



**NOT
BROKEN
DO NOT
FIX**

Prevalence,
Nature and
Impact of
Medical, Cultural
and Religious
“Normalisation”
or “Conversion”
Practices Against
Intersex Persons
in Kenya.



Prevalence, Nature and Impact of Medical,
Cultural and Religious “**Normalisation**” or
“**Conversion**” Practices Against Intersex
Persons in Kenya.

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CONTENTS 2023

| | PAGE |
|--|-------------|
| ACKNOWLEDGMENT | V |
| ACRONYMS AND ABBREVIATIONS | VI |
| GLOSSARY OF TERMS | VIII |
| EXECUTIVE SUMMARY | X |
| METHODOLOGY | XI |
| | |
| CHAPTER 1: | |
| NOT BROKEN, DO NOT 'FIX' | |
| 1.0 Intersex Body is Normal, Not Abnormal, Do Not 'Fix' | 1 |
| 1.1 Types of "Normalisation" Practices | 4 |
| 1.1.1 Moral Obligation to Fix 'Abnormal' Children: Medical "Normalisation" | 4 |
| 1.1.2 The Cultural Fix: Cultural "Normalisation" | 5 |
| 1.1.3 A Call to the gods: Religious "Normalisation" | 6 |
| 1.2 Effects of the "Normalisation" Practices | 6 |
| | |
| CHAPTER 2: | |
| WE HAVE BEEN FIXED; LIVED EXPERIENCES OF INTERSEX PERSONS IN KENYA | 7 |
| 2.0 We have been Fixed, Majority Says | 9 |
| 2.1 Fixed by Medicine: Medical "Normalisation" | 10 |
| 2.1.1 Effects of Sex Assignment Surgeries and Hormonal Therapies | 10 |
| 2.2 Cultural "Normalisation" Practices | 12 |
| 2.3 Religious Practices | 13 |
| 2.4 Self "Normalisation" | 13 |
| 2.5 The Theft of Choice: Consent to the "Normalisation" Practices | 14 |
| 2.6 Bodies in pain: Consequences of "Normalisation" Interventions | 15 |
| 2.7 Access to Sexual, Reproductive and Health Rights | 15 |
| 2.7.1 Health Care Practitioners Do not Understand Intersex Condition | 16 |
| 2.7.2 Our Bodies are Props and Teaching Aid Tools | 17 |
| 2.7.3 Cervical Cancer Screening | 17 |
| 2.7.4 Prostate Screening | 18 |
| 2.7.5 Access to Contraceptives | 19 |
| 2.7.6 Menstrual Cycle | 20 |
| 2.7.7 Access Denied: The Washrooms Conundrum | 21 |
| 2.8 The Cycle of Violence | 22 |
| 2.8.1 Physical Violence | 22 |
| 2.8.2 Verbal Violence | 22 |
| 2.8.3 Sexual Violence | 23 |





| | |
|--|----|
| 2.9 The Internal Turmoil: Mental Health Challenges | 23 |
| 2.10 I am Physically Male but my Identity Documents are Female | 24 |
| 2.10.1 National Identity Cards | 25 |
| 2.10.2 Birth Certificate | 25 |
| 2.10.3 Passports | 26 |
| 2.10.4 The Uphill Task of Acquiring Identity Documents | 26 |
| 2.10.5 The Push for Survival through Fake Documents | 27 |
| 2.10.6 Changing Particulars on Identity Documents is Tedious & Expensive | 27 |
| 2.11 Access to Health Care Services Versus Identity Dilemma: The Interplay | 28 |

CHAPTER 3:

| | |
|--|-----------|
| LEGAL AND POLICY FRAMEWORK ON THE RIGHTS OF INTERSEX PERSONS IN KENYA | 30 |
| 3.0 Introduction | 31 |
| 3.1 Bodily Integrity and Autonomy | 31 |
| 3.2 Freedom from Torture | 32 |
| 3.3 Best Interest of the Child | 33 |
| 3.4 Legal Recognition | 33 |
| 3.5 Freedom from Discrimination | 34 |
| 3.6 Freedom from Violence | 35 |
| 3.7 Right to Health Care | 35 |

CHAPTER 4:

| | |
|--|-----------|
| LESSONS FROM MALTA AND SOUTH AFRICA | 38 |
| 4.0 Malta | 39 |
| 4.1 South Africa | 40 |

CHAPTER 5:

| | |
|--|-----------|
| CONCLUSION AND RECOMMENDATIONS | 44 |
| 5.0 Conclusion | 45 |
| 5.1 Policy Recommendations | 45 |
| 5.2 Recommendations for the National Registration Bureau | 45 |
| 5.3 Recommendations for the Office of Director of Public Prosecution & Attorney General | 47 |
| 5.4 Recommendations for the Ministry of Health and Kenya Medical Practitioners and Dentists Council | 47 |
| 5.5 Recommendations for National Hospital Insurance Fund (NHIF) | 47 |
| 5.6 Recommendations for Civil Society Organizations | 47 |
| 5.7 Recommendations for the Private Sector | 48 |
| 5.8 Recommendations for the Ministry of Education | 48 |
| 5.9 Recommendations for the National and County Governments | 48 |

| | |
|-------------------|-----------|
| REFERENCES | 50 |
|-------------------|-----------|





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Acronyms & Abbreviations

| | |
|--------|--|
| ACHPR | African Charter on Human and Peoples' Rights |
| ACRWC | African Charter on the Rights and Welfare of the Child |
| CoK | Constitution of Kenya 2010 |
| CRC | Convention on the Rights of the Child |
| FGDs | Focus Group Discussions |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| IPICC | Intersex Persons Implementation Coordination Committee |
| KIIs | Key Informant Interviews |
| KNCHR | Kenya National Commission on Human Rights |
| NHIF | National Health Insurance Fund |
| NID | National Identification Card |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| WHO | World Health Organisation |





My body

is not the

problem





GLOSSARY OF TERMS

Acquired/self-recognised sex identity: “sex category an intersex individual uses following biological developments or surgical intervention that alters their sex category to one which was not recorded at birth.”¹

Binary: in reference to sex, this refers to society’s classification of persons into two categories of male or female.²

Gender Expression: “the way in which we express our gender through actions and appearance.”³ It is the external manifestation of one’s gender through behaviour, mannerism, dressing, hairstyle, voice, body characteristics⁴ and relationships.

Gender Identity: “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth.”⁵

Gender: “characteristics of women, men, girls and boys that are socially constructed. This includes non-physiological components of sex such as norms, behaviours and roles that are culturally associated with being a woman, man, girl or boy, as well as relationships with each other”⁶ within a particular society.

Intersex Child: “means 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 anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood.”⁷

- 1 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) <<https://www.klrc.go.ke/images/TASKFORCE-REPORT-on-INTERSEX-PERSONS-IN-KENYA.pdf>> (accessed 24-02-2023)
- 2 Human Rights Campaign, ‘Transgender and Non-Binary People’ (undated) <<https://www.hrc.org/resources/transgender-and-non-binary-faq>> (accessed 14-04-2023)
- 3 UN, ‘Free and Equal: Definitions’ (undated) <<https://www.unfe.org/definitions/>> (accessed 14-04-2023)
- 4 Elijah Edelman, ‘The Gender Identity and Transgender Rights in Global Perspective’ in Michael Bosia, Sandra McEvoy and Momin Rahman (eds) *The Oxford Handbook of Global LGBT and Sexual Diversity Politics* (OUP 2019) 61–74
- 5 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)
- 6 WHO, ‘Gender and Health’ (undated) <https://www.who.int/health-topics/gender#tab=tab_1> (accessed 14-04-2023)
- 7 Section 2 of Children Act No 29 of 2022 <www.kenyalaw.org> (accessed 28-04-2023)





Intersex Genital Mutilation: refers to “any procedure involving partial or total removal of the genitalia or other injury to the reproductive organs of new-born intersex babies, infants or children, for non-medical reasons.”⁸

Intersex Person: “a child or an adult 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 anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood.”⁹

Nonbinary: describes people who “do not describe themselves or their genders as fitting into the categories of man or woman.”¹⁰

“Normalisation”: interventions that are used to change the body of an intersex person to fit into either the male or female bodies, viewed as the only acceptable ones.¹¹ Often used interchangeably with the term conversion. It includes medical or social interventions that alter the sex characteristics of an intersex person such as anatomy, hormones, chromosomes or reproductive organs so as to fit into either the male or female sex.

Sex: “different biological and physiological characteristics of females, males and intersex persons, such as chromosomes, hormones and reproductive organs”¹² or a biological construct referring to the genetic, hormonal, anatomical and physiological characteristics based on which an individual is classified at birth as either male or female.¹³

8 Kenya National Commission on Human Rights, “Intersex Persons in Kenya” (undated) <<https://www.knchr.org/our-work/special-interest-groups/intersex-persons-in-kenya>> (accessed 16-05-2023)

9 Intersex Persons Bill 2023

10 Human Rights Campaign, “Transgender and Non-Binary People” (undated) <<https://www.hrc.org/resources/transgender-and-non-binary-faq>> (accessed 14-04-2023)

11 Kenya National Commission on Human Rights, ‘Equal in Dignity and Rights Promoting the Rights of Intersex Persons in Kenya’ (2018) 37 <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 25-02-2023)

12 WHO, Gender and Health (n 6)

13 The Inter-American Court of Human Rights Advisory Opinion OC-24/17 <www.corteidh.or.cr> (accessed 28-04- 2023)





EXECUTIVE SUMMARY

Reports indicate that “normalisation” practices against intersex persons are rampant in Kenya. However, data lacks on the prevalence of these practices, and on this basis, Amka Africa Justice Initiative, funded by the Embassy of the federal Republic of Germany in Nairobi, conducted this baseline study between February and April 2023 in Nairobi, Mombasa and Kilifi Counties.

The research was limited to the qualitative and quantitative analysis of the impact of “normalisation” practices on intersex persons and respondents were intersex persons only.

The objectives of the study were to: analyse the prevalence, nature and impact of medical, cultural and religious “normalisation” practices against intersex persons in Kenya; and highlight the intersecting relations between the legal and policy framework, cultural and religious dogmas and the “normalisation” practices against intersex children and persons so as to support policy advocacy for implementation of the Children Act 2022. The research was limited to the qualitative and quantitative analysis of the impact of “normalisation” practices on intersex persons and respondents were intersex persons only.

The study’s key findings are that “normalisation” practices are rampant in Kenya, they are non-consensual and have resultant adverse effects on the bodies and lives of intersex persons. Thus, to ensure the protection of intersex persons’ rights and the successful implementation of the Children’s Act 2022, relevant officials in the office of the Registrar of Births and Deaths, the office of the Registrar of Persons, medical professionals and other key stakeholders should be sensitised on these practices and on provisions of the Children Act. Policy regulations to the Act should also be formulated detailing clear parameters and guidelines that govern what qualifies as “normalisation” practices including Intersex Genital Mutilation against intersex children and proscribe the same. Additionally, regulations to the Births and Deaths Registration Act guiding the birth registration of intersex children and persons, as envisaged by the Children’s Act, should also be formulated.

In the same breath, the proposed Intersex Persons Bill should provide comprehensive protection against all forms of “normalisation” and a framework for safeguarding social, economic and civic rights of intersex persons. Critical policies such as the National Reproductive Health Policy 2022-2032 should be revised to adopt a wholesome and protective definition of intersex persons, and provide for specific sexual reproductive health rights of intersex persons.



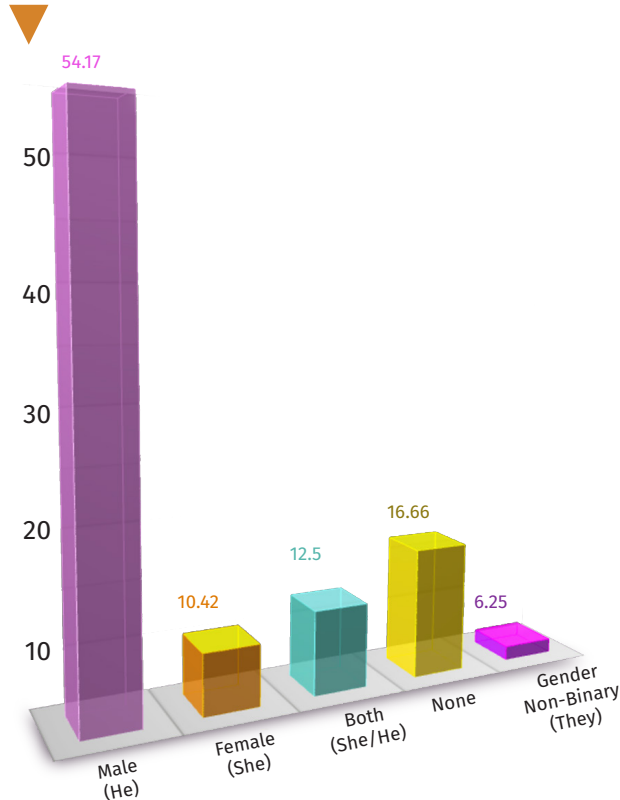


METHODOLOGY

This report is based on desk review of existing literature, laws and human rights instruments. It is further supported by data from field findings collected from 48 intersex respondents who congregated in Nairobi, Mombasa and Kilifi Counties.

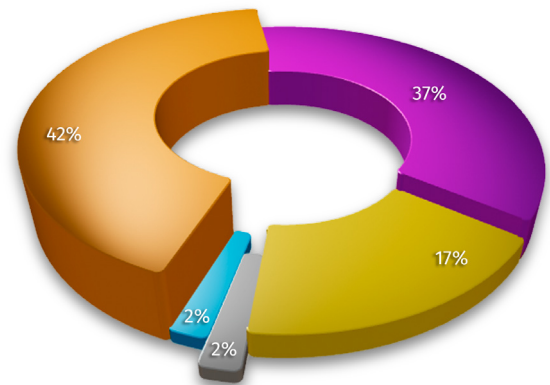
Key Informant Interviews (KIIs) and Focus Group Discussions (FGDs) sessions were employed for the study. Kiswahili was the medium language used. However, translation to English has been adopted in the narrations for reporting purposes. Additionally, pseudonyms, rather than the actual names of the respondents, have been used in the narrations.

The respondents preferred gender identity and pronouns(%) were as follows:



All the respondents were adults, and they were distributed into the following age brackets:

18-25 26-33 34-41 42-49 50 and above



The majority of the respondents have been educated at different levels with the exact proportionality as follows:

Level of Education

Primary Secondary Tertiary University None





CHAPTER 1

NOT BROKEN, DO NOT 'FIX'





1. Intersex Body is Normal, Not Abnormal, Do Not 'Fix'

Society is wired to believe that the only two acceptable sex categories are male or female. Intersex persons whose sex characteristics do not fit the typical female or male categories are viewed as abnormal hence the need to be “normalised” to fit into either of the acceptable sexes. The estimate of intersex births worldwide is placed at 1 in every 1500 or 2000 births.¹⁴ The estimated number may be low, but it factually details that intersex persons exist. In Kenya, while shrouded in secrecy, the existence of intersex persons can be evidenced by the names used to refer to them in the local communities. The Luo refer to them as ‘*Nyot Gath*’, meaning an unnatural baby; Kikuyu- ‘*Kiugu/Ciugu*’, meaning a person of no value or someone not perfect, and the Akamba- ‘*Mali-nda*’ meaning something inside the body.¹⁵ The Luhya equate them to an ogre, referring to them as ‘*Gundu*’.¹⁶

Upon birth of an intersex child, the immediate intervention has always been left to doctors to “normalise” the child through corrective surgeries to make them fit into the acceptable sexes. Religious and cultural practices are also used as avenues of “normalisation”, but due to the secrecy surrounding these practices, unlike medical procedures, they are not sufficiently documented in the available literature.

Human rights discourse on intersex persons in Kenya first emerged in the case of ***R.M. v The Attorney General & Others***¹⁷ where an intersex person was committed to Kamiti Maximum Prison for male convicts where he was made to share cells, bedding, and sanitary facilities with male inmates. He suffered mockery, ridicule, and sexual abuse from the inmates and prison officers who would ask him to spread his legs and expose his private parts in front of other inmates. The court awarded the petitioner Kshs.

