

Normalisation of intersex persons through 'conversion practices' in East Africa – Building on the 'indigenous' way forward

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Abstract

Intersex people, individuals born with biological sex characteristics that cannot be categorised as female or male, are often subjected to 'conversion practices' aimed at 'normalising' them into the binary sex and gender. The medical field views intersex bodies as 'disordered' while cultural and religious norms portray them as defective female or male. Often, the law only recognises binary sex and gender. In East Africa, Kenya pioneers reforms to recognise the rights of intersex persons within a predominantly cisnormative and binary constitutional system. On the other hand, Ugandan law on registration of births principally sanctions medical normalisation of intersex children, while Tanzania is silent on intersex. The same lacuna obtains in the African human

rights mechanisms. This chapter critically examines the nexus between the prevailing assumptions on sex and gender binarism and lack of legal recognition of intersex persons in East Africa, and how that engenders normalisation practices. It explores the adequacy of law from the perspective of Malta and South Africa. It concludes with a proposal for deconstructing presumptions that binarism and cisnormativity are historical African concepts by 'building on the indigenous' process that allows the immediacy of historical and modern lived realities to shape policy.

Key words: *normalisation; conversion; intersex; East Africa; cisnormativity*

1 Introduction

The prevailing socio-cultural beliefs worldwide, including in East Africa, hold that human beings are biologically male and female. The sex of a person and the corresponding gender are assumed to be fixed at birth based on the genitalia.¹ The societal presumption that people whose gender matches the body they were born with (cisgender people) are normal while others are not, constructs sex and gender as a 'stable and immutable normative concept that is binary', 'always synonymous, uncomplicated and in-sync'.² Consequently, those branded male are assumed to have a corresponding masculine gender and identify and express as men, while females are assumed to have a corresponding feminine gender and, therefore, identify and express as women.³ This erroneous view was buttressed by the High Court of Kenya in *RM v*

- 1 World Health Organisation 'Gender and health', https://www.who.int/health-topics/gender#tab=tab_1 (accessed 15 August 2022). Gender refers to the socially construed characteristics of boys, girls, men and women while sex refers to their biological and physiological differences. Gender encompasses the societal expectations assigned to males and females.
- 2 American Psychological Association 'Guidelines for psychological practice with transgender and gender non-conforming people' (2015) 70 *American Psychologist* 832.
- 3 MW Kuria & SG Maranya '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' (2022) 33 *Stellenbosch Law Review* 101.

*Attorney General*⁴ where the Court interpreted the word 'sex' to include the two categories of male and female genders.

Cisnormativity, sex and gender binarism deny the existence of sex and gender diverse persons including intersex people, and relegate them to 'abnormal' status that requires 'normalisation' to fit in.⁵ Intersex persons are born with sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit typical binary notions of male or female bodies.⁶ These traits may be apparent at birth or may emerge later in life.

Social structures anchored on cisnormativity and binarism amplify 'body vigilance' against gender diverse persons thereby compelling them to regulate how they 'embody normative gender expressions', in compliance with how cisgender people perceive their gender.⁷ As a result, normalisation becomes the only option for gender diverse persons to experience a meaningful life. In a study conducted in the United Kingdom (UK), it was established that transmen and women experienced higher job satisfaction, mental health and life satisfaction after undergoing sex reassignment surgery.⁸ The case of Caster Semenya and the infamous 2018 International Amateur Athletic Federation rules, which require athletes such as Semenya to undergo hormonal therapy to maintain their testosterone levels within an acceptable limit so as to be permitted to compete in the female classification,⁹ ensconces the ideology that sex and gender must be borne out in normative ways, and any deviations must be normalised.

4 *RM v Attorney General* (2010) eKLR para 124.

5 GR Bauer and others 'I don't think this is theoretical: This is our lives: How erasure impacts health care for transgender people' (2009) 20 *Journal of the Association of Nurses in AIDS Care* 356.

6 Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (adopted 10 November 2017) Preamble.

7 T Kölken & N Rumens 'Challenging cisnormativity, gender binarism and sex binarism in management research: Foregrounding the workplace experiences of trans and intersex people' (2022) 37 *Gender in Management* 702.

8 N Drydakis 'Trans employees, transitioning, and job satisfaction' (2017) 98 *Journal of Vocational Behaviour* 1.

9 *Mokgadi Caster Semenya v International Association of Athletics Federations* CAS 2018/O/5794. Semenya is an intersex Olympic medal winner athlete within the female classification.

The consequence of cisnormativity, sex and gender binarism is that people build their identities and organise their social, cultural and economic interactions around them, resulting in the structural exclusion of non-binary individuals. For example, the use of 'male' and 'female' designated changing rooms and bathrooms in public spaces socially enforces gender binarism. The designation brings to question the normality of any person that cannot be properly identified by the binary sex and the corresponding gender. Similarly, most legal regimes on recognition and registration of persons follow a binary sex pattern, and the corresponding genders of masculinity (associated with men) and femininity (associated with women).¹⁰

On the other hand, evidence from biomedicine and sociology demonstrates sex as a 'complicated phenomenon located along a continuum or spectrum'. The biological sex assigned at birth does not invariably predict individuals' inner gender identity.¹¹ The existence and lived experiences of non-binary individuals, including intersex persons, also pose a direct challenge to the notion of sex, gender binarism and congruence.¹² Gender diverse persons express an identity that fall 'between or beyond the male or female genders'.¹³ Historically, sex and gender diversity has existed in many African cultures even before the advent of modern science.¹⁴ However, the colonial heritage of binarism

10 Eg, in Tanzania the Births and Deaths Registration Act 1920 (CAP 108); in Uganda the Births and Deaths Registration Act 1973.

11 JS Hyde and others 'The future of sex and gender in psychology: Five challenges to the gender binary' (2008) 74 *American Psychologist* 171.

12 A Mbugua 'Gender dynamics: A transsexual overview' in S Tamale (ed) *African sexualities: A reader* (2011) 238.

13 Gender identity has been defined as 'a person's deeply felt internal and individual experience of gender' 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; World Health Organisation '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 August 2022).

14 I Amadiume in *Male daughters, female husbands: Gender and sex in African societies* (1987) examines and demonstrates that in pre-colonial African societies roles were neither feminised nor masculinised. Eg, in the Shangani community of Southern Africa, a practice existed where 'men married other men as part of their culture and everyday life known as *ngochani* (male wife)'. Other examples include woman-to-woman marriages in certain Kenyan, Nigerian and Sudanese communities. M Mbaru, M Tabengwa & K Vance 'Cultural discourse in Africa and the promise of human rights-based on non-normative sexuality and/or gender expression: Exploring the intersection, challenges and opportunities' in N Nicol

and cisnormativity persists in the African socio-legal systems despite the existence of formidable evidence of a gender diverse pre-colonial Africa. These notions continue to subject intersex persons to some of the most ignominious and painful forms of sex and gender normalisation practices, to which Bauer refers as 'serious human rights abuses'.¹⁵ Normalisation is often carried out through 'conversion practices' including medical treatments, cultural and religious rituals.

Over the years, the United Nations (UN) and regional human rights bodies, including the African Commission on Human and Peoples' Rights (African Commission) have denounced sex normalisation practices against intersex persons. Some countries such as Malta and South Africa have established legal frameworks aimed at curbing the practices and protecting the bodily integrity of intersex persons.¹⁶ However, the prevalence of sex normalisation practices in these countries remain largely unaffected by policy protections, thereby reflecting what Rittel and Webber describe as a 'wicked problem'.¹⁷ Empirical studies on the disjuncture between practice and policy against normalisation point to fundamental epistemic challenges compounded by differences in values based on religious and socio-cultural perspectives on intersexuality.¹⁸

This chapter seeks to contribute against cisnormativity and binarism assumptions that underpin sex and gender normalisation practices against intersex persons in three countries in East Africa.¹⁹ It explains the correlation between the erroneous assumption on synonymy and

and others (eds) *Envisioning global LGBT human rights: (Neo)-colonialism, neoliberalism, resistance and hope* (2018) 177.

