



**UNIVERSITY OF NAIROBI**

**FACULTY OF LAW**

**MASTER OF LAWS (LL.M) PROGRAMME**

**FROM INEQUALITY TO DIGNITY: AN ANALYSIS OF RIGHTS OF TRANSGENDER**

**PEOPLE IN NAIROBI COUNTY**

**A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF THE  
DEGREE OF MASTERS OF LAWS IN THE FACULTY OF LAW OF THE UNIVERSITY OF NAIROBI**

**BY:**

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**DATE: 9<sup>TH</sup> JUNE 2023**

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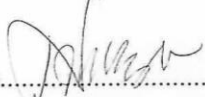


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## **DEDICATION**

To Almighty God and my lovely family, my pillars of strength and sources of hope.

## **ACKNOWLEDGEMENTS**

I am grateful to the Almighty God, without whose Grace I would not have made it this far. I am also forever thankful to my family, which has supported me at every stage of this journey. Furthermore, I want to thank the Nairobi University faculty of Law members and the administration team, who have always been at hand to make this journey as smooth and exciting as possible. I also want to thank my Supervisor, Justice Dr. Nancy Baraza, who has patiently worked with me on this paper. Her encouragement and insights have been invaluable. I am, finally, indebted to my research assistants, without whom I would have struggled with data collection.

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## LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights.
APA	American Psychological Association.
COK	Constitution of Kenya.
CRC	Convention on the Rights of the Child.
GID	Gender Identity Disorder.
GQ	Gender Queer.
ICCPR	International Covenant on Civil and Political Rights.
ILGA	International Lesbian, Gay, Bisexual, Trans, and Intersex Association.
KNCHR	Kenya National Commission on Human Rights.
LGBT	Lesbian, Gay, Bisexual, and Trans.
LGBTI	Lesbian, Gay, Bisexual, Transgender, and Intersex.
NGEC	National Gender and Equality Commission.
OII	Organisation Intersex International.
UN	United Nations.
UNHRC	United Nations Human Rights Council.

## LIST OF CASES

*Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others* [2014] eKLR.

*Bellinger v Bellinger* [2002] 2 WLR 409.

*Cossy v United Kingdom* (1990) 13 EHRR 622.

*National Coalition for Gay and Lesbian Equality and Another v Minister of Justice*, ZACC 15, 1999 (1) SA 6 (CC).

*Republic v Kenya National Examination Council & Another Ex Parte Audrey Mbugua Ithibu* [2014] eKLR.

*Sheffield and Horshman* 27 EHRR 163, 206.

**LIST OF CONSTITUTIONS AND STATUTES**

Birth & Death Registration Act.

Children Act.

Kenya Citizen and Immigration Act.

Kenya National Examination Council Act

Prisons Act.

Registration of Document Act.

Registration of Persons Act.

The Constitution of Kenya 2010

## LIST OF INTERNATIONAL AND REGIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3/rev 5, 21 I.L.M. 58 (1982).

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

UN Committee on Economic Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C. 12/1999/10.

UN Committee on the Rights of the Child (CRC), General Comment No. 11 (2009): *Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11.

The Treaty for the Establishment of the East African Community, 1999.

Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

*Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

*International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 17

## CHAPTER ONE: INTRODUCTION TO THE STUDY

### 1.0 Introduction

The condition of being transgender is when one's gender expression or gender identity does not correspond to their biological sex.<sup>1</sup> Sexual orientation is irrelevant to transgender people. In addition, "people who were assigned a sex, typically at birth and based on their genitals, but who feel that this is a false or incomplete description of themselves" and the "on-identification with, or non-presentation as, the sex, and assumed gender, one was assigned at birth" are included in the definition.<sup>2</sup> As can be seen, the transgender case is now primarily presented as a medical illness instead of a consciously chosen lifestyle. The idea is that trans persons frequently possess gender identities, which are typically complex, making them change from one "trans" category into another over time. Transgender people are generally classified into three categories: transvestite, transgender, and transsexual.

Transgender people fall into the category of LGBTQIA+, which stands for Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual people. A Lesbian is a woman who has a significant attraction, primarily to members of the same gender or who identifies as a member of the lesbian community. A gay person is one who has significant sexual attractions primarily to members of the same gender or sex, or who identifies as a member of the gay community. A bisexual person is one who has the potential to be sexually attracted to people of more than one sex and/or gender, not necessarily at the same time, not necessarily in the same way, and not necessarily to the same degree. The transgender term is used for those whose gender expression

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<sup>1</sup> Elias Aboujaoude et al., 'Doubts and Pre-occupations About Being Transgender: Questioning One's Gender Identity or a Case of Obsessive-Compulsive Disorder?'(2021)12 *Frontiers in Psychiatry* <<https://doi.org/10.3389/fpsyt.2021.644114>> Accessed 2 May 2023.

<sup>2</sup> *Cossy v United Kingdom* (1990)13 EHRR 622; Oxford Dictionaries, 'Definition of transgender' (Oxford English Dictionary, draft version, March 2004) <[Definition of transgender](#)> Accessed 2 May 2023.

or identity is not congruent with the sex assigned at birth and/or whose gender is not validated by the dominant culture. The Queer term is a derogatory slang by many who reject gender and sexual binaries. Intersex is a general term used for a variety of bodies in which a person is born with reproductive or sexual anatomy that does not fit into the sex binary. Asexual is an umbrella term for those who tend not to have a sexual desire towards others.<sup>3</sup> This work will put a special focus on the transgender persons.

A transgender person can identify with another gender on the traditional gender gamut or outdoors as someone who is gender-neutral, genderqueer, non-binary, or of a third gender. People who identify as transgender may also do so as bigender, pangender, or at other points along the classic transgender continuum or the more inclusive continuums that have in response contributed to recent, incredibly detailed studies.<sup>4</sup> A phase of identity development that includes a deeper awareness of one's self-image, self-reflection, and self-expression is also something that many transgender persons go through. Transgender congruence, in more precise terms, refers to how comfortable and at ease people feel with their exterior look and accept their true selves.<sup>5</sup>

"Gender doesn't have to do with bedmates; it has to do with identity," Christine Jorgensen declared in newsprint in 1979, publicly rejecting transsexuality. At the University of Ulster, Richard Elkins founded the "Trans-Gender Archive" in 1985. The term "transgender" was first

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<sup>3</sup>South Dakota State University, '*LGBTQIA+ Basic terms and definitions*' (South Dakota State University) <<https://www.sdstate.edu/office-multicultural-affairs-accessibility/lgbtqia-basic-terms-and-definitions#:~:text=LGBTQIA%2B%3A%20An%20acronym%20used,member%20of%20the%20lesbian%20community>> Accessed 2 May 2023.

<sup>4</sup>Holly B Kozee et al, '*Measuring transgender individuals' comfort with gender identity and appearance: Development and validation of the Transgender Congruence Scale*' (Psychology of Women Quarterly, 2012) 36, 179-196 <doi:10.1177/0361684312442161> Accessed 2 May 2023.

<sup>5</sup> Holly B Kozee et al, '*Measuring transgender individuals' comfort with gender identity and appearance: Development and validation of the Transgender Congruence Scale*' (Psychology of Women Quarterly, 2012) 36, 179-196 <doi:10.1177/0361684312442161> Accessed 2 May 2023.



used by the International Conference on Transgender Law and Employment Policy in 1992 to refer to "transsexuals, trans genderists, cross-dressers," and anyone who was transitioning.<sup>6</sup>

Additionally, gender identity disorder is frequently interpreted to mean same-sex relationships. Gay weddings or same-sex relationships result from two consenting individuals who share a similar gender identity or biological make-up. Therefore, a homosexual is someone who experiences a sexual attraction to another gay.<sup>7</sup> In the same manner that a transsexual person differs from a transvestite person, a transsexual person can be easily identified from a homosexual person. A transvestite enjoys dressing in the attire of the other sex, usually for sex-related reasons. Lord Nicholls of Birkenhead identified Gender Identity Disorder (GID) in a paragraph for the House of Lords in the *Bellinger v Bellinger* case.

The distinctions made previously were founded on this. The cause of GID appeared to be unknown in the landmark case *Bellinger v Bellinger* [2002] 2 WLR 409. Eminent medical experts served as advisors and practitioners in the Court of Appeal. In their expert testimony to the court regarding the condition of GID, Professors Gooren and Green, as well as Mr. Terry noted that "Behind those plain facts lies a human problem which significantly affects a small minority of the population."

## 1.1 Background and Context

People in Kenya who sought to change their gender identity have faced significant hostility and resistance for a very long time.<sup>8</sup> It is suggested that there are significant underlying issues behind

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<sup>6</sup> Harry Benjamin 'The transsexual phenomenon' (Publishing Julian Press, New York, 1966) page 23.

<sup>7</sup> G Fioravanti et al, 'Comparing Heterosexual And Homosexual Sexual Behaviors In A Sample Of Gay And Lesbian Parents Who Had Children In A Previous Heterosexual Relationship' (2016) 13 (5) *The Journal of Sexual Medicine* 1-43 <<https://doi.org/10.1016/j.jsxm.2016.03.196>> Accessed 2 May 2023.

<sup>8</sup> Carolyn P Edwards and Beatrice Blyth Whiting, *Ngecha : A Kenyan Village in a Time of Rapid Social Change* (University Of Nebraska Press 2016).

the slow progress of transgender legal, societal, and medical recognition. Due to this group's under-recognition, there has been unmeasured prejudice, with those who want to be recognized as transgender being viewed as rebels trying to disturb the traditional and cultural peace. People who identify as transgender frequently have multiple gender identities, which causes them to transition over time from one 'trans' category to another. A transgender person, when used broadly, can exceed the traditional gender boundaries in aspects such as dress norms and apparel, to present themselves, and can even go further. Often, whether correctly or incorrectly, it is believed that members of the transgender community are those whose lifestyles seem to defy societal gender norms.

Even though Articles 24, 27, and 81 of the Constitution forbid any type of discrimination against people in any circumstance, including gender, this discrimination still exists. Although it is unclear how far this right can be exercised, Article 24 of the Constitution grants the right to freedom of choice. Kenya adopted the National Gender Policy in 2000, which acknowledges the necessity of a framework for gender mainstreaming.<sup>9</sup> In August 2010, the nation also adopted a new Constitution. The Constitution is specific regarding discrimination and gender orientation and is progressive. The preamble of the constitution and later Article 27 acknowledge that all Kenyans are equal before the law.

The question of whether the government should recognize the transgender community is currently one of the most hotly debated topics in Kenyan legal and social circles. This covers the position of other statutes as well as the constitutional interpretation. Public forums, as well as print and electronic media, are still having these conversations. For instance, the case of self-

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<sup>9</sup> Prince V, 'Men Who Choose to be Women' (Sexology February, 1969) <<http://www.gender.go.ke/index.php/download-document/36-gender-policy-2000.html>> Accessed on 3 November 2021.

declared transgender Audrey Mbugua Thimbu was featured in the Daily Nation Newspaper on June 10, 2013. The applicant Audrey Mbugua Thimbu requested court intervention to compel the Kenya National Examination Council to perform its directive by altering the gender mark on the Kenya Certificate of Secondary Education bestowed to him so that it reflects her new name. This request was made in the miscellaneous application *Republic v Kenya National Examination Council & Another* [2014] eKLR.<sup>10</sup>

Although the applicant was successful in the application, disputes concerning the nature of legislation governing transgender behaviors, as well as how they should be treated by the general public, continue in several state legal jurisdictions. On the other hand, both national and international laws are vibrant about how everyone's human rights must be respected.

Furthermore, the African Charter on Human and Peoples' Rights (ACHPR)<sup>11</sup> provides that:

“Without limitations based on anything, including race, ethnicity, color, sex, language, religion, political opinion, or other status, every individual has the right to exercise the liberties and rights recognized and guaranteed in the existing Charter.”

If the word "person" is used without any distinction for sex, intersex people could also be included. It was noted in the landmark case *Bellinger v Bellinger* [2002] 2 WLR 409 that *"Behind those bare facts lies a human problem, which deeply affects a small minority of the*

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<sup>10</sup> *Republic v Kenya National Examination Council & Another Ex Parte Audrey Mbugua Ithibu* [2014] eKLR.

<sup>11</sup> ACHPR adopted on 27 June 1981, entered into force 21 October 1986.

*population.*" Accordingly, the Court of Appeal invited three eminent consultants—Professor Gooren, Professor Green, and Mr. Terry—to provide expert reports to the court on this condition.

In the paper he filed to the court, published in *Journal of Nature* (1995), vol. 378, Professor Gooren draws the following conclusions:

Finally, there is no evidence to support the theory that transsexualism is a problem of sexual differentiation, or the transformation into a man or women as we typically perceive it. These subjects, like others affected by mistakes in the process, require medical rehabilitation to lead respectable lives as men or women. Since it takes a lot of real-world experience to realize that one was born in the wrong sex, that is, with sexual and nonsexual brain patterns that are inconsistent with the other sex's characteristics, inevitably, such subjects with errors of the sexual differentiation of the brain undergo sex reassignment after birth, sometimes much later in their lives. The established diagnostic and therapeutical approach to transsexuals is that it is a step-by-step process: the choice to treat hormonally depends on the results of the psychodiagnostics process, and the choice to recommend surgery depends on the positive results of the hormone treatment and the real-life test. It is crucial to advise sex reassignment surgery if neither seems to cure the subject's gender issues.' pg 420.<sup>12</sup>

According to Professor Gooren's study from June 20, 1999, "there are major health hazards in refusing sex reassignment to people who qualify for it as a consequence of meticulous and complete psychodiagnostics process. Suicide is one of the hazards, and "stereotyping of

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<sup>12</sup> Loren S Schechter, *Gender Confirmation Surgery: Principles and Techniques for an Emerging Field* (Springer International Publishing 2020).

newborns was not based on any public interest which could justify the interaction with their fundamental rights".<sup>13</sup>

In the case of *Bellinger*, Thorpe LJ made the following observation on the question of 'compelling reasons.

"Is it not inconsistent for the state to offer complete treatment for gender identity disorder through its health services but to refuse the sought recognition through its legal system? The Judge then cited Judge Van Dijk's ruling in *Sheffield and Horshman* (27 EHRR 163, 206), where it was decided that "Transsexualism, however, cannot be ignored by the law on the basis that it is an anomaly that should be disregarded or that sex roles should be viewed as legally irrelevant. The law must adapt to the current state of society. There are transsexuals in our sex-divided society, which also includes transsexuals.

In his concluding remarks, he stated:

"Transsexuals have a wide range of rights that cross over into many areas of the court system. The current allegation falls under the purview of the family justice system. That system must always be adaptable enough to consider social change. Recognition of the right to human dignity and the freedom of choice in one's private life must also be humane and prompt. Making sure the law responds to and reflects social change must be one of the goals of statute law reform in this area. In construing the current statutory provisions, that must also be the goal of the judges in this area."<sup>14</sup>

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<sup>13</sup> Ibid.

<sup>14</sup> Maria Elisa Castro-Peraza and others, 'Gender Identity: The Human Right of Depathologization' (2019) 16 International Journal of Environmental Research and Public Health 978 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6466167/>> accessed 12 December 2019.

Therefore, at first look, it may seem that Kenyan laws are reluctant to address the central concerns raised by transgender activism and are hiding behind the traditional science and biology of sexual orientation deriving from differentiation. This readily exposes trans groups, especially transgender people, to discrimination in employment, healthcare, and education, among other fields in both public and commercial sectors. This discrimination can be absurd.

## **1.2 Problem Statement**

The Constitution of Kenya 2010 springs forth a set of core liberties and human rights. According to Art. 27 of the Constitution, everyone has the legal right to equality and freedom from discrimination. Art. 27 (4) of the COK forbids discrimination based on protected characteristics, which include sex. The provision mentioned above has traditionally been considered to cover both gender identity and sexual orientation. In addition, Art. 32 of the COK provides everyone with the freedom of conscience, and Art. 56 of the COK requires the State to implement affirmative action.

The constitutional rights of transgender individuals in Kenya, despite the legislation mentioned above, are illusory.<sup>15</sup> According to the World Health Organization report, transgender people must deal with various forms of prejudice, many of which overlap. Moreover, myths, prejudices, and false narratives have aided the enslavement of trans people. As a result, a sizeable population of transgender people cannot exercise their right to identical fortification in the Bill of Rights. For instance, many transgender people face discrimination when trying to exercise their social and economic rights, plus the right to housing, the right to education, the right to health care, and the right to own property. In extreme cases, transgender people must deal with harassment,

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<sup>15</sup> Jennifer Gitiri, 'Progressive Nature of Social and Economic Rights in Kenya: a Delayed Promise?' (2020) 6 (1) *Constitutional Review* 133. <<https://doi.org/10.31078/consrev615>>Accessed 3 November 2021.

extortion, and physical abuse. From the finding of the study, it is evident that the law does not exhaustively cater to the needs of the transgender people, and as such, this study aims to fill this lacuna by proposing recommendations that would ensure that this is met and that the rights of all persons including transgender people are fully attained. For example, Article 27 of the 2010 Constitution talks of equality for every citizen and freedom from discrimination but then again fails to cater to the needs of everyone, such as transgender people adequately and exhaustively who face constant discrimination from birth, and thus the study has suggested reforms aimed at ensuring the promotion of equality of transgender in the country.

### **1.3 Research Questions**

The research strives to react to the ensuing precise queries:

- i. The conceptual and theoretical underpinnings of the transgender discourse in Kenya.
- ii. The existing legal, policy, and regulatory framework on the protection of the rights of transgender persons in Kenya.
- iii. The challenges faced by transgender persons in Kenya.
- iv. The legal and policy recommendations that are necessary for the protection of the rights of transgender persons in Kenya

### **1.4 Study Objectives**

The main objective of the study was to analyze the rights of transgender persons in Kenya.

The specific study objectives were as follows:

.To analyze the conceptual and theoretical underpinnings of the transgender discourse in Kenya

- i.To analyze the existing legal, policy, and regulatory framework on the protection of the rights of transgender persons in Kenya.
- ii.To evaluate the challenges faced by transgender persons in Kenya.
- iii.To make legal and policy recommendations necessary for the enhancement of the protection of the rights of transgender persons in Kenya.

### **1.5 Hypotheses**

The study hypothesizes thus;

1. Because they are citizens of Kenya, transgender people have the right to fully exercise all their constitutionally guaranteed rights.
2. The existing legal and policy framework in Kenya does not sufficiently recognize and cater to the rights of transgender persons
3. Transgender persons in Kenya experience varying indignities that undermine the full enjoyment of their rights and freedoms.
4. There is an urgent need to develop policy and legislative frameworks to cater to transgender persons and guarantee the satisfaction of their rights. This includes amending and restructuring the already existing policy and legal frameworks to recognize and cater to transgender persons.



## 1.6 Justification of the Study

While the law must be firm, it must also go forward.<sup>16</sup> The Kenyan legal and policy framework is reluctant to blatantly acknowledge, bravely cater to, and ensure the protection of transgender people's rights within its republic. Despite how disgusting one may find their sexual orientation, there are a lot of transgender persons living in Kenya. As such, we must accord them the same rights as everyone else under the Constitution because they are also people/ human.<sup>17</sup> This study intends to demonstrate that it is the state's duty to ensure that transgender people's fundamental legal rights and freedoms are secured and safeguarded in order to end discrimination and abuse, promote freedom and equality, and stop transgender people from being subjected to it.<sup>18</sup> The recognition and defense of human rights and fundamental freedoms are crucial if we are to protect the dignity of persons and communities, advance social justice, and realize the potential of every person.

