

# THE LEGAL IMPUNITY FOR GENDER-BASED VIOLENCE AGAINST INTERSEX, TRANSGENDER, AND GENDER DIVERSE PERSONS IN KENYA: A LEGAL RECOGNITION ISSUE FOR THE AFRICAN HUMAN RIGHTS SYSTEM

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## Abstract

*In 2019, a judge of the Supreme Court of Kenya issued a public apology to an intersex person for a decision the court handed down in 2010. The judge regretted the court's failure to appreciate the identity and human rights needs of intersex persons in that case. R.M. had petitioned the High Court for redress due to the sexual, psychological, and emotional abuse he had suffered while detained at the state correctional facilities. This case highlighted the various forms of violence that intersex, transgender, and gender diverse persons ("ITGDPs") experience on account of their gender identity. Studies reveal that gender-based violence against ITGDPs in Kenya is intricately conjoined with a lack of socio-cultural and legal recognition of their gender identities. The exclusion engenders pervasive violence by state actors and private individuals. Despite the growing use of public interest litigation ("PIL") as a mechanism for pursuing the goals of legal recognition and social, economic, and political emancipation of ITGDPs in Kenya, there is scant improvement in policy and practice. The same lacuna obtains in the African human rights mechanisms. The apology, the research findings and the unyielding PIL create the appropriate occasion for a critical examination of the effects of the assumption on synonymy and binarism of gender and sex espoused by the national and the African human rights system, on sexual and gender-based violence ("GBV") against ITGDPs in Kenya. This article analyses the nexus and how a lack of legal recognition of ITGDP gender identities and expression aggravates sexual and GBV against the group against the backdrop of the African human rights system.*

**Keywords:** gender-based violence, intersex, legal recognition transgender

## 1 Introduction

Kenya's Constitution has been recognised as one of the most progressive globally. This is mainly due to its transformative agenda that aims at promoting human rights, social justice, equity, inclusiveness, equality, non-discrimination and the protection of marginalised groups.<sup>1</sup> Despite this progressive stance, intersex, transgender and gender diverse persons ("ITGDP") do not enjoy all the fundamental rights guaranteed therein.<sup>2</sup> The question is: why would a country with such a transformative constitution exclude and outlaw a certain minority group? In the words of Shivji, "constitutions do not make revolutions, revolutions make constitutions".<sup>3</sup> There is a need for a revolution to influence the inclusion and recognition of ITGDPs to eliminate GBV in Kenya.

Prevailing socio-cultural attitudes and norms of most societies, including in Africa, consider sex and gender to always be "synonymous, uncomplicated and in-sync".<sup>4</sup> This view is anchored on the presumption that sex and gender are categorised along binary lines, and human beings are biologically male or female. Accordingly, those who are labelled as male are assumed to have a corresponding masculine gender and therefore identify and express as men, while females are assumed to have a corresponding feminine gender, and therefore identify and express as women. It is also assumed that the sex of a person and the corresponding gender are fixed at birth based on the genitalia.

However, evidence from biomedicine and sociology demonstrates that a person's sex is a complicated phenomenon that cannot be determined by simply looking at their genitalia.<sup>5</sup> Sex is located along a continuum or spectrum and the biological sex assigned at birth does not invariably predict individuals' inner gender identity.<sup>6</sup> Further, the existence and lived experiences of ITGDPs pose a direct challenge to the assumptions of sex and gender binarism and congruence.<sup>7</sup> This article seeks to explore the concepts of sex, gender, gender identity, gender expression and how they relate to ITGDPs. It explains the correlation between the erroneous assumption on synonymy and binarism of gender and sex and the consequent wide-reaching social-legal exclusion of ITGDPs. The research employs an extensive analysis of GBV against ITGDPs in Kenya and the intricate interrelations of different factors and actors such as the police, public administrators, religious leaders and media.

<sup>1</sup> Article 10(1)(b) of the Kenyan Constitution.

<sup>2</sup> CE Finerty "Being Gay in Kenya: The Implications of Kenya's New Constitution for its Anti-Sodomy Laws" (2012) 45 *Cornell International Law Journal* 431-432.

<sup>3</sup> F Kabutu "The Constitution of Kenya 2010: Panacea or nostrum" (2020) *Strathmore Law School* <<https://law.strathmore.edu/the-constitution-of-kenya-2010-panacea-or-nostrum/>> (accessed 25-01-2022).

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

<sup>5</sup> 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.

<sup>6</sup> JS Hyde, RS Bigler, D Joel, CC Tate, SM van Anders "The Future of Sex and Gender in Psychology: Five Challenges to the Gender Binary" (2008) *American Psychologist* 171.

<sup>7</sup> A Mbugua "Gender Dynamics: A Transsexual Overview" in S Tamale (ed) *African Sexualities, A Reader* (2011).

Drawing upon judicial pronouncements from numerous cases on ITGDPs and other minority and marginalised groups in Kenya, we posit that the pervasive violence against ITGDPs is significantly aggravated by the social, cultural, and legal non-recognition that beleaguer their gender identity. The article concludes with proposals to make the text and institutions of the African human rights mechanisms an effective and forceful guardian of the human rights of ITGDP Africans.

## 2 Conceptual analysis: Sex, gender, gender identity, gender expression, intersex, transgender, gender diverse

In many jurisdictions, the terms gender and sex are generally used interchangeably in all spheres of life including legislation. Nonetheless, the two terms differ in meaning and context. Gender refers to the socially construed characteristics of boys, girls, men and women while sex refers to their biological and physiological differences.<sup>8</sup> In essence, gender entails the societal expectations assigned to males and females. For instance, the notion that women should do more housework and men should never show weakness is a gender stereotype while biological traits like having a vagina, ovaries, penis, testosterone, and testes represent sex.

An intersex person is a person with sex characteristics that do not fit the typical binary notion of male or female bodies.<sup>9</sup> The ambiguity may manifest through the person's genitals, gonads or chromosomes at birth or during puberty. Intersexuality variations include "the congenital development of ambiguous genitalia, disjunction between the internal and external sex anatomy, incomplete development of the sex anatomy and chromosomal anomalies or disorders of gonadal development".<sup>10</sup>

A transgender person was defined succinctly in *Bellinger v Bellinger*.<sup>11</sup> This case was decided in England in 2003 when the position of the law was that a person's gender was fixed at birth and could not be changed.<sup>12</sup> The House of Lords defined a transgender person as a person who is born with the anatomy of a person of one sex but with the unshakeable belief that they are persons of the opposite sex. Transgender persons have "physical characteristics that are congruent, but their sexual belief is incongruent".<sup>13</sup> For instance, a transgender man identifies and expresses as a man although assigned female at birth and *vice versa*. Transgender persons experience mental and psychological distress

<sup>8</sup> The World Health Organization "Gender and Health" (undated) *WHO* <[https://www.who.int/health-topics/gender#tab=tab\\_1](https://www.who.int/health-topics/gender#tab=tab_1)> (accessed 25-01-2022).

<sup>9</sup> The Taskforce on Legal, Policy, Institutional and Administrative Reforms regarding Intersex Persons in Kenya "Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya" (2018) *KNCHR* 44-46 <<https://www.knchr.org/Portals/0/INTERSEX%20TASKFORCE%20FREPORT-Abridged%20Version.pdf>> (accessed 25-01-2022).

<sup>10</sup> Kenya National Commission on Human Rights "Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya" (2013-2022) *Kenya National Commission on Human Rights* <<https://www.knchr.org/Our-Work/Special-Interest-Groups/Intersex-Persons-in-Kenya/Taskforce-on-Policy-Legal-Institutional-and-Administrative-Reforms-regarding-Intersex-persons>> (accessed 25-01-2022).

<sup>11</sup> (2003) UKHL 21.

<sup>12</sup> This was pursuant to the decision of Ormrod J in *Corbett v Corbett* [1970] 2 All ER 33, 47.

<sup>13</sup> See *R v Kenya National Examinations Council ex parte Audrey Mbugua Ithibu* (2014) eKLR.

from the dissonance between the sex that they were assigned at birth and their brain sex.<sup>14</sup> This distress is known as gender dysphoria and may begin at childhood, after puberty or much later into adulthood.<sup>15</sup>

Gender diverse persons express an identity that does not fall squarely in either the female or male gender.<sup>16</sup> They identify “between or beyond the male or female genders”. Gender identity has been defined as “a person’s deeply felt internal and individual experience of gender”,<sup>17</sup> while gender expression is how a person publicly expresses their gender through behaviour and outward appearance such as dressing, hair, body language, voice and preferred pronouns.<sup>18</sup>

The unique issues affecting ITGDPs have been largely absent from the spotlight of the LGBTIQ movement. This is mainly attributed to the inorganic combination of two groups with significantly different issues and experiences into one movement. The ideology behind the formulation of the LGBTIQ movement was premised on the collective identity theory which stipulates that individuals are connected because of similar life experiences and characteristics.<sup>19</sup> This did not take into account the fact that the LGB community and the ITGDP community undergo remarkably distinct life experiences.<sup>20</sup> The former’s experiences revolve around their sexual orientation while the latter’s revolve around gender identity. Consequently, both issues are often merged in literature and advocacy forums. In Kenya for instance, there is no conclusive literature that focuses solely on the plight of ITGDPs in the country. Even progressive states such as South Africa continue to conflate these issues.<sup>21</sup> The continued use of this umbrella term (LGBTIQ) has led to the dilution of gender identity and expression issues in the larger inclusion discourse.