- 15 M Bauer, D Truffer, & D Crocetti 'Intersex human rights' (2020) 24 *International Journal of Human Rights* 724.
- 16 United Nations Office of the High Commissioner for Human Rights 'Intersex Awareness Day – Wednesday 26 October: End violence and harmful medical practices on intersex children and adults, UN and regional experts urge' 2 4 October 2016, <https://www.ohchr.org/en/press-releases/2016/10/intersex-awareness-day-wednesday-26-october?LangID=E&NewsID=20739> (accessed 1 May 2024); United Nations Human Rights Council 'Combating Discrimination, Violence and Harmful Practices against Intersex Persons Resolution' adopted 4 April 2024 A/HRC/RES/55/14.
- 17 HWJ Rittel & MM Webber 'Dilemmas in a general theory of planning' (1973) 2 *Policy Sciences* 155-160, https://urbanpolicy.net/wp-content/uploads/2012/11/Rittel+Webber_1973_PolicySciences4-2.pdf (accessed 7 April 2024).
- 18 CB Tabone, F Garland & M Travis 'Cultural awareness of intersex in Malta: Invisibility, stigma and epistemic injustice' (2024) 13 *Social Sciences* 150, <https://www.mdpi.com/2076-0760/13/3/150> (accessed 7 April 2024).
- 19 For the purposes of this chapter, East Africa refers to Kenya, Tanzania and Uganda.

binarism of gender and sex and the normalisation practices. The research extensively analyses and interrelates the concepts of normalisation and conversion practices from the medical, cultural and religious perspectives with the right to legal recognition. Drawing from legal frameworks of the three East African countries, international and African human rights mechanisms, we posit that the legal exclusion of intersex people significantly exacerbates their exposure to normalisation practices. As such, the question that emerges is whether legal reform is the panacea for ending sex normalisation practices in East Africa.

On the contrary, evidence from countries with decent legal frameworks on protection of intersex persons indicate that law by itself is often seen as a coercive tool for social change. This invites dissent and disassociation resulting in silent but violent socio-cultural environment. The chapter concludes with a proposal for East Africa to infuse legal reforms with Nnameka's 'building on the indigenous' approach to deconstruct norms, structures and institutions that diminish the dignity and existence of intersex persons.²⁰ 'Building on the indigenous' presents a space where the immediacy of African historical perspectives of sex and gender welds with modern lived realities to mediate policy through a participatory repudiation of offensive norms to be reconstituted with an ethos of common humanity and dignity of all human beings; a space where society is empowered to determine the 'form and content' of inclusive sex and gender to be relocalised and assimilated within the modern 'values, interests, aspirations and social institutions that are important in the life of the people'.²¹ In light of the scarcity of academic research on intersexuality in East Africa, qualitative studies by civil societies and public interest litigations become instrumental.

20 O Nnaemeka 'Nego-feminism: Theorising, practicing, and pruning Africa's way' (2014) 29 *Journal of Women in Culture and Society* 361. The 'indigenous' is defined as 'whatever people consider important in their lives, whatever they regard as an authentic expression of themselves'.

21 Nnaemeka (n 20) 376-377.

2 Conceptual analysis: Normalisation, conversion practices

2.1 Principle of normalisation

The concept of normalisation was first propagated by Bank-Mikkelsen and incorporated into Danish law in 1959 as a right based approach to disability, focused on 'letting the mentally retarded obtain an existence as close to the normal as possible'.²² The principle was systematically conceptualised by Nirje who rephrased it as 'making available to the mentally retarded patterns of life and conditions of everyday living which are as close as possible to the norms and patterns of the mainstream of society'.²³ From a culture specific perspective, Wolfensberger defined normalisation as the 'utilisation of means which are as culturally normative as possible in order to establish and/or maintain personal behaviours and characteristics which are as culturally normative as possible'.²⁴

To Wolfensberger, the ultimate concern of the principle of normalisation is the 'maintenance or attainment of nondeviant or normative behaviour' in human beings.²⁵ The normalisation principle is characterised by 'labels, concepts, stereotypes, role perceptions and role expectancies' that are applied to a person and often determine the 'circularity between his own self-concept, the way others react to him, and the way he is likely to respond'.²⁶ For instance, the normalisation principle demands that a person expresses normal gender expression behaviours such as dressing according to the same gender and any incompatible expressions are perceived as deviance. Regarding intersex persons, normalisation interventions get credence from the assumptions of sex and gender binarism and cisnormativity of all humans. Intersex

22 WP Wolfensberger and others *The principle human normalisation in human services* (1972) 27.

23 B Nirje 'The mormalisation principle and its human management implications' (1994) 1 *The International Social Role Valorisation* 19; RB Kugel & W Wolfensberger (eds) *Changing patterns in residential services for the mentally retarded: A President's Committee on Mental Retardation monograph* (1969) 181.

24 Wolfensberger (n 22) 26.

25 As above. According to Wolfensberger, a person is perceived deviant in social parlance if viewed to be 'significantly different from others in some aspect that is considered of relative importance, and if this difference is negatively valued.'

26 Wolfensberger (n 22) 31.

persons are therefore perceived as ‘diseased’, ‘abnormal’ and requiring intervention to ‘fit in’.²⁷

Despite overwhelming epistemic literature on the hazards of elective sex normalisation, surgeries aimed at making intersex children’s bodies conform to those associated to typical male or female continue to be implemented. Some intersex adults express satisfaction with the outcomes of the surgeries performed on them when they were children.²⁸ A 2024 systematic review of medical literature focused on understanding the rationales for interventions conducted on intersex children as contextualised within the medical, ethics, social, political and cultural controversies. The review identified ‘cosmetic, functional and anatomical outcomes that align more with those associated with ‘typical’ male or female bodies’ as a major motivation for surgical interventions.²⁹ The justification is that sociocultural contexts elicit a strong parental desire to have a child’s external genitalia correspond to a binary gender identity. This enables the child’s psychosexual development, a normal sexual life and well-being within the family, school and wider society.³⁰ The surgeries have also been rationalised as a way of increasing ‘parental comfort, improving parent-child attachment’, reducing stigma and psychological distress on parents.³¹ Appreciating the psychological implications of having an intersex child on parents in an epistemologically violent socio-legal context, Baird proposes a child-centric rights-based approach that balances parental rights against the rights of intersex children to bodily autonomy and informed consent entrenched within the principle of the best interests of the child.³²

27 American Psychological Association (n 2) 832-834.

28 L Muschialli and others ‘Perspectives on conducting “sex-normalising” intersex surgeries conducted in infancy: A systematic review’ (2024) 4 *PLOS Global Public Health* 2, <https://doi.org/10.1371/journal.pgph.0003568> (accessed 4 March 2025).

29 As above.

30 As above; MG Scarpa and others ‘Ovotesticular differences of sex development: Male or female? Case series’ (2019) 66 *Italian Journal of Paediatrics* 45.

31 Scarpa and others (n 30) 25.

32 S Baird ‘Somewhere over the rainbow: An analysis of intersex gender-normalising surgery in Kenya, Uganda and India’ (2024) 1 *International Journal on Minority and Group Rights* 1.

