these issues. Peer learning and partnerships with NHRIs from other African countries that have made significant strides in advancing transgender and intersex rights, can also enhance the capacity of the NHRC on these issues and equip it with proven approaches and enhance its advocacy practices. Such cross-border collaboration offers valuable perspectives and can significantly support the Commission's mission to protect and promote transgender and intersex rights in Côte d'Ivoire.



3. 2 Kenya

A) General situational analysis

Kenya's journey towards protecting transgender and intersex rights is marked by legislative reforms, judicial precedents, and institutional advocacy. Kenya's Constitution has gained recognition as one of the most forward-thinking worldwide. This distinction is primarily attributed to its transformative goals, focusing on advancing human rights, social justice, equity, inclusivity, equality, non-discrimination, and safeguarding marginalised communities.¹¹³ Highlighting this connection, since the adoption of the 2010 Kenyan Constitution, issues concerning intersex persons have gained prominence within the legal landscape and public discourse. However, despite the fact the constitution upholds principles of equality, non-discrimination, and protection of minorities, these values often fall short in practice due to entrenched binary assumptions regarding gender and sexuality. For instance, while Article 27(1) guarantees equality and freedom from discrimination, specific protections for sexual orientation and gender identity are notably absent.¹¹⁴

Police harassment, extortion, and discriminatory practices in healthcare, housing, and employment further marginalise transgender and intersex persons, forcing many to conceal their identities to avoid victimisation.¹¹⁵ Police often exploit laws criminalising same-sex activities, loitering, solicitation, and impersonation to target sexual and gender minorities, including transgender and intersex persons, either for monetary gain or to deny them essential services.¹¹⁶ These discriminatory laws also fuel employment and housing discrimination, school expulsions, censorship of LGBTQ+ expression, and hinder the registration of sexual and gender minority organisations. Consequently, transgender persons primarily endure economic disparities, limited job opportunities, and the constant threat of harassment or termination at work. Moreover, the rise in anti-LGBTQ+ rhetoric from politicians and religious leaders exacerbates violence and dis-

¹¹³ Article 10(1)(b) of the Kenyan Constitution.

¹¹⁴ Section 5 of the Employment Act, Cap 226 of the Laws of Kenya, prohibits employment discrimination based on a limited list of grounds including HIV status.

¹¹⁵ National Gay and Lesbian Human Rights Commission '2020/2021 Annual legal aid report' (2022) available at: https://static1.squarespace.com/static/581a19852994ca08211faca4/t/620aff8a94673a4ebb7c3ee7/1644887955628/2020_2021+ANNUAL+LEGAL+AID+REPORT.pdf.

¹¹⁶ National Gay and Lesbian Human Rights Commission (as above).

crimination. Many transgender persons describe bribery¹¹⁷ as a norm to navigate encounters with law enforcement and healthcare providers, highlighting the systemic challenges they face in accessing basic services and maintaining their privacy and dignity.¹¹⁸ Discriminatory housing practices further compound these hardships, with individuals experiencing eviction due to their gender expression.¹¹⁹

The survey results also revealed that the misconception regarding the distinction between sexual orientation and gender identity contributes to a widespread belief among Kenyans that transgender and intersex persons are homosexual or bisexual. Additionally, there is lack of psychosocial support for transgender and intersex persons despite the hostile and often violent environments they find themselves.

Although enforcement of laws against same-sex conduct resulting in charges is rare, they frequently serve as justifications for violence and discrimination against sexual and gender minorities, fostering a perception of them as criminals. Transgender women are frequently misidentified as men engaging in same-sex activities by law enforcement, leading to their arrest for participating in behaviour deemed criminal under the law. Additionally, laws criminalising activities such as 'living on the earnings of prostitution' and 'loitering with intent to commit an offence', which target sex workers, subject transgender and intersex persons to heightened levels of police harassment.¹²⁰

In 2021, the KNCHR released a significant report titled 'The Undefended Defender: The Situation of Human Rights Defenders Working towards Addressing Violence based on Sexual Orientation, Gender Identity and Expression in Kenya: A Focus on Kisii, Garissa and Kajiado'.¹²¹ This report thoroughly documents the hardships faced by human rights defenders in Kenya who are committed to combating violence rooted in sexual orientation and gender identity. The report's key findings reveal the numerous challenges these defenders face, including harassment, family rejection, property destruction, loss of life, forced eviction, discrimination, detention, torture, defamation, job loss, restrictions on freedom of movement, and major difficulties in gaining legal recognition for their organisations. This critical documentation highlights the urgent need for enhanced protective measures and support for human rights defenders in Kenya, especially those operating in the Kisii, Garissa, and Kajiado regions.

B) Advancement towards protection

The rights of intersex and transgender persons have seen some advancement since the adoption of the 2010 Constitution intersex despite legal challenges. Notably, the establishment of organisations like Transgender Education & Advocacy (TEA) and Ushirikiano Panda have been instrumental in advocating for rights and support for these communities. Legal victories, like the case of Transgender Education & Advocacy (TEA) v. Kenyan State and NGO Coordination Board illustrate this trend.¹²² In the TEA case three transgender persons filed a lawsuit against the Kenyan State and the NGO Coordination Board on 23 August 2013. The lawsuit was prompted by the refusal of the Board to register TEA as an NGO, citing an inability to determine the gender of its board members and discrepancies in the names submitted for

¹¹⁷ National Gay and Lesbian Human Rights Commission (as above).

¹¹⁸ J Okata 'Forced to pay bribes at every step: How trans and intersex people say they survive in Kenya' (BBC) available at: <https://edition.cnn.com/interactive/asequals/trans-intersex-people-kenya-survival-as-equals-intl-cmd/>.

¹¹⁹ J Okata 'Forced to pay bribes at every step: How trans and intersex people say they survive in Kenya' (BBC) available at: <https://edition.cnn.com/interactive/asequals/trans-intersex-people-kenya-survival-as-equals-intl-cmd/>.

¹²⁰ Section 154 of the Penal Code & 'The issue of violence' (Human Rights Watch, 2015) 32-33.

¹²¹ Available at: https://www.knchr.org/Portals/0/KNCHR_The_Undefended_Defender_B5_Final.pdf.



registration. Following a protracted legal battle initiated in 2013, the High Court of Kenya rendered a landmark decision¹²³ on 23 July 2014. Justice George Odunga presiding, ruled in favour of TEA, declaring the Board's actions as 'unfair, unreasonable, unjustified, and in breach of rules of natural justice'. The Court ordered the immediate registration of TEA, asserting that the Board's refusal constituted discrimination and a violation of the organisation's fundamental rights to freedom of association based on gender or sex, deeming it unconstitutional.

In the case of *ANN v. Attorney General*,¹²⁴ the petitioner, Batha Nthungi, a transgender woman was subjected to severe mistreatment by police officers, including being publicly stripped by the police, an act that was intended to degrade her and violate her dignity. This incident reflects the broader issues of police brutality and discrimination faced by transgender persons in Kenya. In this landmark case, the Court recognised the severe violation of Nthungi's rights and ruled in her favor. The judgment not only awarded her USD 2,000 in damages as compensation for the harm and humiliation she suffered but also set a significant precedent for the protection of transgender persons in Kenya. The Court established clear guidelines for the future arrest of transgender persons to ensure that such violations do not occur again, marking a notable advancement in addressing police mistreatment and affirming the dignity and rights of transgender persons in Kenya. Importantly, these guidelines serve as a vital framework for NHRIs, national court judges, and CSOs, which mandate for respect for gender identity, prohibit degrading treatment, ensure respectful search procedures, and provide appropriate detention conditions aligning with individuals' gender identities. They also emphasise the necessity of regular training and sensitisation programs for law enforcement, effective and accessible complaint mechanisms, independent monitoring and accountability, legal recourse and support for mistreated individuals, and engagement with transgender communities and advocacy groups.

In the case of *Audrey Mbugua v. Kenya National Examination Council (KNEC)*, Audrey Mbugua, a transgender woman, initiated legal proceedings in March 2013 at Kenya's High Court. Her objective was to compel the Kenya National Examination Council to amend the name on her high school diploma and remove the male sex marker from her certificate and replaced with her identity as a transgender female. In 2014, the High Court issued a landmark ruling, ordering the Kenya National Examinations Council (KNEC) to issue her a new certification reflecting her chosen name and devoid of

¹²² *Mandamus (Transgender) HCMA No.308A of 2013*, available at: <https://www.scribd.com/document/242276335/Mandamus-Transgender-HCMA-No-308A-of-2013-1>.

¹²³ *Mandamus (Transgender) HCMA No.308A of 2013*, available at: <https://www.scribd.com/document/242276335/Mandamus-Transgender-HCMA-No-308A-of-2013-1>.

¹²⁴ *ANN v Attorney General (Petition 240 of 2012)*, available at: <http://kenyalaw.org/caselaw/cases/view/83334/>.

any gender marker.¹²⁵ In its judgement, the Court underscored that human dignity can be compromised through acts of humiliation, degradation, or dehumanisation, and recognised the significance of upholding everyone's inherent dignity. The Court ordered the KNEC to amend the name on the certificate Andrew to Audrey, in recognition of her new gender identity. The Court also highlighted that since the law does not mandate the inclusion of a gender marker on a Kenya Certificate of Secondary Education (KCSE) certificate and the examination process in Kenya is not gender-based, with marks awarded irrespective of gender, the removal of the gender marker from the certificate would not diminish its quality or integrity. This ruling signifies an important step forward in affirming the rights of transgender persons and recognising their right to self-identification without discrimination based on gender identity.

While the Court declined to order KNEC to amend the certificate include a female marker, as it has already held that this was not required by the law, it adopted an innovative and forward-thinking approach by permitting the elimination of the gender marker in cases where its inclusion is not explicitly mandated by law. However, this approach cannot be applied to identification documents such as birth certificates, National Identity Cards (NID), and passports, where the law explicitly mandates the inclusion of a gender or sex marker.¹²⁶

Similarly, landmark cases, such as *R.M v Attorney General & Others*¹²⁷ and *E.A & Another v Attorney General & Others* ('Baby A' case)¹²⁸, have prompted judicial recognition and protection of intersex persons from inhumane treatment and discrimination. *R.M v Attorney General & Others*¹²⁹ involved public interest litigation addressing the struggles encountered by intersex persons, which was pivotal in the establishment of fundamental principles ensuring that intersex persons are safeguarded from any form of inhumane, cruel, or degrading treatment or punishment, particularly during processes such as arrest and search. The petitioner who was born intersex with both male and female genitalia, was raised as male by the parents. Due to the condition of being intersex, the petitioner could not obtain a birth certificate or national identity card, which denied him citizenship rights such as voter registration, travel documents, property acquisition, and employment. Consequently, the petitioner was an early school dropout and his attempt to get married was not recognised by law. He was charged with a criminal offence in 2005 and checks revealed his ambiguous genitalia, following which he was remanded in a police cell during the trial. However, upon his conviction and sentence to death, he was committed to a male death row prison, where he was subjected to abuse, ridicule, inhuman treatment, and sexual molestation from other inmates. He sued claiming that the lack of legal recognition for intersex persons infringed his fundamental rights, including dignity, freedom from inhuman treatment and sex-based discrimination, freedom of movement and association, the right to a fair hearing, and legal protection.

While the petitioner lost on most of the grounds, he succeeded in his claim for rights violations based on the inhumane treatment he received while in male death roll prison and was awarded compensation for violation of his right to dignity. This provided guidelines for law enforcement on the appropriate treatment of intersex persons, emphasising respect for their dignity and human rights.

¹²⁵ JL Feder 'Kenyan Court Defends Trans Rights In New Ruling' (2014) available at: <https://www.buzzfeednews.com/article/lesterfeder/kenyan-court-defends-trans-rights-in-new-ruling>.

¹²⁶ The Births and Deaths Registration Act, the Registration of Persons Act and The Kenya Citizenship and Immigration Act.

¹²⁷ *R.M v ATTORNEY GENERAL & 4 others* (2010) available at: <http://kenyalaw.org/caselaw/cases/view/72818>.

¹²⁸ *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others* [2014] eKLR available at: <http://kenyalaw.org/caselaw/cases/view/104234/>.

¹²⁹ *R.M v ATTORNEY GENERAL & 4 others* (2010) available at: <http://kenyalaw.org/caselaw/cases/view/72818>.



These decisions contributed to the recognition of intersex persons as Kenya's third gender, marked by an 'I' gender identifier under the Children Act of 2022.¹³⁰ Through this legislation Kenya becomes the first African nation to grant universal rights to the intersex community. The legislation mandates the dignified treatment of intersex children, ensuring their equal access to essential services like health-care and education, as well as social protection services, recognising their unique needs.

Similarly, the 'Baby A' case involved the parents of an intersex child who challenged the legal and social barriers their child faced in particular the absence of a distinct gender marker for intersex persons. The medical doctor who examined the child after birth put a question mark in the column that is supposed to indicate the sex of the child. The parents challenged this designation on the basis that this violated the child's right to legal recognition, dignity and freedom from inhumane and degrading treatment which guaranteed in the Children's Act and the Constitution of Kenya. The Court acknowledged that there was a need to enact laws and guidelines that are inclusive and protected intersex persons and directed the government to enact the appropriate legal framework on the regulation of the place of intersex persons as a sex category and guidelines and regulations for corrective surgeries of intersex persons. The Court also directed the government to consider the issue of data collection relating to intersex children and persons generally.

The court's ruling in this case provided legal recognition of intersex persons, emphasised the necessity of anti-discrimination measures, and recommended the need for guidelines for healthcare providers to ensure informed consent and appropriate medical care for intersex persons. These judicial decisions have been pivotal in promoting equality, safeguarding the dignity of intersex persons, and prompting further legal and social reforms to support and protect intersex persons from discrimination and inhumane treatment.

These decisions contributed to the recognition of intersex persons as Kenya's third gender, marked by an 'I' gender identifier under the Children Act of 2022.¹³⁰ Through this legislation Kenya becomes the first African nation to grant universal rights to the intersex community. The legislation mandates the dignified treatment of intersex children, ensuring their equal access to essential services like healthcare and education, as well as social protection services, recognising their unique needs. It further stipulates the inclusion of intersex children in child protection centres and similar facilities, while also prohibiting so-called 'sex normalisation' surgeries unless medically recommended. Violators of these provisions face penalties of up to three years imprisonment and a minimum fine of \$5,000. It is also worth mentioning that Kenya set a global precedent by accrediting Intersex persons as Election Observers for its 2022 elections through the Independent Electoral and Boundaries Commission.¹³¹

Prior to this legislative framework and following the cases cited above, the Government of Kenya established the Taskforce on Policy, Legal, Institutional, and Administrative Reforms Regarding Intersex Persons in 2017. The Taskforce released its report in December 2018, presenting various recommendations aimed at enhancing the rights and welfare of intersex persons. To ensure these recommendations were effectively implemented, the Intersex Persons Implementation Committee (IPIC) was established. This committee has since spearheaded significant progress, which includes:

¹³⁰ The Children Act 2022 available at: <https://judiciary.go.ke/download/the-children-act-2022/>.



- i. Introduction of the Intersex Sex Marker: Acknowledging the existence of intersex persons in official documents, enabling them to have a distinct identity.
- ii. Inclusion in the 2018 Census: For the first time, intersex persons were recognised in the national census, with 1,524 individuals being remunerated. This was a crucial step in understanding the demographics and needs of the intersex population in Kenya.
- iii. The 2022 revision of the Persons Deprived of Liberty Act No. 23 of 2014: Under the revised law intersex detainees have the right to choose who searches them and to be held separately, ensuring their dignity and safety.
- iv. **Draft Intersex Persons Bill:** A legislative proposal specifically addressing the needs and rights of intersex individuals is under development.
- v. Collaboration with CSOs: Active partnerships with civil society organisations such as JinsiYangu, Intersex Persons Society (IPS), and Transgender Education & Advocacy (TEA) to advance intersex and transgender rights.

In addition to these efforts, the Kenya National Commission on Human Rights (KNCHR) plays a pivotal role in these advancements. As the host of the Intersex Persons Implementation Committee (IPIC), the Commission has designated SOGIESC focal persons at all levels and mainstreamed SOGIESC issues into its systems and programs. Their comprehensive approach includes:

- i. Strategic litigation and policy reforms aimed at protecting the rights of intersex and transgender persons.
- ii. Initiatives to educate the public and reduce prejudice against intersex and transgender communities.
- iii. Handling and investigating complaints of rights violations, ensuring accountability and justice.
- iv. Collaborating with both state and non-state actors to uphold the rights of intersex and transgender persons.
- v. Joint initiatives with CSOs for outreach, research, and awareness creation.

¹³¹ S Kendi '17 Intersex Persons accredited as Election Observers in Kenya' (ICJ, 2022) available at: <https://icj-kenya.org/news/17-intersex-persons-accredited-as-election-observers-in-kenya/>.



KNCHR's involvement extends to various platforms that unite CSOs and the intersex and transgender communities. They host the Situation Room to coordinate interventions when these communities are at risk and act as a vital link between the government and CSOs, ensuring effective and meaningful engagement with intersex and transgender persons. In its proposal to the National Assembly, KNCHR seeks to promote non-discrimination and fairness for intersex persons in sports through the Intersex Persons Bill, 2024.¹³² This bill is part of a series of amendments aimed at securing equal rights for intersex persons, officially recognised as a third sex by the government in 2019. The bill proposes changes to Kenya's Sports Act of 2013, mandating the Sports and Youth Affairs Ministry's Cabinet Secretary and the newly established National Council for Intersex Persons to adopt measures to ensure fairness for intersex athletes without requiring hormonal alterations.

The commendable efforts made by Kenya towards the protection of intersex children has received the acknowledgement and commendation of the African Committee of Experts on the Rights and Welfare of the Child.¹³³ The Children's Committee praised the establishment of a Task Force on Policy, Legal, Institutional, and Administrative Reforms for Intersex Persons in Kenya in 2017 and recommended that the State Party consider and implement the Task Force's report to improve the registration processes for intersex children.

C) Regressive steps

Despite advancements in legislation, discrimination and violence against transgender and intersex persons persist in Kenya, illustrating the ongoing challenges faced by these communities. In a distressing incident in late January 2020,¹³⁴ a Ugandan transgender refugee was brutally attacked in Kakuma Refugee Camp by a group of Sudanese refugees, leaving them severely injured. This attack was reportedly the fifth targeting the transgender refugee. Other tragic instances of violence include the murder of Erica Changra, a transgender woman, in Nairobi in 2021 and the murder of Rose Mbesa, an intersex woman in July 2022, further highlighting the vulnerability of intersex and transgender persons to violence.

The case of Transgender Education & Advocacy (TEA) v. Kenya Medical Practitioners and Dentist Board and others¹³⁵ represents a retrogressive step in the fight for transgender and intersex rights. TEA filed a judicial review application with the Kenyan High Court on 10 July 2014, seeking an order to compel the Kenya Medical Practitioners and Dentist Board, as well as the Ministry of Health, to formulate medical guidelines specifically tailored for the treatment of transgender persons. TEA aimed to address the lack of comprehensive healthcare protocols catering to the unique needs of transgender persons in Kenya. The High Court dismissed TEA's case, deeming it premature. The court noted that the Kenya Medical Practitioners and Dentist Board had already established a task force tasked with advising the Ministry of Health on the development of guidelines concerning the management of 'transgender'. Additionally, TEA was ordered to cover the state's legal expenses. The dismissal of TEA's case, along with the imposition of legal costs, illustrates the challenges faced by marginalised groups in seeking judicial redress. In particular, the award of cost against TEA can discourage other organisations from pursuing necessary legal action, fearing financial repercussions if they do not succeed. This highlights the need for a more supportive legal framework that does not penalise already under-resourced organisations fighting for human rights.

¹³² Intersex Persons Bill, January 2024, available at <https://www.knchr.org/Portals/0/Intersex%20Persons%20Bill%2C%20January%202024%20.pdf>.

¹³³ Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Second Periodic Report of the Republic of Kenya, on the Status of the Implementation of the African Charter on the Rights and Welfare of the Child (November 2020) para 32.

¹³⁴ J Milton 'Transphobes stabbed a vulnerable trans refugee in the head in a brutal and bloody attack' (2020) available at: <https://www.thepinknews.com/2020/01/30/trans-refugee-kenya-kakuma-camp-stabbed-stephen-sebuuma/>.

¹³⁵ Republic v Cabinet Secretary Ministry of Health & 2 others Ex-Parte Transgender Education and Advocacy (Suing Through Its Officials) Audrey Mbugua Ithibu (Chairperson) & 2 others [2015] eKLR available at: <http://kenyalaw.org/caselaw/cases/view/105454>.

Kenya's legal framework lacks provisions for recognising the gender identity of transgender persons. The Registration of Persons Act stipulates that individuals must be classified as either male or female in the principal register of persons, with the High Court defining 'sex' in these terms in 2007. Despite legal avenues for name changes, as established by a High Court ruling in 2014, transgender persons still face obstacles in obtaining legal recognition of their gender identity. Although efforts have been made to advocate for legal recognition through submissions to legislative bills, such as the 2016 Health Bill, no substantive changes have been enacted to address this issue, perpetuating stigma, and discrimination against transgender persons.

Hate speech from politicians and religious leaders contributes to societal stigma and legitimises violence against intersex and transgender persons.¹³⁶ Proposed legislation, such as the Family Protection Bill 2023,¹³⁷ seeks to further criminalise same-sex activities and restrict rights for sexual and gender minorities, reflecting ongoing challenges to advocacy and legal recognition. Media coverage often sensationalises violence against transgender persons, perpetuating harmful stereotypes and contributing to societal prejudice. Instances like *A.N.N v Attorney General* highlight the media's role in perpetuating discrimination and violating the dignity of transgender persons.

D) Opportunities for intervention by KNCHR

Amidst these obstacles, Kenya's courts have emerged as beacons of progress in recent decades. Through landmark decisions, they have sought to affirm the rights of intersex and transgender persons, challenging societal norms and advocating for their rightful recognition as individuals with agency and dignity. Besides, Kenya's position during the Universal Periodic Review (UPR) process since 2017 highlights a mixed response to recommendations concerning discrimination and violence against marginalised groups, particularly women and sexual and gender minorities. Kenya accepted several recommendations aimed at combating discrimination and collecting disaggregated data to address inequalities, such as those from Argentina and Cyprus. Recommendations from the Netherlands to eliminate workplace harassment and discrimination were also accepted. However, Kenya noted but did not accept numerous recommendations to decriminalise consensual same-sex relations and enact comprehensive anti-discrimination laws, as proposed by countries like Australia, Canada, Chile, and others. This selective acceptance and noting of recommendations reflect a cautious approach towards sexual and gender minority rights, balancing between international human rights obligations and domestic socio-political dynamics.

From the above, there is a need to develop appropriate legal frameworks and guidelines for the treatment of intersex and transgender persons, addressing the systemic challenges faced by intersex and transgender persons through policy reform. Partial legal victories such as *Audrey Mbugua v. Kenya National Examination Council (KNEC)*, could provide a springboard for KNCHR to advocate for the full legal gender recognition of transgender persons, allowing for change in gender on relevant identification documents.

Enhancing public awareness and education is crucial to dismantle entrenched binary assumptions regarding gender and sexuality. Strengthening the implementation of existing legal protections and ensuring accountability for violations is essential. Advocacy for the inclusion of specific protections for sexual orientation and gender identity in relevant legal frameworks is also necessary. Additionally, efforts to address police harassment, extortion, and discriminatory practices in healthcare, housing, and employment are imperative to improve the situation for transgender and intersex persons in Kenya.

¹³⁶ B Oruta 'Kenyan react to MP's remarks on gay rights' (2023) available at: <https://www.the-star.co.ke/news/2023-01-12-kenyans-react-to-mps-remarks-on-gay-rights/>.

¹³⁷ 'Family Protection Act 2023' available at: <https://www.washingtonblade.com/content/files/2023/04/Family-Protection-Act-2023.docx>.



Prevailing political goodwill, especially regarding the protection of intersex persons, presents a unique opportunity for KNCHR. Capitalising on this goodwill, the commission can push for comprehensive legal reforms and policies that specifically protect intersex persons. Engaging with lawmakers and policymakers ensures that intersex and transgender rights are included in broader human rights frameworks, providing a solid foundation for further advancements.

The progressive constitution and supportive court decisions provide a solid legal foundation for advocating for stronger protections and legal recognition for intersex and transgender persons. KNCHR can highlight these legal foundations in advocacy and public education efforts, reinforcing the legitimacy and necessity of these protections.

The implementation of the Intersex Task Force Report offers a direct avenue for impactful intervention. KNCHR can support and monitor the implementation of the report's recommendations, alongside other concluding observations from treaty bodies such as the Human Rights Committee observations on the fourth periodic report of Kenya.¹³⁸ The Human Rights Committee expressed significant concerns regarding the treatment of sexual and gender minorities in Kenya, particularly in relation to the criminalisation of same-sex relations and societal discrimination. The Committee highlighted the following issues:

Sections 162 and 165 of the Penal Code criminalise same-sex relations, and a 2019 High Court ruling upheld these provisions as constitutional. The State justified the prohibition of same-sex relations based on cultural and societal values but did not provide measures to combat discriminatory attitudes and stigma. Sexual and gender minorities face harassment, discrimination, and violence from law enforcement and vigilante groups, along with barriers to justice. Instances of children being expelled from schools due to their actual or perceived sexual orientation or gender identity. Reports of non-urgent, irreversible surgical procedures, infanticide, and abandonment of intersex children. The Committee raised concerns about arbitrary arrest and detention, particularly among human rights defenders, journalists, civil society representatives, and sexual and gender minorities. The Committee expressed concerns about clause 23(5) of the asylum Bill, which requires asylum seekers to abide by all Kenyan laws and allows for the cancellation of asylum applications for law violations. This could result in LGBTI refugees facing refoulement due to the illegality of same-sex relations. The Committee noted that national legal provisions have been used to limit online expression, repress sexual and gender minorities, and suppress criticism of the government, affecting human rights defenders, journalists, and CSOs.

As part of its mandate in monitoring Kenya's compliance with international human rights obligations, the KNCHR has a role to play in following up with other relevant state actors on the implementation of these recommendations. In particular, the KNCHR should advocate for the decriminalisation of same-sex relations by amending relevant laws, conduct awareness campaigns to combat discriminatory attitudes, and intensify efforts to eliminate discrimination and violence against sexual and gender minorities, ensuring their access to justice. Immediate steps should be taken to prevent the expulsion of children from schools based on their SOGIESC, and measures should be strengthened to protect intersex children from unnecessary medical procedures, providing effective remedies for victims. The KNCHR should also advocate for police reform, investigate arbitrary arrests, safeguard the freedom of expression, protect LGBTI refugees from refoulement, and enhance civic space by operationalising relevant acts and policies. Ensuring these recommendations lead to tangible improvements in the lives of intersex and transgender persons and is crucial for advancing their rights and well-being.

¹³⁸ CCPR/C/UZB/CO/R.5 available at <https://www.knchr.org/Portals/0/ICCP%20Concluding%20Observations.pdf>.



3.3 Liberia

A) General situational analysis

Despite being one of the two African countries that were never formally colonised, Liberia grapples with deeply ingrained societal attitudes, legal gaps, and systemic discrimination against transgender and intersex persons. The Constitution of Liberia lacks express provisions safeguarding these rights, and existing laws do not offer protection or recognition for transgender and intersex persons in various sectors, including healthcare, education, housing, and employment.¹³⁹ While section 2.4(b) of the Decent Work Act of 2015¹⁴⁰ theoretically protects individuals from workplace discrimination regardless of sexual orientation or gender identity, enforcement remains inconsistent.

The current employment policy¹⁴¹ in Liberia outlines strategies aimed at fostering gender equality, facilitating the employment of individuals with disabilities, and promoting the social inclusion of disadvantaged youth. However, there is a notable absence of clear strategies to enhance the employability of individuals with diverse sexual orientations and gender identities or to address workplace discrimination against them. The National Gender Policy of 2009¹⁴² only acknowledges various vulnerable groups, including children, youth, the elderly, people living with HIV, and individuals with disabilities, who require support to engage in national development programs. Consequently, despite constitutional protections of fundamental rights, including the rights to life, liberty, and security,¹⁴³ the lived realities of transgender and intersex persons in Liberia are characterised by discrimination, marginalisation, violence, and social exclusion.¹⁴⁴

This is further exacerbated by the continued criminalisation of same-sex conducts which have pernicious effect on the lives of sexual and gender minorities. As noted by the UNDP and OHCHR in a 2020 report:

Beyond the immediate threat of arbitrary arrest and detention, the existence of laws criminalizing consensual same-sex conduct may deter victims of homophobic and transphobic hate crimes from coming forward to report incidents to the police – for fear of exposing themselves to harassment, extortion or arrest by police officers if their sexual orientation or gender identity were to become known.¹⁴⁵

Thus, in the absence of clear guidance beyond the Penal Law regarding sexual orientation and gender identity, local authorities and law enforcement officials struggle with implementation, leading to cases of arbitrary detention, abuse, and extortion based on sexual orientation or gender identity.¹⁴⁶ Transgender and intersex persons in Liberia often experience social ostracism and violence from family members,¹⁴⁷ as well as discrimination and mistreatment within the healthcare system.¹⁴⁸ Despite the high prevalence of HIV among key populations,¹⁴⁹ including transgender persons, stigma, discrimination, and punitive laws hinder access to prevention and treatment services. Reports¹⁵⁰ also indicate widespread negative attitudes among healthcare providers towards transgender persons, resulting in humiliating treatment¹⁵¹ and denial of care.¹⁵² Instances of violence, such as the attack on an HIV testing centre in 2019,¹⁵³ highlight the pervasive threat of physical harm and discrimination. The fundamental human rights of transgender persons remain inadequately protected, particularly in efforts to address sexual and gender-based violence and provide sexual and reproductive health services.¹⁵⁴ Transgender persons face harassment and are often denied access to public offices, transportation and health facilities. For instance, it is reported that in July 2016 a transgender social worker was harassed denied access to the Ministry of Health by security officers on account that she had hair that made her look like a woman.¹⁵⁵



The absence of laws prohibiting conversion therapies or unnecessary medical interventions on intersex minors without their consent further exacerbate the plight of transgender and intersex persons in Liberia. The absence of legislation prohibiting incitement to hatred, violence, or discrimination based on these attributes, further exposes transgender and intersex persons to violence and abuse, with minimal or no consequences for perpetrators. Moreover, Liberia's laws do not permit individuals to change their names or gender markers on identification documents, which is essential for many transgender and intersex persons.

Additionally, even though the Associations Law of 1977 allows the registration of NGOs for 'any lawful purpose' this provision is used to deny registration to organisations formed for advocacy for the rights of LGBTI persons as illustrated by the rejection of the application of Trans Network of Liberia (TNOL) to be registered as a legal entity by the Liberia Business Registry on the basis that the 'articles of incorporation includes activity which is not allowed in Liberia'.¹⁵⁶ This refusal to register sexual and gender minority organisations means that they often are unable to legally rent office space, open bank accounts nor raise funds from donors to support their advocacy activities, resulting in the further marginalisation of these communities.