Second, it must be acknowledged that the persistent disrespect for and infringement on these people's rights represents a breach of the fundamental rights protected by Kenya's 2010 Constitution as well as other international accords to which Kenya is a signatory. Thirdly, this research will also aid in the understanding of the public and society that the transgender issue is a medical condition that requires the same level of care as other medical conditions.

Furthermore, the law in Kenya is unclear on the transgender issue; thus, research into it is crucial. Being a new piece of legislation, the Kenyan Constitution of 2010 is the topic of several discussions and debates, as well as court references, to give it the full meaning intended by the authors. For both people and the nation, it is crucial that the Constitution's provisions on freedom

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<sup>16</sup> Roscoe Pound, *Introduction to the Philosophy of Law* (Yale University Press, May 1922).

<sup>17</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] ZACC 15 (1) SA 6 (CC), 1998.

<sup>18</sup> *National Coalition for Gay and Lesbian Equality Vs Minister of Justice* [1999] ZACC 15 (1) SA 6 (CC), 1998.

of choice and protection from discrimination are followed. The academia will particularly profit from new insights into transgender behavior and science to have their legal rights upheld by the highest court.

Law students interested in the academic study of constitutional evolution will find the research easily accessible in terms of the substance of the Constitution as well as a summarized material on the developing jurisprudence of the best practices on gender parity from other jurisdictions. Our courts and practitioners will discover trustworthy sources to help them inform their decisions in cases involving transgender results. Law students interested in the academic study of constitutional evolution will find the research easily accessible in terms of the substance of the Constitution as well as a summarized material on the developing jurisprudence of the best practices on gender parity from other jurisdictions. Additionally, reference materials for the various players in the constitutional implementation process will be available to policymakers.

The task of drafting legislation aimed at making the gender quota operative falls to the government through the Office of the Attorney General. The specifics of adopted law could be determined by including this issue as one of the referendum issues in ongoing constitutional amendment discussions.

## **1.7 Theoretical Framework**

### ***1.7.1 The Theory of Constitutional Democracy***

The dual doctrines of constitutionalism and democracy serve as the foundation of this study. Constitutionalism assumes that the government has set boundaries on its authority and that compliance with those boundaries is a condition of that authority. The idea of constitutionalism

can be seen from the perspectives of Natural law, Positivist law, Social Jurisprudence, and Legal Marxism.

Naturalists hold that there is a higher law in the universe that each person must submit to and follow. Natural law has been heavily referenced in both our 2010 constitution and most other constitutions throughout the world. Natural law still exists today and continues to influence the legal system in terms of how people regard nature, the value of human rights, and gender equality.

Natural law is acknowledged, as is the underlying impact of culture, education, and society on how we think. In light of the above statement and particular reference to how naturalists believe that there is a higher law in the universe that each person must submit to and follow, naturalists view the whole notion of LGBTQIA as going against what they believe and stand for. They consider it unnatural and that it goes against the general predetermined order.

Constitutionalism is predicated on the idea that individual rights exist and must be respected.<sup>19</sup> In large, the exercise of free will depends on everyone participating equally in daily life activities, regardless of their gender, religion, race, or any other characteristics. For both the person and society, this is the foundation of democracy.

Positivist theorists hold that once a law is passed and given due process, everyone must abide by it. Our constitution also borrows from positivists in that everyone is required to observe it and that it is the supreme law of the state. Williams describes democratization as the procedure by which the people's rulers provide their political rights. Peace talks, combat, and significant societal change are among them.

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<sup>19</sup> Paul De Hert et al., 'Principles of National Constitutionalism Limiting Individual Claims in Human Rights Law' (2013) 7 (1) *ICL Journal* <<https://doi.org/10.1515/icl-2013-0104>> Accessed 3 November 2021.

Four globally recognized indicators of democracy are as follows; Popular election of parliament and head of state; Continuous accountability of government; Guaranteed civil and political rights; and finally, an independent and influential civil society.

John Rawls is an ardent supporter of a theory of justice that accounts for the just, fair, and equal allocation of costs and rewards.<sup>20</sup>He advocates justice as fairness and imagines a society in which all people have access to fundamental rights. Since it aims to address the difficulties of the weak and marginalized within a society, this idea is crucial to this study.

According to this view, to ensure a socially just society, the State must take proactive measures like affirmative action and other equitable mechanisms to safeguard persons who have historically faced disadvantage. One of the fundamental tenets of government established in the Kenyan Constitution, equality, was one of the concepts of justice proposed by Rawls. He also claimed that "reflective balance," as he put it, was the only way to reach the content of the principles of justice.

Reflective equilibrium is a state where a certain set of concepts and moral judgments are in balance.<sup>21</sup> It has been described as a process that alternates between our well-considered judgments about specific cases, the principles or rules we think apply to them, and the theoretical considerations we think have an impact on whether we accept these well-considered judgments, precepts or guidelines that alter any of these elements.

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<sup>20</sup> John Rawls, *A Theory of Justice* (1st edn, 1971; revised edn, Harvard University Press, 1999).

<sup>21</sup>Devon Brickhouse-Bryson, 'Reflective Equilibrium, Judgments of Coherence, and Judgments of Beauty' (2019) 102 (1) *Soundings: An Interdisciplinary Journal* 31 <<https://doi.org/10.5325/soundings.102.1.0031>> Accessed 3 November 2021.

Law is understood by the sociological school of thought as having a contextual aspect.<sup>22</sup> The theory emphasizes that you need a sociological framework to comprehend law. They emphasize how crucial it is for judges, attorneys, and the legal system to play a part in certain judgments because it is via the legal system that society advances. He emphasizes that the law's ability to serve as a social tool depends on where it is going in the future.

The core principle, according to Rosco Pounds, is that law must move society in a particular direction, that the law is not value neutral, that there must be a conscious decision to be made, and that every society has certain basic underlying assumptions to maintain cohesiveness and order in the society. The fundamental practices and beliefs that guide the principles are what inform the choices, according to Rosco Pounds.<sup>23</sup>

According to Rosco Pounds<sup>24</sup>, the purpose of law is to preserve the status quo and prevent social unrest. He asserts that to maintain social cohesion and order, every society has a set of fundamental underlying principles.

Although he emphasizes that society must acknowledge that it is changing and that we must eventually undertake drastic reforms, he asserts that every society has the ability to decide what is and is not beneficial to it. In addition, he contends that legislation must assume its proper place in society's values rather than serving as a weapon for social engineering. According to him, a

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<sup>22</sup>Milena Korycka-Zirk, 'Wiesław Lang's Legal Thought – Between Sociological and Analytical Jurisprudence' (2020) 45 (2-3) *Review of Central and East European Law* 281–298 <<https://doi.org/10.1163/15730352-bja10010>> Accessed 3 November 2021.

<sup>23</sup> James A Gardner, 'The Sociological jurisprudence of Roscoe Pound (Part I)', (1961) 7 (1) *Villanova Law Review* <[https://warwick.ac.uk/fac/soc/sociology/staff/sfuller/social\\_theory\\_law\\_2015-16/roscoe\\_pound\\_the\\_sociological\\_jurisprudence.pdf](https://warwick.ac.uk/fac/soc/sociology/staff/sfuller/social_theory_law_2015-16/roscoe_pound_the_sociological_jurisprudence.pdf)> Accessed 4 November 2021.

<sup>24</sup> James A Gardner, 'The Sociological jurisprudence of Roscoe Pound (Part I)', (1961) 7 (1) *Villanova Law Review* <[https://warwick.ac.uk/fac/soc/sociology/staff/sfuller/social\\_theory\\_law\\_2015-16/roscoe\\_pound\\_the\\_sociological\\_jurisprudence.pdf](https://warwick.ac.uk/fac/soc/sociology/staff/sfuller/social_theory_law_2015-16/roscoe_pound_the_sociological_jurisprudence.pdf)> Accessed 4 November 2021.

law is more valid the more it complies with societal norms. That legislation must be pursued with a purpose rather than in a vacuum.

### ***1.7.2 Queer Theory***

The institutionalization of some forms and expressions of sexuality and gender while stigmatizing others is critically examined by queer theory. The rise and acceptance of Gay and Lesbian (now LGBT or Queer) Studies in the academic and social field was followed by the development of Queer Theory. Queer Theory questions and opposes inflexible identity categories, sexuality and gender norms, and the oppression and violence that such hegemonic norms are meant to justify. LGBT studies try to understand LGBT persons as stable identities. Queer Theory, which is frequently referred to as the "deconstruction" of LGBT studies, undermines sexual and gender identities while promoting various unrestricted interpretations of cultural occurrences.<sup>25</sup> In order to comprehend gender, queer theory demystifies the binary narrative of biological man and woman. It presented a number of gender and sexuality truths that should support the inclusion of transgender people in the category of gender identity.

This study is premised on the queer theory, given that it presented a number of gender and sexuality truths that supports the inclusion of transgender people in the category of gender identity.

## **1.8 Research Methodology**

This report has used a hybrid methodology that combines desk research with fieldwork. Since the selected respondents are literate, the data gathered from them used highly semi-structured,

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<sup>25</sup> Cynthia Weber, *Queer International Relations Sovereignty, Sexuality and the Will to Knowledge* (Oxford University Press New York, 2016).

open-ended self-administered questionnaires. Due to the lack of knowledge about or awareness of transgender groups in Nairobi, the study concentrated on a large, randomly chosen population. As of the time of data collection, the target population included residents of Nairobi as well as judges, physicians, religious leaders, the Kenya National Commission on Human Rights (KNCHR), the National Gender and Equality Commission (NGEC), Kituo Cha Sheria, and openly identifying transgender people.

The study used both primary and secondary sources of data collection and additionally used extensively curated questionnaires to gauge the information that the public has pertaining to the population of transgender people and their rights. Everyone who participated was made aware that their participation was optional and that their answers would only be used for academic purposes. They were further informed that their details would be kept confidential. Textbooks, academic articles, studies on the subject, and internet resources were used as reliable sources of information.

## **1.9 Literature Review**

According to Jobson et al., transgender people whose gender identification or sexual identity departs from the gender they were born with.<sup>26</sup> According to the authors, transgender women begin with a male body but identify as female, while transgender men start with a female body but identify as male.<sup>27</sup> Additionally, their research indicates that there are persons in Africa who identify as gender non-conforming. However, transgender individuals are susceptible to violence

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<sup>26</sup> Geoffrey A Jobson, 'Transgender in Africa: Invisible, inaccessible, or ignored?' (2012) 9 (3) *SAHARA-J: Journal of Social Aspects of HIV/AIDS* 160.

<sup>27</sup> Geoffrey A Jobson, 'Transgender in Africa: Invisible, inaccessible, or ignored?' (2012) 9 (3) *SAHARA-J: Journal of Social Aspects of HIV/AIDS* 160.

and victimization because of defying the accepted gender and sexual standards.<sup>28</sup> The argument is strengthened by stating that, despite the greater risk of HIV infection among transgender persons being acknowledged, little information is available about this group of people.

Oloka-Onyango claims that since the *Eric Gitari v NGO Co-Ordination Board & Attorney General*<sup>29</sup> judgement, the situation of LGBTI people in Kenya has substantially changed. In this instance, the Court noted that the LGBTI group's fundamental rights under the Bill of Rights were breached for the reasons the Board sought to deny their registration. However, Oloka-Onyango notes that despite the legal declaration on the rights of individuals, including transgender people, they continue to experience numerous rights abuses.<sup>30</sup>

The author specifically believes that LGBTI people face difficulties such as "harassment by state officials, shame and exclusion by family and community, physical assault and threats of death, expulsion from learning institutions, blackmail and extortion and poor access to health care." The author's earlier opinions and the study's hypothesis are consistent. Despite the constitutional acknowledgement of the right to freedom of choice, equality, and against discrimination, transgender people in the country still do not enjoy these rights.

Smith et al., who believe that transgender people are more vulnerable to HIV infection without any helpful medical care, support the position.<sup>31</sup> According to Smith et al a justification,

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<sup>28</sup> Cynthia Weber, *Queer International Relations Sovereignty, Sexuality and the Will to Knowledge* (Oxford University Press New York, 2016).

<sup>29</sup>J Oloka-Onyango, 'Debating love, human rights and identity politics in East Africa: The Case of Uganda and Kenya' (2015) 15 (1) *African Human Rights Law Journal* 28.

<sup>30</sup>J Oloka-Onyango, 'Debating love, human rights and identity politics in East Africa: The Case of Uganda and Kenya' (2015) 15 (1) *African Human Rights Law Journal* 48.

<sup>31</sup>Adrian D Smith et al, 'HIV Burden and Correlates of Infection Among Transfeminine People and Cisgender Men Who Have Sex With Women in Nairobi, Kenya: An Observational Study' (2021) 8 (5) *The Lancet HIV* e274-e283 <[https://doi.org/10.1016/s2352-3018\(20\)30310-6](https://doi.org/10.1016/s2352-3018(20)30310-6)> Accessed 3 November 2021.



transgender people frequently face discrimination or exclusion in the healthcare industry, making it impossible for them to have the same access to care as other people.

The author of the article, Chakrapani, argues for the requirement of transgender-specific statistics from Africa and other regions.<sup>32</sup> The author claims that despite transgender women having a significant HIV burden globally, not enough has been done to record their data accurately. According to a 2018 WHO report, transgender people are only mentioned in 22 percent of national HIV strategic plans in African nations. The report goes on to show that just 9% of the African nations with HIV strategy plans that reference transgender people provide interventions.

In this regard, Chakrapani believes that information relevant to transgender people is essential if medical treatment for this population is to be provided. The number of transgender people, the proportion of the transgender community who are HIV positive, and the intervention measures that have been implemented to uphold their rights, particularly their health rights, should all be included in such data, according to the author.

The health and freedom issues experienced by Kenyans who identify as LGBTIQ are more briefly discussed in the paper by Mung'ala and de Jong.<sup>33</sup> While analyzing the Court's ruling in the Eric Gitari case, the authors note that Kenyans of the LGBTIQ community, which includes transgender people, experience a variety of forms of discrimination.<sup>34</sup> In particular, the authors note that LGBTIQ people experience excessive discrimination despite the fundamental guarantee of equality.

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<sup>32</sup> Venkatesan Chakrapani, 'Need for Transgender-specific Data From Africa and Elsewhere' (2021) 8 (5) *The Lancet HIV* e249-e250.

<sup>33</sup> Lucy Wanjiku Mung'ala et al. 'Health and Freedom: The Tense Interdependency of HIV/AIDS Interventions and LGBTIQ Activism in Kenya' (2020) 6 (1) *A Journal for Body And Gender Research*.

<sup>34</sup> Lucy Wanjiku Mung'ala et al., 'Health and Freedom: The Tense Interdependency of HIV/AIDS Interventions and LGBTIQ Activism in Kenya' (2020) 6 (1) *A Journal For Body And Gender Research*.

For instance, transgender people face discrimination while trying to access public services like hospitals and schools. In her examination of transgender people's access to healthcare, Schwenke adopts a similar point of view.<sup>35</sup>

On the other side, Wilson et al. contend that the laws and regulations in place are to blame for the difficulties transgender women and other sexual minority women in Western Kenya have accessing sexual health care.<sup>36</sup> The authors claim that despite Kenya's 2010 Constitution being progressive in terms of sexual minority women's rights, major changes have not been made. The authors assert that the Penal Code and other laws and practices have been utilized to intimidate and instill fear in transgender people.<sup>37</sup>

Religious leaders in Kenya have also voiced their opinions on transgender people. An essay by Mbote et al. compares the opinions on religious freedom and constitutional rights with those on same-sex relationships and gender nonconformity. According to Mbote et al., the Kenyan Penal Code, particularly sections 162, 163, and 165, and churches' negative sentiments against same-sex relationships go hand in hand. The writers point out that the Constitution offers comprehensive guarantees of protection for civil and human rights despite the Penal Code's provisions, even though transgender people are not specifically mentioned in the highest law.

According to statistical data from the study by Mbote et al., about half of the participating religious leaders have positive sentiments regarding transgender people. According to the poll, 78 percent of participants agreed that it is immoral for a male to present himself as a woman or

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<sup>35</sup>Chloe Schwenke, 'Bewitched or Deranged: Access to Health Care for Transgender Persons' in Colleen O'Manique, Pieter Fourie (eds), *Global Health and Security: Critical Feminist Perspectives* (Routledge, March 2018) 179.

<sup>36</sup>Bianca D M Wilson, 'The sexual health needs of sexual minority women in Western Kenya: An exploratory community assessment and public policy analysis' (2019) 14 (10) *Global Public Health* 1495x.

<sup>37</sup> Bianca D M Wilson, 'The sexual health needs of sexual minority women in Western Kenya: An exploratory community assessment and public policy analysis' (2019) 14 (10) *Global Public Health* 1504.

vice versa when asked whether the "transgender claim" is morally unacceptable. According to the figures above, transgender people are not accepted by society, which keeps them out of the mainstream of the economy, society and politics.

The influence of heteronormativity on the achievement of sexual subgroups' human rights under the purview of Kenya's 2010 Constitution is also critically outlined in a paper by Nancy Baraza. The author talks about several first-hand accounts of sexual minorities in Kenya. As an illustration, her research demonstrates how societal institutions, including churches, schools, families, and the media, have been utilized to further the oppression of sexual minorities.<sup>38</sup> As a result of the myths, stereotypes, and narratives that are aimed at sexual minorities, they are denied access to medical facilities, forced medical procedures, harassed, stigmatized, subjected to extortion, and violence, and have their access to housing restricted.<sup>39</sup>

Nancy Baraza's study also clarifies advice that is essential for Kenya's preservation of its sexual minorities. First, the author contends that drastic legal reforms are required. Her well-informed opinion is that legislation like the Penal Code, including sections 162, 163, and 165 thereof, should be repealed to prevent the rights of LGBTIQ people from being subordinated. The author also believes that comprehensive law on equality and non-discrimination that provides extensive protection of minorities' rights should be adopted in this line.

The author also believes that policy guidelines should be established by the Ministry of Health and the Parliament to improve the protection of LGBTIQ people. Importantly, Nancy Baraza

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<sup>38</sup> Bianca D M Wilson, 'The sexual health needs of sexual minority women in Western Kenya: An exploratory community assessment and public policy analysis' (2019) 14 (10) *Global Public Health* 393.

<sup>39</sup> Bianca D M Wilson, 'The sexual health needs of sexual minority women in Western Kenya: An exploratory community assessment and public policy analysis' (2019) 14 (10) *Global Public Health* 373-384.

also suggests that sexual minorities ought to be involved in the creation of laws and policies.<sup>40</sup> Along with the viewpoints, the author suggests that the public be educated and made more aware of sexual minorities.<sup>41</sup>

According to Schwenke, empowering these people would improve their ability to exercise their liberties and rights.<sup>42</sup> The author uses the term "empowerment" to describe the beginning of affirmative action initiatives to ensure that transgender persons are included in society's economic, social, and political systems. In fact, Schwenke's position is in line with Kenya's 2010 Constitution in Article 56, which mandates that the State put affirmative action policies in place to make sure that minorities and other oppressed groups can reach their full potential.<sup>43</sup> This study took a dive into the comparative analysis of Kenya's legal and policy framework in comparison to that of other vibrant democracies and the norms of the international community. This was aimed at highlighting the government of Kenya's failures in terms of policy and legal protection of transgender people's rights. This study concentrated on nations like South Africa and Malta to determine how these nations have created laws and policies intended to protect and advance transgender people in their own nations. The findings of this comparative analysis showed that these two countries have properly enacted laws geared towards the protection and enhancement of the rights of transgender people in their respective countries, and this also formed some suggestions that will be of use with regard to the protection of the rights of transgender people in Kenya.

