



UNIVERSITY OF NAIROBI

**NON-RECOGNITION OF INTERSEX PERSONS AND ITS IMPACT ON THEIR
HUMAN RIGHTS: THE CASE OF KENYA.**

BY

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REGISTRATION NUMBER: G80/51541/2017

**A THESIS SUBMITTED IN FULFILMENT OF THE REQUIRMENTS OF THE DEGREE OF
DOCTOR OF PHILOSOPHY (PH.D) IN LAW, SCHOOL OF LAW, UNIVERSITY OF NAIROBI.**

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2023.

DECLARATION.

I hereby declare that this thesis is my own original work. It has not previously been submitted to this or any other University. Any secondary source used which is not originally mine has been duly acknowledged and referenced.

I confirm that I have complied with the University of Nairobi's Policy on Plagiarism.

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DEDICATION

This thesis is dedicated to all the intersex persons in Kenya. May they find complete legal and social acceptance.

ACKNOWLEDGEMENTS.

This work has taken six years to complete. In that time, I have received tremendous help from many people. The greatest support came from my three supervisors. Dr. Elizabeth Muli, Professor Edwin Abuya and Dr. Seth Wekesa, please receive my gratitude for your tireless efforts in helping make this thesis a reality. Right from the development of the proposal to the entire writing process, you read, reread and guided every chapter. Your insightfulness, enthusiasm and determination that I should produce nothing but the best, even when I sometimes could not keep up, is greatly appreciated. Your patience and encouragement when I broke my leg and was internally broken will forever be in my heart. We made a great team.

My family was a constant support system. My daughter Nyokabi and my sister Mumbi (Lawyers *Inc*), thank you, not just for continually encouraging me, but also for sending my way everything and anything you thought would be relevant. Ernest Njenga, my son and IT *guru*, and Dr Robert Ngugi my nephew (my twins), many thanks for everything. My mother Nyambugi, my sisters Nelly, Wanjiku and Mbaire, thank you for upholding me in prayer. Special gratitude to you Mbaire for letting me clean my chapters in the quiet of your house in Kapiti Plains, with the hyenas howling in the bush as a 2022 presidential aspirant made certain plans for their body parts. Dr Ndambo, Dr Joy Mbaya, Dr Wambua, Kevin, Dr Shish and Ms Selly Makokha, *asanteni sana*. Lt Col Gachoki, many thanks for your constant support.

My colleagues Dr. Faith Kabata and Ms Elizabeth Wanjiru, receive my gratitude for stepping in for me and handling my duties when I needed time off to write. Dr Kabata, I cannot thank you enough for nominating me for the doctoral fellowships through which I gained invaluable exposure in Addis Ababa, South Africa and China. Raoul Wallenberg Institute of Human Rights and Humanitarian Law, The Cross-Cultural Human Rights Centre (CCHRC) of *Vrije Universiteit*, Strengthening Human Rights Research and Education in Sub-Saharan Africa (SHUREA) and the International Committee of the Red Cross (ICRC), please accept my gratitude for your generous financial support which enabled me access resources from various universities globally and interact with scholars whose input greatly enriched my work.

Last but not least, *asanteni sana* my Ph.D support group and the entire team from University of Nairobi School of Law.

And to God be all the glory....His mercies are new every morning!

LIST OF ABBREVIATIONS AND ACRONYMS.

ACHPR	African Charter on Human and Peoples' Rights.
ACRWC	African Charter on the Rights and Welfare of the Child.
AIDS	Acquired Immunodeficiency Syndrome.
AfriCog	Africa Centre for Open Governance.
AU	African Union.
BBC	British Broadcasting Corporation.
BDMRA	Births, Deaths, and Marriages Registration Act.
BMC	British Medical Council.
BOR	Bill of Rights.
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
CBC	Curriculum Based Course.
CDDECS	Committee for Social Cohesion, Human Dignity and Equality.
CEDAW	Convention on the Elimination of All Forms of Discrimination against.
CEDE	Convention against discrimination in Education
CESCR	Committee on Economic and Social Cultural Rights.
CRC	Convention on the Rights of the Child.
CRPD	Convention on the Rights of Persons with Disabilities.
DCI	Director of Criminal Investigations.
DIAC	Department of Immigration and Citizenship.
DRTD	Declaration on The Right to Development.
DSD	Disability Discrimination.
DSM	Diagnostic and Statistical Manual of Mental Disorders.

ECHR	European Court of Human Rights.
FGM	Female Genital Mutilation.
GIGESCA	Gender Identity, Gender Expression and Sex Characteristics Act.
HIV	Human Immunodeficiency Virus.
HRC	UN Human Rights Committee.
HRW	Human Rights Watch.
IBOR	International Bill of Rights.
ICCPR	International Covenant on Civil and Political Rights.
ICESCR	International Convention on Economic, Social and Cultural Rights.
IGM	Intersex Genital Mutilation.
IILA	International Institute for Legislative Affairs.
ILC	International Labour Conference.
ILO	International Labour Organization.
ISOSA	Intersex Society of South Africa.
ISSA	Intersex Society South Africa.
ITUC	International Trade Union Confederation.
KCPE	Kenya Certificate of Primary Education.
KCPF	Kenya Christian Professional Forum.
KCSE	Kenya Certificate of Secondary Education.
KHRC	Kenya Human Rights Commission.
KICD	Kenya Institute of Curriculum Development.
KLR	Kenya Law Reports.
KNBS	Kenya National Bureau of Statistics.

KNEC	Kenya National Examination Council.
KNHRC	Kenya National Human Rights and Equality Commission.
KNH-UoN	Kenyatta National Hospital-University of Nairobi.
KPTJ	Kenyans for Peace with Truth and Justice.
KRA	Kenya Revenue Authority.
LGBT	Lesbian, Gay, Bisexual and Transgender.
LGBTI	Lesbian, Gay, Bisexual and Transgender Intersex.
LGBTQI	Lesbian, Gay, Bisexual and Transgender Queer Intersex.
MDG's	Millennium Development Goals.
MOH	Ministry of Health.
NACOSTI	National Council of Science, Technology and Innovation.
NCST	National Council for Science and Technology.
NCST	National Council of Science and Technology.
NEMIS	National Education Management Information System.
NHIF	National Hospital Insurance Fund.
NIIMS	National Integrated Identity Management System.
NIV	New International Version.
NSSF	National Social Insurance Fund.
NTSA	National Transport and Safety Authority.
OAU	Organization of African Unity.
ODPP	Office of the Director of Public Prosecutions.
OECD	Organization for Economic Co-operation and Development.
OHCHR	Office of the High Commissioner for Human Rights.

PADVA	Protection Against Domestic Violence.
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act.
PIN	Personal Identity Number.
PSTG	Personenstandsgesetz.
SDG	Sustainable Development Goals.
SOA	Sexual Offences Act.
SRLP	Sylvia Rivera Law Project.
UDBHR	Universal Declaration of Bioethics and Human Rights.
UDHR	United Nations Declaration of Human Rights.
UN	United Nations.
UNAIDS	United Nations Program on HIV and AIDS.
UNDP	United Nations Development Program.
UNESCO	United Nations Educational, Scientific and Cultural Organization.
UNESCO	United Nations Educational, Scientific and Cultural Organization.
UNFPA	United Nations Population Fund.
UNGA	United Nations General Assembly.
UNICEF	United Nations Children's Fund.
UPI	Unique Personal Number.
WHO	World Health Organization.

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ABSTRACT

As a law student in the early eighties, a friend undertaking a course in midwifery and I used to share our daily learning experiences. One day, she told me about a child who had been born with female and male external genitalia, both fully formed. This ‘unusual’ birth threw everyone into a state of confusion at the hospital where she was training. There was a flurry of activity as people came to peek at the child’s double genital. Some turned away with shocked revulsion while others laughed and labeled the child a ‘curse’. What struck my then novice legal mind was the way the child was ‘documented’. On the first legal form officially used to recognize the birth of a human being, a question mark (?) was inserted against the sex/gender description of ‘Tim’, as the child was named. In all subsequent hospital records and discharge notes, Tim’s sex/gender description was declared as ‘query boy’ (?), ‘query girl’ (?) and ‘unknown’. This was an indication that the intersex gender was ‘unknown’ and ‘nonexistent’ under Kenyan law.

Years later, I encountered the cases of *RM v Attorney General & 4 Others* [2010] eKLR and *Baby A and Another v the Attorney General and Others* (2014) eKLR, both involving individuals, who like ‘Tim’ had been born with double genitalia. They too could not get identity documents due to the lacuna in the documents’ issuance legal regime, which fails to factor in people born with the intersex gender. They too were stigmatized. This was a reflection of fundamental gaps in the legal documentation regimes.

Starting from the premise that legal recognition is realized through the medium of accurate government issued identity documents, this research aims at examining the gaps and shortcomings in the regimes relating to legal recognition for people born intersex in Kenya. It is driven by the key hypothesis that the law is deficient in this regard thereby negatively impacting people born intersex from the cradle to the grave. The research further contends that recent piecemeal legislative changes have not helped seal the gaps in the identity documents’ issuance regimes and that discrimination and exclusion against intersex persons seeking to access their livelihood rights and other unquantifiable human needs remains intact. Its primary objective is to identify those legal gaps and inadequacies with the specific objectives of investigating if and how the gaps adversely impact intersex persons’ access to various socio-economic rights and certain human needs.

To achieve the primary and specific objectives, the research seeks to answer an overarching question being whether there exists gaps, shortcomings, and inadequacies in the legal regime

through which identity documents are issued, when it comes to documenting intersex persons. It also seeks to answer specific questions on what those gaps are and how they have translated to denial of access to specific socio- economic rights and human needs for people born in that unique sex/gender. And towards responding to the research questions, achieving the objectives and testing the key hypothesis, the research uses narratives drawn from intersex persons' lived experiences.

The research is undertaken in six chapters. The first introduces the work and sets the context within which the research is undertaken by setting out the problem statement, the research objectives and the justification. Chapter two seeks to determine what deficiencies exist in the legal framework through which precise identity and other crucial documents are issued to Kenyans, and how they discriminate and exclude the intersex person. Chapter three examines the manner in which exclusion and discrimination has negatively impacted their rights in the areas of health, education and employment. Chapter four proceeds to evaluate the negative impact on the unquantifiable human needs including dignity, autonomy, personal liberty and personal rights such as the right to a name, to family life and even dignity at death.

Drawing from responses gathered from the field and illustrative experiences from selected jurisdictions discussed in chapter five, the research, in chapter six, arrives at a number of multi-dimensional corrective recommendations. Key among these are legislative review of the identity documents' issuance legal regime and specific policy formulation in health, education and employment sectors. Others are societal sensitization, advocacy and awareness measures aimed at promoting social acceptance.

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CHAPTER ONE. INTRODUCTION AND CONTEXT OF THE STUDY

1.1. INTRODUCTION

Undoubtedly, human beings are born with physical bodily diversities which are attributable to variations in genetic compositions.¹ Genetic differences may manifest in pigmentation determining the colour of the hair, the skin or the eyes of an individual.² Variations in genetics may also include the gonadal, hormonal, chromosomal and other genetic composition differences which determine the biological genital organs.³ Differences in genetic composition determining external genitalia manifests in either male, female or intersex external genitalia.⁴ Research points at genetic variations being the reason human beings are not just unique individually but also usually significantly different.⁵ Indeed, even twins, who are conceived and gestated simultaneously, may, and often are, born as diverse and unique individuals.⁶ Irrespective of the differences in bodily diversities manifested through the colour of a person's eyes, skin or even physical genital organs, everyone has a right to be recognized as a person by the law.⁷

The right to be recognised as a person before the law is a human rights principle whose importance cannot be gainsaid. It is a right bestowed upon every person and entrenched in all key human rights instruments. It is contained in the Universal Declaration of Human Rights (UDHR),⁸ the International Covenant on Civil and Political Rights (ICCPR)⁹ and the Convention on the Rights of the Child (CRC).¹⁰ In the African region, the right is found in the African Charter on Human and People's Rights (ACHPR),¹¹ the founding human rights

¹ Richard Sturm, 'Molecular Genetics of Human Pigmentation Diversity'. (2009) 18 *Human Molecular Genetics* 1, 10-14.

² Ibid.

³ David Andrew Griffiths, 'Shifting Syndromes: Sex Chromosome Variations and Intersex Classifications'. (2018) 48 *Social Studies of Science* 1, 130- 132.

⁴ Ibid.

⁵ Yusuke Nakamura, 'DNA Variations in Human and Medical Genetics: 25 Years of My Experience'.(2009) 54 *Journal of Human Genetics* 1-8.

⁶ Kerry Lynn Macintosh, *Illegal Beings: Human Clones and the Law*. (Cambridge University Press 2005) 23-24.

⁷ The right to be recognised as a person before the law is provided for in all key human rights instruments. It is found in the Universal Declaration of Human Rights (UDHR), Article 6, the International Covenant on Civil and Political Rights (ICCPR), Articles 16 and 24, the Convention on the Rights of the Child (CRC), Article 7, and the African Charter on Human and People's Rights (ACHPR), Article 5, amongst other human rights instruments.

⁸ UDHR, Article 6.

⁹ ICCPR, Articles 16 and 24.

¹⁰ CRC, Article 7.

¹¹ ACHPR, Article 5.

instrument in the region.¹² In Kenya, the Constitution of Kenya, 2010, grants every person equal protection and benefit before the law, thereby giving everyone the right to be recognised as a person before the law.¹³

Registration and issuance of identity documents by one's government has been determined to be the key medium through which an individual is granted legal recognition.¹⁴ Ladner *et al*, opine that access to identity documents is an intrinsic universally accepted right.¹⁵ Identity documentation is what chronicles an individual's legal status within that individual's State.¹⁶ The act of providing legal identity by a State to its citizens, has indeed, been described as a key State responsibility.¹⁷ Kenya acknowledges this responsibility by proclaiming, in its supreme law, that all citizens have a right to be registered and to receive all documents of identification given by the State to its citizens.¹⁸ Certain documents, issued under various legal regimes, fall in this constitutionally guaranteed category. These identity documents are crucial for identifying the holder for purposes of accessing key human rights as well as certain unquantifiable human needs. These include birth registration documents,¹⁹ a national identity card,²⁰ travel documents,²¹ a voter's card²² and social security scheme identification cards.²³ A driver's license,²⁴ the Kenya Revenue Authority personal Identification Number (KRA PIN) Certificate, a marriage certificate,²⁵ the recently introduced digital identity documents,²⁶ and even those used to document a person's death are all of central legal importance.²⁷

¹²Makau wa Mutua, *The African Human Rights System: A Critical Evaluation*: (United Nations Development Programme, Human Development Report 2000)1.

¹³ Constitution of Kenya 2010, Article 27(1) and (2).

¹⁴ Adam Hussein, 'Kenyan Nubians: Standing up to Statelessness' (2009) 32 *Forced Migration Review*, 19- 21.

¹⁵ Debra Ladner *et al*, 'A Critical Assessment of Legal Identity: What It Promises and What It Delivers'(2013) *Hague Journal on the Rule of Law*, 1-2.

¹⁶ Marijke Kremin , 'To Be Out and In: Influencing Factors in the Recognition of SOGI-Based Asylum Claims in South Africa and Kenya' (Master of Arts Thesis, Columbia University 2017) 9-10.

¹⁷ Ben Oppenheim and Brenna Marea Powell, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya* (Open Society Foundations, 2015) 1-2.

¹⁸ The Constitution of Kenya 2010, Article 12 (1)(b).

¹⁹ These are issued under the Births and Deaths Registration Act, Chapter 149 of the Laws of Kenya (Rev.2012).

²⁰ Issued under the Registration of Persons Act, Chapter 107 of the Laws of Kenya.

²¹ Kenya Citizenship and Immigration Act, No.12 of 2011 of Kenya.

²² Elections Act, No. 24 of 2011 of Kenya (Rev 2012)

²³ The issuing regime for these documents are the National Hospital Insurance Fund Act Chapter 255 and the National Social Security Fund Act, No. 45 of 2013.

²⁴ Traffic Act, Chapter 403 of the Laws of Kenya.

²⁵ Marriage Act, No. 4 of 2014 of Kenya.

²⁶ Registration of Persons Act, Chapter 107 of the Laws of Kenya.

²⁷ Births and Deaths Registration Act, Chapter 149 of the Laws of Kenya (Rev.2012).

Legal recognition through acquisition of identity documents from one's State translates into a key human right. But even more important is acquisition of identity documents, which are not inconsistent with one's sex/gender identity. According to Maier, identity documents should never be incongruent with the sex/gender of their holders.²⁸ The importance of acquisition of legal identity through access to sex/gender congruent government issued identity documents can therefore not be overemphasised.²⁹ Every human being, whether born with the male, female or intersex sex/gender characteristics, are entitled to this medium of legal recognition.

Although the right to acquire sex/gender congruent identity documents for every human being is of critical importance, it is noteworthy that there are currently no human rights instruments in place specifying this right. However, certain international consensus documents have underpinned the centrality of sex/gender congruent identity documents. One of this is in the form of the 'Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (2016 Yogyakarta Principles).³⁰ The other is the 2017 'Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics' (Yogyakarta Principles Plus 10).³¹ These two sets of documents were drafted in an attempt to develop human rights standards for persons of non-conforming sexual and sex/gender identities, where intersex persons fall. In terms of the right to access sex/gender congruent identity documents, the Yogyakarta Principles Plus 10 provides as follows:

'Everyone has the right to obtain identity documents, including birth certificates, regardless of sexual orientation, gender identity, gender expression or sex characteristics.'³²

According to this Principle, everyone has the right to change the sex/gendered information in such documents. This provision gives sex/gender nonconforming persons the right to alter the sex/gendered classification recorded in their identity documents including a birth certificate,

²⁸ Megan Brodie Maier, 'Altering Gender Markers on Government Identity Documents: Unpredictable, Burdensome, And Oppressive' (2020) 23 University of Pennsylvania Journal of Law and Social Change 204-205.

²⁹ Michael Ryan, 'Gender Identity Laws: The Legal Status of Global Sex/Gender Identity Recognition' (2018) 8 LGBTQ Policy Journal 3-6.

³⁰ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles) (Adopted 2006, the International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity).

³¹ Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics (Yogyakarta Principles Plus 10 or (YP+10)) (Adopted 10th November 2017, The International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity).

³² Yogyakarta Principles Plus 10 (YP Plus 10) or (YP+10), Principle 31.

to reflect their accurate sex/gender, if need be.³³ It is acknowledged that both sets of Yogyakarta Principles constitute soft law as defined under international law and therefore lack the binding force of law.³⁴ Nevertheless, both sets of Principles have been described as standard setting and authoritative norms of international law for States in the protection and promotion of the rights of sexual and gender diverse persons.³⁵ Indeed, read together with the provisions of key human rights instruments, specifically the ICCPR,³⁶ the CRC³⁷ and the ACHPR,³⁸ the standards set out in the Principles bring on board everyone. Intersex persons and other persons of gender non-conforming sex/gender also have the right to legal recognition through access to identity documents accurately describing them in terms of their true sex/gender. The Principles have thus set a global standard through which States can base what legal recognition through identity for everyone would entail.³⁹

An individual's name and sex/gender description constitutes central identifying components of a human beings' identity. These components will normally be present in key identity documents. Marjie-Okyere indeed argues that it is a name which gives everyone a legal identity as an individual.⁴⁰ Wandere makes a similar argument with regard to the sex/gender of a person.⁴¹ Maier equally stresses the importance of these two central identity features and asserts that identity documents serve to disclose both the name and legal sex/gender of the holder.⁴² Indeed, the documentation issuance regime in Kenya has determined that the aspect of sex/gender description is a key identifying feature. It is a feature, alongside an individual's name, that has to be included in every key document imparting a legal identity on the holder.⁴³ And it is that legal identity which determines one's ability to fulfil various fundamental

³³ Ibid.

³⁴ Andrew Guzman and Timothy Meyer, 'International Soft Law' (2010) 2 *Journal of Legal Analysis* 1, 171- 173.

³⁵ Morgan Carpenter, 'Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics And The Yogyakarta Principles Plus 10' (2020) 23 *Culture, Health & Sexuality* 4: 516-517.

³⁶ ICCPR, Articles 16 and 24.

³⁷ CRC, Article 7.

³⁸ ACHPR, Article 5.

³⁹ Morgan Carpenter, 'Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics And The Yogyakarta Principles Plus 10' (2020) 23 *Culture, Health & Sexuality* 4: 516-517.

⁴⁰ Sarah Marjie-Okyere, 'A Linguistic Survey of Types of Names Among The Babukusu of Kenya'. (2015) 15 *Global Journal of Human Social Science* 3: 35.

⁴¹ Donald Oluchina Wandere, 'Firming Up The 'Other' Gender: Discourse On Sexuality And Sexual Minorities in Kenya' (2021) 3 *African Journal of Emerging Issues*, 10 : 98.

⁴² Megan Brodie Maier, 'Altering Gender Markers on Government Identity Documents: Unpredictable, Burdensome, and Oppressive' (2020) 23 *University of Pennsylvania Journal of Law and Social Change*, 204-205.

⁴³ Herman Omiti, 'Sexual Orientation, Gender Identity and the Right to Legal Recognition of the Intersex Persons in Kenya' (2012). SSRN: <https://ssrn.com/abstract=2181973>. Accessed on 26th September 2022.

rights.⁴⁴ It is that legal identity that also facilitates access to basic services, economic opportunities and many other needs.⁴⁵

Access to fundamental human rights, basic services and human needs ought to be equal and without discrimination.⁴⁶ According to Kimotho and Oluoch, lack of recognition through identity documents not only acts as a stumbling block to one's personal development but also hinders a person's ability to access the services they need.⁴⁷ These encompass access to rights and needs necessary for one to live a life of dignity and to develop one's potential fully.⁴⁸ Accurate government issued identity documents essentially allow access to such rights, needs and opportunities in life, without which one is exposed to negative outcomes whilst trying to access those rights.⁴⁹ Undocumented people can for instance, be excluded from easily accessing health and opportunities for education and employment.⁵⁰ The ability to travel and to navigate many day-to-day activities is also premised on identity documents which accurately describe their holder.⁵¹ The capability to engage in several transactions including financial and non-financial ones is equally dependent on accurate identity documentation. Without a legal identity, personal security and safety also becomes compromised.⁵² Given that sex/gender is a central piece of material fact in identity documents, accurate insertion of this data on all identity document for everyone, including those born with the intersex gender becomes imperative.

1.2. BACKGROUND TO THE STUDY.

The aspect of legal recognition through acquisition of identity documents that are not discordant with a person's reality as seen, is of critical importance. However, experiences of people born intersex in Kenya indicates that the country is yet to actualize the right to

⁴⁴ Agnieszka Wedet-Domaradzka, *The Right to an Identity: The Context of the Rights of the Migrant Child* in Markienwicz-Stanny *et al* (eds) *Children in Migration, Status and Identity*. (Nomos Verlagsgesellschaft mbH & Co. KG, 2022)13.

⁴⁵ Scharrer, Tabea. "Ambiguous citizens": Kenyan Somalis and the question of belonging'. (2018) 12 *Journal of Eastern African Studies* 3 : 494-513.

⁴⁶ Equality and freedom from discrimination are fundamental principles entrenched in the Constitution of Kenya 2010 at Article 27.

⁴⁷ Rueben Kimotho and Ken Oluoch, 'Assessment of Effectiveness of Citizen Registration Systems in Kenya' (2016) 1 *Journal of Public Policy and Administration* 1: 58.

⁴⁸ Ben Oppenheim and Brenna Marea Powell, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya* (Open Society Foundations 2015)14.

⁴⁹ *Ibid.*

⁵⁰ Wendy Hunter, 'Identity Documents, Welfare Enhancement, and Group Empowerment in the Global South' (2018) 55 *The Journal of Development Studies* 3: 368-377.

⁵¹ *Ibid.*

⁵² *Ibid.*

recognition through issuance of accurate identity documents.⁵³ This situation not only exists but persists despite the fact that Kenya is a signatory to key human rights instruments which afford protection for every human being, regardless of any diversity. Kenya has domesticated these recognition principles and provisions making them part of Kenyan law, but the situation has not changed.⁵⁴ A documentary aired on national television in 2018 exposed the magnitude of the difficulties intersex persons undergo during their life cycle for not being recognized in society.⁵⁵ For them life is a daily struggle as they try to access various basic needs and opportunities.⁵⁶ They struggle to fit into a binary ordered legal regime which has been silent regarding their existence.⁵⁷

Since 2014 however, there appears to be a shift from this silence. This was when, for the first time in Kenya's legal history, the term intersex found its way into the Statutes through the enactment of 'The Persons Deprived of Liberty Act'.⁵⁸ Soon thereafter, the first Intersex Awareness day was observed simultaneously with the world's maiden International Intersex Awareness day.⁵⁹ Additionally, the Attorney General in 2017 constituted a Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya (Taskforce).⁶⁰ The Taskforce in its Report, 'Taskforce Report on Intersex Persons, Kenya', set out a number of areas through which the rights of intersex persons get undermined in Kenya.⁶¹ The 'Taskforce Report on Intersex Persons, Kenya' also set out certain recommendations

⁵³The research demonstrates this through the lived experiences of intersex persons. See Chapters 2,3 and 4 of this research.

⁵⁴ Constitution of Kenya 2010, Article 2(6) .

⁵⁵ Rose Wangui, *Born in Between* (NTV Kenya 2018).

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸The Persons Deprived of Liberty Act, No. 23 of 2014 (Kenya Gazette Supplement No. 172 of 31st December 2014).

⁵⁹The Intersex Awareness Day was held on the 26th October 2016.

<http://www.mediamaxnetwork.co.ke/news/266826/kenyan-groups-join-world-marking-first-intersex-day>. Accessed on 10th February 2017).

⁶⁰The Taskforce was constituted vide Gazette Notice Number 4904 of 18th May 2017. Its mandate was to *inter alia* (a) compile comprehensive data regarding the number, distribution, and challenges of intersex persons.

(b) undertake comprehensive literature review based on a comparative approach to care, treatment, and protection of intersex persons.

(c) examine the existing policy, institutional, legislative, medical, and administrative structures, and systems governing intersex persons.

(d) recommend comprehensive reforms to safeguard the interests of intersex persons.

(e) develop a prioritized implementation matrix clearly stating the immediate, medium- and long-term reforms governing the intersex persons; and,

(f) Compile comprehensive data and document challenges.

⁶¹ Government of Kenya, *Report of the Task Force on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya*(Government Printer 2019)('Taskforce Report on Intersex Persons, Kenya). The report was launched in December 2018.

intended to right the wrongs.⁶² More significantly, the intersex person was counted as a distinct sex/gender category in the 2019 national census, alongside the traditionally known and accepted male and female sex/gender categories.⁶³ Other legal developments include the enactment of the Children Act No 29 of 2022⁶⁴ and the National Reproductive Health Rights' Policy⁶⁵ launched in July 2022. In this regard therefore, the intersex person who has for many years remained in the legal shadows in Kenya appears to be increasingly becoming visible. And for this visibility, Amnesty International has scored the government of Kenya well in terms of protection of intersex persons' rights.⁶⁶

However, this perceived visibility has neither been translated into legal acceptance through issuance of accurate identity documentation nor into improved access to human rights and needs of this category of people. The person born intersex in Kenya cannot actualize the reality of attaining legal recognition by acquiring congruent identity documents due to the deficient identity documentation regime. Any rights targeted by the recent legal developments are yet to be converted into substantive rights capable of being enjoyed⁶⁷ Glaring legal voids and inadequacies are evident in specific identity documents issuance frameworks. Intersex persons still lack legal recognition, cannot accurately be documented and their fundamental rights, freedoms and other human needs continue to be negatively impacted. They continue to find themselves caught up in the middle of two legal dilemmas. In the first, the law has not made provision for issuance of accurate identity documents consistent with their sex/gender status. The result is that those who get documented end up being misgendered and are issued with identity documents incongruent with their sex/gender reality. In the second, they are not documented at all and therefore do not get issued any identity documents. Both situations have created major legal gaps leading to significant limitations in their lives.

These gaps can be attributed to Kenya's social - cultural attitudes and norms which have been mainly binary based and heteronormative in nature, presenting heteronormativity and

⁶² Ibid.

⁶³ Hitherto, the Kenya National Bureau of Statistics, the body charged with collection of population data had never included intersex in its census tool. Its population distribution by sex was always in terms of male and female sex/gender categorizations. <http://www.knbs.or.ke> (Accessed on 1st July 2017).

⁶⁴ Children Act, 2022, No 29 of 2022, Laws of Kenya.

⁶⁵ Ministry of Health, *The National Reproductive Health Policy 2022 - 2032*, (Government of Kenya, 2022).

⁶⁶ Amnesty International Kenya, *Missed Opportunities: A Scorecard on the Jubilee Administration and Lessons for the Next Government* (Amnesty International Kenya 2022)9.