Several organisations work for sexual and gender minority rights in Liberia, but they face significant challenges, including legal and security issues, discrimination within the community and health institutions, and increasing hate crimes. The lack of a legal framework to protect basic human rights exacerbates problems such as blackmail. The homophobic and transphobic climate within the political sphere poses severe safety risks to sexual and gender minorities.¹⁵⁷

Intersex and transgender students often experience harassment, bullying, and expulsion due to their sexual orientation or gender identity.¹⁵⁸ The Lesbian and Gay Association of Liberia documented 14 cases of abuse, ranging from mob violence to physical assault and reports from local media highlighted threats from residents of Sinoe County to harm individuals associated with homosexuality.¹⁵⁹ Incidents of violence against sexual and gender minorities, particularly transgender persons remain alarmingly prevalent, as highlighted in the Shadow Report submitted to the Human Rights Committee during its 122nd session. As a case in point, in early 2017, a trans person was violently expelled from their family home in New Georgia due to their SOGIESC, leaving them homeless and vulnerable. Additionally, another trans individual in Grand Bassa County was subjected to a brutal gang rape, underscoring the pervasive risks and discrimination faced by the transgender community. These incidents not only reflect ongoing physical threats but also systemic failures in protecting the fundamental rights of sexual and gender minorities in Liberia.

¹³⁹ Stop AIDS in Liberia (SAIL) et al 'Human Rights Violations Against Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Liberia (2017) available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=INT%2FCCPR%2F2017/27270&Lang=en.

¹⁴⁰ Decent Work Act 2015, available at: [https://database.ilga.org/api/downloader/download/1/LR%20-%20LEG%20-%20Decent%20Work%20Act%20\(2015\)%20-%20OFF%20\(en\).pdf](https://database.ilga.org/api/downloader/download/1/LR%20-%20LEG%20-%20Decent%20Work%20Act%20(2015)%20-%20OFF%20(en).pdf).

¹⁴¹ Republic of Liberia Ministry of Labour (2009). Employment Policy, p 16.

¹⁴² Ministry of Gender and Development (2009 available at: www.africanchildforum.org/clr/policy%20per%20country/liberia/liberia_gender_2009_en.pdf).

¹⁴³ Article 20 of the Liberian Constitution.

¹⁴⁴ US Department of State '2020 Country Reports on Human Rights Practices: Liberia', available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/liberia/>.

¹⁴⁵ UNDP & OHCHR 'Sexual orientation, gender identity and rights in Africa: Liberia country report' (2020) 25, available at <https://www.ohchr.org/sites/default/files/Documents/Countries/LR/OHCHR-UNDP-SOGIR-Report-Liberia.pdf>.

Survey results further revealed that traditional norms and cultural attitudes still pose obstacles to broader societal acceptance and legal reform. Media and civil society frequently report harassment directed at individuals based on their SOGIESC, often with some newspapers specifically targeting sexual and gender minorities. Persistent anti-LGBTQI+ hate speech remains a significant issue. Public figures, including government officials and traditional or religious leaders, frequently make public statements that are homophobic and transphobic in nature. While there are no legal barriers preventing advocacy on sexual and gender minority issues or the formation of intersex or transgender organisations, few engage in these activities due to widespread fears of verbal or physical abuse, as anti-gay sentiments are commonly expressed in political, social, and religious contexts.

The government does not permit individuals to change their gender identity markers on official documents to align with their gender identity, and there are no provisions for individuals to identify as ‘non-binary/intersex/gender non-conforming’. Attempts to criminalise same-sex sexual activity have not been fully realised, but societal attitudes and cultural norms contribute to the marginalisation and stigmatisation of intersex and transgender persons. Hate crimes, rejection by families, and exclusion from various aspects of life are common experiences.¹⁶⁰

The media significantly contributes to fostering intolerance and violence against sexual and gender minorities through misleading, biased, and incendiary reporting. Politicians have worsened this environment by making public statements condemning homosexuality, often citing religious and cultural reasons. The Liberian Council of Churches further intensified this hostility by blaming sexual and gender minorities for the Ebola virus outbreak, with over 100 religious leaders endorsing a prejudiced statement that linked Ebola to homosexuality.¹⁶¹ In this vein, sexual and gender minorities face numerous barriers to accessing sexual and reproductive health and rights. These challenges include social isolation, lack of education, traditional practices, economic disparities, violence, and issues related to confidentiality and stigmatisation. The Ebola crisis has further strained Liberia’s already fragile healthcare infrastructure, resulting in limited or non-existent treatment services.

¹⁴⁶ Human Rights Watch “‘It’s Nature, Not a Crime’ Discriminatory Laws and LGBT People in Liberia’ (2013) available at: <https://www.hrw.org/report/2013/12/03/its-nature-not-crime/discriminatory-laws-and-lgbt-people-liberia>, p 11-36.

¹⁴⁷ Human Rights Watch (as above).

¹⁴⁸ Human Rights Watch (as above).

¹⁴⁹ UNAIDS ‘Liberia: County Factsheet’ (2022) available at: <http://www.unaids.org/en/regionscountries/countries/liberia>.

¹⁵⁰ Stop AIDS in Liberia (SAIL) et al (n 134 above).

¹⁵¹ Human Rights Watch (n 141 above).

¹⁵² Stop AIDS in Liberia (SAIL) et al (n 134 above).

¹⁵³ US Department of State ‘Country Reports on Human Rights Practices: Liberia’ (2019) available at: <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/liberia/>.

¹⁵⁴ Shadow report on Liberia. Submitted to: Committee on the Elimination of Discrimination Against Women (2015) available at: <https://ilga.org/wp-content/uploads/2016/02/Liberia-Shadow-Report-for-the-62nd-Session-of-CEDAW.pdf>.

¹⁵⁵ UNDP & OHCHR (n 140 above) 34.

¹⁵⁶ Stop AIDS in Liberia (SAIL) et al (n 134 above).



International positions on sexual and gender minority rights have also influenced the situation in Liberia. The US government's announcement to consider sexual and gender minority rights in foreign aid decisions and the UK's contemplation of reducing aid to countries that violate sexual and gender minority rights were perceived by many Liberians as threats to their international assistance.¹⁶² This perception sparked media debates on decriminalising same-sex sexual behaviour and legalising same-sex marriage, further inflaming public attitudes against sexual and gender minorities. Opponents of SOGIESC-related rights argued that these international policies represented a new form of colonialism, imposing foreign values on Liberia.

B) Advancement towards protection

While progress has been slow, there has been some advancement towards the protection of the rights of transgender and intersex persons in Liberia, especially in policy documents that recognises their vulnerabilities and the need to address these vulnerabilities. For instance, the Liberia National Human Rights Action Plan of 2013 recognises the vulnerability of several groups including persons of a different sexual orientation and gender identity and commits to a number of actions to address these vulnerabilities, even though 'no further specific actions are identified that pertain to people of diverse sexual orientation and gender identity'.¹⁶³ This is a step in the right direction and which should be built on to enhance protection for transgender and intersex persons. Another government policy that recognises the vulnerability of sexual and gender minorities is the National HIV and AIDS Strategic Plan 2015-2020 which acknowledges the disproportionate HIV burden borne by men who have sex with men (MSM), resulting in the National AIDS Commission and Ministry of Health recognizing the need to provide information on HIV prevention and the provision of related services in order to meet the needs of each key population group, including MSM.¹⁶⁴ In acknowledging the vulnerabilities faced by sexual and gender minorities, the Ministry of Health has appointed a coordinator tasked with facilitating access to healthcare services and police support specifically for minority groups, including sexual and gender minorities.¹⁶⁵ This appointment reflects a proactive step towards addressing systemic barriers and promoting inclusivity within Liberian society.

Human rights defenders and sexual and gender minority activists in Liberia have also made strides in raising awareness and advocating for change. Efforts include human rights training, community dialogues, and campaigns aimed at combating discrimination and violence.¹⁶⁶ One notable advancement is the progress made within the Liberian National Police (LNP) through initiatives led by the Community Services Section. Following human rights education initiatives, the LNP has reported improvements in addressing crimes against sexual and gender minorities.¹⁶⁷ Activists have observed positive changes in how officers handle cases, ensuring better protection for victims within these communities, despite initial concerns about stigma and mistreatment based on sexual orientation and gender identity.

¹⁵⁷ SIDA 'The rights of LGBTI People in Liberia (2014) available at: <https://cdn.sida.se/app/uploads/2021/05/07084552/rights-of-lgbt-persons-liberia.pdf>

¹⁵⁸ G Stewart 'Liberia: Access to Justice Remains a Top Concern for the LGBTQ+ Community in Liberia' (2023) available at: <https://allafrica.com/stories/202310150103.html>.

¹⁵⁹ 2022 Country Reports on Human Rights Practices: Liberia.

The survey results also revealed that at least since the past four years, the Independent National Commission on Human Rights (INCHR) has been involved with SOGIESC issues, including receiving reports on human rights violations against sexual and gender minorities, even though it encounters significant challenges in advocating for transgender and intersex rights. These challenges include the absence of a specific legal framework that recognises and protects these persons, pervasive social stigma and discrimination that deter them from seeking assistance, limited financial and operational resources, and a need for specialised training among its staff to effectively handle cases and advocate for their rights.

C) Regressive steps

Currently, same-sex sexual conduct is illegal in Liberia, classified as ‘voluntary sodomy’ under Section 14.74 of the Penal Law. This law applies to both men and women, categorising the offence as a minor misdemeanour, punishable by up to one year of imprisonment. Despite this existing law, the Liberian legislature has considered implementing more restrictive measures. For example, in July 2012, the Senate passed a bill to ban same-sex marriage, classifying it as a first-degree felony with penalties of up to five years in prison. This bill, an amendment to the Domestic Relations Law, has not been enacted. The bill faced criticism from the Office of the High Commissioner for Human Rights, and President Sirleaf while reaffirming her position against decriminalising same-sex sexual activity, committed to vetoing any new anti-homosexuality laws, leading to the bill not being adopted.¹⁶⁸ Furthermore, in November 2018, Representative Clarence Massaquoi of Lofa County introduced a bill to amend the penal code to criminalise ‘same-sex practices’. This bill was not discussed before the legislature went on recess in December.¹⁶⁹ In March 2020, there was a proposal to escalate the penalties for ‘voluntary sodomy’ by reclassifying it as a second-degree felony, included in a set of proposed amendments aimed mainly at ‘involuntary sodomy’.¹⁷⁰ Former President Sirleaf stated she would veto any proposed legislation targeting homosexuality and would not engage in LGBTI politics, citing cultural and traditional values. The former Solicitor General remarked that decriminalising the existing anti-gay law would be ‘political suicide’.¹⁷¹

Again, the refusal of registration of organisations such as the Trans Network of Liberia (TNOL) in 2016 by the Liberia Business Registry signifies continued regressive measures in violation of the freedom of expression and association for transgender persons in Liberia.¹⁷² This rejection underscores the challenges faced by groups seeking official recognition to advocate for transgender rights and equality. Furthermore, incidents of transphobic discrimination and the detention of activists further underscore the hostile environment in which these advocates operate. Such actions not only restrict the ability of transgender activists to organise and mobilise effectively but also perpetuate a climate of fear and marginalisation within sexual and gender minorities in Liberia.

¹⁶⁰ US Department of State (n 139 above).

¹⁶¹ SIDA (n 151 above).

¹⁶² SIDA (as above).

¹⁶³ UNDP & OHCHR (n 140 above) 26.

¹⁶⁴ UNDP & OHCHR (n 140 above) 27.



D) Opportunities for intervention by INCHR

Liberia's Universal Periodic Review (UPR) has highlighted significant areas for improvement in its human rights record, particularly concerning sexual and gender minority rights. Liberia has received numerous recommendations from various countries to decriminalise same-sex relations and combat discrimination and violence based on sexual orientation or gender identity. Recommendations from Portugal, Spain, East Timor, the United States, Canada, Costa Rica, France, Iceland, Ireland, Israel, Italy, Mexico, and Chile emphasised the need to repeal discriminatory laws, promote social acceptance through awareness campaigns, and protect sexual and gender minorities from violence and harassment. Despite these recommendations, Liberia has noted many of them, acknowledging the concerns but not yet committing to concrete actions, except for Israel's recommendation to adopt comprehensive anti-discrimination legislation, which was accepted. It is however, instructive that Liberia's representative to the Human Rights Council indicated during UPR oral discussions in 2015 that 'the government would like to tread cautiously in this area until there has been adequate public discourse, sensitization and awareness on the need to protect these rights' in response to recommendations by Brazil, France, Poland, Ireland, Canada and Colombia on the need to safeguard the rights of LGBT persons in the country.¹⁷³ This presents an opportunity for the INCHR to design and implement programmes aimed at community sensitization and awareness raising.

While the INCHR maintains positive relations with CSOs working on SOGIESC issues, there is a recognised gap in targeted advocacy for transgender and intersex rights. To address these challenges, it is recommended that the INCHR prioritise capacity building initiatives, including training programs for staff on SOGIESC issues, and advocate for the inclusion of transgender and intersex rights in Liberia's National Human Rights Action Plan (NHRAP), which already acknowledges the vulnerabilities of these communities. Moreover, the INCHR can significantly improve the situation for transgender and intersex persons in Liberia through several strategic interventions. One key area is media engagement and education, where the INCHR can collaborate with media houses to promote fair and balanced reporting on SOGIESC-related issues, organise training workshops for journalists on ethical reporting, and launch public awareness campaigns to counteract misinformation.

Legislative advocacy is another crucial intervention, with the INCHR providing policy recommendations for decriminalising same-sex conduct, supporting legislators willing to introduce protective bills, and opposing new anti-LGBTI legislation. Additionally, enhancing community support and protection by establishing safe spaces and offering legal assistance to those facing persecution can create a safer environment for the community. In the healthcare sector, the INCHR can collaborate with health institutions to ensure that transgender and intersex persons receive adequate care, provide training for healthcare professionals on SOGIESC-specific needs, and work to improve access to sexual and reproductive health services.

¹⁶⁵ US Department of State '2022 Country Reports on Human Rights Practices: Liberia'.

¹⁶⁶ See for instance 'Protection and Support of Enabling Environments for Women and Human Rights Defenders in Liberia' (2021-2022) available at: https://mptf.undp.org/sites/default/files/documents/2024-02/ktk_unpbf_evaluation_report_clean.pdf.

¹⁶⁷ US Department of State '2022 Country Reports on Human Rights Practices: Liberia'.

¹⁶⁸ T Ford & B Allen 'Nobel peace prize winner defends law criminalising homosexuality in Liberia' (The Guardian, 2012) available at: <https://www.theguardian.com/world/2012/mar/19/nobel-peace-prize-law-homosexuality>.

Liberia's receipt of recommendations during its UPR presents clear opportunities for international and domestic intervention to advance sexual and gender minority rights. These recommendations underscore critical areas where targeted interventions can make a significant impact. International stakeholders, including CSOs, NHRIs, policy makers, and diplomatic missions, can support advocacy efforts to encourage Liberia to implement these recommendations fully. Collaborative initiatives can include providing technical assistance for legal reforms, supporting awareness campaigns to foster social acceptance, and engaging with local transgender and intersex communities to strengthen advocacy and support networks.



¹⁶⁹ '2018 Country Reports on Human Rights Practices: Liberia' available at <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/liberia/>.

¹⁷⁰ Liberia country database available at: <https://database.ilga.org/liberia-lgbti>.

¹⁷¹ SIDA (n 151 above).

¹⁷² Human Rights Watch (n 141 above).

¹⁷³ UNDP & OHCHR 'Sexual orientation, gender identity and rights in Africa: Liberia country report' (2020) 26, available at <https://www.ohchr.org/sites/default/files/Documents/Countries/LR/OHCHR-UNDP-SOGIR-Report-Liberia.pdf>.



3.4 Malawi

A) General situational analysis

Malawi faces a complex legal, social, and cultural landscape concerning the rights and protections of transgender and intersex persons. Amidst conflicting values between tradition and modernity, the issue of SOGIESC has become a battleground in courts, public debates, and advocacy circles. The intersection of legislation, societal norms, and human rights principles shapes the lived experiences of intersex and transgender persons in Malawi, that impact their rights, well-being, and access to essential services.

Malawi's legal framework contains provisions that can be wielded against individuals based on their gender identity and expression. For instance, Penal Code provisions such as section 180(g) on 'idle and disorderly persons' and section 153(c) on 'unnatural offence' are used to persecute individuals based on their gender identity and expression. Section 153 of the Penal Code, revised in 2011, declares that engaging in 'carnal knowledge of any person against the order of nature' constitutes a felony, punishable by up to 14 years in prison. Furthermore, Section 156 prohibits 'indecent practices between males', regardless of whether they occur in public or private, with a penalty of up to five years of imprisonment. Moreover, section 156 of the Penal Code perpetuate discrimination by criminalising acts perceived as deviating from societal norms, potentially targeting intersex persons despite the guarantees the right to equality and protection from discrimination under section 20 of the Malawian Constitution.

Sexual and gender minorities continue to face discrimination, exclusion, harassment and violence at the hands of community members and often state officials that are supposed to be protecting their rights.¹⁷⁴ The police often fail to assist sexual and gender minorities who have been assaulted due to their status or have other criminal complaints. Instead, they may threaten to disclose the complainant's SOGIESC status to family, friends, or colleagues to coerce a confession. In some cases, transgender persons are brought to the police station under false pretences and then asked for money or sexual favours in

¹⁷⁴ Southern Africa Litigation Centre & Nyasa Rainbow Alliance "We get traumatised in different ways": Key issues related to sexual orientation, gender identity and expression identified by a community consultation in Malawi' (2020), available at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/11/Malawi-research-report.pdf>.

¹⁷⁵ Human Rights Watch "Let posterity judge": Violence and discrimination against LGBT people in Malawi' (2018) 21, available at <https://www.hrw.org/report/2018/10/26/let-posterity-judge/violence-and-discrimination-against-lgbt-people-malawi>.

¹⁷⁶ The State v. Jana Gonani, Criminal Case No. 547 of 2021.

¹⁷⁷ Southern Africa Litigation Centre 'Laws and policies affecting transgender persons in Southern Africa' (2016) 28, available at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Transgender-Rights-Booklet.pdf>.

exchange for their release.¹⁷⁵ Additionally, some police officers are reported to have forced sexual and gender minority detainees to undergo non-consensual genital verification to determine their gender.¹⁷⁶ There have also been instances where sexual and gender minorities have been subjected to involuntary medical examinations to assess their mental faculties solely based on their SOGIESC, operating under the misguided belief that identifying as sexual and gender minority is a sign of insanity. Reports also suggest that police often use vagrancy laws to harass and intimidate transgender persons, on account of being found in a public place without a legitimate purpose or engaging in indecent acts in public, among others.¹⁷⁷

Intersex children in Malawi face multifaceted challenges, including invisibility, stigma, and discrimination. The absence of legal frameworks to protect their rights exacerbates their vulnerability. Reports indicate widespread discrimination and violence against intersex children, with societal norms and superstitious beliefs amplifying their marginalisation. Instances of bullying in schools, lack of teacher capacity to address gender diversity, and inadequate school environments illustrate the pervasive nature of discrimination, hindering these children's access to education and impeding their personal development. However, a recent survey report revealed changing attitudes among Malawians towards intersex persons with 83% of those who participated in the survey indicating that they would accept an intersex family member and 86% further indicating that intersex persons should be included in culture and tradition,¹⁷⁸ depicting increasing understanding and acceptance of intersex persons. On other hand, less than 12% participants of the survey would accept a transgender family member, while just about 20% agreed that transgender persons should be able to partake in culture and traditions, illustrating the continued stigmatisation and discrimination against transgender persons in Malawi.

The healthcare system in Malawi inadequately addresses the needs of intersex persons, perpetuating harmful practices such as non-consensual surgeries and sterilisation. Deep-seated cultural beliefs, including associating intersex conditions with witchcraft, contribute to the mistreatment and neglect of intersex children. The lack of expertise among healthcare professionals exacerbates the physical and psychological health risks faced by intersex persons.

In terms of enabling legal framework, there is no specific legislation addressing the rights of transgender persons or legal precedents for gender identity amendments. The National Registration Act (Act No. 13) of 2010 outlines procedures for updating personal details. Section 20(1) requires district registrars to record significant changes in a registered person's particulars, notify the Director of these changes, and recommend issuing a new identity card. Section 21(1) allows registered individuals to apply for a new card with an updated photograph if their appearance changes significantly. However, under the Marriage, Divorce, and Family Relations Act (2015), gender is defined as 'the sex of a person at birth', limiting legal recognition for transgender and intersex persons. It remains uncertain whether applications for gender-specific changes would be approved, especially given documented instances of state-sanctioned discrimination against transgender and gender-diverse persons in Malawi.

¹⁷⁵ The Other Foundation 'Under wraps: A survey of public attitudes to homosexuality and gender non-conformity in Malawi' (2019), available at <https://theotherfoundation.org/wp-content/uploads/2019/09/Other-Foundation-Malawi-Paper-v7.pdf>.

¹⁷⁹ US Department of State '2023 Country Reports on Human Rights Practices: Malawi' available at <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/malawi/>.



NGOs advocating for sexual and gender minority issues have navigated legal challenges by adopting nondescript names to minimise scrutiny, yet they continue to face substantial operational hurdles. In April 2011, the Ministry of Information and Civic Education held press conferences to publicly criticise a funding proposal addressing SOGIESC issues, which had been submitted to the Norwegian Embassy. In 2016, the Nyasa Rainbow Alliance (NRA) applied to the Registrar General's Department to formally incorporate and register as the Registered Trustees of NRA. However, in 2017, the Minister of Justice and Registrar General rejected their registration, citing that the organisation's membership practices contravened Malawian laws. Even though the trustees of NRA modified the application to remove references to LGBT rights, they encountered continued government resistance to reconsider their decision refuse registration.¹⁷⁹ This refusal compelled the trustees to seek judicial review of the decision, with the cases subsequently certified in 2018 by the Chief Justice as a constitutional matter. The case was then set down for hearing in September 2022, but was adjourned citing logistical reasons and a new date for hearing is yet to be set.¹⁸⁰

NGOs advocating for sexual and gender minority rights also face online harassment and threats, with their senior officers targeted on social media platforms for allegedly undermining cultural values, yet there was no government response to these threats. Additionally, the government's ban on registering sexual and gender minority asylum seekers and refusal to grant refugee status based on SOGIESC left sexual and gender minority refugees feeling unsafe in the country.¹⁸¹ Although there is limited information on coercive medical or psychological practices targeting intersex and transgender persons, reports indicated instances where police labelled individuals as mentally unfit and subjected them to forced psychological evaluations. However, there are no documented cases of medically unnecessary surgeries performed on intersex persons without their consent.¹⁸²

At the judicial level, in June 2024, Malawi's Constitutional Court dismissed¹⁸³ two constitutional cases brought Jana Gonani and Jan Willem Akster challenging the legality of sections 153, 154, and 156 of Malawi's Penal Code, which criminalise same-sex relationships and 'unnatural offenses'. Both applicants are undergoing criminal trials in lower courts: Akster faces accusations of child abuse, while Gonani a 29-year-old Malawian transgender woman was convicted of two counts of 'false pretence', for presenting as a woman and a single count of 'unnatural offence'.¹⁸⁴ Gonani was sentenced to eight years in a men's prison in December 2021, and Akster's case is ongoing. The two legal challenges were consolidated into a single case for judicial review, with the court holding that the applicants did not sufficiently demonstrate that these laws specifically discriminate against sexual and gender minorities.¹⁸⁵ Justices Joseph Chigona, Chimbigzani Kacheche, and Vikochi Chima emphasised that the responsibility to amend such laws lies with Parliament, not the judiciary.¹⁸⁶ In August 2023, reports indicated that a parliamentary committee drafted a recommendation advocating for a referendum on the issue rather than judicial adjudication. The decision means that criminal proceedings against Akster and Gonani will proceed in lower courts.

¹⁸⁰ Southern Africa Litigation Centre 'JW & 4 others v State, Ministry of Justice & Constitutional Affairs – Challenging the refusal to register Nyasa Rainbow Alliance (NRA): Factsheet' (2023), available at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/NRA-CASE-FACT-SHEET-2023.pdf>.

¹⁸¹ As above.

¹⁸² US Department of State (as above).

¹⁸³ Declaration by the Ministry of Justice – Malawi, available at: <https://www.facebook.com/photo/?fbid=482917017461754&set=a.140120528408073>.

¹⁸⁴ KS Wepukhulu and H Chinele 'Could the historic case of a trans sex worker and Malawi's anti-LGBTIQ law? (2023), available at <https://www.opendemocracy.net/en/could-the-historic-case-of-a-trans-sex-worker-end-malawis-anti-lgbtq-law/>.

¹⁸⁵ L M'bwana 'Malawi court disowns same-sex marriages' (The Maravi Post, June 28, 2024) available at: <https://www.maravipost.com/malawi-court-disowns-same-sex-marriages/>.

¹⁸⁶ R Igual 'Malawi: Regressive Step as High Court Upholds Ban on Same-Sex Intimacy' (Mamba Online, 2024) available at: <https://www.mambaonline.com/2024/06/29/malawi-regressive-step-as-high-court-upholds-ban-on-same-sex-intimacy/>.

During the hearing of the case, numerous religious organisations submitted legal documents and orchestrated protests opposing sexual and gender minority rights during the hearings.¹⁸⁷ The case triggered a nationwide discussion on same-sex marriage, with religious figures leading demonstrations arguing that the court proceedings sought to legalise same-sex marriages in Malawi. Following the dismissal of the case, the responsibility to safeguard sexual and gender minority rights shifts to parliament. It is imperative for parliament to fulfil Malawi's international human rights commitments by promptly reviewing and revising the Penal Code to eliminate anti-SOGIESC based discrimination and ensure the safety, privacy, and dignity of all persons.

B) Advancement towards protection

Even though progress has been slow, there has been some progress made in advancing the rights of transgender and intersex persons in Malawi which can be capitalised on to further enhance protection. For instance, the National Strategic Plan for HIV and AIDS (2020-25) acknowledges transgender persons and men who have sex with men as key populations whose engagement was necessary to achieve the goals of the plan.¹⁸⁸ The government has also allowed sexual and gender minorities to peacefully assemble, including permitting a Pride march in Lilongwe in June 2021 with the participation of the Malawi Human Rights Commission (MHRC), which served as a powerful platform to advocate for the decriminalisation of same-sex sexual activity, an end to discrimination and violence against sexual and gender minorities, and the provision of equal access to healthcare. By boldly taking to the streets, activists in the pride parade courageously asserted their rights and visibility, challenging prevailing norms and demanding recognition and acceptance.

The MHRC indicated in the survey responses that it has been advocating for the rights of transgender and intersex persons, including publicly speaking against the issuance of the moratorium on the enforcement anti-sodomy laws by the Executive arm of the government, emphasising that legal reforms should ideally be enacted by Parliament. Between 2013 and 2014, the MHRC initiated efforts to address transgender and intersex rights, prompted by numerous reports of violence against these communities. These efforts included engagement meetings with CSOs advocating for transgender and intersex rights. Despite some progress, resistance remains significant, particularly from groups opposed to these rights. Currently, the MHRC employs several strategies to engage with transgender and intersex communities and CSOs working on SOGIESC rights. One of the primary strategies is the organisation of awareness and sensitisation meetings aimed at educating the broader public and specific groups about transgender and intersex rights. These meetings often involve direct interactions with transgender and intersex communities, fostering an inclusive dialogue to understand their challenges and needs. Another critical aspect of the MHRC's efforts involves investigating reported cases of violence against transgender and intersex persons, aimed reducing such violence and ensuring that perpetrators are held accountable, and that victims receive necessary support. Additionally, the MHRC targets groups that oppose transgender and intersex rights through awareness campaigns, aiming to educate and mitigate hostile behaviours. Despite these initiatives, the MHRC faces notable challenges, primarily resistance from groups opposed to transgender and intersex rights. This resistance is often evident in the behaviour of participants during awareness campaigns and engagement meetings.

¹⁸⁷ I. Masauli 'Religious groups march in Malawi before court case on LGBTQ+ rights' (The Guardian, 2024) available at: <https://www.theguardian.com/global-development/2023/jul/14/religious-groups-march-in-malawi-before-court-case-on-lgbtq-rights>.

¹⁸⁸ US Department of State '2023 Country Reports on Human Rights Practices: Malawi', available at <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/malawi/>.



The Commission highlights the need for the reform of the Penal Code, which it views as prohibitive and contrary to Section 20 of the Constitution, which addresses discrimination. Through thorough investigations of violence against transgender and intersex persons, the Commission has consistently advocated for their rights and ensured confidentiality to protect the identities of victims and survivors. Several Directorates within the Commission—namely the Civil and Political Rights Directorate, the Gender and Women’s Rights Directorate, and the Economic, Social and Cultural Rights Directorate—actively address the rights of transgender and intersex persons. Depending on the nature of the issue, these Directorates either handle specific thematic rights or form cross-functional teams to address broader concerns. Capacity-building training on transgender and intersex rights is a priority, and most officers have attended multiple sessions to enhance their understanding and effectiveness in this area.

In response to increased incidents of violence against transgender and intersex persons, the MHRC has trained law enforcement officers to improve access to justice for these communities. Health workers have also been sensitised to the health rights of transgender and intersex persons, leading to a noticeable drop in violence cases. The Commission’s strategy includes issuing advisory notes and memorandums to the government on discriminatory laws and engaging CSOs, media, and frontline workers through training workshops, press briefings, and meetings. Reporting to regional and international bodies further strengthens their advocacy efforts.

C) Regressive steps

In December 2010, Parliament passed an amendment to the Penal Code (effective 2011), introducing Section 137A, which criminalises ‘indecent practices between females’ with a penalty of up to five years in prison.¹⁸⁹ In 2012, the then-Minister of Justice reportedly declared a moratorium on enforcing such criminalising legislation to give Parliament time to repeal the laws. This followed international condemnation of the arrest and sentencing of a trans woman and her partner, whom the President subsequently pardoned. Although the succeeding President initially indicated support for decriminalisation, the government soon reversed its stance. The Minister of Justice later asserted that the criminalising laws would still be enforced, contradicting the moratorium reports. In 2015, the new Minister of Justice reinstated the moratorium by ordering the release of two men charged with having sex ‘against the order of nature’. However, several instances of criminal enforcement during this period violated the moratorium. In February 2016, the High Court in Mzuzu accepted an application from several religious leaders to annul the moratorium, arguing that it was an ‘abdication of [the Minister’s] constitutional duty’, thus permitting the police to resume arresting and prosecuting individuals for consensual same-sex acts. The Catholic Church has been a vocal opponent of any government efforts to end the enforcement of these criminalising laws. In March 2016, in response to the moratorium, the Episcopal Conference of Malawi, the highest authority of Catholic Bishops in the country, issued a strongly worded pastoral letter opposing the measure.