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<sup>40</sup> Bianca D M Wilson, 'The sexual health needs of sexual minority women in Western Kenya: An exploratory community assessment and public policy analysis' (2019) 14 (10) *Global Public Health* 401.

<sup>41</sup> Bianca D M Wilson, 'The sexual health needs of sexual minority women in Western Kenya: An exploratory community assessment and public policy analysis' (2019) 14 (10) *Global Public Health* 400.

<sup>42</sup> Chloe Schwenke, 'Empowerment and Transgender' (2010) 53 (2) *Development* 187.

<sup>43</sup> The Constitution of Kenya, 2010, Article 56.

## **1.10 Scope and Limitation**

The study unequivocally shown that the respondents' biased opinions limited the feedback. The primary data on transgender people is still sparse, either because the research in this field is too small or because it has been previously hampered by methodological limitations. There is no distinct population that is publicly acknowledged and recognizable. As a result, bias and assumptions make interviewing a small number of purposefully chosen respondents more difficult. A wider populace may find it difficult to have an open and honest conversation due to the pervasive cultural and religious issues.

## **1.11 Chapter Outline**

The study is divided in five chapters as follows:

Chapter One: This chapter provides a background to the study, a statement of the study problem, the research questions, and the study objectives. The chapter also provides the study hypotheses, justification of the study, theoretical underpinnings, and the literature review upon which the study is based. Lastly, the chapter also provides the study methodology and the limitations of the study.

Chapter Two: This chapter discussed the conceptual and theoretical underpinnings of the transgender discourse in Kenya. This was as against the challenges faced by the transgender people in Kenya and the denial, violation and infringement of their rights and fundamental freedoms.

Chapter Three: In this chapter, the existing legal, policy and regulatory framework on the protection of the rights of transgender individuals in Kenya was discussed. Insights were given

outlining the insufficiencies of the laws in this regard. A comparative analysis was undertaken for Kenyan Laws as juxtaposed against international standards.

Chapter 4: This contained a comparative study of the Kenyan legal and policy framework as juxtaposed with other dynamic democracies and the general international standards. This underlined the shortcomings of the government of Kenya with regard to the policy and legislative protection of the rights of transgender persons.

Chapter Five: This chapter involved data collection and its findings. The chapter offered an overview of the study's data collection methods, such as the use of questionnaires and key informant interviews to analyze the rights of transgender in the county.

Chapter Six: The chapter offered an overview of the study's findings, key recommendations for strengthening Kenya's protection of transgender individuals' rights, and a study conclusion.

## **CHAPTER 2: CONCEPTUAL AND THEORETICAL FRAMEWORK**

### **2.0 Introduction**

The conceptual and theoretical underpinnings of the transgender discourse in Kenya are discussed in this chapter. These underpinnings will support the difficulties transgender persons in Kenya endure, as well as the denial of, violations of, and restrictions on their fundamental rights and freedoms.

According to their culture, religion, historical background, societal structure, geographic location, and general comprehension and awareness of the behaviors considering their ingrained standards, communities typically conclude which traditions are more arbitrary than others.

The idea that there are two sexes, or male and female, is generally held and regarded to be universal. Because of this, intersex and transgender situations are seen as abnormal and problematic, and because of this lack of understanding, intersex people in the community suffer a variety of difficulties. The binary gender concept, which divides sex and gender into masculine and feminine identities, is where this idea came from. Transgender people do not conform to the "normal" societal expectations considering this assertion. The community then exhibits stereotyped behavior, which gives rise to institutionalized marginalization and prejudice.

### **2.1 Conceptual Framework**

The transgender population in Kenya will be the main emphasis of this conceptual framework, even if gender implications apply to people of all genders; men, women, and others.

The study is predicated on the supposition that gender identity is developed and not a consideration at birth and thus this ought to protect their fundamental liberties and rights and improve their access to socioeconomic services during infancy, youth, and maturity. The study is

also based on the notion that transgender people can be recognized as a third sex category on birth registration and their rights and freedoms can be secured and upheld with a more liberal reading of Kenya's 2010 Constitution. The topics that will be explored include sexuality, healthcare, identity, acknowledgment, social institutions, and stigma.

### ***2.1.1 Sexuality***

Humans are different; among other things, we vary in terms of our appearance, physiognomy, geographic location, gender, and sexual orientation. We are never exact replicas of one another. We are all unique in our own ways, and history has both witnessed and documented this truth.

When a child is born, parents and the larger community eagerly await the discovery of the infant's sex. The typical query is, "Is it a girl or a boy?" It can be challenging to have these discussions about transgender people in a nation where there are multiple varying superstitions and beliefs. In this scenario, Kenyan culture does not value indifference since anything that deviates from the established norm is viewed negatively or avoided because it is bad, evil, or unnatural. Recognition of transgender people is, therefore, a contentious issue because it is championed as being just mythical and not African in the minds of many in the culture. As a result, many transgender people have endured unimaginable suffering.

### ***2.1.2 Medicare***

Every parent's instinct is to shield their children from any danger that might loom over them and endanger their existence. This is the justification buried deep in the beam that permits "corrective" surgery on kids to give them a gender, as is customary.<sup>44</sup> These operations provide the parents with the relief they need to give their kids a chance at a good life that complies with

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<sup>44</sup> 'INTERSEX PERSONS & the LAW:John Chigiti SC|Rafubooks.com | Same Day Delivery' (*rafubooks.com*) <<https://rafubooks.com/product-detail/intersex-persons-the-law/>> accessed 6 June 2023.



societal norms for gender identity. Intersex persons experience physical integrity violations after birth, as children, adolescents, and adults, including medical procedures without explicit, previous, ongoing, and full agreement.<sup>45</sup> Along with serious physical disadvantages like osteoporosis, urethral problems, and psychological anguish, this can also result in painful scar tissue.

### **2.1.3 Identity**

Identity is essential to a being's existence. Being who one is, is having an identity.<sup>46</sup> The fact that we each have a unique identity contributes to the fact that we are different. Life gives us the chance to discover who we are, and this usually happens after birth. Unfortunately, if a girl is born, she typically identifies as a woman, and a boy typically identifies as a man.

Most intersex people do not get the chance to define their own identities when they are born. After the "corrective" operation, at least for most of them, they are given a gender, and they will identify as that gender for the rest of their lives. The issue of what happens or ought to happen in cases where a child is given the incorrect gender following such "corrective procedures" emerges. One is bound to the identity they are given when they are raised as a guy but is not one, and vice versa. Given that their relatives, friends, and the larger society will associate and know them based on their assigned identity, what does this ultimately do to them when they grow up and realize they are not their pre-assigned identities? As a result, it is difficult for them to accept

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<sup>45</sup> TGEU, 'Transgender Europe's Trans Rights Europe Map 2015' (TGEU, 2015) < [http://tgeu.org/wp-content/uploads/2015/05/trans-map-Side-B-may-2015\\_image.png](http://tgeu.org/wp-content/uploads/2015/05/trans-map-Side-B-may-2015_image.png)> Accessed 23 November 2021.

<sup>46</sup> Wallace M Nderu, '*Of Intersex Persons, Identity, Recognition and the Law; Born this Way*' (International Commission of Jurists, 2021) <<https://icj-kenya.org/news/the-need-to-recognize-intersex-persons-respect-safeguard-and-uphold-their-rights>> Accessed 23rd November 2021.

that this guy is a female and vice versa. This, tragically, encourages ignorance and the spread of irrational ideas and superstitions.<sup>47</sup>

Our identification documents are the main sources of identity. A birth certificate is given out at childbirth. The name and gender of the kid are among the information on the birth certificate. When a kid is born transsexual, they are entitled to a name. How does the name come about? Our sex impacts our names, whether we are male or female. A parent will go to any lengths to protect their children, even approving "corrective/reconstructive" procedures, so they can "proudly" declare this is my kid, he goes by the name of "John," given the preceding comments regarding Medicare. When "John" is not "John" and "he" is forced to identify as such, what results is a breeding ground for mental suffering that also fosters hatred and unjustified verbal and physical assault.

According to the African Charter on the Rights and Welfare of Children, every child has the right to be named and registered at birth.<sup>48</sup> A legal name and nationality are mandated children's rights under the United Nations Convention on the Rights of the Child.<sup>49</sup> Every child has this right, and it has been granted to them because they are named after birth and registered, but this paper is specifically concerned with intersex children. They must also be registered at birth and given a name, along with whatever marker is listed on the registration form. Not a unisex name, as most parents would choose a name based on the sex of their child. This contributes to the overall picture of identity. Thus, the difficulty arises when the child reaches adulthood and must now identify as who they truly are, and the process of altering their given names to realign with

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<sup>47</sup> Wallace M Nderu, *'Of Intersex Persons, Identity, Recognition and the Law; Born this Way'* (International Commission of Jurists, 2021) <<https://icj-kenya.org/news/the-need-to-recognize-intersex-persons-respect-safeguard-and-uphold-their-rights>> Accessed 23rd November 2021.

<sup>48</sup> The African Charter on the Rights and Welfare of the Child, 1990, Article 6.

<sup>49</sup> The United Nations Convention on the Rights of the Child, 1989, Article 7.

who they are becomes time-consuming and laborious. An order of mandamus ordering KNEC to recall the applicant's KCSE certificate issued in the name of Audrey Mbugua Ithibu was given in the matter of *R v KNEC & AG Ex parte Audrey Mbugua* <sup>50</sup>. A gender mark was not to be present on the replacement certificate.

It is critical that intersex people can select an identity that best represents who they are as individuals, one with which they will feel at ease. It is tragic that most intersex people cannot access most documents because they do not fit into what is thought of as the typical gender binary that would speak to their identity.

#### **2.1.4 Recognition**

There are a variety of opinions on whether transgender people are accepted in Kenya, and this study will demonstrate how trans people are not yet fully accepted in Kenya. As previously mentioned, society by its very nature, finds it difficult to accept ideas that deviate from the standards established before the beginning of time. It is based on superstitions and beliefs of a people that don't really desire to learn more about it when a child is born transgender. How can one assert that transgender people are accepted if society views them as curses? How can parents of transgender children discuss their children openly without fear of being associated with ill luck?<sup>51</sup>

According to the interpretation of the Registration of Births and Deaths Act, "required particulars" include the baby's name and sex at the time of birth, among other things.<sup>52</sup> There are only two genders recognized by the established gender markers: female or male. Where the

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<sup>50</sup> *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR.

<sup>51</sup> Edwin Hancock, 'Pattern Recognition Referees 2018–2019' (2020) 97, *Pattern Recognition* <<https://doi.org/10.1016/j.patcog.2019.107041>> Accessed 23 November 2021.

<sup>52</sup>The Births and Deaths Registration Act, Section 2.

gender of the infant is unknown, a question mark (?) may be used. This demonstrates unequivocally that transgender children are not protected by the law. The lack of a clear guideline in the law about how intersex infants are to be registered at birth again begs the question of why they are not recognized. Having the newborn given a gender that will inform their name and gender marker on their birth certificate will significantly inform the "corrective/normalizing surgery."

When a child's birth has been registered before it has been given a name or when the name under which it was registered has changed, Section 14 of the cited law states that the child's parent or guardian may, within two years of the registration, on payment of the prescribed fee and upon provision of such evidence as the registrar may deem necessary, register the name that has been given to the child.

The law recognizes that a child's name can be changed and that it can be done within two years, but it does not allow for the changing of a gender marker if the one submitted already indicates the baby's real and actual sex. This once further demonstrates that transgender people are not accepted in Kenya.

The Persons Deprived of Liberty Act tries to identify intersex by defining an intersex person as one with both male and female reproductive organs and has been recognized as such by a qualified medical professional.<sup>53</sup>

There is no doubt that people may occasionally find themselves in legal trouble. If this happens and they are arrested, they will typically be kept at a police station or a remand facility if they cannot post the necessary bond. This also applies to transgender people, who will be treated differently in detention facilities based on physical appearance. If the detainee is a guy, he will

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<sup>53</sup>Persons Deprived of Liberty Act, 2014, Section 2.

be housed in a male cell, and vice versa. When it is learned who they are, the abuse will start while they are being confined in these cells. If transgender people were recognized, the law should have been extremely explicit in their holding or remanding cells, but this is not the case. When addressing admission, control, and discharge of inmates, Section 36 of the Prisons Act<sup>54</sup> expressly calls for the separation of female convicts.

In *R. M. v Attorney General and 4 Others*<sup>55</sup>, the petitioner argued that the absence of a jail provision left him vulnerable to cruel and humiliating treatment at the hands of other convicts. He added that the correctional officers stripping him naked caused him extreme shame. This instance demonstrates how institutional discrimination subjects transgender people to inhumane and humiliating treatment.

### ***2.1.5 Social Institutions***

The requirements of transgender people are not considered by our educational system. When someone is identified as transgender in school, others will make fun of them and avoid them. Because transgender people are seen as less than human, most people who consider themselves normal will explicitly refuse to interact with them. In turn, this will cause the transgender youngster to avoid going to school to avoid being made fun of and jeered at by others. The Basic Education Act<sup>56</sup> and the Constitution's provisions<sup>57</sup> for a basic, free, and required education are thereby violated.

The lack of acknowledgement extends outside the realm of education to settings like our houses of worship, jails, businesses, and the broader cultural structure. The issue of what this ultimately

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<sup>54</sup>Prisons Act, 2016, Section 36.

<sup>55</sup> *R. M. v. Attorney General & 4 Others* [2010] eKLR.

<sup>56</sup> The Basic Education Act, 2013, Section 4.

<sup>57</sup>The Constitution of Kenya, 2010, Article 53 (1) (b).

causes to intersex people or parents of intersex children then emerges. The short answer is that they will avoid speaking, or expressing their realities, and will constantly remain in the shadows hoping that no one will ever discover. This fuels the taboo, bad omen, and curse song, which prevents most people from learning about transgender people, who are also people.

### ***2.1.6 Stigma***

Stigma refers to a state in which one bears a physical or figurative mark that has connotations associated with it because of social interaction.<sup>58</sup> From the discussion above, it is clear that transgender people experience stigma in many areas of life and from the majority of social institutions. Many other authors have emphasized how stigma is more closely related to the social connotations attached to a trait.

### ***2.1.7 Binarism***

A concept or belief that there are only two genders and that one's sex or gender assigned at birth will align with traditional social constructs of masculine and feminine identity, expression, and sexuality.

## **2.2. Conclusion**

It is important to recognize those who have come forward to promote our cause, and this includes the Intersex Society of Kenya, which has been recognized as a society. Additionally, a task force has been established to examine policy, administrative, and legal reforms related to intersex individuals in Kenya; in my opinion, this is also a step toward the acknowledgment of intersex individuals. The proposals made by the taskforce will significantly improve the lives of

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<sup>58</sup>Mayo Clinic Staff, '*Mental health: Overcoming the stigma of mental illness*' (Mayo Clinic, 2017) <<https://www.mayoclinic.org/diseases-conditions/mental-illness/in-depth/mental-health/art-20046477>> Accessed 24 November 2021.

transgender people in Kenya. People need to accept this fact if civilization is to advance because more and more people are choosing identities that are not traditional or "conventional."

Transgender people's rights have been infringed because of the failure to recognize them, causing them to endure unjustified amounts of pain and suffering. Break free from the chains of myths and superstitions that prevent people from seeing the reality that intersex individuals exist and are not curses or bad omens, but rather real people just like them. We must first raise awareness at the grassroots level before we can build on that recognition. This acknowledgement is required to defend, uphold, and respect transgender people's rights.

## **2.3 Theoretical Framework**

This subtopic will discuss the theories relating to transgender persons in Kenya.

### ***2.3.1 Gayle Rubin's theory of sexual hierarchy***

This study's foundation is Gayle Rubin's idea of sexual hierarchy, which is highly helpful in examining how social injustices based on sexual orientation are created.<sup>59</sup> The idea that heterosexuality is okay and that being between a man and a woman is acceptable has already been ingrained in society.<sup>60</sup> Any other sexuality that deviates from that range is despised and devalued.<sup>61</sup> According to Rubin, "societies evaluate sex acts according to a hierarchy of sexual value."<sup>62</sup> She creates an erotic pyramid, placing heterosexuals at the top, married couples below,

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<sup>59</sup> Gayle S Rubin 'Thinking sex, Notes for a radical theory of the politics of sexuality' in Richard Parker & Peter Aggleton (eds) *Culture, Society and Sexuality: A Reader* (2007) 158.

<sup>60</sup> Sylvia Tamale 'Researching and theorizing sexualities in Africa' in Sylvia Tamale (ed), *African Sexualities* (Pambazuka Press, 2011) 11.

<sup>61</sup>Rostom Mesli, 'Gayle Rubin's Concept of "Benign Sexual Variation: A Critical Concept for a Radical Theory of the Politics of Sexuality' (2015) 114 (4) *South Atlantic Quarterly* 803–826 <<https://doi.org/10.1215/00382876-3157144>> Accessed 25 November 2021.

<sup>62</sup> Rostom Mesli, 'Gayle Rubin's Concept of "Benign Sexual Variation: A Critical Concept for a Radical Theory of the Politics of Sexuality' (2015) 114 (4) *South Atlantic Quarterly* 803–826 <<https://doi.org/10.1215/00382876-3157144>> Accessed 25 November 2021.

and members of sexual minorities like gays, lesbians, transsexuals, and sex workers at the bottom.

People at the bottom are assumed to be criminals and mentally ill. They receive just a limited amount of institutional and social support. Rubin contends that those at the top of the hierarchy receive rewards from the state in the form of social support, legality, and institutional support. As is the case in all hierarchical situations, aggression, punishment, and actual or implied use of force may be required to uphold uneven power relations.<sup>63</sup>

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<sup>63</sup> Patricia Hill Collins 'It's All in the Family: Intersections of Gender, Race, and Nation' (1998) 13 (3) *Hypatia*  
<sup>64</sup> <<https://www.jstor.org/stable/3810699>> Accessed 25 November 2021.