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<sup>14</sup> In *Re Kevin (Validity of marriage of transsexual)* [2001] FamCA 1074 para 273, the court explained that brain sex determines whether a person thinks of themselves as either female or male. It is the constant strong need in the brain to perceive oneself as a woman or a man.

<sup>15</sup> J Turban “What is Gender Dysphoria?” (2020) *American Psychiatric Association* <<https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>> (accessed 26-02-2022).

<sup>16</sup> S Hanssen “Beyond Male or Female: Using Non-binary Gender Identity to Confront Outdated Notions of Sex and Gender in the Law” (2017) 96 *Oregon Law Review* 283-287.

<sup>17</sup> F Pega & JF Veale “The Case for the World Health Organization’s Commission on Social Determinants of Health to Address Gender Identity” (2015) 105 *Am J Public Health* 3.

<sup>18</sup> World Health Organization “FAQ on Health and Sexual Diversity: An Introduction to Key Concepts” GER <<https://www.who.int/gender-equity-rights/news/20170227-health-and-sexual-diversity-faq.pdf>> (accessed 26-02-2022).

<sup>19</sup> N Jazayeri *Transgender Exclusion within the LGBTQ Movement: An Introductory Analysis* LLB thesis Florida (2014) 6-7.

<sup>20</sup> 7.

<sup>21</sup> Gender Dynamix, Iranti-org & Legal Resources Centre “Recognition of Civil and Political Rights: A continued struggle for Transgender and Intersex Persons in South Africa: An Alternative Report to the United Nations Human Rights Committee” (2016) 4 <[https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT\\_CCPR\\_CSS\\_ZAF\\_23065\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ZAF/INT_CCPR_CSS_ZAF_23065_E.pdf)> (accessed 25-01-2022).

### 3 Situational analysis of gender-based violence against ITGDPs in Kenya

A 2019 study on violence in nine African countries concluded that ITGDPs are more likely to experience gender-based violence than the general population.<sup>22</sup> The research sampled 887 ITGDPs and found that 56% had experienced some form of violence during their lifetime. In 2018 alone, 29% had experienced GBV with 25% having encountered physical violence and 19% sexual violence.<sup>23</sup> Notably, transgender women were the most affected with 73% having encountered violence in their lifetime and 45% in 2018 alone.<sup>24</sup> In Kenya, the study found that 61.3% of ITGDPs experience GBV in their lifetime with 53% encountering physical violence and 44% sexual violence.<sup>25</sup>

Studies establish that the violence is perpetrated by police officers and other law enforcement agents and private individuals alike.<sup>26</sup> The police often refuse to take victims' statements, investigate, or arrest the perpetrators of GBV against ITGDPs. Instead, they victim-shame ITGDPs and blame them for the violence.<sup>27</sup> A 2015 Human Rights Watch report investigated the prevalence of GBV against ITGDPs in Kenyan coastal communities and found that between 2008 and 2015, there were at least six attacks on ITGDPs or health workers serving these communities. The police did not arrest any of the perpetrators.<sup>28</sup> This inaction by the police legitimises and exacerbates these violent attacks.

A 2012-2013 baseline survey administered by the East African Sexual Health and Rights Initiative ("UHAI-EASHRI") found that 46% of the respondents had faced police harassment at some point in their life.<sup>29</sup> They reported having been subjected to physical, sexual and verbal violence upon arrest. For instance, transgender women are forced to strip and are incarcerated with male inmates where they suffer further violence.<sup>30</sup>

The situation is no different for victims of GBV who end up being arrested for personation, instead of accessing justice when they report to the police. The police choose to focus on the discrepancy between the ITGDPs' identity documents and their gender expression rather than their complaint. For instance, when Bettina, a transgender woman, reported an attack on her kiosk,

<sup>22</sup> A Müller, K Daskilewicz, Mc L Kabwe, A M Chalmers, C Morroni, N Muparamoto, A S Muula, V Odira, M Zimba, & The Southern and Eastern African Research Collective for Health "Experience of and Factors Associated with Violence against Sexual and Gender Minorities in Nine African Countries: A Cross-Sectional Study" (2021) 21 *BMC Public Health* 1-9.

<sup>23</sup> 4.

<sup>24</sup> 4.

<sup>25</sup> 6.

<sup>26</sup> East African Sexual Health and Rights Initiative "Why Must I Cry? Sadness and Laughter of the LGBTI Community in East Africa" (2013) *UHAI EASHRI* 20.

<sup>27</sup> 20.

<sup>28</sup> Human Rights Watch "The Issue Is Violence" (2015) *HRW* 19 <<https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast>> (accessed 02-02-2022)

<sup>29</sup> EASHRI "Why Must I Cry? (2013) 20.

<sup>30</sup> The East African Sexual Health and Rights Initiative "Lived Realities, Imagined Futures: Baseline Study on LGBTI Organizing in Kenya" (2011) *UHAI EASHRI* 25.

the police refused to give her a case number and focused on questioning her on whether she was male or female.<sup>31</sup>

Some of the violent attacks against ITGDTPs are fuelled by extremist religious leaders. A study by UHAI-EASHRI found that religious leaders are the most vocal opponents of the inclusion and acceptance of ITGDTPs in society.<sup>32</sup> A 2018 research by Kenya Human Rights Commission (“KHRC”) and Columbia University found that 78.1% of religious leaders believe it is morally wrong to identify as a transgender woman and 77.1% found it morally wrong to identify as a transgender.<sup>33</sup> These religious attitudes often culminate in violence. The KHRC study found that 37.4% of religious leaders agreed that violence can be justified to preserve social values. A further, 27.4% opined that violence against transgender persons is permissible to preserve social values.<sup>34</sup>

A 2018 intersex taskforce report documented that most intersex children have been accused of engaging in homosexuality and been expelled from school.<sup>35</sup> Similarly, a National AIDS and STIs Control Programme (“NASCOP”) and Jinsiangu report found that transgender persons are often referred to as homosexual or gay.<sup>36</sup> This misidentification often places ITGDTPs at a higher risk of violence. The Human Rights Watch report detailed that in February 2015, some photos and videos of men engaging in same-sex conduct circulated on social media. This increased the attacks on ITGDTPs prompting them to flee or go into hiding because people believe that they are homosexuals.<sup>37</sup>

The media also plays a huge role in exacerbating GBV against ITGDTPs. FM radio stations constantly encourage hate speech and exhibit ignorance on issues affecting ITGDTPs.<sup>38</sup> The media covers negative public sentiments as they are and does not make any attempts to objectively change negative and discriminatory perceptions of ITGDTPs.<sup>39</sup> The media also covers GBV cases perpetrated against ITGDTPs in an undignified manner. This was the situation in *A.N.N v Attorney General*<sup>40</sup> (“*A.N.N*”) where the media ran a clip

<sup>31</sup> Human Rights Watch “The Issue Is Violence” (2015) *HRW* 36.

<sup>32</sup> EASHRI “Lived Realities:” (2011) 21.

<sup>33</sup> DK Mbote, TGM Sandfort, E Waweru & A Zapfel “Kenyan Religious Leaders’ Views on Same-Sex Sexuality and Gender Non-conformity: Religious Freedom versus Constitutional Rights” (2018) 55 *J Sex Res* 1-9.

<sup>34</sup> 10.

<sup>35</sup> Taskforce on Intersex Persons in Kenya (2018) “Report of the Taskforce” *KNCHR* 177.

<sup>36</sup> USAID, PEPFAR, JINSIANGU, LINKAGES, LVCT Health, University of Manitoba & NASCOP “The Nexus of Gender and HIV among Transgender People in Kenya” (2016) *FHI 360* 2. <<https://www.fhi360.org/sites/default/files/media/documents/resource-linkages-kenya-tg-gender-analysis-2016.pdf>> (accessed 03-02-2022).

<sup>37</sup> Human Rights Watch “The Issue Is Violence” (2015) *HRW* 24.

<sup>38</sup> EASHRI “Lived Realities” (2011) 21.