The refusal to register Nyasa Rainbow Alliance, conviction of Jana Gonani under Section 153(c)¹⁹⁰ and the subsequent dismissal of challenges to the constitutionality of this provision by the Constitutional Court in June 2024 highlight ongoing legal battles for sexual and gender minority rights in Malawi. Moreover, legislative reforms have often fallen short in

¹⁸⁹ A Msosa & CG Sibande ‘LGBT+ rights lawfare in Malawi’ in A Jjuuko, S Gloppen, A Msosa and F Viljoen (eds) *Queer lawfare in Africa : Legal strategies in contexts of LG-BTIQ+ criminalisation and politicisation* (2022) 107, available at <https://www.ohchr.org/sites/default/files/documents/cfi-subm/2308/subm-colonialism-sexual-orientation-oth-university-pretoria-input-3.pdf>.



protecting the rights of intersex and transgender persons, as evidenced by laws like the Marriage, Divorce, and Family Relations Act of 2015, which enshrines the sex assigned at birth as the sole determinant of gender identity, effectively erasing the existence of intersex and transgender persons.

D) Opportunities for intervention by MHRCD)

The legal setback in Malawi presents a crucial opportunity for intervention to advance transgender rights and health-care access. Despite the absence of specific legislation allowing transgender persons to change their gender markers on official documents, provisions within the National Registration Act 13 of 2010 offer potential pathways for altering sex descriptions, albeit without explicit recognition of transgender identities. However, discriminatory practices deter many transgender persons from seeking essential healthcare services. The Gender Equality Act of 2012 guarantees the right to sexual and reproductive health services, underscoring the obligation of healthcare providers to uphold these rights without discrimination. Despite Malawi's HIV prevention efforts targeting key populations including men who have sex with men (MSM) and sex workers, there remains a notable gap in tailored strategies for transgender and intersex persons, highlighting a critical need for inclusive healthcare policies and interventions.

During its UPR, recommendations from various countries, including Spain, the United States, Canada, Chile, France, Switzerland, Iceland, Ireland, Italy, Netherlands, New Zealand, Norway, Australia, and Portugal, urged Malawi to decriminalise same-sex relations, repeal discriminatory laws, and ensure protection against violence and discrimination based on sexual orientation and gender identity but the state has not issued recommendations on sexual, gender or bodily diversity during the UPR's third cycle. These recommendations underscore significant opportunities for intervention by the MHRC, international stakeholders and CSOs, to support Malawi in implementing these reforms. Interventions can include providing technical assistance for legal reforms, advocating for inclusive policies, supporting awareness campaigns to foster social acceptance, and collaborating with local sexual and gender minority communities to strengthen rights advocacy efforts.

While facing significant challenges, the MHRC has identified several opportunities for intervention to strengthen its advocacy for intersex and transgender rights in Malawi. Firstly, the Commission can leverage its position to take a firm public stance on intersex and transgender rights. By issuing a clear and unequivocal statement, the Commission would signal its commitment to the cause and help mobilise support from various stakeholders, including CSOs, media, and

¹⁹⁰ The State v J Gonani (2021), available at <https://media.malawilii.org/files/judgments/mwmc/2021/1/2021-mwmc-1.pdf>.



international partners. This public declaration can also serve as a catalyst for broader societal change, encouraging others to join the fight against discrimination and stigma. Secondly, utilising strategic litigation to challenge discriminatory laws can be an effective approach. By bringing carefully selected cases to court, the MHRC can set legal precedents that promote the rights of intersex and transgender persons. This approach can be bolstered by offering pro bono legal representation, legal counselling, and assistance with legal gender recognition. Strategic litigation not only addresses specific legal issues but also raises public awareness and creates pressure for legislative reform.

Additionally, building alliances with Members of Parliament, relevant ministries, CSOs, and the media can significantly strengthen the Commission's advocacy efforts. These partnerships can also enhance the Commission's ability to navigate the complex political and social landscape, increasing the likelihood of achieving meaningful change. In this regard, the Commission's strategic plan, which is more progressive than the outgoing plan, presents an opportunity to incorporate these interventions into a cohesive and comprehensive approach. The MHRC can leverage its role in conducting awareness and sensitisation campaigns (as envisioned in the National Human Rights Action Plan 2016-2020 and the Gender Equality Act) to enhance public understanding of transgender and intersex rights. Addressing resistance from groups opposing transgender and intersex rights requires strategic communication and targeted awareness campaigns. The MHRC can play a pivotal role in sensitizing these groups about human rights principles and debunking misconceptions that perpetuate discrimination and hostility. These campaigns should emphasise constitutional guarantees of equality and non-discrimination, and international human rights obligations of Malawi, and their application to persons who identify as transgender and intersex, encouraging societal acceptance and respect for diversity.

Additionally, the MHRC should utilise its powers under the Gender Equality Act of 2012 to investigate reported cases of violence against transgender and intersex persons, as a crucial step in ensuring accountability and justice for these communities. By actively pursuing these cases, the MHRC can demonstrate the state's commitment to protecting vulnerable communities and holding perpetrators accountable under the law.

Lastly, MHRC should advocate for the repeal of vagrancy laws that are used by police to harass and intimidate transgender persons. This will be in line with both African Commission's Guidelines on the decriminalisation of petty offences and the African Court's Advisory Opinion on the compatibility of vagrancy laws with the African Charter and other human rights instruments.



3.5 Namibia

A) General situational analysis

Namibia's legal system often falls short in adequately protecting transgender and intersex persons, thereby perpetuating systemic injustices. Although consensual same-sex intimacy is no longer criminalised following a recent landmark ruling in the case of *Dausab v The Minister of Justice* by the High Court,¹⁹¹ which declared these provisions unconstitutional due to unfair discrimination, recent events like the tragic murder of Sexy Fredricks,¹⁹² a transgender woman, underscore the stark reality of pervasive violence and discrimination. Fredricks' brutal killing, characterised by multiple stab wounds and mutilation, serves as a chilling reminder of the extreme dangers faced by transgender persons in Namibian society.

Namibia's laws do not explicitly protect against discrimination based on SOGIESC in various spheres, including employment, healthcare, education, and housing. While National Health Act of 2015 theoretically guarantees access to state healthcare services for all citizens, practical barriers persist. For instance, section 40(2) grants wide discretion to hospital superintendents to deny access health services for any person 'any other reason whatsoever', which can be arbitrarily applied, particularly against marginalised groups. This discretionary power, coupled with the absence of gender-affirming healthcare services within the public sector, leaves intersex and transgender persons vulnerable to discrimination and denial of care. While Section 51(2) of the National Health Act provides for a Special Fund for medical treatment, including gender reassignment surgery, the lack of availability of such procedures within Namibia raises questions about the fund's utility. The absence of explicit protections and guidelines leaves room for discrimination and denial of services, as evidenced by the experiences of many within the healthcare system.

¹⁹¹ *Dausab v The Minister of Justice* [2024] NAHCMD 331 available at <https://www.humandignitytrust.org/wp-content/uploads/resources/Judgment.pdf>.

¹⁹² P Nakashole & S Petersen 'Mutilated body of transgender woman discovered' (2024) available at: <https://www.namibian.com.na/mutilated-body-of-transgender-woman-discovered/>.

¹⁹³ see ILGA World Database: Namibia available at: <https://database.ilga.org/namibia-lgbti>.

¹⁹⁴ Births, Marriages and Deaths Registration Act 81 of 1963 (RSA).



Moreover, Namibia presents a rare case where a legislative body repealed a provision protecting individuals from discrimination based on 'sexual orientation', which local activists had successfully lobbied to be included in the Labour Act in 1992 as a prohibited ground of discrimination in the workplace. However, during discussions of a new labour law in 2004, the inclusion of this term sparked heated debates in Parliament, ultimately leading to its exclusion from the final text. While the 2004 law never came into force, the current Labour Law of 2007 does not list 'sexual orientation' among the prohibited grounds of discrimination.¹⁹³

While Namibian law does not provide explicit protection for transgender and intersex rights, section 7B of the Births, Marriages and Deaths Registration Act (1963) (as amended),¹⁹⁴ allows the alteration of the sex of an individual in the register for any person who has undergone a sex change, on the recommendation of the Minister of Health. Sections 8 and 8A of the Act on their part allow individuals to request for alteration of their names in the register if the Secretary is satisfied that the applicant 'is competent to make the application'. These provisions offer legal avenues for transgender and intersex persons to align their legal identities with their gender identities. Reports suggest that though requests for sex change is done on a case-by-case basis, these are often routinely approved if the applicant has a medical report confirming their sex change.¹⁹⁵ However, the requirement for the Secretary's satisfaction regarding the applicant's competence to request for a name change could introduce subjectivity and potential barriers, highlighting the need for clear guidelines and protections to ensure equitable access to this process. Additionally, the requirement of a medical report for sex change is not fully compliant to the right to self-determination of the applicants who should ideally be able self-identify without a medical certificate, as not every transgender or intersex persons has access to medical intervention or even desires to have a full medical sex change beyond self-identification. It is pertinent to note that refusal of a request for sex or name change by the Secretary requires a written justification in accordance with the right to administrative justice under article 18 of the Constitution¹⁹⁶ and may therefore be subjected to judicial review. Other permissible legal framework for legal gender change includes section 12(1)(a) of the Identification Act of 1996, which allows an individual to request for new identity documents if 'an identity document does not reflect correctly the particulars of the person to whom it was issued, or contains a photograph which is no longer a recognizable image of that person'.

Additionally, there are no legal barriers to freedom of expression, association and assembly for transgender and intersex person in Namibia, who are legally able to register and operate civil society organisations that engagement in advocacy and other services for the benefit of these communities. The government has similarly not placed any impediment in the ability of transgender and intersex persons and indeed the LGBTIQ community in general to express themselves and seek public solidarity through for instance, the organisation and participation in pride marches.¹⁹⁷

Despite these permissive legal frameworks (even if not fully compliant), Namibia's detention system presents significant challenges for the human rights and well-being of sexual and gender minorities, particularly transgender persons, who encounter pervasive discrimination and violence within the criminal justice system, spanning from arrest through

¹⁹⁵ Southern Africa Litigation Centre (SALC) 'Laws and policies affecting transgender persons in Southern Africa' (2016) 33-34, available <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Transgender-Rights-Booklet.pdf>.

¹⁹⁶ SALC (as above).

¹⁹⁷ Home Office 'Country Policy and Information Note – Namibia: Sexual orientation and gender identity and expression' (2018) available at <https://www.justice.gov/eoir/page/file/1116346/dl>.

¹⁹⁸ SALC (n 190 above).

detention and post-conviction periods. Transgender persons who are engaged in sex work are often targeted by law enforcement for harassment using vagrancy by laws and indecent dressing or exhibition under the Combating of Immoral Practices Act 21 of 1980.¹⁹⁸

Transgender women are frequently detained with male inmates, exposing them to heightened risks of sexual assault and other human rights violations in custody.¹⁹⁹ Other violations committed against transgender sex workers in detention include being forced to strip naked in public²⁰⁰ or in custody to 'verify their gender'.²⁰¹ This practice is not only degrading and humiliating but also perpetuates systemic discrimination and violence against transgender persons. Reports also indicate that sexual and gender minorities who interact with law enforcement often face ridicule, degradation, and insensitive questioning, further eroding trust in the criminal justice system.²⁰² The denial of access to condoms in prisons under the guise of preventing 'immoral practices' exacerbates health risks, particularly for persons living with HIV and AIDS. The lack of gender-sensitive policies and procedures leaves transgender persons vulnerable to mistreatment and harassment while in custody.²⁰³ While the state reports access to medical services, including HIV/AIDS treatment, within correctional facilities,²⁰⁴ CSOs highlight understaffing and inconsistent availability of medical assistance.²⁰⁵ The discrepancy between official policies and the reality within detention facilities poses significant health risks, particularly for persons living with HIV/AIDS.²⁰⁶

Lesbians also face threats of sexual violence aimed at altering their sexual orientation, often met with inadequate police response. Cases of 'corrective' rape, though underreported, highlight the serious risks faced by sexual and gender minorities, exacerbated by systemic failures in investigation and prosecution.²⁰⁷ Such harmful practices may disproportionately affect intersex persons who are often perceived to be lesbians because they may not present as heteronormative women.

Again, despite the adoption of a Comprehensive Sexuality Education curriculum that incorporates content on sexual orientation, schools in Namibia persistently witness rallies where learners who identify as sexual and gender minority face discrimination and bullying. Alarming, there is a notable lack of proactive measures taken by schools to address such incidents. This failure to respond effectively not only perpetuates harm against learners who identify as sexual and gender minorities but also fosters an environment of intolerance and exclusion within educational institutions.

¹⁹⁹ AIDS Rights and Alliance for Southern Africa (ARASA) 'Sexual orientation, gender identity, HIV and human rights: An advocacy toolkit (2015).

²⁰⁰ Open Society Initiative for Southern Africa 'Rights No Rescue, A Report on Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia, and South Africa' (2009) 40.

²⁰¹ ARASA (n 194 above).

²⁰² ARASA (as above).

²⁰³ ARASA (as above).

²⁰⁴ Committee against Torture, Consideration of reports submission (2015) p 117 available at: <https://documentsddsny.un.org/doc/UNDOC/GEN/G15/268/37/PDF/G1526837.pdf?OpenElement>.

²⁰⁵ Namibia Non-Governmental Organisations Forum and Legal Assistance Centre 'Civil society report on the implementation of the ICCPR'(2016) 23, available at https://ccprcentre.org/files/documents/NGO_coalition_report_Namibia.pdf.

²⁰⁶ Namibia Non-Governmental Organisations Forum and Legal Assistance Centre (as above).

²⁰⁷ Immigration and Refugee Board of Canada 'Namibia: Treatment of sexual minorities by society and government authorities; recourse and protection available to sexual minorities who have been subject to ill-treatment'(2012), available at: <https://www.ecoi.net/en/document/2011361.html>.



B) Advancement towards protection

As the preceding section highlights, the legal framework though not fully compliant, provides a permissive basis for the protection of legal gender recognition for transgender and intersex persons who can utilise these provisions for both sex and name change, though without impediments. Additionally, Namibia's National Human Rights Action Plan (NHRAP, 2015-2019), indicated non-discrimination and human dignity among its key principles, highlighting the need to 'guaranteeing human rights without discrimination of any kind' and 'the inherent and immutable dignity of every person at all times, without exception'. The NHRAP stressed on the need to affirm the rights of vulnerable groups including transgender and intersex persons through among others, research to establish the extent of discrimination, public education and awareness raising aimed at eradicating discriminatory practices against LGBTI persons and other vulnerable groups, including though incorporating human rights and tolerance education in the school curriculum and 'incorporate training on a human rights approach in dealing with LGBTIs into training curriculum of law enforcement officials'.²⁰⁸

The survey results also revealed that the Office of the Ombudsman has made significant strides in advocating for the rights of transgender and intersex persons through various initiatives, including public sensitisation through media engagements on radio and television programs to educate the public on equality and non-discrimination related to these rights. Internal efforts include comprehensive training and sensitisation of Ombudsman's staff, enhancing their ability to handle complaints and improving service accessibility for transgender and intersex persons. Additionally, the office of the Ombudsman has fostered strong relationships with transgender and intersex communities and CSOs through consultations and collaborative projects. However, significant gaps remain, including resource and capacity for comprehensive research and documentation on the human rights situation of transgender and intersex persons, hindering their understanding of specific challenges faced.

At the judicial level, the June 2024 decision in the case of *Dausab v. The Minister of Justice*,²⁰⁹ which declared the common law offences of sodomy and unnatural sexual offences between consenting adults, along with the statutory provisions incorporating these offences, as unconstitutional, marks a significant advancement in the rights of sexual and gender minorities, including transgender and intersex persons in Namibia. This decision provides a basis for the protection of transgender and intersex persons who have been subjected to harassment and violence by law enforcement officials and the public on account of these provisions.

C) Regressive steps

While the preceding sections illustrate a generally permissive framework for the protection of transgender and intersex persons in Namibia, despite social stigma and discrimination and the harassment from law enforcement, recent judicial advances for the protection of the LGBTIQ community generally seems to have provoked backlash from conservative religious communities and politicians. For instance, following the the Supreme Court decision in *Digashu et al. v. Government of the Republic of Namibia* compelling the state to recognise same-sex marriages performed abroad, the Namibian government took steps to restrict such recognition. Prime Minister Saara Kuugongelwa-Amadhila announced on June 6, 2023, that a bill would be introduced to the National Assembly aiming to limit the recognition of same-sex marriages, even those legally solemnised abroad. Subsequently, SWAPO Party lawmakers submitted two private member bills in

²⁰⁸ National Human Rights Action Plan, Republic of Namibia 2015 – 2019, available at <https://ombudsman.org.na/wp-content/uploads/2022/09/NHRAP.pdf>.

²⁰⁹ *Dausab v The Minister of Justice* (HC-MD-CIV-MOT-GEN- 2022/00279) [2024] NAHC 331 (21 June 2024).

July 2023, the Definition of Spouse (Bill) (2023)²¹⁰ and the Marriage Amendment (Bill) (2023),²¹¹ both aiming to define ‘spouse’ as exclusively between a man and a woman, invoking Articles 81 and 45 of the Namibian Constitution to contradict the Supreme Court decision, and prohibiting same-sex marriages. These bills passed with minimal amendments in both the National Assembly and the National Council by July 19, 2023. The bills await final approval from the President, alongside the Amendments to the Civil Registration and Identification Bill (2023),²¹² which seeks to restrict the definition of ‘spouses’ to genetically born men and women of full age. The Civil Registration and Identification Bill also aims to repeal in its entirety the Births, Marriages and Deaths Registration Act of 1963 (as amended) and the Identification Act of 1996, which allows sex and name changes for transgender and intersex persons. These proposed legislative changes if enacted will result in a significant setback for the rights of transgender and intersex persons, and in particular undermine legal gender recognition and rights of transgender and intersex persons in Namibia, further entrenching discrimination and hindering their full participation in society. Former Ombudsman John Walters has equated this legislative push to apartheid-era oppression, emphasising the recurrence of repressive measures targeting sexual and gender minorities.²¹³

Besides recently proposed regressive legislation, the mandatory medical sex change requirements under existing legal framework, imposes a regressive requirement on transgender and intersex persons who may not desire or have access to medical intervention for sex reassignment or hormonal therapy.

Again, following the recent decisions by the Supreme affirming the rights of the LGBTIQ community, the Coalition of Churches and Organisations’ petitioned President Hage Geingob to investigate and potentially dismiss the judges involved, alleging judicial overreach and failure to uphold Namibian morals and customs.²¹⁴ The group also targeted Justice Minister Yvonne Dausab, accusing her of advancing personal and SOGIESC interests, calling for her removal from office. Traditional leaders and former President Sam Nujoma added to the dissent, criticising the ruling as contrary to Namibia’s cultural norms and values. Nujoma’s outspoken opposition reflects broader societal divisions, highlighting significant challenges to the advancement of rights for intersex and transgender persons in Namibia amidst entrenched conservative sentiments and legal controversies.

The rise in hate crimes²¹⁵ can be attributed to intensified queerphobic rhetoric perpetuated by politicians and religious leaders in response to progressive legal developments, such as the Supreme Court ruling²¹⁶ mandating recognition of same-sex marriages celebrated abroad and decriminalisation of consensual same-sex relationships. As a case in point, Sexy Fredricks’ tragic death is not an isolated incident, but part of a disturbing pattern of violence against sexual and gender minorities in Namibia.²¹⁷ The intersectionality surrounding transgender and intersex lived realities in Namibia involves various factors such as gender identity, sexual orientation, socioeconomic status, and access to healthcare. Discrimination and violence intersect with these identities, exacerbating vulnerabilities and limiting access to essential services and opportunities primarily education, health care and housing. The experiences of transgender persons, particularly transgender women, are shaped by intersecting forms of discrimination, including transphobia, hate crimes, misogyny, and racism.²¹⁸

²¹⁰ NA - LEG - Definition of Spouse (Bill) (2023).

²¹¹ NA - LEG - Marriage Amendment (Bill) (2023).

²¹² NA - LEG - Amendments to the Civil Registration and Identification Bill (2023).

²¹³ S Petersen ‘Govt oppressing LGBTIQ+ like in apartheid days - Walters’ (July 2024) available at: <https://www.namibian.com.na/govt-oppressing-lgbtqi-like-in-apartheid-days-walters/>.

²¹⁴ International Commission of Jurists (ICJ) ‘Namibia: Attacking judges for upholding human rights threatens judicial independence and the rule of law’ (2023) available at: <https://www.icj.org/namibia-attacking-judges-for-upholding-human-rights-threatens-judicial-independence-and-the-rule-of-law/>.



D) Opportunities for interventions by the Office of The Ombudsman

The recent decriminalisation of same-sex conduct by the courts presents an opportunity for the Office of The Ombudsman (OTO) to enhance advocacy towards comprehensive protection for sexual and gender minorities, especially those most at risk such as transgender and intersex persons. This advocacy should include the reintroduction of sexual orientation and gender identity as a prohibited ground for discrimination in employment under the Labour Act (as was under the 1992 version of the Act), as well as in accessing other social services such as education and health care. This is in line with the National Human Rights Action Plan which aim to ensure an inclusive society for all.

The decriminalisation of petty offences such as vagrancy laws that are often utilised to harass and intimidate transgender and intersex persons on the basis of their status should also be pursued by OTO as recommended by the African Commission Guidelines and the Advisory Opinion of the African Court which declared vagrancy laws incompatible with the African Charter and other human rights instruments on account of their disproportionate impact on vulnerable groups.

The increasing queerphobic rhetoric, underscores resistance among conservative organisations and officials towards the full recognition of the rights of LGBTIQ persons in Namibia which requires the urgent attention of OTO to undertake community sensitisation and providing support to communities at risk of violence and other forms of human rights violations. These sensitization measures should aim at conscientizing both the general public, political, religious and community leadership that are instigating further criminalising measures against LGBTIQ communities to understand constitutional and international human rights obligations of the state of Namibia to ensure the full protection and fulfilment of the rights of all of its inhabitants, including those that identify as transgender or intersex. The full protection of transgender and intersex persons from violence should include the explicit legal recognition of such violence as hate crime with aggravated penalties, similar to the recently enacted Preventing and Combating of Hate Crimes and Hate Speech Act of South Africa, to protect the dignity of transgender and intersex persons among other vulnerable groups.

Additionally, Namibia does not have laws regulating or restricting conversion practices. This lack of regulation leaves room for harmful practices that seek to change or suppress transgender and intersex persons, posing serious risks to their mental and physical well-being. The prohibition of such conversion practices is recommended as there is no evidence suggesting their efficacy.

Furthermore, the lack of explicit legal recognition hindered by restrictive interpretations and bureaucratic hurdles, limited availability of gender-affirming treatments and lack of coverage for hormone therapy pose significant barriers to healthcare access for intersex and transgender persons. These are issues that OTO is well placed to champion to ensure that transgender and intersex persons have access gender affirming care and the legal recognition required to live a dignified life.

²¹⁵ R Igual 'Namibia: Rise in Deadly Hate Crimes Against LGBTQIA+ Community' (2024) available at: <https://www.mambaonline.com/2024/05/03/rising-deadly-hate-crimes-against-lgbtqia-community-in-namibia/>.

²¹⁶ R Igual 'Historic! Supreme Court of Namibia recognises same-sex marriages' (2023) available at: <https://www.mambaonline.com/2023/05/16/historic-supreme-court-of-namibia-recognises-same-sex-marriages/>.

²¹⁷ R Igual 'Brutal assault on trans woman sparks outrage in Namibia' (2024) available at: <https://www.mambaonline.com/2024/01/10/brutal-assault-on-trans-woman-sparks-outrage-in-namibia/>.

²¹⁸ C De Beer-Procter 'Where we belong: Inside the reckoning for queer rights in Namibia' (2021) available at: <https://africanarguments.org/2021/08/where-we-belong-inside-the-reckoning-for-queer-rights-in-namibia/>.

Such legal recognition would be bolstered by capacity building of healthcare professionals, law enforcement officers and other state agencies to understanding the issues facing transgender and intersex persons in the country and the best avenues to ensure the protection and full realisation of their human rights.

The Office of the Ombudsman have been approached by the United Nations Development Programme (UNDP), which has helped in developing a human right tracking system. This system will be instrumental in conducting research and documenting the human rights situation of transgender and intersex persons in Namibia. Leveraging this support from UNDP presents a significant opportunity for the Ombudsman office to enhance its advocacy and protection efforts by providing reliable data and insights into the challenges faced by these communities.

Besides, there is a critical need to reach out to transgender persons in rural areas who may not have access to the internet or other resources. Engaging these communities to ensure their voices are heard is essential for inclusive advocacy efforts. Developing outreach programs that connect with rural communities will help in addressing their unique challenges and ensuring they are not left behind.

Advocating for the implementing economic empowerment services such as train-to-hire programs, informal education to prepare for the job market, and small funds for transgender entrepreneurs and access to health services, such as health insurance for gender-affirming healthcare, psychotherapy support, and capable physicians is vital. These initiatives will help transgender persons achieve economic independence and stability.

OTO can also intervene by providing legal aid services, including pro bono legal representation, legal counselling, and assistance with legal gender recognition.

In the wake of hate crimes, OTO can intervene by establishing shelters for transgender persons in need, relocation support, and social assistance for those facing immediate threats to their safety and well-being.

The Ombudsman should actively involve transgender and intersex human rights organisations in their activities to ensure that the voices of transgender and intersex persons are authentically represented, and their specific needs are addressed. The Office of the Ombudsman can adopt proven models that create stronger linkages for transgender and gender-diverse persons to sexual and reproductive health and rights. An inclusive transgender and intersex agenda should be promoted to reduce stigma, discrimination, and violence against transgender persons.



3.6 Nigeria

A) General situational analysis

The lived realities of intersex and transgender persons in Nigeria are characterised by a complex interplay of legal, cultural, and social factors. Deeply ingrained traditional beliefs result in misconceptions about intersexuality, with many viewing it as unnatural or even evil. This stigma manifests in various forms, including ostracisation, familial rejection, and verbal abuse, as evidenced by the experiences shared by intersex and transgender persons and their families. Effeminate men, colloquially known as 'Yan Daudu' in Northern Nigeria, face societal scrutiny and legislative attempts to restrict their freedom of expression. While a proposed bill to prohibit cross-dressing failed to pass in 2023, the mere introduction of such legislation underscores the challenges faced by individuals who do not conform to traditional gender norms.²¹⁹

Neither the constitution of Nigeria nor legislation explicitly include SOGIESC as protected grounds of discrimination. This omission means that there is limited constitutional or legislative basis for safeguarding the rights of intersex and transgender persons against discrimination. Nigerian laws neither aggravate penalties for crimes committed against persons on the basis of SOGIESC nor do they explicitly classify such crimes as hate crimes. This lack of recognition and enhanced penalties fails to address the specific vulnerabilities and targeted violence faced by intersex and transgender persons. Again the absence of laws prohibiting incitement to hatred, violence, or discrimination based on SOGIESC and nor prohibiting or regulating conversion practices exposes transgender and intersex persons to such human rights violations.

Additionally, absences of regulation or restrictions on medically unnecessary interventions aimed at modifying the sex characteristics of intersex minors without their free, prior, and fully informed consent, puts intersex persons at risk of these harmful practices and violations of bodily autonomy and integrity. This is compounded by the absence of legislations that enables changes to the sex (gender marker) and names of transgender and intersex persons in their identification documents, perpetuates challenges for transgender and intersex persons in accessing official documentation that aligns with their gender identity, and further exposes them to harassment and extortion from law enforcement officials.

²¹⁹ O Ige 'Nigerian Youths And Cross-dressing Culture In Nigeria' (2024) available at: https://www.naijanews.com/2024/04/21/nigerian-youths-and-cross-dressing-culture-in-nigeria/?utm_source=rss&utm_medium=rss&utm_campaign=nigerian-youths-and-cross-dressing-culture-in-nigeria.

Nigeria's legal landscape is characterised by a complex interplay of federal, state, and customary or religious laws, all of which contribute to the criminalisation of consensual same-sex sexual acts. This has significant implications for intersex and transgender persons, who often face heightened vulnerability due to their gender identity and expression. At the federal level, the Criminal Code Act (2004) is a primary legal instrument governing criminal matter. Key provisions include Section 241, which criminalises consensual same-sex sexual acts with penalties of up to 14 years imprisonment, and Section 217, which imposes a three-year imprisonment penalty for acts of 'gross indecency' among men, regardless of whether these acts occur in public or private. These provisions predominantly affect Southern states, where the Criminal Code Act is often used as state law.

In contrast, the Northern states operate under the Penal Code (Northern States) Federal Provisions Act (1959). This code includes Section 284, which criminalises consensual same-sex sexual acts with penalties including imprisonment for up to 14 years and fines. Additionally, 12 Northern states have incorporated Shari'a Penal Codes, which, in varying degrees, prescribe the death penalty for same-sex sexual activity. This creates an even more perilous environment for intersex and transgender persons, as these laws are interpreted and enforced through a religious lens, with Christian evangelicalism in the south and support for Islamic law in the north, that often condemns any deviation from traditional gender norms.

In December 2013, Nigeria passed the Same-Sex Marriage (Prohibition) Act (SSMA), which came into effect in January 2014. This law further entrenches the criminalisation of same-sex relationships and imposes severe penalties on those who engage in such relationships. Section 1 of the law explicitly prohibits both 'same-sex marriages' and 'civil unions'. The law's reach is extensive, with Section 7 defining 'civil union' broadly as 'any arrangement between persons of the same sex to live together as sex partners'. This expansive definition significantly impacts the daily lives of intersex and transgender persons, whose relationships and living arrangements can easily be construed as violations of the law. The Act's stringent measures include Section 4(2), which prohibits the public display of same-sex amorous relationships, whether 'directly or indirectly'. This prohibition is vaguely defined, leading to a wide interpretation that can encompass a broad range of behaviours and expressions. This harsh penalty serves as a significant deterrent against any form of cohabitation or partnership among same-sex individuals, further marginalising intersex and transgender persons. The broad and ambiguous language of the law means that intersex and transgender persons can be targeted simply for their gender expression or for living with someone of the same sex, regardless of the nature of their relationship.

The SSMA further significantly impacts on the freedoms of expression, association and assembly of sexual and gender minorities, including transgender and intersex persons with the prohibition of the registration and operation of 'gay clubs, societies, and organisations', along with their meetings and events under section 4(1). This Act also criminalises supporting such groups, with sections 5(2) and (3) prescribing a 10-year imprisonment for individuals who register, run, or participate in these organisations or assist in their activities. This legislation significantly hampers the ability of intersex and transgender persons to form or join community organisations, which are vital for their support and advocacy. In 2018, the civil society organisation known as the Lesbian Equality and Empowerment Initiatives challenged the decision of the Corporate Affairs Commission's (CAC) to deny their registration under the Companies and Allied Matters Act but were unsuccessful. The High Court cited the SSMA as conflicting with the group's name, exemplifying the legal challenges faced by organisations supporting intersex and transgender persons. By February 2020, the Lesbian Equality and Empowerment Initiatives had escalated the case to the Court of Appeal (currently pending for adjudication), highlighting the ongoing legal struggles for recognition and rights.