14 Religious Institute, ‘Fact Sheet on Intersex People’ (undated) <<http://religiousinstitute.org/resources/fact-sheet-intersex-people/>> (accessed 24-04-2023)

15 Taskforce Report on Intersex Persons in Kenya (n 1) 42

16 Amka Africa Focus Group Discussion on 2nd March 2023

17 Petition No. 705 of 2007 (2010) eKLR

500,000 as damages for the inhumane and degrading treatment he had been subjected to in prison for being intersex. However, the court failed to appreciate the identity and human rights needs of intersex persons in that case.

The second case was Baby ‘A’ (Suing through the Mother E A) & Another v Attorney General & 6 Others,¹⁸ which fundamentally increased the visibility of intersex persons in the country. The case concerned the inability of Baby ‘A’ to obtain a birth certificate because a question mark (?) had been entered in the place of ‘sex’ particular on the birth notification form of Baby ‘A’. Without a birth certificate, Baby ‘A’ was excluded from all social, economic and civil processes, including enrolling in school. In a progressive and commendable move, the court acknowledged at the time that there was no legal framework or policies in place for recognition and protection of intersex persons and proceeded to direct government to collect data on intersex persons, and parliament to formulate an appropriate legal framework for protection of intersex persons based on international best practices.

Consequent to Baby ‘A’ judgement, intersex persons were included in the 2019 National Census, making Kenya the first African country to count intersex persons in a national census. 1524 people were counted as intersex, a number that arguably is not a true reflection of the actual population of intersex persons in the country.¹⁹

The directive in the Baby ‘A’ case, has also produced legislative interventions through the recent formulation of the Children Act 2022. In particular, section 23 of the Act expressly bans Intersex Genital Mutilation (IGM) on children; and contravention of this provision attracts a sentence by imprisonment for a term of not less than three years or/and a fine of not less than five hundred thousand. Section 7 of the Act amends the Births and Deaths Registration Act so as to provide for registration of intersex

18 Petition No. 266 of 2013 (2014) eKLR

19 Nita Bhalla, ‘Kenyan census results a ‘big win’ for intersex people’ Reuters, (4 November 2019) <<https://www.reuters.com/article/us-kenya-lgbt-intersex-trfn-idUSKBN1XE1U9/>> (accessed 07-03-2023)





sex category at birth. The Act is relatively new and applauded for its progressive provisions. However, to ensure that its provisions are fully implemented, the society must appreciate and understand that intersex bodies are normal, they do not need ‘fixing’. Further, sensitisation on the existence of these provisions to relevant officials in the office of the Registrar of Births and Deaths, medical professionals and other key stakeholders needs to be facilitated.

Additionally, policy regulations to the Children Act should be formulated detailing clear parameters and guidelines that govern what qualifies as “normalisation” practices against intersex children. Regulations to the Births and Deaths Registration Act guiding the birth registration of intersex children, as envisaged by the Children Act, should also be formulated. In a latest move to advance the rights of intersex persons, a draft Intersex Persons Bill 2023 is under consideration. The Bill is spearheaded by the Intersex Persons Implementation Coordination Committee (IPICC) through Kenya National Commission on Human Rights (KNCHR). Public participation sessions on the Bill are currently ongoing. The Bill, if passed to law, will amongst others, complement the provisions of the Children’s Act in ensuring that registration of intersex children is affected and ensuring that harmful “normalisation” practices, inclusive of medical procedures, cultural and religious rituals are banned.

1.1. Types of “Normalisation” Practices

“Normalisation” is referred to as interventions that are used to change the body of an intersex person to fit into either the typical male or female bodies, which are generally viewed as the norm²⁰ The ideology supporting “normalisation” stems from the stigma that society attaches to intersex persons who are viewed as abnormal,

thus the justification to be ‘fixed’ or corrected so as to meet the social expectations of being either male or female. There are different types of “normalisation practices”. The most common practice is the medical “normalisation”. Other practices include cultural and religious “normalisation”.

1.1.1. It is our Moral Obligation to Fix ‘Abnormal’ Children: Medical “Normalisation”

Medical “normalisation” refers to intrusive, unwarranted and non-consensual surgeries and hormonal therapy that are performed on the body of an intersex person to forcibly modify the sex characteristics to conform to the typical male or female bodies.²¹ Medicine has always seen intersex bodies as a purely medical issue since nineteenth century as evidenced by terminologies such as 'Disorders of Sex Development' (DSDs).²² Doctors 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.²³ The ‘abnormal’ views are founded on the need to preserve the ideologies of fixed sex and gender binarism. The conflation and comingling of issues of sex, sexual orientation, gender identity and expression further encourages medicine to keep sex and gender borders clearly defined, by labelling everyone 'truly male' or 'truly female' to so as to control homosexuality.²⁴

20 Ana Lúcia, ‘Beyond Binarism? Intersex as an Epistemological and Political Challenge’ (2014) RCCS Annual Review, 128 <https://estudogeral.uc.pt/bitstream/10316/36578/1/Beyond%20Binarism_Intersex%20as%20an%20Epistemological%20and%20Political%20Challenge.pdf> (accessed 17-04-2023)

21 Office of the High Commissioner for Human Rights, ‘Background Note on Human Rights Violations against Intersex People’ (2019) 13 <<https://www.ohchr.org/en/documents/tools-and-resources/background-note-human-rights-violations-against-intersex-people>> (accessed 07-03-2023)

22 Silvia Cuadra et al, ‘Normalizing Intersex Children through Genital Surgery: The Medical Perspective and the Experience Reported by Intersex Adults’ (2022) Sexualities 1-20. Medical practitioners alternatively used the terminologies 'intersex' and 'hermaphrodite' until around 2005, when the Chicago Consensus coined the term 'Disorders of Sex Development' (DSDs)

23 Morgan Carpenter ‘The Human Rights of Intersex People: Addressing Harmful Practices and Rhetoric of Change’ (2016) 24 Reproductive Health Matters 74 -75

24 Marcus Arana ‘A Human Rights Investigation into the Medical “Normalization of Intersex People: A Report of a Hearing of the San Francisco Human Rights Commission’ (April 28, 2005) 11 < https://sf-hrc.org/sites/default/files/Documents/HRC_Publications/Articles/A_Human_Rights_Investigation_Into_the_Normalization_of_Intersex_People.pdf> (accessed





As such, medical practitioners see sex assignment interventions on intersex children as their moral obligation to necessary, good care to 'abnormal' children, while at the same time mitigating the parents' anxiety that their intersex children may grow up to be homosexual, and or face societal stigma and exclusion.²⁵ These procedures, often referred to as corrective, sex assignment or sex re-assignment surgeries, are usually performed on intersex children when they do not have the capacity to consent to them, thus being non-consensual and only performed at the behest of parents and doctors.²⁶

Even so, this study and evidence from elsewhere reveals that majority of intersex variations require no medical intervention for maintaining a healthy intersex body and in fact medical interventions have left intersex people damaged, 'sterilised, mutilated, with lost sexual function and sensation'.²⁷ The experiences of the respondents who had undergone surgeries and hormonal therapy can be described in the words of Butler thus:²⁸

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.

Further, the medical procedures have been established as merely cosmetic with no medical benefit, resulting in permanent and irreversible

effects on the lives of intersex persons, which include "permanent infertility, pain, loss of sexual sensation, and lifelong mental suffering."²⁹ Ideally, the procedures ought to be put on hold until individual intersex persons attain capacity to make their own decision.

1.1.2. The Cultural Fix: Cultural "Normalisation"

Cultural "normalisation" refers to practices that involve consulting and engaging with traditional healers, witch doctors and herbalists to 'fix' the perceived abnormality of an intersex child. Culturally, intersex persons are viewed as 'bewitched, bad omen or products of a curse'.³⁰ The cultural interventions by the healers, witchdoctors or herbalists are meant to dispel the curse or bad omen through purification rituals.³¹ Intersex persons have generally been associated with lesbians, gays, bisexuals, transgender and queer persons. Hence, they are viewed as a people seeking to champion homosexuality which is supposedly against African culture and morality.³² Thus culture becomes a weapon to reject intersex persons. This is further cemented by the fact that in the African culture, the only recognisable and acceptable categories of sex are male and female.³³

This rejection by dint of culture explains the names attached to intersex persons, and the perception that they are a curse, thereby justifying 'fixing' purification rituals. Unfortunately, the rituals are usually performed without the consent of intersex persons and are often performed in infancy. These rituals performed on the bodies violate their fundamental right to bodily integrity and the autonomy to make informed decisions on what should happen to their bodies.

30-03-2023)

- 25 Taskforce Report on Intersex Persons in Kenya (n 1). See also, 'Anne Schotel and Lizza Mugge 'Towards Categorical Visibility? The Political Making of a Third Sex in Germany and the Netherlands' (2021) 59 (4) Journal of Common Market Studies 985
- 26 Marissa Mallon, 'Comment: Ambiguous Genitals & Societal Disdain, A Case For a Prohibition of Medically Unnecessary, Cosmetic Genital Normalization Surgeries on Infants and Children' (2020) 32 Journal of the American Academy of Matrimonial Lawyers 465
- 27 Taskforce on Intersex Persons (n 1). See also: Morgan Carpenter 'The "Normalization" of Intersex Bodies and "Othering" of Intersex Identities in Australia' (2018) 15(4) J Bioeth Inq 487-495
- 28 Judith Butler, *Undoing Gender* (Routledge 2004) 53

- 29 UN Free and Equal (n 3)
- 30 KNHCR, *Equal in Dignity* (n 11) 14-16
- 31 Taskforce Report on Intersex Persons in Kenya (n 1) 167
- 32 Wallace Nderu, 'Of Intersex Persons, Identity, Recognition and the Law, Born This Way: The Need to Recognize Intersex Persons, Respect, Safeguard and Uphold their Rights' (2018) ICJ Kenya, 2
- 33 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





1.1.3. A Call to the gods: Religious “Normalisation”

Religious “normalisation” involves taking intersex persons to spiritual leaders for prayers meant to ‘deliver’ and transform them to binary beings to fit into the society that God created.³⁴ Religious leaders have been at the forefront of fighting against the recognition of intersex persons arguing that that would be an introduction of a third gender which God did not envision. They base their argument on, among others, the creation story of Adam and Eve, arguing that male and female are the only accepted design of sex and gender. Thus, in mainstream Christianity and Islamic religion, the understanding of gender is only confined to the binary male or female model. The perception that intersex persons require prayers to be “normalised” is thus justified by this understanding of sex categories.

Additionally, the association of intersex persons with the lesbians, gays, bisexuals and queer persons lead to the assumption that accepting them is tantamount to promoting homosexuality. Thus, the grouping of intersex persons with sexual minorities has eroded the acceptance, recognition and championing of intersex persons’ rights in religious backgrounds. These misconceptions force some parents to engage leaders to fix their children, who at times resort to crude means such as exorcism, starvation and incessant prayers.³⁵

1.2. Effects of the “Normalisation” Practices

The prevailing practice after, or even before, the “normalisation” practices has always been socialising the intersex child as either a boy or a girl. However, as the child transitions into adolescence and adulthood, secondary

sex characteristics such as beards, pubic hair, deepening of voice, enlargement of breasts or widening of hips begin to develop. Unfortunately, in some cases, these secondary sex characteristics may be at variance with those associated with the sex and gender in which the intersex child has been socialized. Yet, parents and the society will prevail upon the intersex child to express, and conform to the chosen gender despite the child’s internal experience of gender. This conflict between the sex and consequent gender chosen by the parents or guardians and their external bodily appearance is often a cause for psychological trauma and tension for intersex children.³⁶

The adverse effects of all the “normalisation” practices not only affect intersex persons mentally and physically, but they also affect their human rights. The notion of the abnormality of their bodies and society’s understanding of sex as either male or female, which informs the “normalisation” practices, has directly and severely affected their rights. This study confirmed the existing literature on adverse effects of social rejection of intersex persons which include:³⁷

1. Accessing healthcare services, where they are discriminated against and encounter doctors who are not trained to treat them;
2. Accessing washrooms since they are unable to fit into designated washrooms for either men or women perfectly;
3. Challenges with legal documents since they possess documents with sex markers that contrast with their acquired gender and sex identity; and
4. They are prone to violence which is occasioned by being viewed as abnormal hence violence becomes justifiable to society.

The lived realities of this study’s respondents confirmed these challenges and more as expounded in the next chapter.

34 Gays and Lesbians Coalition of Kenya, ‘Shame is not a cure: So-called Conversion “Therapy” Practices in Kenya’ (2020) 11 <<https://www.galck.org/wp-content/uploads/2022/07/Shame-is-not-a-cure-doc-3.pdf>> (accessed 24-04-2023)

35 UN 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’ (2020) 7 <https://digitallibrary.un.org/record/3870697/files/A_HRC_44_53-EN.pdf> (accessed 24-04-2023)

36 Taskforce Report on Intersex Persons in Kenya (n 1) 111

37 Office of the High Commissioner for Human Rights, ‘Background Note on Human Rights Violations against Intersex People’ (2019) <<https://www.ohchr.org/en/documents/tools-and-resources/background-note-human-rights-violations-against-intersex-people>> (accessed 07-03-2023)





CHAPTER 2

WE HAVE BEEN FIXED; MAJORITY SAYS: LIVED EXPERIENCES OF INTERSEX PERSONS IN KENYA



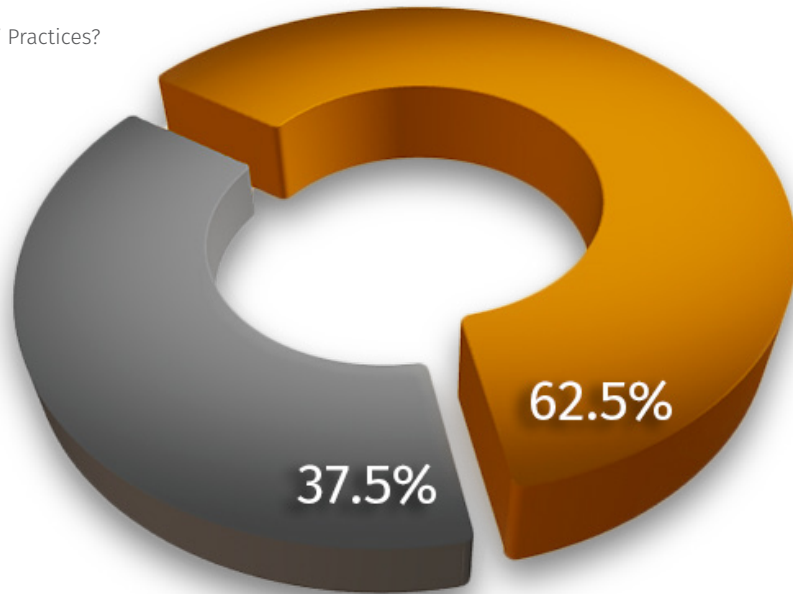


2. We have been Fixed, Majority Says

The study found that 62.5% of all the respondents had undergone some form of “normalisation” while 37.5% of the respondents had not undergone any form of “normalisation”.

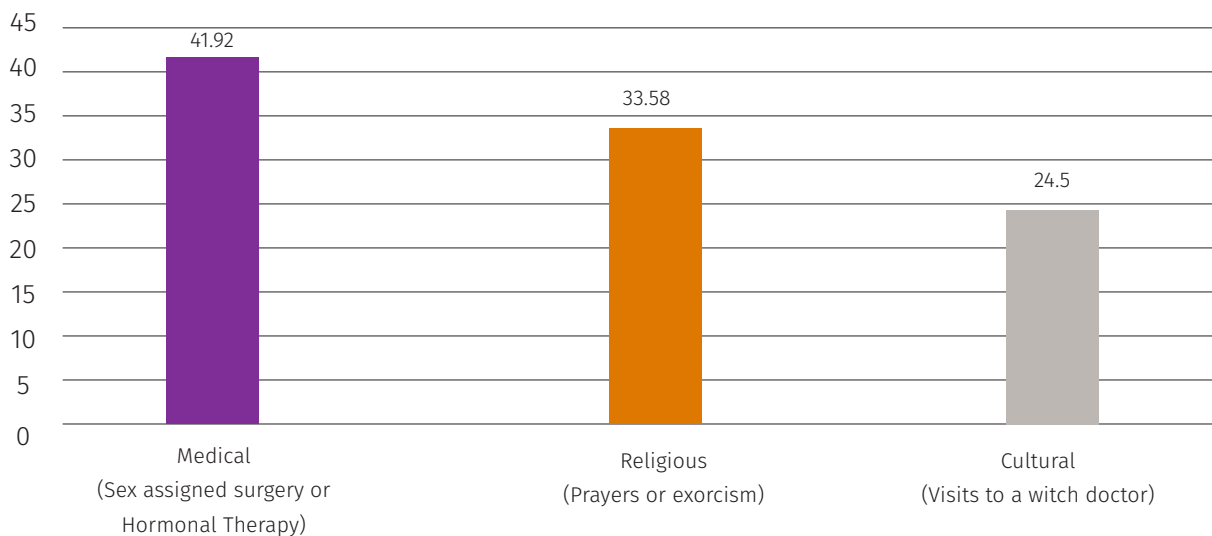
Have you undergone any 'Normalisation' Practices?