2.2 Conversion practices

The UN Human Rights Council (HRC) defines conversion therapy as an umbrella term that explains a variety of methods and practices that aim at changing non-heterosexual to heterosexual and from trans or gender diverse to cisgender identities.³³ Conversion practices encompass a wide range of physical and non-physical practices that pathologise and erase identities of sexual minorities and non-binary persons so as to suppress an individual’s expression of sexual orientation or gender identity.³⁴ Physical conversion therapies include hormone treatments, surgeries, electroconvulsive shock treatments, ‘corrective’ rape and sexual assault, imprisonment and kidnapping, physical abuse, purification rituals, cultural treatments, and aversion therapy. Non-physical conversion therapies, also known as ‘talking’ therapies, include psychotherapy, peer support and pastoral counselling.³⁵

Conversion practices are anchored on the assumption that recipients can and should be normalised to conform with sex and gender binarism, cisnormative and heteronormative behaviours that are perceived as the desirable norm in a given cultural, social and religious setting.³⁶ However, although conversion practices occur globally and in East Africa, studies indicate that the practices do not work. They are a form of ‘deception, false advertising and fraud’.³⁷ On the contrary, the practices provoke self-loathing and have profound consequences on their victims’ mental, physical and psychological integrity and well-being.³⁸ This chapter uses the terms ‘normalisation practices’ and ‘conversion practices’ interchangeably to refer to interventions that reinforce binary sex and gender, including feminising and masculinising surgical and hormonal treatments, cultural and religious practices.

33 United Nations Human Rights Council ‘Practices of so-called “conversion therapy”: Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity’ (1 May 2020) A/HRC/44/53 paras 2 & 3; Independent Forensic Expert Group ‘Statement on conversion therapy’ (2020) 72 *Journal of Forensic and Legal Medicine* 1.

34 I Trispiotis & C Purhouse ‘Conversion therapy: As degrading treatment’ (2021) 42 *Oxford Journal of Legal Studies* 104.

35 Trispiotis & Purhouse (n 34) 107.

36 Wolfensberger (n 22) 26; UN Human Rights Council (n 33) 5.

37 UN Human Rights Council (n 33) 5; Independent Forensic Expert Group (n 33).

38 UN Human Rights Council (n 33) 5; J Butler *Undoing gender* (2004) 53.

3 Foregrounding normalisation of intersex persons through medical, cultural and religious conversion practices in East Africa

3.1 Medicalisation of intersex bodies

Since the nineteenth century, medicine has always seen intersex bodies as a purely medical problem.³⁹ Medical practitioners construe intersex variations as 'physical malformations that can be fixed to ensure the healthy physical and psychological development' of intersex persons as sex binary humans.⁴⁰ This perspective aims to preserve the ideologies of normative sex and gender binarism, cisnormativity and heteronormativity. Further, the potent conflation of sex, sexual orientation and gender expression influenced by political conservativeness underscores the need for medicine to keep sex and gender borders clearly defined so as to control homosexuality.⁴¹ As such, medical interventions that label everyone 'truly male' or 'truly female' are encouraged. For instance, the 1950s 'optimum gender of rearing model' by Johns Hopkins University sought to eliminate intersex in early childhood through surgery, endocrinology and psychology.⁴² The model presumed to maximise each child's potential for a normal gender identity by aligning the child's body, upbringing and mind, supported by psychologist John Money's theory that gender identity is 'malleable and mutable' early in life, and 'nurture is more important than nature'.⁴³ As such, intersex children needed surgical and social aligned to be psychologically healthy. The success of the process was measured by the patient's heterosexual orientation and gender identity compatible with the assigned gender.⁴⁴

39 SM Cuadra and others 'Normalising intersex children through genital surgery: The medical perspective and the experience reported by intersex adults' (2022) *Sexualities* 1-20.

40 M Carpenter 'The human rights of intersex people: Addressing harmful practices and rhetoric of change' (2016) 24 *Reproductive Health Matters* 74.

41 MM Arana 'A human rights investigation into the medical "normalisation" of intersex people: A report of a hearing of the San Francisco Human Rights Commission' (28 April 2005) 11.

42 Arana (n 41) 12; L Downing and others *Fuckology: Critical Essays on John Money's diagnostic concepts* (2014) 11.

43 Downing and others (n 42) 12.

44 Arana (n 41) 12.

Money's theory continues to resonate with medical practitioners because it validates what they see as their moral obligation to take care for 'abnormal' children, while mitigating parents' anxiety that their intersex children could grow up to be homosexual, and/or face societal stigma and exclusion.⁴⁵ Even so, evidence reveals that the majority of intersex variations require no medical intervention for maintaining a healthy intersex body. In fact, medical interventions have left many intersex people damaged, 'sterilised, mutilated, with lost sexual function and sensation'.⁴⁶ Butler describes the experiences of the victims of medical interventions as follows:⁴⁷

The bodies produced through such a regulatory enforcement of gender are bodies in pain, bearing the marks of violence and suffering. When gender ideals are literally incised and mapped onto the intersexed body, it comes at a potentially incalculable physical, emotional and psychological cost to the intersexed person.

There is a dearth of information on medical normalisation practices in East Africa as the subject of intersex is fraught with misinformation and secrecy. However, documented lived realities affirm the persistence of the practices especially in private health institutions and traditional healers.⁴⁸ The procedures are often conducted on children without the informed consent of parents. Further, practitioners are seldom experienced on intersex conditions, hence allegations of medical malpractices resulting in serious health implications emerge.⁴⁹ Doctors have also been accused

45 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) (Taskforce on Intersex Persons in Kenya), <https://www.knchr.org/Portals/0/INTERSEX%20TASKFORCE%20REPORT-Abridged%20Version.pdf> (accessed 28 July 2022); AL Schotell & LM Mugge 'Towards categorical visibility? The political making of a third sex in Germany and The Netherlands' (2021) 59 *Journal of Common Market Studies* 985.

46 As above; M Carpenter 'The "normalization" of intersex bodies and "othering" of intersex identities in Australia' (2018) 15 *Journal of Bioethical Inquiry* 487.

47 Butler (n 38) 53; Amka Africa Justice Initiative 'Not broken do not fix: Prevalence, nature and impact of medical, cultural and religious "normalisation" or "conversion" practices against intersex persons in Kenya' (2023) 10, <https://amkafrika.org/media/amka-publications/> (accessed 22 December 2024).

48 As above; Amka Africa Justice Initiative 'Not Broken: Do not Fix' (19 May 2023), <https://www.youtube.com/watch?v=CCf2rVx3w8&t=10s> (accessed 10 March 2025).

49 Amka Africa Justice Initiative (n 47); Support Initiative for People with Congenital Disorders (SIPD – Uganda) 'Baseline survey on intersex realities in East Africa – Specific focus on Uganda, Kenya and Rwanda' (2016), <https://sipdug.org/>

of failing to effectively inform parents of the irreversibility and long-term consequences of the interventions.⁵⁰ Despite these experiences, the necessity to protect their intersex children from societal ostracisation and stigmatisation, coupled with the need to record the mandatory binary 'M' or 'F' sex marker on the birth register compels parents to seek medical normalisation interventions.⁵¹

3.2 Cultural and religious normalisation practices

3.2.1 *Cultural practices*

The paradox of the reality of intersex persons in East Africa is that communities believe they do not exist, yet the local language and culture is replete with descriptive names that expose cultural bias against the group.⁵² For instance, the Ameru of Kenya call intersex individuals *Nturuntu* (deviant or unruly); the Luo *Nyot Gath* (deformed progeny or unnatural baby/child); and the Kikuyu *Kiugu/Ciugu* (someone not perfect, or of no value).⁵³ A 1964 research on the cultural beliefs and perspectives on intersex persons among the Pokot tribe in Kenya found that intersex children are perceived as 'an unfortunate occurrence and a freak'.⁵⁴

wp-content/uploads/2019/03/SIPD-Baseline-Survey-on-Intersex-in-East-Africa.pdf (accessed 28 August 2022); Kenya National Commission on Human Rights 'Equal in dignity and rights: Promoting the rights of intersex persons in Kenya' (2018) 29, https://www.knchr.org/Portals/0/GroupRightsReports/Equal%20In%20Dignity%20and%20Rights_Promoting%20The%20Rights%20Of%20Intersex%20Persons%20In%20Kenya.pdf?ver=2018-06-06-161118-323 (accessed 15 July 2022).