In April 2022, a bill titled 'A Bill for an Act to Amend Same-Sex Marriage (Prohibition) Act 2013 to Prohibit Cross Dressing' passed its first reading in the House of Representatives. This bill aimed to punish 'cross-dressing' which is not done for explicit public entertainment with a penalty of up to six months' imprisonment. Although the bill was dropped in December 2022 after failing its second reading, it highlights the ongoing legislative efforts to curtail the freedom of expression of intersex and transgender persons. The Deputy Speaker of House of Representatives noted during the consideration of the bill that the proposed legislation did not adequately address Nigeria's multicultural nature, where some cultures traditionally wear clothing that might be considered 'cross-gender' in others.

In October 2023, a controversy erupted around the 'Queen Primer', a schoolbook with historical roots dating back to the 19th century. The media frenzy and parliamentary debates centred on the book's inclusion of the term 'gay', with House of Representatives members alleging a 'covert attempt' to introduce an 'immoral culture' in schools. A parliamentary session resulted in a unanimous resolution urging federal scrutiny and censorship, proposing to criminalise the sale and use of this book. The book was criticised as 'unlawful' and 'immoral' and blamed for moral decay in Nigeria. The Committee on Basic Education was mandated to oversee and ensure compliance with this directive. In response to the uproar, Kano State promptly banned the 'Queen Primer', directing schools to cease using the book and leading to the swift seizure of 1,200 copies by the Kano State Films and Censorship Board. In February 2024, the Ministry of Education hosted a roundtable in Abuja to discuss the 'Queen Primer' and its use of the term 'gay'. The event, attended by government officials and CSOs, highlighted the book's crucial role in combating illiteracy and supporting foundational learning. The CEO of the National Library underscored its uniqueness for early literacy. Despite the term 'gay' being misconstrued, the roundtable opposed an outright ban, urging nuanced reviews of other terms and proposing revisions instead of a wholesale prohibition for educational institutions. This response indicates a potential shift towards a more balanced approach, acknowledging the educational value of the book while addressing concerns about specific terminology.

On January 25, 2024, the Nigeria Police Force issued a statement in response to a social media video where several individuals disclosed their SOGIESC-related identities. The statement announced arrest orders against all persons featured in the video and provided explanations on the legal framework regarding 'unnatural offences' and 'same-sex marriage' in Nigeria, implying that 'identifying as queer' was unlawful.²²⁰ The Police Force also urged Nigerians to report 'all suspicious activities related to unnatural offences or same-sex marriage' and provide crucial information to aid police efforts to enforce the law. Local groups criticised the statement for stretching the scope of the existing legislation, undermining basic universal freedoms that Nigerians have long fought to defend. This police action is reminiscent of past decades under military rule when civil rights were treated with contempt.

Today, the erosion of digital safe spaces in Nigeria has further significant repercussions for sexual and gender minorities, depriving them of essential avenues for self-expression, affirmation, and community support. In a society that systematically demonises their identities with the rise in Kito²²¹ cases, the absence of safe online spaces exacerbates the psychological toll they are facing.²²² The normalisation of queerphobic rhetoric and violence perpetuates a cycle

²²⁰ 'Same Sex Marriage Remain Illegal In Nigeria, Police Warn' (2024) available at: <https://ustvafrica.com.ng/?p=8073>.

²²¹ 'Kito happens when a gay person has been deceived and lured by someone who pretended to be gay for the purposes of either outing, beating, robbing or in common cases, blackmailing the queer person', see SM Olaoye 'From hate speech to being kited: The precarious online lives of the Nigerian LGBT community', available at <https://www.media-diversity.org/from-hate-speech-to-being-kited-the-precarious-online-lives-of-the-nigerian-lgbt-community/>.

²²² 'LGBTQ+ Nigerians battle dating app traps' (2024) available at: <https://www.devidiscourse.com/article/entertainment/2920977-feature-i-had-been-set-up-lgbtq-nigerians-battle-dating-app-traps>.

of fear and oppression for intersex and transgender persons in Nigeria. Hate speech and discriminatory attitudes in both physical and digital realms contribute to a climate of hostility and intolerance, reinforcing the notion that sexual and gender minorities, including intersex and transgender persons are unworthy of dignity and respect.²²³

Despite these challenges, several organisations and advocacy groups work²²⁴ to support intersex and transgender persons in Nigeria. These groups provide legal aid, offering legal assistance to those prosecuted under anti-LGBT laws; health services, providing access to medical care, including mental health support and gender-affirming treatments; and community support, creating safe spaces for intersex and transgender persons to connect, share experiences, and support each other. Additionally, advocacy and awareness campaigns strive for legal reforms and greater societal acceptance of gender diversity.

B) Advancement towards protection

Advancements towards protection for intersex and transgender persons in Nigeria have been slow but notable in recent years. While the country is still in the early stages of recognising and understanding intersex issues, there have been some positive developments. CSOs, the National Human Rights Commission (NHRC) and human rights activists have been increasingly advocating for the rights of intersex and transgender persons in Nigeria. They have raised awareness about the human rights violations faced by these communities, including intersex genital mutilation and unethical medical procedures.

The survey results revealed that the NHRC has been actively involved in various advocacy initiatives and legal actions to protect the rights of transgender and intersex persons. Collaborating with CSOs focused on sexual and gender minority rights, the NHRC has organised key workshops, such as the in-country workshop in 2022 with NANHRI and a strategic capacity-building workshop in 2021 for staff and stakeholders from across Nigeria's 36 states. The NHRC has also established a specific thematic area dedicated to SOGIESC Rights, focusing on issues related to the protection of sexual and gender minorities. By including transgender and intersex rights in their human rights monitoring activities, the NHRC ensures active documentation and protection against human rights violations. Legal support provided to sexual and gender minorities further reinforces this commitment. Despite these efforts, the NHRC faces significant challenges, including a lack of supportive legal framework, social stigma, limited resources, insufficient staff training, deep-seated religious and cultural beliefs, lack of awareness, and an unsupportive political climate. Nonetheless, the NHRC continues to engage with transgender and intersex communities and CSOs working on SOGIESC rights, fostering collaboration to better advocate for and protect these vulnerable populations.

Although there is currently no specific legal framework protecting intersex and transgender persons in Nigeria, there have been legal challenges and discussions aimed at addressing these gaps.²²⁵ Human rights lawyers and activists have been working towards legal recognition and protection. As a result, some healthcare providers and organisations are starting to recognise the specific healthcare needs of intersex and transgender persons. Efforts are being made to provide more informed and respectful healthcare services,²²⁶ although challenges remain regarding access and stigma.

²²³ E Kachi 'For queer Nigerians, being on gay dating apps is still risky' (2024) available at: <https://www.losangelesblade.com/2024/04/24/for-queer-nigerians-being-on-gay-dating-apps-is-still-risky/>.

²²⁴ See for instance: Intersex Nigeria <https://grassrootsjusticenetwork.org/connect/organization/intersex-nigeria-center-for-healthcare-development-and-youth-empowerment/>.



C) Regressive steps

Despite the absence of specific laws targeting transgender and intersex persons, state actors have been implicated in violations such as invasion of privacy, arbitrary arrest, and unlawful detention, while non-state actors perpetrate crimes such as blackmail and assault.²²⁷ Besides, intersex persons face the alarming practice of Intersex Genital Mutilation, characterised by non-consensual and medically unnecessary surgeries. These procedures, often justified by societal prejudices²²⁸ and cultural norms,²²⁹ pose serious risks to the physical²³⁰ and psychological well-being of intersex persons, including sterilisation and reproductive system complications, and often directly financed by the states.²³¹

The lived experiences of intersex and transgender persons in Nigeria are shaped by a complex mix of legal, cultural, and social factors. Deep-seated traditional beliefs lead to widespread misconceptions about intersexuality, often viewing it as unnatural or malevolent. This stigma results in various forms of discrimination, including ostracisation, rejection by family members, and verbal abuse. Although a proposed bill to prohibit cross-dressing was ultimately unsuccessful in 2023, its introduction underscores the persistent challenges faced by those who do not conform to traditional gender norms.

The response of the Nigeria Police Force in January 2024 issuing arrest orders on account of a social media video featuring individuals disclosing their SOGIESC-related identities, allegedly for ‘unnatural offences’, demonstrates the extent of state-sanctioned repression, even for the basic right to freedom of expression. This action was criticised for expanding the scope of existing legislation and undermining basic freedoms. Similarly, the controversy in October 2023 over the inclusion of the term ‘gay’ in the ‘Queen Primer’ schoolbook and subsequent actions by the Kano State and federal authorities illustrate the deep-seated resistance to acknowledging and respecting diverse sexual orientations and gender identities.

²²⁵ ‘Intersex community seeks inclusion, tasks FG on recognition, protection of rights’ (2022) available at <https://www.vanguardngr.com/2022/11/intersex-community-seeks-inclusion-tasks-fg-on-recognition-protection-of-rights/>.

²²⁶ ‘Intersex community seeks inclusion, tasks FG on recognition, protection of rights’ (2022) available at <https://www.vanguardngr.com/2022/11/intersex-community-seeks-inclusion-tasks-fg-on-recognition-protection-of-rights/>.

²²⁷ ‘2021 Report on Human Rights Violations’ (The Initiative for Equal Rights) available at: https://theinitiativeforequalrights.org/wp-content/uploads/2023/01/PRESS_2022-Violations-Report_20Dec21.pdf.

²²⁸ ‘Nigerian intersex newborns leave parents in dilemma’ (2024) available at: <https://dailytimesng.com/nigerian-intersex-newborns-leave-parents-in-dilemma/>.

²²⁹ A Edoro ‘A Nigerian Intersex Teenager is the Heart of Papillon’s Debut | Review of An Ordinary Wonder by Bukki Papillon’ (2022) available at: <https://brittlepaper.com/2022/01/a-nigerian-intersex-teenager-is-the-heart-of-papillons-debut-review-of-an-ordinary-wonder-by-bukki-papillon/>.

²³⁰ ‘James Johnson: ‘My struggles as an intersex footballer’’ (2019) available at: <https://www.bbc.com/news/av/world-africa-49851991>.

²³¹ ‘Intersex community seeks inclusion, tasks FG on recognition, protection of rights’ (2022) available at: <https://www.vanguardngr.com/2022/11/intersex-community-seeks-inclusion-tasks-fg-on-recognition-protection-of-rights/>.

D) Opportunities for intervention by NHRC

Given the very difficult legislative and socio-cultural context that the NHRC operates with regards to the rights of transgender and intersex persons, opportunities for intervention may almost seem bleak. However, the survey results indicated continued efforts by NHRC and CSO towards the promotion, protection and fulfilment of the rights of transgender and intersex persons. These efforts aimed at public education and awareness raising should be encouraged and continued, together with continued support for these communities and active involvement organisations representing these communities in the activities of the NHRC.

In the context of growing violence against person on account of their SOGIESC, the NHRC should continue to advocate for the protection of transgender and intersex persons from violence and other forms of human rights violations in line with resolutions 275 and 552 of the African Commission and the constitutional guarantee of the right to dignity.

The NHRC should continue to be vigilant and oppose to introduce legislation that seeks to criminalise the status of transgender and intersex persons such as attempts to prohibit cross-dressing.

In Nigeria's recent UPR cycles, significant recommendations have been made regarding the protection of rights for sexual and gender minorities. Notably, recommendations from the 2018 cycle urged Nigeria to adopt measures combating discrimination against sexual and gender minorities, and to repeal discriminatory legislation criminalising homosexuality. These recommendations were issued by various states including Italy, France, and Uruguay. Despite the reception of these recommendations, Nigeria has not yet implemented comprehensive measures addressing these issues, highlighting ongoing challenges in policy reform and human rights protections. Moving forward, avenues for intervention by the NHRC, CSOs, and policymakers include continued advocacy for legislative reform, increased dialogue with international partners, and enhanced protections for intersex and transgender persons to ensure comprehensive human rights for all Nigerians.

To enhance the advocacy and protection of transgender and intersex rights, the NHRC can adopt several successful practices from other regions. Key practices include the development of comprehensive legislation and policies that explicitly protect transgender and intersex persons. For instance, advocating for laws like the Gender Recognition Act 2015 in Ireland, which allows transgender persons to legally change their gender without medical procedures, can significantly advance legal recognition and protections. Moreover, improving healthcare access, as demonstrated by the Danish Institute for Human Rights' support for gender-affirming healthcare services, can ensure transgender and intersex individuals receive necessary medical care.

Addressing significant gaps in the current approach is crucial. These gaps include inadequate awareness of intersex issues, limited inclusion of intersex voices, insufficient staff training on intersex rights, and challenges in addressing intersecting forms of discrimination. A holistic approach that prioritises intersex inclusion, education, and collaboration with intersex-led organisations can bridge these gaps. NHRC should continue public education and awareness raising about intersexuality and the need to regulate gender normalisation surgeries, which are often conducted on intersex children in their infancy, often with dire consequence for their health and wellbeing into adulthood.

Providing legal aid to transgender and intersex persons facing discrimination or human rights violations is another crucial intervention. The NHRC can represent individuals in court or offer free legal advice on issues related to SOGI-



ESC. Building the capacity of NHRC staff members through training programmes on SOGIESC issues, human rights principles, effective communication strategies with marginalised communities, and cultural sensitivity towards diverse gender expressions is essential. In the next five years, international funders, NGOs, and the NHRC should focus on advocating for the prohibition of non-consensual genital normalisation practices, access to legal gender recognition, enforcing anti-discrimination clauses, decriminalisation, social awareness, and prevention of violence against intersex and transgender persons.

Research and documentation on the human rights violations faced by transgender and intersex persons could also provide necessary tool for data informed advocacy with policy makers towards enhanced protection for transgender and intersex persons.

While this may be a long-short in the current socio-political climate, the NHRC should continue to support advocacy for legal reforms to decriminalise same-sex relationships and gender expressions. By collaborating with advocacy groups and CSOs, the NHRC can push for the repeal of laws that criminalise consensual same-sex acts and prohibit the formation and operation of organisations supporting intersex and transgender communities. Legal advocacy could include supporting ongoing litigation, like the case of the Lesbian Equality and Empowerment Initiatives against the Corporate Affairs Commission and working to change discriminatory laws that conflict with human rights principles or intervening as *amicus curiae* to provide the court with relevant legal and factual arguments on why it is important to have legal protection for the rights to freedom of expression, association and assembly, through the registration of organisations that advocate for the rights of vulnerable communities such as transgender and intersex persons.

Furthermore, the NHRC can work towards ensuring that laws and policies explicitly classify crimes based on SOGIESC as hate crimes and introduce enhanced penalties for such offenses. This would address the specific vulnerabilities and targeted violence faced by intersex and transgender persons, providing them with greater protection under the law. Additionally, the NHRC can advocate for the prohibition of incitement to hatred, violence, or discrimination based on SOGIESC and call for regulations against harmful practices such as conversion therapies and non-consensual medical interventions on intersex minors. The NHRC can also focus on promoting awareness and education to combat deeply ingrained stigmas and misconceptions about intersex and transgender persons. This can include public education campaigns, training for law enforcement and judicial officials, and working with educational institutions to foster a more inclusive and respectful understanding of gender diversity.

Lastly, the NHRC can support the creation and maintenance of safe spaces, both physical and digital, for intersex and transgender persons. These spaces are essential for community support, self-expression, and advocacy. By addressing the erosion of digital safe spaces and the rise in queerphobic rhetoric and violence, the NHRC can help mitigate the psychological toll and social isolation experienced by sexual and gender minorities. Through these interventions, the NHRC can significantly improve the lived realities of intersex and transgender persons in Nigeria, ensuring their rights and dignity are upheld.

3.7 South Africa

A) General situational analysis

South Africa stands as a beacon of hope for many transgender and intersex persons across the African continent who face persecution and discrimination based on their SOGIESC. Constitutional, legislative and policy frameworks are generally progressive in recognition of the need to undue the historical injustices of the past that led to the



marginalisation of the majority non-white population and aimed at fostering principles of equality and dignity. While section 9(3) of the South African Constitution (1996)²³² explicitly prohibits discrimination based on 'gender' and 'sexual orientation', it does not specifically mention safeguarding 'gender identity'. Nevertheless, in the landmark case *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (1998)²³³, which led to the decriminalisation of consensual same-sex relations, the Constitutional Court ruled that the constitutional protections prohibiting discrimination based on sexual orientation 'must be interpreted liberally'.

Prior to this landmark decision, there was legal framework already in place to facilitate change of identity for transgender and intersex persons. Notably, section 24 of the Births and Deaths Registration Act of 1992 allows individuals to request a change to the forename recorded birth. While some applicants have faced challenges in simultaneously processing requests for gender marker and name changes with the Department of Home Affairs (DHA), these difficulties seem to stem from administrative issues rather than legislative or policy constraints.

The Alteration of Sex Description and Sex Status Act 2003 also allows transgender persons who have undergone gender-reassignment surgery or medical treatment and intersex persons to apply to the Director General of the

²³² Constitution of the Republic of South Africa [No. 108 of 1996].

²³³ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998) para 21.



Department of Home Affairs to change the sex description on their birth certificate. Transgender persons who have undergone gender-reassignment surgery or medical treatment (such as hormonal treatment without the need for surgery) require report from a medical practitioner confirming such treatment, while intersex persons require a report from a medical practitioner confirming their intersex status in support of their application for change in sex description. The Director-General is required to give reasons in writing if the application is refused, subsequent to which the applicant may appeal to the Minister of Home Affairs and the refusal of the Minister may be further appealed to a magistrate. While gender-reassignment surgery is not required for the purposes of requesting a sex change, reports suggest that Home Affairs sometimes erroneously apply the provisions of the law to require proof of surgery failing which some applicants are wrongly turned away.²³⁴

The Alteration of Sex Description Act has however, faced criticism for its requirement that transgender individuals seeking a change in gender marker undergo surgical, medical, or other interventions before their application can be considered. Additionally, the Act mandates that applicants provide supporting letters from medical practitioners, effectively pathologising transgender identities and expressions. By linking legal recognition of gender to medical interventions, the Act reinforces outdated and harmful notions that transgender identities are inherently pathological, leaving them vulnerable to human rights violations. This approach to legal recognition excludes individuals who are unable to access or afford medical interventions, especially those in rural areas, perpetuating unfair discrimination and denying them their right to self-identify. The situation is much dire considered against the fact that currently '[o]nly six South African national government hospitals currently provide gender-affirming care, with waiting lists for gender-affirming surgeries of up to twenty-five years'.²³⁵

A significant challenge also persists in the identity management system, which does not cater to the needs of intersex persons and perpetuates discrimination by accommodating only binary gender categories in identification documents. The Department of Home Affairs has recently published in draft form an Official Identity Management Policy (OIMP) which proposes to utilise randomised identity numbers which does not disclose any details about the gender of the holder as the preferred option or the inclusion of a digit 'X' to mark transgender, intersex and non-binary persons.²³⁶ Transgender and intersex activists have, however, raised concerns about the proposal by the DHA, to introduce an 'X' gender marker on identity cards for transgender, intersex and non-binary persons, over concerns of privacy and security. This on account that having such gender markers may further expose transgender, intersex and gender non-conforming persons to discrimination. These activists rather suggest that the 'X' gender marker should be an option that any persons regardless of their gender identity should be able to choose.²³⁷ This is further bolstered by the Draft South African National Identification and Registration Bill 2022,²³⁸ which proposes in section 9 not to assign 'a numerical figure that bears no relation to the gender of the person' in instances where the gender of the person is not determined.

²³⁴ Southern Africa Litigation Centre (SALC) 'Laws and policies affecting transgender persons in Southern Africa' (2016) 39.

²³⁵ SB Shabalala & MM Campbell 'The complexities of trans women's access to healthcare in South Africa: moving health systems beyond the gender binary towards gender equity' (2023) 22 *International Journal for Equity in Health* 231.

²³⁶ Department of Home Affairs 'Draft Official Identity Management Policy' (2020) 56, available at https://www.gov.za/sites/default/files/gcis_document/202101/44048gon1425.pdf.

²³⁷ <https://foremedia.tv/news/south-africas-home-affairs-considers-disregarding-male-and-female-id-numbers/>.

The 2005 amendment to the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 through the Judicial Matters Amendment Act 2005 marked another significant step in safeguarding the rights of intersex persons by the inclusion of intersex as one of the prohibited categories for discrimination. Other protective legislation includes the Employment Equity Act 55 of 1998 and Labour Relations Act 6 of 1995 both of which prohibit discrimination on the basis of sex, gender and sexual orientation.

Despite these progressive legislative and policy frameworks, significant challenges remain in the lived realities of transgender and intersex persons in South Africa. While data from a recent study suggests that the majority of South Africans (between 57% and 72%) have positive opinions of transgender persons and agree that their rights need to be protected,²³⁹ transgender persons, especially those who reside in rural areas and townships continue to face stigmatisation, harassment,²⁴⁰ bullying in schools²⁴¹ and violence in society, including high rates of ‘corrective rape’ committed against transgender men,²⁴² family rejection and expulsion from church and other religious institutions, which exposes them to significant mental health challenges.²⁴³ Transgender women are also sometimes incarcerated in male prisons without access to services that conform to their gender identity and sometimes subjected to harassment and intimidation by other inmates and correctional services officials alike.²⁴⁴ The study on the other hand suggested that about half of the respondents (47.6%) ‘believe that transgender people are violating the traditions of their culture, and a slight majority (50.1%) agreed that they worry about exposing children to transgender people.’²⁴⁵ Similarly, ‘almost half of participants disagreed (47.5%) that transgender people should be allowed to use a restroom consistent with their gender identity’,²⁴⁶ illustrating the kinds of attitudes that put transgender persons at risk of violence and the need for continued public education and awareness raising.

Again, transgender persons continue to face discrimination in the workplace based on their gender identity, as illustrated by cases such as *Ehlers v Bohler Uddeholm Africa* (2010)²⁴⁷ despite progressive legal regime. The existence of multiple legal regimes for marriages and civil unions also means that, there are times when transgender persons who have transitioned after being married under the Marriage Act have been instructed by officials of the DHA to dissolve their marriage so that they can remarry under the Civil Unions Act, which is the legal regime governing same-sex unions, resulting in unnecessary complications in their lives.

This situation is best illustrated by the case of *KOS and Others v Minister of Home Affairs and Others*,²⁴⁸ who three married persons who had transitioned from biological male to female after their marriages under the Marriage Act had requested for the gender markers on various identify documents to be amended to take cognisance of their

²³⁸ Available at https://www.gov.za/sites/default/files/gcis_document/202304/48435gon3311.pdf.

²³⁹ W Luhur, L Mokgoroane & A Shaw ‘Public opinion of transgender rights in South Africa’ (2021) available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-Trans-South-Africa-Jun-2021.pdf>.

²⁴⁰ See for instance *Lallu v Van Staden*, Roodepoort Equality Court, Case No 3 of 2011.

²⁴¹ See *Mphela v Manamela and others* (2016), case no1/2016 Seshogo Magistrates Court (Equality Court).

²⁴² See “‘We’ll Show You You’re a Woman’ Violence and Discrimination against Black Lesbians and Transgender Men in South Africa’ (2011), available at https://www.hrw.org/reports/southafrica1211ForUpload_0.pdf.

²⁴³ For a detailed discussion on these issues see Gender Dynamix *Trans rural narratives: Perspectives on the experiences of rural-based trans and gender diverse persons in South Africa; Addressing issues of recognition, belonging and access* (2020) available at https://0ce9900d-c9c4-45eb-9f73-8e17bcae73f0.filesusr.com/ugd/3486ef_cd72f992b4374a16b2b497097601b7a1.pdf.

²⁴⁴ See *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC)

²⁴⁵ Luhur, Mokgoroane & Shaw (n 234 above).

²⁴⁶ Luhur, Mokgoroane & Shaw (as above).



transitions. Officials of DHA indicated to one of the couples that this process of alteration of the sex on the identity documents of the applicant could only be completed if they first dissolved their marriage under the Marriage Act and remarried under the Civil Unions Act. For one of the couples, the request for sex alteration on the identity documents were effected but unknown to the couple, officials of DHA had deleted the records of their marriage and further altered the applicant's name in the records to reflect her maiden name effectively nullifying their marriage.

The Western Cape High Court found these actions by DHA to be inconsistent with the Constitution and unlawful. The court held that the refusal to alter the sex description on identification documents, or the deletion of marriage particulars, was discriminatory and violated the rights of transgender persons, ordering DHA to process all applications for alteration of sex descriptors without requiring individuals to divorce if they were married under the Marriage Act. This case underscores the systemic barriers and discriminatory practices that transgender persons in South Africa face, even with existing progressive legal frameworks.

South Africa's current laws do not regulate or restrict conversion practices, putting transgender at risk of such practices. Similarly, there are no legal restrictions on medically unnecessary interventions intended to modify the sex characteristics of intersex minors without their free, prior, and fully informed consent. The absence of recognition for a possible third gender perpetuates systems of gender essentialism, which assume that gender is determined by one's assigned sex at birth. This flawed assumption not only perpetuates societal hierarchies favouring cis-normative identities but also contributes to the medicalisation of transgender persons, as problematic laws often arise from these assumptions.

B) Advancement Towards Protection

In addition to the discussion above, this section highlights some of the recent advances towards more comprehensive legal, policy and administrative frameworks for the protection of transgender and intersex persons in South Africa. While a comprehensive review of the advances that have been made are not necessary for this study, some of the most significant recent advances towards the protection of transgender and intersex persons in South Africa are briefly highlighted here.

²⁴⁷ Ehlers v Bohler Uddeholm Africa (Pty) Ltd 2010 31 ILJ 2382 (LC).

²⁴⁸ KOS and Others v Minister of Home Affairs and Others (2298/2017) [2017] ZAWCHC 90; For more detailed discussion on this case see S Baird 'The Mariana Trench of transphobia in South Africa: The legislative lacunae in KOS v Minister of Home Affairs' (2023) 23 African Human Rights Law Journal 410-431.

That said, the lived realities of intersex and transgender persons in South Africa have been brought to the forefront of public consciousness through significant events like the case of track athlete Caster Semenya, who was subjected to gender verification tests following her remarkable performance at the World Athletics Championships in Berlin. In 2009, the World Athletics raised suspicions regarding Semenya's performance improvements, leading to her suspension from competitions pending the results of these tests. The controversy surrounding Semenya's gender verification tests sparked international debate and scrutiny of the policies and practices regarding gender in sports.²⁴⁹ By April 2011, the discussion had expanded beyond Semenya's case to encompass broader issues of intersex conditions and gender verification in sports. The International Athletics Federation and the International Olympics Committee revisited their regulations, particularly concerning routine gender verifications for female athletes, which led to the implementation of a new policy focusing on specific cases of 'hyperandrogenism' among elite female athletes.²⁵⁰ Efforts to challenge these discriminatory regulations have travelled all the way to the European Court of Human Rights, with the support of the South African Human Rights Commission (SAHRC) as part of its ongoing efforts to safeguard the rights of intersex persons, which resulted in a landmark win for Semenya against the government of Switzerland, where World Athletics is based.²⁵¹

Other notable recent attempts to advance the rights of transgender and intersex persons include efforts by the Department of Basic Education (DBE) to protect learners from marginalised groups against discrimination in education. The DBE has faced public criticism for its draft guidelines on for socio-education inclusion²⁵², which is yet to be implemented. This policy, if enacted, aims to incorporate gender-specific pronouns, adapt the curriculum, and establish unisex bathrooms to foster inclusivity and ultimately create a human rights school culture that inculcates the values of diversity and inclusion and the rights of vulnerable groups in the curriculum. These guidelines are in line with international human rights and national constitutional obligations and complement other policies such as the 2017 National Policy on HIV, STIs and TB for Learners, Educators, School Support Staff and Officials in all Primary and Secondary Schools in the Basic Education Sector,²⁵³ which among others 'specifically recognises the particular vulnerability of learners with non-heteronormative SOGIESC' and aims to 'ensure that they enjoy the same support, protection and freedom as their heterosexual peers in the system, including though the inclusion of gender, gender identity and gender expression in the curriculum for comprehensive sexuality education.'²⁵⁴

This follows similar efforts aimed at creating more inclusive environments for intersex and transgender persons, particularly within the education system including the 2015 National School Safety Framework (NSSF), which aims to make schools safer through developing anti-violence structures and policies against homophobic bullying. The Department of Basic Education (DBE) also developed and distributed copies of the guide 'Safer schools for all: Challenging homophobic bullying' to schools nationwide. This guide provides essential guidelines and anti-homophobic-bullying materials aimed at teachers, students, and administrators.²⁵⁵ The primary goal of these guidelines is to

²⁴⁹ D Smith 'Caster Semenya row: 'Who are white people to question the makeup of an African girl? It is racism' (2009) available at: <https://www.theguardian.com/sport/2009/aug/23/caster-semenya-athletics-gender>.

²⁵⁰ F Sanchez & others 'The New Policy on Hyperandrogenism in Elite Female Athletes is not about "Sex Testing' (2013) available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3554857/>.

²⁵¹ See SAHRC 'Media Statement: SAHRC files its submission as Third Party Intervener before the European Court of Human Rights in the matter of Semenya v Switzerland', available at <https://sahrc.org.za/index.php/sahrc-media/news-2/item/2836-media-statement-sahrc-files-its-submission-as-third-party-intervener-before-the-european-court-of-human-rights-in-the-matter-of-semenya-v-switzerland>; Baker McKenzie 'Baker McKenzie's pro bono team assists SAHRC in successful Caster Semenya discrimination case at European Court of Human Rights', available at <https://www.bakermckenzie.com/en/newsroom/2023/07/sahrc>.

²⁵² 'Guidelines for the socio-educational inclusion of diverse sexual orientation, gender identity, expression and sex characteristics (SOGIESC) in schools', available at <https://eelawcentre.org.za/wp-content/uploads/guidelines-for-the-sogiesc-schools.pdf>.



eradicate discrimination and prejudice within schools, ensuring that the academic potential of learners who identify as sexual and gender minorities is fully realised in a safe and supportive environment.²⁵⁶

Additionally, there has been a marked increase in South African schools accommodating transgender students. Many schools now allow transgender students to be addressed by their preferred names and to wear gender-neutral uniforms. This inclusive approach is further supported by the introduction of genderless bathrooms in certain schools, ensuring that transgender students are not forced to use facilities that do not align with their gender identity.²⁵⁷ These measures represent a significant step forward in creating affirming and respectful school environments for transgender students. However, it is important to note that the experiences learners who identify as sexual or gender minority can vary significantly depending on their geographical location. While learners in urban areas would generally benefit from these progressive changes, those in rural and peri-urban often face greater challenges and may not have access to the same level of support and inclusivity.²⁵⁸ This disparity highlights the need for continued efforts to ensure that all learners who identify as sexual or gender minority, regardless of their location, can experience the positive impacts of these progressive steps.

