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African Voices: Well behaved women rarely make history

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Abstract

Well behaved women rarely make history: A Botswana transgender woman made history after filling a monumental constitutional case against the government for refusing to legally change her gender marker. By Miles Tanhira In her High court application against the department of Registrar of National Registration, Tshepo Ricki Kgositau who is the Executive Director of Gender DynamiX, [...]

Article



Well behaved women rarely make history:

A Botswana transgender woman made history after filling a monumental constitutional case against the government for refusing to legally change her gender marker.

By Miles Tanhira

In her High court application against the department of Registrar of National Registration, Tshepo Ricki Kgositau who is the Executive Director of Gender DynamiX, a regional transgender right organisation based in Cape Town, South Africa, argues that the State has a duty to fully realise the constitutional protection of rights and issuing her an identity document (Omanang) that clearly reflects her gender identity is fundamental to realising her dignity and security as a citizen. She reasons that

the refusal to change her gender marker is ultra vires her constitutional liberties to dignity, privacy, freedom of expression, freedom from discrimination, inhumane and degrading treatment and equal protection under the law.

In 2011, Kgositau reportedly applied to the Civil and National Registration office in Gaborone to have her gender marker changed from male to female, as “her birth assigned gender does not correspond with her internal and individual experience of gender”. However, the regional registrar denied that change recommending that she seek a court order for the gender marker to be amended. “The registrar denied the change of the gender marker on my Omang document despite the fact that the National Registration Act states that the registrar can use their discretion to allow this change in circumstances where these particulars materially affect the person’s registration,” Kgositau was quoted as saying.

Kgositau submitted her landmark application before the High court on August 4, 2017, represented by Lesego Nchunga of Nchunga & Associates, with the support of the Southern Africa Litigation Centre. Botswana High Court Justice Mothobi has since postponed the case to 12 December. According to media reports, the application also includes supporting evidence on an affidavit from her mother, siblings and relatives, as well as psychological and medical evidence to the effect that her innate gender identity is and has since an early age always been female and that her family has embraced her and loved her as a woman.

There is no law in Botswana which makes it illegal to be transgender, however, the conservative country has also remained mum and lethargic on the issue of crafting LGBT rights inclusive policies. Consequently, this has created a living hell for transgender citizens as state authorities often use other laws - especially the Penal Code- to harass, arbitrarily arrest and detain them. Although hormonal therapy is available in government hospitals, it is usually at the discretion of the predominantly transphobic medical staff, who often expose transgender persons to invasive tests as a precondition for accessing hormonal therapy.



Figure 1. Tshepo Ricki Kgositau

Kgositau's case is a microcosm of the insurmountable challenges experienced many Transgender people across the continent. Her fight with the Registrar is not unique, but a reality for the many African transgender people struggle to overcome the obstacle of having a conflicting gender assigned to them by their governments. Most countries in Africa have a gamut of draconian laws, processes and administrative procedures stipulating the possibilities and restrictions for trans people around the world to change their sex/gender markers and names on official identity documents as these influence access to other rights, and services as well as mobility across borders.

Transgender persons face discrimination when their identification documentation does not match their appearance. For example stigmatisation by health care providers deter trans people from accessing public health care services further compromising individuals' health. Bullying in schools by both authorities and students means many drop out of school. Thus, many a trans persons often find themselves without a family, home or a job, ultimately making it even harder to earn a decent living let alone afford private health care. Transgender job seekers have a torrid time securing employment if they do not conform to employers expectations. As is that were not enough, Transgender people face ostracisation by family, societal marginalisation, name-calling intimidation and even physical violence by both state and non-state actors. Extortion, blackmail and invasion of privacy by police and members of the public who feel they have carte blanche to humiliate and abuse Transgender persons.

The absence of respect and dignity in most instances results in self-harm, risky sexual behaviours, depression and sometimes suicide. manifestly apparent to trans and gender-diverse people that gender marker and name change processes are but a bureaucratic window into the innumerable ways that their countries discriminate against them and prevent them from fully enjoying their human rights.

The breadth of discrimination and procedural obstacles are documented in the Ilga World Trans legal Mapping report: Recognition before the Law (2016). The report states that "there is a dearth of information available for individual countries on legal recognition for transgender people coupled with the lack of explicit provision for gender marker changes, most countries rather alluding indirectly to

the possibility of amendments. In some countries, such as Nigeria, this is compounded by laws that prohibit “posing” as the “opposite sex”--outlawing transgender people’s very existence.”

The report points out that “there are, however, countries with overt provisions for gender marker changes in their legislation (albeit with overwhelmingly pathologising requirements) such as Namibia and South Africa. Namibia’s legislation, for example, allows the state to request “medical reports and institute such investigations as may be deemed necessary”. This often leads to violations of doctor-patient confidentiality, a person’s dignity, and basic human rights, such as the rights to privacy and self-determination. Nevertheless, some communities have managed to access the legislative processes and change their gender markers accordingly. In many other countries, such as Kenya, provision is made for some respite through allowing for a name change and/or change of personal photographs to more closely match a person’s expressed gender and alleviate instances of misgendering.”