● Yes ● No



From the 62.5 who had been “normalised”, 41.92% had undergone medical “normalisation” through either sex assignment surgeries or hormonal therapies, 33.58% had undergone religious “normalisation”, while 24.5% had undergone cultural “normalisation”, as shown in the diagram below.

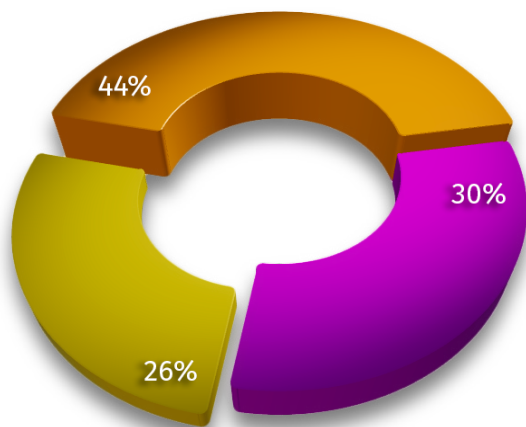
Normalisation Practices %





2.1. Fixed by Medicine: Medical “Normalisation”

43.48% of medical “normalisations” had been done through sex assigned surgery, while 26.09% were through hormonal therapy. 30.43% of the respondents underwent both sex assignment surgery and hormonal therapy.



Medical 'Normalisation' Practices

● Sex assigned surgery ● Hormonal Therapy ● Both

The respondents who had undergone medical “normalisation” gave their lived accounts, and some of the accounts were as follows:

Shakira* stated:

“I have been on hormones since I was 4 years old, in total for 22 years. The hormones were meant to boost female sex characteristics. I have also undergone 12 surgeries, most of which were done when I was a child because my parents wanted to raise me as a girl. I took the hormones from that tender age as the doctors wanted to ensure my male characteristics were fully suppressed. However, I stopped taking hormones 2 years ago, and my body has become more masculine, my breasts have significantly shrunk, and the hips and smooth face are gone. People who knew me before can hardly recognise me”.

NA*, on his part, stated:

“Since the age of 3, I have undergone 7 surgeries. The surgeries were not always successful, as my penis kept growing back despite being mutilated. Once after a surgery session, the

hospital staff left me alone in the theatre room, bleeding until a security guard found me w. I was then bandaged and taken to the ward. After each surgery, I experienced a lot of pain and requested my parents not to subject me to more surgeries. My parents still took me back to the hospital despite my pleas.”

Billmark* stated:

“I have undergone 2 surgeries and am currently on hormonal treatment. My first surgery was at age 8, and my penis was mutilated since my mother wanted to raise me as a girl. The surgery was unsuccessful because my penis grew back, and I was operated on again in 2017. Afterwards, I convinced my mother to allow me to grow as a boy, and I was put on hormonal treatment to ensure the same.”

Justin* stated:

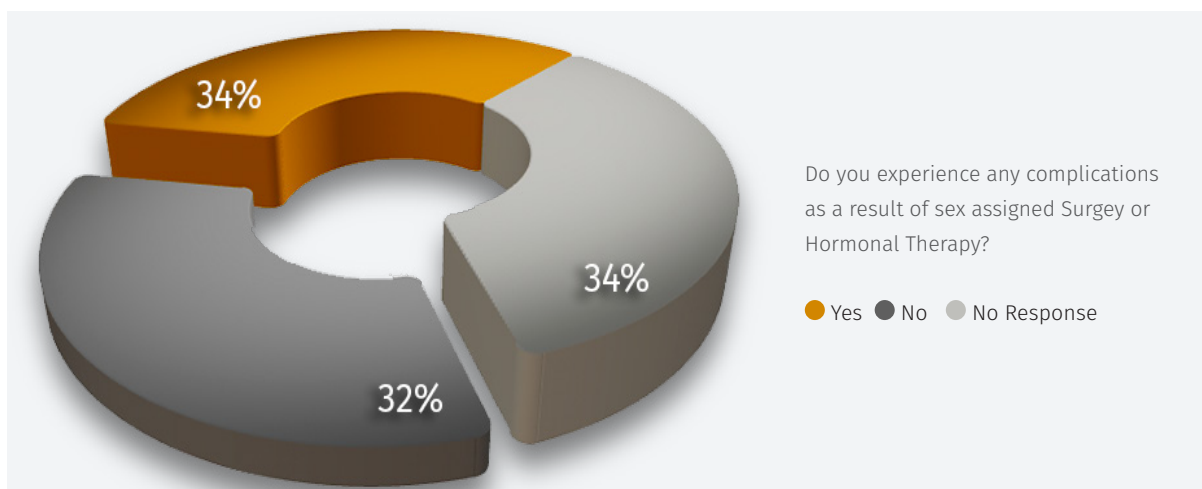
“Since my childhood, I have gone through 4 surgeries. One of the surgeries was done to remove my penis, and another was done to push back my testes. All these surgeries were done because my mother wanted to raise me as a girl.”

Sex assignment surgeries and hormonal therapies have very severe effects on the bodies of intersex persons.

2.1.1. Effects of Sex Assignment Surgeries and Hormonal Therapies

Sex assignment surgeries and hormonal therapies have very severe effects on the bodies of intersex persons. The study found that 33.33% of the respondents who had gone through medical normalisation suffer or had suffered from side effects of medical procedures, 31.25% had not suffered from any side effects and 33.42% did not respond to the question.





As gathered from FGD sessions conducted, the side effects of sex assignment surgeries and hormonal therapies were cited as follows:

Sex Assignment Surgeries

- Pain around surgical areas when doing strenuous activities;
- Persistent pain in areas where skin grafting has been done;
- Painful bowel movement;
- Predisposal to haemorrhoids;
- Frequent urinary tract infections;
- Increased rates of general infections;
- Severe back pains;
- Lower abdominal pain;
- Leg pain and numbness.

Hormonal Therapies

- Excessive bleeding during menstruation;
- Frequent lower abdominal pains;
- Persistent stomach pains;
- Severe headaches;
- Leg pain and numbness;
- Memory loss;
- Mood swings;
- General body weakness;
- Dizziness spells;
- Increase in appetite.

Detailing these side effects, Shakira* stated:

“I experience a lot of pain when it is cold or when I carry anything heavy. I also experience severe pain in my abdomen, worse than cramps. Due to the surgeries, I walk with a limp, my left leg sometimes gets numb and very painful. I usually self-medicate when I experience this pain because medical personnel cannot assist me satisfactorily since most do not understand my intersex status.”

Charles* indicated that:

“Since my surgery, I have had a huge challenge in urinating. I usually feel the urge to go to the washroom, but when I get there, no urine comes out.”

Skylar* said:

“While on hormones, I often felt fatigued and dizzy, and my appetite reduced tremendously.”

Kibz* stated:

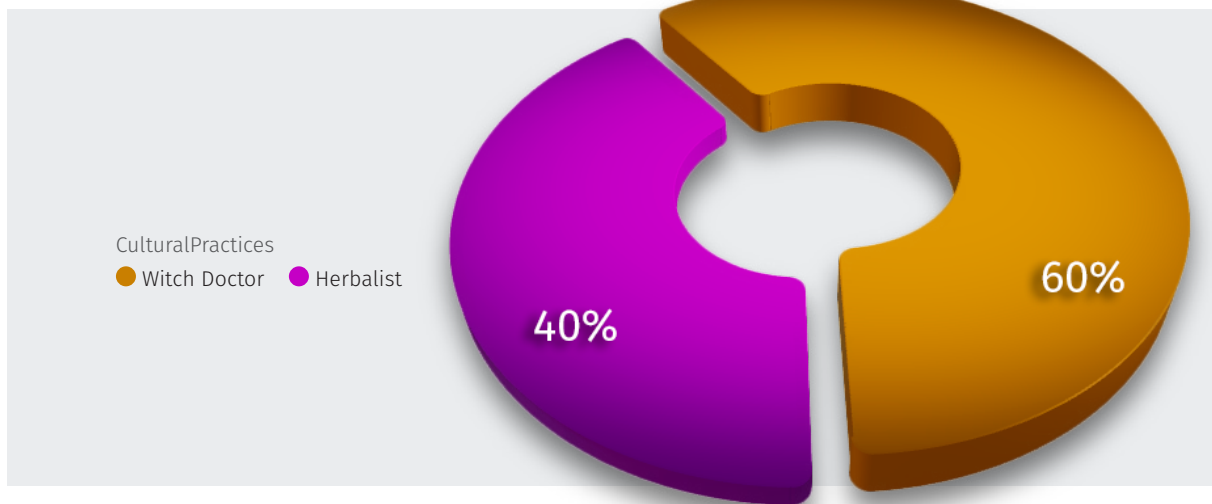
“When my penis get aroused, I experience intense pain in my veins and testicles. I also experience acute stomach pains which make me shiver, and I get paralysed, cannot do anything in terms of chores or move around until the pain subsides.”





2.2. Cultural “Normalisation” Practices

The study found that 24.5% of all the respondents had undergone cultural “normalisation”, which entailed being taken to traditional herbalists and healers and witch doctors. Of these, 60% had seen witchdoctors and 40% traditional healers and herbalists.



UM* detailed their experience with witch doctors indicating as follows:

“My parents took me to a witch doctor when I was young. The witch doctor told me to kneel and covered me with red clothing on my face. He then placed an object on my head and started chanting while moving around me. After this, I suffered mental anguish and dropped out of school at class four.”

Vera* stated:

“I was taken to Tanzania when I was younger and given various instructions by a witch doctor on how to be a ‘normal’ girl. For example, I was told to leave the house naked at night during heavy rains, as the rain and darkness would assist with my transformation. I was also supposed to stand under a special huge tree dressed in specific clothes so that I could be a ‘normal’ girl.”

Brian* stated:

“A herbalist gave my parents herbal medication, and the instructions were to insert the medication in my vaginal opening. The medicine was supposed to widen my vaginal opening and make me a ‘normal’ girl.”

Hassina* stated:

“I was taken to ‘Daktari wa miti shamba’ (a herbalist), he did some painful things on my genitalia and now that I am older, I regret that I had to endure that ordeal.”

Moses* stated:

“I was taken to a witch doctor to have satanic spirits that were allegedly in me removed. The whole ordeal was very scary and traumatising”

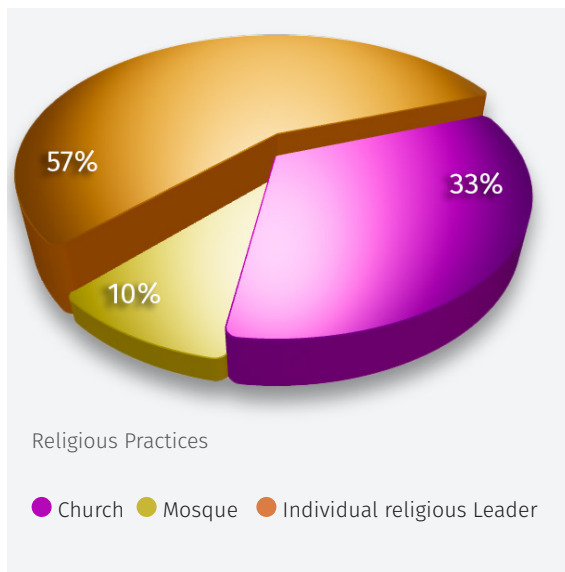
Being subjected to such humiliating practices further contribute to psychological and mental torture that affects the lives of intersex persons. For instance, UM* stated: “I dropped out of primary school in class four after my parents took me to a witch doctor, and I was unable to focus in school.”





2.3. Religious Practices

The study found that 33.58% of the respondents had undergone religious “normalisation” through prayers and other rituals in religious institutions and through individual religious leaders. Of this, 57% were attended to by individual religious leaders, 33% in churches and 10% in mosques.



The respondents recounted their experiences with religious leaders and institutions, indicating as follows:

Andre* stated:

“I was constantly taken to several religious leaders who would pray for me. At one point, a preacher cut my fingertips with a razor and inserted unknown substances in my finger to ‘cure’ me of intersex condition.”

Johnson* stated:

“The Ustadhi (Muslim religious leader) was invited to our home, and he used specific verses of the Quran believed to exorcise the demons and that caused me to be intersex. He came with perfumes which he used to exorcise the intersex demons. Additionally, I was beaten at the tips of my fingers with a wooden rod to make me ‘normal.’”

Melvin* stated:

“My mother was convinced by her friend that being intersex is a curse. She was advised to go to Uganda for religious conversion. We visited a pastor in Uganda who gave me anointing oil to drink, eat with food in all meals and bathe with it. Sometimes my mother would wake me up in the middle of the night to drink the oil. It never worked”.

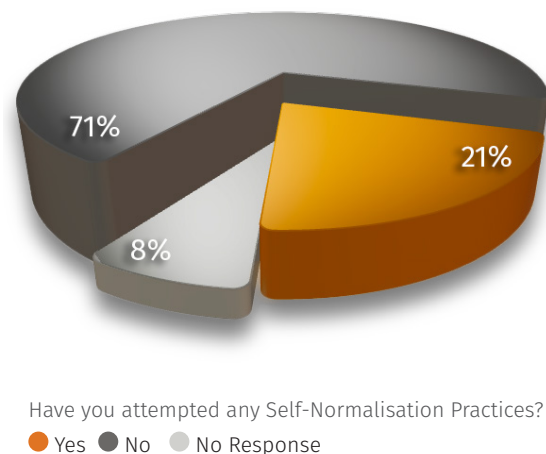
Societal expectations have not only pushed parents of intersex children to seek the help of these religious leaders, but some intersex persons have also sought the help of religious leaders themselves. For instance,

Shakira* stated:

“When I was older, I went to a priest and shared my story since I believed I was experiencing life challenges because of my condition. The priest groped me on my chest, fondled my breasts and declared “you are a girl”.

2.4. Self “Normalisation”

The pressure of fitting into societal expectations pushes intersex persons to “normalise” themselves on their own accord. Self “normalisation” can thus be referred to as interventions that an intersex person themselves undertake to fit into society as either male or female. The study found that 70.83% of the respondents had not attempted self “normalisation”, 20.83% had attempted, and 8.34% did not answer this question.





Highlighting their experiences with self “normalisation,”

Komollo* stated

“I wanted to be a girl so badly but my body was continuing to develop male characteristics like beards. My friends advised me there was a medicine I could use so I bought hormonal medicine from the chemist but stopped using them after I developed severe headaches”.

Skylar* on her part, stated:

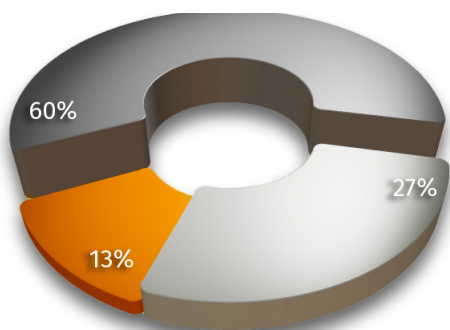
“I am a professional athlete and identify and express myself as a girl. However, my testosterone levels keep increasing, and since I want them to be lowered, I use hormones to suppress them. Suppressing them enables me to keep participating in athletics as a girl.”

Shawn* stated:

“I wanted to fit in school as a ‘proper’ boy especially because I was in boys’ school, so I tried taking hormones to make myself a boy. My parents found out and stopped me from taking the hormones.”

2.5. The Theft of Choice: Consent to the “Normalisation” Practices.

The “normalisation” practices are usually at the parents’ behest, with the intersex children’s consent not being sought. 60.42% of the respondents who had undergone “normalisation” never consented to the practices, 12.5% of the respondents consented to the “normalisation” practices and 27.08% did not respond to the question.