Efforts have also been made to address hate crimes, including those committed against transgender and intersex persons. The Prevention and Combating of Hate Crimes and Hate Speech Act, signed in May 2024 by President Ramaphosa,²⁵⁹ recognises crimes motivated by factors such as sexual orientation, gender identity, and gender expression as hate crimes, providing a framework for prosecuting perpetrators and protecting victims. This law also reaffirms the government's dedication to upholding the rights and dignity of all citizens, regardless of their gender identity or expression.

In July 2023, the DHA initiated a public comment period for the Draft Marriage Bill (2022)²⁶⁰. This proposed legislation aims to unify the various laws regulating marriage in South Africa and to acknowledge all forms of intimate partnerships, without regard to 'gender, sex, or sexual orientation'. The bill proposes legalising and defining monogamous marriages as permissible between any two adult prospective spouses, regardless of their gender or sex, while also permitting polygamous marriages. This Bill if enacted into law will provide some relief for transgender and intersex persons and prevent unfortunate and very harmful incidents such as the situation faced by the applications in *KOS and Others v Minister of Home Affairs and Others*.

On its part, the SAHRC has made notable strides in advancing the rights of transgender and intersex persons through targeted initiatives and legal actions. Since 2017, the Commission has developed promotional materials aimed at increasing awareness of SOGIESC rights, alongside specific efforts such as the 2023 intersex pamphlet designed for parents of intersex children. These materials are being actively disseminated in healthcare settings to enhance ac-

²⁵³ Available at <https://www.education.gov.za/Portals/0/Documents/Policies/Policy%20on%20HIV%20STIs%20%20TB.pdf?ver=2018-03-23-115911-213>.

²⁵⁴ See Draft Guidelines (n 244 above), para 5.3.9.

²⁵⁵ F Reygan, 'Making schools safer in South Africa: An antihomophobic bullying educational resource' (2016) 13 *Journal of LGBT Youth* 173.

²⁵⁶ Reygan (as above).

²⁵⁷ K Mafolo, 'Transgender learners make inroads in reshaping rigid binaries in schools' (Daily Maverick, 4 June 2019) available at: <http://www.dailymaverick.co.za/Article/2019-06-04-transgender-learners-make-inroads-in-reshaping-rigid-binaries-in-schools>

²⁵⁸ B Dyers, 'The Right to Education: Fiction or Fact for LGBTQI+ Children?' (Unpublished thesis 2019, Leiden University).

cessibility. SAHRC has also actively utilised the courts, including interventions in cases like *Mphela v Manamela*²⁶¹ and a significant 2022/3 case concerning discrimination in school uniforms against a transgender person. Notably, SOGIESC issues rank as the third most prevalent ground for unfair discrimination cases brought to equality courts in recent years, underscoring the commitment of SAHRC towards ensuring an inclusive society for all, including transgender and intersex persons. Collaborating closely with CSOs, the SAHRC ensures that its initiatives and programmes are inclusive and community-driven, leveraging inputs throughout the development process. Despite these efforts, challenges persist, including limited resources and deep-seated societal prejudices, such as harmful practices by traditional healers towards intersex infants.

C) Regressive Steps

Despite South Africa's reputation for progressive legal frameworks and a vibrant social scene for the sexual and gender minorities, significant barriers to full equality persist, particularly for transgender and intersex persons. While South Africa became the first country to constitutionally ban discrimination based on sexual orientation in 1996 and has since legalised same-sex adoption and marriage equality, the reality for many sexual and gender minorities remains fraught with challenges. Transgender persons have had the right to legal gender recognition since 2003, and numerous activist groups alongside annual Pride events signal a strong presence and representation. However, the progressive legislation has not eradicated violence, harassment, and discrimination, which remain pervasive in various public services such as education and healthcare. Local activists highlight a troubling trend of slow police response to crimes against the sexual and gender minorities, indicating a gap between legal protections and their enforcement.

For asylum seekers who identify as sexual or gender minorities, South Africa's progressive reputation is marred by the harsh realities they face upon arrival.²⁶² Many refugees, fleeing from persecution in their home countries, encounter discrimination from immigration officials and a need to 'prove' their SOGIESC to validate their asylum claims. Statistics reveal that 86% of asylum seekers have been subjected to this invasive requirement, with refusals often leading to denied applications.²⁶³ Asylum seekers who identify as transgender are disproportionately impacted by discriminatory practices within DHA. Indeed, a recent study found that 'the system seemingly precludes asylum seekers from being categorised according to their lived gender, even when lodging a claim based on transphobic persecution. This means that transgender and gender-diverse applicants are provided with permits that do not reflect their everyday gender expression. This places them at an increased risk of violence, discrimination and exploitation, especially if police officers or other state officials request their paperwork for identification purposes.'²⁶⁴

Perhaps the most regressive step taken nationally that could have significant impact on transgender and intersex persons who are foreign nationals is the recent publication of the White Paper on Citizenship, Immigration and Refugee Protection,²⁶⁵ which recommends a complete overhaul of the South Africa's citizenship, immigration and

²⁵⁹ R Igual 'President Ramaphosa Signs Hate Crimes and Hate Speech Bill' (2024) available at: <https://www.mambaonline.com/2024/05/09/president-cyril-ramaphosa-signs-hate-crimes-and-hate-speech-bill/>

²⁶⁰ Marriage Bill draft available at: [https://database.ilga.org/api/downloader/download/1/ZA%20-%20LEG%20-%20Draft%20Marriage%20Bill%20\(2022\)%20-%20OR-OFF\(en\).pdf](https://database.ilga.org/api/downloader/download/1/ZA%20-%20LEG%20-%20Draft%20Marriage%20Bill%20(2022)%20-%20OR-OFF(en).pdf)

²⁶⁰ *Mphela (transgender learner) v Manamela (school principal) and others* (2016).



refugee protection legal and policy framework, including recommendations to withdraw ratification of international and regional refugee treaties with the aim of assenting to these treaties with reservations. Proposals relating to the restrictions on access to socio-economic rights for asylum seekers and refugees could have significant impact on transgender and intersex persons who require gender affirming healthcare, which could be taken away if these proposals in the White Paper are enacted into national legislation.

Political rhetoric targeting the LGBTI community during elections by some of the major political parties comprise significant regress steps. These political parties often use homophobic rhetoric to whip up anti-LGBTI sentiments among community members with the aim of getting votes. While such rhetoric has the potential to increase public stigmatisation, harassment and violence against LGBTI persons generally, such rhetoric will naturally have disproportionate impact on transgender, intersex and other gender non-conforming persons who can often be easily identified and made out by their gender expression.

D) Opportunities for intervention by SAHRC

While SAHRC has already been actively involved in the promotion, protection and advocating for the fulfilment of the rights of transgender and intersex persons, more can be achieved, including the following opportunities for intervention.

The continued violence against transgender and intersex persons need to be addressed through public education and awareness raising campaigns targeting in particular rural and peri-urban communities, where transgender and intersex persons are most at risk of being victims of harassment and violence.

SAHRC should have dedicated internal structures specifically focused on transgender and intersex rights, which the Commission indicated in the survey that it currently lack and which limits its capacity to address the unique challenges faced by these communities effectively. Establishing such a dedicated internal structure would provide a centralised platform within the NHRC to drive focused advocacy and protection efforts, led by a commissioner's office dedicated to these issues. This structural enhancement would enable the SAHRC to better coordinate resources, engage stakeholders, and monitor progress on advancing transgender and intersex rights across the country.

The treatment of transgender persons within South Africa's prison system has been a subject of legal scrutiny and advocacy. The Standard Operating Procedure for the Detention of Transgender Prisoners outlines guidelines for the treatment of detained transgender persons, emphasising the importance of respecting their gender identity.²⁶⁶ However, challenges persist, particularly in correctional facilities where transgender prisoners may face discrimination and denial of their gender identity as illustrated by the case of *September v Subramoney*.²⁶⁷ SAHRC has a role to play in the training of correctional service officials on the rights of transgender and other gender non-conforming detainees in their custody, to ensure their dignified treatment.

²⁶² E Böll-Stiftung, 'A double challenge: LGBTI refugees and asylum seekers in South Africa' available at: <https://za.boell.org/en/2018/10/11/double-challenge-lgbti-refugees-and-asylum-seekers-south-africa>.

²⁶³ L DeBarros, 'Abusive Home Affairs biggest challenge facing LGBTI asylum seekers' (Mamba Online, 31 May 2019) available at: www.mambaonline.com/2019/05/31/abusive-home-affairs-biggest-challenge-faced-by-lgbti-asylum-seekers.

²⁶⁴ Legal Resources Centre 'LGBTI+ Asylum Seekers in South Africa: A Review of Refugee Status Denials Involving Sexual Orientation & Gender Identity' (2021) available at <https://lrc.org.za/wp-content/uploads/LGBTI-ASYLUM-REPORT-RFS.pdf>.

²⁶⁵ https://www.gov.za/sites/default/files/gcis_document/202404/50530gon4745.pdf.

The absence of legal restrictions on conversion practices and medically unnecessary interventions on intersex minors highlights a clear need for legislative reform. SAHRC has a role to play in advocating for legislation that explicitly prohibit harmful conversion practices as well as ensure that all medical interventions on intersex minors are conducted with their free, prior, and fully informed consent. This legislation should aim to protect intersex minors from unnecessary medical procedures and affirms their rights to bodily autonomy and self-determination.

The lack of recognition for a third gender in South African law perpetuates gender essentialism and reinforces societal norms that marginalise non-binary and gender non-conforming individuals. SAHRC should engage with current proposals towards legislative reforms that recognise at the minimum a third gender category for intersex and non-binary persons.

The Alteration of Sex Description Act, which currently mandates medical interventions for legal gender recognition pathologise transgender identities and perpetuate discrimination especially for individuals who have no access to such services because of economic and or geographic reasons presents another critical area for intervention. SAHRC should engage policy makers and civil society on the possibility of amending the Act to decouple legal gender recognition from medical procedures, ensuring that transgender persons can obtain legal recognition based on self-identification rather than medical criteria.

The significant challenges faced by transgender persons as illustrated by the case *KOS and Others v Minister of Home Affairs and Others* requires the attention of SAHRC, including engaging with and advocating for the passage of the proposed harmonised legislation on marriage. This will ensure that some of the challenges faced by transgender persons who transition after marriage are alleviated.

SAHRC should support the finalisation and implementation of the Guidelines for the socio-educational inclusion of diverse sexual orientation, gender identity, expression and sex characteristics (SOGIESC) in schools, including through the training and capacity building of educators and their support staff on these issues.

SAHRC should enhance trainings on transgender and intersex rights for officials of DHA, social workers and other law enforcement officials who are tasked to provide supportive services to these communities to ensure that such officials do not become avenues for secondary victimisation and violation of the rights of transgender and intersex persons.

SAHRC should engage with DHA on their treatment of transgender, intersex and non-binary asylum seekers who are exposed to further victimisation by practices that prevent such applicants from being categorised according to their lived gender, which results in transgender and gender-diverse applicants are provided with permits that do not reflect their everyday gender expression. Such engagement should aim to ensure that transgender, intersex and other gender diverse asylum seekers are treated with dignity, respect and compassion and that their rights guaranteed by legislation are upheld.

²⁶⁶ Standard Operating Procedure: Detention of Transgender Prisoners SAPS: Western Cape V5.

²⁶⁷ *September v Subramoney NO and Others* (EC10/2016) [2019] ZAEQC 4.



SAHRC should continue to engage with the proposed white paper on citizenship, immigration and refugee protection, to ensure that any legislation that emerges from the process complies with constitutional obligations to protect and fulfil the rights of all residents in South Africa, including transgender and intersex asylum seekers who may thus require gender affirming healthcare services they would otherwise not be able to privately afford if not provided by the public sector.

SAHRC should also engage political parties to respect their constitutional obligation to respect the rights of all persons in the country including those who identify as transgender and intersex and to refrain from political rhetoric that violate these rights.

3.8 Togo

A) General situational analysis

Discrimination and violence against intersex and transgender persons in Togo are entrenched in colonial-era penal codes and conservative social norms and have been observed in recent years, although the true extent of the issue remains largely undisclosed due to underreporting. Articles 392 and 394 of the revised Penal Code of 2015²⁶⁸ includes penalties for incitement to gross indecency, encompassing consensual sexual acts between adults of the same-sex, punishable by imprisonment or fines. These laws pose a threat to individuals based on their sexual orientation or gender identity, as well as human rights defenders advocating for sexual and gender minorities. Provisions against publication and distribution of content deemed contrary to public morals and decency are also present in national legislation, indicating a legal environment that restricts sexual and gender minority rights and freedoms.

While legislation criminalising sexual relations between consenting adults of the same sex, are rarely enforced,²⁶⁹ there have been reports of arbitrary arrests and detention of persons on account of their real or perceived sexual orientation, gender identity and expression.²⁷⁰ Reports also suggest that transgender persons are sometimes subjected to harassment and extortion by law enforcement officials on account of wearing clothes that do not conform with their biological sex.²⁷¹ A few illustration will suffice. In May 2023, TikTok influencer Bobo Périta,²⁷² known for cross-dressing, was arrested by national police for ‘affront to public decency’ and subsequently convicted.²⁷³ A 2018 article highlighted the ordeal of two transgender persons who were arrested and detained for three days based on their clothing choices. They were released only after paying a fee to the authorities.²⁷⁴ Another transgender person faced arrest by law enforcement and was forcibly taken to their family to disclose their identity against their will.²⁷⁵ In August 2021, the UN Human Rights Committee’s concluding observations on Togo’s 5th periodic report highlighted reports²⁷⁶ of security forces subjecting individuals to harassment, attacks, ill-treatment, and arbitrary detention based on their SOGIESC. Despite facing discrimination and violence, transgender and intersex persons often refrain from reporting incidents to the police due to fear of reprisals.²⁷⁷

Heterosexuality is deeply ingrained as the norm, while any deviation is often met with stigma, discrimination, and violence.²⁷⁸ Thus, violence and harassment are rampant, with sexual and gender minorities enduring death threats, physical attacks, and intimidation tolerated by authorities.²⁷⁹ Sexual and gender minorities face hostility, including verbal abuse, physical attacks, and familial rejection. The fear of reprisals and stigmatisation further silences victims, hindering reporting and access to justice. Leaders of NGOs supporting sexual and gender minorities also face threats. Fear of stigma and legal repercussions prevents many from reporting abuses. Religious programs promoting so-called conversion therapies exist, despite lack of endorsement from authorities or medical associations, though no involuntary surgeries on intersex persons have been reported. Freedom of expression and association are restricted by criminal statutes and societal self-censorship, inhibiting advocacy for sexual and gender minority rights.²⁸⁰

²⁶⁸ Togo Penal Code.

²⁶⁹ See <https://www.ohchr.org/en/press-releases/2021/07/human-rights-committee-raises-concerns-about-torture-transitional-justice>, where representative of Togo during the reporting process indicated that no one in Togo has been convicted of offences related to their sexual orientation or gender identity.

²⁷⁰ Amnesty International ‘Togo: Submission to the UN Universal Periodic Review 26th Session of the UPR Working Group, October-November 2016, available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR5738522016ENGLISH.pdf>.

²⁷¹ Amnesty International ‘Togo: Submission to the United Nations Human Rights Committee 128th Session (2 March - 27 March 2020) available at https://ccprcentre.org/files/documents/INT_CCPR_CSS_TGO_41355_E.pdf.

²⁷² ‘A LA UNE Togo : Un jeune influenceur et homosexuel arrêté pour “outrage aux bonnes mœurs” (2023) available at: https://afreepress.net/2023/05/27/togo-un-jeune-influenceur-et-homosexuel-arrete-pour-outrage-aux-bonnes-moeurs/#google_vignette.



Although there are no specific laws or regulations that hinder the registration or operation of CSOs focused on sexual and gender minorities, practical challenges and societal attitudes often impede these organisations' ability to function effectively. Thus, while SOGIESC groups can register under health-related categories, they are barred from advocating specifically for sexual and gender minority human rights. Reports indicate that civil society organisations that explicitly indicate mandates related to the LGBTI community are often refused registration on the basis that they 'challenged cultural and social norms'.²⁸¹

The denial of legal recognition to such organisations deny them access to essential funding and resources, necessary to engage in advocacy and provide services to these vulnerable communities. This means that organisations representing the interest of transgender and intersex persons often conduct their meetings and activities clandestinely, reflecting the hostile environment that limits public visibility and advocacy efforts.²⁸² Organisations advocating for transgender rights, for instance, often operate under the guise of HIV/AIDS prevention efforts, as official registration is challenging, and threats are not uncommon. Consequently, intersex and transgender persons in Togo remain highly vulnerable, facing systemic discrimination and a lack of legal safeguards.

The intersecting issues surrounding transgender and intersex lived realities in Togo are multifaceted. Discrimination intersects with other factors such as socio-economic status, access to healthcare, and education. Discrimination extends to healthcare settings, where intersex and transgender persons encounter stigma, particularly in HIV/AIDS services and denial of services. Health providers may refuse care or perpetuate discrimination, exacerbating health disparities within the community.²⁸³ Persons who identify as transgender and gender non-conforming persons are not legally acknowledged, barring them from changing their legal gender or name. They are especially susceptible to rape, extortion, and blackmail by partners, often forcing them to stay silent about these crimes.²⁸⁴ As a result, many seek refuge in neighbouring countries like Benin and Ivory Coast or in Europe to escape the intense social and legal pressures in Togo.²⁸⁵ Thus, the daily reality for intersex and transgender persons in Togo is fraught with stress, compounded by the challenges of advocating for justice in a society that often fails to recognise their rights.²⁸⁶

The current laws do not restrict medically unnecessary interventions on intersex minors without their informed consent. Same-sex couples are unable to legally adopt children, whether through joint or second parent adoption, and cannot enter civil unions or marriages. Conversion therapies aimed at changing SOGIESC are not regulated or restricted by Togolese law. Furthermore, there are no legal provisions to prevent incitement to hatred, violence, or

²⁷³ 'Togo : l'homme Kossi Elikplim alias Bobo Périta déposé en prison' (2023) available at: <https://24heureinfo.com/justice/togo-lhomo-kossi-elikplim-alias-bobo-perita-depose-en-prison/>.

²⁷⁴ 'For Togo's LGBTQ community, justice remains just out of reach' (2018) available at: <https://religionnews.com/2018/01/12/for-togos-lgbtq-community-justice-remains-just-out-of-reach/>.

²⁷⁵ Amnesty International 'Togo: Shadow report to the African Commission on Human and Peoples' Rights 63RD Ordinary Session: 24 October-13 November 2018, available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR57820202018ENGLISH.pdf>.

²⁷⁶ CCPR/C/TGO/CO/5: Concluding observations on the fifth periodic report of Togo (2021) available at: <https://www.ohchr.org/en/documents/concluding-observations/ccprctgoco5-concluding-observations-fifth-periodic-report-togo>.

²⁷⁷ K Lawson 'For Togo's LGBTQ community, justice remains just out of reach' (2018) available at: <https://religionnews.com/2018/01/12/for-togos-lgbtq-community-justice-remains-just-out-of-reach/>.

²⁷⁸ 'Au Togo, l'homosexualité se vit dans la clandestinité' (2022) available at: <https://full-news.tg/togo-lhomosexualite-se-vit-clandestinite/>; L Pettinotti and S Raga 'Gender equality in Togo: Contextualising Togo's progress on gender equality (2023) available at https://media.odi.org/documents/ODI_Policy_Brief_Gender_Equality_in_Togo_June_2023.pdf.

²⁷⁹ US Department of State '2023 Country Reports on Human Rights Practices: Togo' available at: <https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/togo/>.

²⁸⁰ US Department of State (as above).

discrimination based on SOGIESC. Consequently, crimes motivated by these factors are neither subject to aggravated penalties nor classified as hate crimes. Discrimination in housing, education, employment, healthcare, and access to goods and services based on these attributes is not legally prohibited, further negatively impacting the lives of transgender and intersex persons.

The experiences of intersex and transgender persons are shaped by both medical practices and societal norms. A pivotal event influencing these dynamics was a scientific seminar held in 2006, focused on intersex management.²⁸⁷ The seminar included two days of theoretical sessions aimed at improving the understanding, recognition, and treatment of sexual ambiguities. Practical sessions involved surgeries addressing various intersex conditions, such as mixed gonadal dysgenesis and pseudo hermaphroditism, provided at no cost.²⁸⁸ Participant feedback indicated satisfaction and increased confidence in managing intersex cases post-seminar. Despite advancements highlighted during the seminar, the realities for intersex and transgender persons in Togo remain daunting, including the absence of legal frameworks that support legal gender recognition, preventing individuals from altering gender markers on official documents. While the seminar represented progress in medical education and practice, it underscores the urgent need for broader societal and legal reforms to protect the rights and well-being of intersex and transgender persons.

In Togo, intersex persons confront daunting challenges. Cultural beliefs often label children like C, identified as intersex, as symbols of malevolence or witchcraft, leading to severe discrimination and mistreatment.²⁸⁹ Legal safeguards for intersex persons are practically non-existent, exposing them to physical and psychological violence without state protection. In response to these risks, C's family sought refuge in Belgium. However, a sudden policy shift revoked their residency status, plunging them into uncertainty and imminent deportation to Togo. Concerned for C's safety in such a hostile environment, their legal representative filed an asylum petition citing documented threats of violence and discrimination in Togo. Support from organisations played a crucial role, providing essential research and evidence that substantiated C's asylum application, underscoring the lack of protective legislation and pervasive societal animosity towards intersex persons in Togo.²⁹⁰ This comprehensive assistance led to C being granted refugee status, ensuring ongoing security and stability in Belgium. This landmark decision not only secured C's future but also advanced understanding and acknowledgment of intersex persons within legal circles.

However, there exists a contrasting perception of public displays of affection among lesbians and homosexuals compared to other countries where such actions are met with violence and discrimination. Here, the ability for individuals to openly kiss and engage in public displays of affection is cited as evidence against widespread homophobia.²⁹¹ This suggests a relative degree of acceptance and tolerance towards sexual and gender minorities within Togolese society. However, despite these apparent freedoms, it is important to recognise that broader systemic issues, such as legal protections and social attitudes, alongside lack of documentation on the lived realities, may still pose significant challenges to the lived realities of intersex and transgender persons in the country.

²⁸¹ Amnesty International "Togo: Submission to the United Nations Human Rights Committee 128th Session (2 March - 27 March 2020) available at https://ccprcentre.org/files/documents/INT_CCPR_CSS_TGO_41355_E.pdf.

²⁸² Afrique Arc-en-ciel Togo (2019).

²⁸³ Rapport pour examen lors de la 132eme session du Comité des Droits de (2021) p 12, available at: <https://synergi.aihr.org/wp-content/uploads/2021/06/UN0028.pdf>

²⁸⁴ Arc-en-Ciel International Rainbow website: <https://www.arcenciel-international.be/world-facts/togo>.

²⁸⁵ Arc-en-Ciel International Rainbow website: <https://www.arcenciel-international.be/world-facts/togo>.

²⁸⁶ Afrique Arc-en-ciel Togo (2023).



B) Advancement Towards Protection

There has not been advancement towards protection of sexual and gender minorities rights in Togo, whether in legislation, policy or administrative practices. However, er, The National Human Rights Commission ([Commission Nationale des Droits de l'Homme](#), CNDH) expressed in the survey conducted for this study that have they have provided support for sexual and gender minorities detained by the police, provided they feel safe enough to seek the assistance of the Commission.

On the social front, social media platforms offer some refuge for sexual and gender minorities to express themselves and connect with allies, even though this also pose risks such as harassment, blackmail, and violence. Nonetheless, individuals like Nono L'Arcadien and Kalisha LaBlanche, prominent Togolese TikTokers, navigate a harsh environment where gender roles are strictly enforced, homosexuality is criminalised, and the promotion of SOGIESC-related identities is banned.²⁹² Social media platforms have therefore offered a rare space for self-expression and community support. L'Arcadien, who confidently embraces his effeminate appearance, uses TikTok to share makeup tutorials with his 37,000 followers, proudly displaying a rainbow flag in his videos. Similarly, LaBlanche, who faced familial rejection and the trauma of anti-LGBT conversion therapy, finds solace and connection through her TikTok account, which has garnered over 35,000 followers.²⁹³ However, these online expressions come with significant risks, including harsh criticism and potential backlash. The legal framework in Togo forces many sexual and gender minorities, like Hyppolite, to live in secrecy and isolation.²⁹⁴ Nonetheless, the courage of these young TikTokers provides a glimmer of hope and inspiration, showing that even in the most restrictive settings, the quest for identity and acceptance persists.

C) Regressive Steps

The government has shown reluctance to decriminalise same-sex acts, citing social values²⁹⁵ and international pressures, mainly in response to speculations that Togo's aspirations to join the Commonwealth of Nations might prompt pressure from the United Kingdom to enact such reforms.²⁹⁶ Togo faces significant resistance from religious institutions and conservative factions within the country. The government's position reflects a delicate balancing act between meeting international expectations and respecting domestic cultural sensitivities, often resulting in the prioritisation of the latter at the expense of sexual and gender minority rights. For instance, in 2020, the Bishops' Conference of Togo commended the authorities for their steadfastness in resisting pressure from international institutions, which have sought to tie aid and development projects to the adoption of controversial sexual orientation policies and the promotion of homosexuality.²⁹⁷

The country led by Faure Gnassingbé has reiterated its refusal to recognise the rights of sexual and gender minorities during the process leading to its official membership in the Commonwealth and before the United Nations Human Rights Council during the 3rd cycle of its Universal Periodic Review (UPR). The Minister of Communication and Media, Prof. Akodah Ayewouadan, has reiterated that Togo's position on the SOGIESC issue has not changed, in the

²⁸⁷ K Gnassingbe & others 'Transfer of surgical competences in the treatment of intersex disorders in Togo' (2009) available at: <https://indexmedicus.afro.who.int/iah/fulltext/AJPS/vol6%20n2/transfert%20surgical%2082-84.pdf>.

²⁸⁸ K Gnassingbe & others 'Transfer of surgical competences in the treatment of intersex disorders in Togo' (2009) available at: <https://indexmedicus.afro.who.int/iah/fulltext/AJPS/vol6%20n2/transfert%20surgical%2082-84.pdf>.

²⁸⁹ JZ Pohl 'Togolese and Intersex: A child facing the unpredictability of the system' (2019) available at: <https://www.asylos.eu/blog/togoleseandintersex>.

²⁹⁰ Pohl (as above).

name of the country's social fabric and does not wish to move towards these freedoms.²⁹⁸ Besides, Togo rejected recommendations to protect sexual and gender minority rights during its first UPR, including to repeal the provisions of its Criminal Code which criminalise same-sex relationships and discriminate against sexual and gender minorities, and since the 2011 review, several people have been arbitrarily detained in Togo on the basis of their SOGIESC.²⁹⁹

Apart from the resistance to legislative change, the recent arrest and conviction arrest, conviction and imprisonment of transgender activists like Bobo Périta³⁰⁰ for merely making social media posts expressing her gender identity is a retrogressive step that needs to be stopped. This clearly flies in the face of public statements that were made by government officials during their engagement with the Human Rights Committee as part of the state reporting process in 2021 indicating that the state does not enforce laws that criminalise sexual orientation or gender identity.³⁰¹

D) Opportunities for Intervention by CNDH

The legal framework falls short in protecting the rights of intersex and transgender persons, as the existing laws do not extend protection against discrimination in crucial areas such as access to goods and services, healthcare, education, employment, and housing. This legal gap contributes to a hostile environment where transgender and intersex persons face significant barriers and are vulnerable to various forms of discrimination and violence, including attacks and social marginalisation.³⁰² The CNDH as a body entrusted to ensure the promotion and protection of human rights in Togo has an important role to play in ameliorating this situation.

Togo's UPR process, particularly since 2017, has highlighted significant concerns regarding the rights of sexual and gender minorities. During the third cycle in March 2022, Togo received numerous recommendations from various states, urging the country to enhance protections for people facing discrimination based on sexual orientation or gender identity. Key recommendations included the decriminalisation of consensual same-sex relations, the introduction of legislation to prohibit discrimination on the grounds of sexual orientation and gender identity, and efforts to address violence against women, children, and sexual and gender minorities. Despite these calls for action, many of the recommendations, such as those from Argentina, Australia, and Canada, were noted but not accepted, reflecting ongoing challenges in advancing SOGIESC rights within the nation. Togo did, however, accept Slovenia's recommendation to take measures to protect sexual and gender minorities from violence and marginalisation, indicating a potential area for progress. This presents an opportunity for CNDH to engage the relevant government institutions towards the adoption of legislation to protect transgender and intersex persons from violence, marginalisation, and discrimination. Such legislation should also aim to categorise crimes committed against transgender and intersex persons solely on the grounds of gender identity as hate crimes that require enhanced penalties. Ultimately the target should be to get the state to repeal laws that criminalise sexual orientation and gender identity, but in the absence of that, protective legislation in the manner described above is essential.

²⁹¹ A Haka 'Togo-Que les homosexuels du pays fassent doucement' available at: <https://icilome.com/2022/04/togo-que-les-homosexuels-du-pays-fassent-doucelement/>

²⁹² S Combey 'Can TikTok help young LGBT people in Togo find community?' (2021) available at: <https://www.opendemocracy.net/en/5050/tiktok-lgbt-togo-community/>

²⁹³ Combey (as above).

²⁹⁴ Combey (as above).



CNDH should also advocate for legislation that prohibits unnecessary sex normalisation surgeries for intersex minors without their consent and the prohibition of conversation practices which have no known efficacy and yet are often harmful to the physical and psychological wellbeing.

Even before such legislation becomes a reality, CNDH has an opportunity to engage in public education and awareness raising on the rights of transgender and intersex persons, aimed at changing harmful societal attitudes and beliefs that work adversely against these communities including exposing them to violence and marginalisation. Public advocacy of this kind will also embolden transgender and intersex organisations as well as other organisations that share solidarity or are interested in the protection of these communities but who are currently unable do so because of the fear of public backlash to be able to publicly engage on these ensures towards enhancing the rights and lived realities of transgender and intersex persons.

One of the practice means through which this kind of public education and awareness raising can be achieved by CNDH is developing a comprehensive manual and instituting continuous training programs for its own staff and staff other state institutions including social workers and law enforcement to ensure that there are coherent national efforts to protect transgender and intersex persons. This initiative would ensure that all involved parties are equipped with updated knowledge and skills necessary to effectively address the specific rights and challenges faced by transgender and intersex persons. Additionally, fostering robust collaboration between CNDH and CSOs can strengthen advocacy efforts and facilitate a more coordinated approach to promoting transgender and intersex rights within the country. This will require the CNDH to acknowledge the vulnerability of transgender and intersex persons to various human rights violations and actively include programming on the rights of transgender and intersex persons in their programmes and activities, including have dedicated focal points to ensure that there a direct channel of communication between CNDH and civil society actors, so that transgender and intersex persons can reach out for assistance when they require it.