50 SIPD – Uganda (n 49) 8; Taskforce on Intersex Persons in Kenya (n 44) 170.

51 Baird (n 32) 22; Child Education Society (CHESO) 'Submission on best practices to ensure access to birth registration for intersex children in Tanzania and beyond' (2019), <https://www.ohchr.org/sites/default/files/Documents/Issues/Children/BirthRegistrationMarginalized/ChildrenEducationSociety.doc> (accessed 18 July 2022).

52 G Thomas 'A third sex identity: Assessing cultural and structural violence against intersex people in Tanzania' unpublished Master's dissertation, University of Zimbabwe, 2016; East African Sexual Health and Rights Initiative 'Why must I cry? Sadness and laughter of the LBGTI community in East Africa' (2013) 19 *UHAI EASHRI* 6.

53 Taskforce on Intersex Persons in Kenya (n 45) 42.

54 RB Edgerton 'Pokot intersexuality: An East African example of the resolution of sexual incongruity' (1964) 66 *American Anthropologist* 1288.

The widespread conflation of gender identity and sexual orientation often leads to intersex persons being misidentified as homosexual and/or transgender. The notion of African morality underpins the misconception that homosexuality and gender identity are alien practices from the West.⁵⁵ The stereotype and conflation often places intersex persons at a higher risk of stigma, discrimination and violence, including 'corrective rape'.⁵⁶ Reports indicate that poor East African parents and families who cannot afford surgeries are likely to consult traditional healers, mediums or witch doctors to conduct 'cleansing rituals' for their intersex infants soon after birth, and some abandon or kill them.⁵⁷ Several cultural myths and stereotypes contribute to normalisation practices against intersex people in East Africa. For instance, there is a belief that intersex people are a 'curse' or product of 'witches' or 'cursed' parents.⁵⁸ In Uganda, traditional practices may lead to a family or a clan declining to name a child thereby denying them lineage rights.⁵⁹

Further, East African communities consider cismormativity, normative sex and gender binarism ideologies part of their African heritage.⁶⁰ Consequently, gender and sex are seen as immutably synonymous, and the latter determines the former. The convolution is heightened by the belief that gender always informs one's cultural context and understanding of appropriate gender expression, roles and responsibilities, which play a critical task in 'constituting the essence of cultures as ways of life to be passed from one generation to the next'.⁶¹ Consequently, public life, including dressing, art, music, sports and politics, is organised alongside gender identities and roles determined by binary biological sex, leading to the exclusion of intersex persons.

55 T Walton 'Sexual minorities and the right to culture in African states' (2018) 50 *Journal of International Law and Politics* 1325.

56 Human Rights Watch 'The issue is violence' (2015) *Human Rights Watch* 32-33, https://www.hrw.org/sites/default/files/report_pdf/kenya0915_4upr.pdf (accessed 30 September 2022).

57 SIPD – Uganda (n 49) 7; Taskforce on Intersex Persons in Kenya (n 45).

58 Kenya National Commission on Human Rights (n 49) 3.

59 As above; N Segawa 'Intersex children in Uganda face rejection, violence' *Global Press Journal* 23 August 2020.

60 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* 9.

61 NY Davis *Gender and nation* (1997) 43.

Culture influences the nature and scope of the law. The Kenyan case of *RM v Attorney General (RM)*⁶² is a proper illustration of how cultural prejudices permeate the highest socio-political systems expected to protect the intersex from biases. Tasked to recognise intersex as a different sex from the male and female sexes, the Court held:⁶³

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 the recognition of a third category of gender which our society may not be ready for at this point in time.

3.2.2 Religion

Religious perspectives and practices on intersex persons in East Africa present another paradox. For instance, dominant religions such as Christianity and Islam consider all human beings (including intersex persons) as the works of 'an all-knowing, all powerful God and creator of the universe who makes no mistakes and whose creation was purposefully put together for a divine purpose'.⁶⁴ On the other hand, both faiths accentuate sex and gender binarism without a plausible explanation on how intersex persons fit within the human creation.⁶⁵ Consequently, religion has been used largely to support normalisation interventions, ostracise intersex persons as 'cursed, deviant or devil worshippers' together with other groups within the lesbian, gay, bisexual, transgender, queer/questioning, intersex and others (LGBTQI+) community.⁶⁶ The

62 *RM* (n 4).

63 *RM* (n 4) para 133.

64 *Bible*, Psalms 139:13-15 (NIV); *Quran* 42:49-50; Taskforce on Intersex Persons in Kenya (n 45) 49.

65 *Bible*, Genesis 1:27: 'So God created man in his own image, in the image of God he created them; male and female he created them' (NIV); *Quran* 42:49-50: 'Allah creates whatever he pleases, he grants females to whomever he pleases and males to whomever he pleases, or grants them a mix of males and females.' However, classical Islam recognises four genders among human beings: male, female, *khusna* and the effeminate male. AA Zainuddin & ZA Mahdy 'The Islamic perspectives of gender-related issues in the management of patients with disorders of sex development' (2016) *Archives of Sexual Behaviour* 353.

66 Minority Women in Action and others 'List of issues relating to the violence and discrimination against lesbian, bisexual, transgender, intersex and queer women in Kenya,' https://intersexrights.org/wp-content/uploads/2020/08/INT_CEDAW NGO_KEN_26370_E.pdf (accessed 6 August 2021).

HRC report records a myriad of religious conversation practices in East Africa, including the administration of prayers and fasting to 'cleanse' intersex persons.⁶⁷

The majority of religious leaders view the existence of intersex persons as against God's will and morality.⁶⁸ A study by UHAI-EASHRI found that religious leaders in East Africa are the most vocal opponents of acceptance of other genders in the society.⁶⁹ A research by Kenya National Human Rights Commission (KNHRC) and Columbia University in Kenya established that 77,1 per cent of religious leaders believe it is morally wrong to identify as a transgender person.⁷⁰ Similarly, 37,4 per cent of the same religious leaders were of the view that violence can be justified to preserve social values.⁷¹ Further, a 2022 study by Amka Africa Justice Initiative revealed that intersex refugees and asylum seekers face grievous social stigma from religious leaders and institutions.⁷²

Persistent ignorance on intersexuality greatly contributes to the stigma and the resultant attempt to normalise or sanctify intersex persons from the perceived demonic influence. The report of the taskforce on intersex in Kenya revealed that awareness on intersex matters among professional groups was lowest among religious and faith-based institutions, at only 6 per cent.⁷³

4 Legal recognition of intersex people in East Africa and normalisation practices: The convergence

The UN 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', in other words, the 'right to have

67 United Nations HRC (n 33) 6 & 7.

68 Thomas (n 52) 13.

69 EASHRI (n 52) 21.

70 DK Mbote and others 'Kenyan religious leaders views on same-sex sexuality and gender non-conformity: Religious freedom versus constitutional rights' (2018) 55 *Journal of Sex Research* 1.

71 Mbote and others (n 70) 10.

72 Amka Africa Justice Initiative 'A false safe haven: The registration and documentation woes of intersex, transgender and gender non-conforming asylum seekers and refugees in urban Kenya' (2022), <https://amkafrica.org/wp-content/uploads/2022/03/AmkaAfrica-Report2022-2.pdf> (accessed 15 August 2022).