Do you consent to the ‘normalisation’ practice/s you underwent? ● Yes ● No ● No Response

Consent should solely be left to intersex persons, as the decision affects them directly for life. It is the intersex persons who bear the brunt and adverse effects of these practices. Decisions should thus rest with them in adulthood or at a time that they fully understand their intersex status and are sure of their internal identity. 60.42% of the respondents who never consented stated as follows:

Anita*:

“For the surgery to be conducted, my mother was the one who gave consent. She never explained anything substantial to me about the surgery. In fact, before the surgery, I was left all alone in the hospital.”

Justin* stated:

“My surgeries were conducted when I was young, and my mother consented. She did not explain anything to me, and I did not know the purpose of the surgeries. However, even with the surgeries conducted when I was 17 years, my consent was never sought. It was my mother who still consented on my behalf. What pains me most is that I woke up from the surgery to find my penis missing and a bandage on. I was devastated because I liked having it, I told my mother I was done with surgeries and medications. I have never recovered from that loss”.

Andre* stated:

“I was very young when my surgery was being done, and my mother consented. I am however convinced that the surgery’s exact details were not well explained to her as she does not appreciate my condition to date. I also did not consent to the visits to the witch doctors.”

John* stated:

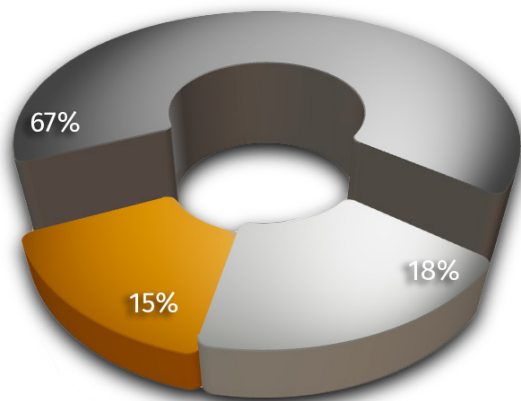
“My father wanted me to be a girl and consented to my surgery. I was a child and did not have a say over anything. I also did not understand what was happening to me at the time.”





2.6. Bodies in pain, bearing the marks of violence and suffering: Consequences of “Normalisation” Interventions

67% of the respondents who had been normalised emphatically stated that the “normalisation” practices their parents subjected them to were unnecessary and unjustifiable, 15% stated that the practices were necessary and 18% did not respond to this question.



Do you think the ‘normalisation’ process you went through was necessary? ● Yes ● No ● No Response

The respondents who deemed the “normalisation” practices unnecessary stated as follows:

Ali* stated:

“I feel bad that the procedures that were conducted on me because I do not recognise the person I became after the procedures. My genitalia was made female and I was brought up as such. However, I grew up to become masculine and I believe I am male. I even developed self-esteem issues that I still struggle with to date. I think these procedures are unnecessary unless a person wants them and feels the need to have them conducted or for medical purposes.”

Dolas* stated:

“I developed anxiety as a result of the prayers and exorcism rituals. I was worried and anxious

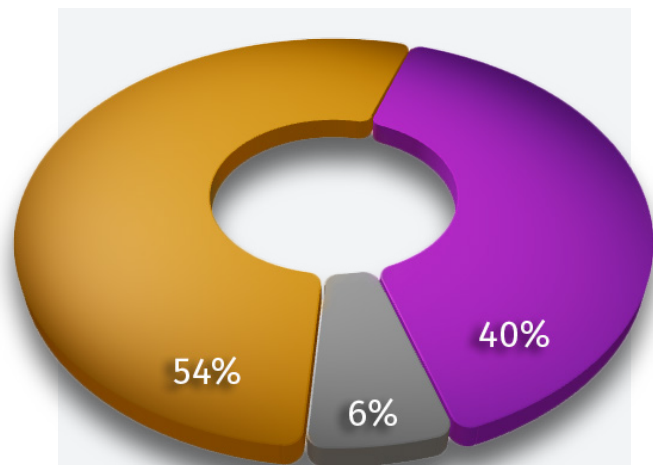
about why the prayers were being conducted, and I was still not changing. To me, the prayers were unnecessary and very traumatising.”

Simba* said:

“Herbs given to me by the witch doctor only made me diarrhoea, nothing else changed. Visiting the witch doctor was unnecessary and worthless. I firmly believe that God is the creator, and His creations are perfect and should not be changed.”

2.7. Access to Sexual, Reproductive and Health Rights

Studies indicate that there are over 46 variations of intersex,³⁸ and some of these variations often require continuous medical attention which is not sex assignment treatments.³⁹ This study found that 54.17% of the respondents had experienced various complications due to the intersex condition, hence the need for medical care, 39.58% had no challenges, and 6.25% did not respond to this question.



Do you experience any medical complications as a result of being intersex?

- Experienced Complications
- Experienced No Complications
- No Response

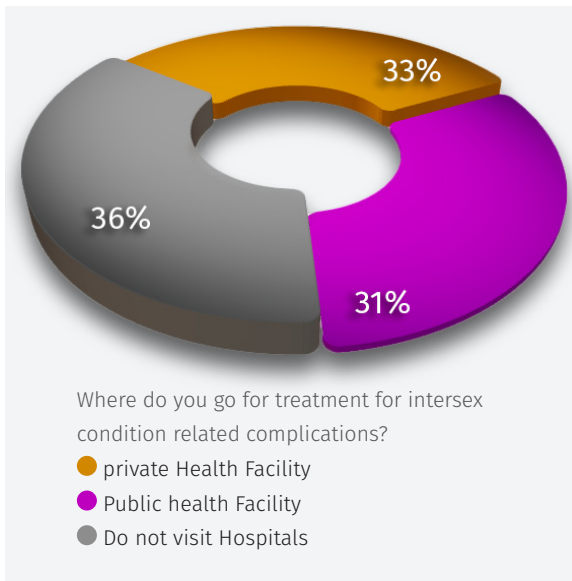
38 Taskforce Report on Intersex Persons in Kenya (n 1) 51

39 Health Direct, ‘Intersex Variation’ (undated) <<https://www.healthdirect.gov.au/intersex-variation>> (accessed 03-03-2023)





Out of all the respondents who experienced complications, 33.33% access treatment from private health facilities, 31.25% from public health facilities and 35.42% do not visit hospitals, instead they opt for self-medication. They cited health care providers ignorance, constant misdiagnosis, stigma and lack of money to pay as the main reasons for shunning hospitals.



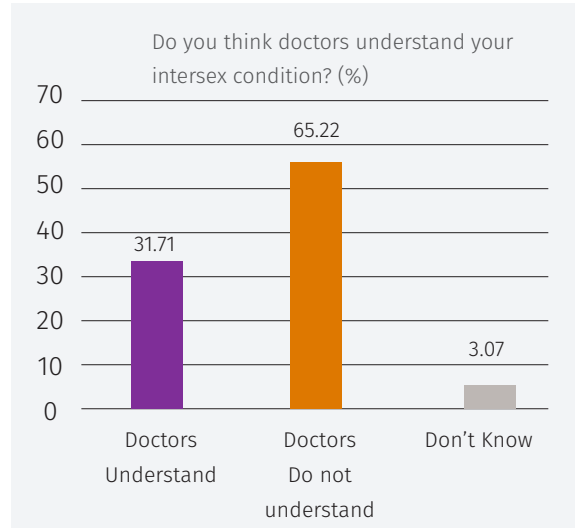
2.7.1. Health Care Practitioners Do not Understand Intersex Condition, Majority Says

A report to the UN Committee Against Torture detailed that while intersex children suffer from excessive medical attention, intersex adults have difficulty finding medical practitioners who are knowledgeable about their needs.⁴⁰ In Kenya, Kenya National Commission on Human Rights affirms that there is an inadequacy of specialised doctors who fully understand how to treat intersex persons.⁴¹ 65.22% of the respondents stated that the doctors they had interacted with did not understand their intersex condition and variation and how to

40 Anne Tamar-Matti, 'Report to the UN Committee Against Torture: Medical Treatment of People with Intersex Conditions as Torture and Cruel, Inhuman, or Degrading Treatment or Punishment' (2014) USA-AIC-CAT 4 <<https://interactadvocates.org/wp-content/uploads/2017/03/interACT-Report-for-UNSRT-on-Intersex.pdf>> (accessed 01-03-2023)

41 KNCHR, Equal in Dignity (n 11) 30, 33; Taskforce Report on Intersex Persons in Kenya (n 1) 187

treat them. 31.71% said their doctors understood them, while 3.07% did not know whether the doctors understood them or not.



The respondents gave detailed lived accounts of how doctors were oblivious to their intersex condition and ignorant on how to treat them.

Justus* indicated that:

“I was brought up as a boy, and I once visited a clinic with severe cramping and lower abdominal pain during my menstrual periods. Instead of prescribing medication for menstrual period cramps pain, the doctor diagnosed that the bleeding was simply an infection and could not possibly be menstrual periods. This happened despite me telling him that I was intersex. Such instances have forced me to opt for self-medication.”

Risper* stated:

“During the birth of my child, the first doctor who examined me was shocked, and he called another doctor who pretended to examine me because he had never seen an intersex person before. Over 7 doctors examined me to see how an intersex person looks. All this time, I was still experiencing severe labour pains. It was a private hospital and the first doctor to examine me had suggested I be transferred to Kilifi Hospital because it is a government hospital with experts who could attend to me. However, another doctor, an European, delivered my Baby and treated me very well till I left the hospital.”





X* stated:

“I have been taken to numerous doctors all of whom did not understand my condition. I believe that they do not understand my condition because they keep asking me questions due to curiosity rather than to assist me with the illness that had taken me to the hospital.”

John* stated:

“I usually suffer from lower abdominal pain and cramps, but I prefer to buy painkillers from the pharmacies rather than tell the doctors I have cramps. Previously I used to go to hospital but I realised they cannot possibly understand how a man has cramps.”

2.7.2. Our Bodies are Props and Teaching Aid Tools

When some doctors attend to an intersex person, their curiosity arises and without the consent of the intersex person, they summon colleagues and medical students and then proceed to use the intersex person as a prop and teaching aid. The study found that doctors had paraded 31.25% of the respondents as teaching subjects without their consent.

Gerald* detailed his encounter as follows:

“I had gone for treatment at a private hospital in Kiambu County, and on realising that I was intersex, the doctor asked me to undress for the examination. Without my consent, the doctor proceeded to call students who surrounded me, and my genitalia was used as an educational tool for the students. The trauma that followed was so massive that I have avoided going to hospitals ever since.”

Sheila* detailed:

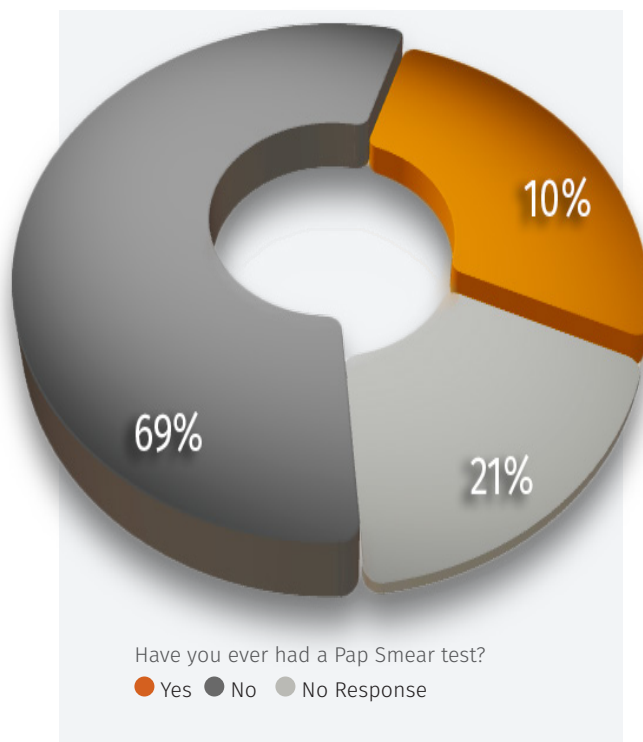
“I was told to lay on the bed, spread my legs, and the doctor called colleagues and students without my consent. He pointed at my genitalia, telling them, ‘This is what we call intersex.’ I was so traumatised that I had to remove my sweater and cover my face because I was surrounded by 7 men who were so curious about my functionality. I had to endure the humiliation as I needed a written medical report, and I had already paid for the service.”

Shakira* stated:

“When I used to go to a private hospital in Nairobi, the staff would ask me to get naked and use me to teach nursing students without my consent.”

2.7.3. Cervical Cancer Screening

Intersex persons born with a female reproductive system require cervical cancer screening and prevention services. A pap smear is used to test whether the cells in the cervix are normal and whether they are predisposed to cancerous cells.⁴² However, the standard medical equipment used is not appropriate for the genitalia of most intersex persons, thus making it very painful to penetrate and challenging to complete the testing successfully. The study found that only 10.42% of the respondents have been able to get a pap smear test, while 68.75% had not done the test. 20.83% did not respond to the question. During the FGDs, most of the respondents confessed to not having heard about pap smear before.



42 WHO, 'WHO guideline for screening and treatment of cervical pre-cancer lesions for cervical cancer prevention' (2016) 6, 96 <<https://apps.who.int/iris/rest/bitstreams/1354685/retrieve>> (accessed 06-03-2023)





The respondents shared the difficulties they have encountered with cervical cancer screening.

Syd* stated that:

“The test was painful and caused a lot of bleeding because the instrument used could not penetrate my genitalia. I told the doctor to stop even before she could complete. I will never try again”.

Andre* stated:

“During a support group meeting, we were educated and encouraged to go for free pap smear, but the test was unsuccessful on me because the device used was too big to fit in my genitalia.”

Tibz* stated:

“The doctor was upfront with me and informed me that the pap smear would be difficult to be conducted on an intersex person. After receiving the information, I willingly opted out of the procedure.”

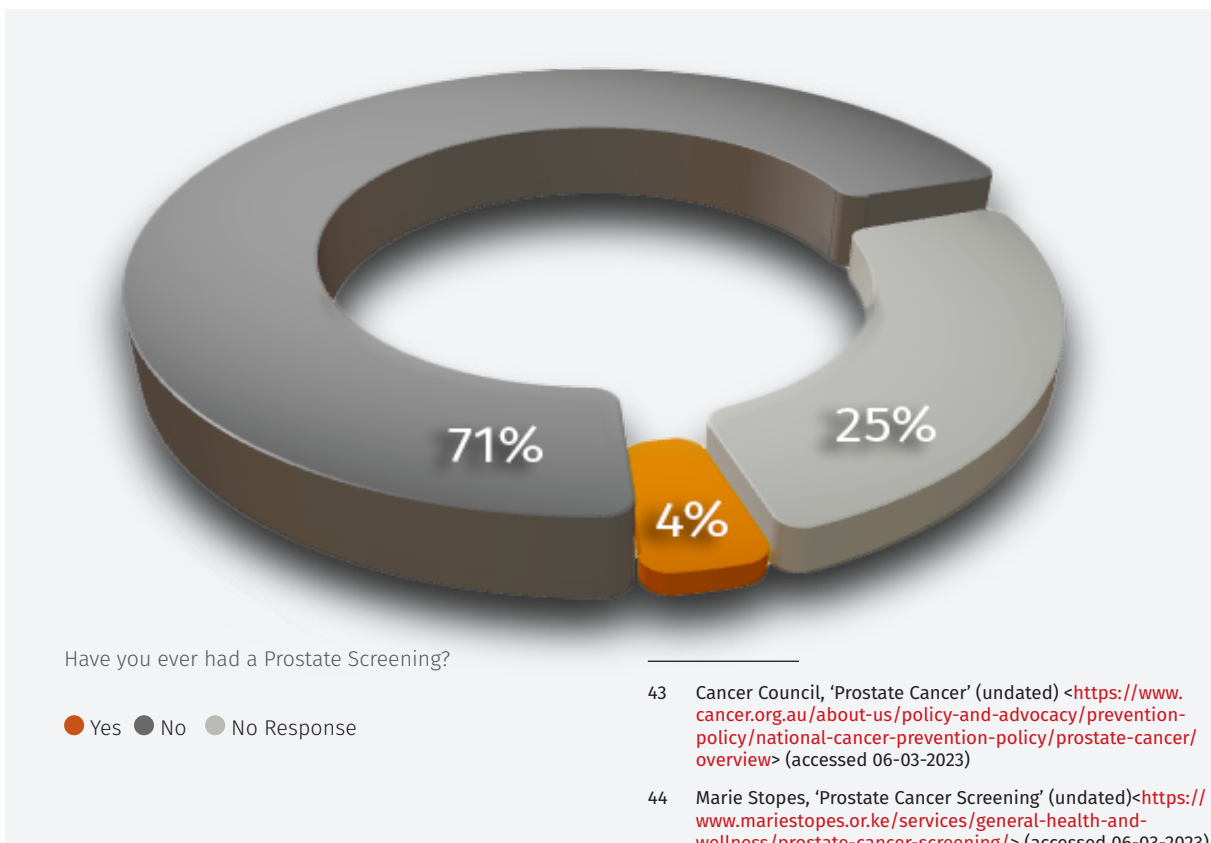
2.7.4. Prostate Screening

Intersex persons born with prostate gland can get prostate cancer⁴³ and therefore screening is necessary. Early screening ensures that if cancer is detected, treatment is started early before it becomes life-threatening⁴⁴ Prostate screening is done in a few health facilities in the country. It is costly, and this was apparent during the FGD sessions when the respondents stated that prostate screening is only done in a few institutions and the associated cost is very high.