⁶⁷ Black's Law Dictionary talks about procedural rights acquired through administrative procedures, which then actualise substantive rights. See Byran Garner *et al*, (eds) *Black's Law Dictionary, 10th Edition*. (Thompson Reuters 2014)1519.

sex/gender binarism as the normal and natural.⁶⁸ Any alternative sex/ gender category has subsequently been propounded as abnormal and criminal.⁶⁹ Socio-cultural attitudes, norms and constructs of that nature have subsequently advertently, inadvertently but certainly subtly, stamped gender binary and heteronormativity constructs in society.⁷⁰ These constructs have in turn majorly influenced the present nature of the law. During the constitutional review process held in Kenya between 2001 and 2010 for instance, representations were made for the protection of the rights of persons who do not conform to the known sex /gender features and sex/gender identities.⁷¹ However, the ‘Constitution of Kenya Review Commission’, the institution then charged with the process, rejected this debate.⁷² This was to avoid a situation that would have led to the overall defeat of the draft constitution at the national referendum.⁷³ Even after the passage of the Constitution in 2010, Kenya has remained fixated on the traditional sex/gender binary classification.⁷⁴ Yet, the Constitution of Kenya, 2010, impliedly protects the rights of all citizens.⁷⁵ Despite this implied protection for everyone, the country still officially documents people in the binary and sadly for intersex persons, only male and female sex/gender options are available. And yet, documented research shows that human beings can be born biologically and anatomically male, female or intersex. Balen and Creighton estimate that at least one in every four thousand children born globally has an intersex condition.⁷⁶ Fausto Sterling puts the global figure of persons born with intersex traits at 1.7%.⁷⁷ The United Nations Free and Equal Campaign initiated by the United Nations office for Human Rights also places the global figure of children born intersex at 1.7%.⁷⁸ In Kenya, the 2019 population census put the official statistical data on intersex persons at 1,524.⁷⁹ This is official confirmation that there are at least 1,524 Kenyans who cannot and should not be put in either the male or female gender/ sex category because they are neither. Nonetheless the

⁶⁸ Moagi Lefatshe, *Violence Against LGBT(QI) Persons in Africa*. (The Palgrave Handbook of African Women’s Studies 2020)7-9.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Seth Muchoma Wekesa, *Decriminalization of Homosexuality in Kenya: The Prospects and Challenges*, in Sylvie Namase and Adrian Jjuko, (eds), *Protecting the human rights of sexual minorities in contemporary Africa*. (Pretoria University Press 2017)88.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Sex is listed as one of the prohibited grounds of discrimination at Article 27(4).

⁷⁶ Adam H. Balen & Sarah M. Creighton, *Pediatric and Adolescent Gynecology: A Multidisciplinary Approach*, (Cambridge University Press 2004) 97.

⁷⁷ Anne Fausto-Sterling, *The Five Sexes, Revisited*. (The Sciences 2000) 20.

⁷⁸ Council of Europe, *Human Rights and Intersex People Issue Paper Number 32* (Council of Europe 2015) 16.

⁷⁹ Kenya National Bureau of Statistics, *2019, Kenya Population and Housing Census: Volume 1* (Kenya National Bureau of Statistics 2019) 7.

structure of the documentation regime which confers identity on citizens of Kenya is such that it can only classify them as male or female or totally exclude them.⁸⁰

The current nature of the law has led to various reactions regarding the process of documenting an intersex person at birth. The first is to wrongly categorize them in either the male or female sex/gender legal classifications. The other is to not categorize them at all and to instead place doubtful phrases in the sex/gender identity description part of the identity documents as happened with Baby A and Tim, the intersex child who inspired this work.⁸¹ An even more violent reaction is to ‘medically and surgically fix, modify or reassign’ the intersex genitalia to make it ‘fit’ into either of the two sex/gender categories currently availed by the legal documentation regime.⁸² This ‘fixing’ invariably amounts to intersex genital mutilation, a negative and brutal reaction towards intersex births, which seems to have received credence in the National Reproductive Health Policy 2022-2032.⁸³ This Reproductive Health Policy is meant to guide the right to reproductive health for every person, including intersex persons in matters of reproductive health, for the next ten years beginning in the year 2022.⁸⁴ The fact that it states that it has retained the definition of sex/gender in the binary and traditional male and female classifications constitutes not just a considerable legal gap but a major cause for concern.⁸⁵ An additional cause for concern is that the Reproductive Health Policy considers intersex genitalia a ‘disabling developmental stage.’ This implies that it is condoning continued ‘correction’ of healthy intersex genitalia. Its tone seems to suggest that intersex genitalia ought to be fixed into the binary definition of male and female existing in Kenya, which it has retained.⁸⁶ The position taken by the Reproductive Health Policy would be akin to adopting the now discredited and infamous ‘John /Joan’ theory.⁸⁷ Dr. Money had tried to prove that a person’s genitalia can be surgically altered and the person raised in the assigned sex/gender. To Money, surgical genital reassignment coupled with withholding all information from the person concerned would result in the person adapting into the reassigned and altered

⁸⁰ *RM v Attorney General & 4 Others* [2010] eKLR (*RM*) and *Baby A and Another v the Attorney General and Others* (2014) eKLR (*Baby A*). Both *RM* and *Baby A* demonstrate the exclusion from identity documentation for intersex persons from the time they are born.

⁸¹ *Baby A*, Para 1. Tim was also excluded by the documentation regime. See the Abstract section of this research.

⁸² This is what the doctors in Kenyatta National Hospital were trying to do to baby A. This has also happened to many other intersex persons in Kenya as this research demonstrates.

⁸³ Ministry of Health, *The National Reproductive Health Policy 2022 - 2032* (Government of Kenya 2022) 28.

⁸⁴ *Ibid*, Preamble.

⁸⁵ *Ibid*.

⁸⁶ *Ibid*.

⁸⁷ Anne Tamar- Mattis. ‘Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants’ (2013) 21 *Berkley Journal of Gender, Law, and Justice* 1: 58-110.

sex/gender. Even though this theory was discredited, the Reproductive Health Policy by advocating for ‘surgical correction’ seems to be propagating it.⁸⁸ Yet surgical modification of an intersex person’s genitalia and reassignment of a sex/gender they were not born with is a clear case of intersex genital mutilation (IGM). IGM is a practice equated to female genital mutilation (FGM) which is not just frowned upon, but proscribed by many nations, Kenya included.⁸⁹ Unfortunately, neither the Children Act 2022 nor the Reproductive Health Policy 2022-2032 proscribe IGM. While the Children’s Act mentions the practice of IGM at some point in its provisions, it neither prohibits nor criminalize it as it does FGM.⁹⁰ On the other hand, the Reproductive Health Policy does not mention IGM at all, nor does it commit the government to work towards ending it as a reproductive health problem for intersex children.⁹¹

The legal gaps are noticeable immediately an intersex person is born. The format of the birth notification form, and the certificate issued at birth makes provision for only two sexes: male and female.⁹² Even though the Children Act 2022 has included consequential amendments to the Births and Deaths Registration Act,⁹³ to factor in the intersex person,⁹⁴ the structure of the issuance regime for identity documents remains in the binary. The Reproductive Health Policy seems to not only compound this void. It provides that after a sex/gender change, an intersex person can alter their formal registration, once again implying that people born intersex should have their genitalia modified.⁹⁵ Having retained the exclusive binary sex/gender categories, the import is that an intersex person can only change the sex/gender contained in their identity documents to either the male or female sex/gender classifications only. Yet intersex persons are neither male nor female. They are intersex.

The legal voids continue in the structure of all other identity documentation issuance regimes. As in the case of the certificates issued at birth, all other identity documents issuance regimes in Kenya are similarly structured in the binary. The regimes through which educational

⁸⁸ By indicating that intersex persons need to have their ‘correct’ sex/gender ascertained by medical personnel, The Reproductive Health Policy appears to suggest that the intersex gender is an incorrect sex/gender requiring medical correction.

⁸⁹ Ndu Eke and Kanu Nkanginieme, ‘Female Genital Mutilation: A Global Bug That Should Not Cross the Millennium Bridge’ (1999) 23 World Journal of Surgery, 1082.

⁹⁰ Children Act No. 29 of 2022, Section 144(1).

⁹¹ Ministry of Health, *The National Reproductive Health Policy 2022 - 2032*, (Government of Kenya 2022)25.

⁹² The Births and Deaths Registration Act (Cap 149 of the Laws of Kenya (Rev.2012).Form No.1 in the Schedule of Forms, makes provision for the sex of a child but provides for male or female options only.

⁹³ Births and Deaths Registration Act, Cap 149 of the Laws of Kenya.

⁹⁴ Children Act No. 29 of 2022, Laws of Kenya, Section 250(2).

⁹⁵ Ministry of Health, *The National Reproductive Health Policy 2022 - 2032*, (Government of Kenya, 2022), 29.

certificates, the national identity card and the Kenya Revenue Authority (KRA) Personal Identification Number (PIN) certificate are issued are all structured to exclude anyone who does not fall in the binary sex/gender categories. Similarly structured are the legal regimes through which travel documents, driving licenses, social security certificates and even the death certificate are procured.⁹⁶

The identity documents issuance legal framework continues to create problems for intersex persons' identity documents as is seen in the newly introduced and ongoing digital registration and identity documents issuance programs in Kenya. These are the National Integrated Identity Management System (NIIMS) introduced in 2019⁹⁷ and the National Education Management Information System (NEMIS) initiated in 2017.⁹⁸ The NIIMS program is currently being used to digitally collect the biodata of everyone in Kenya while NEMIS is being used to collect all learners' biodata. These two digital identity registration systems have all excluded the intersex person, even though both were initiated post the Persons' Deprived of Liberty Act through which the term intersex was introduced in the country.⁹⁹

The legal lacunae created by the binary recognition and identity documentation regime negatively impacts the socio-economic rights of people born with the intersex gender. In addition, this lacuna equally negatively affects certain personal rights and non-tangible human needs. Such personal rights and human needs provide people with equal opportunities to make decisions which allow them to live their lives to the fullest, just like other members of the communities where they are born. The intersex person however remains excluded. And even in the face of recent legislative and policy changes in Kenya, the gaps not only remain unsealed but the law seems to be creating more.

Naturally, when a State fails to document the existence of any category of its citizens from the point of birth, it is unlikely that such a State will make provision for the protection and access to the special needs of that excluded category.¹⁰⁰ The likely result is denial of access to certain

⁹⁶ All these identity documents are analysed in Chapter two.

⁹⁷ The National Management System (NIIMS) was established in 2019 through the introduction of Section 9A to the Registration of Persons Act Chapter 107 of the Laws of Kenya. The registration format provides for 'male' and 'female' check boxes only, which means that the intersex individual will either not be registered or will be registered using the wrong sex categorization. The gaps in the legal regime governing this registration system are examined in chapter two.

⁹⁸ Ministry of Education, *National Education Management Information System (NEMIS) User Guide* (Ministry of Education 2017). The gaps in the legal regime governing this registration system are examined in chapter two.

⁹⁹ The gaps in the documentation regime governing education in Kenya are analyzed in chapter 2.

¹⁰⁰ Specific legislation that is expected to make such provisions is lacking.

rights and human needs of persons in that category firstly by the State through omission and then by society through violent reactions to the distinctiveness and differences of that person.¹⁰¹ To a large extent such violent reactions may be due to information gaps leading to certain socio-cultural negative attitudes.¹⁰² As earlier seen, such attitudes have impacted the law in a manner that adopts and stamps the social ordering by structuring the documentation regime in only binary divisions, which neither recognizes nor documents intersex persons.¹⁰³ Non recognition leading to non-documentation has seen intersex persons being marginalized and excluded in many areas of their lives. When a child is born intersex in Kenya, there is no law in place yet, through which they can be recognized as intersex.¹⁰⁴ That situation means continued negative impacts in fundamental areas of their lives and life trajectories.¹⁰⁵ It is against this background that this research is undertaken.

1.3. PROBLEM STATEMENT.

The problem statement of this study is to examine the legal gaps existing in the identity documents' issuance regimes and the manner in which the gaps have led to a state of legal non-recognition and non-documentation for people born with the intersex gender in Kenya. The study examines the way the existing lacunae have denied intersex persons a legal identity and how that denial has created legal voids so huge that they negatively impact access to their human rights and human needs from the cradle to the grave. People born intersex find themselves discriminated against and treated unequally as they navigate through life either without crucial identity documents or with incongruent documents defying their reality, due to these legal gaps. The gaps present themselves in the official identity documentation regimes starting at birth through the birth registration documents all the way to death through the legal death certification.

The study proceeds to examine the concrete problems intersex persons face as they attempt to access their right to health, education and employment opportunities without identity

¹⁰¹ Hearing the intersex persons, their parents and guardians give their lived experiences and speaking about how they have suffered and continue to suffer while the law and policy remains silent means that there are major problems that need urgent attention. This also brought the realisation that the challenges need to be brought to the fore and possible remedies explored.

¹⁰²John Chigiti, 'The Intersex child' (2017) 1 *The Advocate* 1:31.

¹⁰³ Moagi Lefatshe, *Violence Against LGBT(QI) Persons in Africa*. (The Palgrave Handbook of African Women's Studies 2020), 7-9.

¹⁰⁴The Children Act No. 29 of 2022, which commenced in July 2022, though a step in the right direction, cannot apply in isolation, with respect to accurate and consistent documentation for intersex persons. In addition, the entire identity documents regime reflects the binary sex/gender divisions only.

¹⁰⁵ A comprehensive analysis of the various identity documents issuance regimes is undertaken in chapter two.

documents and or with incongruent documents. It also analyses the challenges in enjoyment of non-tangible human needs mainly dignity, autonomy and self-determination in the face of these legal voids. The difficulties in accessing personality rights such as the right to a name, to marriage, parenthood and even dignity at death created by the legal gaps are considered. Drawing lessons from selected progressive jurisdictions, the study explores how legislation, the judiciary and society can work together towards removing the identified legal hurdles to give intersex persons protection in all the areas as legally entitled.

1.4 RESEARCH OBJECTIVES.

The primary objective of this research is to identify the gaps and inadequacies in the current legal regime as it relates to recognition through identity documents for people born with the intersex gender. This objective also seeks to analyze the negative consequences created by those voids and shortcomings on access to selected social economic rights and unquantifiable human needs. It also seeks to explore possible amelioration measures. In support of the primary objective, the research deals with the following specific objectives:

- 1) To determine the legal gaps and shortcomings relating to the identity documents' issuance regimes in Kenya,
- 2) To analyze how the gaps have negatively impacted the intersex person whilst accessing their social economic rights and unquantifiable needs,
- 3) To evaluate available best practices for amelioration of the problems and suggest appropriate legal and other measures to address the gaps.

1.5. RESEARCH QUESTIONS.

To achieve the primary and specific objectives, this research seeks to answer three questions. The overarching question is whether there are gaps, short comings, and inadequacies in the identity documents issuance regimes in relation to people born with the intersex gender in Kenya how that has translated to denial of specific social economic rights and human needs.

The specific research questions are:

- 1) What are the gaps, shortcomings, and inadequacies in the recognition and identity documentation issuance regimes applicable in Kenya in relation to persons born with the intersex gender?
- 2) How have those gaps, shortcomings and inadequacies negatively impacted certain social economic rights and other human needs of intersex persons.

- 3) What measures should be put in place to mitigate the negative impact of the violations of the identified human rights and needs?

1.6. HYPOTHESES

This research is driven by two main hypotheses namely:

- 1) The current legal identity documentation issuance regime in Kenya contains gaps which have resulted in a failure to recognize and accurately document persons born with the intersex gender in Kenya.
- 2) Failure to recognize and accurately document intersex persons has hampered access to their socio-economic rights and other unquantifiable human needs, thus negatively impacting their lives.

1.7. JUSTIFICATION OF THE STUDY.

This study focuses on the legal gaps existing in the identity documents issuance regimes in relation to people born with the intersex gender in Kenya. Using narratives from the lived experiences of intersex persons, parents and guardians of intersex children, it sets out to demonstrate the negative impact caused by the legal gaps on their human rights and needs. Drawing from those narratives, the research seeks to recommend ameliorating measures. It is therefore significant for several reasons.

First, an intersex person, due to their unique congenital and anatomical genital framework, has distinctive needs. A discussion on what these needs are or how a holistic approach to address them can be undertaken is almost unexplored through scholarly work in Kenya. Although some studies have been undertaken,¹⁰⁶ pre research interviews revealed that the concrete problems faced by intersex persons are very profound. The problems are so many and so deep, that a great deal of research is required to adequately address them.¹⁰⁷ The existing scholarly work has therefore hardly scratched the surface.

Second the negative impact created by non-recognition and non-documentation of intersex persons on their specific rights and other human needs has hardly been examined from a scholarly perspective. Indeed, there is no scholarly work analyzing the impact of lack of identity documents and or possession of incongruent 'identity' documents on an intersex person's life trajectory. Data collected by this research will therefore play a valuable role in divulging the

¹⁰⁶Studies undertaken by John Chigiti, Hon Justice Teresia Matheka, Milka Kuria and Shelmith Gatwiri amongst others, on the subject of intersex persons and other gender nonconforming persons, are identified and reviewed under the literature review segment of this research.

¹⁰⁷ General discussions with Rye, an intersex person, through a series of email conversations and telephone calls from Naivasha in January and February 2017.

discrimination suffered and challenges faced by intersex persons in a quest to access their basic rights and needs.

Third, although a number of attempts have been made in defining an intersex person, the existing explanations remain inconclusive and are likely to cause confusion to the ordinary person. Indeed, the ‘Taskforce Report on Intersex Persons, Kenya’, has noted this confusion and has called for reform to the initial definition introduced by Statute.¹⁰⁸ The Task force does attempt its own definition, but this too appears to be wanting in terms of recognizing the intersex person as a specific legal category of human beings.¹⁰⁹ Recent developments relating to the discourse on intersex condition have seen more definitions enter the Kenyan legal realm. The Children Act, 2022 for instance, contains a slightly more elaborate definition of the intersex condition.¹¹⁰ The Reproductive Health Policy however appears to compound the problem by referring to the intersex condition as a ‘disabling medical condition’, and asserting that the sex /gender classification in Kenya remains male and female only.¹¹¹ This study therefore sets out to contribute to the understanding of who an intersex person is. It seeks to do this by adding value in terms of the correct conceptual understanding of intersex as a distinct sex/gender category of human beings.

Fourth, there is a confusion regarding the understanding of the intersex condition. Some people, out of ignorance, regard intersex as a choice rather than a congenital condition.¹¹² Others conflate the genetic condition of being intersex with sexual preferences. Consequently, intersex persons have frequently been lumped together with persons who are lesbian, gay, transgender and bisexual, to form the LGBTI acronym. Other scholars have linked the rights of intersex persons with those of transgender, gays, bisexual and other gender non-conforming persons to form the ITGDP acronym.¹¹³ This conflation has negatively impacted on the intersex persons whose unique basic needs are then overlooked. This research specifically seeks to document the unique and distinctive concrete needs of persons born with double genitalia using

¹⁰⁸ Taskforce Report on Intersex Persons, Kenya, 192.

¹⁰⁹ Ibid.

¹¹⁰ The Children Act No 29, 2022, Section 2.

¹¹¹ Ministry of Health, *The National Reproductive Health Policy 2022 - 2032* (Government of Kenya, 2022) 28.

¹¹² The researcher acknowledges that research has shown that the LGBT condition is not a personal choice either but an innate condition as well. See Seth Muchuma Wekesa, ‘A Constitutional Approach to the Decriminalization of Homosexuality in Africa: A Comparison with Kenya, South Africa and Uganda’ (Doctoral Thesis, Faculty of Law, University of Pretoria 2016) 43-44.

¹¹³ Milka W.Kuria and Shelmith Gatuiri Maranya, ‘The Legal Impunity for Gender Based Violence Against Intersex, Transgender, And Gender Diverse Persons In Kenya: A Legal Recognition Issue For The African Human Rights System’ (2022) 1 Stellenbosch Law Review Journal, 101-122.

a novel approach of drawing from the concerned person's perspectives. In so doing, the research aims at isolating and identifying their specific, distinct, and unique human rights and needs. In this way, the research hopes to help bring to light a proper understanding that an intersex person, being a human being who is born with both male and female genitalia due to genetic variations, should not be boxed in a male or female sex/gender category because they do not belong to either. That person requires the identity documents' regimes to make provision for them as part of the population and to issue them sex/gender congruent identity documents to enable them access their human rights and needs like any other citizen. By bringing in these clarifications, this research intends to help plug that knowledge gap and make a valuable scholarly contribution to the existing but scanty body of knowledge in the area.

Fifth, accurate and adequate information including public awareness regarding the identity of an intersex person and what their real needs are is deficient. As seen, scholars discussing the rights of intersex (I) persons have usually invariably linked them to those of Lesbians, Gays, Bisexual and Transgender (LGBT) persons. Kuria and Maranya for instance,¹¹⁴ group intersex persons with transgender and other gender diverse persons to form the intersex, transgender and gender diverse persons(ITGDP) acronym.¹¹⁵ In their work, the two writers treat these diverse groups alike without regard to intersex specific and particular needs. Wesonga *et al* combine discussions of intersex challenges with those of sexual minorities.¹¹⁶ A conflation of this nature creates various problems. Currently, there exists high levels of homophobic and transphobic attitudes towards LGBT persons in Kenya.¹¹⁷ Such negative attitudes are presently entrenched in the law, which criminalize any form of sexual relationships that does not fall within the male and female sex/gender divides.¹¹⁸ Combining intersex issues with LGBT or TGDP to form the LGBTI or ITGDP acronyms results in the intersex (I) persons' unique needs being lost, muffled and eclipsed. This has essentially excluded the much needed legal attention to intersex persons' distinctive and physical specific needs.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Nicholas Wasonga Orago, *et al*, *Queer Lawfare In Kenya: Shifting Opportunities For Rights Realization* in Adrian Jjuuko *et al*, *Queer Lawfare in Africa: Legal Strategies In Contexts Of LGBTIQ+(Pretoria University Law Press 2022)*136 .

¹¹⁷ Moagi Lefatshe, *Violence Against LGBT(QI) Persons in Africa*. (The Palgrave Handbook of African Women's Studies 2020) 3.

¹¹⁸ The Penal Code Chapter 63 of the Laws of Kenya (Rev 2010), Sections 165 and 162 (a) respectively. The law criminalizes any same sex relationships, between male persons and carnal knowledge against the order of nature, whether in public or private.

Finally, judicial pronouncements have consistently failed to make progressive pronouncements regarding issuance of consistent and accurate identity documents for persons born intersex, rather opting to maintain a rigid binary sex/gender description. This rigidity is specifically seen in *RM* and *Baby A*.¹¹⁹ The two cases are the first to initiate litigation fighting against intersex exclusion due to non-recognition and non-documentation in Kenya. The judiciary, in both instances, missed the opportunity to correct the existing gaps. In *RM* for instance, the Constitutional and Human Rights Division of the High Court, in response to the call to recognize intersex as a third gender stated as follows:

‘...to include intersex as a sex category would be contrary to the specific intention of the Legislature in Kenya. It would also result in recognition of a third category of gender which our society may not be ready for at this point in time.¹²⁰ To introduce intersex as a third category of gender would be a fallacy.¹²¹

In *Baby A*, the same court directed the Petitioner to proceed to procure a birth certificate for *Baby A*, an intersex child.¹²² Such an order was however futile, granted that the court had itself observed that there is no legislation in place through which intersex persons could accurately be documented, that having been the gist of *Baby A*’s claim. By indicating that it was not ready to overstretch its mandate by getting into the realm of legislature through acknowledging a third sex/gender category in Kenya,¹²³ the court closed the possibility of a judicial avenue for sealing the gaps. The gaps therefore failed to get corrected through judicial intervention. These gaps persist even in the face of legislative and policy changes in Kenya. This entire background therefore justifies this research.

1.8. THEORETICAL FRAMEWORK.

There are many theories that have the potential to guide this work. The research however relies on those which transcend the work and appropriately anchor the various arguments made. Those selected are the natural law theory, legal positivism, corrective justice and the *ubuntu* African philosophy. The segments below examine these theories and their suitability to underpin this study.

¹¹⁹ *RM* and *Baby A*.

¹²⁰ *RM*, Para 133.

¹²¹ *RM*, Para 130.

¹²² *Baby A*, Para 71.

¹²³ *Baby A*, Paras. 62 and 65.

1.8.1. NATURAL LAW THEORY.

The principles of equality and non-discrimination which run through human rights instruments and constitutions of progressive nations are said to be espoused in the natural law theory.¹²⁴ This theory, whose best formulation is attributed to Cicero, views rights and values as being inherent for everyone by virtue of being born human.¹²⁵ According to naturalists, rights are entitlements which are due to people naturally because they are human beings and because God intended them to be so.¹²⁶ Aquinas affirms this position by pointing out that natural rights are entitlements which are due to human beings from a moral perspective.¹²⁷ Locke picks up this line of thought which he further advances by defending natural rights as being given by God. This position then makes rights sacred and inalienable.¹²⁸ Indeed Isanga argues that application of human rights theories in contemporary times demands that they be grounded in natural law theories,¹²⁹ a proposition that this research agrees with. The research however disagrees with Isanga's argument positing that human rights should not be grounded in positivists theories.¹³⁰ This research contends that for rights to be realized, they must be set out in written laws and government policies. This would be in line with Plato's assertion that there is a relationship between what is natural and what is legal.¹³¹ It also aligns itself to John Finnis's contention that principles derived from natural law explain the obligatory force of positive law.¹³² The research associates itself with Locke's assertion that there is an element of what is ideal and therefore just in natural law, which must be considered and fulfilled in legislation as well as in government. From these arguments, this research contends that Kenya can use principles drawn from natural law to dispense its obligations to its citizens who are born with the intersex gender. The arguments flow into the centrality of codification as propounded by positivists, the other theory that this research is anchored on, as explained in the subsection below.

¹²⁴ Claudia Andritoi, 'Equality-A Contested Concept'(2007) 10 *Universitatis Apulensis Series Jurisprudentia*, 19.

¹²⁵ Brian Bix, *Jurisprudence: Theory and Context* (Sweet and Maxwell 2006) 66-67.

¹²⁶ Fred D Miller, 'Aristotle and the origin of Natural Rights' (1969) 9 *The Review of Metaphysics* 4: 873-907.

¹²⁷ Jack Donnelly, 'Natural law and rights in Aquinas political thought'(1980) 33 *Western Political Quarterly*, 4: 520-535.

¹²⁸ Pascual Crisolito, 'Natural Law Revisited' (1955) 30 *Philippine Law Journal*, 330.

¹²⁹ Joseph M Isanga, 'Foundations of Human Rights and Development: A Critique of African Human Rights Instruments'(2012) 11 *Ave Maria Law Review*, 123.

¹³⁰ *Ibid.*

¹³¹ Hans Kelsen, 'Plato and the doctrine of natural law' (1960) 14 *Vanderbilt Law Review* 23.

¹³² Nancy Baraza, 'The Impact of Heteronormativity on the Rights of Sexual Minorities: Towards Protection through the Constitution of Kenya 2010'(Doctoral Thesis, School of Law, University of Nairobi 2016)8.

1.8.2 THE POSITIVISTS LEGAL THEORY.

Positivists hold the position that a right is a child of the law and therefore, real rights must come from real law.¹³³To this end, according to positivists, the only way through which rights can be validated is through codification. Indeed, proponents of this theory see the dignity of a person as being as good as the law in place.¹³⁴This argument in reality, underscores the need to have legislation addressing specific rights and human needs for intersex persons in society. Consequently, the importance of enacting specific legislation that includes intersex persons in the various regimes, and or reforming laws unjustly excluding them cannot be overemphasized.

Sen introduces an interesting perspective on the topic of rights, but which nevertheless ties with codification as contemplated by positivists.¹³⁵ To him, just as people are not born with clothes, people are not born with rights. And just like people's clothes are acquired through tailoring, so are rights acquired through legislation.¹³⁶ While this research does not agree with Sen's proposition suggesting that there are no pre legislative rights, the research aligns itself with his argument that codification through legislation, firmly legitimizes rights. And drawing from his argument, intersex rights can only be fully protected if they are specifically tailor made according to their unique needs. This research therefore posits that the natural law theory should be used as the guiding tool to tailor make laws, through amendments and creation of relevant policies, in the area under study.

As pointed out by Ita and Segun,¹³⁷ ideas from natural law have historically influenced evolution of positive law. Indeed, in many instances, ideas of natural law and natural rights have ended up forming part of positive law.¹³⁸ This study advances a similar argument. Fusing and unifying the two theories will, as Ita and Segun contend, result in a law that is drawing from both natural and human authority.¹³⁹ This notion is not very far from what the Constitution of Kenya stipulates. It specifies that the national values and principles of governance binding Kenya as a State include human dignity, social justice, inclusiveness, non-discrimination and

¹³³Jeremy Bentham, *The collected works of Jeremy Bentham: An introduction to the principles of morals and legislation*. (Clarendon Press 1996).

¹³⁴Andrzej Kobylnski,(ed) *The Genesis and Nature of New Human Rights* (Ethical Dimensions of Human Rights 2009)137.

¹³⁵Amarta Sen, *Development as Freedom* (Anchor Books 2000) 228.

¹³⁶ Ibid.

¹³⁷Mesembe Ita and Samuel Temitope Segun 'The Natural Law Theory in Traditional African Jurisprudential Thought'(2014) 26 *Journal of Law Policy and Globalization*, 44.

¹³⁸ Ibid.