CNDH should 'promptly, thoroughly and impartially investigate all allegations of attacks, harassment, intimidation, arbitrary arrest and detention of persons on the basis of their real or perceived sexual orientation or gender identity and expression and'³⁰³ ensure accountability for such violations.

On the back of public statements made by state representatives in their engagement with various international human rights mechanisms on the government's lack of interest in enforcing legislation criminalising sexual orientation and gender identity, CNDH has an opportunity to engage state officials and law enforcement to refrain from the harassment, intimidation and extortion of transgender and intersex persons using public decency laws, as exemplified by the recent conviction of Bobo Périta for expressing her gender identity online.

²⁹⁵ 'Human Rights Committee Raises Concerns about Torture, Transitional Justice and Sexual Minorities in Dialogue with Togo' (2021).

²⁹⁶ 'LGBT: La position du Togo ne variera pas' (2022) available at: <https://www.togobreakingnews.info/lgbt-la-position-du-togo-ne-variera-pas/>.

²⁹⁷ A Haka 'Légalité de l'homosexualité : Le Togo reste intransigeant' (2022) available at: <https://icilome.com/2022/07/legalite-de-lhomosexualite-le-togo-reste-intransigeant/>.

²⁹⁸ 'Togo : Pas de droit pour les homosexuels' (2022) available at: <https://24heureinfo.com/politique/togo-pas-de-droit-pour-les-homosexuels/>.

²⁹⁹ Togo Human Rights – A long way to go 'Amnesty International Submission to the UN Universal Periodic Review, October - November 2016' (Amnesty International, 2016) available at: <https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR5738522016ENGLISH.pdf>

³⁰⁰ https://afreepress-net.translate.goog/2023/07/17/societe-les-secrets-du-sejour-de-bobo-perita-a-la-prison-civile-de-lome/?_x_tr_sl=fr&_x_tr_tl=en&_x_tr_hl=en&_x_tr_pto=sc.

³⁰¹ <https://www.ohchr.org/en/press-releases/2021/07/human-rights-committee-raises-concerns-about-torture-transitional-justice>.



CNDH should also engage relevant state agencies towards the cessation of discriminatory practices such as the denial of legal registration for organisations representing the interests of transgender and intersex persons. Policy advocacy for change in legislation especially with regards to freedom of association and the ability of transgender and intersex organisation to register legally is essential.

CNDH should also aim to collaborate NGOs and development partners in ensuring access to gender-affirming health-care is available for transgender and intersex persons. Secondly, enacting and enforcing anti-discrimination laws is essential to guaranteeing transgender persons equal opportunities in employment, housing, healthcare, and education, thus fostering inclusive societal integration. Concurrently, promoting social awareness through policies that reshape negative societal and religious narratives about transgender and intersex persons can foster greater acceptance and inclusion.

In terms of essential services required in the coming years, prioritising economic empowerment initiatives like vocational training and support for transgender and intersex entrepreneurs can significantly enhance their economic independence and livelihood opportunities.

Legal aid services, including pro bono representation and assistance in gender recognition processes, are crucial for navigating legal challenges and ensuring access to justice.

Additionally, providing emergency and security services such as shelters, and resettlement assistance can offer critical support during crises. Capacity building efforts, including training in rights advocacy and legal rights awareness, are also essential to empower transgender and intersex persons to defend their rights effectively and mitigate risks of discrimination and prosecution. Such training for transgender and intersex persons could include literacy in digital security as social media, which has become one of their main avenues for advocacy and expression in the repressive socio-political context they find themselves.

³⁰² '2022 Country Reports on Human Rights Practices: Togo' available at: <https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/togo/>



3.9 Uganda

A) General situational analysis

Uganda has a strict, zero-tolerance policy toward sexual and gender minorities, heavily marginalizing and discriminating against intersex and transgender persons. The Anti-Homosexuality Act (AHA 2023) and other laws criminalize same-sex relationships, fostering a hostile environment. This follows the Anti-Homosexuality Act of 2014, known as the “Kill the Gay” law,³⁰⁴ which was declared unconstitutional. Additionally, the Sexual Offenses Bill of 2021, which was rejected by President Museveni aimed to criminalize same-gender sexual acts and anal sex with penalties of up to 10 years in prison.³⁰⁵ These legislative efforts contribute significantly to the persecution of sexual and gender minorities in Uganda.

Cultural and religious beliefs in Uganda further intensify the difficulties faced by transgender and intersex persons. Dominant religious perspectives in the country often reject sexual and gender minorities, labelling them as un-African and a product of Western influence. This rhetoric fuels transphobia and stigma, leading to widespread social ostracism. Transgender and intersex persons, who are often more visible than their LGB counterparts, frequently bear the brunt of this discrimination. They not only encounter societal rejection but also experience violence and economic injustices, such as arbitrary dismissal from employment and denial of social welfare benefits. Economically, they face significant challenges due to job discrimination and social stigma, prompting many to seek asylum or flee the country. Despite these adversities, activists continue to advocate for their rights.

Article 24 of the Constitution of Uganda guarantees protection from cruel, inhumane, and degrading treatment. However, in practice, transgender persons frequently face severe violations of this right, often subjected to public humiliation and danger through practices such as public parading during arrests. They are also victims of non-consensual anal examinations, carried out ostensibly to find evidence of ‘carnal knowledge against the order of nature’, but primarily serving to humiliate and degrade them. These examinations, widely recognised as having no evidentiary value, continue to be used with alarming frequency. For instance, in a recent case involving 20 persons charged with spreading disease, 8 transgender persons reported being subjected to these examinations.³⁰⁶ Because of their gender atypical appearance or expression, transgender persons are often charged with impersonation, which involves presenting oneself as another person, living or deceased, to deceive others. However, because proving this offense is challenging, police often resort to charging transgender persons with minor offenses under the Penal Code Act such as being idle and disorderly, being a rogue and vagabond, being a common nuisance, and more recently, disobeying lawful orders or doing a negligent act likely to spread disease, especially in relation to alleged violations of COVID-19 prevention directives.³⁰⁷

Additionally, police tend to arrest transgender persons on tenuous grounds as a punitive measure. In one incident, 16 transgender persons were arrested after being rescued from a hostile mob; they were insulted, charged with having carnal knowledge against the order of nature, and subjected to forced anal examinations, although the case did not proceed to court.³⁰⁸ Transgender persons are at risk of sexual violence, including rape or threats of rape, and physical violence from law enforcement officers. One particularly egregious incident involved a Deputy Officer in charge of a

³⁰³ Amnesty International “Togo: Submission to the United Nations Human Rights Committee 123th Session (2 March - 27 March 2020) available at https://ccprcentre.org/files/documents/INT_CCPR_CSS_TGO_41355_E.pdf.

prison who burned the anus and private parts of a transgender woman with a smoldering log as a form of punishment.³⁰⁹ Such actions highlight the extreme abuse and lack of protection faced by transgender persons in detention. Besides, the use of anal examinations as a punitive measure is a particularly pervasive manifestation of this denial of bodily integrity.³¹⁰

Within the above context, the violations of the rights of transgender persons in Uganda by law enforcement officials has been widespread. For instance, in November 2019 police arrested 125 people at Ram Bar, Kampala's only sexual and gender minority bar, citing violations of the Anti-Tobacco Law although only a few individuals were using shisha at the time.³¹¹ According to media report,³¹² victims were forcibly dragged and thrown onto police trucks. On October 21, 2019, police arrested 16 people associated with Let's Walk Uganda, an advocacy program for sexual and gender minority youth, during which a doctor forcibly conducted anal examinations on the detainees.³¹³

The experiences of intersex and transgender persons in Uganda have been particularly challenging, especially in the wake of the COVID-19 pandemic. The Ugandan government's enforcement of pandemic-related regulations has disproportionately affected sexual and gender minorities. The enforcement has frequently led to the arrest and detention of sexual and gender minorities, including intersex and transgender persons, under charges such as 'disobeying lawful orders' and 'doing a negligent act likely to spread infection of disease', as stipulated in sections 117 and 171 of the Penal Code Act. One notable incident occurred on March 29th, 2020, when 23 youths were arrested at a shelter for homeless sexual and gender minorities in Kyengera Town Council and detained for over 50 days. Among those arrested were 11 transgender women. Although the official charges were related to the alleged violation of COVID-19 safety measures, it was apparent that the arrests were motivated by the individuals' perceived SOGIESC. The authorities charged these individuals with 'doing a negligent act likely to spread infection of disease'. Of the arrested group, 8 transgender women were remanded to prison, where they faced inhuman and degrading treatment, including denial of access to their legal representatives. This denial was later found by the High Court as a violation of their rights to liberty and a fair hearing.³¹⁴ The charges were again linked to the alleged disobedience of COVID-19 lockdown rules. During their detention, these individuals faced inhumane and undignified treatment, including being initially denied access to legal counsel.³¹⁵

Since the enactment of the Anti-Homosexuality Act (AHA) in May 2023, there has been a disturbing surge in human rights abuses³¹⁶ targeting sexual and gender minorities. These violations include evictions, loss of employment, arbitrary arrests,³¹⁷ hate-motivated violence,³¹⁸ murder, assault, sexual violence,³¹⁹ harassment, extortion, and the denial of essential healthcare services. As a case in point, in 2023, a group of unidentified assailants looted,³²⁰ robbed, and set fire to the offices of the trans organisation TranzNetwork in Kikaaya, Kampala. The Human Rights Awareness and Promotion Forum (HRAPF) reports that, in June 2024 alone, 81 cases were handled involving violence, threats, evictions, and arrests based on real or presumed SOGIESC.³²¹ Notably, there were 15 cases of physical violence, 5 cases of threats of violence, 12 cases of eviction, and 5 cases of arrests. These incidents frequently result in severe physical injuries and psychological trauma. Additionally, many face eviction from their homes, either by landlords or family members, further exacerbating their vulnerability and precarious living situations. Thus, the lived realities of intersex and transgender persons are marked by a constant threat of violence, often from unknown assailants or community members.

³⁰⁴ Mulucha 'The anti-gender movement in Uganda: A critical analysis of its impact on trans and gender diverse persons' (27 September 2022), available at <https://gate.ngo/knowledge-portal/article/the-anti-gender-movement-in-uganda-a-critical-analysis-of-its-impact-on-trans-and-gender-diverse-persons/>.

³⁰⁵ Human Rights Watch 'Uganda: Reject Sexual Offenses Bill' (2021) available at <https://www.hrw.org/news/2021/05/06/uganda-reject-sexual-offenses-bill>.



The vague language of AHA 2023 and societal stigma surrounding gender identity pose a heightened risk to transgender and gender-diverse communities, who often face discrimination based on misconceptions linking their identities to homosexuality.

Despite Uganda's commitments to increasing its health budget allocation and ensuring healthcare access for all, there remains a glaring neglect of the broader sexual and reproductive health needs of transgender and intersex persons.³²² Government initiatives like the Most at Risk Populations Initiative (MARPI) focus on HIV and STI treatment, neglecting other crucial health services. This neglect is evident in the lack of specialized healthcare for transgender and intersex persons, who face limited access, widespread discrimination, denial of services, humiliation, and abuse in healthcare settings. Forced anal examinations are a particularly egregious practice. These discriminatory actions violate the right to health and reflect deep-seated social and cultural misconceptions about transgender persons.³²³ The stigma surrounding transgender identities is further exacerbated by Uganda's legal framework, which criminalises same-sex sexual conduct under the Penal Code Act. This legal backdrop informs the negative attitudes of healthcare workers, who may refuse to treat transgender patients, citing fears of endorsing 'imported behaviours' or a lack of requisite skills.³²⁴ Last year, a transgender woman was attacked and delayed medical care for eight hours due to medical staff prioritizing sensationalism over her needs. The staff's transphobia led to her being neglected until a compassionate doctor intervened, underscoring the severe impact of transphobia on healthcare.³²⁵

Besides, the closure of Drop-In Centres (DICs) across Uganda has had profound implications for the health and well-being of sexual and gender minorities, particularly transgender persons.³²⁶ These centres provided essential services such as HIV treatment, mental health support, and access to resources. With their closure, many individuals have been cut off from critical healthcare services, exacerbating health disparities and risking increased rates of HIV transmission and mental illness among the community.

Uganda's healthcare system fails to collect data reflecting the needs of transgender persons, leading to gaps in understanding and addressing their healthcare needs. Government efforts on sexual and reproductive health rights (SRHR) target mainly heterosexual individuals, neglecting transgender and gender-diverse populations. For instance, the Ministry of Health's contraception campaign focuses on heterosexual couples. Mental health services are inadequate,

³⁰⁶ Come Out Positive Test Club & others 'Universal Periodic Review of Uganda: Joint submission by civil society organisations advocating for the transgender and gender diverse persons' (2021) available at <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=9571&file=EnglishTranslation>

³⁰⁷ Come Out Positive Test Club & others (as above).

³⁰⁸ Human Rights Awareness and Promotion Forum (HRAPF), 'The Uganda report of human rights violations on the basis of sexual orientation and gender identity 2019 (March 2020) available at <https://www.hrapf.org/index.php/resources/violation>.

³⁰⁹ Come Out Positive Test Club & others (as above).

³¹⁰ Independent Forensic Expert Group 'Statement on anal examinations in cases of alleged homosexuality' (2022) available at <https://irct.org/wp-content/uploads/2022/08/IFEG-Statement-Anal-Examination.pdf>.

³¹¹ Human Rights Watch 'Uganda: Stop police harassment of LGBT people, (2019) available at <https://www.hrw.org/news/2019/11/17/uganda-stop-police-harassment-lgbt-people>.

³¹² Human Rights Watch (as above).

³¹³ Human Rights Watch (as above).

³¹⁴ Human Rights Awareness and Promotion Forum (HRAPF) vs. Attorney General and Another (High Court MA No. 188 of 2020).

³¹⁵ HRAPF 'Report of human rights violations against key populations in Uganda January- June 2020 available at <https://www.hrapf.org/index.php/resources/violation-reports>.

with transgender persons often misdiagnosed as having mental disorders, resulting in inappropriate treatment and further marginalization. This misdiagnosis violates their right to health and exacerbates psychological stress from societal discrimination. Urgent action is needed to address these critical healthcare issues.

In many Uganda cultures, intersexuality is often perceived to be a curse that must be gotten rid of, leading some families to hide intersex children at home or even resort to infanticide.³²⁷ Intersex persons are subject to traumatic traditional ‘normalisation’ procedures, especially in childhood.³²⁸ Superstition and lack of awareness about what being intersex means results in intersex persons being subjected to stigmatisation, ostracization and physical abuse. As one activist recounts ‘[g]rowing up as an intersex person in Uganda, you are taught that your own body no longer belongs to you. It is abused, investigated, tested and ‘corrected’ against your will’.³²⁹

Legal recognition of intersex and transgender persons faces significant challenges due to restrictive laws and societal attitudes. Because of the binary nature of the law, there is no legal recognition of intersex a separate category. While the Registration of Persons Act 2015 enables intersex persons to change their sex on official documents if they have undergone gender reassignment surgery, this is only allowed before the age of 21, resulting in the exclusion of intersex persons from social, economic and political programmes.³³⁰ The Registration of Persons Act, however, does not recognise transgender individuals’ ability to change their sex on official documents. This exclusion of transgender adults and those without medical proof of being intersex denies them legal recognition and associated benefits. Consequently, many face barriers in employment, healthcare, and other public services. The discrepancy between gender presentation and official documents leads to discrimination and exclusion, marginalizing transgender persons and denying them the rights and protections afforded to other citizens.

The absence of regulations concerning conversion practices poses further risks to the well-being and autonomy of intersex persons. Moreover, medically unnecessary interventions to modify the sex characteristics of intersex minors are not restricted, disregarding their fundamental right to free, prior, and informed consent. This legal void exacerbates the vulnerability and marginalisation faced by intersex and transgender persons in Uganda.

³¹⁶ C Kimeu & A Rosalia ‘LGBTQ+ groups face crackdowns in Uganda as environment turns hostile’ (2023) available at: <https://www.theguardian.com/global-development/2023/mar/14/lgbtq-crackdowns-uganda-environment-hostile>.

³¹⁷ HRAPF ‘HRAPF’s report on Violations through the enforcement of the AHA in August 2023’ available at: <https://hrapf.org/mdocs-posts/hrapfs-report-on-violations-through-the-enforcement-of-the-aha-in-august-2023/>.

³¹⁸ Amnesty International ‘Africa: Barrage of discriminatory laws stoking hate against LGBTI persons’ (2024) available at: <https://www.amnesty.org/en/latest/news/2024/01/africa-barrage-of-discriminatory-laws-stoking-hate-against-lgbti-persons/>.

³¹⁹ J Longman & others ‘Gay and targeted in Uganda: Inside the extreme crackdown on LGBTQ rights’ (2023) available at: <https://abcnews.go.com/International/gay-targeted-uganda-inside-extreme-crackdown-lgbtq-rights/story?id=103696195>.

³²⁰ ‘Arson destroys offices of Ugandan trans organization’ (2023) available at: <https://rightsafrika.com/2023/09/18/arson-destroys-offices-of-ugandan-trans-organization/>.

³²¹ HRAPF violations report for June 2024 available at <https://hrapf.org/violation-reports/#>

³²² HRAPF ‘Trends analysis of programming and budget allocation to SRHR commodities and services for LGBT persons in Uganda’ (2020) <https://www.hrapf.org/index.php/resources/legal-policy-analyses>

³²³ HRAPF (as above).

³²⁴ HRAPF (as above).

³²⁵ K Lay ‘Threats, accusations and assault: The dangers of running an LGBTQ+ health clinic in Uganda’ (2024) available at: <https://www.theguardian.com/global-development/2024/may/01/lgbtq-health-clinic-uganda-anti-gay-law>.

³²⁶ Amnesty International ‘LGBTI rights in Uganda: An interview with activist Jaqueline Kasha’ (2024) available at: <https://www.amnesty.org/en/latest/campaigns/2024/06/lgbti-rights-in-uganda-an-interview-with-activist-jaqueline-kasha/>.

³²⁷ Hirschfeld Eddy Foundation ‘Portrait of Julius Kaggwa, intersex activist from Uganda’ (2021) available at <https://blog.lsvd.de/portrait-of-julius-kaggwa-intersex-activist-from-uganda/>.



Besides, the upcoming national Census in Uganda has stirred controversy due to its exclusion of intersex persons. The head of Uganda's Bureau of Statistics stated that the agency is not involved with intersex persons. This decision is significant as it would have made Uganda the second African nation and third globally, following Australia and Kenya, to include intersex data in a Census. Intersex people in Uganda face marginalisation and discrimination, lacking recognition as the third sex alongside other minority groups. Their exclusion from the Census reflects broader societal attitudes and governmental neglect. Nonetheless, grassroots organisations like the Support Initiative for People with Atypical Sex Development (SIPD) continue to advocate for intersex rights, urging for policy reforms and societal acceptance.³³¹

The Non-Governmental Organisations Act 2016 (NGO Act) presents significant challenges for organisations advocating for the rights of sexual and gender minorities, including transgender and intersex persons. The Act imposes special obligations on NGOs, prohibiting activities deemed 'prejudicial to the interests of Uganda and the dignity of the people of Uganda'.³³² This vague provision leads to self-censorship among CSOs and targets those addressing controversial issues like SOGIESC rights. The Act requires all NGOs to register with stringent oversight by the NGO Bureau. Article 30 prohibits objectives contrary to Ugandan laws, often used to deny registration to NGOs advocating for sexual and gender minorities. This creates significant legal and administrative obstacles for intersex and transgender persons and their advocates. For instance, Sexual Minorities Uganda (SMUG) has repeatedly faced legal challenges in obtaining recognition due to its advocacy for sexual and gender minority rights, deemed unlawful under Ugandan law. Despite legal efforts, including a 2018 lawsuit and a 2024 appeal, courts upheld the NGO Bureau's rejection of SMUG's registration. This denial hampers SMUG's ability to support sexual and gender minorities and reflects broader government actions against civil society. The Court of Appeal's decision undermines democratic principles, particularly freedom of association, further marginalizing sexual and gender minorities by denying them essential support and advocacy services.

The Ugandan government's crackdown on civil society has extended beyond SMUG, shutting down over 12,000 organizations in November 2019 and suspending numerous NGOs in August 2021. This reflects growing intolerance toward CSOs, especially those advocating for sexual and gender minority rights. Organizations like The Robust Initiative for Promoting Human Rights, Tranz Network Uganda, and Ubuntu Law and Justice Centre have faced increased scrutiny and punitive actions. The NGO Bureau's heightened oversight and criminalization of activism create a hostile environment, severely limiting the ability of transgender and intersex persons and their allies to advocate for their rights and access essential resources.

³²⁸ As above.

³²⁹ As above.

³³⁰ As above.

³³¹ S Kisika 'Ugandan Census will not count intersex people' (2024) available at: <https://www.losangelesblade.com/2024/04/22/ugandan-census-will-not-count-intersex-people/>

³³² Non-Governmental Organisations Act, 2016 sections 30 and 44.

³³³ Mukasa & Oyo v Attorney General, Misc Cause No. 24/06 (2008).



B) Advancement Towards Protection

Despite the oppressive legal and social environment, notable progressive steps have been taken towards the protection of intersex and transgender persons in Uganda. Strategic litigation has continued to be a powerful tool for combating discrimination and injustice. The 2006 case involving Victor Mukasa³³³ stands out as a significant milestone in transgender activism in Uganda. The Ugandan High Court ruled in favour of Mukasa, declaring that the government's raid on their home, which targeted members of the organisation Sexual Minorities Uganda (SMUG), was a violation of their privacy rights. The court awarded Mukasa and Oyoo \$6500 (USD) for the humiliation, degrading treatment, trauma, and injury they suffered, as well as covering their legal costs.

In the 2010 case of *Kasha Jacqueline, David Kato, and Onziema P v Rolling Stone Publications Limited and Giles Muhame*,³³⁴ the High Court of Uganda ruled in favor of sexual and gender minority activists after the tabloid published their personal details under the headline "Hang Them," inciting violence and fear. The court issued a permanent injunction against further publications and awarded damages for emotional distress, recognizing the violation of privacy rights. This landmark decision affirmed the universal application of human rights in Uganda and set a crucial precedent for protecting sexual and gender minorities against incitement and discrimination.

Other notable court victories include the annulment of the Anti-Homosexuality Act of 2014 by the Constitutional Court in *Oloka-Onyango & 9 Others v Attorney-General*³³⁵ and the Constitutional Court decision in *Adrian Jjuuko v Attorney General*³³⁶ declaring section 15(6)(d) of the Equal Opportunities Act 2007 unconstitutional, as it prohibited the Equal Opportunities Commission from addressing issues deemed socially unacceptable by majority societal and cultural norms. These decisions affirm the rights to equality and non-discrimination for sexual and gender minorities, including transgender and intersex persons.

A significant legislative achievement is the Human Rights (Enforcement) Act of 2019, which has streamlined and expedited justice for victims of human rights violations. This act empowers courts to address human rights abuses with less emphasis on procedural technicalities, providing a more accessible legal framework for upholding the rights of transgender and intersex persons.³³⁷

³³⁴ *Kasha Jacqueline, David Kato, and Onziema P v Rolling Stone Publications Limited and Giles Muhame*, Misc Cause No. 163 of 2010.

³³⁵ *Oloka-Onyango & 9 Others v Attorney-General*, Constitutional Case 8 of 2014.

³³⁶ *Adrian Jjuuko v Attorney General*, Constitutional Petition No 001 of 2009 (2016).

³³⁷ *Human Rights Awareness and Promotion Forum (HRAPF) vs. Attorney General and Another* (High Court MA No. 188 of 2020).



At the socio-political level, there has been marked improvement in the visibility of advocacy for LGBTI rights, including the rights of transgender and intersex persons.

Before 2014, SOGIESC rights activism in Uganda was relatively limited, with many individuals remaining closeted due to societal stigma and legal threats. However, in the wake of the 2014 legislation, there has been a notable increase in visibility and activism among sexual and gender minorities. Many have bravely stepped forward to publicly advocate for their rights, despite heightened vulnerability to discrimination and violence. This may signal a gradual push towards the enhancement of the rights of sexual and gender minorities including for transgender and intersex persons in Uganda.

The Uganda Human Rights Commission (UHRC) indicated in the survey that it engages with transgender and intersex communities and CSOs working on SOGIESC rights. Through its Human Rights Defender's Desk, the UHRC conducts regular trainings and advocacy engagements aimed at sensitising stakeholders on the rights and challenges faced by transgender and intersex persons. In addressing the rights of transgender and intersex persons, successful practices employed by the NHRC include continuous sensitisation efforts, which not only empower affected communities to assert their rights but also foster a supportive environment for advocacy, policy reform initiatives and greater societal acceptance.

C) Regressive Steps

Regressive steps have significantly outweighed the progressive ones. The enactment of laws criminalising same-sex relations, and the ongoing societal and institutional discrimination reflect a regressive trend. The government has used various laws, such as the AHA 2023, Penal Code and the NGO Act, to suppress sexual and gender minorities and CSOs advocating for these rights. For example, the Penal Code's provisions on impersonation, indecent practices, being idle and disorderly amongst others, are often misused to harass and arrest transgender persons. The COVID-19 pandemic exacerbated these issues, with authorities using pandemic regulations to target and arrest sexual and gender minorities, often under the pretence of public health concerns. The enforcement of these regulations disproportionately affected sexual and gender minorities, including transgender and intersex persons, who faced arbitrary arrests and detentions, sometimes accompanied by inhumane treatment. The pervasive use of anal examinations as a form of humiliation and punishment against transgender persons exemplifies the extreme violations they face. Additionally, the lack of legal recognition for transgender persons under the Registration of Persons Act 2015 and other legal frameworks limits their access to services and employment opportunities.

The judiciary has also contributed to regressive steps concerning the rights of intersex and transgender persons, as evidenced by a number of legal precedents. For example, in the case of *Jacqueline Kasha Nabagesera & 3 Others v AG & Anor*,³³⁸ the High Court ruled that Minister of Ethics and Integrity did not violate the rights of sexual and gender minorities when he closed down a workshop, on grounds of purportedly 'promoting homosexuality' citing section 145 of the Penal Code Act as justification, despite the applicants' assertion that the workshop aimed at advocating human rights, leadership, and project planning. The court validated the closure, citing evidence that the workshop promoted illegal activities, such as homosexuality, prohibited by Ugandan law. Despite arguments raised concerning freedom of association, assembly, political participation, and equality under the law, the judge deemed the limitations imposed

on the applicants' rights as justifiable in the 'public interest' and aimed at safeguarding 'moral values'. This decision, which is currently under appeal in the Court of Appeal (Civil Appeal No. 195 of 2014), is yet to be heard, despite being filed five years ago. Such instances reflect a judicial stance that upholds discriminatory laws, thereby perpetuating a hostile environment for sexual and gender minorities in Uganda.

Again, delays in the finalisation of significant cases such as *Adrian Jjuuko v Attorney General*, which challenged the constitutionality of section 15(6)(d) of the Equal Opportunities Commission Act that prevented the Commission from investigating issues deemed 'immoral or socially unacceptable' by most cultural groups, underscores judicial acquiescence in the marginalisation of sexual and gender minorities, including transgender and intersex persons in Uganda. The case, filed in 2009, was heard in 2012 but was only decided in 2016. While the case was decided in favour of the applicant, the long delay left room for sexual and gender minorities in the meantime to be discriminated against by the Equal Opportunities Commission on account of section 15(6)(d) of the Equal Opportunities Commission.

More significantly, the watershed ruling of Uganda's Constitutional Court in *Fox Odoi-Oywelowo & Others v Attorney General & Others*³³⁹ in April 2024 endorsing the AHA of 2023, a legal framework that perpetuates discrimination and harm against the country's sexual and gender minority community, not only condones but also institutionalises the marginalisation of individuals based on their SOGIESC. By prioritising so-called 'traditional' and 'cultural' values over universal human rights, the court has effectively sanctioned the ongoing violations of the rights and freedoms of sexual and gender minorities, including transgender and intersex persons, deeming it necessary to hold that the individual rights to self-determination, self-perception and autonomy had to be balanced against the 'societal right to social, political and cultural self-determination'.

Since 2013, the Communications Act³⁴⁰ has mandated broadcasters in Uganda to ensure that their programs align with 'public morality'. In 2019, the Uganda Communications Commission introduced the Standards for General Broadcast Programming in Uganda, which includes strict regulations regarding certain lifestyles and topics deemed sensitive by the government. Article 6(5) of the Act prohibits the promotion, justification, or glamorisation of homosexuality, lesbianism, bisexuality, transsexualism, transvestism, paedophilia, and incest. Explicit discussion or information pertaining to these subjects is prohibited from being broadcasted. Additionally, section 8(6) of the Act specifies that sex education programmes must refrain from endorsing or advocating for 'unnatural sex acts'. These regulations highlight the restrictive environment faced by intersex and transgender persons in Uganda, subject to scrutiny and censorship based on moral grounds.

In a nutshell, Uganda has experienced significant regressive steps impacting the lives of transgender and intersex persons, exacerbating their marginalisation and vulnerability. The AHA 2023 has further intensified human rights abuses, including evictions, job losses, arbitrary arrests, and violence. Existing laws fail to protect against discrimination in crucial areas such as healthcare, education, employment, and housing, with section 9 of the AHA 2023 penalising non-discriminatory landlords. The attack on TranzNetwork in 2023 exemplifies the heightened risks faced by advocacy groups. The repeated denial of legal registration for SMUG and the mass shutdown of over 12,000 NGOs highlight a broader crackdown on civil society.

³³⁸ *Jacqueline Kasha Nabagesera & 3 Others v AG & Anor*, Misc. Cause No. 33 of 2012 (2014).

³³⁹ *Fox Odoi-Oywelowo & Others v Attorney General & Others*, Consolidated Constitutional Petitions No. 14, 15, 16 & 85 of 2023 (2014).

³⁴⁰ Uganda Communications Act (2013).



D) Opportunities for intervention by UHRC

Uganda faces formidable challenges within the current legal framework and operational context of the Uganda Human Rights Commission (UHRC), which limits its direct influence on institutional change. Despite these constraints, there are strategic opportunities for the NHRC to significantly enhance its advocacy and protection efforts for transgender and intersex persons.


Since 2017, Uganda's Universal Periodic Review (UPR) has included numerous recommendations to protect sexual and gender minorities. During the 40th session in March 2022, states like Argentina, Chile, Australia, and Canada urged Uganda to decriminalise same-sex relations, combat discrimination, and protect against police violence. France, Iceland, and Italy emphasized preventing violence and discrimination based on sexual orientation and gender identity. Despite these recommendations, Uganda has noted but not committed to implementing them, showing persistent resistance to changing its stance on these issues.