Alvin* emphasised that:

“I would like to go for a prostate screening, but I cannot because of the high cost of the procedure.”

Only a paltry 4.2% of the respondents had successfully done the procedure done, while 70.83% of the respondents had not had the procedure done. The other 24.97% did not know what prostate screening was, yet majority of the respondents reported to having prostate gland.





2.7.5. Access to Contraceptives

The Committee on Social and Cultural Rights, through General Comment No. 22, stated that the right to sexual and reproductive health encompasses the right of intersex persons to be respected in seeking sexual and reproductive health services, which include accessing affordable contraceptives.⁴⁵

The study found that most intersex persons could access different family planning methods and contraceptives, but only a few use them. 66.67% of the respondents stated that they did not use contraceptives, while 25% used condoms primarily and 8% of the respondents offered no response.



⁴⁵ Committee on Economic, Social and Cultural Rights, “General comment No. 22 on the Right to Sexual and Reproductive Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)” (2016) E/C.12/GC/22, paragraph 23, 13

During the FGD sessions, the respondents shared their reasons for not using contraceptives, and they included:

- Lack of sexual relations as they would rather not explain their intersex status to sexual partners;
- Ignorance of available contraceptive alternatives;
- Available contraceptives such as condoms and tampons not fitting their anatomy.
- Fear of going to hospitals for contraceptive advice due to stigma, especially for those whose identity documents indicate them as women but they have masculine physical looks and vice versa.

Detailing their reasons for not using contraceptives, the respondents stated as follows:

Jeff* stated:

“Anytime I get intimate, I am forced to cut the male condoms in half to use them successfully on my genitalia because the normal size does not fit me.”

Billmark* stated:

“I cannot engage in painless sex due to my genitalia, and for this reason, I do not see the need to use contraceptives because I am not having sex.”

Marie* stated:

“I thought contraceptives are used by women who do not want to get pregnant. Therefore, I do not know any other types of contraceptives or how they would be helpful to me.”

Komollo* stated:

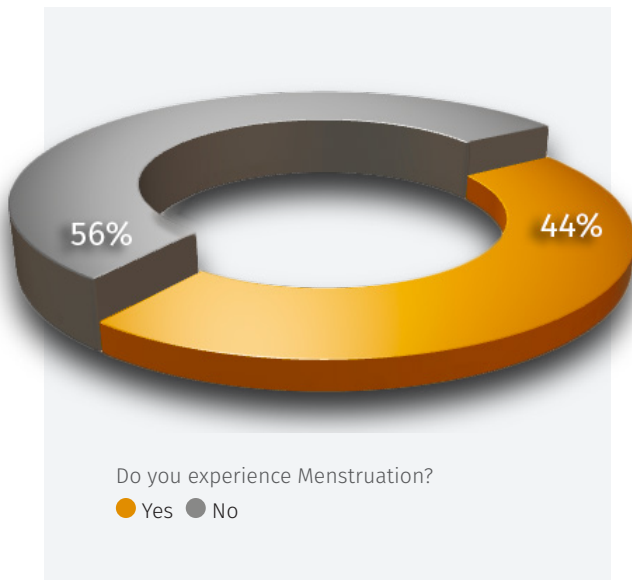
“I have only used condoms. However, the condom is usually too tight that it hurts.”



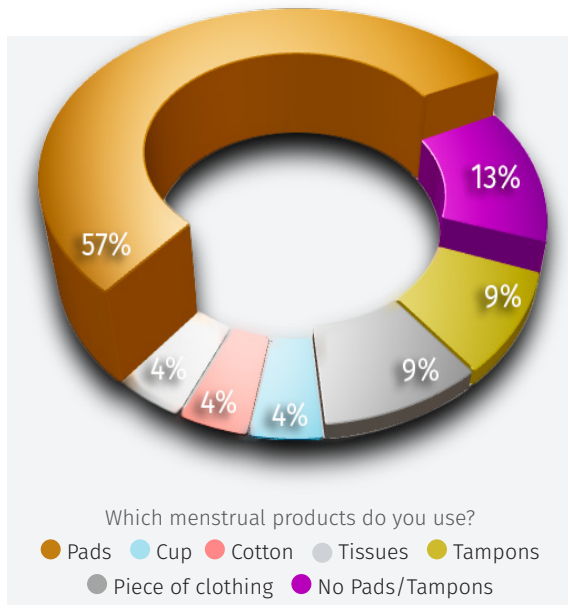


2.7.6. Menstrual Cycle

Intersex persons born with functioning uterus, ovaries and vaginas experience menstrual cycles.⁴⁶ 44% of the study's respondents experience menstrual cycles, while 56% do not



Of the 44% who experience menstrual cycle, 57% use pads, 9% use tampons, 9% use a piece of cloth and 4% use cotton, tissues or a menstrual cup and 13% specified that they do not use pads or tampons.



Pads and tampons are menstrual products which are generally affordable and easily accessible for intersex persons. The downside is that these products are not designed for their anatomy, and intersex persons encounter difficulties wearing them, forcing some not to use them. 22.92% of the respondents who experience menstrual cycles indicated they face challenges in using pads or tampons, while 37.5% faced no challenges and 39.58% offered no response.

The challenges faced, especially in using pads and tampons, were identified as follows:

- Pads are uncomfortable and tight;
- The available pads are not compatible (do not fit or offer full coverage) with their genitalia;
- The pads are unable to accommodate their uncontrollable bleeding;
- Perfumed pads cause infections.
- Tampons are unfriendly to their genitalia.

Johnson* stated that:

"I started menstruating in class 8, and my mother gave me pads. I had no idea how to wear them because I could not wear them comfortably. I suggest that pads should be made with a hole for accommodating intersex persons with a penis."

Hamsa* stated:

"I use a piece of cloth. I specifically gave up on using pads since they do not fit my genitalia properly, and using them severely hurts."

Akish* stated that:

"Pads with perfumes give me infections."

Syd* stated:

"I use cotton as it allows me to cover every part of my genitalia, unlike a pad which is uncomfortable and leaves some parts exposed and blood leaking."

⁴⁶ Natra Care, 'Do Intersex People Have Periods?' (undated) <<https://www.natracare.com/blog/do-intersex-people-have-periods/#>> (accessed 01-03-2023)

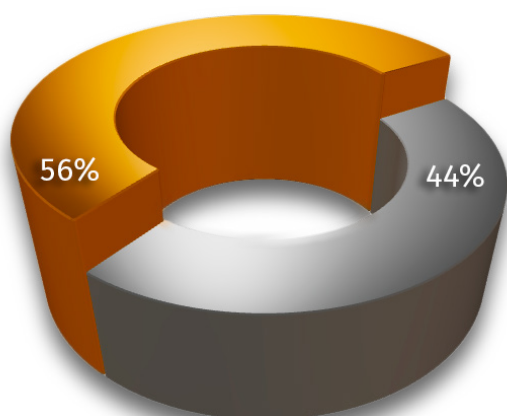




2.7.7. Access Denied: The Washrooms Conundrum

Human Rights Watch reports that being unable to use washrooms or avoiding use is linked to health complications such as urinary tract infections, dehydration and kidney problems.⁴⁷ It is thus advisable to use washrooms when needed. However, intersex persons face challenges in accessing them since their appearances do not fit into either the male or female side.

The study found that 56% of all the respondents' faced challenges in accessing washrooms in public spaces, while 44% did not face any challenges. The majority of the respondents who had no challenges had undergone sex assignment surgeries, and others had documents that were compatible with their appearance and gender expression.



Do you face any challenges in accessing Public Washrooms?

● Yes ● No

Maria* shared his experience, stating: *"I identify as male, but I cannot urinate the regular way like most men because I have to squat, therefore I cannot go to a public washroom that have urinal only. On the other hand, I cannot go to the women's washroom because I look like a man and that would expose me to violence."*

MO* stated:

"I identify and express as a man. I recently went to a mall, and as I was entering the men's washroom, a man who knew me when I was a girl (I was brought up as a girl and have a girl's name) commented that I was gay and even had both genitals. I felt unsafe entering the washroom with him, therefore I went to the ladies' washroom, where the ladies were afraid of me and asked me to leave as they were uncomfortable. So I left, and since I was in town and there was no 'forest' to go to and relieve myself, I had to walk around while pressed by urine."

Brian* stated:

"I cannot go to the ladies or gents. Therefore, I opt not to eat or drink completely when I am out and about to avoid making toilet visits in public. At times I hold the urine in for a whole day until I get home."

John* stated:

"Sometimes I want to go to the women's bathroom because I squat to relieve myself, but I cannot because I usually dress like a man. On the other hand, I do not feel safe going to the men's bathroom."

Riziki* said:

"I have never used public toilets because I fear getting attacked."

Komollo* stated:

"I am usually in a dilemma because if I go to the men's toilet, I am in danger because I have a vagina. On the other hand, if I go to the women's toilet, I am also in danger because I have a penis too and I have been forced to undress before. It is dangerous for me either way."

Hamsa* stated:

"I never go to public toilets unless it is a matter of extreme need because I am usually in danger in both toilets."

⁴⁷ Human Rights Watch, 'Going to the Toilet When You Want': Sanitation as a Human Right' (2017) <https://reliefweb.int/attachments/fcb1528c-e49d-3f46-b6e2-cb3f9e299477/wrdsanitation0417_web.pdf> (accessed 07-03-2023)





2.8. The Cycle of Violence

Ignorance and lack of education by the general public on what intersex status is, has led to intersex persons being discriminated against and violence meted on them in different spheres of their lives. The study found that 85.42% of the respondents had faced violence, be it physical, verbal and/or sexual, as a result of their intersex status, while 14.58% of the respondents had not faced any violence. Of the 85.42% who had experienced violence, 20.83% of the stated they had faced various forms of sexual violence, 62.5% verbal abuse and 16.67% physical violence.



2.8.1. Physical Violence

45.83% of the respondents stated that they had faced physical violence, and some of the ordeal shared were as follows:

Hassina* stated:

“Because I am intersex, no one in my family understands me or why my genitalia presents as it is. Growing up, I was constantly beaten to make me ‘normal’. When the beatings did not change my intersex status, police officers were sent by my father to beat me up.”

Jeremy* stated:

“My neighbours beat me terribly in the guise that I had stolen a neck chain. They were curious about my genitalia and just wanted to undress me. I was raised as a girl but exhibited male features during puberty, and this prompted hostility because they could not understand nor explain the changes.”

Akish* stated:

“I was once beaten up at night while going to buy charcoal by young men who used to insult me. I was glad that one of the ‘Nyumba Kumi’ elders knew about my intersex status and helped me.”

Komollo* stated:

“I was beaten up at a party without provoking anyone because my friends told people I am intersex.”

John* said:

“I was once beaten up by villagers for what they said was acting like a woman, yet they knew that I was a man. My status was very confusing for them.”

2.8.2. Verbal Violence

85.7% of the respondents stated that they had experienced verbal abuse. The abuses are majorly from parents and society in general.

Dolas* detailed his ordeal as follows:

“My dad has constantly insulted me, and growing up, any mistake that I made, my dad would cane me in front of all my siblings because of my intersex status, which was not the same treatment my siblings got. I am still terrified of my dad and feel uneasy whenever he is beside me. He is against my dressing and has clarified that he will only support me if I decide to dress as a girl. For me, I want to dress as a boy, which is the sex and gender identity that I want to be identified with. On the other hand, my mum does not want to walk with me because she is ashamed of me, pushing me into isolation. When she has guests over, she tells me not to show my face anywhere near the living room, and if I need anything, I should pick it up before the





guests arrive. My elder sister is embarrassed by me, and she shuns me. She does not want to be associated with me, and I cannot even meet her friends. It is heartbreaking to undergo all these humiliations, and I am constantly pained.”

Grace* stated:

“The villagers in my hometown made my life a living hell. I was raised as a girl but was more inclined to do chores traditionally meant for boys. The villagers would insult and laugh at me whenever I did anything, leading to mental anguish. They kept asking whether I was a boy or a girl, and the scrutiny mentally affected me.”

Maria* stated:

“I am a loner because, in the community, people will beat me if I am seen talking to anyone. I have been accused of wanting to convert others to my weirdness and raping children whenever I interact or talk to them. I have been forced into isolation, and I only look for manual work to sustain myself and then return to my rented house in absolute loneliness.”

2.8.3. Sexual Violence

Sexual violence can be perpetrated by family, society and even medical professionals. 41.67% of the respondents stated they had faced various forms of sexual violence.

Vera* detailed as follows:

“I experienced sexual assault from my grandfather, who was curious about my intersex status, and he touched me inappropriately (on my breasts and my genitalia) to examine me. This made me think I was HIV positive because my grandfather was positive.”

Komollo* stated:

“Some people sexually assaulted me at a party, as they tried to pull down my trousers and even tried to rape me when someone told them I was intersex.”

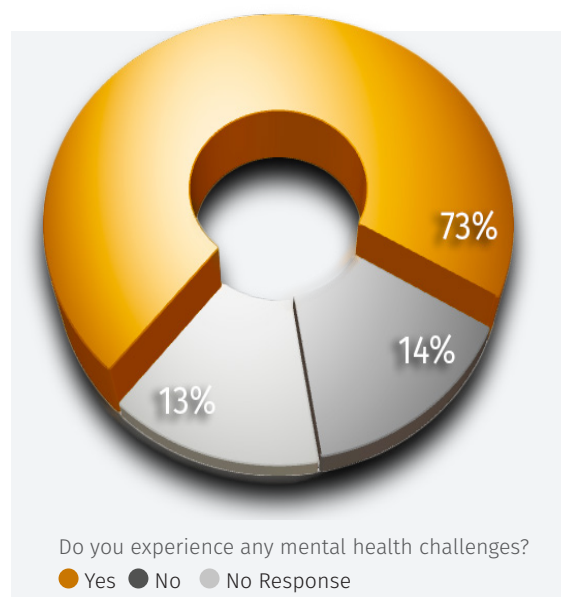
Peter* stated:

“I faced sexual violence at the hospital where a doctor called in his fellow doctors to examine me when I was naked without my consent.”

Intersex persons have had instances of suicidal thoughts and depression. The study found that 73% of the respondents had suffered or suffered from various mental health issues

2.9. The Internal Turmoil: Mental Health Challenges

By dint of being intersex and the negative experiences faced, such as ridicule, violence and isolation, intersex persons have had instances of suicidal thoughts and depression. The study found that 73% of the respondents had suffered or suffered from various mental health issues, while 14% had not suffered and 13% did not respond to this question.





Giving an account of the mental issues suffered,

Simba* stated:

"I used to cry every day when growing up because I had many thoughts about my intersex status. I tried committing suicide once and even drank poison to kill myself. However, that attempt was unsuccessful, and I was rushed to the hospital. Being intersex led to alienation from my siblings because they did not understand me. Additionally, they still blame me to date for breaking up our family due to my intersex status."

Kibz* stated:

"I bought a rope to hang myself because of the mental torture caused by my intersex status. Fortunately, I changed my mind midway. Sometimes I get overwhelmed, cry and ask God why I had to be intersex."