<sup>39</sup> The East African Sexual Health and Rights Initiative “A People Condemned: The Human Rights Status of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in East Africa” (2009-2010) *UHAI EASHRI* 55.

<sup>40</sup> (2013) eKLR.

of the transgender woman being stripped by police during prime-time news reporting.

Cultural beliefs further aggravate GBV against ITGDs. This is due to the internalised gender norms and expectations which reject identities outside the binary classification.<sup>41</sup> Generally, many societies view women as lesser beings than men, thus, trans women are often seen to have degraded themselves and given up the privilege of being men hence the heightened violence.<sup>42</sup> Intersex children also suffer sexual violence and genital mutilation due to detrimental religious and customary beliefs and practices.<sup>43</sup>

GBV against ITGDs transcend their person to their property, families and businesses. For instance, a transgender woman reported to Human Rights Watch how her kiosk was attacked by a mob because of her gender identity.<sup>44</sup> In February 2010, a crowd of 200 people attacked transgender women who served as peer educators at Kenya Medical Research Institute (“KEMRI”), a government institution.<sup>45</sup> These attacks deny ITGDs opportunities for engaging in lawful means of earning livelihood hence many resort to sex work which further exposes them to more violence including; rape, arbitrary arrests, police harassment and abuse from clients.<sup>46</sup>

ITGDs in conflict with the law endure extreme humiliation at the hands of police. In *A.N.* the petitioner, a transgender woman, had been arrested and charged with assault. She was dressed as a woman at the time of the arrest. While being held at the police station, male and female police officers undressed her in the full glare of the media to ascertain her gender. The police touched her all over her body, pulled her hair, beat her, teased her, and threatened her with guns.<sup>47</sup> The High Court found the police liable for violating her right to human dignity.<sup>48</sup>

Incarceration is a hotspot for the perpetration of GBV against ITGDs. The Prisons Act only provides for the separation of female and male convicts.<sup>49</sup> Although the Persons Deprived of Liberty Act<sup>50</sup> defines an intersex person, it does not lay down a mechanism for their incarceration. This creates a situation where the prison officers place ITGDs in the wrong cells thereby inviting

<sup>41</sup> Human Rights Watch “The Issue Is Violence” (2015) *HRW* 4.

<sup>42</sup> USAID et al (2016) “Nexus of Gender and HIV” *FHR* 4.

<sup>43</sup> Taskforce Intersex Persons in Kenya (2018) “Report of the Taskforce” *KNCHR* 182.

<sup>44</sup> Human Rights Watch “The Issue Is Violence” (2015) *HRW* 26.

<sup>45</sup> Human Rights Watch “The Issue Is Violence” (2015) *HRW* 28.

<sup>46</sup> See R George, J Rivett, F Samuels & E Dwyer “Intersecting Exclusions: Displacement and Gender-based Violence among People with Diverse Sexualities and Gender Identities in Kenya” (June 2021) *Literature Review* 34 <[https://cdn.odi.org/media/documents/GESI\\_Samuels\\_et\\_al\\_SGBV\\_prevention\\_Web\\_8blqQFX.pdf](https://cdn.odi.org/media/documents/GESI_Samuels_et_al_SGBV_prevention_Web_8blqQFX.pdf)> (accessed 02-03-2022). See also The East African Sexual Health and Rights Initiative “Defiant: Landscape Survey on Violence against LBQ Women, Trans People & Female Sex Workers in Burundi, Kenya, Tanzania and Uganda” (2018) *UHAI EASHRI* 49 <<https://uhai-eashri.org/wp-content/uploads/2019/12/DEVFIANT-FULL-REPORT-1-1.pdf>> (accessed 02-03-2022).

<sup>47</sup> *A.N. v Attorney General* (2013) EKLr para 16.

<sup>48</sup> Para 57.

<sup>49</sup> Section 36 of the Prisons Act, CAP 149 of the Laws of Kenya.

<sup>50</sup> Persons Deprived of Liberty Act 23 of 2014 of the Laws of Kenya.

violations. In *R.M v Attorney General*,<sup>51</sup> (“*R.M.*”) an intersex person was tried, convicted and sentenced. He was committed to a Maximum Prison for male convicts where he was made to share cells, bedding, and sanitary facilities with the male inmates because of the male name and gender expression. This exposed R.M. to mockery, ridicule, and sexual abuse from the inmates. The prison guards also treated him in a degrading and humiliating way. Officers asked him to spread his legs and expose his private parts in front of all other inmates. The Court ruled that the petitioner’s incarceration in a male prison was not unlawful under the Prisons Act. However, the Court condemned the strip searches conducted by the prison wardens as cruel, inhuman and degrading treatment and a violation of R.M.s right to human dignity.

### 3 1 ITGDPs and GBV-related laws in Kenya

Article 29(c) of the Constitution of Kenya, 2010 (“Kenyan Constitution”) protects all persons from any form of violence from either public or private sources. The provision provides for the right not to be subjected to physical or psychological torture. Article 29(f) protects every person from being treated or punished in a cruel, inhuman or degrading manner.

The Sexual Offences Act 3 of 2006 is the main legislative framework that protects individuals from sexual gender-based violence. Section 3(1) defines rape as “the act of causing penetration with one’s genital organs without the consent of the other person”. Section 2 defines genital organs to include “the whole or part of male or female genital organs and includes the anus”. The definition of rape is not gender-neutral and does not consider the realities of intersex persons with sexual violence. The definition only recognises penile penetration of the female genitalia or the anus.<sup>52</sup> An inclusive definition of sexual offences would improve the protection of ITGDPs from sexual violence.

ITGDPs experience other forms of sexual violence including; oral rape, genital violence, amputation of the testes or penis, genital mutilation, forced sexual activity with other people, corpses or animals, forced witnessing of sexual violence, insertion of objects or liquids into the urethra, forced sterilisation, sexual humiliation such as forced nudity, forced masturbation of self or others, and the non-consensual touching of their genitals.<sup>53</sup> Although some of these violations are covered by the Act, the majority are not mentioned.

The main form of violence that is perpetrated against intersex persons is intersex genital mutilation. Intersex children are subjected to non-consensual, medically unnecessary, irreversible, and cosmetic hormonal and surgical interventions to modify their ambiguous genitalia to fit the typical gender binary.<sup>54</sup> There is no medical evidence on the benefits of these surgeries;

<sup>51</sup> (2010) eKLR.

<sup>52</sup> E McDonald “Gender Neutrality and the Definition of Rape: Challenging the Law’s Response to Sexual Violence and Non-Normative Bodies” (2019) 45 *University of Western Australia Law Review* 166-183.

<sup>53</sup> Women’s Refugee Commission *Addressing Sexual Violence against Men, Boys, and LGBTIQ+ Persons in Humanitarian Settings* (2021) *Reliefweb* 2 <<https://reliefweb.int/sites/reliefweb.int/files/resources/Addressing-Sexual-Violence-against-Men-Boys-LGBTIQ-Persons-Guidance-Note-022021.pdf>> (accessed 02-03-2022).

<sup>54</sup> Human Rights Watch “The Issue Is Violence” (2015) *HRW* 26.



instead, they are justified by societal and cultural prejudices that require one to be either male or female.<sup>55</sup> Sadly, the only law that prohibits genital mutilation in Kenya is the Prohibition of Female Genital Mutilation Act which recognise cisgender girls and women only.<sup>56</sup> Yet, the taskforce research on intersex in Kenya found that out of 112 intersex persons interviewed, 29% had undergone this surgery, 30% were happy with the outcomes while 24% were dissatisfied about the surgery yet they had to live with the consequences for a the rest of their lives.<sup>57</sup>

Section 3(a) of the Protection against Domestic Violence Act 2 of 2015,<sup>58</sup> describes domestic violence to include largely violations that occur in marriage. However, the Constitution only recognises marriages between a cis-gender man and woman.<sup>59</sup> As such, domestic violence within a marriage involving members of the ITGDP community is likely to fall outside of the protection of the Constitution and this Act. Nevertheless, the Act defines a domestic relationship to include relationships between persons living in the same household or having a close personal relationship, thus creating a possibility of protection for individual ITGDPs against domestic violence.<sup>60</sup> The Penal Code<sup>61</sup> creates some GBV-related criminal offences which apply to everyone despite their gender identity.

#### **4 Lack of legal recognition: An aggravator of GBV and SGBV against ITGDPs in Kenya?**

##### **4 1 Understanding the right to legal recognition**

The Oxford dictionary defines recognition as “the acknowledgement of the existence, validity, or legality of something”. Therefore, legal recognition is the acknowledgement of the existence of a person in law. The United Nations Working Group on enforced disappearance defines the right to legal recognition as, “the capacity of each human being to be the holder of rights and obligations under the law”.<sup>62</sup> That is, the “right to have rights”.<sup>63</sup> Bell J in *Lifestyle Communications Ltd (No 3) (“Anti-Discrimination”)*<sup>64</sup> explained that legal recognition means that all people enjoy all the rights under the law.