**The charmed circle:**  
 Good, Normal, Natural, Blessed Sexuality

- Heterosexual
- Married
- Monogamous
- Procreative
- Non-commercial
- In pairs
- In a relationship
- Same generation
- In private
- No pornography
- Bodies only
- Vanilla



**The outer limits:**  
 Bad, Abnormal, Unnatural,  
 Damned Sexuality

- Homosexual
- Unmarried
- Promiscuous
- Non-procreative
- Commercial
- Alone or in groups
- Casual
- Cross-generational
- In public
- Pornography
- With manufactured objects
- Sadomasochistic

**FIGURE 1.** The **sex** hierarchy: the charmed circle vs. the outer limits

Rubin, Gayles S. 1993. Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality. In *The Lesbian and Gay Studies Reader*, edited by H. Abelove, M. A. Barale and D. M. Halperin. NY: Routledge

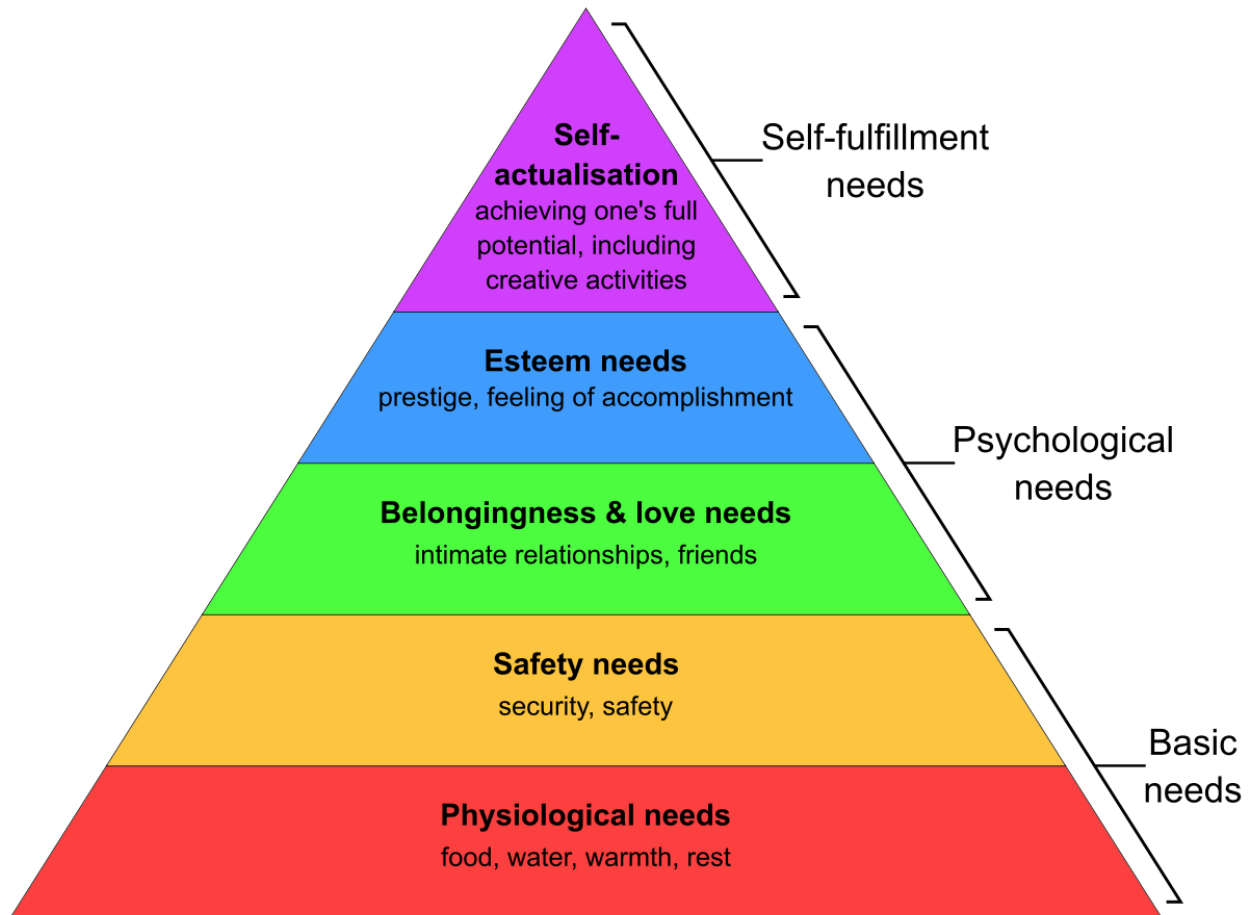
Intersex issues are covered by the lesbian, gay, bisexual, transgender, and intersex (LGBTI) movement even though the Rubin's theory does not specifically mention intersex people because the violations experienced by intersex people are very similar to the violations experienced by the other sexual minorities. Therefore, the findings of Rubin's theory are consistent with the experiences of intersex people. The society assumes that sex or gender is either male or female. Anything that doesn't fit into those categories is discriminated against and doesn't receive public assistance. As a result, transgender people have been denied their right to legal recognition from birth, which is guaranteed by several international human rights conventions to which Kenya is a party.

### ***2.3.3 Abraham Maslow's Theory of Needs***

Maslow suggests that there is a hierarchy of human wants.<sup>64</sup> The demands in this hierarchy vary from more necessities like food and water to more abstract ideas like self-fulfillment. When a lower need is satisfied, the following need up the hierarchy takes center stage, according to Maslow.

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<sup>64</sup> Anon, 'Delusions, Maslows Hierarchy and Cognitive Behavioral Therapy' (2021) 2 (4) *Social Science, Humanities and Sustainability Research* 14 < <https://doi.org/10.22158/sshsr.v2n4p14>> Accessed 26 November 2021.



Maslow's theory of needs is crucial in examining intersex discourse in Kenya. Maslow categorizes

.basic needs to include physiological (food, water, warmth and rest) and safety needs (security and safety)

i. psychological needs to include belongingness and love needs (intimate relationships and friends) and Esteem needs (prestige and feeling of accomplishment)

ii. Self-fulfillment needs to include Self-actualization (achieving one's full potential, including creative and activities)

### ***2.3.3.1 Maslow's basic need concept and transgender persons in Kenya***

Physiological demands and safety needs are among Maslow's basic needs, as was already mentioned. These individuals have experienced tremendous challenges and marginalization because of the community's lack of understanding of intersex people. This group of people has experienced demonization at the hands of several institutions within the republic, and they have encountered extraordinary social, political, and economic difficulties when interacting with other people in the community.<sup>65</sup> The difficulties that these members of our community have faced have been caused by public ignorance and a lack of knowledge of what intersex people are.

Intersex children in schools face a conundrum that is driven by identity confusion about basic necessities and the right to education as guaranteed by the Kenyan Constitution. This is due to a lack of in-depth discussion of this topic in the curriculum and instruction for both primary and secondary schools. By not providing restroom facilities for transgender students, mixed-gender schools have disregarded this special set of youngsters. They only have toilets for boys and girls.

Discrimination is a problem that the intersex population also faces. Unacceptably many transgender people are not receiving the basic medical treatment they require, which is against their constitutional right to have access to health care services.<sup>66</sup> The medical records that can be found in both public and private health facilities only classify sex as being either male or female; they also acknowledge people with disabilities, but they do not take transgender people into account. A transgender person should not be treated as a lesser being because they do not fit a

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<sup>65</sup> Anon, 'Delusions, Maslows Hierarchy and Cognitive Behavioral Therapy' (2021) 2 (4) *Social Science, Humanities and Sustainability Research* 14 <<https://doi.org/10.22158/sshsr.v2n4p14>> Accessed 26 November 2021.

<sup>66</sup> Constitution of Kenya, 2010, Article 43 (1) (a).

specific definition of what it means to be male or female. This includes being denied access to basic services like healthcare, which is a constitutional right.

### ***2.3.3.2 Maslow's psychological need concept and transgender persons in Kenya***

According to Maslow, psychological requirements include esteem needs, needs for love and belonging, and needs for both. Intimate connections, friendships, and a sense of accomplishment and distinction fall under these demands.

The parents themselves contribute to the detrimental psychological impacts in these populations. When transgender people enter adolescence, they often struggle with the decision of whether to live the remainder of their life as a woman or a man. Parents do this by deciding that their transgender child will live as a male, for instance, even though as the child gets older, she feels more like a female. This is most evident when boys attend boys' schools yet feel like girls and should attend girls' schools, and vice versa, leading to role confusion. In consequence, this causes transgender people to experience identity issues.

Most transgender people do not experience the psychological urge to belong. This type of discrimination occurs when a group of people is forced into social exclusion and cannot exercise their freedom of association. They must interact with people of their kind, and because of this, transgender people often have trouble finding and enjoying intimate relationships to the point that they wind up with violent partners.<sup>67</sup>

Finding people who can relate to them on an intimate level or who even comprehend them is challenging for them. They are frequently avoided, and even "normal" people are hesitant to

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<sup>67</sup> Leigh S Goodmark, 'Transgender People, Intimate People, Intimate Partner Abuse, and the Legal System' (University of Maryland Francis King Carey School of Law, 2013) <[https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2464&context=fac\\_pubs](https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2464&context=fac_pubs)> Accessed 23rd November 2021.

mingle with these social subgroups for fear of being humiliated and derided by their fellow citizens.

### ***2.3.3.3 Maslow's self-fulfillment need concept and transgender persons in Kenya***

When a lower need is satisfied, the following need up the hierarchy takes center stage, according to Maslow. This idea entails engaging in creative endeavors to realize one's full potential. Since the first two demands of transgender people were found to be difficult to meet in this research, meeting the third need will undoubtedly be challenging.

## **2.4 Conclusion**

These models, as explained above, have demonstrated the difficulties that transgender people face because of improperly formulated legal frameworks and regulations. Maslow's theory sheds light on the needs that transgender people should have in accordance with their constitutional rights, and as a result, much more work needs to be done before transgender people can fully enjoy their fundamental rights. Additionally, according to Rubin's sex hierarchy theory, transgender people, who are a minority, should have access to the same rights as people who he views as being at the top of the hierarchy

## **CHAPTER THREE: ANALYSIS OF THE LEGAL, POLICY AND REGULATORY FRAMEWORK ON THE PROTECTION OF THE RIGHTS OF TRANSGENDER PERSONS IN KENYA**

### **3.0 INTRODUCTION**

In light of Article 4 of the Constitution 2010, Kenya is a sovereign multiparty republic founded on national values and principles of governance in accordance to Article 10 of the Constitution of Kenya.<sup>68</sup> These values include among others non-discrimination and protection of the marginalized. Additionally, Kenya consists of the territory and territorial waters comprising of Kenya, and any additional territory and territorial waters as defined by an Act of Parliament.<sup>69</sup> The constitution further states that a national state organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.<sup>70</sup> This shows that every person has a right to be offered such services without any discrimination and any limitation of such rights should be as per the law.<sup>71</sup> In light of the above statements, cultural characteristics vary subtly between groups to the point where they are seen as inherent and constant.<sup>72</sup> In accordance with the definition given earlier, transgender people are those who "possess genital, chromosomal, or hormonal traits that do not conform to the prescribed standard for male or female categories as for sexual or reproductive anatomy."<sup>73</sup> Despite medical proof to the contrary, the regulations governing birth registration

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<sup>68</sup> Article 4 of the Constitution of Kenya, 2010.

<sup>69</sup> Article 5 of the Constitution of Kenya, 2010.

<sup>70</sup> Article 6 of the Constitution of Kenya, 2010.

<sup>71</sup> Article 24 of the Constitution of Kenya, 2010.

<sup>72</sup> Robert B Edgerton, 'Pokot intersexuality: An East African Example & [the Resolution of Sexual Incongruity' (1964) 66 (6) *American Anthropologist* <<https://doi.org/10.1525/aa.1964.66.6.02a00040>> Accessed 30 November 2021.

<sup>73</sup> Amnesty International, 'Africa: Making Love a Crime: Criminalization of same-sex conduct in Sub-Saharan Africa' (Amnesty International, 2013) 97.

function under the presumption that there are only two sexes—"male" and "female," which are fixed and unambiguous. When a child is born, it is currently customary everywhere in the world, including Kenya, for the parents to select the child's sex.<sup>74</sup>

When seeking medical care, transgender people in Kenya often experience violence and discrimination. These abuses are partially caused by the pathologizing of gender identities and expressions that defy societal gender norms. Health care for transgender people is unequal in this nation.<sup>75</sup> People who want to have medical operations done to match their physical attributes with their gender identification encounter a restrictive legal and policy climate that ignores their requirements. There are no current recommendations for identifying and treating gender identity problems (GID). In addition to forcing invasive medical interventions, this lack of proper legal recognition at birth also impacts and restricts access to other human rights.<sup>76</sup>

Since Isaac Mwaura<sup>77</sup>, a member of the Special Interest Groups in Parliament, presented a petition to the parliament on behalf of transgender rights on August 26, 2016, there has been an increase in interest in transgender rights in Kenya.<sup>78</sup> As was previously noted, the lack of clear regulations and guidelines is both a cause and a result of the violence and discrimination experienced by transgender people in the nation, necessitating the participation of such lawmakers.

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<sup>74</sup>Sara R Benson, 'Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed' (2005) 12 *Cardozo Journal of Law and Gender* 31.

<sup>75</sup>Zoe Playdon, 'Unequal Treatment of Transgender People' (2016) 353 *BMJ* <<https://doi.org/10.1136/bmj.i2329>> Accessed 30 November 2021.

<sup>76</sup>Amnesty International, '*The State Decides Who I Am: Lack of Recognition for Transgender People*' (Amnesty International, 2014) 29.

<sup>77</sup>The BBC, 'Kenyan MP Pushes For Law to Recognize Transgender People' *BBC* (2 September 2016) <<https://www.bbc.com/news/world-africa-37256913>> Accessed 24 July 2022.

<sup>78</sup>*EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2016] eKLR.



This chapter will examine Kenya's current legal system and determine if it supports the protection and advancement of transgender people's rights. It is wise to look at the historical context of the issue to address the current system dealing with transgender people in Kenya. This study will shed light on how the country's transgender laws have changed over time, looking at both the pre-Constitution of Kenya, 2010, and post-Constitution of Kenya, 2010, periods. By guaranteeing the promotion and preservation of transgender people's rights in Kenya, this chapter will also take a close look at the country's current legal system and determine whether it adequately meets the needs of transgender people living there. The conclusion, which includes the findings, will be the last section of this chapter.

This study tends to highlight the fact that there are still significant gaps and inadequacies in the country's legal rights and recognition of transgender rights. The law itself determines the recognition of bodies that are permissible to be without the intervention of medical, in addition to the society's opinions on gender and sex. Transgender people are perceived as both a biological and legal abnormality because the law also makes it legal to modify bodies that are abnormal.<sup>79</sup>

### 3.1 The historical developments of the protection of the rights of transgender people in Kenya

Prior to Kenya's independence, inequality among the people was a way of life. Most Kenyans were thought to be under a gloomy cloud caused by it. In 1920, Kenya became a protectorate of the British.<sup>80</sup> During that time, the council was presided over by Europeans who were also Arab and Indian representatives.<sup>81</sup> There was no African representative in this council.

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<sup>79</sup> Jo Bird, 'Outside the Law: Intersex, Medicine and Discourse Rights' (2005) 12 *Cardozo Journal of Law & Gender* 65-80.

<sup>80</sup> Constitution of Kenya Review Commission, *Final Report of the Kenya Review Commission*, (CKRC,2005) 18.

<sup>81</sup> Constitution of Kenya Review Commission, *Final Report of the Kenya Review Commission*, (CKRC,2005) 18.

The Legislative Body believed that Africans lacked the capacity to participate in this council. In 1944, Eliud Mathu received a nomination for the Legislative Council. Africans battled tenaciously for self-governance through organizations like the Mau Mau, which fiercely rebelled against the British protectorate and won independence for the continent in 1964. The independence constitution has undergone significant changes over the years due to various amendments.

*Article 82* contained an anti-discrimination clause restricting the use of laws to enact discriminatory clauses. Discrimination, according to Section 83, is "according different treatment to different people attributed entirely or mainly to their characteristics, either by race, tribe, place of origin, color, creed, or sex, while persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges which are not accorded to persons of another such description."<sup>82</sup>

In accordance with sections 70 and 82 of the repealed constitution, the term "sex" was not defined. The case of *R. M. v Attorney General and 4 others*, in which the applicant in this instance claimed to have experienced sex discrimination, highlighted the necessity for a comprehensive definition of sex. The key concerns in this instance are outlined below;

### ***3.1.1 The High Court Judgment in the R. M. v Attorney General and 4 others***

The job of protecting and preserving the fundamental liberties and rights of the Kenyan people falls to the High Court of Kenya. The Kenyan Constitution, which serves as the cornerstone of basic human rights, gives rise to this obligation. One has the right to go to the High Court for assistance if they believe that a fundamental human right has been restricted, infringed, or

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<sup>82</sup> The Constitution of the Republic of Kenya, 1963, Article 82 (3).

threatened. This improves access to justice, particularly for the most vulnerable citizens of the nation whose human rights are frequently violated.

The High Court's ruling in the case significantly contributed to jurisprudence and is thus an excellent resource for this research

project. The independence constitution under which the petitioner submitted his application was abolished by the 2010 Kenyan Constitution, which was proclaimed on August 27, 2010. Therefore, it is important to understand that the Constitution mentioned in the short here refers to the Independence Constitution.

The petitioner in this case, a transgender man who had been found guilty of armed robbery, asked the court to acknowledge his status under the Births and Deaths Registration Act. He believed that being transgender had caused him to experience significant discrimination, which led to his conviction. He added that because he was a transgender man, he should have been placed in a different cell from his male counterparts, making his incarceration unlawful. Since he was not housed in a different cell, he was subjected to cruel and inhumane treatment, infringing on his constitutionally guaranteed rights.

In its ruling, the court firmly emphasized that the petitioner was entitled to protection from cruel and humiliating treatment as a matter of right. The court also stated that the only instances in which human rights can be restricted are those that are expressly permitted by law. Given that he had only been successful in obtaining one of the declarations he sought, he was fairly granted Kshs. 500,000 and 20% of the cost.

Regarding the impact of the judgment's analysis, it was evident from this case that Kenya was a conservative nation, and that society was not prepared to expand the Bill of Rights, even though doing so would have promoted and protected the rights of the country's transgender citizens.

The court concluded that the case was not in the public interest because it did not believe the petitioner adequately represented the community's overall transgender population. The court further determined that given the petitioner's status was an uncommon occurrence, the case should be handled as an isolated incident. Statistics revealed that there were far more transgender people than the court had been led to believe, and this went against the country's efforts to recognize transgender people.<sup>83</sup>

According to international law, minorities are defined as social groups that share a dominant element that may be seen in social structure and social processes that have an impact on politics.<sup>84</sup> They are prone to attacks from others and are isolated within the social structure. They also hold positions that are relatively resistant to change (in particular, resistance to the constantly altering interest alignments).

These groups, in this case, the transgender community, have reason to fear that the communal kinship that motivates politicians to care about the majority of their constituents would weaken in their situation.<sup>85</sup> The most likely issue is that if they believe the law treats them less favorably

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<sup>83</sup> Standard on Sunday Reporter, 'Suffering in Silence: The Difficult Life of Intersex Individuals' *The Standard* (Nairobi, 2014) <<https://standardmedia.co.ke/features/article/2000099636/suffering-in-silence-the-difficult-life-of-intersex-individuals>> Accessed 29th November 2021.

<sup>84</sup> In 1786, the Supreme Court of Rhode Island "held that a statute of the legislature which purported to make a penalty collectable on summary conviction, without trial by jury, gave the court no jurisdiction, i.e., was invalid; the colonial charter, which was then still in force as the Constitution of the State, having secured the right of trial by jury in all cases' pg. 1299.

<sup>85</sup>Ivy Irene Kwamboka Nyarang'o, 'The Role of the Judiciary in the Protection of Sexual minorities in Kenya' (LLM dissertation, Universidad Eduardo, 2011) 23.

than others, they will consider these legislative agreements as not binding on them and, hurt by the political process, they will be motivated to engage in illegal self-help.<sup>86</sup>

In general, it has a lot of importance, especially when it comes to matters involving the rights and liberties of sexual minorities who are reclusive, shunned, and typically too few to be able to enact legislation that protects their rights. Therefore, laws that divide people based on statuses like sexual orientation, race, or sex frequently reflect weak democratic ideas, and as a result, reviewing such laws improves democratic flaws rather than discouraging deliberate democracy.