Skylar* stated:

"I used to consider self-harm when I was younger, particularly cutting off my penis. I wished I could swim comfortably with my friends, and I hated that my penis would bulge, yet I was considered a girl. I regularly visit a psychologist, and this has greatly helped with acceptance of my intersex status."

Hamsa* stated:

"I constantly have thoughts of marriage and how I may never marry due to my intersex status. These thoughts usually make me sad because the reality is I may never enjoy such luxuries."

Komollo* stated:

"I suffer from depression because I want to fit into the community but I cannot. I express and identify as female, but my documents indicate that I am male. I have been forced to act and behave like a man, yet I do not want to. I hate this about myself."

Riziki* said:

"I am usually under a lot of stress due to rejection by my family."

John* stated:

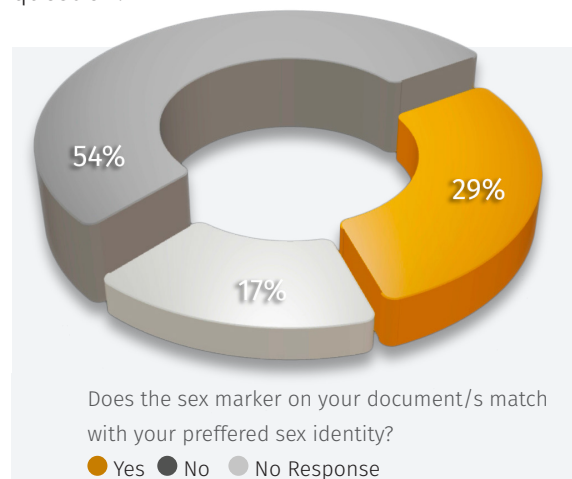
"I hate myself for being intersex. Constant thoughts about my status usually make me stressed and suicidal. I once tried to commit suicide, but it was unsuccessful."

Intersex person's identity remains problematic thereby denying them opportunities to fully enjoy social, economic and civil rights.

2.10. I am Physically Male but my Identity Documents are Female

Majority of intersex persons are in possession of legal identity documents. However, the problem is usually the sex markers indicated on the documents contrast with their acquired sex and gender identity and physical appearance. As a result, their identity remains problematic thereby denying them opportunities to fully enjoy social, economic and civil rights.

The study found that 54.17% of the respondents had identity documents with sex markers that do not match their acquired sex and gender identity, while 29.17% had documents that aligned with their acquired sex and gender identity, and 16.67% did not respond to the question.





Some of the respondents with identity documents with sex markers that do not match their acquired sex and gender identity stated as follows:

Maria* stated:

“I regret taking my identification card before I fully understood my status and what I prefer being identified as. My identity card contains the name of a girl I was given at birth, contrasting with my physical looks and personal identity which is more male. Now I find it hard to use my documents to look for a job, sometimes even passing through a security gate”

Komollo* stated that:

“My documents show that I am male, but I would have liked them to state female or intersex, as I express and identify as female.”

John* stated:

“I would have chosen the female gender marker, as I identify and express as female. However, my documents indicate male, which my father insisted it should be.”

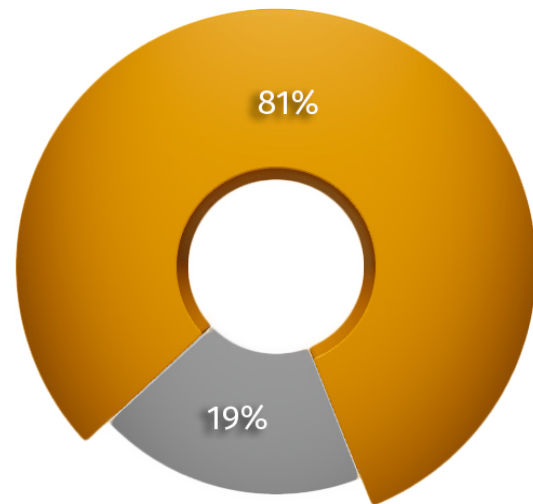
Other respondents had documents that had conflicting gender markers. For instance, Shawn* stated, “My ID indicates that I am male, while my birth certificate indicates that I am female. When I went to apply for ID, the lady at the desk looked at me and filled male, I liked it because I feel more male, I don’t know this will affect me in future”

Jonathan* noted the same issue:

“My ID indicates that I am male, but my name is female, and my birth certificate also indicates female. This issue has caused me a lot of anguish as getting to change my birth certificate is a nightmare, where do I even start to explain? Yet I know I cannot get a passport until this is sorted out”.

2.10.1. National Identity Cards

The study found that 81.25% of the respondents had National Identity Cards (NIDs) while 18.75% did not.

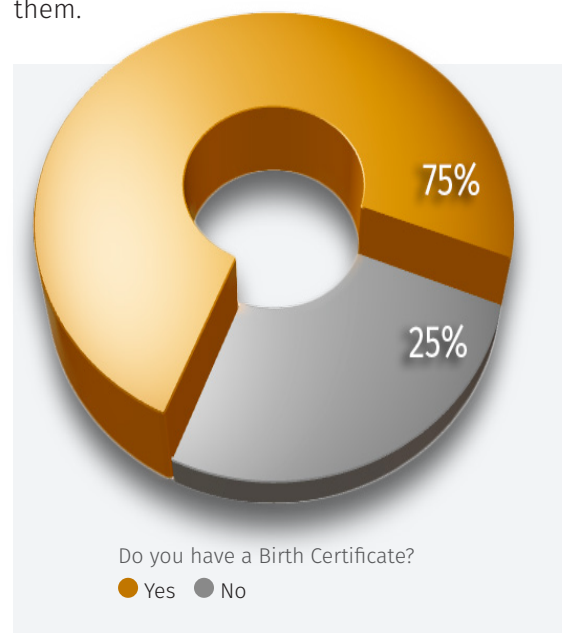


Do you have a National Identity Card?

● Yes ● No

2.10.2. Birth Certificate

75% of the respondents had birth certificates, while 25% of the respondents did not have them.



Do you have a Birth Certificate?

● Yes ● No

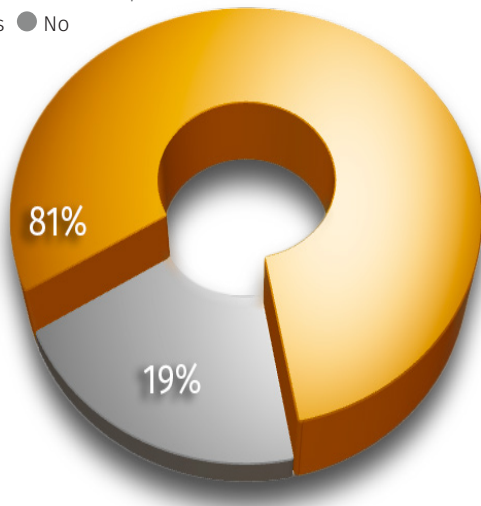




2.10.3. Passports

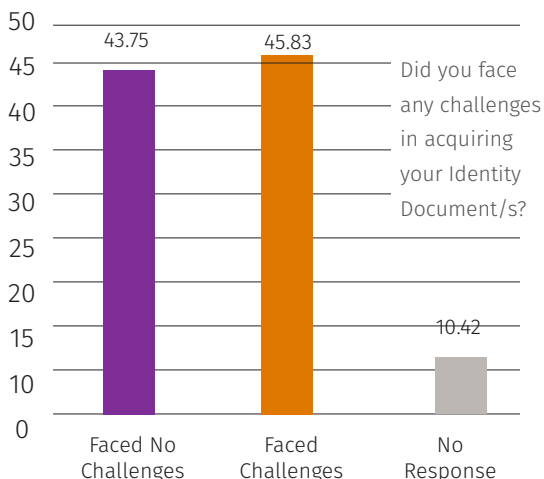
18.75% of the respondents had passports, while 81.25% of the respondents did not have them.

Do you have a Passport?
● Yes ● No



2.10.4. The Uphill Task of Acquiring Identity Documents

Intersex persons face challenges in acquiring secondary identity documents such as NID primarily because their appearance and gender expression do not match the sex markers indicated on birth documents such as birth notification and certificate. 45.83% of the respondents stated that they faced challenges when acquiring their identity documents, 43.75% did not face challenges, and 10.42% gave no response.



The respondents who faced challenges in acquiring their legal documents detailed their struggles as follows:

Kephar* stated:

“When I went to get my NID, one of the officers insisted that I had to provide my school certificates to ascertain that the information on my birth certificate was real. She kept insisting that I can’t be man because my birth certificate has a female name and sex marker. I dress and live as a man”

Agnes* stated:

“Due to the difference between my physical appearance and the marker on my birth certificate, the officers in the registration offices could not place me or who I am, so they did not process my application. My brother-in-law assisted me using a backdoor channel to get my NID.”

Peter* stated:

“I have tried applying for my NID card since 2016 in Nyandarua. Since then, the officers have not processed my NID and keep asking that I provide documents with my real identity. I have been frustrated, and to date, I still do not even have a waiting card.”

Melvin* stated:

“The process for getting my NID took so long, and when I went to pick up my card, my physical appearance had already changed. The officers first refused to issue the ID because my appearance no longer matched the details on the card.”

Some respondents resorted to bribery to get their legal documents without much scrutiny from other officials. For instance,

Andre* stated:

“I did not have a birth certificate since my parents did not get me one, and it is a requirement to acquire the NID. Therefore, I had to bribe someone to get me a birth certificate that showed my preferred sex, so that I could apply for an NID that would suit my identity.”





Sostine* stated:

“My birth certificate and my ID did not reflect the same gender. Therefore, when I wanted a passport, I had to bribe an official to process the passport.”

Johnson* stated:

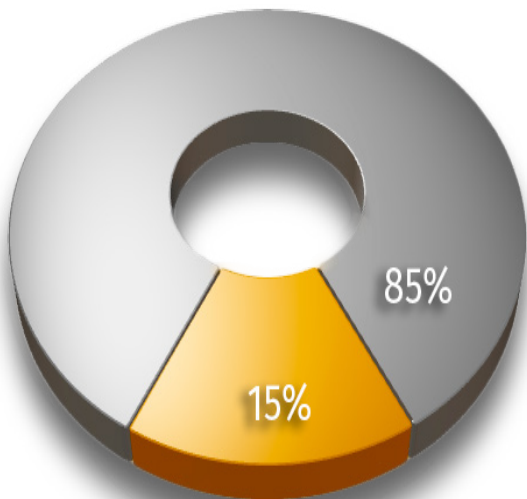
“I had to bribe an official so that my biometrics and photo could be taken when other people were not in the office. This was to avoid being asked to go to either the girls’ or boys’ queue.”

2.10.5. The Push for Survival through Fake Documents

The need to survive and access basic services such as employment, education and health services unrelated to intersex status has forced some intersex persons into acquiring fake documents to lessen stigma and improve their chances for socio-economic opportunities. The study found that 14.58% of the respondents had acquired fake identity documents.

Do you have any fake Identity Document/s?

● Yes ● No



MO* stated:

“I have a fake birth certificate, a fake KCPE certificate and a fake identity card. I got the fake birth certificate to allow me to repeat class 8 exam using a male name so that I could proceed to secondary school as a boy rather than as a girl.”

Syd* stated:

“I got a fake ID to easily access certain services such as M-pesa without being questioned about my sex and gender identity.”

John* stated:

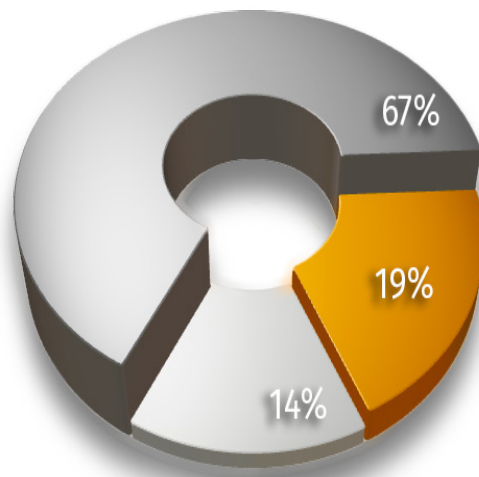
“I used a fake birth certificate to acquire my current identification card.”

2.10.6. Changing Particulars (Name) on Identity Documents is Tedious and Expensive

Changing names to reflect the preferred gender identity and expression ensures that intersex persons have a chance at accessing socio-economic opportunities without the fear of discrimination or stigmatisation. The study found that only 18.75% of the respondents had changed their names to reflect their preferred sex, gender identity and expression, while 66.67% had not and 14.58% offered no response.

Have you attempted to change your name so as to align it with your preferred Sex and Gender?

● Yes ● No ● No Response



66.67% of the respondents who had not changed their names detailed their reasons as follows:

Syd* stated:

“I feel that the legal procedure of name change is so rigid, long and expensive. I don’t even have an idea where to start”





Brian* stated:

“The process of name change is long as I have been trying to change my name. However, I have asked Jinsiangu for help, especially with getting a lawyer to start the process.”

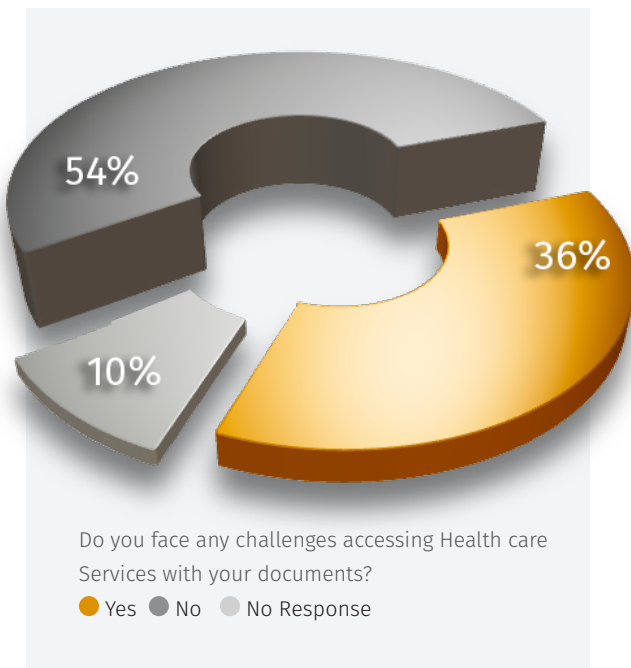
Justin* stated:

“The name change process is very challenging. I had even started the process, but the lawyer told me there was a big problem due to the mismatch of sex markers in my ID and birth certificate.”

2.11. Access to Health Care Services Versus Identity Dilemma: The Interplay

Intersex persons whose sex markers in their identity cards do not match their gender identity and gender expression or appearance are usually stigmatised by medical professionals. They are viewed with suspicion and accused of impersonation.

35.42% of the respondents who sought medical services stated they had faced discrimination in accessing the services, while 54.17% faced no challenges and 10.41% offered no response.



The respondents shared their stigmatisation experiences. For instance,

Meghan* stated:

“I went to a hospital because I was unwell and planned on using my private insurance card. At the reception, I gave out my card. Instead of directly asking me questions because my card reflects a different sex from what I identify with/ look like, the receptionists and nurses resorted to whispering amongst themselves and calling their colleagues to look at my card. They would look at the card, look at me, and continue whispering. Finally, one of them gathered the courage to ask whether that insurance card was mine. I was angry at that point and scolded them for their behaviour.”

Charles* stated:

“I once went to Kenyatta Hospital, and I was in the waiting area waiting for my turn. The name I was given at birth was called, it was a female name, and I present as masculine. I stood up, but the scrutiny from the nurses was so humiliating that I had to lie to them that I was in the company of the female who was called to avoid further scrutiny. I waited a few minutes and then bolted to the doctor’s consultation room, skipping the triage/nursing station. I explained to the doctor that I was intersex, and the doctor was so shocked because he had never seen an intersex person. He called his colleagues, who came and just started staring at me while asking very intimate questions that I was so uncomfortable answering.”

Gerald* stated:

“I have to explain myself almost every time I visit the hospital since most medical personnel think I am lying about my identity. My ID indicates that I am female, but I present and look like a man.”