73 Taskforce on Intersex Persons in Kenya (n 45) 183.

rights.⁷⁴ According to the HRC, the right to legal recognition is related to the right to civil registration and documentation as a prerequisite to the enjoyment of other rights, including ‘the right to vote, marry, secure formal employment, open a bank account, access social security or a pension, obtain insurance or a line of credit, secure inheritance and property rights and most importantly be able to register one’s own children’.⁷⁵

In *Open Society Justice Initiative v Côte d’Ivoire*,⁷⁶ the African Commission on Human and Peoples’ Rights (African Commission) elaborated on the importance of the right to be recognised by third parties, natural persons or institutions, without which ‘legal status remains only an unproductive attribute which cannot bear any of its potential fruits, especially a series of fundamental rights and obligations’. The Kenyan case of *Baby A (Suing through the Mother EA) v Attorney General*⁷⁷ (*Baby A*) exemplifies the African Commission’s assertion that legal recognition is the ‘right to have rights’.⁷⁸ Baby A, an intersex child, could not obtain a birth certificate because of the conflict between his Notification of Birth form which indicated ‘male’ sex and a lab request form that had a question mark (?) in the place of sex particulars. Departing from its earlier judgment on the same issue in *RM*, the Court stated:⁷⁹

It is the duty of the state to protect children born as intersexual by providing a legal framework to govern issues such as their registration under the Births and Deaths Registration Act, examinations and tests by doctors, corrective surgeries etc ... These guidelines would inform those minded to carry out medical examinations and corrective surgeries on intersex persons of the procedures and guidelines to follow so as to act within the law and in line with the best interests of the child.

The *RM* and *Baby A* judgments embody the intersection between lack of legal recognition and sex normalising practices, with the earlier being

⁷⁴ United Nations General Assembly (UNGA) ‘Report of the Working Group on Enforced or Involuntary Disappearances’ (2 March 2012) 43 UN Doc A/HRC/19/58/Rev1.

⁷⁵ 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.

⁷⁶ Communication 318/06, <https://www.achpr.org/sessions/descions?id=228> (accessed 8 August 2022). The 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.

⁷⁷ *Baby A* case (2014) eKLR.

⁷⁸ Kuria & Maranya (n 3).

⁷⁹ *Baby A* (n 77) para 67.

a significant aggravator of the later. The *RM* judges upheld exclusive binary sex and gender, while the *Baby A* decision recognised the need for autonomous recognition of intersex children, but still seemed to encourage normalisation through corrective surgeries. Even so, Kenya's noteworthy efforts to implement the *Baby A* judgment is discussed in the subsequent chapter.

4.1 National legal frameworks

4.1.1 Kenya

The struggle for the social and legal recognition of intersex persons in Kenya dates back to the *RM* case, where an intersex person (labelled male from birth) was committed to a maximum prison for male convicts despite having female features, including breasts slightly larger than those of a typical male. Failing to appreciate sex and gender diversity and identity challenges of intersex persons, the Court ruled that RM could be properly classified as either female or male, hence his incarceration in a male prison was lawful.⁸⁰

The *RM* judgment was overturned in *Baby A*. This case birthed the taskforce on intersex persons in Kenya, leading to the inclusion of intersex persons in the 2019 national census,⁸¹ and the enactment of the Children Act 2022 (Children Act).⁸² The Act defines an intersex child and provides comprehensive infrastructure for safeguarding the rights of intersex children in Kenya.⁸³ Section 7(3) of the Act obligates the registrar of births to ensure the correct documentation and registration

80 *RM* (n 4) para 137.

81 Kenya National Bureau of Statistics '2019 Kenya Population and Housing Census Results' 4 November 2019, <https://www.knbs.or.ke/2019-kenya-population-and-housing-census-results/> (accessed 10 March 2025); Census counted 1 524 intersex persons. However, this count has been criticised as a grave undercount attributable to the widespread stigmatisation of intersex persons that prevented them from revealing themselves and lack of awareness by the census enumerators; G Kajilwa '2019 census reveals Kenya has 1 524 intersex people' *The Standard* (Nairobi) 2020, <https://www.standardmedia.co.ke/entertainment/news/article/2001348112/2019-census-reveals-kenya-has-1524-intersex-people> (accessed 28 August 2022).

82 Children Act 29 of 2022.

83 Sec 2 of the Children Act defines an intersex child as 'a child with a congenital condition in which the biological sex characteristics cannot be exclusively categorised in the common binary of female or male due to inherent and mixed

of intersex children at birth. The Act also amends sections 7 and 29 of the Births and Deaths Registration Act to include intersex children and persons.⁸⁴ Section 21 affirms the right of intersex children to be treated with dignity, which includes being accorded ‘appropriate medical treatment, special care, education, training and consideration as a special need category in social protection services’, while section 23 criminalises harmful cultural and religious practices that diminish a child’s well-being. Sex alignment surgeries on intersex children are prohibited except on advice of a medical geneticist.⁸⁵ For intersex children in conflict with the law, the Act provides for infrastructure for care during the court process and segregation in custody.⁸⁶

Despite the commendable legal reforms introduced in Kenya through the Children Act, 2022, the legal system is replete with provisions that exclude intersex persons from legal recognition in the areas of governance, cultural, economic and social rights such as marriage.⁸⁷ In her critique of the Act, Baird argues that using terms such as ‘congenital condition’ to define an intersex child is pathologising and implies that intersex bodies are inherently defective.⁸⁸ She criticises section 23(1)(f) for permitting sex normalisation surgeries to be carried out by medical geneticists. In agreement with Baird, this chapter submits that the practical application of the provision may have the same effect as Money’s ‘optimum gender of rearing model’.⁸⁹ Further, the Children Act relates to children, hence there is a need for legal reforms to address the recognition of intersex adults. For example, although the Kenyan law allows a change of name via deed poll, there is no legal provision for the change of the sex

anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood’.

84 Sec 250 Children Act. The Births and Deaths Registration Act CAP 149 of the Laws of Kenya provides for the issuance of the birth certificate, from which all other identity and school documents derive particulars. For details on the process of non-recognition of intersex people before the Children Act 2022, see Kuria & Maranya (n 3) 110-112.

85 Sec 23(2) Children Act; exposing a child to harmful practices is punishable with an imprisonment for a term of three years or more and or a fine of not less than five hundred thousand shillings.

86 Secs 26(3), 64, 95 & 144(z) Children Act.

87 The Constitution of the Republic of Kenya, 2010 art 45(2) recognises marriage between persons of the opposite sex only; Marriage Act 2014; Matrimonial Properties Act 2013 & Law of Succession CAP 160, Laws of Kenya.

88 Baird (n 32).

89 As above; Downing (n 42).

marker, which is also considered the gender marker. Intersex adults who change their name to reflect their desired gender identity and expression are not able to change sex and gender markers on identity documents and academic certificates. The inability to change the gender marker creates a socio-legal complexity that robs an individual of the ability to use their education certificates. This was the case in *Republic v Kenya National Examinations Council Ex-parte Audrey Mbugua Ithibu*,⁹⁰ whereby a transgender woman who, after successfully having obtained her Kenya Certificate of Secondary Education, could not use the certificate to secure employment, as the male name and gender marker on her certificate conflicted with her female gender expression.

4.1.2 *Uganda*

Article 21(2) of the Constitution of the Republic of Uganda enshrines the principle of equality before the law and prohibits discrimination on the grounds of sex, among others. Article 24 promotes respect for human dignity and protection of all persons from inhuman or degrading treatment, while article 32 obligates the government to take affirmative action in favour of groups marginalised on the basis of 'gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them'.