<sup>55</sup> Human Rights Watch “The Issue Is Violence” (2015) *HRW* 26.

<sup>56</sup> Section 2 defines female genital mutilation as the “partial or total removal of the clitoris or prepuce, excision of the clitoris and labia majora or the narrowing of the vaginal orifice”.

<sup>57</sup> Taskforce Intersex Persons in Kenya (2018) “Report of the Taskforce” *KNCHR* 170.

<sup>58</sup> Protection Against Domestic Violence Act 2 of 2015 of the Laws of Kenya. Its objective is to protect victims of domestic violence.

<sup>59</sup> Article 45 (2) of the Kenyan Constitution, 2010; s 3(1) of the Marriage Act 2014 of the Laws of Kenya.

<sup>60</sup> Section 4 of the Protection Against Domestic Violence Act 2 of 2015 of the Laws of Kenya.

<sup>61</sup> CAP 63 of the Laws of Kenya. Section 202 criminalises manslaughter, section 203 criminalises murder, section 234 criminalises actions that causes grievous harm, section 250 criminalises common assault, and section 251 assault that causes actual bodily harm.

<sup>62</sup> UNGA “Report of the Working Group on Enforced or Involuntary Disappearances” 43 (2 March 2012) UN Doc A/HRC/19/58/Rev1.

<sup>63</sup> 43.

<sup>64</sup> (2009) VCAT RefNo. A98 of 1869 <<https://jade.io/article/114166>> (accessed 15-08-2021).

Without legal recognition, a person cannot enforce their rights, commence, defend or participate in legal proceedings.<sup>65</sup>

The United Nations (“UN”) Human Rights Council affirms that the right to legal recognition is connected to the right to civil registration and documentation as a prerequisite to the enjoyment of other rights:

“Birth registration, and more especially a birth certificate, is a life-long passport for the recognition of rights, which may be necessary to, *inter alia*, vote, marry or secure formal employment. In some countries, it may be needed to obtain a driver’s license, to open a bank account, to have access to social security or a pension, to obtain insurance or a line of credit, and, significantly, to be able to register one’s own children. It is also vitally important for securing inheritance and property rights, particularly for women and within families.”<sup>66</sup>

*R.M.*, discussed above, chronicles the scenario described by the UN Human Rights Council in a dramatic sense.<sup>67</sup> *R.M.*, an intersex person, could not obtain a birth certificate when he was born as the law did not have a category for his sex. Consequently, he could not obtain a national identity card (“NID”). He dropped out of school at the lower primary level due to social stigmatisation and exclusion. As a young adult, he attempted to marry but the marriage could not be recognised culturally and legally. Frustrated, he sought employment in the city but with almost non-existent education he could only secure low-level employment. He eventually broke the law and was convicted. The prison authorities placed him in the male cells where he was violated by inmates and prison officers which led to his taking legal action.

## 4.2 Legal recognition and culture

The relationship between the law and culture is two-pronged. First, culture influences the nature and scope of the law. For instance, some communities in Kenya consider intersex children a curse hence, they are disowned or at times killed.<sup>68</sup> The patriarchal Kenyan society and lawmakers hold cis-heteronormative constructions of gender that generally regard ITGDPs as “cursed, deviant or devil worshippers” which hinders legal recognition.<sup>69</sup> Moreover, African lawmakers have vocally expressed their opinions on the un-African nature of the ITGDP community.<sup>70</sup> These African cultural values have influenced the ITGDP-excluding laws in Kenya.

<sup>65</sup> *Zohra Madoui and Menouar Madoui v Algeria* (28 October 2008) Communication No. 1495/2006 <[http://www.worldcourts.com/hrc/eng/decisions/2008.10.28\\_Madoui\\_v\\_Algeria.htm](http://www.worldcourts.com/hrc/eng/decisions/2008.10.28_Madoui_v_Algeria.htm)> (accessed 02-03-2022).

<sup>66</sup> Human Rights Council “Birth Registration and the Right of Everyone to Recognition Everywhere as a Person before the Law” (17 June 2014) UN Doc A/HRC/27/22.

<sup>67</sup> *R.M v Attorney General* (2010) eKLR.

<sup>68</sup> KG Nelson “Intersex is Counted in Kenya’s Census: but is this a Victory?” (10-02-2022) *Global Post* <<https://theworld.org/stories/2019-09-10/intersex-counted-kenyas-census-victory>> (accessed 10-03-2022). J Chigiti *Intersex Persons and the Law in Kenya* (2021).

<sup>69</sup> Minority Women in Action, AFRA-Kenya, Kenya Campus Lessees Association and the National Gay and Lesbian Human Rights Commission *List of Issues Relating to the Violence and Discrimination against Lesbian, Bisexual, Transgender, Intersex and Queer Women in Kenya* (Submitted for the consideration of the 8th periodic report by Republic of Kenya for the 68th Session of the Committee on the Elimination of all forms of discrimination Against Women) <[https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT\\_CEDAW\\_NGO\\_KEN\\_26370\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/KEN/INT_CEDAW_NGO_KEN_26370_E.pdf)> (accessed 6-8-2021).

<sup>70</sup> T Walton “Sexual Minorities and the Right to Culture in African States” (2018) 50 *Journal of International Law and Politics* 1325 <<https://nyujilp.org/wp-content/uploads/2018/10/NYI404.pdf>> (accessed 6-8-2021).

On the other hand, the law indirectly changes and fuels certain moral attitudes in society.<sup>71</sup> The lack of legal recognition means that the law does not acknowledge ITGDs. This in turn heightens the notion in the society that ITGDs are social outcasts, immoral people whose existence is out of the bounds of the law and therefore do not deserve humane treatment. For example, 2018 research study conducted in Kenya found that 27.4% of religious leaders agreed that violence against ITGDs is justified to preserve cultural values; 35.5% of these respondents held the belief that the Kenyan Constitution does not apply to transgender persons.<sup>72</sup>

*R.M.* is a proper illustration of how cultural prejudices permeate the highest justice systems expected to protect the ITGDs from the same biases. Called to recognise intersex persons as different from the male and female sex categories provided by the law, the court stated:

“Issues of sexuality are issues which cannot be divorced from the socio-cultural attitudes and norms of a particular society. To include intersex in the category of “other status” would be contrary to the specific intention of the Legislature in Kenya. It would also result in recognition of a third category of gender which our society may not be ready for at this point in time.”<sup>73</sup>

However, recently the court expressed a different opinion in *Baby A (Suing through the Mother E A) v Attorney General*<sup>74</sup> (“*Baby A*”) where it pronounced that “intersexuals ought not to be discriminated against in any way including in the issuance of registration documents such as a birth certificate”. This case birthed the taskforce on intersex persons in Kenya,<sup>75</sup> and the inclusion of intersex persons in the 2019 national census which reported their total count as 1,524.<sup>76</sup> This number has been decried as a grave undercount and the inaccuracy is attributed to the existing widespread stigmatisation of intersex persons and lack of awareness by the census enumerators.<sup>77</sup>

### 4 3 Kenyan law on legal recognition

#### 4 3 1 *The process of non-recognition of ITGDs in Kenya: An explainer*

The Births and Deaths Registration Act<sup>78</sup> makes provision for the notification and registration of births and deaths. Section 10 obligates the person

<sup>71</sup> K Bilz & Janice Nadler “Law, Moral Attitudes, and Behavioral Change” in E Zamir & D Teichman (eds) *The Oxford Handbook of Behavioral Economics and the Law* (2014) 241.

<sup>72</sup> Mbote et al (2018) *J Sex Res* 1-10.

<sup>73</sup> *R.M v Attorney General* (2010) eKLR para 133.

<sup>74</sup> (2014) eKLR.

<sup>75</sup> *Baby A (Suing through the Mother E A) v Attorney General* (2014) eKLR. It is during a meeting of the taskforce that Justice Lenaola issued an apology for the court’s failing to appreciate the identity and unique challenges faced by intersex persons in *R.M*’s case. The taskforce report recommended; the amendment of the existing legal recognition laws to include an intersex marker and the establishment of agencies to effectuate the amended laws.

<sup>76</sup> G Kajilwa “2019 Census Reveals Kenya has 1,524 Intersex People” (2020) *The Standard* <[<sup>77</sup> Kenya National Commission on Human Rights estimates there are 1.4 million intersex people in Kenya. See also N Bhalla “Kenya Census Results a Big Win for Intersex People” \(04-11-2019\) \*Reuters\* <\[<sup>78</sup> Births and Deaths Registration Act CAP 149 of the Laws of Kenya.\]\(https://www.reuters.com/article/us-kenya-lgbt-intersex-trfn-idUSKBN1XE1U9></a> \(accessed 17-01-2022\).</p>
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registering the birth of a child to furnish the registrar with some mandatory particulars which include sex in the alternate options of male or female.<sup>79</sup> This sex assignment considers the child's genitalia as a representation of both their sex and gender identity.