¹³⁹ Ibid.

protection of the marginalized.¹⁴⁰ Further, Kenya calls upon its State officers, Public Officers and all other persons to be bound by these values when enacting, applying or interpreting any law, formulating or implementing public policy decisions. This call ideally makes a constitutional demand for enactment of laws that will give effect to natural law rights which will enable everyone including the marginalized enjoy their natural law rights. By marrying the naturalists', positivists' and Sen's arguments, this work asserts that Kenya can give life to the natural rights of the intersex person through specific and deliberate legislation.

1.8.3. CORRECTIVE JUSTICE THEORY.

In addition to the two theories examined above, the corrective justice theory is relevant for this research, especially since its key purpose is to address historical injustices for marginalized members of society previously unfavorably impacted in one way or another.¹⁴¹ The idea of rectifying historical injustices is traceable to the philosopher Aristotle's corrective justice theory.¹⁴² The theory propounds that wrongdoers, where identifiable, should correct the wrongs they committed against victims who can be identified.¹⁴³ According to Mwanza, corrective justice entitles a victim of harm to a remedy and places a corresponding duty on the perpetrator to correct the wrongdoing.¹⁴⁴ Ndethiu suggests that addressing historical injustices should involve proactive government measures to rectify the wrongs occasioned.¹⁴⁵ By using the corrective justice theory, this research is making a case not just for entitlements, but also for a corresponding duty by both State and non-State actors to address all past wrongs against intersex persons. It is calling on the wrongdoers, to address the harms historically caused to intersex persons, either through acts of omission or commission, due to the legal gaps in the identity documents' issuance structure. Existing gaps in the identity documents' regime have created a legal order that has generally denounced and blatantly ignored and or excluded the intersex person, due to nonconformity with what is considered normal. The alternative attempts to make the intersex 'fit' into what the legal order perceives as normal through mutilation of the intersex genitalia has caused intersex persons untold harm and permanent damage.¹⁴⁶ The

¹⁴⁰The Constitution of Kenya, 2010, Article 10(2)(b).

¹⁴¹ Daniel Butt, 'Repairing Historical Wrongs and the End of Empire' (2012) 21 *Social & Legal Studies* 2: 233

¹⁴² Adam Samaha, 'What Good is the Social Model of Disability?' (2007) 74 *The University of Chicago Law Review* 4: 1251-1255.

¹⁴³ *Ibid.*

¹⁴⁴ Rosemary Mwanza, 'Compensation Funds as a Remedial Mechanism for Victims of Corporate Pollution in Kenya: A Feasibility Study' (2021) 33 *Journal of Environmental Law* 571.

¹⁴⁵ Maureen Ndethiu, 'Environmental Justice in Kenya: A Critical Analysis' (Master of Laws, University of South Africa 2018) 23.

¹⁴⁶ This was demonstrated by Baby A's mother in *Baby A*.

result has been an abnormal impact for the person concerned, which now requires a corrective approach, which is supported by the corrective justice theory.

The corrective justice theory is one based on the notion that victims of injustice and inequality ought to be deferred back to the position they would have been in if there had not been a violation in the first instance.¹⁴⁷ In the words of President Lyndon Johnson:

‘You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say to that person, you are free to compete with all the others, and still believe that you have been completely fair.’¹⁴⁸

Johnson here is saying that a lot more is required if a person previously marginalized is to compete fairly with others who have not been in a disadvantaged position. That brings in aspects of correction through affirmative action measures. Kaimenyi *et al* have defined affirmative action as a deliberate move aimed at reforming and eliminating past and present discrimination.¹⁴⁹ They propose the use of public policies and initiatives designed to lift those who have suffered discrimination on account of various considerations including origin, colour, sex/gender, race or geographical location. Mbote explains that affirmative action, also known as differential treatment, gives effect to substantive equality, which, as she points out, goes beyond formal equality.¹⁵⁰ In her view, formal equality will not be adequate in dealing with entrenched social economic and cultural handicaps for those who suffer or have suffered systemic intersectional inequality. This research agrees with Mbote’s view. In the context of the focus of this research, affirmative action requires that legislation in specific areas be developed to ensure that the intersex persons are not just uplifted but that continued wrongs are ended.

The corrective justice theory brings in elements of equality, fairness and mechanisms for addressing historical injustices for previously marginalized members of society. These features make the theory apt for this work. In using the corrective justice theory, the research however

¹⁴⁷Mark C. Modak- Truran, ‘Corrective Justice and the Revival of Judicial Virtue’(2000) 12 Yale Journal of Humanities 259-250.

¹⁴⁸Lyndon B. Johnson, *Commencement Address at Howard University: ‘To Fulfill These Rights*, Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965, Vol. 2 (Washington, D.C. Government Printing Office, 1966) 635.

¹⁴⁹ Katherine Kaimenyi, *et al*, ‘An Analysis of Affirmative Action: The Two Thirds Gender Rule in Kenya’ (2013) 3 International Journal of Business, Humanities and Technology 6:1.

¹⁵⁰Patricia Kameri-Mbote, *Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses*. (International Law Research Centre 2013) 28 – 29.

acknowledges, as Noti points out,¹⁵¹ that correcting historical injustices can sometimes be an impracticability. All recommendations made around this theory bears this in mind.

1.8.4. THE UBUNTU PHILOSOPHY.

This research also uses the *ubuntu* philosophy, a theory widely cited as having an African flavor.¹⁵² The origin of this philosophy has not yet been ascertained through scholarly work and there are many debates on this aspect.¹⁵³ While some literature seems to suggest that *ubuntu* refers to morals and ethics centered around the way people treat each other amongst communities in the southern part of Africa,¹⁵⁴ others posit that the notion originated from Egypt.¹⁵⁵ From recorded literature, there's a hint that East Africa may have been the birthplace of *ubuntu* as a philosophy.¹⁵⁶ The fact that there is no unanimity on its origin notwithstanding, consensus does exist that *ubuntu* is now firmly ingrained in the African culture of looking out for one another.¹⁵⁷

Ubuntu is said to have been drawn from the words '*Umuntungumuntu ngabantu*' translated to mean that a person becomes a person through others.¹⁵⁸ *Ubuntu* can also be seen as a variant of the word *utu*, a Kiswahili term drawn from the words 'a person' or 'humanity'. The notion of *utu* was popularized in East Africa by Julius Nyerere in relation to the *ujamaa* concept of empowering vulnerable members of society through looking out for one another. Nyerere used the *utu* notion as a rallying call in the formative years of Tanzania journey to becoming a Republic.¹⁵⁹

In the context of Kenya, the philosophy behind *ubuntu* is expressed in Mbiti's statement 'I am because we are and since we are, therefore I am', found in one of his scholarly works.¹⁶⁰

¹⁵¹ Alasia Nuti, *Injustice and the Reproduction of History: Structural Inequalities, Gender and Redress*. (Cambridge University Press 2019) 15.

¹⁵² Thaddeus Metz, *Toward an African Moral Theory* in Isaac E. Ukpokolo (ed), *Themes, Issues and Problems in African Philosophy* (Palgrave, Macmillan 2017)106.

¹⁵³ Rodreck Mupedziswa, *et al*, *Ubuntu as a Pan-African Philosophical Framework for Social Work in Africa* in Janestic Mwendu Twikirize and Helmut Spitzer (eds), *Social Work Practice in Africa Indigenous and Innovative Approaches* (Fountain Publishers 2019) 22.

¹⁵⁴ Fainos Mangena, 'African Ethics through Ubuntu: A Postmodern Exposition' (2016) 9 *Journal of Pan African Studies* 69.

¹⁵⁵ *Ibid*, 68.

¹⁵⁶ Julius Kambarage Nyerere, *Ujamaa: The Basis of African Socialism* (Tanganyika Standard 1962).

¹⁵⁷ Rodreck Mupedziswa, *et al*, *Ubuntu as a Pan-African Philosophical Framework for Social Work in Africa* in Janestic Mwendu Twikirize and Helmut Spitzer (eds), *Social Work Practice in Africa Indigenous and Innovative Approaches* (Fountain Publishers 2019)22.

¹⁵⁸ *Ibid*.

¹⁵⁹ Julius Kambarage Nyerere, *Ujamaa: The Basis of African Socialism*. (Tanganyika Standard 1962).

¹⁶⁰ John S Mbiti, *African Religions and Philosophy* (Anchor Books 1970)166.

Mbiti's statement demonstrates the oneness amongst people in African communities. According to him, the spirit found at the core of *ubuntu* creates a oneness amongst everyone in the community.¹⁶¹ This oneness enables everyone to have the opportunities to participate in what he refers to as corporate existence.¹⁶²

Desmond Tutu moves Mbiti's argument forward when he says that *ubuntu* is the very essence of being human.¹⁶³ To Tutu, it is that principle which provides that a person exists and becomes whole through others. It is also the principle that speaks to the intrinsic worth of everyone, which worth is not dependent on race, status or sex/gender.¹⁶⁴ Indeed, *ubuntu* is what distinguishes a person from an animal, calling upon everyone to treat everyone else as human as it seeks to promote the worth and dignity of all human beings. *Ubuntu* therefore conveys the idea of humanness, thus making it an all-inclusive concept that embraces not just humanity but also the humanness of everyone regardless of any differences.¹⁶⁵ In this way, it connotes the concept of humanness through personhood.¹⁶⁶ In essence, this means that a person with *ubuntu* belongs to a greater whole, and where certain people within the greater whole are excluded, humiliated, oppressed, stigmatized and treated as if they are less human, then the whole gets diminished. *Ubuntu* equally presupposes a situation where the well-being and personhood of people is subject to how ever person interacts with the other. In addition, it suggests the aspect of respecting and looking out for each other in the spirit of African brotherhood, sisterhood and humanness. It also implies equal treatment devoid of any discrimination, for everyone, thus providing protection of rights innately available to every human being as contemplated by the natural law theory and codified in the web of human rights instruments.

The expectation therefore is that the Africaness and humanness theorized under *ubuntu* should be extended to everyone everywhere, including those socially and culturally constructed as being non-conforming, where the intersex person falls. Non recognition and non-documentation often results in negative branding which leads to many forms of dehumanization including discrimination, stigmatization, isolation, harassment, violence and outright

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Desmond Tutu, *God is not a Christian: Speaking the Truth in Times of Crisis*(Random House 2011) 21-24.

¹⁶⁴ Ibid.

¹⁶⁵ Aloo Osotsi Magola, *The African Bantu Concept of Ubuntu in the Theology and Practice of Bishop Desmond Tutu and its implications for African Biblical Hermeneutics* in Madipoane Masenya (Ngwan'a Mphahlele) and Kenneth N. Ngwa(eds),*Navigating African Biblical Hermeneutics: Trends and Themes from our Pots and Calabashes* (Cambridge Scholars Publishers 2018) 58.

¹⁶⁶ Ibid.

ostracism. Bearing this in mind, it is important to consider the plight of intersex persons using the lens of the *ubuntu* philosophy. Intersex persons ought to be seen and treated as human beings first and be shown by the law that they belong. They should not be shunned by the society and considered as a *taboo* or a curse because of their different physical genital and reproductive attributes.¹⁶⁷ This research agrees with the sentiments expressed through the *ubuntu* theory. The research further posits that *ubuntu* principles can be demonstrated through the positive law theory lens. Formulation of legislative and policy frameworks accurately documenting and accepting people exhibiting a different genital framework as part of the whole, is really the crux of this research.

Further, imbued in the principles of *ubuntu* is inclusivity, first and foremost. This research is about people who are excluded by the documentation regime, have suffered stigma and have been denied enjoyment of certain rights because of that exclusion. It is about people who, because of genetic physical sex/gender disparity have needs that are distinct from those of other members of society. *Ubuntu* brings everyone to the table regardless of any consideration. Since it has its basis in Africa and focuses on inclusivity in the African context, the *ubuntu* theory has been considered a good anchor for the research. For these reasons, the researcher finds this philosophy a good basis to support the work generally.

The natural law theory and the *ubuntu* philosophy are used to argue for guarantees to the rights, freedoms and needs of the intersex person as members of the human race and in the spirit of looking out for one another respectively. Legal positivism is used to support the opening up of opportunities to explicitly provide for these rights, freedoms and needs in both legislative and policy frameworks. The corrective justice approach blends in to address historical injustices where practicable. In totality, these theories augment the central arguments raised by the research, which is that Kenya needs to recognize and document persons of the intersex gender in their true sex/gender and move away from legal and social marginalization.

1.9. RESEARCH METHODOLOGY AND APPROACHES.

1.9.1 RESEARCH METHODOLOGY.

This research falls under the broad study of law, sex/gender and society, and is therefore approached from a multidisciplinary perspective. Several data collection methods and

¹⁶⁷ Instead of being embraced the way other newly born children usually are, Tim was dismissed as a ‘curse’ upon birth, despite Tim being a human child like any other. See the Abstract section of this research.

approaches are utilized in the gathering of the primary and secondary data used to develop the research. A qualitative method of inquiry is applied in the data collection process. The qualitative data collection method was found to be appropriate for this research since it produces descriptive data that is necessary for the investigation of the subject matter of this research.¹⁶⁸

The research commences with the collection of secondary data through desk review. This is for the initial purpose of exploring the understanding of the intersex person as established by various scholars and identifying any existing gaps. The desk review also serves to explore the legal, medical and socio-cultural understanding of the intersex person born in Kenya. This helps to identify specific problems and examine the possible dynamics impeding recognition through identity documents. It also helps show the impediments to the enjoyment of the spectrum of rights and needs identified for the study. The desk review encompasses review of existing literature on and around the subject for purposes of showing existing legal voids. It also involves the analysis of current legal provisions drawn from relevant domestic statutes, international and regional legal instruments, government reports and identified policies. Books, periodicals, government reports and all other relevant secondary sources are examined to determine the gaps.

Resources from several university libraries have been accessed for this research. These include the University of Nairobi, Kenyatta University and the Kenya National Library in Kenya. Others are the Center for Human Rights of Addis Ababa University and the African Union Library in Addis Ababa, Ethiopia. The researcher has also had access to resources from the ‘The Grotius Centre for International Legal Studies’ of Leiden Law School in the Netherlands, Stellenbosch University, University of Pretoria’s Law Library and the Center for Human Rights, University of Pretoria in South Africa.¹⁶⁹

¹⁶⁸ Taylor *et al*, *Introduction to Qualitative Research Methods A Guidebook and Resource* (John Wiley & Sons 2016) 13.

¹⁶⁹The researcher is grateful to the Raoul Wallenberg Institute of Human Rights and Humanitarian Law for the generous fellowship that enabled her access the Centre for Human Rights, the African Union and the Stellenbosch University Libraries in Addis Ababa Ethiopia and South Africa respectively. The researcher is equally grateful to The Cross-Cultural Human Rights Centre (CCHRC) of *Vrije Universiteit*, Amsterdam, for the generous sponsorship that allowed her to attend the PhD Academy Seminar and Conference held in Changsha and Beijing, China in December 2019, present her research and benefit from insightful feedback. Further gratitude goes to the Grotius Centre for International Legal Studies for allowing the researcher to present her draft work at the Summer school on Sexual Orientation and Gender Identity in International Law: Human Rights and Beyond, at the Leiden University, and receive very helpful comments from participants from different jurisdictions. Special gratitude goes to the Strengthening Human Rights Research and Education in Sub-Saharan Africa (SHUREA), which selected the researcher’s paper for presentation during the third African Forum for Doctoral Research in Human

Using the doctrinal methodology, the researcher reviews and analyzes domestic case law and legislative instruments to demonstrate instances of judicial reluctance to rise beyond past societal biases and fixations regarding this area in Kenya.¹⁷⁰ Jurisprudence and legislative instruments from five jurisdictions purposefully selected for the study is also reviewed through the use of this methodology. This is with a view to drawing illustrative lessons on various legal models of protective responses used by these jurisdictions. The five are South Africa, Malta, Colombia, Germany and India, all of which have been chosen for varied reasons. The choice of South Africa is, first and foremost, informed by the fact that it is an African country and therefore the consideration is that Kenya would identify better with models utilized there. Further, South Africa was the first country in Africa to use legislative approaches to spear-head intersex issues as human rights concerns. Malta and Germany have used blended techniques, whereby jurisprudential pronouncements have led to legislative changes, which are now being used to document intersex persons in their true sex/gender, thus expressly enabling them better access their rights and human needs. The legal processes adopted by Colombia are quite significant for Kenya. When *RM*, the first case to ever juridically address human rights violations for intersex persons in Kenya was being litigated, jurisprudence developed by the Constitutional Court of Colombia was heavily relied on.¹⁷¹ *Baby A*, equally strenuously relied on the legal position created through jurisprudence in Colombia. In *Baby A*, the Petitioners tried to persuade the High Court to make declarations similar to those made by the Constitutional Court in Colombia.¹⁷² Neither *RM* nor *Baby A* succeeded in the recognition and identity documentation declarations that they were seeking. However, it cannot be denied that the cases caught the attention of authorities in Kenya, triggering some of the significant milestones that have since occurred.¹⁷³

Rights (AfriDoors) conference, in October 2019. This opportunity allowed the researcher to engage with and receive perspectives on the area of study, from participants from Kenya, Ethiopia, Uganda, South Africa and Finland. The researcher further extends her gratitude to the International Committee of the Red Cross (ICRC), whose generous support enabled her access the University of Pretoria's law Library as well as resources from the Center for Human Rights, University of Pretoria.

¹⁷⁰In *RM*, the court declined to issue orders for the recognition of a third gender in Kenya while the court in *Baby A* indicated that it cannot go into the realm of legislation.

¹⁷¹*RM*, paras 34,44, and 59.

¹⁷²*Baby A*, Paras 32, 39 and 64.

¹⁷³ *Ibid*, Para 106. Soon after the High Court conceded that the country did not have an official definition of an intersex person, Parliament legislated on the Persons Deprived of Liberty Act which inserted the term intersex into the Kenyan law. This was the first time in Kenya's legal history that the term intersex appeared in any legal text. Policy reforms were thereafter made to the Police Act, to be followed by the 2019 census, through which intersex as a distinct gender was factored in. More recently, the Children Act, 2022 and the National Reproductive Health Policy 2022-2032 have mentioned the term intersex.

When it comes to India, society there has, for thousands of years, acknowledged the existence of a sex/gender that is neither male nor female, and which it disparagingly refers to as *hijra*.¹⁷⁴ The society in India clusters all non-binary members of society including the intersex, eunuchs, and transgender into this category. The Supreme Court in India, however, has made impactful articulations regarding intersex rights, hence the choice of India. For these reasons, the study considers the doctrinal methodology of the research with respect to these five jurisdictions important.

The research uses primary data collected to augment the work. The data collected is descriptive in nature and is obtained from the respondents using qualitative interviews. Descriptive data consists of data collected from hearing peoples' own words from subjects who have been involved in a particular situation or phenomenon that is under investigation.¹⁷⁵ This form of research has been viewed as a useful way of approaching the empirical world and therefore presented the researcher with the opportunity to explore and understand the phenomenon under investigation. To this end, in depth interviews are utilized. This interviewing method utilized, is a data collection technique involving direct questioning using open ended questions, which is also known as unstructured interviews.¹⁷⁶ This method is considered a useful means of grasping a respondent's point of view by capturing their personal accounts.¹⁷⁷ The interviewing tool used is a structured interview schedule consisting of a set of questions which the researcher has endeavored to make as open ended and as easily understandable and answerable as possible.¹⁷⁸ The open-ended questions go beyond the one-word answers and serve to encourage the respondents to disclose detailed information and the knowledge they have around the phenomenon under review. The interview tool was however not treated as a rigid document but as a flexible guide to the information required. Its intention is to explore the respondents' perspectives in relation to the extent to which non-recognition and non-documentation has impacted their access to social economic rights and personal human needs. This has assisted a great deal and helped the researcher look at the situations as they confront the intersex persons daily. The responses from the respondents have been recorded verbatim.

¹⁷⁴ Jennifer Rellis, 'Please Write 'E' in This Box, Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India' (2008) 14 Michigan Journal of Gender & Law 2: 227.

¹⁷⁵ Taylor *et al*, *Introduction to Qualitative Research Methods A Guidebook and Resource* (John Wiley & Sons 2016)13.

¹⁷⁶ Robin Legard *et al*, *In-depth Interviews* in Jane Richie and Jane Lewis (eds) *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (Sage Publications 2003) 138.

¹⁷⁷ *Ibid*, 139.

¹⁷⁸ The sample interview tool used has been annexed to this thesis at Appendix 2.

Interviews were conducted with identified and purposively selected intersex persons and parents and guardians of intersex children. As expected, the interviews led to snowball / mud ball sampling.¹⁷⁹ Noy defines the snowball (mud ball sampling) approach as a chain referral sampling.¹⁸⁰ Here, the researcher identifies a respondent with the characteristics and qualities the research is interested in. After obtaining information from the initial respondent, that respondent connects the researcher to another one with similar experiences.¹⁸¹ Every respondent thus assists in locating another who may be willing to provide related or additional information.¹⁸² This kind of method then becomes a useful vehicle for accessing what is referred to as a ‘hidden’ population. Ellard-Grey *et al* use the word ‘hidden’ to depict the marginalization and stigma associated with certain phenomena under research.¹⁸³ Given that intersex persons and parents and guardians of intersex children the respondents who are the main focus of this research fall under the hidden population described by Ellard- Grey *et al*,¹⁸⁴ the researcher found snowballing/mud balling sampling useful.

A small population of known intersex persons was initially sampled. This initial sample was referred to the researcher by the ‘Intersex Persons’ Society of Kenya’(IPSK).¹⁸⁵ The researcher expanded the sample by asking the first participants to identify others who would be willing to participate in the study. The sample therefore started small in Nairobi and snowballed / mud balled into a larger sample which took the researcher to Mombasa, Kisumu, Siaya and Homa Bay Counties. The expanded potential contacts aided in accessing the number of participants necessary for the study. The snow/ mud ball sampling was found to be quite effective given the sensitive nature of this research.

¹⁷⁹ The researcher uses the term snowball/mud ball given that since there is hardly any snow in Kenya, mud would be a more familiar term for Kenyan readers, hence mud ball sampling. Scholarly work is now beginning to interchange snowball sampling with mud ball sampling, a term which resonates better with readers in Kenya, who are more familiar with mud as opposed to snow. See Muteti Stephen Masango, ‘Factors undermining the Effectiveness of Prison Officers in the Rehabilitation of Offenders in Kenya’ (Master’s Thesis, University of Nairobi 2008), ix, 49 and 54.

¹⁸⁰ For a deeper understanding on this methodology, see Chaim Noy, ‘Sampling Knowledge: The Hermeneutics of Snowball Sampling in Qualitative Research’ (2008) 11 *International Journal of Social Research Methodology* 8: 327-344.

¹⁸¹ *Ibid*, 328.

¹⁸² *Ibid*, 330.

¹⁸³ Ellard-Gray, Amy, *et al*, ‘Finding The Hidden Participant: Solutions For Recruiting Hidden, Hard-To-Reach, And Vulnerable Populations’ (2015) 14 *International Journal of Qualitative Methods* 5: 2.

¹⁸⁴ *Ibid*.

¹⁸⁵ The Intersex Persons Society of Kenya, (IPSK) is a Kenyan based nongovernmental organization formed in 2016. Its mandate is to create awareness on the intersex condition as it advocates for the welfare, protection and respect of intersex persons in the country. See www.intersexkenya.org.

The target of the research was two categories of respondents. The first, which was the key target, consisted of adult intersex persons and parents and guardians of intersex children. While collecting data from this category, the researcher administered the questions face to face and in person, having obtained prior permission through the signing of an informed consent.¹⁸⁶ Permission to record was sought and granted. After transcribing, the recording was deleted. In the second category, medical practitioners were interviewed regarding their views on sex realignment/reassignment procedures which more often than not result in intersex genital mutilation. Given that religion has been vocal in its opposition to the recognition of the intersex person as a separate sex/gender category particularly in Kenya,¹⁸⁷ religious leaders were also targeted in the second category. The intention had been to interview religious leaders from the Christian and Islamic faiths two of the most dominant religions in Kenya,¹⁸⁸ but this did not materialize. The researcher was only able to interview religious leaders from the Christian faith. The researcher opted to give to the respondents in the second category the interview tool to self-complete. The researcher also informally spoke with several academicians and scholars from different jurisdictions in the course of the research and was able to engage with different perspectives in the area of study.¹⁸⁹

With the onset of the global coronavirus epidemic, the researcher was forced to adjust the research methodology. The face-to-face in person interviews were substituted with telephone interviews and in a few cases with *WhatsApp* video calls. Where the interviews were conducted virtually as stated, the researcher always began by reading out to the respondent the informed consent and then requiring them to confirm that they understood and consented to the interview. In one instance, the researcher was able to get a legal and social perspective from an intersex person from Australia using the email method.

¹⁸⁶ The sample consent confirming willingness to participate in the research has been annexed to this thesis at Appendix 1. With the onset of the Covid 19 pandemic and subsequent government restrictions on interpersonal interactions, the interviewing the researcher switched to virtual interviews.

¹⁸⁷ In RM's case, the arguments made from a religious point of view were categorical that there can only be two genders, male and female, and that intersex conditions are cases of gender ambiguity disorder which is purely biological, and which can be detected immediately at birth and corrected accordingly.

¹⁸⁸ www.therada.com/internationaldata/regions/profiles, (Accessed on 17th December 2018).

¹⁸⁹ An exhaustive list of the formal interviewees and other person the researcher had discussions with in the course of this research (referred to as Informal Discussants (IDS)), is attached at the Appendices segment of this research as Appendix 4.

1.9.2. RESEARCH APPROACHES.

The researcher employed three key approaches while collecting the data required for this research. These are the historical, philosophical and human rights approaches. The following segments detail these approaches.

1.9.2.1. HISTORICAL AND PHILOSOPHICAL APPROACHES.

According to Berg, a historical approach of data collection is a method used to determine what occurred during a past period, from documented records and accounts.¹⁹⁰ It is a method that historically analyses past traditions, conditions, and social knowledge. It is considered to increase understanding and appreciation of contemporary issues by looking at the past. Historical analysis can increase this appreciation and understanding because usually, contemporary issues are intrinsically bound with both historical and social backdrop of the past.¹⁹¹ The researcher therefore found it useful to consider approaches taken by philosophers and historians through the use of the historical and philosophical approaches. Secondary data was therefore collected from philosophical and historical perspectives.

And indeed, data collected through these methods indicates that despite the rigid binary sex/gender classification within some societies globally Kenya included, intersex occurrences have probably existed for as long as humanity has. Historical and philosophical accounts of intersex people abound worldwide. In fact, history and philosophy is rich with reference to intersex persons. In the course of history and in philosophical explanations, the term intersex has been used with reference to human beings, plants and animals which presented with sex/gender characteristics that did not fit the known binary notions of female and male bodies. And as far back as the beginning of recorded history in places like ancient Mesopotamia, Sumerians documented the existence of intersex persons, who they called hermaphrodites.¹⁹² The term hermaphrodite was historically used disparagingly to describe anyone and anything presenting sex characteristics that was both for male and female. It has also been used for centuries in mythology and folklore.¹⁹³ In the case of folk lore and mythology, hermaphrodite as a term, is said to have originated from traditional teachings and myths of ancient Greeks. A Greek god called Hermaphroditus was depicted with both female and male

¹⁹⁰ Bruce Lawrence Berg, *Qualitative Research Methods for Social Sciences 4th edition* (Allyn and Bacon 2001) 211.

¹⁹¹ Ibid.

¹⁹² Dvorsky George and James Hughes, *Postgenderism: Beyond the Gender Binary* (Institute for Ethics and Emerging Technologies 2008).

¹⁹³ Robert Collins, *Internet Linked Dictionary of Human Biology* (Harper Collins Publishers, 2006) 225. The term hermaphrodite is said to be derived from Hermaphroditus a mythical person who inflamed the passions of a young woman, who then prayed for a complete union with him. The gods are said to have granted her wishes as a result of which her body and his were fused into one body with two double genitalia.

genitalia. The term is also to be found in philosophical discourses. Plato was probably the first philosopher to touch on the issue of intersex using the term hermaphrodite. According to him, initially, there were three genders namely female, male and hermaphrodites. Plato mused that hermaphrodites were the original form of humankind before the meiosis of human beings into two sexes.¹⁹⁴ The other philosopher who mentions the intersex phenomenon was Aristotle. Referring to them as hermaphrodites, Aristotle describes intersex persons as people having superfluous or doubled genitalia.¹⁹⁵

Similarly, South Asia has, for many centuries recognized and acknowledged the presence of intersex persons, who have for centuries historically been called *hijras*. A statue in a temple in India for instance depicts one of the gods with both male and female genitalia.¹⁹⁶ *Hijras* have now been accepted as a third sex/gender category in countries in South East Asia.¹⁹⁷

Foucault has also pointed out that historically, hermaphrodites have been born and their description as agreed, was that they had two sexes.¹⁹⁸ According to him, this was a generally accepted position and there was nobody searching for a true sex for them because they were accepted as hermaphrodites (intersex).¹⁹⁹

In the African region, Edgerton had, in the early sixties, attempted to explain the problems faced by intersex persons in East Africa.²⁰⁰ His work demonstrates the historical presence of intersex persons among the Pokot tribe. They were stigmatized and labeled *terer*, a derogatory term that saw them marginalized and placed in a position of vulnerability, because of their unique double genitalia.²⁰¹ There's a historical documentation of the presence of intersex persons in many other parts of Africa as well. In northern Uganda, there was a group of people who were seen as effeminate males who couldn't be classified through the "common sense" sex marker and were pejoratively referred to as *mudoko dako*.²⁰² And in Kenya there's an

¹⁹⁴ Fausto - Sterling *Sexing the body: Gender Politics & Construction of Sexuality* (New York Basic Books 2000) 33.