Regarding intersex persons, the Ugandan Registration of Persons Act allows intersex minors to amend particulars on their birth certificates but only on the condition that they undergo sex reassignment surgery.⁹¹ This provision has been criticised for using the derogatory term 'hermaphrodite' instead of 'intersex', and for sanctioning medical normalisation of intersex bodies to fit the binary sex of 'male' and 'female' as a condition precedent to recognition.⁹² In essence, this law seeks to

90 *Mbugua Ithibu* case (2014) eKLR, <https://kenyalaw.org/caselaw/cases/view/101979/> (accessed 5 March 2025); Kuria & Maranya (n 3).

91 Registration of Persons Act, 2015 Laws of Uganda sec 38 reads: 'If a child born a hermaphrodite, after being registered, through an operation, changes from a female to a male or from a male to a female and the change is certified by a medical doctor, the registration officer shall, with the approval of the Executive Director of the Authority upon application of the parents or guardian of that child update the particulars of the child, which appear on the register.'

92 Human Rights Awareness and Promotion Forum 'The impact of the legal and policy framework on the human rights of intersex persons in Uganda' (2019) 2, <https://hrapf.org/index.php/resources/research-reports/168-the-impact-of-the->

eliminate the existence of intersex people in Uganda.⁹³ The provision also excludes intersex adults from the benefits of changing identity documents to reflect their sex/gender of choice.⁹⁴ Just as in Kenya, the Ugandan Constitution and legal framework embody heteronormativity, cisnormativity, normative sex and gender binarism.⁹⁵

4.1.3 *Tanzania*

Although Tanzania has no specific legislation on the legal recognition and protection of intersex children and adults, the Constitution guarantees the recognition and respect for the dignity of all persons.⁹⁶ It guarantees to all persons equality before the law, prohibits discrimination on the basis of sex and protects the right to live as a free person.⁹⁷ However, despite the progressive constitutional provisions, Tanzania remains silent on the protection and promotion of the rights of intersex people. The constitutional and statutory legal framework is purely binary and the level of awareness and interest on the subject is very low in both public and private spheres.⁹⁸ This exacerbates the social, cultural and religious resistance to recognition of intersex people as human beings with lived realities and needs. As such, intersex children and adults often have to undergo medical and/or traditional and religious normalisation practices so as to survive in a highly discriminative society.⁹⁹ The silence on intersex issues in Tanzania contributes to the dearth of reliable data on normalisation practices in the region.

4.2 Regional and international frameworks and perspectives on the legal recognition of intersex persons and normalisation practices

Kenya, Tanzania and Uganda have ratified various international and regional human rights instruments, including the International Covenant

legal-and-policy-framework-on-the-human-rights-of-intersex-persons-in-uganda/file (accessed 28 July 2022).

93 Trispiotis & Purshouse (n 34) 104-132.

94 Human Rights Awareness and Promotion Forum (n 92) 4.

95 Art 31 Constitution of the Republic of Uganda, 1995.

96 Art 12 Constitution of the United Republic of Tanzania.

97 Arts 13 & 15 Constitution of the United Republic of Tanzania.

98 Thomas (n 52) iii.

99 UN Human Rights Council (n 33) 9.

on Civil and Political Rights (ICCPR);¹⁰⁰ the International Convention on the Rights of the Child (CRC);¹⁰¹ the African Charter on Human and Peoples' Rights (African Charter);¹⁰² the African Charter on the Rights and Welfare of the Child (African Children's Charter);¹⁰³ and Universal Declaration of Human Rights (Universal Declaration),¹⁰⁴ all of which promote non-discrimination, recognition and respect for human dignity. Recently, the treaty bodies that implement these instruments have strongly called on states to take necessary actions to protect and promote the rights of intersex persons. In 2023 the African Commission adopted a resolution on 'promotion and protection of the rights of intersex persons in Africa' followed by the 2024 UNHRC resolution on combating 'discrimination, violence and harmful practices against intersex persons'.¹⁰⁵

The Yogyakarta Principles specifically provide for the recognition and protection of the rights of intersex persons.¹⁰⁶ Principle 3 requires states to put in measures to 'legally recognise each person's self-defined gender identity' which entails eliminating discriminatory laws and practices, and ensuring the registration and issuance of identity documents to intersex, transgender and gender-diverse persons. Principle 18 urges states to protect intersex persons from harmful medical practices based on cultural or other stereotypes, physical appearance or perceived gender norms. Additional principles adopted in 2017 underscore the right to legal recognition and the right to bodily and mental integrity.¹⁰⁷ Specifically, Principle 31 encourages states to establish frameworks that allow intersex persons to have access to a multiplicity of gender markers.

100 Art 16 International Covenant on Civil and Political Rights (ICCPR) 1966.

101 Art 7(1) Convention on the Rights of the Child (CRC) 1989.

102 Arts 2 & 5 African Charter on Human and Peoples' Rights (African Charter) 1981.

103 Art 6(2) African Charter on the Rights and Welfare of the Child (African Children's Charter) 1990.

104 Art 6 Universal Declaration of Human Rights 1948.

105 African Commission on Human and Peoples' Rights Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa (2023) ACHPR/Res.552 (LXXIV); United Nations Human Rights Council 'Combating Discrimination, Violence and Harmful Practices against Intersex Persons Resolution' adopted 4 April 2024 A/HRC/RES/55/14.

106 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).

107 Yogyakarta Principles Plus 10 (n 6).

Principle 32 emphasises the right to bodily and mental integrity for both intersex adults and children, with a particular requirement for states to enact legislations that protect intersex persons from ‘forced, coercive and involuntary modification of their sex characteristics’, and to address social, religious, cultural and other stereotypes that justify the normalisation of intersex persons.¹⁰⁸ Although the Yogyakarta Principles lack treaty binding status, they are a useful interpretive reference to the human rights instruments on sexual orientation and gender identity matters.

In Africa, article 2 of the African Charter provides for 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.¹⁰⁹ Even so, the African Commission, in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights, recognises intersex persons as a vulnerable and disadvantaged group.¹¹⁰ Further, the Commission, through Resolutions 552 and 275, calls on states to end acts of violence against intersex persons.¹¹¹ Article 5 of the African Charter provides for the right to legal recognition, while article 6(2) of the African Children’s Charter provides for the right of every child to be registered after birth.

The African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee) General Comment 2 to article 6 of the African Children’s Charter obligates states to ensure that ‘no child’s birth should go unregistered’¹¹² Regrettably, the General

108 Yogyakarta Principles Plus 10 (n 107) Principle 32.

109 In the Matter of *African Commission on Human and Peoples’ Rights v The Republic of Kenya* Application 6/2012, 138, the African Court on Human and Peoples’ Rights interpreted the phrase ‘any other status’ to include ‘those cases of discrimination, which could not have been foreseen during the adoption of the Charter’.

110 ACHPR/Res.552 (n 105). African Commission on Human and Peoples’ Rights Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights adopted 24 October 2011 sec 1(v).

111 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).

112 African Committee of Experts on the Rights and Welfare of the Child (African Children’s Committee) ‘General Comment 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.