When an intersex child is born, this process simply stalls as the law is oblivious of sex besides the male and female classification. Often the doctors record a question mark (?) on the notification form in the place of the sex marker as was the case in *Baby A*.<sup>80</sup> This complicates the process of obtaining a birth certificate for the intersex child. All other social, economic and civil processes, including enrolling in school rely on the birth certificate and thus this child is excluded. To avoid the registration dilemma and socio-cultural exclusion, sometimes parents opt for corrective surgery to fix the child within the sex binary of male/female.<sup>81</sup> In other circumstances, parents choose the most dominant sex from the intersex child's genitalia and physiological features. This was deemed as an acceptable practice by the judges in *R.M.*<sup>82</sup>

The particulars in the birth certificate inform all other documents that are issued to that child to adulthood and in death. At 18 years of age, the Registration of Persons Act<sup>83</sup> clothes the person with legal capacity through an NID. The particulars of sex are required to issue an NID.<sup>84</sup> For transgender and gender diverse persons whose gender identity and expression become more pronounced at puberty and young adulthood, the challenges start with the inability to obtain an NID with sex/gender marker that match their gender identity and expression, different to the particulars contained in the birth certificate.

The Kenya Citizenship and Immigration Act<sup>85</sup> under section 24 entitles every Kenyan citizen to apply for and be issued with a passport to facilitate their international travel. Particulars of sex in the alternate of male or female, together with copies of the birth certificate and NID are required for this application for inclusion in the passport.<sup>86</sup> Like the passport, all other identification documents such as the National Hospital Insurance Fund card, driver's licence, primary, secondary and college certificates adopt the same particulars of sex/gender as the birth certificate and NID.

A consequence of these laws is that intersex persons cannot acquire documents without either undergoing surgery or identifying as male or female.<sup>87</sup> Thus, transgender and gender diverse persons have documents that do not conform to their appearance (gender expression), hence the legal

<sup>79</sup> Schedule 1.

<sup>80</sup> *Baby A (Suing through the Mother E A) v Attorney General* (2014) eKLR.

<sup>81</sup> Taskforce on Intersex Persons in Kenya (2018) "Report of the Taskforce" KNCHR 173.

<sup>82</sup> *R.M v Attorney General* (2010) eKLR. However, in *Baby "A"* the court stated "[t]he fact that the Births and Deaths Registration Act and the Constitution do not define the term 'sex' does not mean that we should hide behind the traditional definition as we know it."

<sup>83</sup> The Registration of Persons Act CAP 107 of the Laws of Kenya.

<sup>84</sup> Section 5 and 6(1).

<sup>85</sup> The Kenya Citizenship and Immigration Act 12 of 2011.

<sup>86</sup> Section 27(1), the First schedule of the Kenya Citizenship and Immigration Regulations 2012, Rule 13.

<sup>87</sup> For instance, R.M's parents chose to label him a male while *Baby "A"* could not obtain a birth certificate. Sometimes intersex children labelled one sex at birth grow to identify and express themselves with the opposite gender thus encounter the same challenges as TGNCs.

identity crisis.<sup>88</sup> For example, Monica Mary, a transgender woman, can have an identity card that reads Joseph Andrew with a “male” gender marker. This discrepancy in identification documents exposes them to stigma and discrimination whenever they are required to show their official documents to verify their identity.<sup>89</sup>

Although Kenyan law allows a change of name via deed poll, there is no legal provision for change of the sex marker which is also considered as the gender marker.<sup>90</sup> The inability to change the gender marker on a document even after changing one’s name creates a socio-legal complexity that makes ITGDPs unable to enjoy their basic human rights such as the use of education certificates for economic empowerment. In *Republic v Kenya National Examinations Council Ex-parte Audrey Mbugua Ithibu*,<sup>91</sup> a transgender woman who, after successfully obtaining her Kenya Certificate of Secondary Education, could not use the certificate to secure employment due to the male gender marker, petitioned the court to allow the change from a male to a female marker to correspond with her new female name.<sup>92</sup> The court did not approve the change but in an innovative and progressive move allowed the removal of the gender marker where the law does not expressly require its inclusion. However, this approach is not applicable for identification documents like the birth certificate, NID, and passport where the law expressly requires the inclusion of a gender/ sex marker.<sup>93</sup>

#### 4 3 2 *The constitutional perspective: Are ITGDP people “every person”?*

Article 12(1)(b) of the Constitution provides that “every citizen is entitled to a Kenyan passport and any other document of registration or identification issued by the state to citizens”. The term “every person” was interpreted to encompass gender and sexual minorities by the court in *EG v Non-Governmental Organizations Co-ordination Board*<sup>94</sup> (“EG”). Article 27(1) affirms the equality of all people before the law while Article 27(4) prohibits discrimination on the basis of certain grounds including sex. Gender is not mentioned in the grounds. However, the court in *EG* held that the use of the word “including”, immediately preceding the list of the grounds indicate the listed grounds are not exhaustive.<sup>95</sup> Similarly, in *Republic v Non-Governmental Organizations Co-ordination Board ex-parte Transgender Education and*

<sup>88</sup> USAID et al (2016) “Nexus of Gender and HIV” *FHI 2*.

<sup>89</sup> A Müller “Legal Gender Recognition: An Analysis of Law and Policy in the Context of International Best Practice.” (2020) *Southern Africa Litigation Centre* 6 <<https://www.southernafricalitigationcentre.org/wp-content/uploads/2020/11/Botswana-Gender-Marker-Report.pdf>> (accessed 10-01-2022).

<sup>90</sup> Rule 9 of the Registration of Persons Rules.

<sup>91</sup> (2014) eKLR.

<sup>92</sup> In Kenya, and many other African states, names are often gendered female or male.

<sup>93</sup> The Births and Deaths Registration Act, the Registration of Persons Act and The Kenya Citizenship and Immigration Act.

<sup>94</sup> (2015) eKLR.

<sup>95</sup> *EG v Non-Governmental Organizations Co-ordination Board* (2015) eKLR. The court stated that “to allow discrimination based on sexual orientation would be counter the constitutional principles of, human dignity, equity, social justice, inclusiveness, equality, human rights, and non-discrimination” provided under Article 10. In *Baby A*, the court expounded Article 27(4) to include intersexuals.

*Advocacy*<sup>96</sup> the court held that discriminating against transgender persons based on their gender or sex is a violation of Article 27(4) of the Constitution.

Article 28 affirms the inviolable inherent dignity of all persons and the right to have that dignity respected and protected. In *A.N.N.*, the court in a bold and progressive judgment held that:

“If democracy is based on the recognition of the individuality and dignity of man, as a fortiori we have to recognize the right of a human being to choose his sex/gender identity which is integral to his/her personality and is one of the most basic aspects of self-determination dignity and freedom ...”<sup>97</sup>

Although the Kenyan Constitution employs an inclusive language and the courts have progressively interpreted it to embrace the ITGDPs, the statutes preclude ITGDPs from legally affirming their gender identity. Even the process of changing one’s name which is legally provided for is especially difficult for the ITGDPs due to discriminatory practices by the registrars of persons. For instance, in *MM v National Registration Bureau*,<sup>98</sup> four transgender persons had successfully changed their names and applied to have their new names reflected on their NIDs. The registrar of persons refused to effect the changes because their old photos on NIDs did not resemble their immediate appearances.<sup>99</sup>

#### 4 4 Lack of legal recognition and criminalisation of ITGDPs in Kenya: A catalyst for GBV and SGBV

According to section 14(1) of the Registration of Person’s Act, it is an offence to register oneself, to give false information during such registration and or to possess a NID with false entry, alteration or erasure. Section 382 of the Penal Code<sup>100</sup> provides for the offence of personation while sections 313 and 320 criminalise “obtaining registration by false pretences with intent to defraud” and “obtaining registration by false pretences” respectively.<sup>101</sup>

Due to ignorance on gender identity and expression matters, many parents refuse to allow their ITGDP youths the use of their NIDs to register for their own NIDs, a requirement under the Registration of Person’s Act. This forces them to use other people’s documents to obtain identity cards. Equally, ITGDPs are often arrested and charged with these offences because their gender identities and expression contrast with sex/gender particulars on identification documents, thus exposing them to harassment, extortion and

<sup>96</sup> [2014] eKLR.

<sup>97</sup> *A.N.N v Attorney General* (2013) eKLR. ANN, the police had publicly undressed a transgender woman.