¹⁹⁵ Ibid.

¹⁹⁶ A statue depicting a god known as *Ardhanarishvara* is displayed in a temple in India. This statute depicts both female and male genitalia, present at the same time. https://en.wikipedia.org/wiki/Intersex_in_history - cite_note-12 (Accessed on 16th January 2017).

¹⁹⁷ Serena Nanda, *Neither Man nor Woman: The Hijras of India* (Wadsworth Publishing Company 2016).

¹⁹⁸ Michel Foucault, *Herculim Barbin, Introducing the Recently discovered Memoirs of a nineteenth Century Hermaphrodite*. (Vintage Books 1980) vii to xvii.

¹⁹⁹ Ibid.

²⁰⁰ Robert Edgerton, 'Pokot intersexuality: An East African Example of the Resolution of Sexual Incongruity' (1964) 66 *American Anthropological Association* 1288-1299.

²⁰¹ Ibid.

²⁰² Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) 94.

admission of the historical presence of intersex persons amongst a number of communities, but who were also referred to using equally disparaging and demeaning ethnic terms such as *hundha*, *Kiugu*, *malinda* and *nyot gath*.²⁰³

The philosophical and historical questions emerging from the two approaches call for an explanation of not only what is happening now, but also what took place in the past. Sometimes one needs to answer historical questions to understand the present, given that the past, somehow, in one way or the other, has an influence over the present.²⁰⁴ This research therefore found the historical and philosophical approaches critical in laying the background on how intersex persons have been treated in the course of history. That treatment demonstrates the presence of longstanding historical injustices. The social ostracization and different dimensions of oppression and human rights violations existing historically, are utilized to try and understand the genesis and philosophical underpinnings of the marginalization, discrimination and exclusion of intersex persons today. They were therefore found necessary for purposes of laying a basis for proposing improved treatment in current times.

1.9.2.2. THE HUMAN RIGHTS APPROACH.

According to Mahomed *et al*, a universally and commonly accepted definition of what a human rights based approach means is yet to be availed.²⁰⁵ This position notwithstanding, an interpretive guidance as to what constitutes the human rights based approach is not lacking. The Office of the United Nations High Commissioner for Human Rights (OHCHR) for instance has described a rights based approach as a framework which anchors policies and processes in a system of rights which also has corresponding obligations.²⁰⁶ In this way, the human rights based approach addresses inequalities and analyzes discriminatory practices, while looking at unjust distribution of power that impedes development.²⁰⁷ The approach's focus is on the realization of rights for those whose rights are violated and those who have been excluded. This is with a view towards ensuring the attainment of the principle of universality where everyone

²⁰³ Taskforce Report on Intersex Persons, Kenya 42. These ethnic names were used among the Swahili, Kikuyu, Kamba and Luo tribes respectively.

²⁰⁴ Yitayew Alemayehu and Wondemagegn Tadesie, *Human Rights Research: A practical Guidebook on Methodology and Methods* (Centre for Human Rights Addis Ababa University 2013)14.

²⁰⁵ Faraaz Mahomed *et al*, 'Establishing Good Practice for Human Rights-Based Approaches to Mental Health Care and Psychosocial Support in Kenya' (2020) 22 Health and Human Rights Journal 2 :140.

²⁰⁶ UN Office of the High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (UN Office of the High Commissioner for Human Rights, 2006) 15-18. Available online at: www.ohchr.org/Documents/Publications/FAQen.pdf (Accessed on 16th December 2017).

²⁰⁷ *Ibid*,15.

everywhere enjoys their rights. The human rights based approach also uses a human rights lens to understand existing disparities, identify those disadvantaged, those excluded and those ignored.²⁰⁸ Borrowing from this approach, this research adopts a human rights based lens in the data collection process and argues that, as the right holders, intersex persons need to make their claims in the health, education and employment spheres. Using this approach, the research calls for cross cutting multiple strategies to address human rights violations meted on intersex persons through exclusion by the identity documentation issuance system. It also uses the human rights based approach to call on duty bearers to meet their obligations to intersex persons through legislative and policy formulations, as well as advocacy and sensitization aimed at enabling fulfilment of their rights and needs.

1.10. DATA ANALYSIS.

The raw data collected was organized, interpreted and then thematically analyzed in a bid to test the hypotheses, answer the research questions, achieve the research objectives and cover the key themes identified in the research before presentation.

1.11. ETHICAL CONSIDERATIONS.

According to Bernard,²⁰⁹ the biggest challenge in conducting research on human beings is not experienced during the right sample size selection process or in making the right measurement. It is encountered whilst doing all those things ethically and maintaining ethical standards.²¹⁰ Mutugi and Lenaola underpin the need for researchers to maintain ethical standards and to respect the rights of those participating in any form of research.²¹¹ The importance of ethical considerations while conducting research, particularly of the nature that this work undertook therefore cannot be overemphasized.

The researcher was fully aware that the topic under research is extremely sensitive for several reasons. To begin with, matters of sex, genital and reproductive organs are not ordinarily

²⁰⁸ Faraaz Mahomed *et al*, 'Establishing Good Practice for Human Rights-Based Approaches to Mental Health Care and Psychosocial Support in Kenya' (2020) 22 Health and Human Rights Journal 2:140.

²⁰⁹ Russell Bernard, *Ethics and Social Science Social Research Method, Qualitative and Quantitative Approaches* (Sage Publications 2000).

²¹⁰ Ibid.

²¹¹ Marion Mutugi and Isaac Lenaola. *Bioethics of Medical Advances and Genetic Manipulation: Legal, Philosophical and Moral Perspectives* (Longhorn 2018)33-42.

discussed in the open in the society under review.²¹² In addition, the research was bound to be psychologically and emotionally invasive to the intersex persons and parents/guardians of intersex children. Cognizant of the fact that ethical issues were bound to arise before, during and even after the research therefore, the researcher, to the best of her ability, ensured that all ethical matters were taken care of. Before commencing with the interviews, the researcher required each respondent to sign an informed consent. Nachmias and Nachmias underscore the importance of using an informed consent while conducting research involving human participants.²¹³ They point out that an informed consent becomes essential whenever participants are exposed to risks or where a respondent is being required to forfeit any personal right.²¹⁴ Cognizant of the fact that participation in the research would inevitably have implications on the respondents' personal privacy, the researcher developed a detailed informed consent to be administered to each one of them prior to the interviews to take care of this important aspect.

An informed consent, according to Nachmias and Nachmias, serves several purposes. These include the freedom and the right to self-determination, both of which are rooted in John Locke's argument which posits that the state of being free is a natural right. Consequently, if there's going to be a restriction on freedom and self-determination, it must be justified and carefully agreed to.²¹⁵ Every time the researcher requested an intersex person, a parent or guardian of an intersex child to participate in the research, such a request amounted to limiting their freedom. The researcher therefore needed to request them to consent to the limiting of their freedom, having explained fully to each one of them, what it is that they were required to do. By asking the respondents if they wanted to participate in the research, the researcher reflected respect for their right to self-determination.²¹⁶ And for the interviews conducted virtually following the coronavirus outbreak and subsequent government restrictions on in-person interactions, the researcher continued to respect the respondents' right to self-determine before participating in the research as detailed earlier.²¹⁷

²¹² Abdallah A. Kamangu *et al*, 'Barriers to Parent-Child Communication on Sexual And Reproductive Health Issues in East Africa: A Review of Qualitative Research in Four Countries' (2017) 9 *Journal of African Studies and Development* 4: 48.

²¹³ Chava Nachmias and David Nachmias, *Research Methods in the social sciences* (St Martin Press 1996)82.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ The manner in which the informed consent was administered to the respondents virtually has been detailed earlier.

From the researcher's perspective also, the aspect of an informed consent is important for protecting the researcher from the possibility of being blamed. Informed consents serve to shift some legal responsibility to the participants should there be any negative effects occurring during the data collection process. In addition, this reduces issues of liability for the researcher. This is because the researcher is able to show that a respondent voluntarily participated with full and informed knowledge regarding what the research entailed. An informed consent was therefore administered to each respondent. No disclosure of personal particulars was made, even where some respondents specifically directed the researcher to do so. In all cases pseudonyms were used. The respondents were given the liberty to choose a pseudonym and where necessary, the researcher decided on one.

Extreme care was taken not to put any of the respondents at risk. To this end, utmost confidentiality was maintained throughout the process. Previous research has shown that intersex persons in Kenya have undergone many problems including stigma, rejection, humiliation, threats, risks of violence and actual physical violence.²¹⁸ Extreme care was therefore exercised while dealing with the data collected. The same was used only for purposes connected with this research. Any data not used was discarded. The researcher did not and does not intend to divulge personal information or any part of it unless expressly authorized by the respondents.

Further, all Statutory and University requirements for collection of raw data using human subjects were complied with. Authorizations from the National Commission for Science, Technology and Innovation (NACOSTI) were obtained before any interaction with the respondents occurred, as is required under the law.²¹⁹ The ethical approval letter from Kenyatta National Hospital-University of Nairobi (KNH-UoN) Ethics and Research Committee was also procured. All other requirements from NACOSTI in relation to acquisition of authorizations and permits required to conduct research in Kenya were obtained.²²⁰ These included Research Authorizations from the County Commissioner as well as the County Director of Education

²¹⁸ Rose Wangui, *Born in Between* (NTV Kenya 2018). The real-life narrations in this documentary point to a distressing existence for people born intersex in Kenya.

²¹⁹The Science, Technology, and Innovation Act (No.28 of 2013 14.6.2013 (Rev. Ed.2014).

²²⁰ The National Commission for Science, Technology and Innovation (NACOSTI) is an advisory institution of the Government of Kenya on matters of national science, technology, innovation and research in the Country. It is established under Section 4 of the Science and Technology Act, Chapter 250 of the Laws of Kenya, to advise and regulate matters of research among other functions in the country.

Nairobi County.²²¹ The researcher has annexed the permits, the ethical approval letter together with all requisite authorizations from the relevant institutions to the Thesis.²²²

The research findings have been reported ethically and all necessary care taken not to plagiarize other researchers' work. There has been no misreporting, destruction or concealing of data. The alternative views of others have been acknowledged, even where the same do not necessarily agree with those of the researcher.

The researcher is conscious of the fact that many intersex persons in the region have had to go through a myriad of challenges including stigmatization, ostracization, rejection, humiliation, threats of violence and even physical violence. The greatest care has therefore been exercised in dealing with the data collected so that the same is used only for purposes connected with this research. The researcher has not and will not allow the data to end up being used to cause any of the respondents any further trauma.

1.12. LITERATURE REVIEW.

The study on the negative impact of non-recognition due to non-documentation for the person whose intersex traits present in the form of presence of biological external genitalia and reproductive organs for both male and female, from a scholarly perspective, has scarcely been undertaken in Kenya.²²³ This could be attributed to the fact that early writers appear to have failed to recognize the existence of intersex persons among the population, leaving an aura of invisibility for them. This situation is not just in Kenya, but across the region of Africa and globally as well.

Globally however, dialogue on intersex persons issues has steadily been rising in the past few decades.²²⁴ Discussions on intersex variations have therefore attracted a lot of scholarly research but also raised many controversies.²²⁵ This position is reflected by the existence of various and numerous schools of thought and the fact that many scholars have concerned

²²¹ Copies of all the research authorization letters are annexed at Appendix 3 of this thesis.

²²² Copies of the permits and ethical approvals are annexed at Appendix 3 of this thesis.

²²³ The study acknowledges that some scholarly work is emerging in this area in Kenya. The existing literature however does not address the concrete legal problems arising from the lacunae created by the identity documentation issuance regimes, which this research sets out to address.

²²⁴ Fae Garland *et al.*, 'Management of 'disorders of sex development'/intersex variations in children: Results from a freedom of information exercise. (2020) 21 Medical Law International 2: 116-146.

²²⁵ Human Rights Watch, *A changing Paradigm: US Medical Discomfort with Intersex Care Practices*. (<https://www.hrw.org/report/2017/10/26>) 1-59. (Accessed on 17th July 2018).

themselves with the subject.²²⁶ Literature reviewed from work undertaken by scholars from foreign jurisdictions however reflects certain areas of deficiencies particularly with respect to the intersex trait that is the focus of this work, deficiencies which this research intends to address. In addition, the literature under focus in both legal and non-legal arenas is very limited and needs to be expanded to plug the existing gaps, which this research sets out to do. This work therefore examines literature undertaken by various foreign scholars on the subject to identify existing lacunae before proceeding to examine the historical invisibility apparent in existing literary works in Africa generally and in Kenya in particular. It then proceeds to examine the lacunae existing in the current and upcoming legal writing and other scholarly works.

For purposes of a clear focus on issues which the research seeks to examine, a thematic approach of reviewing literature existing around the study is undertaken. Braun and Clarke argue that thematic investigation helps to organize and describe data in a more richer detail. This in turn helps reflect patterned responses, thus offering not just an accessible approach to analyzing qualitative data, but a theoretically flexible one.²²⁷ Gery and Bernard further underpin the importance of thematic categorization in research.²²⁸ Borrowing from these works therefore, this research identifies and reviews the relevant literature under two main themes. The first revolves around non-recognition of intersex persons and the denial of identity documents by the legal identity documents' issuing regimes. Under the second theme, the negative impact occasioned by non-recognition, non-documentation and possession of discordant 'identity' documents on selected human rights and needs, is dealt with. Key areas identified for investigation under the two themes are access to identity documents and the right to three social economic rights namely the right to health, education and employment opportunities in the first limb. Unquantifiable personal human needs are the focus of the second limb. The overarching principles of equality and freedom from discrimination and the relevant literature surrounding the principles are also examined and blended into the themes identified.

1.12.1. NON-RECOGNITION.

The Concise Oxford English dictionary defines the act of being recognized, drawn from the term recognition, as the acknowledgement and admission of the legality, existence or validity

²²⁶ Morgan Carpenter, 'The Human Rights of Intersex People: Addressing Harmful Practices and Rhetoric of Change.' (2016) 24 *Reproductive Health Matters*: 74-84.

²²⁷ Virginia Braun and Victoria Clarke 'Using thematic analysis in psychology.' (2006) 3 *Qualitative Research in Psychology*:2, 77-82.

²²⁸Rye Gery and Russell Bernard, *Techniques to Identify Themes*. (Sage Publications 2003) 85-109. See also

of something.²²⁹ Non-recognition, the antonym of recognition, is therefore refusal to acknowledge the existence, validity, or legality of something.²³⁰ Applied to human beings, recognition becomes the acknowledgement of a person by others as a person or as a human being and the legal admission of their existence. On the other hand, when there is no recognition of a human being, then there is refusal to acknowledge the legal existence of that person as a human being. Such refusal or failure brings into doubt the aspect of legal citizenship of the person who is not recognized.²³¹

Recognition consists of a fundamental human need, with scholars arguing that, when a person is recognized as an autonomous agent in relation to certain features, there's an admission that the person has those certain features.²³² Recognition also demonstrates an embracement of the features of the person recognized, thereby showing a positive attitude towards the person for having the features.²³³ Recognition also implies that those recognizing the person bear certain obligations towards that person, which obligations include treating them in certain ways and refraining from treating them in other unacceptable ways. Recognition thus depicts the person recognized as a free and equal person.²³⁴

Arguments have been put across to the effect that for one to develop a practical identity, one fundamentally depends on the feedback of others.²³⁵ Such feedback can only be present when a person receives recognition as a person from others. The importance of recognition and the dangers of non-recognition therefore cannot be overemphasized. Writing on the aspect of recognition for nations, Tourme-Jouannet observes that where there was no recognition for certain nations, they were not just excluded, they would be disqualified from membership of other civilized nations.²³⁶ The moment recognition would occur however, the instrument of recognition put an end to the exclusion, immediately serving to secure a slot at the civilized

²²⁹ Angus Stevenson and Maurice Waite (eds) *Concise Oxford English Dictionary*. (Oxford university Press 2011)1201.

²³⁰ Bryan A. Garner *et al*, (eds) *Black's Law Dictionary*. (Thompson Reuters 2014) 1220.

²³¹ Faith Kabata, *Rethinking the Right to Nationality in Africa: A Reflection on the Children of Nubian Descent in Kenya Case*, in Markienwicz- Stanny *et al* (eds) *Children in Migration, Status and Identity*.(Nomos Verlagsgesellschaft mbH & Co. KG, 2022)178.

²³² Charles Taylor, *The politics of Recognition* in Amy Gutmann (ed) *The politics of Recognition in Multiculturalism: Examining the politics of Recognition*. (Princeton University Press 1992) 26.

²³³ Iser Mattias, *Recognition* in Edward Zalta (ed) *The Stanford Encyclopedia of Philosophy*. (The Metaphysics Research Lab, Center for the Study of Language and Information, Stanford University 2013).

²³⁴ *Ibid*.

²³⁵ *Ibid*.

²³⁶ Emmanuelle Tourme-Jouannet, 'The International Law of Recognition' (2013)24 *European Journal of International Law* 667.

nations' table.²³⁷ And in analyzing the positive impact of State recognition, Richards and Smith echo Jouannet's observation by stressing that the act of recognition imparts, *inter alia*, a dramatic transformation in the juridical legality of the State so recognized.²³⁸ The converse is true. Lack of recognition, be it for a State or an individual, carries with it significant detriments for the entity or individual who is not recognized. Literature abounds with examples of the negative effects of non-recognition. Fanon for instance, poignantly describes how victims of racism and colonialism in Africa suffered severe psychological harm because they were not recognized as equal humans but were deemed as inferior humans.²³⁹ He also captures the dehumanizing effects of non-recognition of a people through colonization of a person and of a people in general.²⁴⁰

Recognition, therefore, can be said to constitute a vital human need.²⁴¹ Indeed, non-recognition of different categories of people has, from experience, violated the identity of those not recognized.²⁴² Research demonstrates that it is non-recognition of certain groups of people which has, in the course of history, led to emergence of several theories leading to recognition.²⁴³ Friedan for instance, posits that the aspect of non-recognition of women is what led to the development of feminist theories.²⁴⁴ Other scholars' works show theories emerging from struggles for recognition. Some of these include struggles by different ethnic minorities, gender and sexual minorities and persons with disabilities.²⁴⁵ Marginalized groups have struggled and fought for affirmation of their particular and unique identities through *inter alia* written works.²⁴⁶ Writing literature has therefore undoubtedly had a significant impact on many movements towards recognition, playing an important role in political and social movements.

²³⁷ Ibid.

²³⁸ Rebecca Richard and Robert Smith, *State Building and the Politics of Non-Recognition* in Daase C et al (eds) *Recognition in International Relations*. (Palgrave Macmillan 2015) 162.

²³⁹ Franz Fanon, *Black Skins White Masks*. (New York Grove Press 1967).

²⁴⁰ Franz Fanon, *The Wretched of the earth*. (New York Grove Press 1961).

²⁴¹ Charles Taylor, *The sources of self: The Making of modern identity*. (Harvard University Press 1989)26.

²⁴² Ibid.

²⁴³ Several social movements demanding recognition have been born out of these theories. Women movements and struggles for recognition were born out of the aspect of non-recognition. Scholarly work has historically not just sparked, but galvanized many movements globally, resulting in the changes that led to the recognition of the position of women that is present today.

²⁴⁴ Betty Friedan, *The Feminine Mystique*. (W. W. Norton & Co 1963).

²⁴⁵ James Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment*. (University of California Press, 1998).

²⁴⁶ Kimani Njogu, 'Media and Disability in Kenya' (2009) 29 *Disability Studies Quarterly*, 4, available at Media and Disability in Kenya | Disability Studies Quarterly dsq-sds.org. (Accessed on 6th February 2017).

By documenting various views, scholarly work has, on occasions, inspired positive changes in society.²⁴⁷

Looking at the available scholarly work generally undertaken by writers from around the world, the African region and also from Kenya however, one cannot help but notice glaring gaps in terms of lack of inspiration for recognition of intersex persons who presents with the most obvious variation where both male and female external genitalia and reproductive organs and present and physically visible at the same time. The next three subsections examine this failure and the resultant invisibility.

12.1.3. INVISIBILITY IN GLOBAL LITERATURE

Globally, there has been increased interest in the legal, medical and activists' realms regarding variations which lead to different intersex conditions in the past three decades.²⁴⁸ Despite this interest, the problem of recognition for intersex persons still exists. As earlier pointed out, global literature has not laid a lot of emphasis on the intersex condition which presents itself with the presence of double genitalia, and which is the most obvious trait and probably the most concerning of all intersex traits. Literature in this regard has therefore failed to isolate or distinguish this most obvious and probably most severe form of intersex variations where a person is born with both male and female genitalia fully formed and present at the same time, or the limitations brought about by this trait in both law and social interactions. Majority of the literature clusters all the traits together, and yet, the concrete human needs may significantly differ from trait to trait. Consequently very little scholarly work exists to locate the myriad legal and social problems associated with this variation in a male and female ordered society.

²⁴⁹

Global works from different parts of the world are however to be commended for explaining the many forms of naturally occurring traits which makes a person intersex. Davis for instance gives a very comprehensive and technical explanation of the varying traits found in intersex persons. These include androgen insensitivity syndrome, chromosomally and gonadal traits that do not conform to the male or female ones, lack of key androgen receptors and 'ambiguous' external genitalia.²⁵⁰ Huge amounts of scholarly work tend to conflate all the traits under the

²⁴⁷ Margaret Fafa Nutsukpo, 'Feminism in Africa and African Women's Writing' (2020) 14 African Research Review 1: 84.

²⁴⁸ Megan Walker, (ed). *Interdisciplinary and Global Perspectives on Intersex*. (Springer Nature 2022) 2-3.

²⁴⁹ Fae Garland *et al*, 'Management of 'disorders of sex development'/intersex variations in children: Results from a freedom of information exercise. (2020) 21 Medical Law International 2: 117

²⁵⁰ Georgiann Davis *et al*, 'Intersex Bodies as States of Exception: An Empirical Explanation for Unnecessary Surgical Modification' 25 Feminist Formations (2013) 2: 129-152.

umbrella description and discuss them together.²⁵¹ Conflating all intersex variations regardless of the degree or presentation, coupled with the assumption that addressing recognition of intersex persons under the umbrella term will address the problems of recognition through issuance of identity documents or facilitate access to various rights and needs then becomes a fallacy.²⁵² The interest in intersex issues and the seemingly abundance of literature notwithstanding therefore, the problem of recognition for intersex persons still exists.

Walker attributes this to lack of adequate representation for the intersex person, which has led to invisibility due to lack of legal and social change.²⁵³ Law and society have been ingrained in notions of a world organized in a binary and exclusive two sex/gender divide and tries to invisibilize intersex persons by ‘treating’ them to neatly ‘fit’ them into the binary.²⁵⁴ Walker calls for the removal of this narrative and for intersex variations to be recognized as natural occurrences, which they really are.²⁵⁵ This research agrees with Walker with regard to acknowledging these naturally occurring sex/gender characteristics. However, it posits that the aspects of recognizing intersex persons who exhibit perhaps the most obvious form of intersex traits being double genitalia and documenting them in their true sex/gender identity is still very unresearched despite the fact that there appears to be a global move towards legal recognition.²⁵⁶ Research directed at separating the various traits and locating the challenges to particular this particular trait is therefore necessary, a gap this research seeks to plug.

Garland and Travis, while acknowledging that legal recognition can have benefits for intersex persons, make a claim that legal recognition may not constitute the liberating factor for them, and that this could actually create a counterproductive situation, a position that this research does not agree with. In the social- legal and political context within which this research is undertaken, legal interventions through issuance of identity documentations reflecting the true sex/gender for intersex persons is central. Even though such legal interventions may not solve all the problems, they nevertheless are central for purposes of creating visibility, not just in the socio-legal context, but also in the political space. And indeed while this visibility is present in a number of countries such as Australia, Germany and Malta,²⁵⁷ several other states do not

²⁵¹ Ibid.

²⁵² Megan Walker, (ed). *Interdisciplinary and Global Perspectives on Intersex*.(Springer Nature 2022)2-3.

²⁵³ Ibid

²⁵⁴ Ibid.

²⁵⁵ ibid

²⁵⁶ Fae Garland and Mitchell Travis, ‘Legislating intersex equality: Building the resilience of intersex people through law’.(2018) 38 *Legal Studies* 4: 587-606.

²⁵⁷ Ibid, 591

recognize intersex persons as a sex/gender that is distinct from the traditionally known and accepted male and female sex/genders, hence the need for additional research to increase visibility.

Cannoot attributes invisibility for persons with variations of sex characteristics where intersex persons fall to lack of legal accommodation.²⁵⁸ He further points out the great invisibility of persons with variations of sex characteristics in most European societies and legislative instruments, a situation that has led to non-recognition and denial of protection of various rights for those concerned.²⁵⁹ Cannoot's thesis speaks to the central role played by both legal and societal visibility which this research is trying to advance. It is however noteworthy that he clusters all naturally occurring traits which give rise to the intersex condition with sex/gender identity, sex/gender expression and sexual orientation differences.²⁶⁰ Clustering these groups whose concrete human rights and unquantifiable needs may be fundamentally different from the intersex persons identified for this research creates a void this research hopes to help seal.

The reasons attributed to incidents of discrimination, violence and harassment of non-binary persons whose identity documents did not reflect their physical sex/gender identity occurred during the Covid-19 sex/gender based interpersonal restrictions in certain parts of the world are very relevant to this research.²⁶¹ And as Carpenter accurately observes,²⁶² identity documents will always typically identify their holders with reference to their sex/gender, and so long as they are discordant with the physical reality, the hold will encounter various challenges. However, this work, while relevant to this research contains gaps in the sense that it neither de-links the intersex person from other sex/gender non binary members of society nor makes reference to the specific intersex gender variation which the research focuses on.

²⁵⁸ Pieter Cannoot, *The right to personal autonomy regarding sex (characteristics), gender (identity and/or expression) and sexual orientation: Towards an inclusive legal system.* (Doctoral Thesis, Ghent University 2019). 287.

²⁵⁹ Ibid, 299-230.

²⁶⁰ Ibid

²⁶¹ Pieter Cannoot, 'Indirect discrimination and sexual orientation or gender identity in the COVID-19 pandemic.' (Research Working Paper Series (2021)9.

²⁶² Intersex human rights, sexual orientation, gender identity, sex characteristics and the Yogyakarta Principles plus 10 Morgan Carpenter. Carpenter, Morgan. "Intersex human rights, sexual orientation, gender identity, sex characteristics and the Yogyakarta Principles plus 10." *Culture, Health & Sexuality* 23.4 (2020): 516-532.

1.12.2. INVISIBILITY OF THE INTERSEX PERSON IN AFRICAN LITERATURE.

Several African writers are known to have started documenting some of the most extraordinary works, both fiction and nonfiction, more than sixty years ago.²⁶³ This was at a time when their writing had the capability and potential to inform many decisions, particularly relating to the structure of the law. Indeed, according to Oluwole and Bissessar, of the fifty three countries in Africa, at least eighty percent had gained independence in the 1960's.²⁶⁴ Twenty percent gained independence post 1980's with only five percent becoming independent in the nineties.²⁶⁵ This means that substantial writing was undertaken at a time when many colonized countries in Africa were ridding themselves off the colonial rule and gaining self-autonomy. As the people of Africa were being globally recognized as a people, the scholars of that time had the opportunity to influence the legal order of the day through publications, given that works and teachings of publicists have historically been considered significant towards development of the legal order.²⁶⁶ Hardly any one of the early African scholars, in their literary works, recognized that children and persons who did not fit into the 'boy', 'girl'; 'male', 'female' divides existed in Africa. This omission failed to give Africa an opportunity to document persons of the intersex gender as members of society.

Chinua Achebe is one such writer whose works have had a huge impact on many areas in Nigeria and in Africa in general.²⁶⁷ In his scholarly career spanning several decades, Achebe authored several works, picking key theme areas surrounding major issues in Africa.²⁶⁸ He was therefore seen as having depicted a true African society.²⁶⁹ In some of his works, he did recognize vulnerability and stigmatization by depicting characters viewed as outcasts in society for a variety of reasons. An example is a character he named Clara in one of his works. Clara was considered an outcast (*osu*), and ostracized because she descended from slaves within the Ibo community in Nigeria.²⁷⁰ Intersex persons have been part and parcel of many African

²⁶³ Chinua Achebe for instance published his first literary work, *Things Fall Apart* in 1958. While the research acknowledges that Chinua Achebe was not a legal scholar, writing, as explained earlier, does and has influenced legal changes in society.

²⁶⁴ Oluwole Owoye and Nicole Bissessar, *Corruption in African countries: A symptom of leadership and institutional failure.* "Challenges to democratic governance in developing countries (Springer Cham 2014) 227.

²⁶⁵ Ibid.

²⁶⁶ Sandesh Sivakumaran, 'The Influence of Teachings of Publicists on The Development of International Law' (2017) 66 *International & Comparative Law Quarterly* 1: 1.