CHAPTER 3

LEGAL AND POLICY FRAMEWORK ON THE RIGHTS OF INTERSEX PERSONS IN KENYA





3. Introduction

Kenya is a signatory to various international and regional human rights instruments with provisions that protect and promote the rights of intersex persons. Kenyan laws also mirror provisions from these instruments thus with effective implementation is capable of protecting intersex persons from “normalisation” and other rights violations. Further, Article 53 of the Constitution of Kenya comprehensively provide for the children rights.

Progressively, an Intersex Persons Bill has been proposed by Intersex Persons Implementation Coordination Committee (IPICC). However, there is need for massive policy advocacy for review of laws to anchor the ‘intersex’ sex category beyond the current male and female, remove provisions which encourage “normalisation” practices. For instance, the National Reproductive Health Policy 2022-2032, defines intersex as “congenital condition of sex development in which the development of the chromosomal, gonadal or anatomic sex is atypical leading to ambiguous genitalia making it difficult to identify their sex at birth and before development of secondary sexual characteristics at puberty”. The policy further provides that “Sex definition in Kenya is retained as Female or Male, but with a recognition

that intersex is a disabling developmental state presenting with ambiguous genitalia at birth. Intersex can manifest variously from true intersex to normal variants of either the Female or the Male sex marker.... The government shall constitute a multi-disciplinary team to confirm diagnosis, treatment and rehabilitation for the intersex child”.⁴⁸ The presumptions that intersex is a ‘disabling’ developmental state that can be ‘rehabilitated’ to ‘normal variants of female or male sex’ flows from the harmful perspectives espoused by the medical discipline.⁴⁹

This study established that the medicine is the number one driver of “normalization” practices in Kenya. Hence it is imperative that this policy is urgently reviewed to protect intersex persons from IGM and other SRHR violations.

3.1. Bodily Integrity and Autonomy

The right to bodily integrity and autonomy refers to the right of a person to be secure in their being.⁵⁰ This entails the right to make informed decisions about what should happen to one’s body without undue influence. Medical surgeries which negatively impact intersex persons with permanent, physical and psychological damages are the most intrusive to the bodily integrity and autonomy of an intersex person.

The Preamble and Article 1 of the Universal Declaration of Human Rights (UDHR) recognises the inherent dignity of all human beings and provides that all human beings are equal in dignity. The Yogyakarta Principles plus 10 expressly provide for intersex persons’ right to bodily integrity and autonomy by stating that everyone has the right to bodily integrity and autonomy regardless of sex characteristics, gender identity or gender expression.⁵¹ Articles 4 and 5 of the African Charter on Human and Peoples’ Rights (ACHPR) also provides for the respect of the integrity and dignity of every person.

The recent African Commission’s Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa calls on states to guarantee intersex persons’ rights to make their own decisions regarding their bodily integrity and autonomy by stopping non-consensual genital “normalisation” practices.⁵² In Kenya, the Article 28 of the Constitution guarantees the right to integrity, which is to be respected and protected.

48 National Reproductive Health Policy 2022-2032, 3.4.12, p 28

49 Peter Lee et al, ‘Consensus statement on management of intersex disorders’ (2006) 118(2) Paediatrics, e488-e500

50 Marissa Mallon (n 26) 485

51 Principle 32 of the Yogyakarta plus 10 Principles

52 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)





This right should thus be protected by ensuring that consent and the choice of whether to undergo sex assignment surgery is solely left to the intersex person. Parents and doctors must wait for the intersex child to grow into their own identity and make a choice. The proposed Intersex Persons Bill 2023 recognises the physical integrity and autonomy of intersex persons providing that prior to any medical procedure, health care service providers must obtain informed consent of the intersex person in question. If passed into law and successfully implemented, non-consensual procedures will be reduced tremendously.

3.2. Freedom from Torture

Article 5 of UDHR prohibits any person from being subjected to torture, cruel, inhuman or degrading treatment or punishment. This provision is mirrored in Article 16 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT and Article 7 of the International Covenant on Civil and Political Rights (ICCPR). In regard to torture, the ICCPR further protects people from being subjected to medical experimentation without their consent.

The Article 5 ACHPR and Article 16 African Charter on the Rights and Welfare of the Child (ACRWC) also prohibit any form of cruel, inhuman or degrading treatment. Additionally, article 21 of the ACRWC protects a child from harmful social and cultural practices that discriminate against them based on their sex. Cultural practices meant to “normalise” intersex persons can be considered torturous activities. Additionally, unwarranted and irreversible surgical procedures without consent qualifies as torture.

In 2013, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Mendez, identified unwarranted surgeries on intersex children as abusive and torturous. He opined that “irreversible sex assignment, involuntary sterilisation, involuntary genital normalising surgery without their informed consent, and

these procedures are abusive given that they leave the intersex children with permanent, irreversible infertility and severe mental suffering.”⁵³ He called upon States to repeal laws that allowed irreversible surgeries and treatments without the free and informed consent of the intersex person concerned.

The Yogyakarta Principles Plus 10 in Principle 32 provide that ‘every person has the right to be free from torture and cruel, inhuman and degrading treatment or punishment on the basis of gender identity, gender expression or sex characteristics.’ Principle 10 explains that the right comprises not being subjected to invasive medical procedures to modify sex characteristics without the concerned person’s free, prior and informed consent.

The Constitution of Kenya under Article 29 guarantees freedom from torture. Notably, Article 25 lists freedom from torture as non-derogable, meaning that it cannot be limited by law or even lifted in emergencies. Any “normalisation” practice, whether religious, cultural or medical, that amounts to torturous practice against intersex persons is thus prohibited and cannot be limited by any factor. Article 53 of the Constitution provides protection for all children from all forms of abuse and any harmful cultural practices, the interpretation of which fits cultural “normalisation” practices.

Section 9 of the draft proposed Intersex Persons Bill prohibits harmful practices that are directed towards intersex persons, and makes it an offence for any person to subject an intersex person to harmful practices. As of now, Section 2 of the Bill defines harmful practices as “traditional, customary social practices or behaviours, and medical testing, treatment or procedures, based on binary norms of sex, whether based on good intent or otherwise, that negatively affect an intersex person’s health, social welfare, dignity, physical or psychological integrity, life or enjoyment of human rights.” This baseline established that religious “normalisation” practices take place

53 Juan Mendez, ‘Report of the Special Rapporteur on Torture and other cruel, Inhuman or Degrading Treatment or Punishment’ (2013) A/HRC/28/68 paragraph 77





and is therefore imperative that the draft be revised to include 'religious rituals' in this definition of harmful practices.

3.3. Best Interest of the Child

This principle dictates that in every action concerning a child, the primary consideration is the child's best interests. The Committee on the Rights of the Child emphasised that this principle applies to areas such as the child's right to health. In particular, the Committee stated that:

"...if the outcome of a treatment is uncertain, the advantages of all possible treatments must be weighed against all possible risks and side effects, and the views of the child must also be given due weight based on his or her age and maturity. In this respect, children should be provided with adequate and appropriate information in order to understand the situation and all the relevant aspects in relation to their interests, and be allowed, when possible, to give their consent in an informed manner."⁵⁴

Thus, subjecting intersex children to non-consensual and intrusive medical surgeries violates the best interest of the child doctrine. They should be involved in the decision-making, and their views and consent should be sought first. The Children Act 2022, under section 144 acknowledges that an intersex child is likely to be subjected to infant genital mutilation as a child in need of protection and therefore explicitly prohibits infant genital mutilation in section 23. These provisions enforce the child's best interest in holding off intrusive surgeries until the child can make an informed decision. Further, section 8 of the Children Act emphasises that in any consideration of the child, the child's best interest is of paramount importance and triumphs all other considerations and interests. Article 53 Constitution affirms this principle and states that in any matter concerning a child, the child's best interest is of paramount importance. One of the guiding principles of the

⁵⁴ Committee on the Rights of the Children, 'General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests taken as a Primary Consideration' (2013) CRC/C/GC/14 paragraph 77

draft Intersex Persons Bill is the best interest of the child, as the principal consideration prior to any medical procedure or treatment in relation to an intersex person.

3.4. Legal Recognition

Legal recognition refers to the "acknowledgement of the existence of a person in law."⁵⁵ The Office of the United Nations High Commissioner for Human Rights (OHCHR) stipulates that the right to recognition entails being registered at birth, as it is only upon registration that other legal and human rights can be realised⁵⁶

"The fulfilment of the right to be registered at birth is closely linked to the realisation of many other rights; socio-economic rights, such as the right to health and the right to education, are at particular risk where birth registration is not systematically carried out, and the protection of children is jeopardised."

Section 7 of the Children Act 2022 specifically recognises the right of an intersex child to be registered at birth. Article 53 of the Constitution of Kenya also guarantees children the right to a name and nationality.

Article 7 of the Convention on the Right of the Child (CRC) and Article 6(2) ACRWC provide that a child has the right to be registered immediately after birth. In Kenya, section 7 of

⁵⁵ Milka Wahu and Shelmith 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' (2022) 33 Stellenbosch Law Review 108 <<https://journals.co.za/doi/abs/10.47348/SLR/2022/i1a5108>> (accessed 15-04-2023)

⁵⁶ Office of the United Nations High Commissioner for Human Rights, 'Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law' (2014) A/HRC/27/22, 2014 paragraph 3





the Children Act 2022 specifically recognises the right of an intersex child to be registered at birth. Article 53 of the Constitution of Kenya also guarantees children the right to a name and nationality. Actualisation of nationality necessitates registration at birth.

The Births and Deaths Registration Act provides for the procedure of registration of births and deaths. Section 10 stipulates that every person notifying of the birth of a child shall give particulars of the child, and the particulars include the sex of the child, indicated as either male or female. The registrar, in turn, uses the details in registering the child and issuing a birth certificate. This provision has been amended by section 10 of the Children Act 2022 to include 'intersex' as a third sex category.

The birth certificate details are used to acquire a National Identity Cards (NID) at eighteen years. Section 6 of the Registration of Persons Act provides for issuance of NIDs. Particulars to be filled in the application form include the applicant's sex, male or female, and a copy of the birth certificate.⁵⁷ All other legal identity documents, including but not limited to passports, education certificates, and driver's licenses, use details in the NID.

Before the enactment of the Children Act 2022, the law was oblivious of sex besides the male and female classification hence health care providers left the space for sex particulars blank thereby making it impossible for the child to obtain a birth certificate and other identity documents. This was the issue in R.M. case, where R.M. did not have a birth certificate which made it impossible for him to acquire a NID. He dropped out of school, and his attempts to marry and secure employment in adulthood were futile. Other times a question mark (?) is recorded on an intersex child birth notification forms in the place of the sex marker as was in the case of **Baby A case**.

To avoid this challenge, the common practice in Kenya has been to register an intersex child with details of the dominant sex as observed by

naked eyes or after a sex assignment surgery. Sadly, in many cases as observed in this study, such children develop sex and gender identities at variance with the sex markers assigned at birth. As a result, many children and adult intersex persons hold identity documents that are incongruent with their sex and gender identity and expression. For instance, 54.17% of the respondents in this baseline had identity documents with sex markers that do not match their acquired sex and gender identity. Currently there is no law in Kenya which allows for a change of gender in legal documents, however, the enactment of an intersex persons' law and effective implementation of the Children Act 2022 will improve civil registration of intersex children and persons. This will further ensure that intersex persons can realize other basic human rights essential for their survival.

3.5. Freedom from Discrimination

Article 2 of the UDHR; Articles 2 and 26 of the ICCPR; Articles 2 and 3 of the ACHPR and Article 2 of the CRC stipulate that every person is equal before the law and discrimination is prohibited based on various grounds, including sex. The Yogyakarta Principles, in Principle 2, specifically provide that discrimination includes any exclusion on the basis of gender identity that has the effect of impairing equal protection before the law. Every person is thus entitled to enjoy all human rights without being discriminated against on the basis of gender identity.

In its 2023 resolution, the African Commission urges states to prohibit discrimination based on intersex status in accessing, among others, public services, education, health, and employment.⁵⁸

Article 27 (4) of the Constitution of Kenya prohibits discrimination on the basis of sex, and the court in **Baby A case** affirmed that intersex persons should not be discriminated against based on their sex. The court categorically stated:

57 The Registration of Persons Rules 1948, Laws of Kenya

58 African Commission Resolution on Rights of Intersex Persons in Africa (n 51)





“...Article 27(4) of the Constitution 2010 must be read in its own context and language. It categorically states that there shall be no discrimination “on any ground” from that provision. An inclusive provision is not exhaustive of all the grounds specifically mentioned therein, including sex. That finding will therefore have to mean that intersexuals ought not to be discriminated against in anyway including in the issuance of registration documents such as a birth certificate.”

Non-discrimination of intersex persons is one of the guiding principles of the Intersex Persons Bill 2023. A provision of the draft Bill seeks to ensure full inclusion and participation of intersex persons into the community without being discriminated against based on their intersex status. To this end, the draft Bill’s provisions on, amongst others, amendment of sex markers on legal documents are construed as aiming at ensuring that intersex persons can comfortably fit into the society in seeking employment, education and public services without being discriminated against.

The Second Schedule of the draft Bill further seeks to amend the definition of the term sex to include intersex in the Interpretation and General Provisions Act Cap 2. Once passed into law, prohibition of discrimination on basis of intersex sex will be statutory.

3.6. Freedom from Violence

Principle 30 of the Yogyakarta Principles plus 10 stipulates that every person, regardless of their sexual characteristics, gender identity or gender expression, has the right to be protected by the State from all forms of violence perpetrated by government officials, individuals or groups.

In its recent resolution on promoting and protecting intersex persons in Africa, the African Commission has urged states to ensure that violations against intersex persons are investigated, and the perpetrators are prosecuted. These violations are interpreted to include instances of violence. Yet again, in 2015, the Africa Commission issued Resolution

275⁵⁹ condemning the continuous and increased cases of violence against persons based on, among others, their gender identity. Through this resolution, the Commission urged States to end all these forms of violence and abuses, ensuring that victims have access to justice and the perpetrators prosecuted.

Article 29 of the Constitution of Kenya stipulates that every person has the right to freedom and security, which entails the right not to be subjected to any form of violence from the public or private sphere.

On the other hand, the draft Intersex Persons Bill has provisions for reparation of harm stipulating that intersex persons who suffer any form of violence that is related to their intersex status shall be entitled to reparations, irrespective of any other legal or administrative remedy obtained. This provision is interpreted to mean that violence against an intersex person is prohibited and for any encounter of violence, compensation to the intersex person shall be advanced alongside other legal or administrative remedies.

3.7. Right to Health Care

Article 12 of the ICESCR and Article 16 of ACHPR provide that everyone has the right to enjoy the highest attainable physical and mental health care. Further, Article 25 of the UDHR affirms the right to health for everyone.

On the other hand, principle 17 of the Yogyakarta Principles provides that persons should be able to access the highest attainable standard of physical and mental health without being discriminated against based on their gender identity.

Yogyakarta Principles plus 10 expounds on the right to seek health care, stipulating that states should take all necessary measures to ensure “access to a range of safe, affordable and

59 African Commission on Human and Peoples’ Rights, ‘Resolution 275: Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity’ ACHPR/ Res.275(LV)2014





effective contraceptives, including emergency contraception, and to information and education on family planning and sexual and reproductive health, without discrimination based on gender identity, gender expression and sex characteristics.”⁶⁰

The Committee on Social and Cultural Rights, through General Comment No. 22, stated that non-discrimination as applicable to the right to sexual and reproductive health encompasses the right of intersex persons to be respected for their intersex status and gender identity when seeking sexual and reproductive health services.⁶¹ These services include, among others, access to affordable contraceptives and information on reproductive cancer.

Mental health is also a component of the right to health. The preamble of the Constitution of WHO defines health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.” From its definition, health is taken as not only physical but also the mental well-being of individuals.

Locally, Article 27 of the Constitution of Kenya prohibits discrimination on grounds of sex, and Article 43(1) also provides for the right to health, which entails accessing health care services and reproductive health care. Article 43 (2) further states that nobody should be denied emergency medical treatment.

Section 6 of the Health Act⁶² provides that every person has a right to reproductive health care, and this right includes the right of men and women of reproductive age to have access to affordable and acceptable family planning services. The specific wording of men and women perfectly portrays how society has been socialised to believe that one is either male or female. On the other hand, Section 9 of the Act emphasises consent, stating that a

healthcare provider must obtain the patient's consent before providing any health service. Confidentiality is also key; health providers are not to divulge information about a user/patient's health status or treatment of a user/patient to any other person. Where a patient's information is required for research purposes, section 11 provides that informed consent must first be obtained. However, as established in this study, health care providers rarely seek proper consent from the intersex children, their parents or guardians. Even where consent is provided, it is often uninformed consent.