<sup>98</sup> Judicial Review No 419 of 2015.

<sup>99</sup> The refusal to effect the changes was an administrative decision which had no legal basis. Accordingly, a consent judgement was entered, and MM and others were issued with NIDs reflecting new names and photos.

<sup>100</sup> The Penal Code CAP 63 of the Laws of Kenya.

<sup>101</sup> In *R v SCK*, Eldoret Criminal Case 480 of 2020, SCK, a transgender woman has been charged with obtaining registration by false pretences, the case has been ongoing since February 2020 and SCK is living without an NID, greatly affecting her life and athletic career as NID is a basic requirement for all social, economic and political engagements in Kenya.

violence from the police.<sup>102</sup> *R v SCK*<sup>103</sup> succinctly illustrates the correlation between lack of legal recognition and the consequent criminalisation of ITGDPs and GBV.<sup>104</sup>

Transgender women are often misidentified as men who have sex with men by the police thus they are often arrested for engaging in same-sex conduct between males, which is criminalised.<sup>105</sup> Moreover, criminalisation of “living on the earnings of prostitution”, and conducts such as “loitering with intent to commit an offence” which targets sex workers, greatly expose ITGDPs to police harassment.<sup>106</sup>

## 5 African regional and international frameworks and perspectives on the legal recognition of ITGDPs and GBV

The Universal Declaration on Human Rights<sup>107</sup> provides for the right to recognition for everyone, everywhere as a person before the law. The Inter-American Court of Human Rights expounded the normative context of this provision in *Sawhoyamaxa Indigenous Community v Paraguay* explaining that:

“The right to recognition of personality before the law represents a parameter to determine whether a person is entitled to any given rights and whether such person can enforce such rights. The breach of such recognition implies the absolute denial of the possibility of being a holder of such rights and of assuming obligations and renders individuals vulnerable to the non-observance of the same by the State or by individuals.”<sup>108</sup>

The Court reiterated the state’s duty to provide all means for the enjoyment of this right, especially to vulnerable persons, excluded or discriminated against. More importantly, the court held that the failure by Paraguay to issue identification documents to some members of the Sawhoyamaxa community was a violation of their right to legal recognition as persons before the law.

<sup>102</sup> Human Dignity Trust “The Criminalization of Transgender People and Its Impacts” (2019) *Human Dignity Trust* 27 <<https://www.humandignitytrust.org/wp-content/uploads/resources/Injustice-Exposed-the-criminalisation-of-trans-people.pdf>> (accessed 10-01-2022).

<sup>103</sup> Eldoret Criminal Case 1980 of 2019.

<sup>104</sup> The case concerned a transgender woman athlete who was charged with personation. She was detained in the male section at the remand prison after being subjected to intrusive body search which included stripping, touching of her body parts and probing of her orifices by the prison officers. The court ordered unspecified tests to ascertain her gender, which were used to further subject her to humiliating and dehumanising intrusive physical examination which involved pulling and measuring of her genital parts, radiological examination and the extraction of blood samples. The law enforcement officers released her medical reports to the media and the public without her consent. Yet, she was found innocent and acquitted of personation charges.

<sup>105</sup> Sections 162 and 165 of the Penal Code. See NASCOP “Module 6: Prevention and Response to Violence, Stigma, Discrimination against the Transgender People” (2021) on misidentification of transgender women.

<sup>106</sup> Section 154 of the Penal Code. See also: Human Rights Watch “The Issue Is Violence” (2015) *HRW* 32-33.

<sup>107</sup> Article 6 of the Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (“UDHR”). See also Article 16 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171.

<sup>108</sup> *Inter-American Court of Human Rights, Case of the Sawhoyamaxa Indigenous Community v Paraguay* Merits. Judgment of March 29, 2006. Series C No. 146, 187-193, [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_146\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf)> (accessed 05-08-2021).

In *Anzualdo Castro v Peru*,<sup>109</sup> the same court referred to this right as the right to “juridical personality” and acknowledged that the denial of this right places people in a vulnerable position where they are vulnerable to harm by the state or individuals.

The Convention on the Rights of a Child obligates state parties to register every child immediately after birth.<sup>110</sup> The Committee on the Rights of the Child emphasises that the registration of a child’s birth is essential to their personal identity and their enjoyment of other human rights entitlements.<sup>111</sup> The Yogyakarta Principles<sup>112</sup> establish the state obligation on the application of international human rights law in relation to ITGDTPs. Principle 3 requires states to put in measures to:

“Legally recognize each person’s self-defined gender identity and to ensure that efficient, fair and non-discriminatory procedures exist whereby all state-issued identity papers which indicate a person’s gender/sex including birth certificates, passports, electoral records and other documents reflect the person’s profound self-defined gender identity, and changes to ITGDTPs identity documents are recognized in all contexts where the identification or disaggregation of persons by gender is required by law or policy”.<sup>113</sup>

## 5 1 African human rights mechanisms on legal recognition

The African Union (“AU”) has three principal mechanisms for protecting human rights, the African Court on Human and Peoples’ Rights<sup>114</sup> (“African Court”), the African Commission on Human and People’s Rights<sup>115</sup> (“African Commission”) and the African Committee of Experts on the Right and Welfare of the Child<sup>116</sup> (“Expert Committee”). The African Charter on Human and

<sup>109</sup> Inter-American Court of Human Rights, *Anzualdo Castro v Peru* Merits. Judgment of September 22, 2009. Series C No. 202 [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_202\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_202_ing.pdf) (accessed 05-08-2021).

<sup>110</sup> Article 7(1) of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

<sup>111</sup> Committee on the Rights of the Child “General Comment No 7: Implementing Child Rights in Early Childhood” in “Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies” 25 (20 September 2006) CRC/C/GC/7/Rev.1.

<sup>112</sup> International Commission of Jurists “Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity” (March 2007).

<sup>113</sup> See *Christine Goodwin v United Kingdom* Application No. 28957/95 <[https://hudoc.echr.coe.int/eng#%7B%22itemid%22:\[%22001-60596%22\]}>](https://hudoc.echr.coe.int/eng#%7B%22itemid%22:[%22001-60596%22]}>) (accessed 22.06.2021). In this case, the European Court of Human Rights held that United Kingdom’s failure to legally recognise Goodwin as a transgender woman was a violation of her right to privacy.

<sup>114</sup> 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) CAB/LEG/66.5 establishes the African Court.

“It has jurisdiction to hear and give advisory opinions on any matters that relate to the interpretation of the Banjul Charter, the Protocol or any other human rights treaty ratified by the State Parties. Only State parties, African inter-governmental organizations, individuals, and NGOs have the locus standi to bring a suit before the court. An individual can only lodge a complaint at the court if the respondent state has recognized the court’s competence to receive such a complaint.”

<sup>115</sup> Article 30 of the African Charter establishes the African Commission. Article 30 proscribes that its mandate is “to promote and protect human rights in Africa”.

<sup>116</sup> 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 (“ACRWC”).



People's Rights<sup>117</sup> ("African Charter"), is the principal treaty. Several specific instruments complement the African Charter.

Article 2 of the African Charter promotes the right to non-discrimination on several grounds, including sex and other status. Gender and gender identity are not listed as grounds against which discrimination is prohibited. However, the African Court in the *Matter of African Commission on Human and People's Rights v The Republic of Kenya*<sup>118</sup> interpreted the phrase "any other status" to include "those cases of discrimination, which could not have been foreseen during the adoption of the Charter".

The Commission in *Open Society Justice Initiative v Côte d'Ivoire*<sup>119</sup> explained the importance of the right to be recognised by third parties, natural persons, or institutions, without which the "legal status remains only an unproductive attribute which cannot bear any of its potential fruits, especially a series of fundamental rights and obligations".<sup>120</sup> Nonetheless, the Commission is yet to issue a general comment on the normative content of this right in relation to ITGDPs.

Article 6(2) of the ACRWC provides for "the right of every child to be registered after birth".<sup>121</sup> General Comment No 2 to Article 6 of the ACRWC obligates states to ensure "no child's birth should go unregistered".<sup>122</sup> However, the prohibited grounds of discrimination focus on the parents rather than the child. General Comment 2 identifies and explains the plight of vulnerable children including those born to, imprisoned mothers, indigenous parents, refugees, internally displaced persons, asylum seekers, and parents with a disability. There is no mention of intersex or any other of the ITGD children yet their sex/gender and or gender identity bar them from registration in most African countries and thus they fall outside of the reach of the government's protective actions.<sup>123</sup> Furthermore, General Comment 2 lacks guidance on the details of the registration and only provides for the omission of details that may be prejudicial to the child or lead to stigmatisation or discrimination.<sup>124</sup>

<sup>117</sup> African Charter on Human and People's Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217.