²⁶⁷ Irele Abiola, 'Homage to Chinua Achebe (2001) 32 *Research in African Literatures* 3: 1-2.

²⁶⁸ <https://www.theguardian.com/books/2007/jun/13/chinuaachebe>. (Accessed on 10th October 2019).

²⁶⁹ Chinua Achebe, *Things Fall Apart* (Heinemann Educational Publishers 1958) 24.

²⁷⁰ Chinua Achebe, *No Achebe No Longer at Ease* (Heinemann Educational Publishers 1960).

societies, Nigeria included and have equally been ostracized.²⁷¹ Achebe could have introduced the character of an intersex person, who would have illustrated the psychological trauma, marginalization, rejection, and isolation suffered by intersex persons who were also considered outcasts in Nigeria.²⁷² Achebe has been described as an author who possessed the gift for narrations with the capability to analyze situations, and one who acknowledges the power that is embedded in writing.²⁷³ Yet he failed to use this power to give a picture of the existence of persons of male, female and intersex genders in a true African society. This was a lost opportunity to make an impactful significance for intersex persons at this early period in Africa's history.

The invisibility of the intersex person in the literary works of writers who authored some of the most extraordinary works of the twentieth century in Africa is resounding. None of them mentions an intersex person. In all the fiction works created, the themes of the works reviewed are centered on the binary known male and female. Ata, yet another proficient fiction writer from Ghana tells the story of a beautiful girl who refuses her suitors and decides to marry a man of her choice.²⁷⁴ All these themes revolve around the traditionally known binary sex characteristics. It is regrettable that he did not deem it fit to introduce a character who was intersex, even though existence of intersex bodies have been documented in many African traditions, including Ghana.²⁷⁵

Writing from Uganda, Taban Lo Liyong, narrates the fictional story of an old man from Usumbura with sixty-five wives and three hundred children.²⁷⁶ These children are depicted as belonging to the traditionally known and accepted categorization of boys or girls.²⁷⁷ None of them is intersex. And this is the trend of the other writers in Uganda which shows a restriction of their characters to only male and female. Such include Wegesa, whose narration consists of characters of people who belong to the biologically known and traditionally accepted constructs of boys and girls.²⁷⁸ So are the characters created by Okot p'Bitek, another

²⁷¹ Abdurrahman Muhammad Sani, 'Quality of Life of People Living with Sex Development Disorders and Sex Re-Assignment in Nigeria (Doctoral Thesis, *Universiti Putra Malaysia* 2018) 9-10.

²⁷² *Ibid.*, 4.

²⁷³ Chinua Achebe, *Today, the Balance of Stories in Home and Exile* (New York: Anchor, 2000), 73-105, as cited in Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) 96.

²⁷⁴ Aidoo Ama Ata, *Anowa* (Longmans 1969).

²⁷⁵ Sylvia Tamale, *Decolonization and Afro-Feminism* (Daraja Press 2020) 94. See also Centre for Human Rights, University Of Pretoria, *Study On The Human Rights Situation of Intersex Persons In Africa* (Centre for Human Rights, University of Pretoria 2022) 1-41.

²⁷⁶ Taban Lo Liyong, *The last word* (East African Publishing house 1969).

²⁷⁷ *Ibid.*

²⁷⁸ Benjamin Wegesa, *Captured by Raiders* (East African Publishing House 1969).

significant name in African literature. Some of his work include two epic poems through which he analyzes the tribulations of an African husband and wife brought about by westernization.²⁷⁹ Sadly, none of these epic writers from Uganda pick up the intersex theme to write on. None of their literary writings recognize the existence of an intersex person in the Ugandan society. And yet, these writings were happening at a time when Julius Kaggwa, an intersex person, was being raised as a girl, and struggling in isolation in the midst of the stigma associated with intersex genitalia.²⁸⁰ As the scholars in Uganda avoided intersex as a theme, Kaggwa was stuck in a combination of a culture, tradition, and religious beliefs of only maleness and femaleness.²⁸¹ Kaggwa was equally stuck in the middle of repressive laws which equated being intersex with being a homosexual, which is criminalized in Uganda attracting various prison terms.²⁸² In addition, these scholarly works were being developed in the face of historical evidence of the existence of people who are intersex in Uganda. In the northern part of Uganda for instance, documented evidence shows the presence of people who were considered effeminate males.²⁸³ These people, who could not be categorized through the usual so called ‘common sense’ sex/gender marker, were derogatively referred to as the *mudoko dako*.²⁸⁴ These historical facts notwithstanding, intersex persons were nevertheless excluded from all literary works, the authors choosing to write on persons and bodies that fitted the standard sex/gender moldings.²⁸⁵ And like the rest of Africa, Kenya’s prolific writers also failed to make any significant contribution towards the visibility of the intersex person, as the following section shows.

1.12.3. INVISIBILITY IN DOMESTIC LITERATURE.

This research recognizes that the presence of an intersex person was highlighted in Kenya in the early sixties through scholarly work undertaken from an anthropological approach.²⁸⁶ It also acknowledges that legal scholarly work is beginning to emerge in Kenya. However, none of the work currently existing has investigated aspects of violation of rights and needs from the

²⁷⁹ Okot p’Bitek, *Song of Lawino* (East African Publishing House 1966) and Okot p’Bitek *Song of Ocol* (East African Publishing House 1970).

²⁸⁰ *Becoming Julius, Growing up intersex in Uganda*. <https://www.bbc.com/news/world-africa-39053828> (Accessed on 16th October 2019).

²⁸¹ During the launch of the book ‘Intersex and the Law in Kenya’ in Nairobi on the 26th October 2020 which the researcher attended, Julius Kaggwa virtually attended and explained in detail, his tribulations growing up as an intersex person in the Ugandan society, a society which was completely ignorant of the intersex phenomenon.

²⁸² Stella Nyanzi and Andrew Karamagi, ‘The Social-Political Dynamics of The Anti-Homosexuality Legislation in Uganda’. *Agenda* 29.1 (2015) 26.

²⁸³ Sylvia Tamale, *Decolonization and Afro-Feminism*. (Daraja Press 2020) 94.

²⁸⁴ *Ibid*.

²⁸⁵ *Ibid*, 112.

²⁸⁶ Robert Edgerton, ‘Pokot intersexuality: An East African Example of the Resolution of Sexual Incongruity’ (1964) 66 *American Anthropological Association* 1288-1299.

angle of lack of identity documents and possession of discordant documents' perspective adopted by this research. In addition, since scientific research has acknowledged the existence of persons whose bodies are different from the historically acknowledged sex/gender descriptions,²⁸⁷ there's an urgent need to build on the legal discussions that are beginning to open in Kenya, hence this study.

For this research, building on the limited literature available in Kenya commences with the description of the word intersex. This term does exist in the *Kiswahili* language, a language widely spoken in the country. The *Kamusi*, the Kiswahili language dictionary, contains the word *huntha*, which is explained as *mtu au mnyama aliye na viungo vya uzazi vya kiume na vya kike*.²⁸⁸ Translated into English, this definition means 'a person or an animal that has reproductive organs which are both male and female'.²⁸⁹ The existence of a definition of an intersex person in a language that is widely spoken in Kenya means that the intersex person has always existed in society. However, for the intersex person, non-recognition and non-documentation has historically been the hallmark of their existence and invisibility amongst existing scholarly works undertaken by various scholars. This silence exists even though there is a historical documentation of the presence of intersex persons in many parts of Africa, judging from the assigned different tribal names.²⁹⁰ The following sections demonstrate the invisibility at these levels.

Kenya has had its share of proficient writers since gaining independence from the British colonial rule in 1963.²⁹¹ These writers had the capability and potential to recognize the intersex person in their works, both fictional and non-fictional, at a critical time in Kenya's history. Such recognition may have served to lay a basis for acknowledgment of intersex persons through the law, given that Kenya, which was transitioning from colonial rule, was finding itself as a nation and was in the process of promulgating its own laws. Failure to do so constituted a major lacuna in the scholarly work of that period, which has had its ripple effect on the current scholarly work. Several factors account for failure by scholars of that age to acknowledge the intersex person, one of them being culture. Culturally, most communities in Kenya acknowledged the birth of a child from the typical path that defines sex/gender

²⁸⁷ Elizabeth Reis, *Bodies in doubt: An American History of Intersex*. (John Hopkins University Press 2009)1-8.

²⁸⁸ Hamisi Akida, *Kamusi Ya Kiswahili Sanifu*. (Oxford University Press 1981)83. The term equally exists in other ethnic languages in different communities, as earlier seen.

²⁸⁹ Translation by researcher.

²⁹⁰ See also Sylvia Tamale, *Confronting the Politics of Nonconforming Sexualities in Africa*. (Cambridge University Press 2013) 92.

²⁹¹ Charles Hornsby, *Kenya: A history since independence*. (Bloomsbury Publishing, 2013)2.

characteristics from the ‘male’ or ‘female’; ‘boy’ or ‘girl’ differentiation. This differentiation is what is reflected in the law. Historically, communities in Kenya have had specific ways of acknowledging the sex of a newborn child. Among the Kikuyu for example, a male child would be acknowledged through five ululations, known as *ngemi*, while a female child received four.²⁹² This meant that if a child did not fit in any of these two categories, there would be silence. This signifies that society did not know and still does not know how to deal with such a child.²⁹³ The fact that there was no defined way of acknowledging an intersex child at birth is indicative of a void that may have been used by the scholars to exclude intersex people by past literary works. Further, most people may not have been aware of, or knew little regarding intersex persons, not just in Kenya but globally. It was an indictment on society for instance, when, during a meeting convened by the United Nations to specifically address the human rights situation of the intersex persons, Zeid Ra’ad, the then United Nations High Commissioner for Human Rights, conceded that he knew very little about intersex persons.²⁹⁴ For Africa, this lack of knowledge regarding intersex persons may also be attributed to the fact that there existed and still exist trends of hiding or infantilizing children who did not conform to the known sex/gender norms at birth.²⁹⁵ It is therefore unsurprising that, despite Kenya having prolific writers of literature, none of them picked a child or a person with the intersex condition as their theme.

Ngugi wa Thiong’o is one of those scholars.²⁹⁶ He has extensively written fictional and satirical works touching on real life experiences of the Kenyan society. Indeed, in one of his works written soon after Kenya gained its independence, Ngugi helped bring to the fore the dangers

²⁹² Assa Okoth and Agumba Ndaloh, *Revision Social Studies for Primary Teachers Education*. (East African Educational Publishers 2008) 123.

²⁹³ Zainab, a traditional birth attendant in Western Kenya describes the difficulties she encounters when announcing the birth of an intersex child. Every time a child is born, she tells the mothers: ‘it is a girl’, or ‘it is a boy’. She explains that she does not know what to tell the mothers, when on occasions, she has helped deliver a intersex child. She just says to each of the mothers, ‘here is your baby’. (Interview by Helen Grady and Ann Soi on BBC World Service Kenya). Available at www.bbc.com/news/world-africa-39780214 (Accessed on 16th June 2017).

²⁹⁴ This meeting had been convened in September 2015 and was the first of its kind globally. During the meeting, the United Nations, for the first time, specifically addressed the human rights situation of the intersex individual. It was during this historic meeting that Zeid Ra’ad the then UN Commissioner for human rights, conceded that he knew little about intersex persons. (www.ohcr.org www.ohcr.org). (Accessed on 16th November 2016).

²⁹⁵ World Health Organization (WHO), *World Report on Disabilities*. (WHO 2011)147.

²⁹⁶ Ngugi wa Thiongo initially wrote under the name James Ngugi.

of female genital mutilation.²⁹⁷ It is noteworthy that Kenya was to later legislate against female genital mutilation.²⁹⁸

In the 'River Between', Ngugi tells the story of the *Agikuyu* tribe but only talks about children who are born boys or girls. He fails to recognize the fact that some children are born intersex.²⁹⁹ He proceeds to narrate the then important rite of passage that used to be carried out for girls and explains the things that mattered to the tribe during pre-initiation ceremony dances.³⁰⁰ And although certain inhibitions regarding explicit mention of genitalia existed then,³⁰¹ Ngugi points out that during those celebrations, everyone would openly sing about anything, including those parts of the body that would ordinarily never be mentioned in public. Everyone would speak openly without feeling that they had violated the otherwise strong social code because of speaking on matters generally considered taboo and forbidden.³⁰² Even though the author explicitly mentions the genital organs of the boys and the girls that feature in his book,³⁰³ there is no mention of the genitalia of an intersex person.

In Kenya, open discussions on certain issues of sexuality were and still are regarded as taboo.³⁰⁴ Ngugi however took up this discussion in his work but failed to introduce any discussion on persons who cannot be grouped in the male or female categories. They remain unrecognized in all of his works. Neither are they recognized in Gatheru's work, another Kenyan writer. Gatheru's writing equally revolves around the Kikuyu tribe, where he chronicles two important stages which girls and boys traditionally had to undergo.³⁰⁵ He refers to the two stages as the second birth and circumcision. He explains that the first stage makes a person to start thinking about being a man or woman, while the second stage is what actually makes the person a man or woman. These two stages relate to boys and girls who do not have any ambiguity in their genitalia. The existence of people with ambiguous genitalia is completely ignored.

²⁹⁷ Ngugi Wa Thiong'o, *The River Between*. (East African Educational Publishers Ltd 1965).

²⁹⁸ Although this research does not claim that the Prohibition Against Female Genital Mutilation Act of 2011 was a direct contribution of Ngugi wa Thiongo's work, his demonstration to the society, through scholarly work, of the grave danger posed by the cultural practice, cannot be ignored.

²⁹⁹ Ibid.

³⁰⁰ Ibid .

³⁰¹ Njeri Mbugua, 'Factors Inhibiting Educated Mothers in Kenya From Giving Meaningful Sex-Education To Their Daughters' (2007) 64 *Social Science & Medicine*.5 : 1079-1080.

³⁰² Ibid.

³⁰³ Ibid, 44 - 46.

³⁰⁴ Bangbose Oluyemisi, *Legal and Cultural Approaches to Sexual Matters in Africa: The Cry of the Adolescent Girl*. (University of Miami International and Comparative Law Review 2001) 130.

³⁰⁵ Mugo Gatheru, *A Child of Two Worlds*. (Routledge and Kegan Paul 1964).

John Mbiti was yet another renowned writer in Kenya who wrote fables and tales representing the rich oral tradition of the *Akamba* people, one of the tribes in Kenya.³⁰⁶ He also made no mention of the intersex. Yet, research conducted has revealed that people born with the intersex existed among the *Akamba* people. They were and still are locally referred to as *malinda*, meaning someone with something inside their body.³⁰⁷ Similarly, Ogot, narrates the lives, fears, superstitions, and customs of traditional life amongst the traditional Luo society in East Africa, but nowhere in her narratives does she recognize that the intersex persons existed.³⁰⁸

Muriuki rightly observes that non recognition of persons who are different in society resulted in them being excluded from all societal benefits.³⁰⁹ A study of the traditional structures in Kenya reveals that one needed to be a male or female to be recognized as a member of a particular society. Persons who did not fit in this ‘societal boxes’ did not exist for purposes of society and therefore, remained invisible. Initiation was for instance, an important cultural rite for most African societies. This ceremony marked the stage where a boy became a man and a girl became a woman, thus attaining full adult status and getting the attendant benefits, equivalent to social economic rights and human needs. Males and females became qualified to be allocated social responsibilities and all other privileges reserved for adults within the social systems. After circumcision, they could own land and enjoy personal rights such as marriage and the right to form a family.³¹⁰ Kenyatta’s work demonstrates that even for women who traditionally suffered many forms of discrimination in most traditional settings, initiation equally qualified them to a recognizable status in society since they could marry and become homemakers.³¹¹ Anyone who had not undergone the initiation ceremony remained a child and had no rights.³¹² This setup meant that an intersex person could not be initiated into adulthood through circumcision because they did not belong to the category of either boys or girls. For purposes of cultural descriptions therefore, intersex persons would remain mere ‘children’ throughout their lives, never qualifying for any rights or human needs within the social framework.

³⁰⁶John Mbiti, *Akamba Stories*. (Oxford University Press 1966).

³⁰⁷Taskforce Report on Intersex Persons, Kenya 42.

³⁰⁸ Grace Ogot, *Land Without Thunder*. (East African Publishing House 1968).

³⁰⁹ Geoffrey Muriuki, *The Traditional Social and Political Systems of Kenya*, in Bethwell Ogot (ed), *Politics and Nationalism in Colonial Kenya*. (East African Publishing House 1972) 2.

³¹⁰*Ibid*.

³¹¹Jomo Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*. (Heinemann Group of Publishers 1961) 130-227.

³¹² *Ibid*, 134.

This situation of permanent exclusion is what has been captured by Edgerton from an anthropological perspective.³¹³ This research's hypothesis mirrors Edgerton's views which posits that intersex persons had no place in the societal setting. The exclusion means that they had no legal status either under customary or statutory law and could therefore not enjoy any of the rights available to others. The research seeks to enquire if society has changed in the way it perceives intersex persons and if not, what can be done to bring about attitudinal change, by sharing Edgerton's conclusion that intersexuality cannot be ignored.³¹⁴ The research further posits that violations of intersex rights begin when the law fails to document intersex infants in the sex/gender they are born with and continues by failing to recognize them as they develop to become intersex adults. While violations occurring to categories of citizens previously marginalized for being different have extensively been documented through research leading to changes in law, scholarly work on intersex persons is scarce, hence the need for this study.³¹⁵

According to Nazareth,³¹⁶ when one is reading literature, one needs to ask what the literature means and what morals emerge from it. Nazareth opines that more importantly, there's the need to ask what the literature reveals about the society one is dealing with. It is crucial to question whether literature makes important revelations about society directly or indirectly as well as what its relevance is.³¹⁷ Looking at some of the key scholarly work examined above from Nazareth's angle, one can see that none of it reveals anything about the existence of any other gender in the African society, contrary to the reality. With respect to the intersex discourse therefore, such literature becomes irrelevant. And yet, as Michere- Mugo observes, the voices of proficient African writers used to be heard and still continue to be heard through their books.³¹⁸ Since none of them picked an intersex person as a theme nor recognized the intersex phenomenon, the intersex story was never told when it should have been. Non recognition amounted to distancing themselves from the reality which is that, in society, children are born male, female, and intersex. None used the vividness, thoroughness or forcefulness depicted in their literary works, described by Michere-Mugo, to introduce the intersex as a component of

³¹³Robert Edgerton, 'Pokot intersexuality: An East African Example of the Resolution of Sexual Incongruity' (1964) 66 *American Anthropological Association*, 1288-1299.

³¹⁴ *Ibid.*

³¹⁵The Persons with Disabilities Act, No. 14 of 2003. In Kenya various affirmative action measures provided in the Constitution for the benefit of persons with disabilities have been as a direct result of agitation through *inter alia* scholarly work.

³¹⁶ Peter Nazareth, *Literature and society in Modern Africa: Essays on Literature*. (Kenya Literature Bureau 1972)1.

³¹⁷*Ibid.*

³¹⁸ Micere Githae Mugo, *Visions of Africa: The fiction of Chinua Achebe, Margaret Lawrence, Elspeth Huxley and Ngugi wa Thiong'o*. (Kenya Literature Bureau 1978)1.

the population. Consequently, there was nothing from literature to influence change in social attitude or impact legislation towards recognition.

According to Michere Mugo, African Literature is set in four main epochs consisting of the purely traditional period, the phase of colonial invasion, the period during the struggle for independence and finally the era of freedom and after.³¹⁹ Viewed from these perspectives, African writers in the four phases had the potential to shape the acceptance of sex/gender categorization away from the current binary. Creation of awareness of an intersex gender through literature may have led to a situation where the society would have started acknowledging and recognizing another sex/gender category in its midst, hence informing legislation. Michere-Mugo herself is not without blame. Despite making these critical observations she only dedicates her work to daughters and sons who comprise the known binary sex categorization. She does not mention anyone intersex in any of her works.³²⁰

Edgerton is probably one of the only researchers who explores the intersex occurrence in Kenya during the nation's formative years. As seen, he does this through a study carried out among the Pokot.³²¹ He documents the experiences of two intersex persons who have both male and female external genitalia born. He talks about the social struggles of these two individuals in a community which doesn't consider an intersex person as a 'real' person, but 'something' to be derogatively referred to as *terer*.³²² Edgerton's research is from an anthropological approach. He brings to the fore the plight of the intersex persons who have no place in society, but given the discipline his research is grounded on, his work does not contain any legal mitigation measures. An analysis of the plight of intersex persons explained by Edgerton but from a legal lens is essential. This would then inform recommendations for improvement mainly anchored in law, hence the approach introduced by this research.

1.12.4. INVISIBILITY IN CONTEMPORARY SCHOLARLY WORKS.

The aspect of non-recognition of the intersex person in Africa by African scholars persists in contemporary day literary works as well. Accomplished modern day writers such as Chimamanda Ngozi Adichie also fail to recognize intersex persons anywhere in their works. Although Adichie seems to boldly tackle themes involving sexuality, sexual orientation and

³¹⁹ Ibid 28.

³²⁰ Micere Githae Mugo, *Daughter of My People Sing* (Kenya Literature Bureau Nairobi 1976).

³²¹ Robert Edgerton, 'Pokot intersexuality: An East African Example of the Resolution of Sexual Incongruity' (1964) 66 *American Anthropological Association*, 1288-1299.

³²² Ibid.

sex/gender minorities in her contemporary literature, her focus is on homosexuality and lesbianism.³²³

Ogola, another celebrated modern-day writer in Kenya, lost the opportunity to educate Kenyans on the existence of people with genitalia which is neither male nor female because it is intersex. In her work of fiction known as the ‘The River and the Source’, Ogola tells the story of four women and their milestones towards female emancipation as they skirt around discriminative practices in Kenya.³²⁴ Given that this book has been used as a set book for students in secondary schools for many years, Ogola’s work would have presented a perfect opportunity to educate students about the existence of the intersex phenomena. As a pediatrician of many years standing, there’s a possibility that Ogola had come across intersex infants in her pediatric practice. Yet, she still missed the opportunity to introduce the fact of an intersex child as she depicted sons and daughters in her story.

Before Ogola came into the literary scene, Francis Imbuga’s works had been dramatized in learning institutions for years.³²⁵ Some of them, such as *Aminata*, had been used as Literature set books in Kenyan Secondary schools for a long time.³²⁶ Imbuga, another literary icon, however equally failed the intersex person by not recognizing their existence in any of his works. Even more disturbing is that contemporary scholars who have been writing on sex/gender classifications have been recognizing female and male genders only. A good example is the work of Olembo and Kebaya.³²⁷ While these two underpin the importance of sex/gender identity in the social and cultural classifications in most human cultures, to them, sex/gender identity consists of only the male and female sex/genders.³²⁸

1.12.5. INVISIBILITY IN EDUCATIONAL MATERIAL.

Non-recognition of the intersex person in scholarly work has no doubt been compounded by the fact that learning material through which science and biology is introduced in Kenyan schools is equally silent regarding the intersex issues. During the time this research was

³²³Ehijele Femi Eromosele, ‘Sex and Sexuality in the Works of Chimamanda Ngozi Adichie’, (2013) 5 The Journal of Pan African Studies 9: 110.

³²⁴ Margaret Ogola, *The River and the Source*. (Focus Books Kenya 2004).

³²⁵ Francis Imbuga’s books which featured in secondary schools in Kenya and were widely dramatized include *Betrayal in the City*. (East African Publishers 1976).

³²⁶ Francis Imbuga, *Aminata*. (East African Publishers 1988).

³²⁷ Waveney Olembo and Charles Kebaya, ‘Power and Gendered Identities: (Re) Configuring the Gendered Self in Kenyan Drama’ (2013) 3 Research on Humanities and Social Sciences 9: 96.

³²⁸ Ibid.

conducted, the researcher did not come across any biology or science textbook introducing the intersex anatomy to students in either primary or secondary learning institutions. Learning of the human body is introduced to children at the primary school level. However, a glaring gap is seen in the way the human genitalia is introduced to the learners. All the science and biology books through which the human reproductive anatomy and physical genitalia are introduced to students and pupils' reviewed for this study contain exclusively male and female bodies.³²⁹

In 2017, Kenya unveiled the Competency-Based Curriculum (CBC), a new education system.³³⁰ This marked the beginning of the phasing out of the previous '8-4-4' education system which had served the country for over thirty two years.³³¹ The Kenya Institute of Curriculum Development (KICD), the body mandated with curriculum development in Kenya, is expected to develop learning material and teaching guides for the new system.³³² It is yet to be seen whether the KICD will introduce the intersex gender as another category of sex/gender, into the learning material for the new curriculum. The position with respect to the previous curriculum however is that none of the material used to introduce learners to gender categorizations during the past 32 years, accessed by the researcher, contained any mention of intersex gender.³³³ The human body taught to primary school pupils in Kenya for years has always consisted of the male and female bodies together with the male and female reproductive systems.³³⁴ The physical changes that occur during adolescence show only those of a boy and a girl. The reproductive organs as diagrammatically illustrated also depict those of a boy and a girl.³³⁵

Kalemba and Kadasia's science book, used to teach primary school pupils the parts of a human body, introduces major and important subjects such as reproductive processes of birth.³³⁶

³²⁹The researcher has engaged in extensive research at the Kenya National Library Services Library in Nairobi, and has reviewed the available learning material through which the human reproductive anatomy is taught at different stages of learning institutions in Kenya, which has enabled her to arrive at this conclusion.

³³⁰ Maurice N Amutabi, 'Competency Based Curriculum (CBC) and The End of an Era in Kenya's Education Sector and Implications for Development: Some Empirical Reflections' (2019) 3 *Journal of Popular Education in Africa* 10 : 45.

³³¹ Justus O. Inyega *et al*, 'Post-Independence Basic Education in Kenya: An Historical Analysis of Curriculum Reforms Society' (2021) 7 *Forum for International Research in Education*, 1 : 1-3. The 8.4.4 system that had been in force since 1985 is gradually being phased out and is being replaced with the current 2.6.6.3 competency based new system (CBC).

³³² <https://kicd.ac.ke> (Accessed on 16th October 2019).

³³³ Inyega *et al* (n302). The curriculum being phased out by the new CBC system had been in force since 1985, a period of thirty two years by the time the phasing out process began in 2019.

³³⁴ Dominic Nyoroh and Christopher Muguti, *Primary Science Pupils' Book 6* (Moran Publishers 2011) 1-8.

³³⁵ *Ibid*, 2-7.

³³⁶ Joy Kasandi Kalemba and Joseophine Karochi Kadasia, *Explore science Pupils Book*. (Standard and Longman Kenya 2005)1-8.

Health education including sexually transmitted diseases, Human Immunodeficiency Virus (HIV) and acquired immunodeficiency syndrome (AIDS) education is also introduced to the students, but nothing on intersex gender.³³⁷ Primary school pupils were introduced to important facts on HIV and AIDS in class Four under the old curriculum, there was no mention of people who are born with the intersex gender.³³⁸ Children in primary schools under the old curriculum therefore did not have and still do not have, any way of knowing that another sex/gender characterization known as intersex exists.

Medical literature is equally guilty of ignoring the existence of intersex persons. Young's medical book handles the aspect of studying of man in a scientific manner.³³⁹ This work, which is meant to introduce medical and dental students to the possibility of studying man in a scientific manner, only make reference to fertilization and sexual drives on men and women.³⁴⁰ No reference is made to the intersex person. Similarly, Hutta, while introducing medical terminology in health care, does not recognize the existence of intersex persons either.³⁴¹ He deals with male and female reproductive systems exclusively.³⁴² His illustrative diagrams only consist of the two sex/gender classifications.³⁴³ None of the educational material reviewed for this researcher contained even a hint of the existence of people who are intersex, which is a major gap.

1.12.6. GAPS IN EXISTING LEGAL SCHOLARLY WRITING.

Following the decision in *RM*³⁴⁴ and the subsequent enactment of the Persons Deprived of Liberty Act,³⁴⁵ a number of scholarly works have emerged in Kenya in the area under review. While all have made meaningful impact to the discussion on recognition and protection of the rights of intersex persons, two dissertations stand out in this regard. One is by Matheka³⁴⁶ while the other is by Ibeere.³⁴⁷ Matheka's research was inspired by the case of an intersex child

³³⁷Joy Kasandi Kalemba and Josephine Karochi Kadasia, *Explore science Pupils Book*. (Standard and Longman Kenya 2005) 23.

³³⁸ Dominic Nyoroh *et al.* *Primary Science Pupils' Book 4*. (Mackmillan Kenya Publishers Ltd 2005)14-16.

³³⁹ J.Z. Young, *An Introduction to The Study of Man*. (Oxford University Press 1991)180 -195.

³⁴⁰ *Ibid*, 180-190.

³⁴¹ Andrew R. Hutta, *An Introduction To: Medical Terminology For Health Care A Self-Tasking Package*. (Churchill Livingstone 2006)193-224.

³⁴² *Ibid*.

³⁴³ *Ibid*.

³⁴⁴ *RM*.

³⁴⁵ Persons Deprived of Liberty Act, 2014.

³⁴⁶ Teresia Matheka, 'Speaking the Unspeakable! Interrogating the Rights and Legal Recognition of Intersex Persons in Kenya' (Master's Thesis, Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe 2014).