According to the report in Botswana, both name and gender marker changes are possible although with pre conditions. For name change the Births and Death Registration Act 48 of 1968, s.13(3)(a) stipulates that : the Registrar must be satisfied that the person has a settled wish and intention to be and to continue to be generally known by the new forename or forenames either in substitution for or in addition to the forename or forenames under which the birth was registered. Although not trans* specific gender marker changes on national id are possible :” (1) Where the registrar is of the opinion that any change in the particulars relating to a registered person materially affects his registration, he shall record the change and notify the Registrar of National Registration of the circumstances and recommend that the person concerned should be issued with a new identity card...”

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The Código do Registo Civil 2015, s. 87 in Angola makes it nominally possible to change, national identification card and passport although with unclear requirements. “Conditions for gender marker change Although s. 78 of the Code does not allow alterations of details entered in the registration of records of the Civil Registrar, However s. 87 permits changes, including change of name where there is a change of facts which alter the legal identity or status of the person. A change of sex marker may also be possible.”

In Malawi National Registration Act 13 of 2010, although not trans specific gender marker change is nominally possible, with unclear requirements. “Section 20(1) which provides that where a change in particulars of a registered person materially affect their registration.” every registered person may when he is satisfied that his appearance has changed so as to make it likely that his identity may be questioned, apply to the district registrar for the issue of a new card with a more recent photograph.”

Mozambique’s Código do Registo Civil 2004 although not trans specific, makes it nominally possible for one to change gender marker and name change on identity card, “Section 85(1) gives the Civil Registrar general authority to make changes when there is a change of facts which alter the legal identity or status of the person registered. Trans people could use this section to change the sex description on their identity document.”

In Swaziland The Births, Marriages and Deaths Registration Act 5 of 1983, s. 8(1) is not transgender-specific but gender marker change is nominally possible with unclear requirements. “Section 8(3) provides that for persons over 21 years of age and if, after registration of birth,

there is a change in “any other particular of a person” not provided for in that section, the person may apply for alteration of the birth register...”

The Zambian National Registration Regulations 254 of 1965, allows for a name change. Although legislation is not trans specific it is nominally possible to change the gender marker on the national identity card. A separate register of all persons who have so changed their names is kept by the Chief Registrar. According to the Registration Act 19 of 1964, Section 9(2): “In any case where a national registration card issued to a registered person ceases in any material particular to accurately represent his identity, such person shall, without undue delay, produce his national registration card and give such particulars as shall be necessary for the issue of a new national registration card to a registrar who... shall issue to such person a new national registration card.”

When it comes to Lesotho and Zimbabwe although there is a possibility for a name change for citizens, gender marker change is not permissible.

For Namibia, The Births, Marriages and Deaths Registration Act 81 of 1963, s. 7B allows for a name change with prohibitive requirements. “The Secretary may on the recommendation of the Secretary of Health, alter in the birth register of any person who has undergone a change of sex, the description of the sex of such person and may for this purpose call for such medical reports and institutes such investigations as he may deem necessary. The Act does not define “change of sex”. Applications in terms of s.7B are done on a case-by-case basis as long as a person can provide medical reports of their ‘change of sex’.”

“Once the application is granted, a trans person can apply for a new identity document and passport. Namibia does not provide gender affirming healthcare in the public health system, this makes the Act largely inaccessible. A transgender person who has not had a “change of sex” could use s. 12(1)(a) of the Identification Act 2 of 1996 which stipulates that “if an identity document does not reflect correctly the particulars of the person to whom it was issued, or contains a photograph which is no longer a recognisable image of that person”, the person shall hand over the identity document to the Minister. Section 12(3) states that the Minister shall cancel it and replace it with an improved identity document. “The majority of trans people who have made applications to update their photographs have not been successful.”

In South Africa, however, the scenario is different from most other African countries because there is legislation which is trans and intersex inclusive. According to the Alteration of Sex Status and Sex Descriptor Act, No. 49 of 2003. “Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolution through natural development resulting in gender reassignment, or any person who is intersex 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.”

The report add that because “there are no directives from the Department of Home Affairs on how to interpret the Act, and in practice, this causes arbitrary obstacles such as requiring proof of gender reassignment surgery, long waiting periods for applications to be processed (averaging 1-7 years), what forms to use and what documents an applicant must bring. Despite the legislation in place, the implementation of this is lacking: clerks are not sensitised or knowledgeable about trans issues resulting in nitpicking and misunderstandings at all levels.”

In 2015 Nadia Swanepoel, a transgender woman made headlines when she went on a hunger strike in protest of unfair treatment by South Africa's Department of Home Affairs, after it withheld her ID application for over three years after she applied for an alteration of her sex description.

History has been made, the date for the hearing is set, it now remains to be seen whether Botswana High court will grant Kgositau and the many transgender citizens their constitutional rights.

Miles Rutendo Tanhira is the Founder and Editor of Queerstion Media an organisation working Transgender asylum seekers and newly arrived persons in Sweden. He is a journalist, feminist and transgender person from Zimbabwe, currently based in Sweden. Miles is an LGBT rights activist a trans* rights activist and a blogger. Miles was also one of the winners of the European Parliament Intergroup on LGBT rights Go visible award. Miles has contributed several writings in LGBT rights and Trans* publications as well as News sites. He has experience in facilitating training on safety and security, leadership and wellness as well as creative expression and documentation. Miles is a photographer whose exhibition, T Bonds a documentation of transgender love as exhibited at Stockholm pride as well as Stockholm, trans festival He has also directed the documentary (In) visible, (2014) narratives of LGBT asylum seekers in Sweden.

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