Comment's list of vulnerable children excludes intersex children despite the existence of overwhelming evidence that the inability to fit within the binary sex markers hinders their registration in most African countries, thus compelling them to undergo normalisation to fit in.¹¹³ All the same, neither the African Court on Human and Peoples' Rights (African Court) nor African Commission has had an opportunity to substantively determine a matter on legal recognition and normalisation practices against intersex persons.¹¹⁴

4.3 The convergence

The convergence between legal recognition and normalisation practices in East Africa is epitomised by the fact that intersex persons cannot acquire legal documents without undergoing some form of conversion therapy to fit into the binary sex and gender. On the other hand, religious and socio-cultural beliefs in binarism inform the law. Consequently, to obtain legal registration and deal with social stigma of not knowing how to answer the question, 'is it a boy or a girl?', parents and guardians are often compelled to 'fix' the child through medical, religious and or cultural interventions, or choose the perceived dominant sex from the child's genitalia and physiological features.¹¹⁵ This usually presents challenges when the intersex adolescent or adult who was normalised at childhood and assigned a sex on documents grows to identify with an incongruent gender identity and expression, thereby encountering difficulties in obtaining identity documents with a gender marker that matches their gender identity and expression. A 2023 study of 48 intersex persons in Kenya revealed that 62,5 per cent of all the respondents had undergone some form of childhood normalisation, 41,92 per cent through surgeries and/or hormonal therapies, 33,58 per cent through religious, and 24,5

113 As above; Taskforce on Intersex Persons in Kenya (n 45).

114 The African Court's scope is constrained by the *locus standi* conditions that permit access to individuals and non-governmental organisations with observer status only from states that have submitted to its jurisdiction. Currently only 8 states have recognised the Court's competence; African Court on Human and Peoples' Rights, <https://www.african-court.org/wpacf/declarations/> and <https://www.african-court.org/wpacf/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/> (accessed 11 August 2022). States with an active declaration: Burkina Faso, The Gambia, Ghana, Malawi, Mali, Tunisia, Niger and Guinea Bissau.

115 Taskforce on Intersex Persons in Kenya (n 45) 173.

per cent cultural and traditional rituals.¹¹⁶ Not surprisingly, the identity documents of the majority had sex and gender markers that did not match their acquired sex, gender identity and gender expression.¹¹⁷ As a result, they experienced extreme violence in private and public spheres. They faced challenges accessing social, economic and political opportunities, including sexual reproductive health services such as contraceptives, menstrual products, pap smears and public washrooms.¹¹⁸ *RM* remains pivotal in demonstrating the severe consequences of sex and gender mis-identity on intersex persons.¹¹⁹

5 So, is law the panacea to ‘normalisation’ practices of intersex persons in East Africa? Insights from comparable jurisdictions

Therefore, this chapter is compelled to interrogate the role of the law in eliminating normalisation practices against intersex persons in East Africa by drawing on examples from other jurisdictions.

The Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC Act) of Malta is one of the most progressive laws on the recognition and protection of intersex persons in the world.¹²⁰ It allows Maltese citizens and refugees the freedom to change their name and gender marker in legal documents to reflect the desired gender identity. Further, the Act prohibits the performance of unnecessary corrective procedures on intersex children unless they consent thereto.¹²¹

Despite this reformist law, research indicates that medical normalisation practices remain prevalent in Malta.¹²² Doctors in public

116 Amka Africa Justice Initiative (n 47).

117 Amka Africa Justice Initiative (n 47) 24.

118 As above.

119 *RM* (n 4); *Y v France* 2023 Application 76888/17, where the European Court of Human Rights ruled that the refusal by France to insert the term ‘neutral’ or ‘intersex’ instead of ‘male’ on the birth certificate of an intersex person was not a violation. Note that *RM* was overturned in the *Baby A* case.

120 The Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC Act) 2015.

121 Secs 4 & 14 GIGESC Act (n 120). However, under secs 14(2), (3), (4) & (5) parents and guardians can consent on behalf of a child with the approval of an interdisciplinary team.

122 Tabone (n 18); Stop Intersex Genital Mutilations ‘Intersex genital mutilations human rights violations of children with variations of reproductive anatomy: NGO Report on the 3rd to 6th report of Malta on the Convention on the Rights of the Child’ (April 2019) 7, <https://tbinternet.ohchr.org/Treaties/>

hospitals continue to recommend sex assignment surgeries and parents often travel abroad to access the services outside the law.¹²³ Further, the GIGESC Act focuses on medical normalisation and makes no mention of religious and cultural normalisation practices, which are also common in Malta.¹²⁴

Similarly, South Africa has the most advanced laws for the recognition and realisation of the rights of intersex persons in Africa. The Alteration of Sex Description and Sex Status Act (Act) allows intersex persons to change their names and gender markers.¹²⁵ In contrast to the Ugandan law, the South African Act does not require one to undergo corrective surgery to change one's gender. However, one is required to produce a medical report to confirm their intersex status and a psychologist report to show that they have stably lived in the chosen gender for at least two years.¹²⁶ However, like the Maltese law, the success of this Act in stopping normalisation practices has been questioned. A 2022 report submitted by a rights group to the UN Universal Periodic Review indicates that South African intersex children are still subjected to medical experimentation, non-therapeutic treatments and infanticide.¹²⁷

Comparable to the Maltese case, the South African medical fraternity has been blamed for being complicit in pathologising intersex bodies and enforcing sex and gender binarism through surgery and hormonal treatments.¹²⁸ Traditional South African communities consider intersex persons as 'a bad omen', hence some women who give birth to intersex children with the help of traditional healers, midwives and traditional

CRC/Shared%20Documents/MLT/INT_CRC_NGO_MLT_34709_E.pdf> (accessed 31 August 2024).

123 Stop Intersex Genital Mutilations (n 122) 9, 10.

124 Stop Intersex Genital Mutilations (n 122) 10.

125 Alteration of Sex Description and Sex Status Act 49 of 2003, Laws of South Africa.

126 Sec 2 Alteration of Sex Description and Sex Status Act (n 125).

127 Intersex South Africa, Iranti & Triangle Project 'The situation of intersex persons in South Africa: Submission to the United Nations Universal Periodic Review (4th Cycle)' (31 March 2022) 2, <http://triangle.org.za/wp-content/uploads/2022/03/ISSA-Iranti-TP-2022-The-Situation-of-Intersex-Persons-in-South-Africa-UN-UPR-Submission-4th-Cycle.pdf> (accessed 1 September 2022).

128 M Mudarikwa and others 'Submissions to the Office of the United Nations High Commission for Human Rights on youth and human rights issues' *Legal Resources Centre* 9.

birth attendants have had their children killed at birth.¹²⁹ A research conducted by Legbo Northern Cape from 2008 to 2010 revealed that 88 out of 90 traditional birth attendants interviewed admitted to killing intersex children in fulfilment of their cultural 'responsibility'.¹³⁰ South Africa is also one of the African countries reprimanded by a UN treaty body concerning medical intersex genital mutilation.¹³¹

In reference to a similar state of affairs in Austria, Carpenter describes the coexistence of both legal inclusion and normalisation practices as a disconnect between 'a rhetoric of inclusion and the reality of human rights violations against people born with non-normative bodies'.¹³²

The insights from these countries underscore the intractable persistence of cisnormativity, sex and gender binarism ideologies that transcend overwhelming evidence on factual realities and best laws.

6 'Building on the indigenous' way forward: 'The answer lies from within the community'

This chapter has argued that although the law plays a crucial role in safeguarding the rights of intersex persons, it cannot eradicate normalisation practices or provide sufficient protection for intersex persons in exclusion of other initiatives. It maintains that the ideological assumptions that underpin sex and gender binarism and cisnormativity impute serious disabilities on the ability of intersex persons to participate in cultural, social and governance functions of society. By eliminating intersex bodies, these stereotypes and beliefs legitimise normalisation

129 C Collison 'Intersex persons killed at birth because they're bad omens' *Mail & Guardian* 24 January 2018, <https://mg.co.za/article/2018-01-24-00-intersex-babies-killed-at-birth-because-theyre-bad-omens/> (accessed 3 September 2022). According to the South African Human Right Commission, 70% of women give birth with the assistance of the traditional healers and midwives.

130 M Benini 'Killed at birth: The slaughtering of intersex babies' *IL Grande Colibri* 2 March 2018, <https://www.ilgrandecolibri.com/en/killed-intersex-babies/> (accessed 3 September 2022).