³⁴⁷ Ibeere Kangai, 'From Exclusion To Dignity: The Rights Of Intersex Persons Under Kenya's Constitutional Framework' (Master's Thesis, School of Law, University of Nairobi, 2013).

brought to her court in what she thought was a straightforward matter of child neglect, only to realize that she was confronted with a phenomenon she knew nothing about.³⁴⁸ The fact that a judicial officer had never heard of an intersex person demonstrates the depth of the legal gap in legal scholarship with regard to intersex persons in Kenya.³⁴⁹ And while Matheka's field research highlights what she refers to as the 'living reality' and 'not just a picture', there are many critical areas that her work does not reach. It does not, for instance, explore the violation of the socio economic rights to health, education and employment and the link to non-recognition and non-documentation of those violations. Neither does it extend to the problems created by non-recognition on the non-tangible human needs of intersex persons. On her part, Ibeere approaches the intersex discourse from the constitutional framework perspective.³⁵⁰ Her work consists of the analysis the *RM* case, one of the first cases that the judiciary was confronted with.³⁵¹ The conclusion of her work is that intersex persons in Kenya are not specifically recognized, a view that this study shares. This study seeks to make a comprehensive evaluation of the area of lack of documentation of intersex persons and the attendant violation on various rights and needs, an angle that is lacking in Ibeere's work. This research attempts to fill the gaps identified in both Matheka and Ibeere's works and move the discourse forward by examining the concrete problems created by non-recognition and non-documentation as it attempts to suggest possible solutions.

In 2021, Chigiti published a book titled 'Intersex persons and the law in Kenya', where he poignantly examines the struggles intersex person undergo as they navigate life in a society full of misconceptions regarding the intersex condition.³⁵² Even though Chigiti's work has focused on key legal aspects touching on intersex persons, the concrete problems facing them have not exhaustively been analysed in his work. His work also lacks the field work approach. This research therefore moves the legal discussions forward, building on issues not covered in his book. From the narratives of the intersex persons who have largely lived a life of exclusion, stigma and discrimination fuelled by misconceptions identified by Chigiti's work, this research brings in new knowledge on the extent and impact of the exclusion, stigma and discrimination.

³⁴⁸ Matheka, who is currently a High Court Judge, was then a Chief Magistrate in Nyahuhuru, and was handling a child neglect case in 'Nyahururu Principal Magistrates Court Protection and Care, Case No 8 of 2009', unreported.

³⁴⁹ Ibid, 8-9.

³⁵⁰ Ibeere Kangai, 'From Exclusion To Dignity: The Rights Of Intersex Persons Under Kenya's Constitutional Framework' (Master's Thesis, School of Law, University of Nairobi 2013).

³⁵¹ *RM*.

³⁵² John Chigiti, *Intersex Persons and the Law in Kenya*. (Quality Thoughts Publishing 2021).

In addition, the research brings out what appears to be the government's half-hearted approach to intersex issues. It is an indictment on Kenya that, while the discourse on recognition of intersex gender has been ongoing, the government is still determined to retain the sex/gender description in the binary. This position is reflected in the 'National Policy on Reproductive Health Rights 2022-2032', launched in July 2022, a Policy meant to guide the country for the ten years.³⁵³ The Policy retains the sex/gender definition in the binary male and female categories, a major setback for intersex persons who are fighting for recognition in their true sex/gender identity. A further setback is seen in the definition of the intersex condition which the Policy pathologizes by terming it a 'disabling' developmental state of ambiguous genitalia at birth'. The positions taken by this Policy waters down many gains already achieved, a situation that this research intends to address.

1.13.IMPACT OF NON-RECOGNITION AND NON DOCUMENTATION ON SPECIFIC RIGHTS AND NEEDS.

Having discussed and analyzed available literature on the theme of non-recognition and non-documentation and demonstrated existing gaps, the section below examines literature around the impact of non-recognition and non-documentation on various areas of intersex persons' lives. This review is undertaken in five subthemes namely, the negative impact on official documentation, the right to health, education, employment finally, the impact on the human needs that are of a personal nature. Literature on the principles of equality and nondiscrimination, two overarching themes, as they relate to the intersex person is examined as the sixth subtheme.

1.13.1. ACCESS TO IDENTITY DOCUMENTS.

According to Szreter and Breckenridge, official recognition and existence of identity documents are the grounding and basis for personhood and human rights.³⁵⁴ Official documentation can, therefore, be seen to essentially grant every human being the aspect of identity and personhood.³⁵⁵ For an intersex person, the aspect of not being able to acquire official documentation or being in possession of identity documents falsely describing them, translates into a denial of identity and personhood. Now that discussions on the intersex person have started burgeoning in Kenya, several intersex persons have, through different forums, narrated the negative effects of not having official documentation or having documents that

³⁵³ Ministry of Health, *The National Reproductive Health Policy 2022 - 2032*, (Government of Kenya, 2022).

³⁵⁴ Szreter and Breckenridge, *Recognition and Registration: The Infrastructure of Personhood in World History*, (Proceedings of the British Academy 2012).

³⁵⁵ Ibid.

wrongly describe them.³⁵⁶ A comprehensive and deep scholarly analysis documenting these negative experiences is, however, missing in the Kenyan legal space. This is one critical gap that this research sets out to plug.

Globally however, scholars have analyzed non-recognition and its negative impact on identity documents and the fact that these are what ideally grants a person the crucial aspect of identity and personhood. Byron for instance posits that categorizing anyone along male and female lines and then reducing that maleness and femaleness into writing in documents becomes extremely misleading and disadvantageous to the person concerned.³⁵⁷ This is especially so if the person does not subsequently conform to the sex/gender specified on the identity documents. Byron's focus however is on transgender persons, who have had sex/gender changes and therefore are no longer biologically who they were documented at birth. His work does not explore what becomes of a person who fails to get a birth certificate for reasons that such a person cannot be classified since they are intersex. But Byron's analysis of the fixing of maleness and femaleness and documenting them as such aptly applies to intersex persons, who suffer the same fate in Kenya. Some intersex persons in Kenya are going through life with documents that show a sex/gender identity that is not reflective of the true and accurate reality of who they are. Others have had to go through life without official documentation and therefore without a sex/gender identity. This research therefore intends to demonstrate the overwhelming difficulties arising from exclusion by the identity documentation issuance regimes on intersex persons. This is an area which is almost uncharted through scholarly work in Kenya.

Greenberg advances Byron's argument made in favour of transgender persons but focuses on intersex persons. She emphasizes the challenges faced by intersex persons due to lack of crucial government documents including the birth certificates.³⁵⁸ There are however gaps in her work in that she fails to provide comprehensive suggestions on how the government can accommodate intersex people. Further, the target of her focus is a different jurisdiction. These are critical legal gaps that this research seeks to address with respect to the situation in Kenya.

³⁵⁶ Several documentaries have been aired on National Television. These include *Rose Wangui, Born in Between: the challenges of intersex persons in Kenya*. Several intersex persons have also had their experiences published in newspaper articles and magazines. See also <https://www.The-Star.Co.Ke/News/2021-12-24-Understanding-The-Plight-Of-Intersex>. See also BBC World Service - Youtube.

³⁵⁷ Kylie Byron, 'Natural Law and Bona Fide Discrimination: The Evolving Understanding of Sex, Gender and Transgender Identity in Employment' (2014) 2 Washington University Jurisprudence Review 2: 344.

³⁵⁸ Julie Greenberg, 'Intersexuality and the Law: Why Sex Matters' (2012) 28 Berkeley Journal of Gender, Law & Justice 2:293-302.

1.13.2. RIGHT TO HEALTH.

Several scholarly work exist generally analyzing the right to health for vulnerable populations in Kenya. Literature has documented struggles as well as gains of various vulnerable populations. However, hardly any scholarly work exists on the right to health for intersex persons specifically, despite their vulnerability.

In their analysis of the decision rendered in a constitutional petition challenging the Anti-Counterfeit Act of 2008 (the “Anti-Counterfeit Case) for instance, Maleche and Day highlight various arguments made in favour of persons living with HIV, a group considered vulnerable in Kenya.³⁵⁹ They point out that denying persons living with AIDS access to affordable and generic antiretroviral medication amounts to violations of their right to *inter alia*, health. The authors agree with the court’s ruling that the right to life, dignity, and health of people living with HIV must take precedence over the rights of a patent holder. The court had determined this position despite the existence of intellectual property recognized by the law. Maleche and Day’s work essentially documents the importance of the right to health for persons living with HIV and AIDS, demonstrating the willingness of the court to waive provisions of aspects of other laws in the quest to protect those marginalized and stigmatized. Despite dealing with vulnerable groups on matters of health, nothing is captured in relation to intersex persons who are equally vulnerable and prone to the disease.

On their part, Arnold and Theede have documented the barriers that hinder access to adequate health care for migrants in Kenya.³⁶⁰ These scholars examine the hindrances in the face of the constitutional provisions asserting the right to health for every person in Kenya. They point out that migrants, because of belonging to a marginalized group, continue to experience unique barriers in accessing healthcare. The authors proceed to make suggestions on ways to address these barriers, amongst which is improved migrant-sensitive services and continued research in migrant health. While these scholarly works undertake investigations into the rights of vulnerable members of the Kenyan population, no such research exists regarding the right to health for intersex persons, a group that is equally marginalized.

³⁵⁹Allan Maleche and Emma Day, ‘A Right to Health Encompasses Right to Access Essential Generic Medicines: Challenging The 2008 Anti-Counterfeit Act In Kenya’ (2014) Health and Human Rights 41.

³⁶⁰ Arnold Christine and Jason Theede, ‘A Qualitative Exploration of Access to Urban Migrant Healthcare in Nairobi, Kenya’ (2014) Social Science & Medicine 2014.

Research has shown that due to the historical characterization of the male /female; boy/ girl categorization, some intersex children are subjected to what doctors and parents refer to as ‘corrective’ surgery. This is usually done by removing the whole or part of the child’s genital and reproductive organs, so that the child’s internal or external bodily structure is ‘corrected’ and modified to look either male or female.³⁶¹ This genital alteration process is usually done in an attempt to box the intersex person into the binary sex categorization availed by the identity documentation regimes. As is highlighted in *RM* and *Baby A*, the so-called ‘corrective normalization’ procedures are conducted in Kenya without any set guidelines in place for use by the medical practitioners undertaking the ‘corrective’ surgeries.³⁶² While the Policy on Reproductive Health launched in July 2022 points to the constitution of a medical team for such surgeries, it seems to be endorsing the so-called ‘normalizing’ and ‘editing’ procedures.³⁶³ This is especially because it retains sex/gender categorization at male and female only and refers to intersex as a ‘disabling’ developmental stage.³⁶⁴ The position of the Policy is indicative of lack of scholarly research documenting the effects of the ‘corrective’ procedures. Personal accounts demonstrating just how unnecessary and debilitating such procedures can be are missing in any scholarly work. The field study undertaken by this study seeks to fill this lacuna.

In her work, Preves recounts the personal stories and experiences of two intersex persons who narrate their harrowing experiences through medical interventions as the society attempted to normalize them.³⁶⁵ Here, decisions were made to perform operations on intersex genitalia where upon one set of the genital organs was removed. This was done to ‘neatly’ pigeon-hole the intersex person into the known and acceptable categorization. No prior informed consent was obtained from the person undergoing the genital alteration procedures. While no scholarly work exists documenting the effect of such surgeries in Kenya as in the cases explained by Preves above, such a situation is explainable from a case history discussed by Nthumba, *et al.*

³⁶¹ John Chigiti, *Intersex Persons and the Law in Kenya* (Quality Thoughts Publishing 2021) 98-100.

³⁶² *RM* and *Baby A*.

³⁶³ The National Reproductive Health Policy 2022-2032, 28.

³⁶⁴ *Ibid*,28.

³⁶⁵ Sharon E Preves, ‘Out of the O.R and into the streets: Exploring the Impact of Intersex Media Activism’ (2004) 12 *Cardozo Journal of Law & Gender* 247-288. This author narrates the experiences of Howard Devore, who tells of his distressing childhood as a result of several operations and skin grafts that were conducted on his genitalia in an attempt to make him fit into the acceptable and known sex characteristics. His childhood appears to have been taken away from him as he was always taken to the hospital while other children proceeded to have fun during school vacation. Another intersex activist, Angelo Moreno, tells of how horrified she was because of what was done to her over the course of time.

³⁶⁶ Ndhumba and his fellow medical scholars explain the dilemma created by intersex surgeries through the case study of ‘girl’ who was their patient. The child had undergone a sex reassignment surgery whereupon the vaginal opening was stitched up. The child was then raised as a ‘boy’ only to be brought to the hospital at age sixteen as an emergency case because ‘he’ was ‘bleeding’. This young “boy” was menstruating since ‘he’ had female reproductive organs which remained intact even after being surgically reassigned the male sex/gender.³⁶⁷ The authors refer to the condition as ‘intersex disorders’ clarifying that such ‘disorders’ comprise about 1.7% of all live births. The position taken by these authors is what informs the wrong sex/gender reassignment ‘correction’ procedure their teenage intersex patient had undergone. It is however unfortunate that the authors do not recognize or try to address the violation of the right to health in all its components, which their patient may have suffered.³⁶⁸ Neither do they focus on the impact of the traumatizing experience of the patient on the right to that patient’s holistic health. They do not offer recommendation from a medical perspective either, a gap that this research sets out to address.

Sytsma points out the trauma that medicalization through ‘corrective’ surgery causes to intersex persons.³⁶⁹ This trauma is further illustrated by the work of Tamar- Mattis, who describes the experiences of many intersex people who were surgically forced into a sex/gender through the now infamous ‘Money’s concealment model treatment’ discussed earlier.³⁷⁰ Through this model, Dr. Money took advantage of a boy whose penis had accidentally been mutilated in a botched circumcision procedure, to test his theory that gender was socially constructed. He surgically ‘edited’ the boy’s genitals to give them a female appearance and instructed the parents to give the child a girl’s name, raise him as a female and to start him on female hormones at the onset of adolescence. The parents were further instructed to keep the whole situation a secret, particularly from the child. This model commonly known as the ‘John/Joan’ model was what was used as a justification for genital ‘normalizing’ surgery for intersex children. Available literature has documented the intense suffering the affected persons

³⁶⁶Nthumba *et al*, ‘Ambiguous genitalia in rural Africa and the complexities of management: Which way forward?’ (2008)13 East and Central African Journal of Surgery 1: 51-59.

³⁶⁷ Ibid.

³⁶⁸ Health issues encompass physical, mental, reproductive and sexual health.

³⁶⁹Sharon E Preves, ‘Out of the O.R and into the streets: Exploring the Impact of Intersex Media Activism’ (2004) 12 Cardozo Journal of Law & Gender 247-288.

³⁷⁰ Ibid.

underwent for having a gender forcibly assigned to them, and indeed, Dr Money's 'subject' of study ended up committing suicide.

The analysis of Money's John/Joan botched model undertaken by the writers above is however not from a Kenyan perspective. Documenting these experiences from a local perspective is essential. Tamar- Mattis, in her work in relation to Money's model posed the questions: how did the law allow such suffering to happen to human beings and how can the law work to protect intersex persons in future?³⁷¹ This research is seeking to document literature asking questions similar to those posed by Tamar- Mattis: isn't the John/Joan model happening to intersex persons in Kenya and what is the law doing about it? This way, the research seeks to plug this gap by documenting hitherto undocumented effects of intersex genital alterations and mutilations.

1.13.3. RIGHT TO EDUCATION.

In so far as the right to education is concerned, some scholarly work has begun focusing on the intersex learner, post the 2019 census.³⁷² Aringo and Kimathi for instance have explored the impact of stigmatization on access to equitable education for intersex learners.³⁷³ Prior to this research however, hardly any scholarly work existed on the manner in which the vulnerability that the intersex condition creates directly negatively impacts educational opportunities. While scholars have conducted important research in the field of the right to education in Kenya and arguments have been made in favor of an all-inclusive education system, very few have argued for the inclusiveness of an intersex learner. Elder's work for instance explores aspects of an inclusive education system for persons with disabilities in Kenya, suggesting ways to align it to Article 24 of the United Nations' Convention on the Rights of Persons with Disabilities (CRPD).³⁷⁴ He examines some barriers that he considers to be currently existing in the development of an inclusive education system, naming sex / gender as part of them. He however fails to recognize the fact that an all-inclusive education system in Kenya ought to consider every person regardless of the sex/gender characteristic.

³⁷¹ Ibid.

³⁷² During the national census held in August 2019, 1,524 intersex persons were documented.

³⁷³ Margaret Aringo and Caroline Kimathi. *Words Matter: Stigmatization Narratives by the Intersex Persons in Kenya*, in Lucy Wakiaga (ed) *Women's Contribution to Higher Education and Social Transformation: Implications for Policy and Praxis from Kenya*. (Springer, Cham, 2022) 221-225.

³⁷⁴ Brent C. Elder, 'Right to Inclusive Education for Students with Disabilities in Kenya' (2015)18 *Journal of International Special Needs Education* 1: 18-28

Authors Ngware *et al* pose a critical question in what also constitutes the title of their work: ‘What can be done to improve access to secondary education in Kenya?’³⁷⁵ These authors correctly establish that the main determinants influencing access to secondary education, includes, *inter alia*, the sex/gender of the learner.³⁷⁶ In the category of the sex of the learners, the authors are however, only looking at the traditional boy and girl sex classifications. There is no mention of the fact that there can never be an inclusive education system if it does not include an intersex person. There equally is no mention in their work, of the fact that another category of sex exists, whose access to secondary education is negatively impacted by their sex/gender. The strategies suggested by the authors for improving access to secondary education therefore do not contemplate an intersex child. But the right to education guaranteed under the UDHR and the Constitution of Kenya can never be inclusive until all learners including the intersex learner have been factored in.³⁷⁷ Research that seeks to make recommendations on how intersex learners can holistically be assimilated into the education system in Kenya is lacking, a gap that this research seeks to fill.

It is noteworthy that a publication by the Kenya Human Rights Commission which examines the right to education for Lesbian Gay Bisexual Transgender and Intersex (LGBTI) community in Kenya focuses on the LGBT.³⁷⁸ Although intersex has been conflated in the LGBTI acronym in the report, their needs in relation to the right to education are different from those of the LGBT community and therefore remain unaddressed.

Now that the discourse on access to education for intersex persons is beginning to open up, this research builds onto that by delving deeper and analyzing how the exclusion from the documentation regime violates the right to education for intersex persons. It then proposes suggestions which would help safeguard uninterrupted right to education for the intersex person.

1.13.4. RIGHT TO EMPLOYMENT.

This research’s position is that non-recognition and non-documentation adversely affect intersex persons right to education, right to livelihood and their economic empowerment by

³⁷⁵ Ngware *et al*, *Improving Access to Secondary Education In Kenya: What Can Be Done?* (Emerald Publishing Limited 2006).

³⁷⁶ *Ibid.*

³⁷⁷ UDHR, Article 26 and The Constitution of Kenya 2010, Article 43(1)(f).

³⁷⁸ Kenya Human Rights Commission, *The Outlawed Amongst Us: A Study of The LGBTI Community's Search for Equality and Non-Discrimination in Kenya.* (Kenya Human Rights Commission 2011).

greatly limiting their employment opportunities. While Mamhare has acknowledged that lack of identity documents affects many rights including the chances for employment for intersex persons in Kenya, the length and breadth of this negative impact is missing from his work.³⁷⁹ Further, although some intersex persons have, in various periodicals published in Kenya, explained their challenges while looking for employment,³⁸⁰ a deep and engaging scholarly perspective is missing, a lacuna that this research set out to fill.

1.13.5. NON TANGIBLE HUMAN NEEDS.

Everyone has deep and personal feelings in relation to their identity, autonomy and other human needs that may not necessarily be material. These feelings, described from the personal experiences of intersex persons in Kenya have not been documented in any scholarly work and therefore this is yet another lacuna that this work sets out to bridge. And yet, the importance of the element of who a person is as well as the critical role the question of self-identity plays are key aspects, as underscored through the work of Engler.³⁸¹ To Engler, everyone seeks to self-identify, with the question of ‘who I am?’ dating back to history. This therefore makes it a critical responsibility for every government, to put in place a framework that allows every person, regardless of their genital biological framework, to self-identify. And as human beings, intersex persons desire to not only self-identify but to also make certain decisions concerning their personal lives. Such decisions include their dignity and autonomy, the right to a name, the right to marry and create a family and the right to dignity at death. Proposals on how these rights and needs can be achieved for people born intersex have not been undertaken in any research in Kenya, and this is an area that this work proposes to bridge.

According to Glensy, the basis of dignity lies in the autonomy of self-respect and self-worth reflected in every person’s right to self-determine.³⁸² It is the right to dignity, more than any other right, which reflects the essence of being human.³⁸³ This right forms the basis of human rights as is espoused in the UDHR and echoed in all key human rights instruments.³⁸⁴ It is also

³⁷⁹ Tapiwa Mamhare, ‘The Place of Legal Recognition at Birth in Enhancing the Realization Of The Rights Of Intersex Persons: A Comparative Analysis Of Kenya And Malta’ (Master’s Thesis, University of Pretoria 2016) 35-37.

³⁸⁰ See for instance *One Persons Battle with two sex organs*, an article carried in the People’s daily of 1st November 2021. Others include *Tribulations of life in the grey area*, People’s Daily, 26th October 2018 and *Intersex ‘Apostle’ defies odds in a cloud of taboo*; People Daily, 5th October 2018 and *my life as an intersex*, Parents’ Magazine, (Stellan Consult Limited 27th April 2017).

³⁸¹ Barbara Engler *Personality Theories: An Introduction* (Wadsworth Publishing Company Inc 2013) 2.

³⁸² Rex Glensy, ‘The Right to Dignity’ (2011) 43 *Columbia Human Rights Law Review* 65 : 67-68.

³⁸³ *Ibid.*

³⁸⁴ UDHR, Preamble and Article 1; ICCPR, Preamble and Article1; ICESCR, Preamble and Article 13, ACHPR, Preamble and Article 5.

reflected in the Constitution of Kenya.³⁸⁵ However, in Kenya no legal scholarly work exists to describe how the framework on the right to dignity should look like for an intersex person. Writing from a European perspective, McCrudden observes that the right to human dignity plays a central role in the entire human rights discourse.³⁸⁶ A perspective from an intersex person in Kenya, demonstrating the deep and personal feelings and experiences of intersex persons in search of dignity needs to be documented.

The important areas of personal rights including family life, and the manner the existing legal gaps lead to denial of access to those rights for intersex persons is another uncharted area which this research seeks to delve into. Cotran was amongst the first scholars to undertake studies on the important areas of marriage and other personal rights in Kenya.³⁸⁷ His treatises however contain no mention of marriage and attendant personal rights for an intersex person. This is a gap that this work seeks to fill by evaluating the negative effect that non recognition has had on persons who cannot be described as either male or female in these personal spaces. This is because every person has a right to marry and found a family as provided by the Constitution of Kenya and by international human rights instruments. The intention of this research is to clarify that recognizing marriages and other aspects of family life rights for intersex persons, does not amount to advocating for same sex marriages. This is particularly important because, as Greenberg observes, most countries have not recognized the existence of intersex persons for reasons that recognizing intersexuality would be the first step to recognizing homosexuality.³⁸⁸ Even then, scholarly work has been carried out, from legal and other disciplines on the right to family unions for persons who have not been characteristically recognized in Kenya including people who identify as homosexuals.³⁸⁹ No study exists regarding the intersex person in these areas, hence the importance of this research.

³⁸⁵ Constitution of Kenya, 2010, Article 28.

³⁸⁶ Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2001)19 *European Journal of International Law* 4 : 647 - 653.

³⁸⁷Eugene Cotran, *The Law of Marriage, and Divorce* (1 Sweet & Maxwell 1968) and Eugene Cotran, *The law of succession* (2, Sweet & Maxwell 1969).

³⁸⁸ Julie A. Greenberg , *Intersexuality and the Law: Why Sex Matters* (New York University Press 2012).

³⁸⁹Hassan Ndzovu, '*Un-natural*', '*un-African*' and '*un-Islamic*': *The Three-Pronged Onslaught Undermining Homosexual Freedom In Kenya* in Adriaan van Klinken and Ezra Chitando (eds) *Public Religion and The Politics Of Homosexuality In Africa* (Routledge 2016) 78-91. See also Seth Muchuma Wekesa, 'A Constitutional Approach to the Decriminalization of Homosexuality in Africa: A Comparison with Kenya, South Africa and Uganda' (Doctoral Thesis, Faculty of Law, University of Pretoria 2016).

1.13.6. EQUALITY AND FREEDOM FROM DISCRIMINATION.

In any discourse on human rights, the principles of equality and freedom from discrimination are always overarching. It would therefore be remiss for a study on the negative impact of non-recognition and non-documentation to exclude these principles. Literature on these principles abounds. Dovito *et al*, have pointed out how discrimination leads to negative and unequal treatment against the person targeted.³⁹⁰ And according to Blank and Flynn, society has generally found it challenging to address differences and diversity, treating those it considers different in a discriminatory manner.³⁹¹ There is a painful reality of what happens when society treats certain people differently because they are different. Stigmatization, isolation, ridicule, marginalization and denial of human dignity are the usual results. Instances of racial discrimination and sex/gender discrimination where human beings have been discriminated against because they were different and therefore considered inferior are well documented.³⁹² Persons who are different from the known in any respect have historically been overlooked, ignored and suffered a host of injustices.³⁹³ Literature abounds with examples of the kind of discrimination visited upon people who were considered different from what society knows and accepts as normal, and the resultant violation of human rights.³⁹⁴ A review of the Bible demonstrates the existence of many situations where persons with various forms of disabilities were treated with a lot of scorn, isolated and made to feel inferior. It was a commonly held view in the culture at the time, that disability was a form of punishment from God for sin and other transgressions.³⁹⁵ These were erroneous religious and social beliefs but caused anyone who was different a lot of suffering, injustices, and dehumanization regardless. Intersex persons share some human rights concerns with many minority groups ordinarily discriminated in society, including persons with disabilities. Indeed, the ‘Issue Paper on Human Rights and Intersex People’, reports the case of an intersex woman, who successfully filed a discrimination case in Austria under the disability protection provisions of the Federal Disability Equal

³⁹⁰ John Dovidio *et al*, *The Sage Handbook of Prejudice, Stereotyping and Discrimination* (Sage Publications Limited 2010) 377- 379.

³⁹¹ Peter Blank and Eleonar Flynn (eds) *Routledge Handbook on Disability Law and Human Rights* (Routledge 2016) 224.

³⁹² Howard Schuman, *et al*, *Racial Attitudes in America: Trends and Interpretations*. (Harvard University Press 1998) 5-12.

³⁹³ Stephen C Ainley *et al*, *The impact of Stigma on an Individual* in Stephen C. Ainley *et al* (eds) *The Dilemma of Difference: A Multi-Disciplinary View of Stigma* (Plenum Press 2013)6-7.

³⁹⁴ Nick Wrycraft, *An introduction to Mental Health Nursing* (Open University Press 2009) 86.

³⁹⁵ Pauline A. Otieno ‘Biblical and Theological Perspectives on Disability: Implications on the Rights of Persons with Disability in Kenya’ (2009) 29 *Disability Studies Quarterly* 4 :2.

Treatment Act.³⁹⁶ Unfortunately, no scholarly studies have been undertaken on intersex persons' rights in Kenya, through the lens of these two key principles. There is no comprehensive analysis of the suffering, injustices and or dehumanization that intersex persons undergo due to discrimination and unequal treatment. This research therefore seeks to cover this void.

1.14. DEFINITION OF TERMS AND CONCEPTS.

Literature reviewed in the sections above has uncovered several terms and concepts surrounding and relevant to the discussion on the intersex person being undertaken by this study. It therefore becomes necessary to define certain terms while clarifying controversies surrounding others in the context of the Kenyan social cultural and political understanding. This is because certain key terms are usually conflated and thereby misunderstood, thus defeating protective measures for people born intersex.

The sections below therefore examines the key terms used in the research. Identified are the term intersex and what it means to be born with the intersex gender, the concepts of binarism and heteronormativity, sex/gender, sex/gender identity and sex/gender markers on identity documents. Others are sexuality and sexual orientation and sexual and gender minorities. The meanings given to these terms in the perspectives of research previously undertaken by different scholars and the definitions adopted for this research are also analyzed.

1.14.1. WHAT IS INTERSEX AND WHO IS AN INTERSEX PERSON ?

The term intersex can and has produced diverse understandings due to medical, legal, cultural and even political construction.³⁹⁷ Consequently, different meanings have been attached to the condition as a result of the varying intersecting dimensions.³⁹⁸ The term is generally used as an umbrella one to describe human beings who have innate sex characteristics that do not fit medical and social norms for female or male bodies.³⁹⁹ These characteristics may include hormonal, chromosomal, or genital variations which may present differently in different times during an intersex person's lifetime.⁴⁰⁰ While some intersex variations can be benign and may never physically manifest themselves, others can be determined immediately at birth and

³⁹⁶ This issue paper was prepared by Silvan Agius, a member of the European Committee for Social Cohesion, Human Dignity and Equality (CDDECS) 9.

³⁹⁷ Fae Garland and Mitchell Travis. *Intersex Embodiment: Legal Frameworks Beyond Identity and Disorder*. (Policy Press 2022)167-176.

³⁹⁸ Ibid.