The bias of the Health Act in referring to only men and women as the ones with a right to reproductive health care is set to be cured by the Intersex Persons Bill if it is passed into law. The draft bill stipulates that intersex persons have the right to full enjoyment of their reproductive health and rights which include the right to get adequate information from facilitates, right to their choices about their sexual and reproductive health; and the right to get treatment from health providers with the expertise on how to treat intersex persons. On overall health of intersex persons, the draft bill provides that intersex persons have the right to highest attainable standard of health which encompasses the right to access health services and be treated with dignity.

60 Principle 17 of the Yogyakarta plus 10 principles

61 Committee on Economic, Social and Cultural Rights, “General comment No. 22 on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)” (2016) E/C.12/GC/22 paragraph 23

62 Health Act No. 21 of 2017, Laws of Kenya





CHAPTER 4

LESSONS FROM MALTA AND SOUTH AFRICA





4. Malta

In 2015, Malta was the first country in the world to explicitly ban intrusive and non-consensual medical surgeries, on the basis that they violate the right to bodily integrity and physical autonomy of intersex persons⁶³ Section 3 of Malta's Gender Identity, Gender Expression and Sex Characteristics Act 2015 recognises the existence of intersex persons and guarantees them the right to bodily integrity. In line with respecting bodily integrity, unnecessary surgeries and sex assignment treatment on minors are prohibited. Section 14 (1) of the Act stipulates that it is only until intersex persons can make informed choices and consent that the procedures can be performed.

However, in exceptional cases, section 14 (2) provides that the parents, alongside an interdisciplinary team, may consent to a medical intervention being performed without the minor's consent. The decision shall be given with the child's best interest being considered as stipulated in section 14(5). Additionally, section 16 indicates that the interdisciplinary team should be composed of medical doctors, human rights experts and psychosocial professionals.

Through a 2018 amendment to the Act,⁶⁴ sanctions were introduced, stipulating as follows:

"Medical practitioners or other professionals in breach of this article shall, on conviction, be liable to the punishment of imprisonment not exceeding five years, or to a fine (multa) of not less than five thousand euro (€5,000) and not more than twenty thousand euro (€20,000)."

Section 3 of the Gender Identity, Gender Expression and Sex Characteristics Act further provides that every person has the right to gender identity and the right to be identified with their preferred gender identity in their legal identification documents. Change of gender

identity and name to reflect the acquired gender identity in the legal identification documents is also guaranteed by section 4(1) of the Act.

Medical documents are not required as proof to justify one's gender identity. Section 3(4) of the Act explicitly states that:

"The person shall not be required to provide proof of a surgical procedure for total or partial genital re-assignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity."

To effect gender change in legal documents, section 4(3) provides that a person is required to lodge an application to the Director of Public Registry, and the only requirement is a declaratory public deed. According to section 5(1), the deed include: "a copy of the act of birth of the applicant; a clear, unequivocal and informed declaration by the applicant that one's gender identity does not correspond to the assigned sex in the act of birth; a specification of the gender particulars; and the first name with which the applicant wants to be registered."

In cases of minors, section 7 of the Act provides that parents can lodge an application in a civil court for a change of gender in the child's legal documents. However, in the determination of the application, the court must be guided by the best interest of the child principle and the views of the child on the matter.

Section 13 of the Act provides that discrimination based on gender identity and sex characteristics is prohibited. It specifically states that the public service has a duty to ensure that discriminatory practices, based on, among others, gender identity and sex characteristics, are eliminated in the provision of services.

Malta's Gender Identity, Gender Expression and Sex Characteristics Act has expansive and ambitious provisions that are framed to protect the rights of intersex persons. However, there is still a disconnect between the provisions

63 KNCHR, Equal in Dignity (n 11) 44

64 Section 31 of Legizlazzjoni Malta <<https://legislation.mt/eli/act/2018/13/eng/pdf/>> (accessed 17-04-2023)





and the actual implementation of some of the provisions. For instance, intrusive and unwarranted medical surgeries on intersex persons still occur in the country. The concluding observation of the Committee on the Rights of the Child in Malta indicated that there were cases of intersex children who were still being subjected to unnecessary surgical procedures, which have irreversible consequences⁶⁵

Further, the sanction introduced for being found liable for conducting intrusive and unwarranted surgeries on intersex persons (imprisonment not exceeding five years, or fine not less than €5,000 and not more than €20,000) has also been widely criticised by Malta's CSOs as being too lenient.⁶⁶

4.1. South Africa

South Africa was the first country in the world to protect intersex persons from discrimination by including the term intersex within the definition of sex in section 1 of the South African Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The Alteration of Sex Description and Sex Status Act provides for the procedure of changing legal sex from the marker that was assigned at birth.

In addition, the Alteration of Sex Description and Sex Status Act provides for the procedure of changing legal sex from the marker that was assigned at birth to the acquired sex and gender. Section 2 of the Act expressly states:

65 Committee on the Rights of the Child, "Concluding Observations on the Combined Third to Sixth Periodic Reports of Malta" (2019) CRC/C/MLT/CO/3-6 paragraph 28

66 NGO Report (for LOIPR), '3rd Report of Malta on the International Covenant on Civil and Political Rights' (2020) 17

"Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender re-assignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register."

Section 2 of the Act further provides that the application is to be accompanied by the birth certificate of the applicant, a medical report corroborating that the applicant is intersex and a report that is "prepared by a qualified psychologist or social worker corroborating that the applicant is living and has lived stably and satisfactorily, for an unbroken period of at least two years, in the gender role corresponding to the sex description under which he or she seeks to be registered."

Challenges with implementing this provision have been reported as applications taking so long to be determined, anywhere between 1 to 7 years⁶⁷ The wait affects the lives of intersex persons, given that they stay with documents that do not match their sex and gender identity. While the long-waiting period is discouraging and can be administratively addressed, the provision of allowing sex change in legal documents is progressive in itself.

The South African Children Act 2005, at section 129(2), stipulates that when it comes to medical treatment and surgical operations, a child may consent to them when they are at least over the age of 12 and have sufficient mental capacity to understand the implications of the treatment. Regarding surgical operations, section 129(3) provides that the child may be duly assisted by the parents in making the decision.

These provisions are interpreted to mean that in cases of corrective surgeries on intersex children, the child must reach the age of 12, make an informed decision, and offer full, free, informed consent. Section 6 (2) of the Act

67 National Intersex Meeting Report, 'National Dialogue on the Protection and Promotion of the Human Rights of Intersex People' (2018) 7 <<https://www.justice.gov.za/vg/lgbti/2018-NationalIntersexMeetingReport.pdf>> (accessed 18-04-2023)





In its recent resolution on promoting and protecting intersex persons in Africa, the African Commission has urged states to ensure that violations against intersex persons are investigated, and the perpetrators are prosecuted. These violations are interpreted to include instances of violence





further states that the child's inherent dignity must be respected in all matters concerning the child.

Section 12 of the Act expressly provides that a child should not be subjected to social, cultural and religious practices that are detrimental.

Additionally, section 12 of the Act expressly provides that a child should not be subjected to social, cultural and religious practices that are detrimental to the child's well-being. *However, like the Maltese law, the success of the South African laws in respect to "normalisation" practices is in doubt. A 2022 report submitted by a right group to United Nations Universal Periodic Review indicates that South African intersex children are still subjected to medical experimentation, non-therapeutic treatments and infanticide.⁶⁸ Further, similar to the Maltese case, the South African health care providers have been blamed for being complicit in pathologising intersex bodies and "normalising" them through surgery and hormonal therapies.⁶⁹*

Like Kenya, majority of South African communities consider intersex persons as 'a bad omen' hence cultural "normalisation" practices, including killing of intersex infants by traditional healers, midwives, and traditional birth attendants, continue despite the law.⁷⁰

Malta and South Africa are model countries with laws that have been mirrored in Kenya's Children Act, 2022 and the draft Intersex Persons Bill. It is therefore imperative that Kenya takes note of the challenges these countries are experiencing, especially the ongoing sex reassignment surgeries despite the existence of progressive laws. Investing in intensive public sensitisation campaigns on the Children Act 2022 and the proposed Intersex Persons law will go a long way to address the disconnect between the law and practice. This has been proven to be effective on comparative social-cultural norms such as advocacy against female genital mutilation.⁷¹

68 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 01.04.2023)

69 M Mudarikwa, E Roos & S Brener 'Submissions to the Office of the United Nations High Commission for Human Rights on Youth and Human Rights Issues' Legal Resources Centre 9 < <https://www.ohchr.org/sites/default/files/Documents/Issues/Youth/LegalResourcesCentre-SouthAfrica.pdf> > (Accessed 01.04.2023)

70 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 01.04.2023).

71 UNICEF 'A Decade of Action to Achieve Gender Equality: The UNICEF Approach to the Elimination of Female Genital Mutilation' (October 2020) 7 <https://www.unicef.org/media/88751/file/FGM-Factsheet-2020.pdf> (Accessed 20.04.2023)





CHAPTER 5

CONCLUSION AND RECOMMENDATIONS





5. Conclusion

This study has identified pertinent challenges that intersex persons face in Kenya. They are subjected to “normalisation” practices, which have severe implications for their bodies and lives. Policy and institutional structures to guarantee protection and fulfilment of their sexual reproductive health rights are almost non-existent. Even health care providers are majorly ignorant of intersex condition and variations and at best hold the harmful view that intersex bodies are ‘deformed’ or ‘abnormal’. The manufacturers of SRHR supplies such as pap smear implements and menstrual pads are oblivious of their needs. Majority of intersex persons have challenges accessing social, economic and civil rights due to incongruency between their identity documents and acquired sex and gender identities and expression. In particular, they face challenges accessing health care, washrooms and they are constantly subjected to violence. These recommendations are all geared towards addressing these challenges.

5.1. Policy Recommendations

Policymakers should:

Formulate regulations to the Children Act 2022, with clear provisions and parameters that govern what is necessary treatment for intersex variations, the age of sex reassignment consent for children, and what is prohibited as intersex genital mutilation. This will ensure that intersex children and adults are able to access necessary treatments, and doctors do not perform sex reassignment or “normalising” surgeries while disguising them as necessary and emergencies. Formulate regulations to the Births and Deaths Registration Act, Cap 149, with guidelines on how birth registration of intersex children is to be effected as envisaged by the Children Act.

Amend the Registration of Persons Act, Cap 107, to allow the change of sex markers in national identification cards (IDs) of intersex adults. Lessons can be drawn from South Africa and Malta, where intersex persons can change their legal sex and gender in documents.

Amend the Health Act 2017 by adding intersex sex in addition to ‘male’ and ‘female’ categories. Pass into law the rights bases Intersex Persons Bill 2023 that comprehensively address all the policy, administrative and institutional challenges intersex persons experience as a minority and vulnerable group in need of protection.

Review the National Reproductive Health Policy 2022 – 2032 by adopting a rights-based definition of intersex person similar to the Children Act 2022, change provisions that retain sex definition as exclusively male and female by adding intersex category, delete terminologies that imply abnormality of intersex condition such as ‘disorder’. Further, the policy should be reviewed to comprehensively provide for RH needs of intersex persons identified by this baseline.

The Basic Education Act, among other policies that govern issuance of education certificates should be reviewed to allow intersex persons change the sex and gender markers to align with their acquired identities. This will go along way to alleviate the social-economic and civic exclusion they are currently experiencing.

Amend the the Interpretation and General Provisions Act by inserting a definition of sex as male, female and intersex.

5.2. Recommendations for the National Registration Bureau

Allocate resources for intensive sensitisation of staff in all departments to ensure accurate and registration of births and deaths of intersex persons, issuance of national identity cards, passports and other documents. This study, and existing cases (including court matters) confirm that stigma and discrimination of intersex persons by those tasked with the responsibility of issuing identity documents greatly contribute to their legal exclusion and the consequent inability to access social, economic and civic rights.







5.3. Recommendations for the Office of Director of Public Prosecution and Attorney General

The ODPP and AG office should collaborate in the prosecution of perpetrators of “normalisation” surgeries as per the Children Act 2022.

Undertake sensitisation of the officers on intersex persons and provisions of the Children Act 2022 to enable them implement effectively.

5.4. Recommendations for the Ministry of Health and Kenya Medical Practitioners and Dentists Council

The Ministry of Health should:

Ensure health care providers are adequately trained about intersex variations and how to handle intersex persons who seek health care. This training will reduce the misdiagnosis, stigma and discrimination that intersex persons face when seeking health care.

Health care providers should educate and counsel parents during prenatal visits to ensure a gradual acceptance of intersex children.

Incorporate intersex education in prenatal counselling. Health care providers should educate and counsel parents during prenatal visits to ensure a gradual acceptance of intersex children upon birth.

5.5. Recommendations for National Hospital Insurance Fund (NHIF)

Classify intersex persons as a vulnerable and marginalised group, and establish special measures to provide for intersex specific treatments at highly discounted rates to ensure that they access expensive life saving treatments such as cryptorchidism and prostate screening.

5.6. Recommendations for Civil Society Organizations

CSOs should:

Sensitise duty holders including staff from the Registrar of Births and Deaths office, the Registrar of Persons, Children Officers and other key stakeholders on the provisions and implementation of the Children Act 2022 regarding intersex persons.

Allocate resources and investigate in advocacy for promoting human rights of intersex persons, including the policy changes listed above.

Sensitise communities and community leaders such as elders ‘wazee wa nyumba kumi’ and continuously create awareness about intersex condition. The awareness and sensitisation exercises can be in the form of physical training and campaigns in the media. These exercises will reduce the prejudices, stigma, violence and discrimination against intersex persons.

Once the negative perceptions about intersex persons are changed, they can, in turn, influence the masses into understanding and accepting intersex persons.





Sensitise religious leaders. Religion can successfully be used as a tool to create social change. Once the negative perceptions that religious leaders may have about intersex persons are changed, they can, in turn, influence the masses into understanding and accepting intersex persons.

Support the formation of intersex persons, parents and guardians support groups. The support groups will sensitise parents on intersex status, and provide a platform for constant education and experience sharing so as to enhance parental understanding and acceptance of intersex children and adults.

5.7. Recommendations for the Private Sector

The private sector should:

Invest in production of intersex-friendly SRHR supplies such as pap smear implements, menstrual pads and tampons. Most intersex persons who menstruate have difficulty using pads and tampons that are technically not designed for their anatomy. Further, contraceptives such as condoms that fit the genitalia of intersex persons should also be procured.

The existing curriculum is highly inadequate on intersex variations and necessary treatments as evidenced by this and other studies.

5.8. Recommendations for the Ministry of Education

The Ministry of Education should:

Adequately sensitise teachers who will then intensify sensitisation of learners on intersex sex which is currently part curricula. This will mould children from a young age to

understand sex beyond male and female. Early understanding will dispel myths about intersex persons and tremendously reduce exclusion and violence against them.

Initiate the revision of medical schools' curriculum. The existing curriculum is highly inadequate on intersex variations and necessary treatments as evidenced by this and other studies. The curriculum should also steer clear of pathologising intersex bodies as deformed or disordered.

5.9. Recommendations for the National and County Governments

In collaboration with the county governments, the national government should:

Introduce gender-neutral washrooms that intersex persons can comfortably use. Malta's government introduced a circular in 2016 that mandated all government entities to assign one-third of toilets as gender-neutral toilets. This will eliminate discomfort of intersex persons and enable them live with dignity.⁷² Kenya can model this practice.

72 Human Rights Directorate, 'Legal Gender Recognition and Bodily Integrity' (2020) <<https://humanrights.gov.mt/en/Pages/LGBTIQ%20Equality/Legal%20Provisions/Legal-Gender-Recognition-and-Bodily-Integrity.aspx>> (accessed 07-03-2023)





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Classify intersex persons as a **vulnerable and marginalised group**, and establish special measures to provide for intersex specific treatments at highly discounted rates to ensure that they access expensive life saving treatments such as cryptorchidism and prostate screening.





Embassy
of the Federal Republic of Germany
Nairobi



Amka Africa
Justice Initiative

“NORMALISATION” PRACTICES
AGAINST INTERSEX PERSONS,
REPORT 2023

For more information, **Reach us**

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