131 Stop Intersex Genital Mutilation '50 UN reprimands for intersex genital mutilation and counting' (2021), <https://stopigm.org/IAD-2016-Soon-20-UN-Reprimands-for-Intersex-Genital-Mutilations/> (accessed 20 July 2022); Committee on the Rights of the Child 'Concluding Observations on the second periodic report of South Africa' (30 September 2016) CRC/CZAF/CO/2 para 37.

132 Carpenter (n 40) 487.

practices.¹³³ Good laws attempt to cure the exclusion by recognising intersex persons as autonomous individuals. However, as Holmes claims, 'it is irrelevant whether the society is divided into two or three categories but of importance is how the various groupings are valued'.¹³⁴ The normalisation practices diminish the dignity and self-worth of the victims since people measure their own sense of worth according to their 'ability to realise their capabilities, goals and dreams'.¹³⁵

So, the question is: How can intersex normalisation practices within the deep social cultural binarism and cisnormativity of the East African society aggravated by homophobia, transphobia and intersex phobia be eliminated? The chapter proposes the strategic deconstruction of binarism and cisnormativity presumptions by mediating law with what Nnaemeka calls 'building on the indigenous'.¹³⁶ Ake clarifies that 'the indigenous is not the traditional, as Africans past is not a 'fossilised existence available for us to fall back on, only new totalities however hybrid which change with each passing day'.¹³⁷ Nnaemeka conceptualises 'building on the indigenous' as focusing on 'whatever the people consider important to their lives, whatever they regard as an authentic expression of themselves'.¹³⁸ Thus, the community participates in determining 'the form and content' of the strategy so that the proposed change accommodates itself within the 'values, interests, aspirations and social institutions which are important in the life of the people'.¹³⁹

In the same way, initiatives to eliminate normalisation practices against intersex persons in East Africa, both legal and non-legal, should employ participative processes where intersex persons and other stakeholders' imaginations, values, and world views are taken into account and interrogated within a human dignity value system because 'the answer lies from within the community'.¹⁴⁰

133 Carpenter (n 40) 488.

134 MM Holmes 'Locating third sexes' (2004) 8 *Regions of Sexuality* 1; Carpenter (n 40) 491.

135 Trispiotis & Purhouse (n 34) 110; T Khaitan 'Dignity as an expressive norm: Neither vacuous nor a panacea' (2012) 32 *Oxford Journal of Legal Studies* 1.

136 Nnaemeka (n 20) 361.

137 A Claude 'Building on the indigenous' in P Frühling (ed) *Recovery in Africa: A challenge for development cooperation in the 1990s* (1988) 19-22, quoted in Nnaemeka (n 20) 377.

138 Nnaemeka (n 20) 376-377.

139 As above.

140 Nnaemeka (n 20) 377; Tabone (n 18).

The chapter further proposes multidisciplinary approaches to intractable social justice challenges, that the knowledge construction process should begin by establishing a space where African historical perspectives on sex and gender illuminate contemporary discourse on the legal recognition of intersex persons. In this context, Tamale in her analysis of 'coloniality of sex, gender and sexuality' claims an indigenous pre-colonial Africa that embraced sex and gender in a 'pluralistic, elastic and accommodating' arrangement.¹⁴¹ Further, Ambani agrees that the colonial imperialists and Christian missionaries fundamentally altered the Africans way of life through the 'civilisation of natives' mandate.¹⁴² On the other hand, Tamale implicates the colonial knowledge system for introducing and embedding into African socio-legal systems that impose normative binary sex, gender and sexuality, thereby engendering the exclusion of liminal persons who were recognised in pre-colonial Africa.¹⁴³

The report of the task force on intersex in Kenya documented descriptive names of intersex persons in the pre-colonial culture.¹⁴⁴ Amadiume's account of indigenous Igbo of Nigeria, especially the concepts of 'male daughters' and 'female husbands' collaborates Tamele's claims of a pre-colonial Africa that employed a pluralistic sex and gender constructs.¹⁴⁵

A plethora of contemporary discourse on sex and gender brings complexity and depth in its contention of the dichotomy of sex and gender as an objective truth. Hyde and others demonstrate five empirical findings from multiple disciplines that implicate the concept of gender binarism.¹⁴⁶ Notably, the Kenyan High Court in *ANN v Attorney*

141 S Tamale 'Challenging the coloniality of sex, gender and sexuality' (2020) 1 *Intellectus: The African Journal of Philosophy* 57.

142 JO Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 62.

143 Tamale (n 141) 58; an example of liminal persons is *mudoko dako* from the Langi people of Northern Uganda. They are 'humans who are culturally ambiguous, persons whose bodies cannot be easily classified into a binary identity.'

144 Taskforce on Intersex Persons in Kenya (n 45) 42.

145 Amadiume (n 14).

146 Hyde (n 11); the five contestations are (i) neuroscience challenges the sexual dimorphism of the brain; (ii) behavioural neuroendocrinology challenges the notion of genetically fixed, non-overlapping, sexually dimorphic hormonal system; (iii) psychological research highlight similarities between men and women; (iv)

*General*¹⁴⁷ described human dignity as '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'.¹⁴⁸ Moreover, in his majority judgment, PN Waki J in *Non-Governmental Organisations Coordination Board v Eric Gitari & 5 Others (Eric Gitari)*¹⁴⁹ stated:¹⁵⁰

It is possible for the country to close its eyes and hearts and pretend that it has no significant share of the people described as LGBTIQ. But that would be living in denial. We are no longer a closed society, but fast-moving towards the 'open and democratic society based on human dignity, equality, equity, and freedom' which our Constitution envisages. We must therefore, as a nation, 'look at ourselves in the mirror'. It will then become apparent that the time has come for the people's representatives in Parliament, the Executive, County Assemblies, Religious Organisations, the media, and the general populace to engage in honest and open discussions over these human beings. In the meantime, I will not be the first to throw a stone at her LGBTIQ.

The foregoing is a clear demonstration that, just as Nnaemeka's neo-feminism, socio-legal reforms for intersex rights in East Africa must happen in a space beyond positivist legal approaches that are primarily informed by 'coloniality of being';¹⁵¹ a space where the immediacy of the African history of inclusion and modern lived realities of universal human dignity mediates policy; a space where the location of intersex persons as both knowledge producers and objects of knowledge production is specific, and the voice of gatekeepers of culture and religion, health care providers, the education system, legislators, justice system,

psychological research on transgender identities; and (v) developmental research that suggests that gender/sex is culturally determined and malleable.

147 *ANN v Attorney General* (2013) KEHC 6004, <https://new.kenyalaw.org/akn/ke/judgment/kehc/2013/6004/eng@2013-06-14> (accessed 6 March 2025). The police had publicly undressed a transgender woman in the presence of the media who later showed the clip on television on prime time; *Baby A* case (n 77); *Audrey Mbugua* case (n 90); *Republic v Non-Governmental Organisations Coordination Board & Another ex-parte Transgender Education and Advocacy & 3 Others* [2014] KEHC 8130.

148 *ANN* case (n 147) paras 42-44.

149 Civil Appeal 145 of 2015 [2019] eKLR para 35.

150 As above.

151 Tamale (n 141) 58; she describes the concept of coloniality as 'the ways that our "common sense" understandings of being and knowing reflect processes of internalised colonisation'.

non-governmental organisations (NGOs),¹⁵² and every right-thinking member of society, is appreciated; a consensus built on the indigenous values of non-discrimination, inherent dignity and autonomy of every human being, recognising that intersex is not the ‘other’, but an integral part of humanity, just like binary persons.

152 Despite the dearth of scientific research on this topic, NGOs have been very instrumental in collecting evidence from lived experiences, filing public interest litigations and engaging society. They have great potential to engineer social change, but they too need hermeneutical capacity.