³⁹⁹ What is intersex? – Intersex Human Rights Australia (ihra.org.au) Accessed on 20th November 2023.

⁴⁰⁰ Fae Garland and Mitchell Travis. 'Making the State Responsible: Intersex Embodiment, Medical Jurisdiction, and State Responsibility'. 47 J. Law Soc (2020): 304.

sometimes prenatally for more medically and technologically advanced jurisdictions.⁴⁰¹ The more obvious variations will present with external genitalia, biological anatomy and reproductive organs that is for both male and female, at the same time.⁴⁰²

The varying intersecting dimensions in the understanding of intersex conditions have invariably created gaps and controversies, some of which have negatively impacted the individuals concerned. The Webster's New World College Dictionary for instance describes an intersex as an 'abnormal individual' having characteristics intermediate between those of a male and a female,⁴⁰³ hence explaining the intersex condition as an abnormality. The Concise Oxford English Dictionary advances the 'abnormal' narrative by describing the condition as an 'abnormal condition of being intermediate between male and female'.⁴⁰⁴ These definitions are problematic for profiling the intersex condition as an abnormality, hence creating a sense in which the abnormality ought to or needs to be corrected.

In Kenya, the legal definition as constructed through a number of recent instruments is equally problematic. It is noteworthy that until July 2022 when the Children Act 2022 brought in an additional statutory definition,⁴⁰⁵ one would have needed to go to look at the only official definition that was available in the interpretation section of 'The Persons Deprived of Liberty Act'.⁴⁰⁶ Section 2 of this Act defines an intersex person as a person certified by a competent medical practitioner as having both male and female reproductive organs. Prior to the enactment of this Act, there was no official definition of the term intersex. The definition in the Persons Deprived of Liberty Act appears to have hastily been put together after the government was confronted by a situation of an intersex individual in conflict with the law, and had no official or definition for such a person.⁴⁰⁷ There was no research conducted to determine the best approach to define the term. If one was to rely on this definition, only intersex persons certified by a medical doctor as intersex and those in conflict with the law would have their issues addressed. That legal definition appears to have been expanded through the entry of the

⁴⁰¹ What is intersex? – Intersex Human Rights Australia (ihra.org.au)

⁴⁰² Brendan Gough *et al.* 'They did not have a word': The parental quest to locate a 'true sex' for their intersex children'. (2008)23 Psychology and Health 4: 493-507.

⁴⁰³ V Neufeldt and D Guralnik (eds) *Webster's New World College Dictionary of American English* (Simon & Schuster 1988) 707.

⁴⁰⁴ Angus Stevenson and Maurice Waite (eds) *Concise English Dictionary* (Oxford University Press 2011)743.

⁴⁰⁵ The Children Act adopts a technical definition of the term intersex which is not easily understandable to the common person.

⁴⁰⁶ The Persons Deprived of Liberty Act, Section 2 and the Children's Act, 2022, Section 2.

⁴⁰⁷ The Persons Deprived of Liberty Act was enacted in 2014, soon after the government admitted in *RM*, that there was no definition of the term intersex under the Kenyan law.

children Act in July 2022. For the understanding of the term intersex in the Kenyan legal context therefore, reference can now be made to both Statutes.⁴⁰⁸

This research considers the definition contained in the 2022 Children Act more progressive by departing from that contained in the Persons Deprived of Liberty Act, in that, certification by a medical practitioner is no longer necessary.⁴⁰⁹ However, this research is of the view that the definition is not broad enough since it does not capture the aspects of the presence of female and male genitalia, which is the most obvious form of the intersex condition. Male and female genitalia fully formed being present at the same time on an individual, can be said to be the major cause of exclusion from the current documentation regime as well as social stigma. By failing to mention genital organs accurately and specifically in a manner that would be more relatable to *Wanjiku*,⁴¹⁰ the ordinary person, the Children Act 2022 creates a knowledge gap. This research intends to fill that gap by conceptualizing a definition that is easily understandable to *Wanjiku*, who is a key target of this research.

The National Reproductive Health Policy 2022-2032,⁴¹¹ through its description of the intersex condition as a ‘disabling developmental disorder’, further problematizes the definition of the term intersex, creating even more gaps.

In terms of socio-cultural construction of the term intersex in the context of Kenya, The *Kamusi*, the Kiswahili dictionary, defines the term intersex through the use of the word *huntha*, which is explained as *mtu au mnyama aliye na viungo vya uzazi vya kiume na vya kike*.⁴¹² Translated into English, this definition means a person or an animal that has reproductive organs that are both male and female.⁴¹³ This Kiswahili description of an intersex person is also wanting in that it fails to make reference to the presence of male and female external genitalia which make a person intersex. Reproductive organs do not necessarily constitute external genitalia.

⁴⁰⁸ The Persons Deprived of Liberty Act, Section 2 and the Children’s Act, 2022, Section 2.

⁴⁰⁹ Section 2 of the Persons Deprived of Liberty Act requires certification from a competent medical doctor that a person has both male and female reproductive organs. The Act does not factor in the presence of double external genitalia.

⁴¹⁰The term *Wanjiku* is normally used in Kenya with reference to the ordinary person. See Kenya Human Rights Commission (KHRC), *Wanjiku’s Journey, Tracing Kenya’s Quest for a new Constitution and Reporting on the 2010 National Referendum* (KHRC 2010)11.

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⁴¹² Akida Hamisi, *Kamusi Ya Kiswahili Sanifu* (Oxford University Press 1981) 83.

⁴¹³Translation by researcher

While the Christian Bible does not have a specific word relating to someone born intersex, the Holy Quran has coined the term *Khuntha*, which appears to be a translation from the term hermaphrodite.⁴¹⁴ According to Qurani Takatifu, the *Kiswahili* version of the Holy Quran:

‘..Mwenyezi mungu...anampa amtakaye watoto wa kike na anampa atakaye watoto wa kiume....au huwachanganya watoto wakiume na wa kike kwa mtu mmoja.’⁴¹⁵

The English version states as follows:

‘He [Allah] creates what He wills. He gives to whom He wills female [children] and He gives to whom He wills males or he makes them [both] males and females’.⁴¹⁶

The Quran therefore recognizes the existence of a third category of persons who are born as ‘combined male and female’.⁴¹⁷ This third category of human beings is what has been referred to as *Khuntha*.⁴¹⁸

Although the ‘Taskforce Report on Intersex Persons, Kenya’, does not capture the *kiswahili* version of the definition in the *Kamusi*, it does indicate that several local languages in Kenya have their own versions and descriptions of the word intersex. Unfortunately, most of them are derived from the term hermaphrodite and are often used in a manner intended to demean the person being described. The Kikuyus for instance refer to intersex individuals as *mundu wina ciaga igiri or kiugu*.⁴¹⁹ The Luo community uses either *adhiambo amende* meaning a girl with male genitalia or *nyot gath* meaning someone deformed or unnatural. The Kamba refer to intersex persons as *mali-nda* meaning something inside the body, again implying a form of deformity which needs correction.⁴²⁰ These local social constructions of the term intersex and the euphemisms used to describe intersex persons have resulted in dehumanizing them.

The definition by ‘The Office of the High Commissioner for Human Rights (OHCHR) Fact Sheet’ is equally technical. An intersex person is described as one born with characteristics,

⁴¹⁴ Nasir Malim and Aasim Padela, ‘Islamic Bioethical Perspectives on Gender Identity for Intersex Patients’ (2020)5 British Journal of the Islamic Medical Association 2: 2-3.

⁴¹⁵ Muhammad Sayied (ed) *Qurani Takatifu*, Ash-Shuura(42): 49-50 (The Islamic Foundation 1987).

⁴¹⁶ Maulana Muhammad Ali (ed) *The Holy Quran: English Translation*, Surat Ash-Shuraa (The Counsel) : 49-50(Ahmadiya Anjuman Ishaat Islam 2011).

⁴¹⁷Ibid.

⁴¹⁸ Anam Shahid, (*Inheritance of Hermaphrodite (Khuntha)*)2014) Available at www.academia.edu(Accessed on 17th October 2018).

⁴¹⁹ The literal translation of this definition is someone with two sets of body parts, a deformed and an imperfect person who has no value. Translation by researcher.

⁴²⁰ Taskforce Report on Intersex Persons, Kenya 42.

including genitals, gonads and chromosomal patterns that do not fit typical binary notions of male and female bodies.⁴²¹ But the description of the intersex condition as a disorder of sex development (DSD) contained in various medical treatises could perhaps be the most problematic. The Diagnostic and Statistical Manual of Mental Disorder (DSM) of the International Classification of Diseases for instance, equates the condition to physical and psychological disorders.⁴²² Indeed, it refers to the intersex condition as a ‘congenital malformation of genital organs’, thus pathologizing the condition. This researcher disagrees with that definition for reasons that classifying the condition as a disorder leads to the need to ‘correct’ intersex genitalia through mutilation and other procedures which may be medically unnecessary. This research also differs with Lisdonk, who uses the terms Sex Development Disorder (DSD), terms generally preferred by medical professionals to describe intersex persons.⁴²³ Such a definition obviously creates a major problem for an intersex individual because it implies a disorder that needs correction, which would then explain the surgical procedures carried out on intersex persons, which have been equated to genital mutilations.⁴²⁴

Agius and Tobler refer to the term intersexuality while describing intersex people.⁴²⁵ In the Kenyan social cultural and political context, intersexuality is likely to be conflated with sexuality leading to a rejection of the discourse around the rights of intersex persons through identity documents. The researcher therefore prefers not to use the term intersexuality in relation to the intersex condition.

Interestingly, none of the key international or regional human rights instruments have given a specific definition of the intersex condition. The office of the United Nations Commission on Human Rights has however attempted to explain the terms by indicating that intersex people are born with sex characteristics including genitals, gonads and chromosomal patterns that do not fit the typical known binary notions of male or female.⁴²⁶

⁴²¹ Office of the High Commission of Human Rights (OHCHR) Fact sheet 2015.

⁴²² 2022 ICD-10-CM Diagnosis Code Q54.8: Other hypospadias (icd10data.com). (Accessed on 7th July 2022).

⁴²³ Jantin Van Lisdonk. ‘Living with Intersex/DSD: An Exploratory Study of The Social Situation of Persons with Intersex/DSD’ (2014) Netherlands Institute for Social Research 9.

⁴²⁴ Garry Warne and Vijayalakshmi Bhatia, *Intersex, East And West* in Sharon E. Sytsma (ed), *Ethics and Intersex* (2006) Springer Science and Business Media, 199-122.

⁴²⁵ Sullivan Agius and Christa Tobler, *Trans and Intersex People, Discrimination on the Grounds of Sex, Gender Identity and Gender Expression* (2011) 12 European Union Report 2011) 12.

⁴²⁶ United Nations Human Rights Office of the High Commissioner Fact Sheet, *Intersex*. Available at www.ohchr.org (Accessed on 16th October 2017).

In Kenya, Chigiti has explained the term from the point of view of various jurisdictions including South Africa, Australia, United States of America and India.⁴²⁷ He however appears to conflate the term intersex with the transgender persons known as *hijras* in India.⁴²⁸ His explanation is also from a more comprehensive and technical medical discourse, which this research considers fairly complicated for *Wanjiku* and other non-medical readers.⁴²⁹

On her part, De' Franza describes an intersex person as a sexual minority born with a mixture of both male and female physical and hormonal sex characteristics.⁴³⁰ This study partially agrees with this definition. It however clarifies that even though intersex persons may fall in the sexual minorities' category, being intersex is a congenital condition rather than a sexual orientation situation. An intersex individual would therefore be better described as a sex/gender minority for not conforming to the known societal gender clarifications. The research however prefers Griffiths description. Even though he does not mention external genitalia, Griffith has factored in the biological sex/gender characteristics which vary from what is typically male or female in his explanation of who an intersex person is.⁴³¹

This research adopts some of the definitions with variations as explained above. However, for purposes of this work, an intersex person is one who is born with a congenital condition in which the physical external genital and reproductive organs for both male and female are fully formed and are present at the same time.

1.14.2. SEX/GENDER MARKER(S).

There has been an ongoing global debate on the issue of varying sex/gender markers and how these markers should be represented on official identity documents as well as many contestations as to what such sex/gender marker should be.⁴³² Certain jurisdictions including Australia seem to have settled on 'X' representing 'Indeterminate/unspecified/Intersex' to represent the third categorization sex/gender marker.⁴³³ This 'third' sex/gender marker is considered appropriate and is meant to be acceptable for anyone who does not conform to the

⁴²⁷ John Chigiti, *Intersex Persons and the Law in Kenya* (Quality Thoughts Publishing 2021) 1-14.

⁴²⁸ *Ibid*, 3.

⁴²⁹ *Ibid*, 5-9.

⁴³⁰ Megan De Franza *Intersex and Imago: Sex, Gender, and Sexuality in Post Modern Theological Anthropology* (Marquette University 2011) 117.

⁴³¹ David A Griffiths, *Shifting Syndromes, Variations and Intersex classifications* (Sage Publications 2018)125.

⁴³² Sudai Maayan, 'Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement's Path to De-Medicalization'. 41Harv. Women's LJ (2018): 30-36.

⁴³³ *Ibid*

‘F’ or ‘M’ divide in those jurisdictions.⁴³⁴ Other jurisdictions such as India and Nepal have opted for a ‘3rd’ sex/gender marker alongside the ‘M’ and ‘F’ categories.⁴³⁵ In the case of Kenya, the only two sex/gender marker options available in all identity documents remain in the ‘M’ and ‘F’ sex/gender divide. With reference to the intersex person the focus of this work however, the 2019 National Census has already assigned them the ‘Intersex’ (‘I’) sex/gender marker which has been documented alongside the ‘M’ and ‘F’.⁴³⁶ Further, since a whole range of diverse sex/gender identities have now been globally recognized,⁴³⁷ and given that some of those sex/gender identities are considered controversial in the Kenyan context,⁴³⁸ this research makes a case for intersex persons to be recognized and documented as belonging to the ‘intersex’ (I) sex/gender. The intersex gender allocation which is in line with the 2019 National Census, is more likely to accurately identify them better for purposes of accessing their human rights and other unquantifiable human needs.

1.14.3.BINARY AND HETERONORMATIVITY.

The society in Kenya has been ordered along the social constructs of exclusive binary opposites of male and female when it comes sex/gender classifications.⁴³⁹ These constructs of binary heteronormative norms are what have been exclusively considered legally and socially ‘correct’ and ‘normal’ to the exclusion of all others. These constructs are what are contained in all identity documents issuance regimes which describe people through their sex/gender characteristics in the country. The dangers of ordering society on exclusive binary paradigms cannot be overstated. Such ordering operates to exclude and marginalize people who do not fit in the ordered ‘either’ and ‘or’ brackets.⁴⁴⁰ This rings very true for intersex persons in Kenya who face discrimination and exclusion for not fitting in the binary categorization.

⁴³⁴ Ibid, 36.

⁴³⁵ Fae Garland and Mitchel Travis, ‘Legislating Intersex Equality: Building the Resilience of Intersex People through Law’ (2018) 38 *Legal Studies* 591-593.

⁴³⁶ Kenya National Bureau of Statistics, 2019, *Kenya Population and Housing Census: Volume 1* (Kenya National Bureau of Statistics 2019) 7.

⁴³⁷ Florence Ashley, ‘X’ Why? Gender Markers and Non-binary Transgender People. in: Jaramillo I and Carlson, L. (eds) ‘Trans Rights and Wrongs. *Ius Comparatum - Global Studies in Comparative Law*’. (2021)54. Springer, Cham.

⁴³⁸ Moagi Lefatshe, *Violence Against LGBT(QI) Persons in Africa*. (The Palgrave Handbook of African Women’s Studies 2020) 3.

⁴³⁹ Scot Geibel ‘Same Sex Sexual Behaviour of men in Kenya. Implications for HIV Prevention, Programs and Policy’ (Doctoral Thesis, Faculty of Medicine and Health Sciences, Ghent University 2011) 20.

⁴⁴⁰ Juan Perea, ‘The Black White Binary Paradigm of Race: The Normal Science of American Racial Thought’. (1998) 1 *La Raza Law Journal* 5 :3:129.

1.14.4. SEX/GENDER AND SEX/GENDER IDENTITY.

Gender identity denotes an individual's sense of themselves as being either male or female.⁴⁴¹ Usually, people have a gender identity which is part of their overall identity and which they identify themselves with.⁴⁴² Morrow and Messinger explain that gender refers to the behavioral and cultural characteristics that are socially constructed to express femininity and masculinity, but which is different from the biological sex. This relates to behavior that is associated with females and males respectively.⁴⁴³ This study adopts the definition given by the above scholars and posits that for some intersex persons in Kenya, a dilemma arises when law and society assigns them a sex/gender that does not fit into the sex/gender assigned to them at birth. For purposes of this research, the critical element is not sex/gender as socially constructed, but sex/gender and genital characteristics as congenitally and biologically formed. The other critical element is the impact this categorization through external genitalia and reproductive organs has on those legally and socially not conforming.

According to Steans, in everyday usage, the terms gender and sex are often used interchangeably. The meaning of gender is also often conflated with the meaning of sex.⁴⁴⁴ This is because it is not always possible to make a neat distinction between the biological and the social. Indeed, it is mostly because of society's expectations of femaleness and maleness that the discussion becomes necessary in the first place. Biological differences normally become important when a weight of social meaning is attached to them and institutions structured accordingly. Intersex is a phenomenon rooted in biological and anatomical differences. These differences and social constructs are however intertwined and difficult to separate. For analytical clarity however, this research centers on the biological framing of the intersex identity and focuses on it in exploring the law and empirical experiences of intersex persons. The terms sex and gender and sex/gender identity are therefore used interchangeably and are conflated throughout the work to refer to the biological and external genital sex/gender framework, which determines a person as male, female or intersex.

⁴⁴¹David Rowland and Luca Incrocci (eds) *Handbook on Sexual and Gender Identity Disorders* (John Wiley and Son 2008) 424.

⁴⁴² Ibid.

⁴⁴³ Deana Morrow and Lorri Messinger (eds) *Front Matter; Sexual Orientation and Gender Expression in Social Work Practice: Working with Gay, Lesbian, Bisexual, and Transgender People* (Columbia University Press 2006) 8.

⁴⁴⁴ Jill Steans, *Gender and International Relations: Theory, Practice, Poverty* (Policy Press Cambridge 2013) 7.

1.14.5. SEXUALITY AND SEXUAL ORIENTATION.

Sexuality has been viewed as a social-cultural construct.⁴⁴⁵ The World Health Organization (WHO), also looks at sexuality as a construct influenced by several factors. Such factors include social, cultural, religious, historical, political, economic and ethical interactions. When it comes to matters of sexuality and sexual orientation, the intersex person becomes completely disadvantaged in a society that has ordered and legislated on what is ‘normal’ and criminalizes what is considered ‘abnormal’ in terms of sexual preference. Lack of clarity means that intersex people are ordinarily lumped together with lesbians, gays, bisexuals, and transgender (LGBT) persons in matters of sexuality and sexual orientation, when the two are viewed in terms of sexual feelings and behavior. In a society where matters of sexuality are highly regulated by the law with criminalization of what society has ordered as abnormal, this creates a huge disadvantage for intersex persons. Yet the unique needs of intersex persons go way beyond matters of expressing themselves sexually.⁴⁴⁶ This research clarifies that the focus is not on the sexual preference of intersex persons but on the genetic and congenital framework presenting in external genitalia that makes them of the intersex gender/sex category.

The 2016 Yogyakarta Principles define sexual orientation as each person’s capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with persons of a different gender or the same gender or more than one gender.⁴⁴⁷ This study agrees with this definition and acknowledges that in Kenya, the recognized and ‘normal’ sexual orientation falls in the heterosexual and heteronormative category. It however posits that the fact of being intersex is not necessarily connected with sexual orientation. An intersex person may fall in the ‘normal’ sexual orientation category or in the ‘minor’. It is also important to note that this research does not delve into matters of sexuality or the sexual orientation of an intersex. The research is purely concerned with the intersex condition as a congenital biological condition, the rights violated and the needs denied to certain people for being born with that condition.

1.14.6. SEXUAL AND GENDER MINORITIES.

Typically, society aligns an individual’s sex/gender with the biological sex/gender assigned to them at birth. Society’s expectation is that the sexual preference and orientation will normally

⁴⁴⁵ Janet Kabeberi Macharia, ‘Reproducers Reproduced. Social Legal Regulations of Sexuality Among Girls in Kenya (Doctoral Thesis, School of Law, University of Warwick 1995)18.

⁴⁴⁶Merce Epprecht, *Sexuality and Social Justice in Africa: Rethinking homophobia and forging resistance*. (Zed Books Limited 2013)51.

⁴⁴⁷2016 Yogyakarta Principles, Preamble.

align to the binary opposite. Anyone whose sexual orientation and sexual preference departs from the 'normal' would then fall in the category of sexual minorities. Donnelly describes sexual minorities as people who the rest of society do not consider 'normal' because they do not fit into the mainstream society's expectations.⁴⁴⁸ Their orientation in terms of sexual preference, inclination, behavior and sex/gender identity challenges what society considers normal and therefore acceptable. That is why Morrow and Messinger define sex/gender minorities as people whose gender identity does not conform to the traditional expectations.⁴⁴⁹ The unique intersex status however seems to be lost in these definitions. Intersex Human Rights Australia (formerly known as Organization Intersex International Australia Limited) (OII),⁴⁵⁰ explains that intersex persons cannot be classified through the gender or sexual identity lens. This is due to their unique gender status. Indeed, intersex persons may be both sexual and gender minorities, but with that extra unique status that does not conform to the known and is different from the societal expectations. In this way, the intersex will not fit in the socially constructed 'normal' bracket. They therefore find themselves in the minorities' bracket for being different. This work agrees with this definition and posits that the intersex group in Kenya in that regard fits in the sex/gender minority grouping.

1.15. SCOPE AND DELIMITATION.

Intersex is a complex human phenomenon and studies have confirmed that there are varying degrees and different kinds of people with intersex conditions.⁴⁵¹ The umbrella term of intersex is employed to denote the various congenital conditions where a person is born with certain characteristics like genitals, gonads, or chromosomes which do not fit within the known standard and traditionally accepted male and female binaries.⁴⁵² The explanations examined and the literature reviewed above demonstrates the existence of various traits of the intersex condition. While persons with these different traits certainly exist in Kenya and it would have

⁴⁴⁸ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2003)229.

⁴⁴⁹ Ibid.

⁴⁵⁰ <http://oii.au/author/admin>.(Accessed on 12th December 2017), now (<https://ihra.org.au>).While Australia does not constitute the jurisdictions which the research draws illustrative lessons from, the Respondent the researcher informally interviewed on email, made reference to important decisions determined in Australia which relate to the research and therefore worth mentioning. These include *Norrie v NSW Registrar of Births, Deaths, and Marriages* (2013) 84 SWLR 697; *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 (2014); *Re: Kaitlin* [2017] FamCA 83 and *Secretary of the Department of Health and Community Services v JWB and SMB* [1992] HCA 15.

⁴⁵¹ Stephen Kemp, 'The Role of Genes and Hormones in Sexual Differentiation' in Sharon Sytsma, (ed) *Ethics and Intersex*. (2006) 29 *International Library of Ethics, Law and the New Medicine* 1-26.

⁴⁵² Alice Domurat Dreger, 'A history of Intersexuality from the Age of Gonads to the Age of consent'.(1998) 9 *Clinical Ethics* 345.

been useful to conduct research on the human rights violations of intersex persons generally, that is beyond the scope of this work. This study focuses only on the most obvious type of the intersex condition where a person is born with visible physical external genitalia that are for both male and female, present at the same time. These are visible through physical and visual observation at birth. The study also deals with intersex persons who in addition to having the double genitalia also have bodies with reproductive organs and or physical characteristics associated with a sex/gender they were not assigned to at birth. The reproductive organs and physical bodily features may present later in life, especially at puberty, when the body starts to defy the biological sex/gender assigned at birth. This defiance is seen through cases of hormonal production and consequential changes not associated with the biological sex/gender characterization assigned at birth. Included here are menstruation cycles and breast formations for a person who was assigned a male sex/gender at birth, or facial hair and a masculine body physique for a person who was assigned a female sex/gender at birth. The research examines the various challenges created by these biological occurrences for the individual concerned.

This research also recognizes that intersex persons in Kenya suffer violations of a broad spectrum of human rights and are denied many human needs. However, the scope of the study does not allow examination of all of them. Consequently, only a few specific socio-economic rights and nontangible human needs are identified and the negative impact examined. This is considered sufficient for highlighting the impact of invisibility brought about by the gaps in the recognition and identity documentation systems in the country.

The research is largely legal, and the data collected is meant to inform reforms in law and policy for purposes of influencing legal change. However, the research goes beyond the legal realm and touches on the medical, political, social and cultural aspects revolving round the intersex issues, hoping to influence attitudinal change in communities where intersex persons live.

1.16. LIMITATIONS.

The researcher encountered a number of limitations during the research. Key among them was the global Covid 19 disease outbreak and subsequent introduction of containment measures, which presented a major challenge as it greatly affected the travel plans.⁴⁵³ Face to face interviews had to be substituted with telephone discussions and where possible, with zoom

⁴⁵³ The first coronavirus case in Kenya was reported in March 2020 throwing the entire country into a panic. Thereafter travel lockdowns were put in place as a result of which travel to Kisumu and Mombasa became impossible. Continued person to person interviews also became impossible.

interviews. The virtual method of data collection presented two key challenges. First, some respondents targeted for the research could not be reached because they did not have mobile phones. The second was that the researcher was not able to observe non-verbal cues, which can be very important in qualitative research. Nevertheless, the researcher was able to overcome the challenges and the data collection process completed as initially targeted.

In addition, the researcher's intention to interview religious leaders from the Islamic faith, the other dominant religion in Kenya did not materialize. The researcher was only able to interview religious leaders from the Christian faith.

1.17. STRUCTURE OF THE RESEARCH.

This research is undertaken in six chapters. Chapter one introduces the research and sets out its context. It outlines the subject matter by giving the background, the problem statement and justification of the study. The objectives which the research intends to achieve, the research questions it sets to answer and the hypotheses it sets out to test are outlined in this chapter. The concepts relevant to and surrounding the key discussions and dialogues are identified and examined here, as are the theories that underpin the research. The existing literature relevant to the area of research is thematically reviewed and the legal gaps which the research intends to fill, the inadequacies it seeks to address and the contribution it seeks to make to the existing body of scholarly work in the area are established here. Given that the topic under review is extremely broad, the scope and delimitation of the research is explained in chapter one. The challenges encountered during the research are outlined under the limitations section of the chapter.

Chapter two focuses on the gaps and inadequacies existing in the various identity documents' issuing regimes and the manner in which the regimes have led to non-recognition, non-documentation and or misrecognition of the person born intersex in Kenya. The specific identity documents and the regime under which each document is issued are analyzed in this chapter as the negative impact of the gaps in the issuance structure for the intersex person are demonstrated. Specific identity documents and the issuing regimes analyzed in this chapter are the Birth Notification Form issued immediately at birth, the birth certificate and the national identity card. Others are travel documents including the passport and driving license. The issuing regime for the National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) cards, the two sets of identity documents which give access to social security services in Kenya are also examined. The Kenya Revenue Authority (KRA) Personal Identity

Number (PIN) certificate, even though not strictly an identity card, is also analyzed. The legal gaps existing in the ‘National Integrated Identity Management System’ (NIIMS) and the National Education Management Information System (NEMIS), two digital documentation processes introduced by the government in 2019 and 2017 respectively, and what those gaps mean for the intersex person are also explored here. The *Huduma Namba* identity card introduced through NIIMS and the unique identification number for all learners in Kenya introduced through NEMIS, and what the gaps in the two digital regimes mean for intersex persons are examined. The examination of the identity documents and the respective issuance legal regimes and the failings and shortcomings are discussed from the personal lived perspectives of intersex persons.

Having established the gaps existing in the various identity documents’ regimes in chapter two, chapter three proceeds to examine the negative impact of the identity quagmire created for the intersex person by those gaps, on selected socio-economic rights, given that identity documents identify their holders for purposes of consuming these rights. The chapter extracts and focuses on a selected cluster of these rights. These are the right to the key components of health namely physical, mental, reproductive and sexual health, the right to education and the right to employment. The study zeros in on this cluster because their nature is such that, denial of one almost always invariably negatively impacts the other. The effect of the current documentation regime on these rights is evaluated from the perspective of the personal experiences of the intersex person.

Chapter four analyzes the impact of the exclusion gaps on unquantifiable and non-tangible human needs of an intersex person as a member of humanity. This chapter picks up the analysis of the systemic violation of the socio-economic rights undertaken in chapter three and proceeds to explain how the negative impact of the gaps transcend into other aspects of an individual’s unquantifiable human needs. The areas discussed here are human dignity, autonomy, personal liberty and security of the person. Aspects of stigma, isolation, humiliation and unequal and discriminatory treatment and how these result in dehumanizing the person to whom they are subjected are explained here. Other unquantifiable human needs examined in this chapter are the right to a name, the right to family life and burial rights. Narrations by intersex persons are used to demonstrate the direct linkage between non recognition, non-documentation and denial of these rights and needs for people born intersex. The gaps in the documentation regime are examined to show how they negatively impact an intersex person from the cradle to the grave.