The court found the uncertainty of his genitalia to be unsatisfactory because it did not change the reality that his biological sexual creation was predetermined at birth. The petitioner is within the designated sex range; thus the court further reasoned that the Births and Deaths and Registration Act did not in any way exclude him as an intersex persona. The court's decision amply demonstrates the position of the binary sex paradigm as one of the difficulties transgender people in the nation face.

The binary sex concept doesn't really extend to intersex people, according to this study. They are regarded as being in the middle of the sex range since they have both male and female reproductive organs. To defend itself against the legislature, the Court argued that it could not expand the concept of sex to include a transgender person in the absence of legislation. Because the court's ruling did not recognize the status of transgender people who do not fit into the two-sex module, it is believed that the legislation does not adequately protect, uphold, and advance the rights of transgender people in the country.

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<sup>86</sup>Erwin Chemerinsky 'In Defense of Judicial Review: a Reply to Professor Kramer' (2004) 92 (4) *California Law Review* 1014.

The Court believed that Kenyan society was not ready for the recognition of a third, particularly with reference to the incorporation of the term "intersex" inside the classification of "other statutory provision" as per Article 2 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights.

The court failed to force itself to think more broadly and liberally about how to read the Constitution, which would have otherwise made it possible for the rights of transgender people in the country to be recognized more quickly. I believe the courts' reading of the constitution was more superficial and legalistic. Because of the limited and legalistic approach to constitutional interpretation, which in some ways discourages transgender people from seeking legal recourse when their constitutional rights are violated, the courts have little jurisprudence on issues pertaining to the safeguarding, protection, and promotion of transgender people's rights in the nation.

Finnis' practical reasonableness principles can help understand why courts do not necessarily have to use a broad and legalistic approach when reading the Constitution. He points out that courts should be able to intentionally employ interpretive guidelines in conjunction with their remedial authority to advance justice. He goes on to say that judges should exercise rationality, objectivity, logic, and analysis.

This forces decision-makers to be adept at posing queries about potential alternatives to consistently accomplish goal. Since this study focuses on a minority group in the nation, transgender people decision-makers must be able to protect their decisions regarding whether or not to shield sexual minorities from the many difficulties in majoritarian societies like Kenya, where the morality and values of the majority do not believe in the normality of transgender people may present.

Judges should critically examine the Kenyan Constitution's requirements for them so that the nation can fulfill the Constitution's all-encompassing goal. Considering the current society, this research demands intellectual composure and objectivity on the side of judges. The rallying of multifaceted cooperation for the preservation of sexual minorities' human rights is currently the mainstream culture on a global scale. On the other hand, it is important to distinguish between the autonomous notion of culture's influence on reasonableness and the insignificant claim that the dominant culture might influence ideas about what is reasonable. It is important to distinguish between this culturally dependent notion of reasonableness and the insignificant assertion that a person's opinions about what is acceptable may be impacted by the culture in which they are raised. An obvious instance is when a judge renders a decision based on their cultural or religious convictions regarding gender identity.

People have the right to file a claim with a court of law alleging that one of their Bill of Rights has been infringed or is in danger of being violated under Article 21, which allows for a rather liberal interpretation of the constitution. When maintaining the Bill of Rights, the judiciary is expected to protect the liberties, rights, and interests of individuals from disadvantaged groups. In addition, to prevent the constitution's supremacy from being acknowledged, the judiciary must proclaim any legislation or other actions that are against the constitution.

The judiciary can develop substantive justice law, as well as to encourage adherence to the Constitution's promise to defend and safeguard the rights and interests of transgender people in the nation with regard to equality and dignity.

In the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others*,<sup>87</sup> Kenyan Chief Justice Willy Mutunga made clear the need for the Kenyan court to take a purposeful approach to judicial interpretation. He noted that there is no doubt that the Constitution is a fundamental document that looks to a future that is very different from our past, in terms of its values and practices. Regarding the 68 years of colonialism and the 50 years of independence, it aimed to achieve a profound transformation.

In addition to looking at and considering the plain sense of the Constitution's provisions, which must be taken into consideration while construing it, the Kenyan Constitution of 2010 also offers other methods of interpretation and application. The inclusiveness of the preamble serves as the framework for the Constitution; it must be advocated in a way that advances its goals, ideals, and values.

Involving the public in the decision-making process is one of the aims and values of public service, as stated in Article 232 of the Constitution. Additionally, it demands that broad legal principles and international treaties that Kenya has ratified be followed. This method of interpretation was made clear in the South African case of *S v Zuma*,<sup>88</sup> in which the Constitutional Court determined how a basic right under the Constitution should be interpreted. This Court held that a right should be interpreted in a way that aimed to comprehend its objectives.

The Judiciary currently holds a supra-position that gives it the authority to maintain and protect the dignity of all people without fear or favor, and especially without discrimination when it comes to matters of general morality. This would usher in a new and transformational ethos of

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<sup>87</sup> *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR.

<sup>88</sup> *S v Zuma and Others* [1995] ZACC 1, [1995] 2 SA 642, [1995] 1 SACR 568, [1996] 2 CHRLD 244.



the judiciary that is geared at a shift away from the positivist approach that the Kenyan courts have traditionally followed in respect of the human rights of insular minorities and assures the wellbeing of the minority.

Regarding the equality rules of the Kenyan constitution, minorities are not excluded. Judges are under pressure to consider issues related to individual human rights and their well-being since the way they interpret the constitution has important consequences.

3.2 High Court Judgment in the case *Baby 'A' (Suing through the Mother EA) & another v Attorney General & 6 other*<sup>89</sup>

This case had a significant impact on the country's legal framework on transgender rights following the adoption of the 2010 Constitution, which is why we're delving into the analysis of the court's ruling in this instance. A child born to the first petitioner has both male and female genitalia. The column denoting the child's sex was marked with a question mark, "(?)". By the time the petitioner appeared in court on May 24, 2013, the child had not received a birth certificate.

The first petitioner was unimpressed by this question mark because she argued it violated the kid's right to legal recognition, which had the unintended consequence of destroying the child's dignity and subjecting the youngster to cruel and inhumane treatment. This ruling highlighted the difficulties transgender people in the nation confront even though they are fully human and have a right under the law to fully exercise the fundamental human rights guaranteed by the constitution.

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<sup>89</sup> *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others* [2014] eKLR.

A legal framework is required that must address and resolve the difficulties experienced by transgender people in the nation. Because of this, the verdict, in this case, is crucial in highlighting the issues with the country's acknowledgment and understanding of transgender people that were previously mentioned. The lack of a birth certificate prevented the infant from being registered as a Kenyan, which led the court to wonder if the youngster was denied recognition. The petitioner's evidence did not convince the court that Baby "A" had faced prejudice, hence the court decided that Baby "A's rights and freedoms had not been violated.

A child that is born transgender is comparable to a person without a state because citizenship records demand an affirmative "male" and "female" designation. Therefore, until a transgender child chooses to identify as either male or female, they will not be able to get national identification documents. The right to an education, access to health care, freedom of movement, and inheritance are just a few of the rights that can be obtained with the help of these credentials.

This research, which aims to recommend a legal framework that Kenya and other African nations can adopt to ensure that transgender children are recognized and registered at birth to affirm their identity and give them access to essential human rights and enjoyable experiences, was motivated by the current binary recognition of children as either male or female.

The petitioner requested that the infant's birth certificate include a section for intersex children. The court believed that this would result in the creation of a third gender. By taking such action, the Court's authority would be increased beyond what the Constitution grants it. Without a doubt, this justifies the necessity for a legal framework that would include transgender people inside the definition of sex. The Court emphasized the need for data collection on transsexual individuals. To define transgender people as marginalized individuals, it is crucial that data on transgender

people be collected. The court urged the legislator to create standards that clarify issues such as how corrective surgery and medical interposition should be carried out.

### **3.3 Commentary on the Current Legal Framework on the Rights of Transgender People**

One of the difficulties a transgender person faces is being denied status in terms of recognition since they are limited by the gender binary model that categorizes people as either male or female. The transgender task force was founded in 2017 by the Attorney General. The Taskforce was established to research and assess institutional, legal, policy, and administrative changes pertaining to transgender people in Kenya. The key mandates of the task force included the gathering of detailed information on the prevalence, distribution, and difficulties of transgender people, reviewing the research based on a case study approach for transgender care, treatment, and protection, analysis of the current institutional, governmental, legal, medical, and administrative frameworks and procedures controlling transgender people, recommendation of a comprehensive reform to safeguard the interests of transgender people, implementation matrix which states the immediate, medium and long-term reforms governing transgender persons and undertaking of other activities for the discharge of the mandates of the task force among others.

The creation of this transgender task committee is a positive step toward raising awareness of the issues affecting transgender individuals and advancing their rights and freedoms. Beyond the creation of this task force, nothing else has been accomplished.

To comprehend the legal voids surrounding the treatment of transgender persons and how they contribute to the protection of their rights and freedoms, this chapter will now review the current legal system together with the recent Supreme Court ruling on the right to association pertaining to the LGBTQIA. The Constitution, the Births and Deaths Registration Act, the Persons Deprived of Liberty Act, and the Prisons Act will all be examined to accomplish this.

### 3.3.1 The Supreme Court Ruling on the Right of Association

The Kenyan Supreme Court has chastised the government for refusing to register an organization for LGBTQIA+ individuals, claiming that this action violates the community's civil rights. The court decided that everyone has the right to association, despite the fact that same-sex unions are still prohibited in Kenya.<sup>90</sup> The LGBTQIA+ community has won a win at the end of a ten-year court battle. By refusing to register any of the six names suggested by community representatives, including the National Gay and Lesbian Human Rights Commission and the Gay and Lesbian Human Rights Council, the non-governmental coordination board discriminated against the community and violated its constitutional right to association, the court ruled in a majority decision. The government organization claimed that allowing registration would violate laws prohibiting gay and lesbian relationships, including a British colonial statute that stipulated a 14-year term for anyone found guilty of homosexual activities. The court held that limiting the freedom to associate by refusing to register an organization solely on the basis of the applicant's sexual orientation would be unconstitutional and that the government's decision to do so was discriminatory. The court went on to say that having human rights is an inalienable part of being a human. All people, including LGBTQIA+ individuals, are entitled to fully exercise all of the rights set forth in Chapter Four of the Constitution, not because of their sexual preferences as LGBTQIA+ individuals but because they are people. Similar to how heterosexuals' rights are not dependent on their sexual orientation but rather on shared humanity. This is a huge leap forward in the recognition of the rights of the LGBTQIA+ groups of persons and this includes the

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<sup>90</sup> Peter Muiruri, 'Kenya's LGBTQ Community Wins Bittersweet Victory in Battle for Rights' *The Guardian* (3 March 2023) <<https://www.theguardian.com/global-development/2023/mar/03/kenyas-lgbtq-community-wins-bittersweet-victory-in-battle-for-rights>> Accessed 4 May 2023.

transgender persons. The ruling also emphasized the need for non-discrimination of these persons on the sole basis of sexual orientation.

### **3.3.2 The Constitution**

With the promulgation of the 2010 Constitution, the defense of fundamental liberties and rights was revitalized. National ideals and guiding principles for government are outlined in the Constitution. Article 10 (b) of the Constitution further stipulates the values of human dignity, equality for everyone, and protection of the weak. The Bill of Rights, according to the Constitution, applies to all individuals and State entities. So, to the utmost degree possible given the nature of each fundamental right or freedom in the bill of rights, everyone shall be able to enjoy such freedoms and rights. There is no derogation by the State from discriminating because the Constitutional prohibitions are mandatory.

According to Article 27 (4) of the Kenyan Constitution of 2010, a marginalized group is "a collection of individuals who were or are handicapped by prejudice on one or more bases as a function of legislation or practices before, on, or after the effective date." According to Article 27, the State is not allowed to discriminate against anyone based on their race, sex, gender, pregnancy, birth, language, or ethnic or social origin (4). As a result, the Constitution specifies the situations in which its citizens may encounter discrimination, and one of those situations is sex. Attorney General was sued by Baby "A" and others, and the first petitioner claimed that sexism impeded the issuing of a birth certificate for her child. Due to the lack of a Kenyan passport and other official forms of registration or identity, which are granted by the State of Kenya, failing to issue a birth certificate would thus breach the child's right to acknowledgement and have an impact on his status as a citizen of Kenya.

Any treaty or convention that Kenya ratifies becomes a part of Kenyan law, as the Constitution specifies. The State must pass laws and put them into effect to further its goals for promoting and defending fundamental freedoms and rights, as stated in Article 21 of the Constitution. Most, international and regional human rights treaties, including The International Covenant on Civil and Political Rights, have been ratified by Kenya. International Covenant on Economic, Social and Cultural Rights which means that they are incorporated into Kenyan legislation. The legislature in Kenya faces a significant challenge in ensuring that it continues to produce laws that protect the fundamental freedoms and rights of transgender individuals.

The suppression of discrimination is seen as affirmative action under the Constitution's idea of affirmative action, which ensures the protection of fundamental rights and freedoms. It is described as "actions meant to remedy or ameliorate an inequality or the systematic denial or infringement of a right or fundamental freedom" in Article 260 of the Constitution. The Constitution specifies several conditions for the use of affirmative action as the demonstration of a real need. Therefore, affirmative action is a tool to guarantee the abolition of discrimination.

The following institutions combat structural prejudice against transgender persons. Chapter 15 of the Constitution specifies that certain institutions are required. The Kenya National Human Rights Commission is established by Article 59 of the Constitution. The Commission is given permission in its preamble to maintain justice and gender parity to appreciate and uphold the variety of the Kenyan people. This clause guarantees that everyone, regardless of sex or gender, is aware of impartiality. The Commission is responsible for doing research on issues pertaining to human rights and offering recommendations to state institutions. In the case of *R. M. v Attorney General and 6 others*, this commission also took part. This amply demonstrates the Commission's ongoing commitment to ensuring equality under the law.

The Constitutional provisions stated above strive to promote the realization of the rights of Transgender persons.

### **3.3.3 The Births and Deaths Registration Act**

The Births and Deaths Registration Act's preamble states that it is intended to notify people of births and deaths and to register them. To register a kid, the sex of the child must be indicated on the registration certificate. The Act outlines the manner and steps for registration, which must be completed by disclosing the specifics of the birth. The child's sex is listed under the form's details. This form requires the child to be registered as either male or female in accordance with the binary sex model, which excludes those who identify as transgender.

### **3.3.4 The Prisons Act**

According to the Act, convicts can be classified as either male or female. When it comes to the admission, management, and release of prisoners, the Prisons Act specifically calls for the separation of female inmates. Where there is a female prisoner, a female officer must be present. The provisions of this Act do not cover transgender people since it is silent on the type of procedure to use and the appropriate precautions to be followed while searching and detaining a transgender person.

In the case of *R. M. v Attorney General and 4 others*, it was alleged that a lack of prison provisions led to the petitioner being subjected to harsh and degrading treatment by fellow inmates. This was a strong indication that the goal of recognizing transgender people had not been met. The arbitrarily applied strips he received from the jail guards served to humiliate him further. This instance demonstrates the institutional biases that subject intersex people to cruel and humiliating treatment.

### **3.3.5 Persons Deprived of Liberty Act**

"An Act of Parliament which gives effect to Articles 29 (f) and 51 of the Constitution and for linked purposes" is what the Persons Deprived of Liberty Act is described as. This law defines a transgender person for the first time as "a person certified by a qualified medical practitioner to have both male and female reproductive organs." This statute significantly contributes to the recognition of transgender people as individuals who require legal protection, particularly when they are detained. The Act also declares that everyone who is deprived of their liberty has a right to the fundamental liberties and rights guaranteed by the Constitution. One of the main responsibilities of these institutions, as specified by the Act, is to keep a record of the personal information, physical condition, and medical background of those who are imprisoned in the facility. Both the Act and the Constitution acknowledge the right to humane treatment as a basic freedom.

Thus, the Act has made it possible to acknowledge that intersex people are respectable individuals who merit legal protection. Intersex persons may still be exposed to settings where they are likely to experience abuse in holding cells because the Act does not mandate separate holding cells for them.

### **3.3.6 The Children Act**

Intersex people are now recognized as Kenya's third gender with an 'I' gender marker in response to the Children Act 2022. Kenya is the first African country to grant the intersex community this universal right. The act states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration. The Act under Section 4 further states that the child must be given a chance to voice his opinion



in any procedure-related matters, and that opinion must be taken into account as may be suitable given the child's age and level of maturity. Section 5 of the Act states that no child ought to be the target of discrimination on the basis of national origin, sex, religion, faith, custom, language, opinion, conscience, color, birth, or any other status, including race, disability, tribe, domicile, or local ties. This act protects the interest of the child, including transgender children, on the basis of non-discrimination. This also protects the right to life of such children. Transgender children should also be given the right to voice their wishes and plight. Section 13 of the act protects the child from any form of abuse. It proclaims that the child has the right to protection from neglect, physical and mental abuse, and any other type of exploitation, such as being sold or taken away by someone, and this includes transgender persons.

### **3.4 Conclusion**

The discussion in this article has shown that there is still of unmet needs when it comes to the situation of a transgender person who, according to this research, deviates from the two-sex paradigm. Due to the law's objectivity, it falls short of adequately protecting transgender people, which creates injustice and discrimination against transgender people throughout the nation. However, there are concerns regarding the limited actions done to guarantee the preservation of intersex people's rights.

## CHAPTER 4: COMPARATIVE ANALYSIS

### 4.0 Introduction

This will be a comparative analysis of Kenya's legal and policy framework in comparison to that of other vibrant democracies and the norms of the international community. This will be done to highlight the government of Kenya's failures in terms of policy and legal protection of transgender people's rights.

This study will concentrate on nations like South Africa and Malta to determine how these nations have created laws and policies intended to protect and advance transgender people in their own nations.

The previous chapter went into great length about the evolution of laws pertaining to transgender people and how they have faced tremendous discrimination because of their gender identity. This study also documented examples of transgender people's rights being upheld in Kenya both before and after the adoption of the new constitution. Considering the high courts' rulings at the time on issues pertaining to transgender rights, it was believed that the society at the time of the independence constitution was conservative. Given society's incapacity to freely and widely discuss issues connected to gender identity, this age served as an example of the challenging times transgender people were experiencing.<sup>91</sup>

The 2010 amendments to the constitution opened the door for examination of gender identity-related issues since they were becoming urgent and persistent issues that the courts could no longer ignore. The task force established to examine methods of defending and advancing the rights of transgender people was a positive development. The task force was also tasked with

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<sup>91</sup> *R. M. v Attorney General and 4 Others* [2010] eKLR.

investigating the difficulties faced by transgender people in the nation. The binary paradigm presented to be the most challenge for transgender people in the nation, as it was previously noted, as many people and even judges could not get past the existence of this binary model. Because transgender people have both male and female organs, they do not fit into this rigid binary concept and should be given their own place.

The country needs to be more accepting of transgender people so that they can benefit from the rights enshrined in the Kenyan Constitution of 2010. To do this, the outdated notion of traditional thinking about gender identity must be replaced with a modern approach that envisions the proper entrenchment of transgender people's rights.

This chapter will examine different countries and their approaches to the transgender issue, as well as how they have provided for the needs and rights of transgender people in those countries. As a result, this study will concentrate on South Africa and Malta, as these nations have achieved notable advancements in protecting and promoting transgender people. This study will address this in three ways while performing a comparative analysis. The legal and policy frameworks of South Africa and Malta, which strengthen the rights of transgender people in those nations, will be examined in the first and second halves, respectively. The third and last section of the comparative study will emphasize the lessons that Kenya should not only learn from but also put into practice to improve the rights and quality of life for transgender people in the nation.