Uganda's stringent NGO Act significantly hinders civil society, particularly those advocating for sexual and gender minority rights. The NGO Bureau's restrictive regulations and repeated rejections of registrations for groups like SMUG stifle freedom of expression and perpetuate systemic discrimination against these communities. Within the current restrictive legislative and administrative environment, the Uganda Human Rights Commission (UHRC) can leverage its mandate to monitor and report on human rights violations, including restrictions on NGO operations and advocacy rights. The UHRC should advocate for the removal of restrictions on the registration of NGOs that advocate for sexual and gender minority rights, including the rights of intersex and transgender persons, as such laws impede on the ability of the Commission to effectively perform its mandates towards transgender and intersex communities.

Following the example of the decision in *Adrian Jjuko v Attorney General*, declaring provisions of the Equal Opportunities Act discriminatory for the exclusion of the Commission's mandate from addressing issues deemed socially unacceptable by majority societal and cultural norms, the UHRC has an opportunity to spearhead advocacy towards the repeal of discriminatory provisions of the NGO Act which perpetrates similar discriminatory practices.

The Anti-Homosexuality Act of 2023 and the broader legal framework in Uganda perpetuate discrimination against sexual and gender minorities in crucial areas such as healthcare, housing, education, employment, and access to goods and services. The absence of protections against discrimination based on sexual orientation, gender identity, and intersex status leaves these communities vulnerable to violence, harassment, and exclusion. Consequently, while decriminalisation may be farfetched at the moment, there is an opportunity for advocacy measures to geared towards the repeal of provisions of AHA 2023 to remove provisions that encourage or even enforce discrimination as these provisions have far reaching detrimental consequences on the rights of transgender and intersex persons beyond the criminalisation of same-sex conducts. The NHRC can advocate for the enactment of comprehensive anti-discrimination legislation that explicitly includes protections for sexual and gender minorities, including transgender and intersex persons. This would be in line with the African Commission's Resolution 275 and 552 which urges states to eliminate violence and discrimination against transgender and intersex persons respectively.

Another legislative initiative that can be spearheaded by the UHRC is the decriminalisation of petty offences such as offences relating to being a vagabond, idle and disorderly, amongst others, which are often used by law enforcement to harass and intimidate transgender and intersex persons. This will be in line with the African Commission Guide-



lines on Decriminalising Petty Offences and the Advisory Opinion of the African Court that declared vagrancy laws incompatible with the African Charter and other human rights instruments on account of their disproportionate impact on already marginalised communities. Leveraging its extensive stakeholder network, the UHRC can harness partnerships with government agencies, CSOs, and international bodies to amplify advocacy efforts. This should include persistently lobbying for legislative reforms and policy adjustments that safeguard the rights of transgender and intersex persons within Uganda's legal framework.

Such legislative efforts would, however, only have practical impact on the lives of transgender and intersex persons of communities are sensitised to understand the peculiar concerns of transgender and intersex persons. Such awareness raising campaigns should aim at providing accurate information about what it means to be transgender and intersex and fostering understanding and acceptance of transgender and intersex persons among Ugandan communities, spotlighting the peculiar challenges that these communities face, and the need to provide legal protection. By addressing misconceptions and highlighting the challenges of exclusion and discrimination faced by transgender and intersex persons, these initiatives can pave the way for greater societal acceptance and respect.

The UHRC also has an opportunity here to encourage the submission of complaints relating to discrimination and violence against intersex and transgender persons, which should be properly documented and investigated. Information from these complaints, could then form the basis for making recommendations to the executive and legislature for legislative and policy reforms, including the enactment of legislation that protects the rights of transgender and intersex persons.

The exclusion of intersex persons from the national census and the broader societal marginalisation they face highlight the urgent need for policy reforms and societal acceptance. Despite grassroots advocacy efforts, intersex persons continue to experience invisibility and discrimination, which perpetuates their exclusion from essential services and opportunities. UHRC has an opportunity to engage policy makers on why it is important for the government to have accurate information about intersex and transgender persons so that the state can better plan for their health-care and other socio-economic needs.

Another low hanging fruit that presents an opportunity for the intervention of UHRC is the absence of legislation prohibiting medically unnecessary gender normalisation surgeries on intersex children. Such surgeries have been shown to potentially have significant negative consequence for intersex persons into adulthood and should be prohibited except with the informed consent of the concerned individual.

Ultimately, the UHRC should advocate for the legal recognition of intersex and other gender non-binary persons as a separate sex category or the ability to choose no gender markers on identity documents. This is essential for intersex persons to be able to fully enjoy their rights as the lack of identify documents that much their intersexuality or non-binary status results in the denial of various socio-economic services.

Economic empowerment emerges as another critical intervention. Many transgender persons in Uganda experience severe poverty exacerbated by limited education, which diminishes their competitiveness in the job market. Initiatives focusing on skills development, entrepreneurship, and inclusive employment practices can empower transgender persons economically and socially, thereby reducing their vulnerability and enhancing their overall well-being.



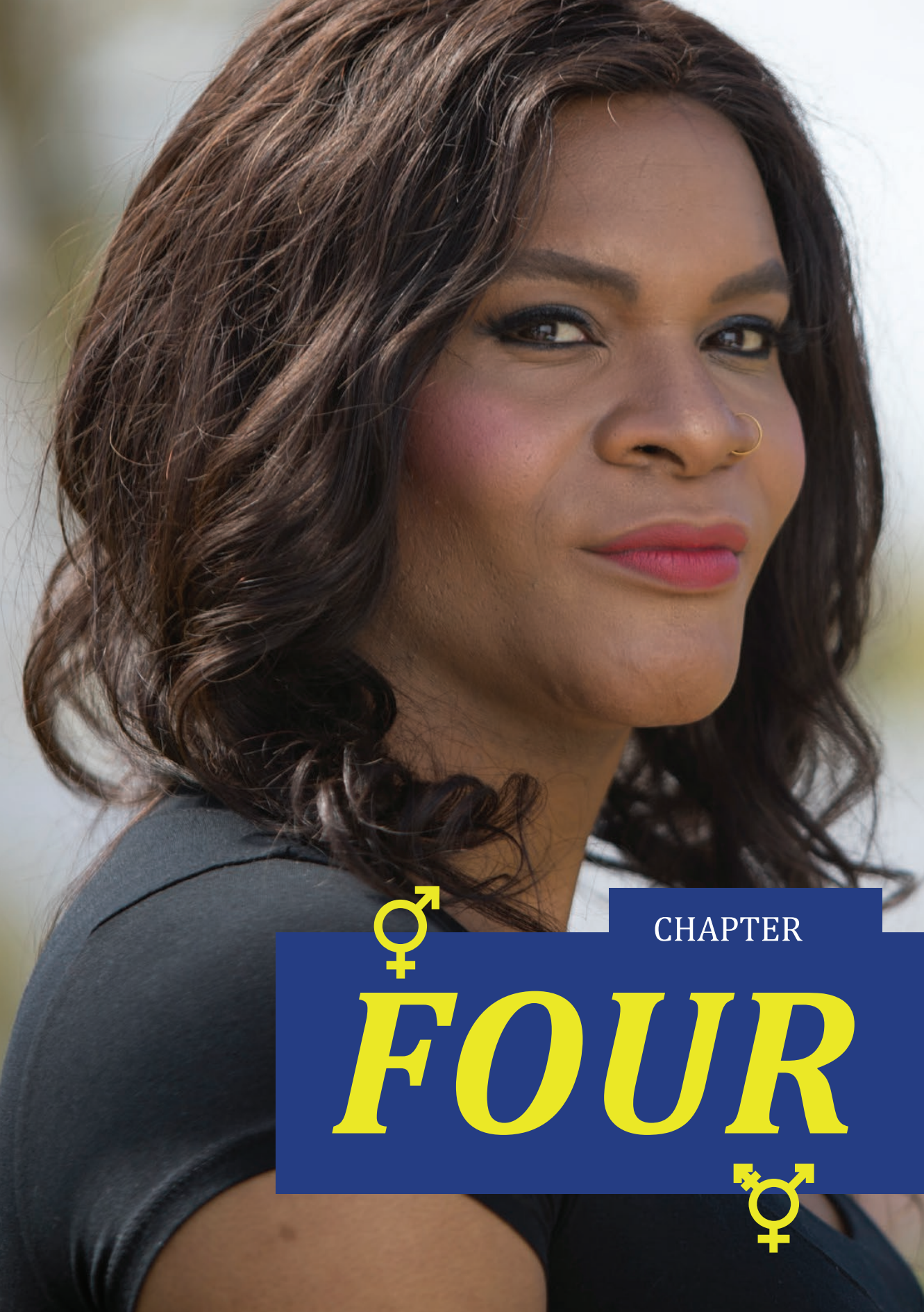
The UHRC can support strategic litigation efforts to challenge discriminatory laws and practices, particularly those enshrined in the Anti-Homosexuality Act. By providing legal aid and representation, the NHRC can assist individuals and organisations in seeking redress for human rights violations. Furthermore, the NHRC can advocate for the repeal or amendment of discriminatory laws and push for the adoption of inclusive policies that protect the rights of transgender and intersex persons, including lobbying for anti-discrimination provisions in national legislation. Besides, establishing robust mechanisms for monitoring and reporting human rights violations against transgender and intersex persons is crucial. The NHRC can set up a dedicated hotline for reporting abuses and ensure timely and transparent investigations. Publishing annual reports on the state of SOGIESC rights in Uganda, highlighting progress, challenges, and recommendations, can serve as valuable advocacy tools and facilitate international engagement.

The UHRC can advocate for inclusive healthcare policies that ensure equitable access to services for transgender and intersex persons. Training healthcare providers on SOGIESC issues and promoting non-discriminatory practices within healthcare institutions are essential steps. Additionally, supporting mental health initiatives that address the specific needs of transgender and intersex persons, including counselling services and peer support networks, can significantly improve their well-being.

The UHRC can also adopt a multi-sectoral approach by collaborating with other government agencies, CSOs, and private sector entities to address challenges in education, employment, and social inclusion.

NHRIs bridge the gap between international human rights norms and national legal systems, serving as key platforms for advocacy, legal reform, and public education.





CHAPTER

FOUR



NATIONAL HUMAN RIGHTS INSTITUTIONS: OPPORTUNITIES AND CHALLENGES IN THE PROTECTION OF INTERSEX & TRANSGENDER PERSONS



National Human Rights Institutions (NHRIs) are crucial in advancing human rights at the domestic level, including the rights of intersex and transgender persons. These institutions, comprising ombudsman offices, human rights commissions, and specialised human rights bodies, are tasked with protecting and promoting human rights within their jurisdictions. NHRIs bridge the gap between international human rights norms and national legal systems, serving as key platforms for advocacy, legal reform, and public education. Established under constitutional or legislative acts, NHRIs operate independently from the government, adhering to the UN Principles relating to the Status of National Institutions (The Paris Principles),³⁴¹ which set minimum international standards for their establishment. Full compliance with these principles grants NHRIs international recognition. This chapter explores the specific roles NHRIs play in advocating for and safeguarding the rights of intersex and transgender persons, who often face systemic discrimination and violence. It discusses the general role of NHRIs in implementing human rights domestically, the strategies they employ to support intersex and transgender persons, and the challenges they face in their efforts to support these communities in the selected countries. The chapter concludes with illustrations of some good practices from selected countries.

4.1 Roles and Responsibilities

NHRIs are state-established bodies that operate independently to monitor, protect, and promote human rights in their respective countries. Their mandates typically include handling complaints, advising the government, raising public awareness, and ensuring compliance with international human rights obligations. For intersex and transgender persons, who often face systemic discrimination and human rights abuses, NHRIs play a crucial role in advancing their rights and well-being. NHRIs have two core responsibilities: human rights promotion and human rights protection.

In terms of human rights promotion, NHRIs advise on the compliance of national laws and practices with international human rights norms. They provide advice to the government, parliament, and other public bodies to address core human rights concerns and eradicate all forms of discrimination

³⁴¹ Principles relating to the Status of National Institutions (The Paris Principles) 1993, General Assembly resolution 48/134, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris>.

irrespective of one's SOGIESC. They promote a culture of rights through training and awareness-raising activities on a variety of issues, and they publish research, recommendations, and opinions. Regarding human rights protection, NHRIs monitor and investigate the human rights situation on the ground. Some NHRIs support individuals in enforcing their rights through complaint handling and legal assistance. They also support the work of human rights defenders to combat issues related to all areas of human rights.

NHRIs can have a direct impact throughout the UPR process by cooperating with national and international stakeholders and the international human rights system as well as contributing to human rights implementation. They can act as a bridge between the State under Review (SuR), other UPR stakeholders, and the Human Rights Council (HRC). They provide independent and authoritative information, share best practice examples and lessons learned on UPR engagement, advise the government on UPR recommendations, monitor the implementation of UPR recommendations, raise UPR awareness at the national level, and encourage domestic actors to participate in the process. They also deliver human rights training.

Cooperating with CSOs is an integral part of the mandate of NHRIs as per the Paris Principles. CSOs operate at the grassroots level and possess local information that may not be readily available to NHRIs. Coordination between NHRIs and CSOs, particularly in terms of international advocacy and reporting, is essential for the effectiveness of initiatives. Given their specific role in the national human rights framework, NHRIs often collaborate with UN agencies and mandate-holders, academia, media, and parliamentarians. The relationship between parliamentarians and NHRIs is detailed in the Belgrade Principles,³⁴² which emphasise the importance of this collaboration in advancing human rights.

4.2 Key areas of engagement for NHRIs

NHRIs engage in several key areas to support intersex and transgender persons, including advocacy for legal and policy reform. They push for the enactment or amendment of national laws and policies to provide specific protections for intersex and transgender rights, such as anti-discrimination laws that expressly forbid discrimination based on gender identity and sex characteristics. Legal support is another crucial function, where NHRIs provide legal assistance to intersex and transgender persons in cases of discrimination or abuse, representing them in court or offering legal guidance to help set precedents that reinforce their rights.

Education and awareness-raising efforts are also essential. NHRIs conduct sensitivity training sessions for public officials, including law enforcement, healthcare providers, and educators, to promote understanding and respectful treatment of intersex and transgender persons. Public campaigns aim to change societal attitudes, reduce stigma, and raise awareness about the rights and needs of these communities. Besides, monitoring and reporting are vital components of NHRI activities. They gather data on the challenges faced by intersex and transgender persons to inform advocacy and policymaking. This includes conducting or supporting research and surveys to better understand these issues. NHRIs often prepare reports on human rights conditions that include specific sections on intersex and transgender rights, drawing national and international attention to thematic that require redress.

³⁴³ <https://forum-asia.org/wp-content/uploads/2017/01/Belgrade-Principles-Final.pdf>.



From the survey, several specific advocacy initiatives and legal actions undertaken by NHRIs to protect the rights of transgender and intersex persons have been highlighted. For example, the Malawi Human Rights Commission opposed the issuance of a moratorium by the Executive arm of the government, advocating for legal reform of the Penal Code, which contradicts the Constitution on discrimination. Through investigations of violence against transgender and intersex persons, the Commission has consistently advocated for their rights and issued public status reports while maintaining confidentiality to protect victims' identities. Following an increase in violence against these communities, the Commission has also trained law enforcement officers on providing justice for transgender and intersex persons and sensitised health workers on their specific health rights, leading to a notable reduction in violence cases.

Further, engaging the media through radio and television programs has been part of the Office of the Ombudsman of Namibia efforts to educate the public on equality and non-discrimination. Meanwhile in Kenya, the Kenya National Human Rights Commission ensured the representation of intersex persons in court, for instance, in the case of *Muasya v Attorney General & Others*, training government agencies, and creating awareness on intersex issues are some of the measures taken. They have also mainstreamed intersex issues in the Junior Secondary School curriculum and collaborated with CSOs like *JinsiYangu*, *Intersex Persons Society (IPS)*, and *Transgender Education & Advocacy (TEA)*. The Commission also hosts the *Intersex Persons Implementation Committee (IPIC)*, which oversees the implementation of recommendations from the 2018 *Intersex Task Force Report*.

Besides, The South African National Human Rights Commission continues to receive complaints and utilise the courts to address human rights violations against transgender and intersex persons. In 2022/23, the Commission held a hearing on the issue of school uniforms following alleged discrimination against a transgender student. The *SOGIESC* category has been the third highest ground for unfair discrimination cases taken to equality courts in the last five years, following race and disability. Additionally, the Commission has been admitted as a third-party intervener in the case of *Semenya v. Switzerland* before the European Court of Human Rights, heard by the Grand Chamber on appeal on May 15, 2024.

On the other hand, The National Human Rights Commission of Nigeria has similarly been active, partnering with CSOs, holding workshops, and providing legal support to sexual and gender minorities, highlighting their comprehensive approach to protecting intersex and transgender rights. The Commission has further established a thematic area dedicated to *Sexual Orientation and Gender Identity Expression Rights*, addressing issues related to sexual and gender minorities.

4.3 Challenges and gaps in the NHRI's current approach to advocating for transgender and intersex rights

NHRIs play a crucial role in advocating for the rights of all individuals, including intersex and transgender persons. However, they face several significant challenges and gaps that hinder their effectiveness. From the survey with the selected NHRIs, key challenges discussed below include social stigma, limited resources, insufficient staff training, political and cultural resistance, and the need for specialised knowledge.

One of the main challenges NHRIs face is the pervasive social stigma against transgender and intersex persons. This widespread discrimination and prejudice can hinder NHRIs' advocacy efforts. The stigma not only impacts the intersex and transgender community, but also creates an environment where advocating for their rights can lead to backlash against the NHRI, further complicating their work. Additionally, societal and political resistance to sexual and gender minority rights is common. This opposition, ranging from hostile government policies to cultural norms that reject sexual and gender diversity, can impede advocacy efforts. NHRIs risk backlash or damaging relationships with the government and other stakeholders when advocating for intersex and transgender rights. Furthermore, many countries lack comprehensive legal protections for intersex and transgender persons, and existing legal frameworks often fail to address their specific needs and challenges, leaving them vulnerable to discrimination and rights violations.

Many NHRIs operate with constrained budgets and limited staff, which significantly affects their capacity to address the wide range of human rights issues, including those specific to intersex and transgender persons. The lack of adequate resources limits their ability to conduct comprehensive research, raise public awareness, and engage in effective advocacy and legal actions. Without sufficient funding, NHRIs continue to struggle to implement and sustain initiatives that support transgender and intersex rights.

The complexity of issues affecting intersex and transgender communities requires specialised knowledge and understanding. However, many NHRI staff members may not initially possess the necessary expertise to address SOGIESC-related issues effectively. Hence, there is a pressing need for continuous training and engagement with experts and activists to build the capacity of NHRI staff. Without this specialised knowledge, NHRIs cannot fully understand or address the unique challenges faced by intersex and transgender persons. However, the process of acquiring and integrating this specialised knowledge can be resource-intensive and time-consuming.

Strategic litigation is a powerful tool for advocating for the rights of marginalised groups. However, many NHRIs have not effectively utilised strategic litigation to challenge discriminatory laws and practices affecting transgender and intersex persons. This gap represents a missed opportunity to achieve significant legal and policy changes through the judicial system. Moreover, effective advocacy requires active engagement with policymakers to influence the development and implementation of laws and policies. Many NHRIs have not sufficiently engaged with policymakers to advocate for comprehensive legal recognition of gender identity and inclusive healthcare policies for transgender and intersex persons. This lack of engagement limits the impact of NHRI advocacy efforts.

Some NHRIs, such as the South African Human Rights Commission (SAHRC), do not have dedicated offices or focal areas specifically addressing transgender and intersex rights. The absence of such focal areas can result in a lack of focused and sustained efforts to address the unique challenges faced by these communities. Establishing dedicated focal areas would allow for more targeted and effective advocacy.



4.4 Opportunities for the NHRIs

NHRIs have numerous opportunities to enhance their advocacy and protection efforts to advance the rights of intersex and transgender persons, thereby ensuring more inclusive and equitable societies.

First and foremost, strengthening the capacity of the staff of NHRIs to monitor and advocate for transgender and intersex rights is fundamental. Enhanced capacity enables NHRIs to engage more effectively in legislative and policy advocacy and reform. Capacity-building initiatives can include specialised training for NHRI staff, increased funding, and the development of dedicated units focusing on SOGIESC-related issues.

Strategic litigation is a powerful tool for challenging discriminatory laws and advocating for legal reforms. NHRIs can utilise strategic litigation to revise or repeal laws that negatively impact transgender and intersex persons. Notable court decisions, such as the 2014 High Court ruling in Kenya that ordered the government to register the Transgender Education and Advocacy (TEA) organisation, exemplify the potential impact of strategic litigation. Besides, countries with progressive constitutions and court decisions provide a conducive environment for advancing transgender and intersex rights. For example, South Africa's progressive constitution and court rulings as discussed in chapter three create significant opportunities for advocacy and legal recognition.

The implementation of recommendations from task forces, such as the Intersex Task Force Report in Kenya, presents a crucial opportunity for advancing the rights of intersex persons. Following through with these recommendations can lead to significant policy and legal reforms that enhance protections for intersex persons. In this vein, prevailing political goodwill, especially on the protection of intersex persons, provides a favourable backdrop for NHRI advocacy efforts. Engaging with supportive political leaders and leveraging this goodwill can facilitate the enactment of laws and policies that protect the rights of transgender and intersex persons.

NHRIs also have an important role to play, alongside their Ministry of Foreign Affairs, in following up on the recommendations issued by various human rights mechanisms including recommendations emanating from the UPR process and concluding observations that are issued by treaty bodies. As highlighted in chapter three, many treaty bodies have issued recommendations aimed at enhancing protection for sexual and gender minorities, including intersex and transgender persons. Following up on the implementation of such recommendations provide an opportunity for NHRIs to be able to





interface with other state institutions towards ensuring compliance with the state's international human rights obligations to respect, protect and fulfil the rights of sexual and gender minorities, including intersex and transgender persons.

A strong civil society and enabling civic space are critical assets for NHRIs. Collaboration with CSOs working on transgender and intersex rights can amplify advocacy efforts. Joint initiatives, capacity-building programs, research projects, and public awareness campaigns are ways in which NHRIs and CSOs can work together to promote and protect the rights of sexual and gender minorities. NHRIs can further engage with lawmakers to advocate for the passage of comprehensive laws protecting the rights of transgender and intersex persons or at the minimum repeal laws that criminalise their status. This includes pushing for anti-discrimination laws, SOGIESC-related recognition laws and provisions. For instance, advocating for a Gender Identity Bill, Hate crimes Bill, or an Anti-Discrimination Bill specifically addressing the unique challenges faced by transgender and intersex persons can bring about substantial legal protections.

NHRIs can provide legal aid to transgender and intersex persons facing discrimination or human rights violations. This includes representing them in court cases or offering free legal advice on issues related to their gender identity or expression. Legal support is crucial for empowering individuals to seek justice and for challenging discriminatory practices.

Conducting public education campaigns to raise awareness about the human rights of transgender and intersex persons is essential. These campaigns can include community outreach programs, workshops, seminars, and training sessions for various stakeholders such as law enforcement agencies, health care persons, educational institutions, policy makers, religious institutions, and traditional leaders. Increased awareness can help reduce conversion practices, stigma and discrimination.

Carrying out research on the experiences of transgender and intersex persons to document instances of discrimination, violence, and other human rights abuses is vital. This can also be included in the annual report of the NHRI. Research findings can serve as evidence in advocacy efforts with lawmakers or in court cases. As an example, Kenya National Human Rights Commission has been progressive on this instance with its publication of the Report on the Status of the Intersex Persons in the Criminal Justice System in Kenya,³⁴³ and the submission to the Office of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI) on the Human Rights Situation, Case Law, and



Research on Protections on Grounds of Sexual Orientation, Gender Identity, and Expression in the Republic of Kenya, in collaboration with CSOs namely the National Gay and Lesbian Human Rights Commission, Network for Adolescent and Youth of Africa, Gay and Lesbian Coalition of Kenya and East Africa Trans & Advocacy Network.³⁴⁴

These documentations can inform policy recommendations aimed at improving the legal framework for protecting transgender and intersex rights. For this, NHRIs can build capacity among their staff members to better understand the unique challenges faced by transgender and intersex persons. This includes training programs on SOGIESC-related issues, human rights principles, effective communication strategies with sexual and gender minorities, and cultural sensitivity towards the community.



4.5 Good practices for the protection of transgender and intersex persons: Lessons from across the world

Globally, various UN Member States have taken important steps to advance the rights of intersex and transgender persons establishing models for others to emulate. Seven nations, such as Albania, Denmark, and Malta, have passed national laws banning discrimination based on sex characteristics. Moreover, countries like Australia and South Africa have enacted legislation to protect intersex persons from broader discrimination. Legal measures to address liability for offenses related to sex characteristics exist in places like Greece and Spain. Additionally, nations such as Kenya and the United States have introduced legal frameworks to ensure the equal enjoyment of human rights by intersex persons. Regarding transgender rights, five countries, including Finland and New Zealand, have adopted legal gender recognition based on self-identification. Sweden and Australia have streamlined their legal recognition processes. Successful legal challenges against surgical requirements for gender recognition have occurred in Japan and Romania. Efforts toward non-binary markers are visible in countries like Belgium and South Africa.

³⁴³ Kenya National Human Rights Commission (KNHRC) 'Report on the Status of the Intersex Persons in the Criminal Justice System in Kenya' (2017) available at: https://www.knchr.org/Portals/0/REPORT-ON-INTERSEX-PERSONS%203_1.pdf.

³⁴⁴ Kenya Human Rights Commission and others 'The human rights situation, case law, and research on protections on grounds of sexual orientation, gender identity, and expression in the Republic of Kenya' (2017) available at: https://khrc.or.ke/wp-content/uploads/2024/02/Kenya-Submission_IE_SOGIE_JUL2017.pdf.

Within that context, this section delves into the imperative of safeguarding the rights and well-being of transgender and intersex persons, drawing upon progressive case studies from around the world. With a focus on identifying and analysing effective practices, this section explores how diverse approaches contribute to the protection and empowerment of transgender and intersex persons, illuminating pathways toward greater inclusivity, dignity, and equality for these communities, distilling actionable insights that can inform NHRIs, policy-making, advocacy efforts, and social change in their respective territory.

i) Argentina

Argentina's Gender Identity Law (Law No. 26,743)³⁴⁵ enacted in 2012, serves as a model for inclusive legislation that respects and affirms the rights of transgender persons, notably the. This groundbreaking law marked a significant milestone as the first legislation worldwide to allow for name and gender marker changes based on self-identification standards, without imposing any restrictive requirements. The Gender Identity Law established a simplified and cost-free administrative procedure, affirming the principle of autonomy and self-determination for transgender persons. Crucially, the law removed the need for legal assistance or intermediaries, ensuring direct access to gender recognition for all applicants solely based on their free will.

One of the key provisions of the law is its recognition of the rights of transgender children to amend their gender markers. By providing clear guidelines for minors, the legislation affirms their right to express their gender identity and ensures their inclusion in the legal framework. Moreover, the Gender Identity Law prioritises confidentiality and dignity in the process of gender marker changes. It mandates respectful treatment according to the gender identity of every individual, underscoring the importance of upholding human rights and preventing discrimination in administrative procedures.

In addition to facilitating legal gender recognition, the law repealed restrictive provisions such as article 19(4) of Law No. 17,132 (1967), which previously prohibited surgical interventions that modify sex, representing a significant step towards affirming the rights of transgender persons to access gender-affirming healthcare without arbitrary restrictions. By prioritising self-identification, confidentiality, and dignity, the law reflects Argentina's commitment to advancing human rights and promoting equality for all its citizens, regardless of gender identity or expression.



³⁴⁵ Available at https://globalhealth.usc.edu/wp-content/uploads/2017/03/english-translation-of-argentina_s-gender-identity-law-as-approved-by-the-senate-of-argentina-on-may-8-2012.pdf.



ii) Brazil

Brazil has advanced transgender rights through progressive legislation and judicial decisions. Since 2009, the Superior Court of Justice allowed transgender individuals to change their legal gender markers without mandatory surgery. In 2018, the Supreme Court ruled in ADI No. 4,275 that neither surgical procedures nor pathologizing requirements were necessary for gender marker changes.³⁴⁶ This decision emphasized autonomy and human rights, setting a precedent for future legal developments. Following this, the National Council of Justice issued Order No. 73 in 2018, simplifying the administrative process for gender marker changes at the Civil Registry by eliminating the need for medical or psychological information or diagnosis, reinforcing the principle of self-determination for transgender persons.³⁴⁷

In 2021, the Court of Justice of São Paulo allowed a non-binary applicant to be registered with a gender marker of “not specified/agender.” Following this, the Court and the Public Defender’s Office launched the Itinerant Justice Programme to rectify the name and gender markers of 49 transgender and 47 non-binary individuals. In July 2022, the Court of Justice of the Federal District recognized the gender identity of a non-binary person, setting a precedent for future cases in the Federal District.³⁴⁸

In March 2023, Bill No. 192 was proposed to criminalise individuals who coerce children or adolescents into changing their gender, while also providing assistance to those affected. Furthermore, in June 2023, the Ministry of Social Security issued Ordinance No. 1,945, granting transsexuals and travestis the right to choose their preferred name in official documents, while also including fields for sexual orientation and gender identity in all registration forms, aimed at preventing discrimination. In October 2023, the National Authority of Justice approved Disposition No. 152, allowing Brazilian transgender persons residing abroad to access legal gender recognition through Brazilian consulates, ensuring recognition of their gender identity regardless of their location.³⁴⁹

³⁴⁶ B Fico ‘Brazil’s landmark decision on transgender persons’ official documents’ (OxHRH Blog, 27 April 2018), available at <https://ohrh.law.ox.ac.uk/brazils-landmark-decision-on-transgender-persons-official-documents>.

³⁴⁷ <https://database.ilga.org/legal-gender-recognition>.

³⁴⁸ As above.

³⁴⁹ As above.



iii) Germany

Germany stands at the forefront of progressive legislation in protecting the rights and dignity of transgender, intersex and non-binary persons. In April 2024, the German parliament passed a groundbreaking law, the Self-Identification Act (Self-ID Act, SBGG) signalling a monumental shift in gender recognition procedures and non-discrimination policies.³⁵⁰ This landmark legislation, scheduled to come into effect in August 2024, replaces the archaic 1980 Transsexuals Law with a streamlined administrative process rooted in self-identification.³⁵¹ Under the new law, transgender, intersex and non-binary persons are empowered to update their legal documents to accurately reflect their gender identity without undue bureaucratic hurdles.