<sup>118</sup> Application No. 006/2012, 138 <<https://africanlii.org/afu/judgment/african-court/2017/28>> (accessed 06-08-2021).

<sup>119</sup> Communication 318/06 <<https://www.achpr.org/sessions/descions?id=228>> (accessed 06-08-2021). This case concerned the discrimination and exclusion of the Dioula ethnic group by the government of Côte d'Ivoire through denial of passports, birth certificates and national identity cards.

<sup>120</sup> Article 5 of the African Charter provides for the right to legal recognition.

<sup>121</sup> The African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entry into force 29

<sup>122</sup> The African Committee of Experts on the Rights and Welfare of the Child "General Comment No. 2 on Article 6 of the ACRWC: The Right to a Name, Registration at Birth, and to Acquire a Nationality" (16 April 2014) ACERWC/GC/02.

<sup>123</sup> International Commission of Jurists "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity" para 43. This was the case in *Baby A and R.M.* discussed above. Further, only South Africa and Uganda allow intersex persons to alter the name and sex in their birth certificates. The Ugandan law only applies to minors who have undergone sex reassignment surgery.

<sup>124</sup> International Commission of Jurists "Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity" para 82. An in-depth discussion and guidance on inclusion of details such as sex and gender in the children's registration documents would be desirable.

Article 1 of the Protocol to the African Charter on Human and People's Rights of Women in Africa<sup>125</sup> ("Maputo Protocol") define women as "persons of the female gender, including girls", while Article III(1) affirms every woman's right to recognition and protection of her human and legal rights.<sup>126</sup> According to Rudman and Snyman, a teleological approach to treaty interpretation of the term "female gender" includes transgender women because a person's gender is not determined by their sex but by their gender identity.<sup>127</sup> Nonetheless, neither the African Court nor the Commission has had an opportunity to pronounce on the issue of gender identity and legal recognition of ITGDTPs.

The issues of sexual orientation and gender identity have generally received hostility and opposition from these institutions.<sup>128</sup> For instance, it took seven years for the African Commission to grant observer status to the Coalition of African Lesbians ("CAL") a non-governmental organisation. However, in what has been criticised as interference with the independence of the Commission,<sup>129</sup> the African Union Executive Council issued a directive to the African Commission to revoke CAL's observer status on the grounds that CAL's organisational objectives were against "fundamental African values, identity and good traditions".<sup>130</sup> The African Court dismissed a request to give an advisory opinion on the AU's directive on this issue.<sup>131</sup> Although significant efforts have been employed by civil society and academic institutions, there has been no substantive progress on the issue of legal recognition of ITGDTPs by the African human rights systems.

<sup>125</sup> Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September, entered into force 25 November 2005) CAB/LEG/66.6.

<sup>126</sup> Article 1 Maputo Protocol defines violence against women to include "physical, sexual, psychological and economic harm".

<sup>127</sup> 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 *Stell LR* forthcoming.

<sup>128</sup> K Esom "Human Rights, Sexual Orientation and Gender Identity in Africa: Challenging the Single Story" (2016) *State of Civil Society Report* <<https://www.civicus.org/documents/reports-andpublications/SOCS/2016/Human%20rights,%20sexual%20orientation%20and%20gender%20identity%20in%20Africa-%20challenging%20the%20single%20story.pdf>> (accessed 02-03-2022).

<sup>129</sup> S Nabaneh "2020 In Review: Focus on the African Commission on Human & People's Rights" *Coalition for the Independence of the African Commission* (accessed 02-03-2022). <<https://achprindependence.org/2020-in-review-a-focus-on-the-african-commission-on-human-and-peoples-rights/>> (accessed 02-03-2022).

<sup>130</sup> During its 33rd Ordinary session in Nouakchott, Mauritania, AU Executive Council declared under paragraph 5 of Decision EX. CL/Dec.1008-1030(XXXIII) of the AU Executive Council (Decision 1015) that the African Commission only had "independence of a functional nature, and not independence from the same organs that created the body". See S Nabaneh "Maintaining the Independence of the African Commission on Human and Peoples Rights: A Commentary on the Rules of Procedure, 2020" (24-08-2020) *Coalition for the Independence of the African* <[https://achprindependence.org/wp/content/uploads/2020/08/CIAC\\_RoP\\_Nabaneh\\_Rules-of-Procedure.pdf](https://achprindependence.org/wp/content/uploads/2020/08/CIAC_RoP_Nabaneh_Rules-of-Procedure.pdf)> (accessed 02-03-2022).

<sup>131</sup> Request for Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians No. 002/2015 (ACHPR) (28 September 2017) <<https://www.african-court.org/en/images/Cases/Judgment/002-2015-African%20Lesbians-%20Advisory%20Opinion-28%20September%202017.pdf>> (accessed 02-03-2022).

## 5.2 The case of South Africa

South Africa is relatively progressive when it comes to the legal recognition of ITGDs. The Alteration of Sex Description and Sex Status Act<sup>132</sup> allows intersex and transgender persons to change their sex description in the birth register. Previously, section 7(b) of the Births, Marriage and Deaths Registration Act<sup>133</sup> regulated such change and restricted it to only intersex and transgender persons who had undergone gender reassignment surgery. The current law eliminated this condition and opened the process to even those who have only undergone hormonal treatment.<sup>134</sup> Section 7 (b) was withdrawn following the High Court judgment in *W v W* where the court held that a person's sex could not be medically changed and that section 7 (b) could not assist the plaintiff, a post-operative transgender woman, to prove that her sex had changed.<sup>135</sup> This led to the introduction of section 33(3) of the Births and Deaths Registration Act, 1992 to include anyone during a gender change.

The Alteration of Sex Description and Sex Status Act is a progressive stride towards the recognition of ITGDs in South Africa. In 2013, the then Minister of Home Affairs, Naledi Pandor, revealed that 95 transgender persons had changed their sex description in the birth register since the enactment.<sup>136</sup> Both Kenya and South Africa have transformative constitutions designed to protect human rights and promote equality. In fact, the Kenyan Constitution has borrowed greatly from South Africa's Constitution.<sup>137</sup> Unfortunately, on the legal recognition of ITGDs, Kenya, as argued throughout this article, lags behind.

## 5.3 International perspectives on gender-based violence against ITGDs

Key international human rights instruments obligate states to protect all people against violence including GBV and SGBV.<sup>138</sup> The Committee against Torture through its General Comment No 2 reiterates state parties' obligation to protect ITGDs from torture and ill-treatment.<sup>139</sup> Principles 4 and 5 of the Yogyakarta principles require states to cease state-sponsored attacks on the lives of ITGDs, to vigorously investigate and prosecute individual or group perpetrators of such attacks, and to ensure the gender identity of a victim is

<sup>132</sup> Section 2(1) of the Alteration of Sex Description and Sex Status Act 49 of 2003.

<sup>133</sup> Births, Marriages and Deaths Registration Act 81 of 1963.

<sup>134</sup> RS Nielsen *A Third Gender in South Africa: Does the Legal Non-Recognition of a Third Gender Violate Non-Binary Transgender Person's Constitutional Rights to Dignity and Equality?* LLM Thesis University of Cape Town (2020) 32.

<sup>135</sup> *W v W* 1976 2 SA 308 (WLD).

<sup>136</sup> Gender Dynamix & Legal Resources Centre "Alteration of Sex Description and Sex Status Act, No. 49 of 2003" (2019) *Briefing Paper* <<https://www.transgendermap.com/wp-content/uploads/sites/7/2019/05/LRC-act49-2015-web.pdf>> (accessed 26-01-2022).

<sup>137</sup> D Ally "A Comparative Analysis of the Constitutional Frameworks for the Removal of Judges in the Jurisdictions of Kenya and South Africa" (2016) 2 *Athens Journal of Law* 137-141.

<sup>138</sup> Article 3 UDHR affirms the right to life and security of persons, Article 5 UDHR and Article 7 CCPR protects ITGDs from torture and other cruel, inhuman, or degrading treatment.

<sup>139</sup> 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.

not used to justify, excuse, or mitigate violence. Principle 10 calls on states to take measures to protect ITGDTPs from torture, cruel, inhuman or degrading treatment, provide medical and psychological support to victims of such treatment and conduct awareness among the police and other state actors who are likely to perpetuate or prevent such acts.

The United Nations General Assembly recognises that lack of legal recognition exposes ITGDTPs to violence and discrimination and urges states to develop measures that permit ITGDTPs to change their gender in state-issued documents.<sup>140</sup> Likewise, the UN has called on member states and other stakeholders to ensure “legal recognition of the gender identity of transgender people without abusive requirements” as an effective measure of curbing violence against this group.<sup>141</sup>

#### 5.4 African human rights mechanisms on gender-based violence against ITGDTPs

The African Charter prohibits “exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment”,<sup>142</sup> while Article 4 of the Maputo Protocol protects the right to security of a person and obligates states to prohibit, prevent, eradicate and punish all forms of violence against women. The African Commission in *Curtis Doebbler v Sudan*<sup>143</sup> explained the normative content of this right to “encompass the widest possible array of physical and mental abuses”.