#### **4.1 South Africa**

The degree to which South Africa's legal system has protected transgender people's rights is discussed here. This study will examine both the Promotion of Equality and the Prevention of Unfair Discrimination Act No. 4 of 2000 and the South African Constitution to determine this.

### ***4.1.1 The Constitution of South Africa***

The apartheid government, which failed to protect the rights of transgender people who were one of the nation's minority groups, was a dark chapter in South Africa's history that entailed oppression and little inclusion. Given the exclusion of Black South Africans during this time, the foundation of South Africa's Constitution was equality<sup>92</sup>. Equality before the law is guaranteed by Article 9 of the Constitution<sup>93</sup>, as is equal protection and advantage. This characteristic anticipates the quality and complete enjoyment of fundamental freedoms and rights.<sup>94</sup>

A provision in the Constitution known as the anti-discrimination clause forbids the State from treating people differently on the basis of their sex, race, gender, marital status, ethnic or social origin, color, sexual orientation, age, religion, conscience, or belief, culture, language, or place of birth.<sup>95</sup> When limiting constitutionally guaranteed rights, consideration must be given to several factors, including the nature of the right, the necessity of the limitation, the nature and extent of the limitations, the relationship between the limitation and its purpose, and the least restrictive method.

Considering the aforementioned, the state is responsible for ensuring that every citizen enjoys their rights to the fullest extent possible, and even when these rights are limited, the many criteria outlined above must be given proper respect. Substantive equality is made possible by treating people as equals in principle and recognizing and accepting their individual variances in

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<sup>92</sup> Murray Christina, 'A constitutional Beginning: Making South Africa's Final Constitution' (2001) 23 (3) *University of Arkansas at Little Rock Law Review*.

<sup>93</sup>Constitution of the Republic of South Africa, Section 9 (1).

<sup>94</sup>Steven Lawrence Gordon, 'Understanding Semantic Differential Measures in Modern South Africa: Attitudes of Black Africans Towards White South Africans' (2017) 48 (4) *South African Journal of Psychology* 526–537 <<https://doi.org/10.1177/0081246317725921>> Accessed 24 July 2022.

<sup>95</sup>Constitution of the Republic of South Africa, Section 9 (3).

behavior and personality.<sup>96</sup> The demands of this sort of equality call for a careful, logical, and critical evaluation of all laws, policies, and practices, especially those that persecute transgender people in the nation.

This kind of equality encourages and envisions using affirmative action to suit its requirements. It aims to remove the barrier separating the public and private spheres, which oppresses groups of people. It Constitution to advance the equal rights and freedoms of people who may be subject to discrimination on the grounds stated in Article 9 (3) of the Constitution. In the case of *Minister of Finance \$ another v Van Heerden*<sup>97</sup>, the court made it quite plain that affirmative action needs to be strengthened to advance equality for minority groups. The court went on to say that affirmative action will make it possible for society to advance the rights of those who have faced discrimination. The Constitutional Court noted direct discrimination regarding equality in *Du Toit v Minister for Welfare and Population Development*<sup>98</sup>. In addition, the court noted particular clauses in the Child Care Act of 1983 and the Guardianship Act of 1993 that violated the right to equality since they prohibited a lesbian couple in a committed partnership from adopting children.

The court underlined that these clauses discriminated against people based on their marital status and sexual orientation. The words "family," "spouse," and "domestic relationship" were further expanded by the court in its orbiter. This Court has received praise for emphasizing the need to accept and accommodate social diversity among individuals by considering the needs and rights of the nation's minority groups. Therefore, substantive equality encourages affirmative action

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<sup>96</sup> Smith Anne, ' Equality constitutional adjudication in South Africa ' (2014) 14 *African Human Rights Law Journal* 609.

<sup>97</sup> *Minister of Finance and Other v Van Heerden* [2004] ZACC 3.

<sup>98</sup> *Du Toit and Another Vs Minister of Welfare and Population Development and Others* [2002] ZACC 20, [2003] 2 SA 198.

and goes beyond simply achieving the necessary formal equality. This provision of the South African Constitution guarantees the protection of minorities rights, including those of transgender individuals.

#### **4.1.2 The Promotion of Equality and the Prevention of Unfair Discrimination Act No 4 of 2000**

The Promotion of Equality and the Prevention of Unfair Discrimination Act, which was to give effect to Article 9 read together with Article 23 (1) of the Constitution of the Republic of South Africa, needed to be put in place to prevent and prohibit unfair discrimination and harassment and thereby enhance equality within its nation. This Act guarantees full enjoyment of rights since it upholds formal and substantive equality within the framework of the Constitution<sup>99</sup>, and it also expands the term of "sex" to include transgender people.

This was accomplished by amending the Judicial Matters Amendment Act to explicitly include transgender individuals in the definition of sex.<sup>100</sup> The inclusion of transgender people within the definition of sex is a big step in the right direction as it broadens the scope of nondiscrimination of transgender people based on sex and gender identity, which is prohibited under Article 9 of the Constitution.

The dissemination of information regarded to be discriminatory, using hate speech, and harassment are also prohibited by this Act. This Act serves as a measure to achieve the elimination of the country's institutionalized prejudice against transgender people. This Act imposes harsh restrictions and penalties on the criminal who violates, negates, or otherwise interferes with a person's ability to fully enjoy their right to equality.

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<sup>99</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000, Section I.

<sup>100</sup> The Judicial Matters Amendment Act No 22 of 2005.

This has led to the establishment of equality courts, the purpose of which is to hold investigations into cases of unfair discrimination, hate speech, and harassment. Additionally, these courts are tasked with investigating claims that a person's rights have been denied, infringed upon, or violated based on the grounds listed in Article 9 of the Constitution. Given that the courts have the authority to issue declaratory, interim, and other measures to compensate such persons, the injured party may be reimbursed by these courts.

The harmed person may seek remedies in these courts thanks to this clause. The Act also requires the State, elected authorities, and the public to implement policies that prevent infractions and interference with the right to equality. People must be made aware of public campaigns and programs through *barazas* and telemarketing to encourage community sensitization. This will help people understand their constitutionally guaranteed individual rights as well as the procedures and methods for addressing discrimination when it occurs, as stated in Article 9 of the Constitution.<sup>101</sup>

#### **4.1.3 Alteration of Sex Description and Sex Status Act 49 of 2003**

According to this Act, transgender people may apply to have their sex listed differently in the birth registration. According to this law, "Any person who has had their sexual characteristics altered by surgery, medical treatment, or by evolution leading to gender reassignment, 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."<sup>102</sup> A medical report from the doctor who performed the surgical procedure or the doctor who administered the medical treatment must be included in the application in accordance with section 2 (2)(b). The

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<sup>101</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000, Section 26.

<sup>102</sup> The Alteration of Sex Description and Sex Status Act 49 of 2003, Section 2 (1).

Act does not mandate the requirement for a candidate to have undergone gender reassignment surgery. Treatment with hormones is sufficient.

If the request is approved, the Magistrate issues an order telling the Director-General to change the person's birth record's sex description. In accordance with the Births and Deaths Registration Act 51 of 1992<sup>103</sup>, the applicant receives an altered birth certificate. If the application is rejected, written justification must be provided to the applicant. The applicant may file an appeal with the Minister of Home Affairs within fourteen days following the decision.

#### **4.1.4 Domestic Violence Act No. 116 of 1998**

Transgender people who have experienced physical, sexual, or emotional abuse as well as harassment or intimidation from their family, roommates, or partners are protected under the Domestic Violence Act 116 of 1998. According to Section 2, a police officer present at the incident must help the complainant, including by helping them find a place to stay or by helping them get medical care.

A police officer may detain a respondent without a warrant under Section 3. Any discrimination against transgender individuals by the government must have legal justification; otherwise, any actions taken by its agents will be arbitrary and unlawful. A transgender person shall abide by the fundamental legal norms outlined in Yogyakarta Principle 7 when they are the target of arbitrary arrest or detention.

#### **4.2 The Rights at Workplace**

Everyone has a constitutional right to fair labor practices, according to Section 23 (1) of the document. The Employment Equity Act 55 of 1998 was passed to advance equality of

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<sup>103</sup>The Births and Deaths Registration Act No. 51 of 1992.



opportunity and end unjustified discrimination in the workplace. "No person may unjustly allow discrimination, explicitly or implicitly, against a worker, in any workforce policy or practice, on one or even more premises, including race, gender, sex, pregnancy, marital status, family responsibilities, ethnic or social origin, color, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth, or on any other arbitrary ground," according to this Act. Additionally, according to this Act, harassing an employee constitutes unfair discrimination.

Every employee has the right not to be subjected to unfair labor practices and wrongful dismissal under the Labor Relations Act 6 of 1995. According to the Act, "A dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee directly or indirectly on any arbitrary ground, including, but not limited to, race, gender, sex, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status, or family responsibility." Dismissal based on gender identification is viewed by South African courts as "automatically unjust."

### **4.3 Malta**

The extent to which the legal framework and policies of Malta have provided for the rights of transgender persons in the Country. To establish this, this research will examine Malta's Constitution and the Gender Expression, Gender Identity and Sex Characteristics Act, and the Malta Educational Policy.

#### **4.3.1 The Constitution of Malta**

Article 45 of the Maltese Constitution, as amended by Act X of 2014, prohibits discrimination based on sex, sexual orientation, and gender identity, among other grounds. When read in

conjunction with the Equality of Men and Women, Article 45 stipulates protection against discrimination based on sex and gender identity. According to the Constitution, "discrimination" is defined as "according different treatment to different people attributed entirely or primarily to their characteristics, either by race, place of origin, color, creed, sexual orientation, or gender identity by according privilege to persons of other such discrimination."

These clauses are necessary under the constitution, making it impossible to depart from the prohibition on sex-based discrimination.

#### **4.3.2 Gender Expression, Gender Identity, and Sex Characteristics Act**

The Maltese Parliament passed the Gender Identity, Gender Expression, and Sex Characteristics Act on April 1st, 2015.<sup>104</sup> The Gender Expression, Gender Identity, and Sex Characteristics Act guarantees the protection of a person's sex characteristic as well as the acknowledgment and registration of their gender and the controlling effect of such changes. Those who are Maltese and have the potential to change their gender are protected by Section 4 of the Act.<sup>105</sup>

People in this state have the option to select their own gender, and what's even better is that the Maltese government has made it mandatory to recognize that choice. The idea of self-determination is amplified by the fact that people who change their gender are capable of being recognized and having a record of this.<sup>106</sup>

A request is presented to the court to change the minor's gender, and the court also keeps a record of the child's preferred first name. This represents a significant step for transgender people, particularly for transgender children who were assigned a specific gender at birth and

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<sup>104</sup>The Gender Identity, Gender Expression and Sex Characteristics Act, No XI of 2015.

<sup>105</sup>The Gender Expression, Gender Identity and Sex Characteristics Act, No XI of 2015.

<sup>106</sup> The Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015, Article 4 (1).

even those who have undergone surgery. Transgender people can identify with whichever gender identity they feel most comfortable with, thanks to this process of altering gender identification, which is crucial.

Before such an application is presented before the Court, the best interests of the child, in conjunction with the Convention on the Rights of the Child, are typically considered. The Act punishes those who perform any medical procedure on a person without that person's consent, including sex reassignment surgery.<sup>107</sup> This serves as the foundation for the self-determination principle. Children who are transgender at birth are unable to consent to have sex reassignment performed on them due to their minor status; however, once they reach a consenting age, which may be the age of majority or an age where they are considered mature enough to make such a decision, they may consent. This demonstrates how seriously this act takes the idea of self-recognition by establishing laws that respect one's bodily autonomy and integrity.

#### ***4.3.3 Malta Education Policy***

The term was first used in the Gender Expression, Gender Identity, and Sex Characteristics Act, which was passed after the Malta Educational Policy was formed "transgender. Unable to be classified as either male or female based on their chromosomal, gonadal, or anatomical sex "is regarded as transgender under this policy.<sup>108</sup> This plan's major objective is to provide an inclusive, safe, and discrimination-free learning environment for all students, regardless of their gender, sexual orientation, gender identity, or other sex-related traits. One of the foundational principles of the policy is active awareness as a means of showing support for transgender

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<sup>107</sup>The Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015, Article 14.

<sup>108</sup> Ministry of Education and Employment, *'Transgender Variant and Intersex students in Schools Policy'* (Ministry of Education and Employment, June 2015).

children and their families. As a result, occurrences of discrimination in schools are considerably reduced.

#### ***4.4 Lessons that Kenya can borrow from Malta and South Africa in order to protect and promote the rights of transgender people***

This study has shown how transgender law has changed in South Africa and Malta. This has made it quite clear that Malta and South Africa are two examples of countries that are coping with issues related to modern sex and gender identity. This study has looked at the many institutional and legal structures used to defend and advance transgender people's rights.<sup>109</sup> Kenya should not only copy but also put into practice the laws from these two nations that strengthen and defend transgender people's rights there.<sup>110</sup>

Kenya should first change its binary male-or-female birth registration legislation to add a third category for transgender births. This will guarantee that children who are born transgender be recorded as such and can modify their sex marker once they reach adulthood.

Second, it shouldn't be difficult for Kenyans to obtain a basic education. The child must be at least four years old to be registered, and that is the only condition the State should consider. Birth certificates shouldn't be required as a prerequisite for admission. When the parent or legal guardian of a transgender child has been able to obtain the birth certificate, it may be filed at a later time. Kenya should make it simpler to make adjustments to the information on academic certificates and other identifying documents when a transgender student wants to update the information to reflect their transgender status. Kenya should implement an equality and anti-discrimination law in accordance with the Constitution to provide the legal and regulatory

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<sup>109</sup> Judicial Matters Amendment Act, No 22 of 2005.

<sup>110</sup> The Constitution of Kenya 2010, Article 255 (1).

foundation for protecting transgender people. The law should clarify that no one is allowed to be discriminated against based on their gender identity or sexual orientation, in addition to its general prohibition against discrimination.

This amendment must receive the approval of at least 25% of the eligible voters in the referendum to pass. Additionally, it must receive the backing of the majority of voters. If the amendment is not approved, the Bill of Rights cannot be changed, which will have a rubber band effect on transgender individuals because they will still be viewed as having no place in the nation.

Although the Persons Deprived of Liberty Act acknowledges the existence of transgender people, it does not consider the need to include transgender people within the definition of sex, leaving transgender people without a legal remedy for sex discrimination should they experience this type of discrimination. The rights of transgender people in the nation will be advanced by following South Africa's example in including transgender people in the definition of gender identification.

In several cases, medical intervention has been employed to treat transgender issues. The State of Malta's law, which makes uninvited medical intervention illegal even when the transgender person is a minor, can be copied by Kenya and put into effect. This clearly demonstrates the need to respect Kenya's self-determination principle, which works to safeguard the integrity and dignity of transgender people. Kenya should impose harsh penalties on anyone discovered performing medications on transgender people without their consent.

This highlights the intrinsic right to bodily autonomy and the fundamental right to self-determination. The High Court stated in the case of Baby "A" that legislators needed to consider the development of regulations that specifically laid out the procedures for medical reassignment

relating to transgender persons. It is possible to run awareness campaigns that support transgender people's rights.

#### **4.5 Conclusion**

This section provided a quick overview of the situation regarding the legal and policy framework influencing transgender people's rights and freedoms in the nation in light of independence and the 2010 new constitution. The chapter then conducted a comparative analysis of the defense and advancement of transgender people's rights in Malta and South Africa. The main motivation for doing this was to research these legal systems and the actions Kenya may take to safeguard and advance the rights of transgender people. In this chapter, the legal systems of South Africa and Malta were further examined, along with the steps that have been made to safeguard and advance transgender people's rights.

This chapter also focused on the areas that Kenya as a country may adopt from these two States and put into practice to help advance the rights of transgender people in the nation.

## **CHAPTER FIVE**

## **DATA COLLECTION AND RESULTS FINDINGS**

### **5.0 Introduction**

To determine if people are aware of transgender existence in the country and the pertinent legislation governing them, this report summarizes the information gathered via key informant interviews, online surveys, and the general public. These results are an essential addition to the legislation governing transgender people in the nation. People that represent the larger community have contributed to the interviews and online surveys that have been done. The interviews, online surveys, and questionnaires to the general public took place in July of 2022.

Everyone who participated was made aware that their participation was optional and that their answers would only be used for academic purposes. The researcher interviewed ten key informants in all. Feedback was received in full. To ensure that the ages of the respondents were varied, 40 questionnaires were given out to the general public. Twenty of the 40 issued surveys were properly completed; thus, their results will also include them. The researcher also recruited law school undergraduate students to spread a link to an online poll that had data from anonymous sources via social media, mostly through WhatsApp groups.

General themes of this research that formed the basis of the report include recognition, identity, stigma, sexual orientation, and social institutions. The report clearly shows how these themes are affected with regard to transgender persons.

### **5.1 Recognition**

This research will clearly illuminate on how transgender persons are not yet clearly recognized in Kenya. As was previously addressed in this research, there are varied responses to whether transgender persons are recognized in Kenya. The information gathered from the Key Informant

interviews, general public questionnaire distribution, and internet survey conducted demonstrate this. As previously mentioned, society, by its very nature, finds it difficult to accept ideas that deviate from the standards established before the beginning of time. It is based on superstitions and beliefs of people that do not desire to learn more about it when a child is born transgender. How can one then say that transgender people are accepted if society views them as curses? How can parents of transgender kids talk openly about their children without being accused of being terrible omens?

## **5.2 Identity**

65% of respondents to the questionnaires, according to the data gathered, believed that transgender people should be given a specified gender at birth. A minority portion of the community, however, supported allowing transgender people the freedom to change their genders as they please. Identity is essential to a being's existence.<sup>111</sup> Being who one is having an identity. The fact that we each have a unique identity contributes to the fact that we are different.

According to earlier findings from this research, transgender people typically are not given the chance to forge their own identities before birth. At least for the greater majority, gender is assigned to them after the 'corrective' surgery, and whichever they are accorded is who they are to identify as throughout their lives.

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<sup>111</sup>Erica Shumener, 'The Metaphysics of Identity: Is Identity Fundamental?' (2017) 12 (1) *Philosophy Compass* <<https://doi.org/10.1111/phc3.12397>> Accessed 3 November 2022.



### 5.3 Stigma

Stigma refers to a state in which one bears a physical or figurative mark that has connotations associated with it as a result of social interaction.<sup>112</sup> From the discussion above, it is clear that transgender people experience stigma in many areas of life and from the majority of social institutions. This report supports the claim that many transgender people face discrimination in a variety of settings. Data gathered from online polls and general population via questionnaires confirm that there is still a long way to go before transgender people are accepted in society.

### 5.4 Sexual Orientation

In this scenario, Kenyan culture does not value indifference since anything that deviates from the established norm is viewed negatively or avoided because it is bad, evil, or unnatural. 65% of the respondents believe that many transgender people experience social rejection when they desire to alter their gender, and this is because the larger community sees this as immoral.<sup>113</sup>

### 5.5 Social Institutions

According to past studies, transgender students' needs are not considered by our educational system. When someone is identified as transgender in school, others will make fun of them and avoid them. Because transgender people are seen as less than human, most people who consider themselves normal will explicitly refuse to interact with them. In turn, this will cause the transgender youngster to avoid going to school in order to avoid being made fun of and jeered at by others. Thus, their right to a fundamental, free, and required education as guaranteed by the

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<sup>112</sup>Curcio C, 'Stigma and Anxiety Disorders: A Systematic Review.' (2019) 5 (2) *Stigma and Health* <<https://doi.org/10.1037/sah0000183>> Accessed 3 November 2022.