This law simplifies the process for transgender, intersex, and nonbinary persons to change their gender entry and first name at the civil registry without bureaucratic hurdles. The Act also amends other laws, such as the Passport Act and the Personal Status Act, to align with the new provisions effective from 11 November 2024. Replacing the outdated Transsexual Act, the Self-ID Act permits changes between female, male, diverse, and no gender entry, without requiring expert assessments. The procedure involves submitting a 'declaration with self-assurance' to the registry office, affirming that the requested change aligns with the individual's gender identity. Changes become effective three months after the declaration.³⁵²

Minors can also change their gender entry and first name with consent from their legal representatives or, if necessary, the family court. The law imposes a minimum one-year binding period before further changes can be made, ensuring applicants understand the implications of their decision. Additionally, the Act respects domiciliary rights and the General Act on Equal Treatment concerning access to gender-specific facilities. It maintains the parent-child relationship based on the gender entry at the time of the child's birth and protects individuals from the disclosure of their previous gender entry and name, with violations subject to substantial fines.

The transformative nature of this legal reform cannot be overstated. It represents a resounding affirmation of the existence and rights of transgender and intersex persons, sending a clear message of inclusion and acceptance. However, the passage of this legislation does not occur in a vacuum. It comes amidst a backdrop of rising anti-LGBT violence and discrimination in Germany, as highlighted by activists and government officials alike. Despite these challenges, the commitment of federal and state-level authorities to combat hate crimes and strengthen protections for sexual and gender minorities underscores a concerted effort towards fostering a more inclusive society. The Self-Determination Act was passed with 374 votes to 251 and 11 abstentions.³⁵³ Germany's progressive stance on transgender and intersex rights not only advances the rights of its citizens but also contributes to a global movement towards greater equality and inclusion for all.

³⁵⁰ Human Rights Watch 'Germany: Landmark Vote for Trans Rights Law' (2024) available at: <https://www.hrw.org/news/2024/04/12/germany-landmark-vote-trans-rights-law>

³⁵¹ 'Expert opinion: Need for regulation and Need for reform for transgender people' (2016) available at: <https://www.gesetze-im-internet.de/tsg/>

³⁵² Library of Congress 'Germany: New Self-ID Act for Transgender, Intersex, and Nonbinary Persons Enacted' (2024) available at: <https://www.loc.gov/item/global-legal-monitor/2024-07-09/germany-new-self-id-act-for-transgender-intersex-and-nonbinary-individuals-enacted/>

³⁵³ J Parker 'Germany eases gender change rules' (2024) available at <https://www.bbc.com/news/world-europe-68801392>.

³⁵⁴ CRC/C/GRC/CO/4-6, para. 28(c).



iv) Greece

Greece is recognised globally for its progressive approach to intersex and transgender rights, exemplified by its legislative advancements. In 2022, following recommendations from the United Nations Committee on the Rights of the Child, Greece took significant steps to protect intersex children from unnecessary medical procedures and to ensure they receive adequate support services. The Medically Assisted Reproduction Reforms Act No. 4958 (2022) prevents medical interventions on intersex minors unless they are over fifteen and provide informed consent.

For urgent medical cases involving younger children, court approval is required, highlighting the emphasis on protecting children's health and rights. A decision from the Magistrate's Court of the minor's place of residence is required, following a thorough evaluation of an opinion that is required to be submitted by an interdisciplinary committee established under law. This committee, composed of experts from relevant fields, provides valuable insights to the court, ensuring informed decision-making. Additionally, the minor is granted the opportunity to personally address the judge, thereby ensuring their voice is heard in the decision-making process. To maintain the utmost privacy and dignity of intersex children, the hearing process is conducted behind closed doors. This protective measure shields the child from unnecessary exposure and respects their right to confidentiality. Furthermore, the legislation includes provisions for exceptional circumstances where medical interventions are deemed necessary to prevent immediate risks to the minor's life or health. In such cases, the requirement for court permission may be waived, emphasising the paramount importance of prioritising the child's well-being.

The Greek legal system imposes severe penalties for unauthorised surgeries. Additionally, through Law No. 4619 (2019), Greece increased penalties for crimes driven by sex characteristics and recognised these characteristics as aggravating factors. Law No. 4491 (2017) addresses incitement to discrimination, hatred, or violence against individuals based on sex characteristics, while Law No. 4443 (2016) bans employment discrimination on similar grounds.



v) India

India has made significant strides in recognizing and upholding the rights of transgender persons, particularly in the realm of legal gender recognition. The landmark judgement of the Supreme Court in *NALSA v. Union of India* (2014) marked a pivotal moment in affirming the fundamental rights of transgender persons and recognising their right to self-identify their gender. In this historic case, the Supreme Court underscored the importance of recognising one’s gender identity as integral to the fundamental right to dignity. The court affirmed that gender identity constitutes a core aspect of an individual’s sense of self and identity, deserving legal recognition and protection. The judgement emphasised the principle of self-identification, allowing transgender persons to identify as ‘male’, ‘female’, or ‘third gender’ based on their own understanding of their gender identity.

Building upon the principles established in the *NALSA v. Union of India* judgement, India passed the Transgender Persons (Protection of Rights) Act in 2019, which aims to protect the rights and ensure the welfare of transgender individuals. It prohibits discrimination in education, employment, healthcare, and access to public services. The Act mandates the establishment of a National Council for Transgender Persons to advise on policies and monitor their implementation. It also provides for the issuance of a certificate of identity, recognizing the person’s gender as male, female, or transgender, without the requirement of surgery. The Act aims to promote social, economic, and political inclusion of transgender individuals in India.

While this legislation represents progress in recognising and protecting transgender rights, certain provisions have been subject to scrutiny and challenge in the Supreme Court. One such provision under scrutiny is section 6 of the Transgender Persons Act, which imposes requirements for gender marker changes on official documents. Despite the Supreme Court’s endorsement of self-identification as the basis for legal recognition, section 6 mandates proof of gender confirmation surgery for individuals seeking to change their gender marker to ‘male’ or ‘female’. This requirement contradicts the principles laid out in the *NALSA v. Union of India* judgement and has sparked legal challenges questioning its constitutionality.

³⁵⁵ National Legal Services Authority v Union of India and others NO.604 OF 2013.

³⁵⁶ Available at <https://www.indiacode.nic.in/bitstream/123456789/13091/1/a2019-40.pdf>.



Beyond legislative reforms, efforts at the state level, such as those undertaken by the Maharashtra government to facilitate gender marker changes on official documents, demonstrate ongoing initiatives to address administrative barriers faced by transgender persons. Moreover, judicial interventions, such as the Delhi High Court's response to a transgender person's denial of a passport based on lack of sex reassignment surgery, underscore the judiciary's role in safeguarding the constitutional rights and liberties of transgender persons.

Concerning intersex children, the Delhi High Court's order in 2022 to restrict medical interventions on intersex infants to life-threatening situations, aligned with recommendations from the Delhi Commission for Protection of Child Rights. Similarly, the Kerala High Court in 2023 issued a significant ruling in WP(C) No. 19610 (2022), concerning a case where parents of a child born with 'ambiguous genitalia' sought approval for genital reconstructive surgery to assign the child a female gender. The court's decision introduced three pivotal directives to oversee such procedures. Firstly, it instructed the government to establish a State Level Multidisciplinary Committee comprising experts such as paediatricians, paediatric endocrinologists, paediatric surgeons, and child psychiatrists or psychologists. Secondly, this committee was tasked with assessing the child within two months to determine if the ambiguous genitalia posed a life-threatening situation, permitting surgery only in such critical cases. Thirdly, the court mandated the government to draft guidelines within three months for surgeries on infants and children based on sex characteristics. Until these guidelines were enacted, surgeries could only proceed upon the committee's determination that they were essential to protect the child's life.

This ruling underscore the Kerala High Court's dedication to ensuring that medical interventions on intersex infants and children adhere strictly to medical necessity and uphold the rights of the child, and further underscore India's commitment to protecting intersex and transgender rights, supported by ongoing efforts to ensure legal and medical frameworks uphold human rights standards.

India's journey towards recognising and protecting the rights of intersex and transgender persons is marked by significant progress, and as legal battles continue and advocacy efforts persist, India remains at the forefront of advancing intersex and transgender rights and promoting inclusivity and equality for all its citizens.

³⁵⁷ 'HC Asks Delhi Govt. to Decide Whether to Ban Sex-Selective Surgeries' (The Hindu, 2022) available at: <https://www.thehindu.com/news/cities/Delhi/hc-asks-delhi-govt-to-decide-whether-to-ban-sex-selective-surgeries/article65698800.ece>.

³⁵⁸ S Shaji 'Kerala HC refuses to permit 'corrective' surgery on intersex child' (The News Minute, 2023) available at: <https://www.thenewsminute.com/kerala/sex-and-gender-not-same-kerala-hc-refuses-permission-surgery-intersex-child-180797#:~:text=After%20hearing%20both%20sides%2C%20the,of%20life%20and%20personal%20liberty>.

³⁵⁹ S Shaji 'Kerala HC refuses to permit 'corrective' surgery on intersex child' (The News Minute, 2023) available at: <https://www.thenewsminute.com/kerala/sex-and-gender-not-same-kerala-hc-refuses-permission-surgery-intersex-child-180797#:~:text=After%20hearing%20both%20sides%2C%20the,of%20life%20and%20personal%20liberty>.



vi) Israel

Israel has emerged as a trailblazer in advancing the rights of transgender persons, particularly concerning legal gender recognition. Over the past several years, significant reforms have been implemented to ease the process of changing gender markers on identity cards, marking a decisive step towards greater inclusivity and respect for gender diversity. Historically, Israel's approach to gender recognition required gender reassignment surgery and hormone replacement therapy until 2015. However, in a landmark move in 2020, the Justice Ministry introduced new rules eliminating these prerequisites. Under the revised regulations, individuals are no longer required to undergo surgery or hormone therapy to change their gender designation on official documents, such as national identity cards.

This pivotal decision was prompted by a Supreme Court ruling mandating the Interior Ministry to allow transgender persons to change their gender designation without surgical intervention. The ministry subsequently revised its procedures, aligning with recommendations from the Health and Justice ministries. A key aspect of the new procedure involves the Health Ministry certifying applicants who seek to officially change their gender based on established criteria, thus streamlining the process and eliminating unnecessary barriers. While the specific timeline of legal gender recognition in Israeli law remains somewhat ambiguous due to the complex interplay of civil, customary, and religious legal systems, legislative developments have steadily progressed towards greater inclusivity. Chapter 1, Section 2 of the Law on Population Registration (Law No. 5,725) (1965) stands as one of the earliest explicit legislative provisions addressing gender changes in official records.

³⁶⁰ E Kenny & E Bloom 'Explainer: The crucial fight for legal gender recognition' (3 April 2023) available at <https://www.idea.int/blog/explainer-crucial-fight-legal-gender-recognition#:~:text=Israel%20has%20significantly%20eased%20the,need%20for%20hormone%20replacement%20therapy>.

³⁶¹ JTA 'Israel to allow sex changes on ID card without surgery - Following Supreme Court ruling, Interior Ministry changes standards for recognizing gender change' Times of Israel, 19 January 2015, available at <https://www.timesofisrael.com/israel-to-allow-sex-changes-on-id-card-without-surgery/>.

³⁶² LM Danon 'Intersex Activists in Israel: Their Achievements and the Obstacles They Face' Journal of Bioethical Inquiry (2018) 15(4) 569-78.



Although efforts to completely remove gender markers from national identity cards were unsuccessful in 2013, subsequent reforms have focused on making the gender recognition process more accessible and accommodating. The Supreme Court's 2014 ruling against the surgical requirement laid the groundwork for subsequent policy changes aimed at ensuring the rights and dignity of transgender individuals. Recent proposals to extend legal gender recognition to younger persons and grant transgender persons the right to self-identification signal ongoing efforts to enhance gender recognition rights in Israel.

Concerning the rights of intersex persons, the Ministry of Health issued Circular No. 10 (2017), aimed at addressing the medical treatment of intersex children. While the circular introduced positive measures by acknowledging that certain intersex variations may not necessitate medical intervention and emphasising the prioritisation of patient needs, it received criticism for its use of pathologising language and its failure to explicitly prohibit non-consensual medical procedures on intersex minors.

Despite these shortcomings, the circular represents a step towards recognising the rights and medical autonomy of intersex persons in Israel. However, there remains a need for further reforms to fully protect intersex children from unnecessary medical interventions and ensure their rights are respected according to international human rights standards.

vii) Malta

Inspired by a pioneering transgender model, Malta has evolved into one of the most LGBTQ+ accepting nations globally over the past 20 years, consistently ranking first on the ILGA-Europe Rainbow Index for the past eight years. This index evaluates countries based on SOGIESC equality, showcasing Malta's progressive approach. In 2016, Malta became the first EU nation to outlaw conversion therapy, marking a crucial step in safeguarding sexual and gender minorities from harmful practices. Malta was the first European country to constitutionally protect gender identity, providing comprehensive legal safeguards for transgender persons.

In 2015, Malta emerged as a pioneer in Europe by passing landmark legislation aimed at protecting transgender and intersex persons' rights and autonomy. Despite facing resistance from the Catholic Archdiocese of Malta, the country embarked on a transformative journey towards greater inclusivity and self-determination for all its citizens. The cornerstone of Malta's progressive stance on transgender and intersex rights is the Gender Identity, Gender Expression and Sex Characteristics Act XI of 2015. This legislation introduced revolutionary measures, including self-determination for gender recognition and the prohibition of medical interventions without consent. Under this Act, individuals have the right to change their gender marker and name on official documents based on self-identification, without the need for invasive procedures or expert assessments. Additionally, the act criminalises any medical intervention, such as sex reassignment surgery, performed without the person's informed consent, ensuring bodily autonomy and integrity.

Furthermore, Malta's legal framework extends protection to intersex persons through Article 45 of the Constitution, which prohibits discrimination based on sex characteristics and gender expression. The Equality for Men and Women Act 1 of 2003 complements this provision by explicitly safeguarding against discrimination on the grounds of gender identity and sex characteristics. In alignment with international human rights standards, Malta's legislation prioritises the best interests of intersex children, as outlined in the Convention on the Rights of the Child. The Gender Identity, Gender Expression and Sex Characteristics Act grants minors the right to have their gender and name changed in accordance with their identity, with parental consent and consideration of the child's welfare.

Malta's commitment to fostering inclusive environments extends to its education system through policies such as the Trans, Gender Variant and Intersex Students in School Policy. This policy recognises the unique needs of intersex persons and aims to create safe and supportive learning environments free from discrimination. By raising awareness of intersex issues and promoting advocacy within schools, Malta seeks to combat discrimination and promote acceptance and understanding among students and educators alike. Through its pioneering legislation and commitment to inclusivity, Malta serves as a beacon of hope and progress for transgender and intersex persons worldwide.

³⁶³ 'RAINBOW EUROPE MAP AND INDEX 2023' (ILGA Europe) available at: <https://www.ilga-europe.org/report/rainbow-europe-2023/>.



viii) Pakistan

Pakistan was one of the first countries in South Asia to acknowledge transgender rights, notably by adding a ‘third gender’ category to the National Database and Registration Authority (NADRA) in 2009, following the decision in *Muhammad Aslam Khaki v. SSP Operations Rawalpindi and others*, and subsequently enacting the Transgender Persons (Protection of Rights) Act in 2018. This Act aimed to provide legal gender recognition based on self-determination. Thus, the protection of intersex and transgender rights has been shaped by both progressive legislation and contentious legal challenges in the Pakistani context. The enactment of the Transgender Persons (Protection of Rights) Act was a significant step towards the legal recognition of transgender persons in Pakistan. The Act defined categories such as ‘intersex (khusra)’ and ‘eunuch’ and offered protections against discrimination. Section 2(n) of the Act included ‘intersex’ as a category characterised by a mixture of male and female genital features or congenital ambiguities.

However, the Transgender Persons (Protection of Rights) Act faced criticism, with opponents claiming it contradicts Islamic law by allegedly legitimising homosexuality. In 2022, three bills were introduced to amend the Act, seeking to replace ‘self-perceived gender identity’ with a requirement for ‘Medical Certificates’. In February 2023, the Senate Standing Committee on Human Rights discussed amendments to the Act and decided to replace the term ‘transgender’ with Khunsa. The proposed Khunsa (Intersex) Person (Protection of Rights) Bill (2023) would limit protections to those categorised as intersex under Islamic law, hence this significantly limits the Act’s application to transgender persons. In March 2023, the Senate Committee passed the Khunsa (Intersex) Person (Protection of Rights) Bill, currently awaiting the approval of the lower chamber of parliament. While it aims to protect intersex persons’ rights per Shari’a and the Constitution, it excludes similar protections for transgender persons. This bill, if passed, would narrow the legal recognition and protections provided under the 2018 Act, emphasising the need for the NHRC to advocate for broad and inclusive definitions in human rights legislation.

³⁶⁴ PKhaki v. Rawalpindi (2009) available at: [https://database.ilga.org/api/downloader/download/1/PK%20-%20UD%20-%20Khaki%20v:%20Rawalpindi%20\(2009\)%20-%20OR-OFF\(en\).pdf](https://database.ilga.org/api/downloader/download/1/PK%20-%20UD%20-%20Khaki%20v:%20Rawalpindi%20(2009)%20-%20OR-OFF(en).pdf).

³⁶⁵ ILGA World Database: Legal gender recognition – Pakistan.

³⁶⁶ I Kakakhel ‘Legislators defer transgender persons protection of rights act’ (Pakistan Observer, 2023) available at <https://pakobserver.net/legislators-defers-transgender-persons-protection-of-rights-act/>.

Article 4 of the Transgender Persons (Protection of Rights) Act (2018) in Pakistan enshrines the prohibition of employment discrimination based on 'gender identity', affirming the legal recognition of transgender persons' rights in the workforce. Complementing this, a significant ruling by the Supreme Court in August 2022, under Case C.P.1655-2019, Pakistan Television Harassment Case, extended the scope of the Protection against Harassment of Women at the Workplace (Amendment) Act (2022) to include trans women. This landmark decision underscores the judicial commitment to safeguarding all women, regardless of gender identity, from gender-based discrimination and harassment within professional environments.

In May 2023, the Federal Shariat Court issued Shariat Petition No. 5 (2023), initiated by the right-wing JUI-F party in September 2022 challenging the provisions of the Transgender Persons (Protection of Rights) Act and the associated Rules of 2020. The plaintiffs argued that the Act provided 'legal cover for homosexuality', which they claimed facilitated immoral activities and contravened Islamic principles. The Court's ruling altered the Act's provisions by denying individuals the autonomy to alter their gender and deemed certain provisions inconsistent with Shari'a law. The ruling emphasised that gender should be preserved as assigned at birth, which was seen as a rollback of the legal recognition of transgender identities. However, The Court acknowledged that Islam grants fundamental rights to transgender persons, which are protected by the Constitution, thus requiring the government to ensure these basic rights are upheld. Following the Federal Shariat Court's ruling, the decision was appealed to the Supreme Court in July 2023.

Following the Federal Shariat Court's ruling, NADRA halted the issuance of ID cards with an 'X' gender marker for transgender persons, leading the National Commission for Human Rights to hold a consultation in September 2023. In October 2023, the Sindh Human Rights Commission urged NADRA to provide ID cards to transgender persons without discrimination. Changes to a Computerised National Identity Card (CNIC) require an affidavit signed by two witnesses, while passport name changes must be announced in a local newspaper. Throughout these developments, NHRIs such as the National Commission for Human Rights (NCHR) and the Sindh Human Rights Commission (SHRC) have played crucial roles. The NCHR convened a consultation in September 2023 to address the suspension of identity card issuance, while the SHRC demanded that NADRA issue identity cards to transgender persons without discrimination. These actions underscore the vital role NHRIs play in advocating for the rights of transgender and intersex persons, challenging regressive legal changes, and ensuring that human rights protections are upheld.

³⁶⁷ Pakistan Television Harassment Case C.P.1655-2019 (2022) available at: [https://database.ilga.org/api/downloader/download/1/PK%20-%20UD%20-%20Pakistan%20Television%20Harassment%20Case%20C.P.1655-2019%20\(2022\)%20-%20OR-OFF\(en\).pdf](https://database.ilga.org/api/downloader/download/1/PK%20-%20UD%20-%20Pakistan%20Television%20Harassment%20Case%20C.P.1655-2019%20(2022)%20-%20OR-OFF(en).pdf).

³⁶⁸ 'JUI-F moves Shariat court against transgender act' (The Express Tribune, 2022) available at <https://tribune.com.pk/story/2379353/jui-f-moves-shariat-court-against-transgender-act>.

³⁶⁹ 'A person can't change gender at will, rules FSC' (The Nation (Pakistan), 2023) available at: <https://www.nation.com.pk/19-May-2023/a-person-can-t-change-gender-at-will-rules-fsc>.

³⁷⁰ 'SC to review Federal Shariat Court's decision on Transgender Act' (Dunya News, 2023) available at: <https://dunyaews.tv/en/Pakistan/740023-SC-to-review-Federal-Sharia-Court%E2%80%99s-decision-on-Transgender-Act>.

³⁷¹ M Imran 'Decision to halt registration processes for transgenders rendered them helpless' (The News International, 2023) available at: <https://www.thenews.com.pk/print/1106574-decision-to-halt-registration-processes-for-transgenders-rendered-them-helpless>.

³⁷² 'SHRC demands CNICs for transgender persons' (The News International, 2023) available at: <https://www.thenews.com.pk/print/1124702-shrc-demands-cnics-for-transgender-persons>.

³⁷³ I Sandozai 'Nadra resumes registration of transgender persons' (25 September 2023) available at <https://www.dawn.com/news/1777815>.



xi) South Korea

In South Korea, recent advancements highlight best practices in the protection of intersex and transgender rights. In February 2023, a landmark decision by Judge Woo In-seong of the Seoul Western District Court allowed a transgender woman to change her gender marker without undergoing surgical procedures. This decision underscored that mandatory surgery for legal gender recognition violates human rights. The National Human Rights Commission of Korea has played a crucial role by advocating for the removal of surgical requirements, recommending revisions to the Supreme Court's Guidelines for Handling Gender Recognition and suggesting legislative changes. In response, the National Assembly introduced the Legal Gender Recognition Bill in November 2023, which proposed removing mandatory medical treatment and expanded rights irrespective of marital or parental status, signalling a potential policy shift for applicants. Despite facing opposition from religious organisations, such as The Korean Christian Public Policy Council, calling it 'unconstitutional' and warning that the institutions of marriage and the family would be destroyed.

Amidst these legislative discussions, in January 2024, the Supreme Court began reconsidering the need for surgery in legal gender recognition, reinforcing a more inclusive approach. These efforts exemplify progressive steps in enhancing legal protections for transgender individuals, driven by the proactive involvement of national institutions.

³⁷⁴ Supreme Court's Guidelines for Handling Gender Recognition (2020), see for instance: <https://www.amnesty.org/en/latest/news/2022/11/south-korea-supreme-court-ruling-on-legal-gender-recognition-an-important-step-forward-for-transgender-rights/>.

³⁷⁵ 'South Korea: Supreme Court ruling on legal gender recognition an important step forward for transgender rights' (Amnesty International, 2022) available at <https://www.amnesty.org/en/latest/news/2022/11/south-korea-supreme-court-ruling-on-legal-gender-recognition-an-important-step-forward-for-transgender-rights/>.

³⁷⁶ Press Release 'The NHRCK Recommended the Supreme Court Established Rule to be revised to prevent possible human rights violation related to the legal gender change of transgender people' (2023) available at <https://www.humanrights.go.kr/eng/board/read?boardManagementNo=7003&boardNo=7609204&searchCategory=&page=3&searchType=&searchWord=&menuLevel=2&menuNo=114>.

³⁷⁷ 'Notice of Proposal of Bill to Not Require Sex Confirmation Surgery for Gender Correction' (2023) available at: <https://www.thekrtimes.com/livelihood/48689.html>.

³⁷⁸ 'Gonghyup, 'Gender Recognition Act' is unconstitutional and unscientific" (2023) available at: <https://www.newspower.co.kr/57163>.

³⁷⁹ H Yun-ji 'Supreme Court considers repealing guideline on 'Transgender Gender Correction Surgery Confirmation' (2024) available at: <https://www.lawtimes.co.kr/news/194745>.



4.6 Conclusion

NHRIs are crucial actors in the landscape of global human rights advocacy, providing a necessary institutional mechanism for promoting and protecting the rights of transgender and intersex persons. Through their multifaceted roles in advocacy, education, monitoring, reporting, advising governments, collaboration with CSOs, and direct support, these institutions have the potential to significantly influence both policy and public opinion regarding intersex and transgender persons. However, realising this potential fully requires adequate resources, political support, and a commitment to understanding the specific needs and challenges faced by intersex and transgender persons. Strengthening NHRIs, therefore, not only benefits intersex and transgender persons but also enriches the human rights culture of entire nations. NHRIs must have the financial, human, and technical resources necessary to undertake comprehensive advocacy and protection efforts. Political will and supportive legal frameworks are equally important to empower NHRIs to challenge discriminatory laws and practices effectively.

The success of NHRIs in advocating for the rights of intersex and transgender persons hinges on their ability to adapt to evolving human rights challenges. This includes leveraging strategic litigation, engaging in continuous capacity building, and fostering strong partnerships with international organisations and local CSOs. The landmark judgement in India's *NALSA v. Union of India* case, for instance, underscores the judiciary's role in recognising gender identity based on self-identification and establishing legal precedents that protect the dignity of transgender persons. Brazil's judicial rulings, which eliminate medical prerequisites for gender marker changes, further demonstrate the impact of litigation in advancing transgender rights.



Moving forward, the effectiveness of NHRIs will depend on their capacity to influence both national policies and societal attitudes towards intersex and transgender persons. As NHRIs continue to advocate for these marginalised communities, they must prioritise building internal expertise, securing necessary resources, and maintaining robust engagement with all stakeholders. By adopting these best practices, NHRIs can play a pivotal role in advocating for legislative reforms, promoting human rights education, and ensuring that transgender and intersex persons are afforded the same protections and opportunities as all citizens.

NHRIs across Africa can draw valuable lessons from global best practices to effectively protect the rights of intersex and transgender persons. The progressive legislation, judicial decisions and administrative measures seen in countries discussed above highlights the importance of enacting laws that support self-identification, prohibit non-consensual medical interventions, and ensure comprehensive legal protections against discrimination. The simplified administrative processes and robust legal frameworks in these nations serve as exemplary models for African states aiming to enhance the rights and dignity of transgender and intersex persons.

Additionally, inclusive education policies and public awareness campaigns, as implemented in Malta, are crucial for fostering societal acceptance and understanding. By adopting these best practices, NHRIs can play a pivotal role in advocating for legislative reforms, promoting human rights education, and ensuring that transgender and intersex persons are afforded the same protections and opportunities as all citizens, thereby advancing equality and inclusivity in their respective countries.



CHAPTER

FIVE



CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The analysis of the lived realities of intersex and transgender persons across selected African countries—Ivory Coast, Liberia, Kenya, Malawi, Namibia, Nigeria, Uganda, South Africa, and Togo—reveals significant gaps in legal protections, resources, and societal acceptance. National Human Rights Institutions (NHRIs) face formidable challenges in advocating for the rights of these communities, primarily due to inadequate legal frameworks, limited resources, and insufficient staff training. Despite articulating concerns about sexual minorities, there is a notable lack of focused attention on intersex and transgender issues.

NHRIs often fall short in strategic litigation to challenge discriminatory laws and practices, comprehensive documentation of human rights violations, and effective engagement with policymakers. Awareness campaigns and educational initiatives aimed at fostering societal acceptance and reducing stigma are notably absent. Resource constraints and the absence of dedicated offices or focal points within NHRIs specifically tasked with advancing transgender and intersex rights exacerbate these challenges.

Recurring themes of discrimination, exclusion, and inadequate access to essential services, particularly healthcare and social support, are evident across surveyed nations. CSOs can play a pivotal role in driving strategic advocacy to complement the work of NHRIs. Bridging gaps in laws and policies to protect intersex and transgender persons is crucial for NHRIs, which must advocate for legislative reforms that align with international and regional human rights standards.

5.2 Recommendations

National Human Rights Institutions (NHRIs)

- Allocate resources to establish specialised units or focal points dedicated to addressing the unique challenges faced by intersex and transgender communities.
- Actively lobby for comprehensive anti-discrimination laws covering employment, education, healthcare, and other essential areas, ensuring alignment with international and regional human rights standards.
- Collaborate with healthcare providers and CSOs to ensure access to gender-affirming healthcare and support services, free from discrimination or barriers.
- Engage in strategic litigation to challenge discriminatory laws and advocate for legal reforms, drawing from successful cases in other jurisdictions as precedents.
- Document and investigate violations of the rights of transgender and intersex persons with the aim of seeking accountability against perpetrators and redress for victims.
- Invest in capacity-building initiatives, including specialised training for NHRI staff, to improve advocacy and protection efforts for intersex and transgender persons.
- Conduct awareness campaigns to educate the public on the human rights of intersex and transgender persons, aiming to reduce stigma and discrimination.

Civil society organisations (CSOs)

- Engage in strategic advocacy to complement NHRI efforts, focusing on the legal recognition of gender identity, healthcare reforms, and inclusive laws and policies.
- Partner with NHRIs in joint initiatives, capacity-building programs, research projects, and public awareness campaigns to amplify advocacy efforts.
- Provide direct support services to intersex and transgender persons, including legal aid, counselling, and healthcare assistance.

Policy makers

- Enact and implement inclusive legislation that recognises and protects the rights of intersex and transgender persons, ensuring compliance with international human rights standards.
- Establish extensive training initiatives for medical and psychological professionals, emphasising sexual, biological, and physical diversity. These programs should highlight the impacts of unnecessary medical and surgical procedures on intersex children, encouraging informed and ethical decision-making.
- Implement healthcare reforms that provide accessible and non-discriminatory services to intersex and transgender persons, including gender-affirming treatments.
- Support public awareness initiatives to foster societal acceptance and understanding of intersex and transgender persons, reducing stigma and discrimination.
- Ensure that intersex and transgender persons in rural areas are actively included in programming, advocacy, and discussions. These communities often face greater vulnerabilities and lack access to resources compared to their urban counterparts, necessitating targeted efforts to address their unique challenges and needs.



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WEDNESDAY 24TH APRIL | 8AM

ISSUES SURROUNDING TRANSGENDER PERSONS IN KENYA

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A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY IN KENYA (NTDS)

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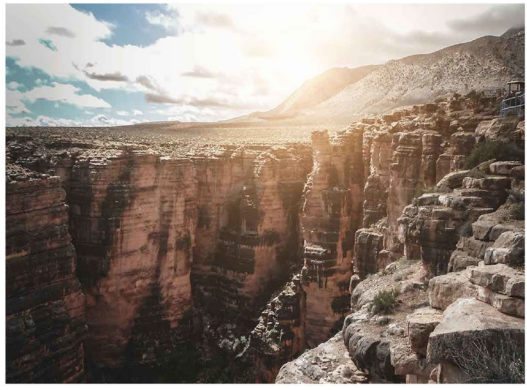



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By the Network of African National Human Rights Institutions (NANHRI)

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WE ARE ALL HUMAN

Everyone has a sexual orientation, gender identity and expression

DO NOT LOOK FOR AN EXCUSE TO HATE!



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