General Comment No 4 of the African Commission on the Right to redress for victims of torture calls on states to effectively address acts of sexual violence against transgender and intersex persons.<sup>144</sup> Specifically, states are required to undertake several measures to combat GBV including; identifying the causes and consequences of GBV and implementing measures to prevent and eradicate such causes.<sup>145</sup> Furthermore, the African Commission’s Resolution 275 calls on states to end acts of violence against ITGDTPs including; corrective rape, physical assaults, torture, murder, arbitrary arrests, detentions, extra-judicial killings, executions, forced disappearances, extortion, and blackmail, by enacting and effectively applying appropriate laws, and establishing judicial

<sup>140</sup> 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.

<sup>141</sup> Joint UN statement on ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people <<https://www.ohchr.org/en/issues/discrimination/pages/jointlgbtstatement.aspx>> (accessed 08-07-2021).

<sup>142</sup> Article 5 of the African Charter.

<sup>143</sup> Communication 236/00: Curtis Francis Doebbler/Sudan. Summary of Facts <[https://www.achpr.org/public/Document/file/English/achpr33\\_236\\_00\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr33_236_00_eng.pdf)> (accessed 07-08-2021).

<sup>144</sup> General Comment No 4: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) para 59 <[https://www.achpr.org/public/Document/file/English/achpr\\_general\\_comment\\_no\\_4\\_english.pdf](https://www.achpr.org/public/Document/file/English/achpr_general_comment_no_4_english.pdf)> (accessed 12-01-2022).

<sup>145</sup> Para 61.

procedures responsive to the needs of the victims.<sup>146</sup> Similarly, the Committee for Prevention of Torture in Africa has called upon African states to take actions to stop and punish perpetrators of violence based on imputed or actual sexual orientation or gender identity.<sup>147</sup>

## 5 5 Are the African human rights mechanisms effective in protecting ITGDPs from GBV?

While it is clear that the African Charter and its complementary instruments prohibit discrimination and violent actions against all people including ITGDPs, it is clear that ITGDPs are not offered sufficient “normative” protection due to the socio-legal non-recognition of their gender identities.<sup>148</sup> Further, the African Charter’s limitation provisions which obligate individuals and states “to preserve and strengthen positive African cultural values, collective security, morality and common interest” are a threat to the ITGDPs’ quest to be legally recognised.<sup>149</sup> In this regard, it is interesting to note that although the Commission, on its interpretation of the Charter, has consistently demonstrated the positive and progressive intention to bar states from using clawback clauses to limit the enjoyment of human rights, by drawing inspiration from international law, it unfortunately approves limitations on grounds of morality and “African cultural values”. This was pronounced in *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* indicating that:

“The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2), that is that the rights of the Charter ‘shall be exercised with due regard to the rights of others, collective security, morality and common interest’.”<sup>150</sup>

The importance attached to the issue of preservation of positive African cultural values and morality within the AU systems can be construed from granting and then revoking the observer status of CAL.<sup>151</sup> To make matters worse, the African Charter does not define what constitutes “positive African cultural values” and “morality” thus African states have an opportunity to use this ambiguity to violate the rights of ITGDPs and other minorities who are considered social outcasts.

<sup>146</sup> The African Commission on Human and Peoples’ Rights “275 Resolution on the Protection against Violence and other Human Rights Violations against Persons on the Basis of their Real or Imputed Sexual Orientation of Gender Identity” (2014) ACPHR/Res.275(LV).

<sup>147</sup> ACHPR “Statement on the Occasion of the International Day in Support of Victims of Torture” (26-6-2014) <<https://reliefweb.int/report/world/statement-occasion-international-day-support-victims-torture-26-june-2014>> (accessed 02-03-2022).

<sup>148</sup> Like Kenya, the African human rights systems employ the problematic assumptions of synonymy and binarism of gender and sex thus excluding ITGDPs.

<sup>149</sup> Articles 27(2) and 29(7) of the African Charter; African cultures consider intersex and transgender persons immoral and a curse. See EASHRI “Why Must I Cry” (2013) 20.

<sup>150</sup> Communication Nos 140/94, 141/94 and 145/95 <[https://www.achpr.org/public/Document/file/English/achpr26\\_140.94\\_141.94\\_145.95\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr26_140.94_141.94_145.95_eng.pdf)> (accessed 19-08-2021). See also GJ Naldi “Limitation of Rights under the African Charter on Human and Peoples’ Rights: The Contribution of the African Commission on Human and Peoples’ Rights” (2001) 17 *S Afr J on Hum Rts* 109.

<sup>151</sup> See S Nabaneh (2021) “2020 in Review” *Coalition for the Independence of the African Commission* .

Further, as Ssenyonjo rightly observes, the mandate of the African Court to ensure the protection of human rights hardly materialises as individuals and non-governmental organisations with observer status cannot directly submit cases to the court unless their states have made a declaration acknowledging the jurisdiction of the court in that regard.<sup>152</sup> So far, only 12 states have deposited such a declaration of which four have subsequently withdrawn their declarations leaving eight active declarations.<sup>153</sup> In addition, lack of mechanisms to enforce and monitor states compliance with the decisions of the African Court and the African Commission and complicit inaction by the AU's political organs, including the Assembly of Heads of State, seriously undermine the ability of the African Court and African Commission to fulfil their mandates.<sup>154</sup>

With regard to the creation of awareness and the value of advocacy before the African Commission, Murray argues that the secrecy and poor mechanisms for information sharing have deprived the African Commission of valuable contributions of the local and international community necessary to “pressurise governments to respect its decisions”.<sup>155</sup>

## 6 Conclusion

Kenya's history on the recognition, promotion and respect for ITGDP's rights is no different from the history of other African states. It is largely underscored by the mystical and customary beliefs that consider and treat ITGDPs as taboo and a bad omen. The social and legal structures are anchored on erroneous presumptions of synonymy and binarism of sex and gender which exclude and incite violence against ITGDPs. On a positive note, though, in the last two decades, the Kenyan Courts have progressively affirmed the rights of ITGDPs in an attempt to rid the society of exclusionist tendencies that treat ITGDPs as objects instead of subjects.

The pronouncements of the African Commission and other human rights mechanisms discussed in this article demonstrate a willingness to recognise the existence and human rights needs of ITGDPs, in an otherwise highly prejudiced society. However, the need to expressly recognise ITGDPs in African human rights instruments is of paramount urgency and should not be left to the mercy of individual benevolent judges and expert opinions that lack reliable enforcement mechanisms.

<sup>152</sup> M Ssenyonjo “Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples’ Rights 1987-2018” (2018) 7 *IHRL Review* 1-35.

<sup>153</sup> See African Court on Human and Peoples’ Rights <<https://www.african-court.org/wpafc/declarations/>> and <<https://www.african-court.org/wpafc/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/>> (accessed 11-03-2022). States with an active declaration: Burkina Faso, The Gambia, Ghana, Malawi, Mali, Tunisia, Niger and Guinea Bissau.

<sup>154</sup> F Viljoen & L Louw “State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights, 1994-2004” (2007) 101 *American Journal of International Law* 32. For instance, in 2013 Libya failed to comply with the court's orders prompting the court to call upon the African Union's Assembly of Heads of State to take action. The assembly did not take any action.

<sup>155</sup> R Murray “African Charter Progress & Problems 1989-2000” (2001) 17 *African Human Rights Law Journal* 17.

In light of the findings in this article there is a need for a general comment by the African Commission to expound on the normative content of Article 5 of the African Charter on the right to recognition of a person's legal status with specific reference to ITGDPs. The comment should explain the correlation between legal recognition and SGBV against ITGDPs.

The Expert Committee should also urgently pass a general comment on article 6(2) of the ACRWC with specific grounds upon which a child must not be denied registration at birth. These grounds should include having ambiguous genitalia. Moreover, such a general comment should refer to intersex and TGDP youths as vulnerable children who are likely to be denied registration at birth or adulthood.

The judicial organs of the AU, the African Commission and the African Court, must make more effort to explain the nature and scope of the problematic criteria for limiting rights under the Charter, that is, "positive African cultural values" and "morality" in relation to ITGDPs. Furthermore, the AU Assembly of Heads of State should consider amending Article 34(6) of the African Court Protocol to allow direct access to victims of human rights violations.

Finally, the African Commission and the AU Commission should grant observer status to any NGOs that advocate for the rights of ITGDPs to enhance advocacy and public visibility of the community that applies for such status.