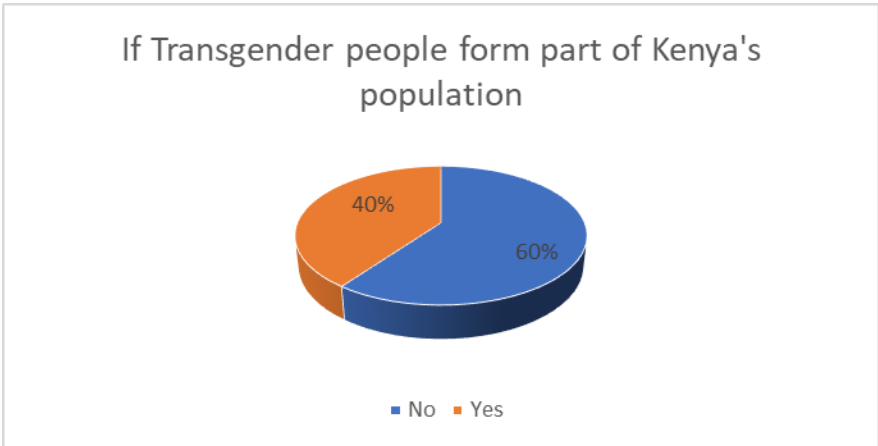
<sup>113</sup>Christina L Magalhães, 'Review of Sexual Orientation at Work: Contemporary Issues and Perspectives' (2015) 2 (2) *Psychology of Sexual Orientation and Gender Diversity*, 205–206 <<https://doi.org/10.1037/sgd0000101>> Accessed 4 November 2022.

Constitution and the Basic Education Act is violated. The data obtained demonstrate unequivocally that transgender people frequently face discrimination in social institutions according to 90% of the respondents.

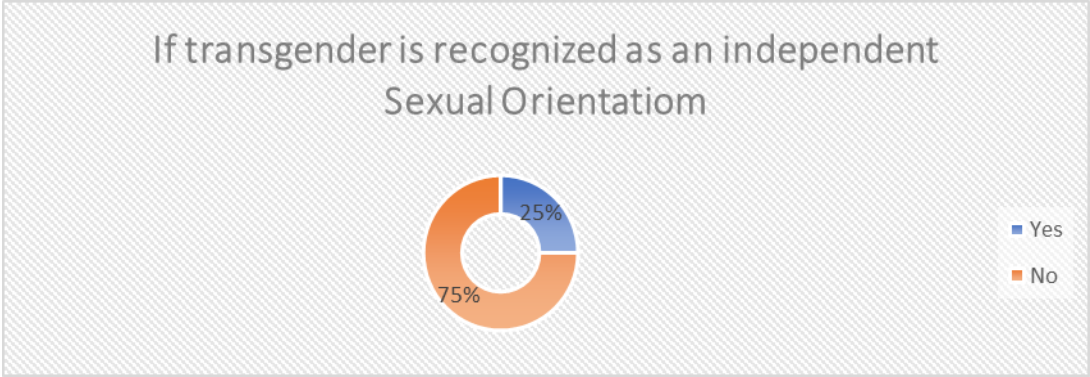
**5.6 Report on Online Survey**

The researcher utilized law school undergraduate students to spread a link to an online survey with a questionnaire-like structure via social media, mostly through WhatsApp groups. The poll's data came from anonymous sources. The results of the online survey, which received 20 responses, are as follows: According to the data, there were 11 people between the ages of 18 and 30; six people between the ages of 30 and 40; one person between the ages of 40 and 50; one person between the ages of 50 and 60; and no one over the age of 60. Eight of these individuals were men. 10 females, and two preferred to remain anonymous.

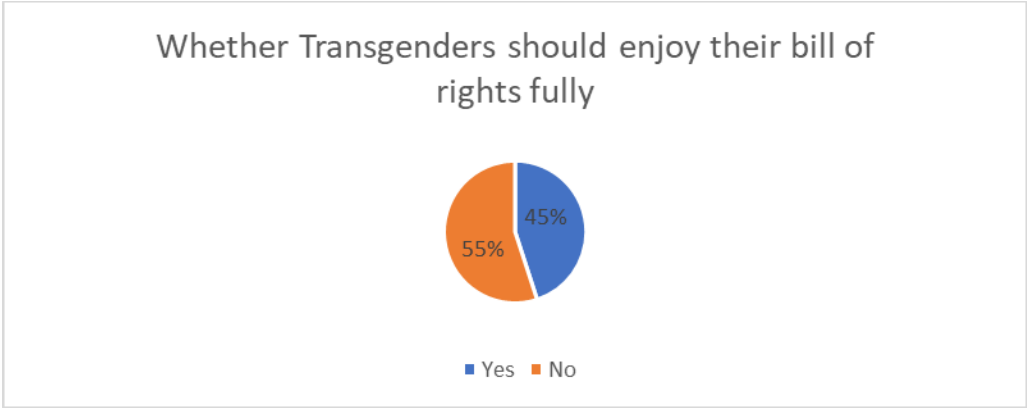
Concerning the issue of whether transgender people make up a significant portion of Kenya's population, especially in Nairobi County, 40% (8 people) of those surveyed responded positively, compared to 60% (12 people) who disagreed.



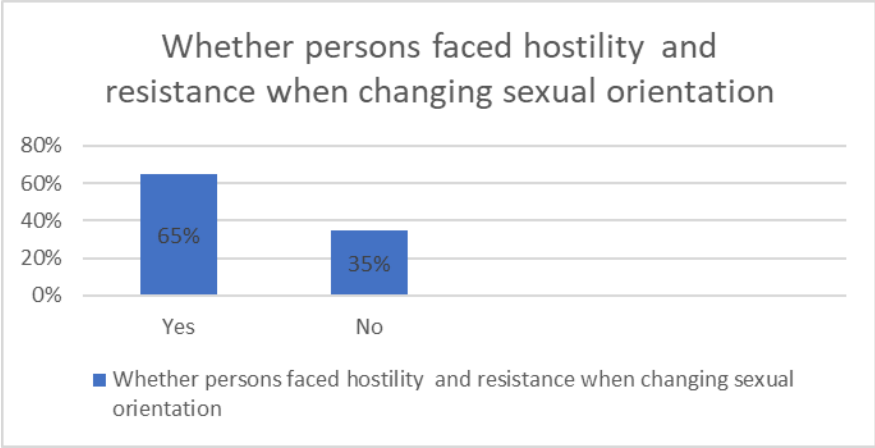
When it comes to whether transgender people are accepted in Kenya, particularly in Nairobi County, as a distinct sexual orientation (medically, legally, and socially), 25 percent (5 people) of the respondents said yes, compared to 75 percent (15 people) who said no.



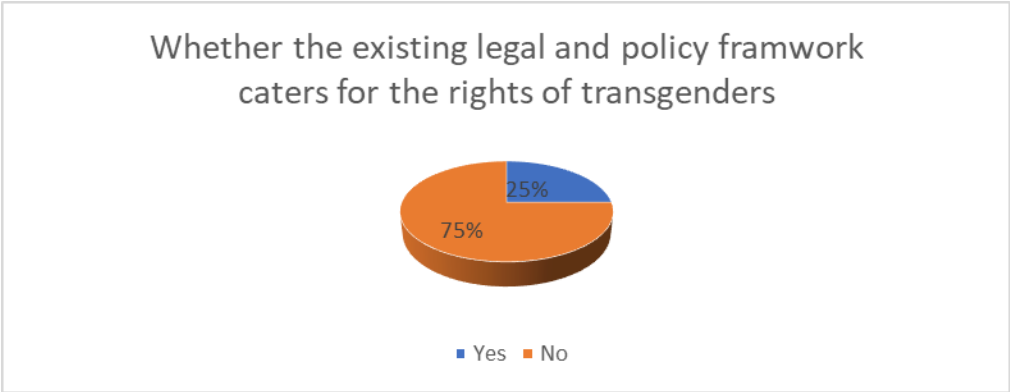
In response to the question of whether transgender people are entitled to the full enjoyment of all of the rights guaranteed by the Bill of Rights, 55 percent (11 respondents) said they are not, while 45 percent (9 respondents) said transgender people are also people who deserve to enjoy their rights fully.



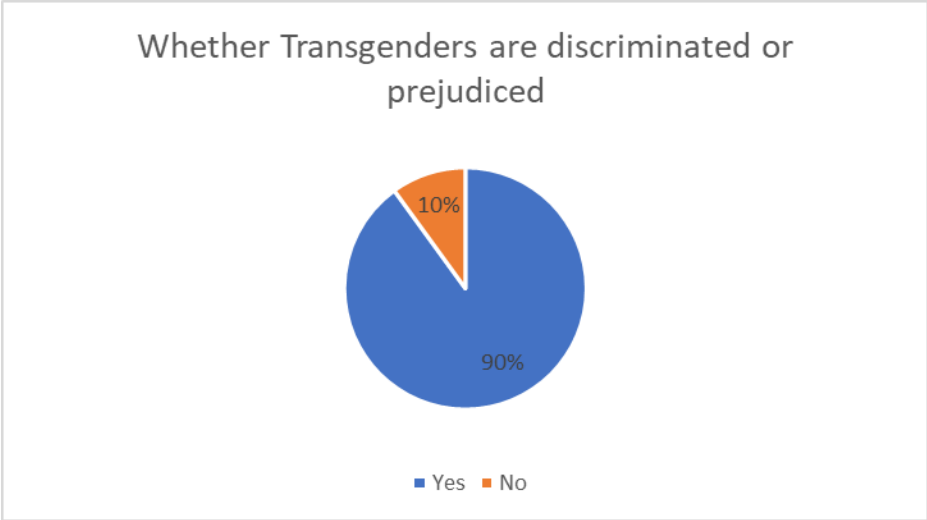
Thirty-five percent (7 respondents) said there was no hatred toward these types of people, whereas 65 percent (13 respondents) said that those who wished to change their sexual orientation were met with hostility and resistance.



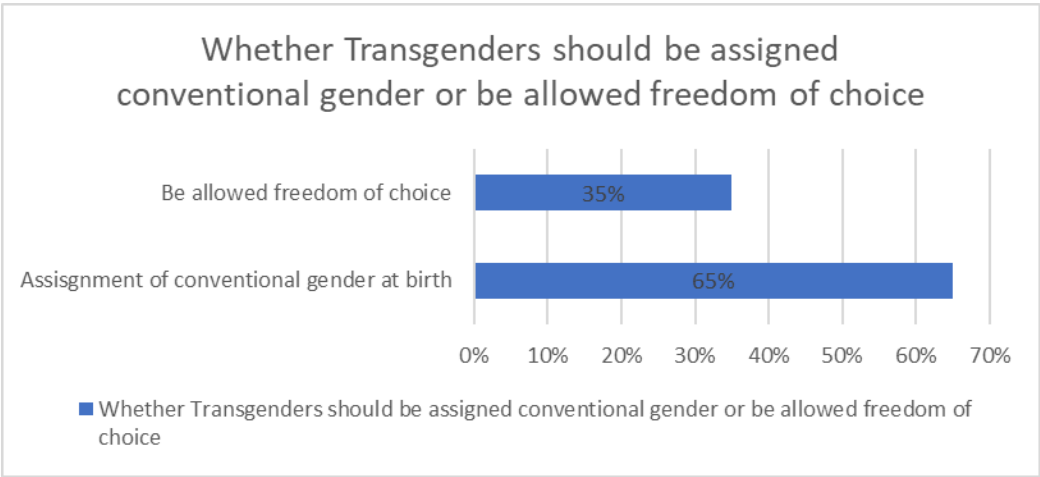
When asked whether Kenya's current legal and policy framework adequately recognizes and protects the rights of transgender people, 75% (15) of respondents underlined that it doesn't, while 25% (5%) categorically said that the current laws are sufficient to meet the demands of the transgender community.



90% of respondents indicated that institutional discrimination, cultural and personal views, opinions, attitudes, and actions based on prejudice, disgust, and fear affect transgender people. In contrast, only 10% of respondents (two people) said that they were unaffected. Most respondents in the explanation part claimed that because of their religious convictions, it was simple to discriminate against transgender individuals because they, in their opinion, did not adhere to the accepted norms.



The majority of respondents to the final question in the online survey agreed that transgender people should be given a conventional gender (male or female) from birth because, according to their cultural and religious views, God only made males and females, not anybody in between. 65 percent (13 people) agreed with this viewpoint. In comparison, 35 percent (7 people) said that transgender people should have the same freedom of choice as everyone else and be permitted to conform to whichever they feel most comfortable.



In conclusion, as a result of the online poll, it is evident from the data gathered that people are still reluctant to welcome transgender persons into their communities. According to the explanations offered, cultural and religious views have a significant impact on this.

## **5.7 Key Informant Interviews**

Ten key informant interviews in total were done. Two of these individuals are High Court of Kenya Advocates, one is a High Court of Kenya Judge, two are Members of Parliament, three were from various Human Rights Non-Governmental Organizations, and one is a human rights activist. A doctor was also interviewed as a key informant. The key informants were made aware that the information was only being gathered for academic purposes, namely, to examine the rights of transgender people in the nation. These interviews lasted for 30 to 45 minutes.

### **5.7.1 Advocates of the High Court**

I reached out to the two attorneys at their separate law firms whose names for the purpose of this research will be AP and JK. When it came to the rights and acceptance of transgender people in the nation, they had a lot of the same opinions. They both agreed that because transgender people comprise a small percentage of the population and are consequently given little to no attention, they are not yet thoroughly understood to be viewed as an autonomous sexual orientation under Kenyan law.

They both asserted that because the Constitution guarantees equality for all people and mandates that any restrictions on these rights be made by legislation, transgender people should be entitled to the same full enjoyment of the rights established in the Bill of Rights as all other "regular" people. Due to the low population density of transgender individuals, the current legal system falls short in protecting their rights, which hinders their ability to fully exercise their freedoms.

Both parties agreed that this in and of itself constitutes discrimination. They said that one method to lessen institutional discrimination against transgender people and make it possible for those people to be recognized is to include the word "transgender" in the definition of sex. This would ensure that institutional discrimination against trans people is less common.

### **5.8.2 Judge of the High Court**

The Judge's chambers served as the setting for this interview. The judge found that Kenya had not passed comprehensive laws that adequately protected transgender people's rights in the nation. The judge did point out that there have been a number of lobbying organizations calling for transgender to be fully accepted as a sexual orientation. According to the court, one way for Kenya to advance and deal with the progress the international community is making toward accepting transgender people is to embrace the need for inclusivity for all people regardless of their sexual orientation.

The judge went on to say that there have been instances in which transgender people have been harassed in court because they changed their sexual orientation. She noted that this is due to Kenya's ethnic diversity, with each group having its own set of religious and cultural beliefs, which contributes to the discrimination against such people there. A comprehensive single piece of law that promotes equality on all fronts and addresses all forms of discrimination must be developed in order for Kenya to be considered a progressive society and for Article 27 to include the prevention of discrimination on the basis of gender identity. All types of discrimination should be outlawed by this single comprehensive piece of legislation, which would also serve as a proactive step. The judge went on to say that it is the responsibility of the judicial branch of the government to advance justice and equality for all and to establish legal precedents that fully uphold the rights of transgender people living in the nation.

### **5.7.3 The members of parliament**

When it comes to whether Kenya has comprehensive laws that cater to the rights of transgender individuals, the two members of parliament shared a similar opinion. They both agreed that Kenya is still far from fully recognizing these people's rights, but there is still hope. The lawmakers claimed that it was up to them to pass legislation that completely protects these people's rights. They both accepted the fact that, due to Kenya's ethnic diversity, there is significant transgender discrimination that results from deeply held religious convictions that such people are against the natural order, making it more challenging for these people to come out and express their frustrations and advocate for change.

They claimed that in accordance with Article 21 (4) of the Constitution, the State must pass and implement laws to uphold its international commitments to uphold human rights and fundamental freedoms, and that in order to give Parliament the power it needs to do this, its members must be made aware of international human rights standards and principles through education, training, and capacity building.

### **5.8.4 Human Rights Non- Governmental Organizations**

The specific key informant group had a wide range of opinions on the country's present transgender issue. They firmly believed that the legal structure pertaining to these people is still far from being thorough enough to include them. They claimed that transgender people encounter a great deal of animosity when they decide to alter their gender and that, as a result, many of them are frightened to even interact with members of their community. When transgender people in the community sought medical care, they reported incidences of violent violence against them. They also said that the state gave them little support in funding their missions to help transgender people.



They claimed that because the government has been silent about these people's rights, it is even more difficult for them to use their rights properly. The majority of Kenyans, including the government, are obviously uninformed of sexuality in general and sexual minorities in particular, according to these NGOs. This is primarily caused by ignorance, which is based on a lack of knowledge and misinformation about issues pertaining to transgender people. They concluded through their own study and database that there are a lot of transgender people in Nairobi County who are hesitant to speak up about their difficulties due to negative public perception. In their final statement, they stressed the significance of Kenya taking the initiative to implement programs that will inform Kenyans about issues relating to sexual minorities and the implications of both international human rights law and the 2010 Constitution of Kenya on those minorities' human rights.

#### **5.8.4 Human Rights Activist**

At the Kituo cha Sheria office, I specifically focused on an individual who proved to be very helpful to the research. The fact that this person identified as transgender and used the pronouns they/them made them incredibly helpful to the research. The source provided information about the country's present transgender community and its struggles. The informant made it quite obvious that the government of Kenya is not doing enough to acknowledge transgender individuals, which has led to discrimination against them. She also said that the country's legal system is sleeping on transgender people's rights. The informant acknowledged that because their sexual orientation is openly and widely known, they have experienced animosity in their community and have even experienced violent abuse. They now find it much more challenging to connect freely with people without having the topic of their sexual orientation brought up.

The informant mentioned that many transgender people they know are reluctant to come out publicly and express their sexual orientation for fear of a hostile response and negative public opinion. The informant expressed hope that one day, transgender people wouldn't be viewed as a social or medical norm and would be accepted on par with everyone else. The source pointed out that those who are afraid of being laughed at or judged can benefit much from public interest lawsuits. The informant also stated that there is widespread cultural confusion regarding sexual minorities, with many failing to distinguish between transgender, intersex, and gay people, and that, as a result, such minority groups should be included in the design of laws and policies.

### **5.8.5 Medical Doctor**

Regarding the nation's current legal system for transgender people, this informant expressed guarded opinions. However, the doctor mentioned that he had spoken with parents and children of transgender people. He observed that such parents would become distraught upon learning about their child's sexual orientation at birth. He added that most parents would typically desire corrective procedures for such youngsters to safeguard their future children under the justification that they don't want them to grow up being different from other kids. According to him, these operations provide the parents with the relief they need to give their children a chance at a proper existence that conforms to cultural norms for either males or females.

Additionally, he mentioned that intersex people experience physical integrity violations, such as medical procedures without their explicit, prior, ongoing, and full consent. He stated that transgender discrimination is greatly influenced by social, cultural, and religious attitudes. He stated that the community should be properly sensitized for people to embrace such people and not consider them as outside of social and medical standards.

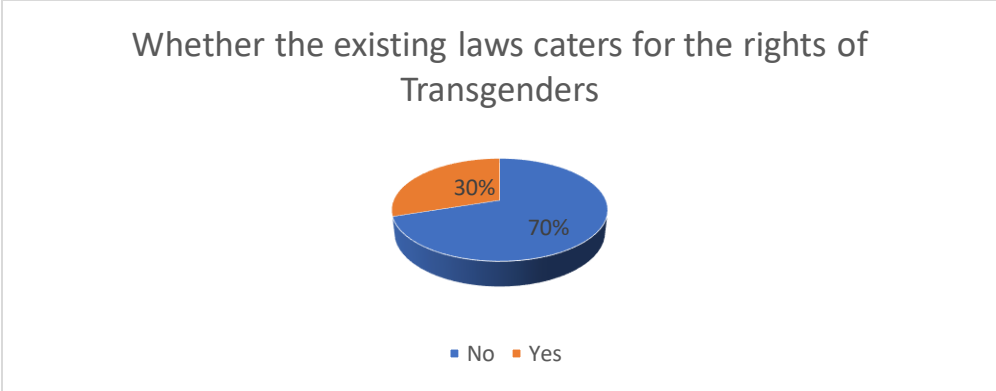
In conclusion, the key informants made it abundantly clear that the legal framework pertaining to transgender people is still insufficient to fully protect these people's rights and that recognition of their sexual orientation is necessary for Kenya to be viewed as a progressive nation that promotes inclusivity for all. In general, they pointed out that in addition to the fact that people's varied cultural and religious beliefs contribute to their discrimination and that the lack of state recognition has caused these people to face hostility and public backlash, there is a need for a more comprehensive legal system and appropriate civic education on the rights of transgender people.

**5.9 General Population Feedback**

Additionally, information was gathered from Nairobi County's general populace by distributing a total of 40 questionnaires to community members. Twenty of the surveys were properly completed, returned, and will therefore serve as the foundation for this component of the report.

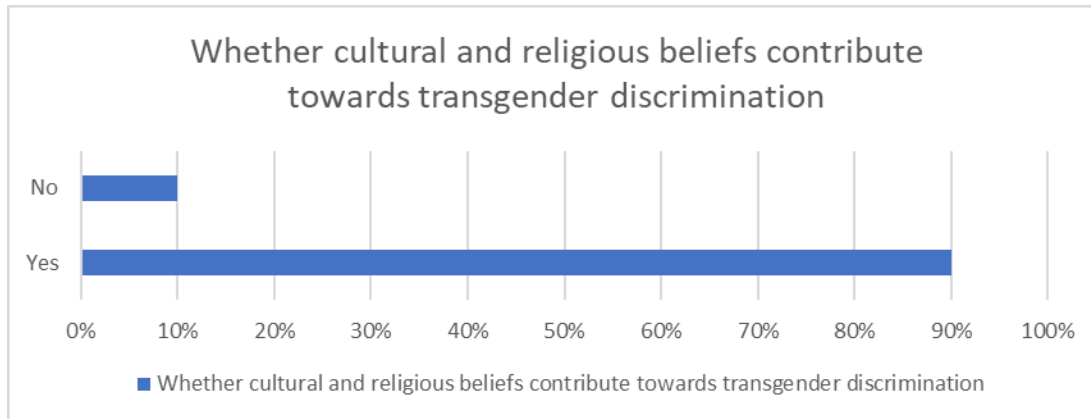
Response Rate		
	Questionnaires	Percent
Distributed	40	100%
Returned	20	50%
Unreturned	20	50%

In the 20 properly completed and returned questionnaires, 14 out of the 20 respondents (or 70%) said that the current legal system does not adequately protect the rights of transgender people, while 6 respondents (or 30%) disagreed.



The majority of respondents also said that, in their opinion and observations, transgender people face additional hostility from the general population when they decide to alter their gender because transgender people are not recognized as having a sexual orientation. Additionally, the majority of respondents (70%) underlined the necessity of restructuring and creating a more thorough legal framework that properly protects the rights of transgender people in order to lessen the antagonism they encounter in society. Furthermore, 65% of the respondents agreed that the education system should be re-evaluated and measures taken put in place to ensure the academic syllabus has teachings on transgender persons so as to create awareness of their existence among children.

In Nairobi County, the majority of respondents observed that in order to remove the social, cultural, and religious hurdles that encourage transgender violations against them, there is a need for good civic education among the general public. The respondents noted that cultural and religious beliefs promoted hostility among such persons.



From the above graph, it is clear that many transgender people in Kenya are considered as abominations and should have no place in society or the community at large because the country is cosmopolitan and has a diverse population of ethnic backgrounds and religious views. This is because they hold the notion that God created male and female, and anyone who doesn't fit this mold is perceived as deviating from a social or medical norm and shouldn't be considered a normal human.

### 5.10 Conclusion

This report is an overview of the information gathered from respondents through key informant interviews, internet surveys, and publicly available questionnaires. The legal system in Kenya is not sufficiently broad to properly protect the rights of transgender people living there, as is clear from the facts above. Additionally, it should be underlined that public interest organizations should intensify their efforts to promote the rights of this underrepresented group in society, as transgender persons are suffering from antagonism from the community's "regular" members. Civic education is another essential strategy for raising understanding and fostering acceptance of transgender people as a sexual orientation.

## **CHAPTER SIX**

### **CONCLUSION AND RECOMMENDATIONS**

#### **6.0 Introduction**

Although Kenya passed a constitution that echoes the spirit of international human rights standards and principles and although the international community has started to address the human rights of minority groups and gender identity after realizing that they face discrimination, Kenya has yet to take any action to ensure protection for minority groups whose human rights are constantly in danger. As a result, transgender people experience marginalization, oppression, and discrimination.

In order to better protect sexual minorities, the study also sought to understand how discrimination against them has been addressed. It also looked at how Kenya can benefit from international human rights norms and principles to better protect its minority groups and address the gender identity issue.

The premise of this study was that because transgender persons in Kenya cannot obtain birth certificates or use public facilities, they are subject to prejudice. By laying out the issue statement, the study's objectives, its underlying assumptions, and its justification in Chapter 1, the study's scope was established. In order to assess the truthfulness of the first hypothesis, the researcher provided a historical backdrop for the defense and promotion of transgender people's rights. This was achieved by highlighting how the Independence Constitution failed to safeguard

and advance the rights of transgender individuals as well as the justifications for why those rights should now be protected following the passage of the 2010 Constitution.

The analysis of the various legal frameworks in place to defend and develop the rights of transgender people in this study was built on a prescriptive approach. The legal system does not adequately safeguard transgender people, according to the second allegation. Thirdly, Kenya can imitate the actions that Malta and South Africa have adopted. The objective of this study was to assess how reliable the aforementioned assumptions were.

The second and third presumptions were examined in Chapter 4, which also outlined the legal gaps Kenya could solve by borrowing from other countries. This study established that transgender people are among the country's marginalized population, and legislative measures were taken to secure the advancement and preservation of their rights. The formation of a transgender task force is another positive development that came to light during the discussion over the protection and promotion of intersex people's rights at the national level.

Reduced institutional discrimination would result from using the term "transgender" in the definition of sex. To further explain the institutional discrimination experienced by transgender people, the researcher considered several national law regulations. The researcher then went over the Persons Deprived of Liberty Act, the Registration of Births and Deaths Act, and the Prisons Act.

The researcher found that the binary sex model was a significant barrier to the growth of transgender people's rights through the analysis of these Acts. All identifying cards that use the word "sex" to denote either male or female directly discriminate against transgender people who fall in the middle of the sex and gender identity continuum.

It is claimed in this paper that formal equality is insufficient to solve the instances of discrimination experienced by transgender persons and that the realization of their rights would result from the demand of substantive equality.

This study demonstrated that a number of elements, such as religion and religious organizations, schools and educational curricula, healthcare facilities, and other factors, influence the daily lives of transgender people in the nation. These elements are pervasive in most social institutions and common social narratives. The issues influencing transgender people's life in the nation will be briefly examined in this chapter.

### **6.1 Religion**

As was already mentioned in Chapter 2 of this study, religion is extremely important in the lives of transgender people in Kenya. According to the study, Christianity has a significant impact on how messages about sexuality, gender identity, and Godly sexuality are conveyed. Because it affects how people understand gender identity and how much sexually acceptable conduct and identity are tolerated, Christianity serves as a crucial regulator when it comes to gender identity. As a result, it plays a crucial social role in shaping sexual identity and behavior. Nearly all Kenyan religions consider transgender people to be situations rather than God's creations that can be treated by necessary measures.

Most participants believe there is little to no room for personal choice in sexual and identity expression that deviates from biblical standards.

### **6.2 Schools and educational institutions**

Educational institutions and systems also influence the marginalization and stigmatization of transgender people. A culture of dread is created in schools through curricula, publications, and



other reading materials that either do not address the reality of transgender people or portray them as scientific anomalies, causing stress in such individuals.

The main effect of this is the daily abuse of human rights that transgender people experience. They lack the fundamental freedoms and individual rights that other groups of people naturally have. Infringements on their safety and security, access to appropriate or adequate healthcare, education, and housing; physical and psychological violence; abuse by state agents; economic deprivation that results in extreme poverty; denial of food, and the right to work are just a few examples of these human rights violations. The overall state of transgender people's human rights is deplorable.

### **6.3 Access to healthcare**

According to Krehely's research, there are a number of discriminations against people based on their sexual orientation and gender identity. It was determined that a sizable portion of transgender people encounter prejudice from medical professionals whenever they want treatment. Due to a lack of awareness of transgender people and the inability to appropriately address their problems, healthcare quality is deficient.

According to Krehely, transgender people are a minority group that is less likely than other majority groups to have access to basic healthcare and are more likely to need treatment in emergency rooms (24 percent compared to 18 percent).

The stigmatization and discrimination experienced by sexual and gender minorities in the workplace and medical settings have a detrimental effect on their health. JM Madera points out that although self-identification as transgender does not increase the risk of suicide, it is linked to

sadness, anxiety, low self-esteem, and social isolation when one encounters stigma and prejudice.

#### **6.4 Stigma and discrimination**

The majority of transgender people typically say that prejudice and stigma are their top issues. Families are the first victims of stigma; once their gender identity is revealed, they are shunned, mistreated, embarrassed, and in some cases, evicted from their homes. Their family is not concerned about where they will travel.

Stigma has been linked to mental health issues and suicide, according to numerous studies. In one such study, Herek et al. discovered that institutionalizing transgender individuals results in poor self-drive due to stigma and societal discrediting. According to research, transgender people are under societal pressure in this atmosphere, which increases their risk of substance addiction, depression, anxiety, and other emotional issues. Growing evidence suggests that prejudice experiences can lead to problems in general and mental health, according to a study by Mays and Cochran in the USA. This study's foundation was a normative framework designed to assess the various legal systems in existence to protect and advance the rights of transgender individuals.

#### **6.5 Recommendations**

Members of the international community generally agree that bias based on gender expression violates both international law and core human rights principles since it has raised major concerns. The application of international human rights concepts and standards at the international, regional, and national levels has significantly increased the promotion and

protection of minority groups, including transgender persons. The UN and its treaty bodies have achieved this incredible feat by establishing regulations and principles that instruct member nations on the protection and promotion of minority groups.

The following are the recommendations that the study sought to address;

### **6.5.1 Legal Reforms**

The foundation for preserving and advancing the rights of minority communities is laid forth in the 2010 Kenyan Constitution. According to Articles 27 (4) and 45 of the constitution, equality and non-discrimination are incompatible.

### **6.5.2 Adoption of comprehensive equality legislation**

The 2010 Constitution's Article 27 should also address the prevention of discrimination on the basis of gender identity, making it imperative to create a complete law that promotes equality across the board and addresses all forms of prejudice. All types of discrimination should be outlawed by this single comprehensive piece of legislation, which would also serve as a proactive step.

### **6.5.3 Need to scale up public interest litigation**

The UDHR affirms that human rights litigation is a crucial tool for bolstering legal rights. In Article 22 of the Kenyan Constitution of 2010, socio-economic rights were first introduced. The locus standi issue that plagued the previous constitution, which only covered those immediately impacted by threats, violations, denials, or infringements of rights, is substantially mitigated by this. Human rights claim's only need to go through the barest minimum of procedures, and this is further enhanced by permitting informal paperwork, allowing proceedings to start without payment of fees, and encouraging pertinent organizations to intervene as friends of the court.

All of this is being done in the name of justice in cases involving infringement, violation, and denial of human rights. These human rights organizations and individuals can benefit greatly from this by launching public interest litigation on behalf of those people who are afraid of being exposed or ridiculed and do not wish to do so. Public interest litigation has gained steam in nations like South Africa and India, where broad court interpretations of their constitutions have increased the protection of socio-economic rights.

#### **6.5.4 Empowering the Judiciary**

When it comes to the judiciary's interpretation of human rights, Kenya has greatly strived to promote transgender rights even if it tended to construe individual rights and fundamental freedoms in favor of citizens which in turn made it acquire a bad reputation. Even though there is good reason to believe that the state has been painted as viciously hostile against the people, its residents, and especially minority groups like transgender individuals, the judiciary has frequently sided with the state in matters involving human rights. It is increasingly well-known for upholding the state's interpretation of rights, even when the state had been extremely antagonistic against its inhabitants and had used its coercive powers arbitrarily and against them.

For judges to understand their new roles, extensive sensitization and training in these areas is necessary. Human rights interpretation with reference to gender identity is a relatively new phenomenon in the Kenyan judiciary, and the new Constitution gives courts new and expanded judicial review powers.

Judiciary Training Institute should strive to inform judges and magistrates about the new global order that significantly influences how international law and the constitution are interpreted. Scholars and judges from other nations that have given equality, non-discrimination, and respect for human dignity life should be welcomed as guest capacity builders by the developing

judiciary. It also requires a different perspective from the judiciary when interpreting the Bill of Rights and those rights to ensure the protection of sexual minorities. The Bill of Rights would be null and void if the legal system lacked the resources and motivation to uphold these rights and if remedies were not monitored to ensure compliance. Therefore, it is necessary to increase the judiciary's expertise and technological proficiency to detect and address abuses of fundamental rights and freedoms. The judiciary must be highly educated and otherwise prepared to handle the complicated human rights problems that arise continuously, including decision-making in instances when rights and interests conflict. This includes creating human rights laws, disseminating rulings, and interacting with the public.

#### **6.5.5 Need to set up a committee to look into sexual minority abuses**

Many people lack cultural awareness of sexual minorities and cannot tell the difference between gay, intersex, or transgender people. There is a great deal of contention and ridicule, which stigmatizes sexual minorities and promotes actual and imagined violence. The idea that quasi-sexual side and gender identity are not African and are a product of foreign culture is frequently propagated by politicians and religious authorities. In order to obtain comments from Kenyans on what steps the country should take to defend and advance their human rights, the government of Kenya could start by creating a commission comparable to the 1954 Wolfenden Committee, made up of well-known human rights advocates.

#### **6.6.6 Public education and sensitization**

It is clear that most Kenyans lack knowledge about sexuality in general and sexual minorities in particular, including the government. This is primarily caused by ignorance based on misinformation and a lack of knowledge. Even though non-heterosexual sex and gender identity have been the subject of much research in other countries, Kenyans have little access to this

knowledge. As part of its responsibility to sexual minorities under international human rights law, the government must step up public education. Most Kenyans lack knowledge regarding gender identity, and this misunderstanding informs many of their opinions toward individuals. The nation must take the initiative to implement programs that inform Kenyans about issues relating to sexual minorities, the implications of international human rights law, and the Kenyan Constitution of 2010 on the human rights of sexual minorities.

#### **6.5.7 Involvement of sexual minorities in legislative and policy formulations**

This study has claimed that a synergetic combination of legal and non-legal processes and policy formulations is the best way to regulate gender identity. An interesting area of study could be the nature of normative and policy formulations, how they are developed, and how well they function as regulatory mechanisms. Participation of transgender people may be beneficial. To ensure effectiveness, this inquiry should also concentrate on how the laws and regulations are applied. This could also shed light on alternative regulatory mechanisms that hinder the effectiveness of normative ones.

#### **6.5.8 Aiding the Parliament in understanding transgender persons**

The judiciary and parliament play key roles in implementing the Bill of Rights into effect. The State must pass and implement laws to uphold its international commitments to uphold human rights and basic freedoms, according to Article 21 (4) of the Constitution. Although Parliament has passed a few helpful laws after the constitution's ratification, more must be done through changes and/or repeals in order to bring them into line with the constitution's spirit. For Parliament to be more effective, its members must be made aware of international human rights norms and principles through education, training, and capacity building. This will help them recognize their responsibility in this area.

The suggestions made in this study report will advance understanding of and advocacy for transgender people's rights. The research paper suggests changes to the various legal frameworks, particularly adding transgender people to the definition of sex. As a result, there will be fewer situations where the needs of transgender people are confused with those of other gender expression or sexual orientation difficulties. Therefore, workshops aimed at educating the public on the need to advance and defend the rights of members of the transgender community should be held.

The Kenya Human Rights Commission, whose job it is to maintain track of human rights concerns affecting Kenyans, could handle this. This study confirms the requirement for a set of rules governing the use of medical intervention. Before using medical intervention on a transgender individual, these rules should assure parental consent as an overriding interest. The Transgender Task Force might write these regulations. The Task force should emphasize the necessity for criminal penalties when medical intervention is performed without a transgender person's permission. This should also be the case when a transgender juvenile is involved; depending on their age and degree of maturity, the minor should be permitted to select their gender identity and undergo surgery.

## **6.6 Conclusion**

### **6.6.1 Limitations and delimitations of the study**

Particularly in Kenya, the topic of sexual minorities' human rights breaches is very new and understudied. It necessitates thorough examinations of the problem's legal, political, and social solutions. The biggest drawback of this study is the paucity of research on the issue of sexuality in Kenya as a result of the taboo nature of the subject. As a result, information is still limited. In addition, the topic of sexual minorities' human rights is one that is still developing within the

international human rights framework. As a result, the normative institutions at the UN and in the regional African systems are unstable and essentially silent on the matter.

Additionally, due to the taboo nature of the subject matter, the field of study that deals with sexualities in Africa is still in its early phases of growth. Furthermore, although it is acknowledged that there are numerous categories of people who belong to the sexual minority class, each category is unique and experiences discrimination in its own unique way from various sources. Because some individuals mistakenly believe that homosexuality and transgender identity are the same, it can be challenging for people to discern between the two. Since this research is based on an area that is contentious in the African precept, there is an absence of resources to support research, and this also posed a challenge during the research given that not much study has been done on this issue.

All of these elements created considerable difficulties during the research period, even when employing questionnaires to get data from the general public. Another difficulty was in convincing the participants that their participation would be kept completely confidential and that their sexual orientation or gender identity would not be revealed unless they expressly consented. Everyone was unaware of their participation because even their close family and friends were unable to assume they knew about their sexual identity and orientation. The researcher also ensured that no interviewee was bullied or pushed into participating. To guarantee successful and voluntary information was provided, appropriate methods of access to all key informant interviewees were used.

### **6.6.2 Reflections**

Finally, regardless of gender identity, people should be able to exercise their unique rights and fundamental freedoms, which is the premise of this study. This study has amply demonstrated



that society has not yet caught up with the development of transgender people, which causes these people to experience marginalization, discrimination, and a lack of access to basic freedoms and rights. Given the international human rights standards and principles that are being promoted, the 2010 Constitution of Kenya, which upholds them, and the creation of a dynamic legislature and judiciary with the potential to improve the lot of sexual minorities through a critical and transformative approach to decision-making, this should not imply that there is no way out for transgender people in the nation.

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