In chapter five, various models used by five selected jurisdictions to afford a legal sex/gender to intersex persons by recognizing and accurately documenting them are examined. The chapter zeroes in on models adopted by South Africa, Malta, Colombia, Germany and India, which it considers could appropriately be used in Kenya. An examination of the legal models, judicial measures, policy changes and other extra-legal measures used to bring about positive change for the intersex person in those jurisdictions is undertaken in this chapter.

Chapter six is the final chapter of this research. It concludes the work as it makes recommendations on possible interventions. After restating the research findings, the chapter reflects on responses from the respondents, draws lessons from perspectives from the jurisdictions analyzed in chapter five and then proceeds to make recommendations. In so doing, the researcher exercises caution given the controversy surrounding the area of study. This is so as to avoid the possibility of resistance and to ensure that any suggestions made fit into the Kenyan social-cultural and political situations for the benefit of the intersex person.

1.18. CONCLUSION.

This chapter has introduced the research and set out the context in which the various arguments and discussions are undertaken. From the literature reviewed, it has been shown that several legal gaps and inadequacies exist in the current regimes through which identity documents are issued. It has also been shown that these have failed to factor in the intersex person as an individual with unique rights and needs requiring special attention. This failure leads to violations of various human rights and need of the person concerned. The following chapter therefore delves into the precise gaps existing in specific identity documents' issuance regimes and links the denial of the various rights to the gaps. This is done from the perspectives of intersex persons themselves.

CHAPTER TWO.

THE IDENTITY DOCUMENTS REGIME IN KENYA: EXISTING GAPS.

*'I do not have a single government document. The government does not know that I exist.'*¹

2.1 INTRODUCTION

Legal recognition, realized through the medium of accurate government issued identity documents as demonstrated in the preceding chapter, represents the fact of a person being officially acknowledged as a human being, alongside others.² Past studies have shown that failure to recognize any person as a human being, invariably leads to invisibility of that person.³ This means that where the law fails to acknowledge the existence of a human being in society, the result will be legal invisibility for the person not legally recognized. And that is the legal invisibility that Mercy has been experiencing her entire life when she says:

'I do not have a single government document. The government does not know that I exist'.⁴

Mercy was born in a hospital and was probably 'documented' as a female through Birth Notification Form B1.⁵ Whether her undocumented status is due to administrative inability to secure a birth certificate or because none was issued in her accurate sex/gender identity, her narrative to the effect that the government does not know that she exists demonstrates the hopelessness that intersex persons experience whilst living as undocumented individuals.⁶ Yet, global and regional legal instruments have, from time to time, guaranteed the right to recognition by one's government and for registration of every person at birth. The ICCPR and the CRC are however very vocal with regard to documentation through registration immediately at birth.⁷ The region of Africa, through the African Charter on the Rights and

¹ These desperate utterances are from Mercy (pseudonym), an intersex person, during an interview conducted in Nairobi on 18th May 2019. Mercy has never been documented due to her intersex status. She does not have a single identity document and therefore feels that she is invisible to the government, which is not aware that she exists.

² Amy Gutmann (ed), *The politics of Recognition in Multiculturalism: Examining the politics of Recognition* (Princeton University Press 1992) 26.

³ Bruce Granville Mille, *Invisible Indigenes: The Politics of Non-recognition* (University of Nebraska Press 2002) 1-5.

⁴ Ibid, (n1) interview with Mercy.

⁵ Birth Notification Form B1 is the form used to document births occurring in hospitals and is issued to the parent or parents of a child immediately at birth. It is issued under the Births and Deaths Registration Act Cap 149 of the Laws of Kenya, which is the legal regime concerned with registration of births in Kenya. This is the form subsequently used to obtain a birth certificate, which is also issued under the same legislation.

⁶ RM, on the other hand was born at home, was never documented and never attained birth registration. See RM Para 33 and 134.

⁷ ICCPR, Article 24(2) and CRC Article 5, respectively.

Welfare of the Child (ACRWC), equally calls for recognition of every child's legal status through registration at birth.⁸

By calling for registration at birth as the first form of legal recognition for every human being, these human rights instruments are underpinning the importance of documenting people and issuing them with identity documents.⁹ Identity conferred through recognition serves to give a person citizenship and a nationality status.¹⁰ And as Horne observes, official recognition and documenting of a citizen by the government is generally what gives that person an individual legal identity.¹¹ Documents attesting to an individual's identity and citizenship play a critical role in controlling the individual's access to certain resources, benefits and rights, which are not just basic but also necessary in the trajectory of one's life.¹² The converse is also true. Where anyone is not recognized and not documented by their government, the person ideally lacks nationality and citizenship, which are considered to be the bedrock of the ability to access those rights, resources and needs.¹³ Lack of a nationality can render a person as a 'non-person'.¹⁴ Without identity documents, a person will find themselves in a space that excludes them, limits enjoyment of their rights, restricts access to various services and erases their personhood.¹⁵

Bearing the above in mind, this chapter analyses the existing identity documents' issuance regimes to determine the existing gaps in relation to documenting people born intersex in that framework. Identity documents not only confer legal recognition but also enable their holders access many rights. In examining the identity documentation regime, this chapter demonstrates

⁸ African Charter on the Rights and Welfare of the Child (adopted 1st July 1990, OAU).

⁹ ICCPR, Article 24(2) and CRC, Article 5.

¹⁰ See Manby, *Citizenship Law in Africa Comparative Study* (African Minds 2016) ix and Open Society Foundations and Namati, *Community-Based Practitioner's Guide: Documenting Citizenship and Other Forms of Legal Identity*. (Open Society Foundations and Namati 2018) 5.

¹¹ Katelyn A. Horne, 'Navigating Nationality: The Rights to Birth Registration and Nationality in Refugee Magnet States' (2014) *Columbia Journal of Transnational Law* 116.

¹² Oliver Bakewell, *The meaning and use of identity papers: Handheld and heartfelt nationality in the borderlands of North-West Zambia*. (International Migration Institute 2007) 3.

¹³ Emmah Wabuke and Patricia Ouma, *Regional Responses to Nationality, Citizenship and child statelessness: The case of the East Africa Community in Markienwicz- Stanny et al* (eds), *Children in Migration, Status and Identity* (Nomos Verlagsgesellschaft mbH & Co. KG 2022) 156.

¹⁴ Lindsey Kingston *et al*, 'Limitations on Universality: The 'Right To Health' and the Necessity of Legal Nationality (2010) *BMC International Health and Human Rights*, 10: 2.

¹⁵ Susan Biblier Coutin, *Illegality, Borderlands and the Space of non-existence* in Richard Warren Perry and Bill Maurer (eds), *Globalization Under Construction: Governmentality, Law and Identity* (University of Minnesota Press 2003) 172.

that there are gaps which cause intersex persons to be excluded and thereby rendered invisible. This exclusion has led to denial of many rights guaranteed under the human rights system.

The objectives of this chapter are met in three intermingled parts. The first two examine the legal identity documentation issuance framework in Kenya and the voids in it.¹⁶ The extent to which the legal framework has failed the intersex person in terms of acknowledging them as a distinct human being deserving accurate documentation is interrogated in this part. The third part weaves the experiences of intersex persons into the discussion, as they narrate the negative impact the gaps and inadequacies in the subsisting documentation systems have had on their daily lives.¹⁷

The chapter contends that the legal framework relating to documentation has institutionalized the marginalization of the intersex person by retaining the binary sex/gender classification of male and female in Kenya.¹⁸ Consequently, intersex persons have experienced and continue to experience precarious access to many rights, including the right to nationality.¹⁹ A person denied a nationality is in effect rendered stateless and precluded from the enjoyment of all rights and privileges granted by the law.

Doyle points out that registration can be used as a tool for excluding people from citizenship.²⁰ Borrowing from Doyle, the argument presented here is that, the current identity registration system has either intentionally, inadvertently but certainly subtly become a tool through which intersex persons are excluded from citizenship, nationality and all attendant rights. This is a

¹⁶ This has been done through an analysis of the current legislative provisions and judicial pronouncements already made regarding accurate identity documents for intersex persons in Kenya.

¹⁷ These are drawn from the various interviews and data collected in the field work part of this research.

¹⁸ The terms sex and gender are usually conflated and used interchangeably to denote the biological physical genitalia through which men and women are differentiated. However, studies have shown that the terms sex and gender are distinct. Sex refers to the biological characteristics that define human beings as female or male, and now, in some jurisdictions, as intersex. Sex is usually assigned at birth and the sex differentiation made on the basis of external genitalia, chromosomes, hormones and the reproductive system. On the other hand, gender has been defined as both a social construct and a personal identity. In the context of social terms, gender refers to the socially created roles, personality traits, attitudes, behaviors and values attributed to and acceptable for men and women, as well as the relative power and influence of each. In individual terms gender refers to the specific gender group with which an individual identifies, regardless of their sex. See Francisco Valdes, 'Queers, Sissys, Dykes and Tomboys: Deconstructing the Conflation of 'Sex', 'Gender' and 'Sexual Orientation'(1995)83 California Law Review 20. For purposes of this research. Sex and gender are interchangeably used to denote the biological physical genitalia through which men, women and intersex are differentiated.

¹⁹ International law, through Article 1 of the 1954 Convention Relating to the Status of Stateless Persons, defines a stateless person as a person who is not considered as a national by any state under operation of its laws. It may be argued that the application of the legal regime relating to identity documentation in Kenya has effectively served to make intersex persons stateless.

²⁰ Shane Doyle, *Parish Baptism Registers, Vital Registration and Fixing Identities in Uganda* in Keith Breckenridge and Simon Szreter, (eds) *Registration and Recognition: Documenting the Person in World History* (Oxford University Press 2012)290-291.

major gap in the legal regime. Yet, by guaranteeing various rights and freedoms, the human rights regime's intention is that the rights be moved from their legal and theoretical nature into practical realities. Having a right is not enough. A right gains status through entitlements sanctioned by the State.²¹ That is what enables one to exercise the rights.²² Failure by the identity documents' issuing regime however means that intersex persons are unable to have their rights translated into reality, which creates many difficulties for them.

In Kenya, legal recognition is at the outset effected through bureaucratic registration.²³ The registration is then trailed by production of official government records and documents, recorded in accordance with the relevant legal framework.²⁴ Identity recognition in Kenya has however, for the longest time, been understood from the perspective of being either male or female, and has been ordered along that standpoint.²⁵ This has subsequently been translated into the nature of identity documentation regimes currently in place.²⁶ All official documents bear the sex or gender marker descriptions of male or female, with the entry of the sex/gender marker being a compulsory requirement. No official identity document will be issued without the insertion of the sex/gender category description provided in the documents.²⁷ This is an indication that the sex/gender component of a person is a critical piece of information for purposes of legal recognition in Kenya. And yet this key component, as it relates to intersex persons, has been missing from the entire identity documents' issuance structure. The section

²¹ Amarta Sen, *Development as Freedom*(Anchor Books 2000) 228.

²² Pamela Abbott and Dixon Malunda, 'The Promise and the Reality: Women's Rights in Rwanda'(2016)24 *African Journal of International and Comparative Law* 4: 567.

²³ Registration, in its most basic form, is the act of producing a written record. In addition to birth registration, civil registration also entails the registration of the marital status and death of the individual citizen. Registration has therefore been defined broadly as the act of listing someone by an institution that commands authority and legitimacy.

²⁴ The process of documentation and maintenance of paper records was introduced in Kenya through the colonial rule and has been maintained throughout independent Kenya. According to Harris, paper system was a Eurocentric idea of a western genesis of registration system. See Harris, 'Paper trail: Chasing the Chinese in the Cape (1904-1933)', available at <http://www.scielo.org.za>.(Accessed on 5th October 2020). Precolonial Africa, including Kenya hardly had any paperwork record keeping. Records were more often than not kept through oral traditions and passed on throughout generations. See also Richard, 'Past and Presentism: The 'Precolonial' and the Foreshortening of African History'(2011) 52 *The Journal of African History* 2:139. Registration and paper documentation have however now acquired a hallowed position in Kenya and are absolutely critical facilitators in accessing basic rights and services.

²⁵ Guillit Amakobe *et al*, *Gender Theatre: The Politics of Exclusion and Belonging in Kenya* in Nancy Nicol *et al* (eds) *Envisioning Global LGBT Human Rights:(Neo)colonialism, Neoliberalism, Resistance and Hope* (University of London Press 2018) 361.

²⁶ This is demonstrated by the structure of the law regarding identity documents that every Kenyan is entitled to during their lifetime, and as the narrations by the respondents will show.

²⁷ The format through which all the identity documents analyzed in this chapter all applied for have a sex/gender description as one of the identifying features.

below seeks to demonstrate these failings. It does this as it tests the first hypothesis, seeks to achieve the first objective and answer the first research question.

2.2. GAPS IN THE IDENTITY DOCUMENTS' ISSUANCE REGIMES.

It should be noted from the outset, that save for the presence of the Yogyakarta Principles which provide for protection of the rights of intersex persons through official recognition and documentation,²⁸ there are no human rights instruments specifically recognizing this right at either the global or regional levels.²⁹ And, just like at the international and regional levels, Kenya has never constitutionally acknowledged this category of its citizens in its documentation process. Neither has it drawn any legislation explicitly directed at people born with the intersex gender in relation to identity documentation. Indeed, before the Children Act enacted in 2022, there had never been any legislative mention of documentation for intersex persons in Kenya for the longest time.³⁰ Sadly, the Children Act 2022, does not remove the inadequacies in the identity documents' registration regimes. Instead of plugging the gaps, the Act contains various limitations as is highlighted below.³¹

Even though the global, regional and domestic human rights regimes have made provisions for vulnerable categories of people in society thereby giving them legal recognition and the right to a nationality,³² that has not been replicated for intersex persons. Instruments that would cater for this unique human category and equally vulnerable group are yet to be drawn at these levels. This position subsists in the face of the vulnerable position that intersex persons find themselves in, both under the law and in society. This is due to their anatomical framework in terms of sex /gender categorization.³³ Being legitimate citizens of Kenya, intersex persons are justified to insist that the obvious lacunae causes the current identity documents' governing legal

²⁸ The 2006 Yogyakarta Principles and the 2017 YP+10.

²⁹ Ibid. The 2006 Yogyakarta Principles speak to recognition and the 2017 principles specifically address intersex issues.

³⁰ The Children Act No 29 of 2022 was passed in May 2022 commencing on the 26th July 2022.

³¹ The Children Act No.29 of 2022 at Section 7(3) requires that the Principal Registrars takes measures to ensure that intersex children are registered at birth. While this provision is a welcome development for children born intersex, it does not solve the registration of identity documents challenges discussed in this chapter as explained in a later segment of this research.

³² Women and children have specifically been provided for through regional human rights in Africa through the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) and the African Charter on the Rights and Welfare of the Child respectively.

³³ The vulnerability of specific groups including women, children and persons with disabilities amongst other vulnerable groups, and their presence as specific members of society, have been acknowledged by the legal framework at the three levels. To this end, the international community, the regional and domestic levels have not only put in place specific protective and recognition measures not just by drawing legal instruments that address their specific vulnerability but additionally in calling for specific and special protection measures.

framework to be unjust, a mistake and a violation of the constitution.³⁴ As classical naturalists would argue, law that creates lacunae is unjust and has no validity.³⁵ The lacunae essentially means that at all levels, specific legal provisions available to grow the law regarding intersex legal recognition through accurate identity documents and other human rights protection is scarce, if not completely lacking. This position exists even though the intersex person has now emerged as a protected category under international law.³⁶ This is a significant omission. Remedial measures through legal reforms are needed to enable conversion of the natural law into valid law through legislation theorized under the synthesized natural and positive law theories.³⁷

Possession of accurate identity documents is therefore fundamental. In addition to the provisions contained in the Constitution of Kenya,³⁸ the right to various official identity documents is to be found in the Kenya Citizenship and Immigration Act.³⁹ This legislation spells out the elements of entitlement to any document of registration and identification issued to all Kenyan citizens.⁴⁰ Moreover, the Act lists the identity documents which every Kenyan citizen is entitled to, among them being a birth certificate, a passport, a national identity card and a voter's card.⁴¹

Legal identification documents in Kenya, as elsewhere, are not just essential, they are crucial. Failure to procure these documents can easily lead to disenfranchisement of the person lacking them. It goes without saying that disenfranchised people can, and do find themselves excluded from full membership of the country where they were born and where they live, which is, very often, the only country they have ever known.⁴² This in turn may deny such a person equal citizenship with everyone else. This chapter argues that in the case of intersex persons, the legal documentation regime in Kenya has served to disenfranchise them, creating a historical legal exclusion.⁴³

³⁴Jerome Bickenbach, 'Law, Morals and the Fallibility Thesis' (1985) *The University of Toronto Law Journal* 1: 67-85.

³⁵ Phillip Soper, 'In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at all' (2007) *20 Canadian Journal of Law & Jurisprudence* 1:201-223.

³⁶ OHCHR Fact Sheet. Intersex, 2015 http://unfe.org/system/unfe.65.Intersex_Factsheet_ENGLISH.pdf (Accessed on 6th September 2019).

³⁷ See Chapter One.

³⁸ Constitution of Kenya 2010, Article 12.

³⁹ Kenya Citizenship and Immigration Act No.12 of 2011, Laws of Kenya (Amended 2012).

⁴⁰ Ibid.

⁴¹ Kenya Citizenship and Immigration Act No.12 of 2011, Laws of Kenya (Amended 2012), Section 22(g) i-v.

⁴² Manby, *Citizenship Law in Africa a Comparative Study* (African Minds 2016), 3.

⁴³ Ibid.

As already stated, legal recognition of a person begins with official acknowledgement, through the act of issuance of official identity documents, issued under the legal regime by one's government. Identity and nationality documents are perhaps the most common ways through which governments confer a citizenship status in a universally and equal way to those who are entitled to it. When individuals fail to secure any of the key documents, they find themselves at a severe disadvantage with many suffering deficits. Indeed, Balaton-Chrimes, while writing on the negative effects of lack of identity documents for the Nubians in Kenya, points out that lack of identity documents has rendered Nubians socially invisible.⁴⁴ And even where they are visible, she continues, they are perceived as strangers.⁴⁵ This can well be said of intersex persons.

In the case of intersex persons, the operation of the law introduces a danger which is always lurking for them. This is due to the fact that the current initial identification documents given at birth will either inaccurately describe the intersex person in relation to their sex/gender description or completely exclude them.⁴⁶ This is attributable to the fact that historically, the identification system in Kenya has principally operated on a binary arrangement when it comes to sex categorization.⁴⁷ Initial incorrect documentation or complete inability to secure documentation ends up kicking into place a domino negative effect on subsequent identification documents required throughout the life of a person.⁴⁸ The sections below analyze the current identification documents regime in Kenya and explain how each has affected the intersex person.

There are certain identity documents which are essential for every Kenyan citizen over the course of their lifetime. Different identity documents become necessary at different stages of peoples' lives. They also become indispensable to the enjoyment of certain rights at different stages of a person's life trajectory. A selection of these documents are examined in separate sections below, each of which focuses on a particular but significant identity document. Those

⁴⁴Samantha Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa: Political Marginalization of Kenya's Nubians* (Ashgate Publishing Limited 2015) 28.

⁴⁵ *Ibid*

⁴⁶ This position is disclosed by both *Baby A, RM* and also Tim's case.

⁴⁷Guillit Amakobe *et al*, *Gender Theatre: The Politics of Exclusion and Belonging in Kenya* in Nancy Nicol *et al* (eds) *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, Resistance and Hope* (University of London Press 2018) 361.

⁴⁸ Alice Grandison *et al* (eds) *Collins Concise English dictionary* (Harper Collins Publishers 1993) 382, defines the domino effect as a series of similar or related events occurring as a direct and inevitable result of one initial event, all of which fall when one is pushed. For the intersex person, the initial event of being ignored by the law sets in motion several negative effects in terms of official documentation, and the negative effect is enormous.

discussed are the set of documents issued to acknowledge the birth of a person, the national identity card issued at the point when one attains the age of majority, a passport for those wishing to travel out of Kenya and a voter's card for citizens who desire to exercise their civil political rights. And as Wabuke and Ouma have pointed out, these are examples of documents that have a critical link between the individual who possesses them and their country, in this case Kenya.⁴⁹

The National Social Security Fund and the National Hospital Insurance Fund Membership cards, though not strictly in the category of identity, nationality or citizenship documents, are nevertheless crucial for purposes of consuming social scheme rights and services. Consequently, the legal regime through which these membership cards are issued are examined. The effect of the issuing regimes on the intersex person in relation to accessing the protection granted through the two funds is demonstrated through the lived experiences of intersex persons.

In addition to these key identity documents, several other important identity documents are issued by the government, all of which identify their holders for purposes of consuming various goods and services availed to its citizens. In this category are the Kenya Revenue Authority (KRA) Personal Identity Number (PIN) card and a drivers' license. With the world moving towards digital identity, the government of Kenya, in 2019 and 2017, introduced two sets of digital forms of mandatory identity registration programs which are ongoing and continuous. The first is in the form of the National Integrated Identity Management System (NIIMS) introduced in 2019⁵⁰ while the other is the National Education Management Information System (NEMIS) initiated in 2017.⁵¹ The NIIMS program is currently being used to digitally register everyone in Kenya and the *Huduma Namba* identity card issued under it is to be used by everyone to access various services from all sectors.⁵² The NEMIS is being used to collect all learner's biodata for use throughout a learners' educational process. This chapter also

⁴⁹ Emmah Wabuke and Patricia Ouma. *Regional Responses to Nationality, Citizenship and child statelessness: The case of the East Africa Community* in Markienwicz- Stanny *et al* (eds) *Children in Migration, Status and Identity*. (Nomos Verlagsgesellschaft mbH & Co. KG 2022)156.

⁵⁰ The National Management System (NIIMS) was established in 2019 through the introduction of Section 9A to the Registration of Persons Act Chapter 107 of the Laws of Kenya. The registration format provides for 'male' and 'female' check boxes only, which means that the intersex individual will either not be registered or will be registered using the wrong sex categorization. The gaps in the legal regime governing this registration system are examined here.

⁵¹ Ministry of Education, *National Education Management Information System (NEMIS) User Guide* (Ministry of Education, 2017). The gaps in the legal regime governing this registration system are examined in chapter two.

⁵² The *Huduma Namba* identity card was introduced through Section 9A of the Registration of Persons Act Chapter 107, Laws of Kenya.

evaluates these two digital identity registration systems to determine the gaps, and given that they are ongoing processes, the manner in which they will impact the intersex person.

The study determines that the registration procedures through which the identity documents examined are issued do not allow for classification of intersex persons.⁵³ As a result, any child born intersex will be placed in what is usually referred to as a catch 22 situation.⁵⁴ On the one hand, such a child is faced with the possibility of being classified as either a ‘male’ or a ‘female’. On the other hand, that child faces the possibility of not being classified at all.⁵⁵ The legal and administrative procedures demand that the intersex person either ‘fits’ within the rigid legal provisions in order to apply for the documents or gets left out of the documentation system altogether.⁵⁶ This becomes a very challenging choice for the intersex person, the parents and or guardians of a child born intersex. Where an intersex person opts to or is compelled to ‘fit’ within what is available in law, then the person is forced to be a person they are not. This is because that person’s physical appearance may and usually does later defy the sex/gender assigned to them in the ‘identity’ documents leading to lifelong struggles. Indeed, Amakobe has detailed the struggles that people who are forced to live their lives with documents that do not accurately reflect their gender have to endure.⁵⁷

Where the intersex person is not squeezed into either of the two available sex/gender markers, the person is shut out of the documentation process altogether.⁵⁸ Both situations mean that a negative domino effect is set in motion regarding subsequent documentation.⁵⁹ Failure to get registered and documented in the first instance means that the person cannot get the next

⁵³ While the Children Act 2022 does provide for the registration of an intersex child at birth with relation to the issuance of a birth certificate, there are no Procedural Rules in place yet to establish the procedures and other incidentals, neither are there application forms which would guide the process. The gaps in the registration regime through which the certificate of birth is to be issued for intersex persons therefore remain unsealed.

⁵⁴ A catch 22 situation is a phrase used to describe the dilemma or difficult circumstance an individual can face, from which there is no escape because of mutually conflicting or dependent conditions. See Bekisizwe Ndimande, ‘It is a Catch 22 Situation: The Challenge of Race in Post-Apartheid South African Desegregated schools’ (2009)2 *International Critical Childhood Policy Studies Journal* 1 : 133-137.

⁵⁵ In *Baby A*, the child was not classified at all. Instead, a query mark was inserted at the column meant to classify and categorize the child’s sex/gender.

⁵⁶ All the intersex people interviewed for this research have either been forced to try and change themselves so as to fit into the bureaucratic documentation in Kenya and live as either ‘male’ or ‘female’, or have completely been left out. In the case of Mercy for example, she has been left out of the documentation process altogether and does not possess any identity document.

⁵⁷ Guillit Amakobe *et al*, *Gender Theatre: The Politics of Exclusion and Belonging in Kenya* in Nancy Nicol *et al* (eds) *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, Resistance and Hope* (University of London Press 2018) 361.

⁵⁸ See *Baby A* and *RM*.

⁵⁹ Alice Grandison *et al* (eds) *Collins Concise English dictionary* (Harper Collins Publishers 1993) 382.

document or the next.⁶⁰ On the other hand, registering the person with wrong particulars in the first instance sets in motion a situation where all subsequent documents will have similar inaccurate information. And where an intersex person is not classified in terms of sex/gender, then it becomes impossible to get the initial documents given at birth.⁶¹ Neither will they be able to get the next document or the next. Yet one document forms the basis of the next and all subsequent documents.⁶² Furthermore, where an intersex child is assigned the male or female sex/gender classification at birth and documented as such, the assignment may sometime be flawed. When this happens, cases of gender incongruousness occur.⁶³ That incongruousness will be reflected in all subsequent documents, rendering the documents unusable. And the domino effect is seen as the list goes on and on. The sections below discuss inaccurate sex/gender assignment on identity documents and the negative impact on the holder. They proceed to analyze sex/gender non-assignment and therefore exclusion from issuance of all identity documents and the negative impact this has on those excluded. The evaluation is made from the perspectives of the personal experiences of the intersex persons interviewed for this research.

2.2.1 BIRTH REGISTRATION AND DOCUMENTATION.

Birth registration is the process of recording a child's birth, and is thus the means to create a permanent and official record of a child's existence.⁶⁴ Registration therefore becomes the process through which legal recognition of a child's identity is provided.⁶⁵ Essentially, this means that official registration of a person is what creates the legal existence of an individual.

Broadly defined, official registration is the act of listing someone by an institution that commands authority.⁶⁶ Official recording or listing of a child's birth by the State consequently constitutes birth registration.⁶⁷ Being the original listing, it forms the first record of a human

⁶⁰ Ibid.

⁶¹ See *RM, Baby A and Tim's case*.

⁶² *Baby A*.

⁶³ The field work demonstrates that there are some intersex persons assigned a male gender who have developed female physical characteristics including breasts, feminine voices and also get menstruation, while those assigned the female gender have defied the gender assigned to them and developed male physical characteristics such as facial hair and husky voices, amongst other male characteristics.

⁶⁴ <https://www.unicef.org/stories/what-birth-registration-and-why-does-it-matter>.(Accessed on 16th February 2018).

⁶⁵ Ibid.

⁶⁶ Karen Harris, 'Paper Trail: Chasing the Chinese in the Cape' (2014) 40 *Kronos*, 1: 292-294.

⁶⁷ Assefa Bequele, *Universal Birth Registration: The Challenge for Africa* (The African Child Policy Forum 2005)1.

being's birth and confirms that human being's existence.⁶⁸ For these reasons, documentation signifying birth has been seen as forming a part of the crucial terrain in the path of legal recognition and conferment of a nationality and citizenship status to a person.⁶⁹ Without birth registration, a person's existence would be invisible to the authorities.⁷⁰ The importance of a birth certificate as the first and foremost official document can therefore not be overemphasized.⁷¹

One of the fundamental State function is to register all births occurring in the nation.⁷² Indeed, birth registration has been considered as the foundation for the fulfillment of all rights.⁷³ International human rights instruments have underscored the importance of registering and issuing birth documents at birth, as is reflected in Article 7 of the CRC. In this regard, scholars have opined that, as a children's human rights instruments, the CRC contains an uncompromising requirement that all children have a right to develop to their full potential.⁷⁴ And the journey through which a child develops to their full potential commences with accurate legal identification through issuance of a correct birth certificate. That is probably why the CRC places the right to a name and nationality for a child immediately after the primary right to life itself so as to underscore the significance of birth registration.⁷⁵ Accordingly, the CRC's requirement for identity through recognition at birth, through official registration, appears to be as important as the right to life for all children.⁷⁶ In Africa the child's welfare instrument, the African Charter on the Rights and Welfare of the Child (ACRWC) equally obligates State Parties in the African region to ensure that every child is registered at birth.⁷⁷ The African Committee of Experts on the Rights and Welfare of the Child has, in its General Comments, highlighted the universality of recognition of every child's right to be registered at birth.⁷⁸ The

⁶⁸ This is ordinarily the case except in instances of late registration which are provided for under Sections 3 and 4 of the Births and Deaths (Late Registration) Rules 1971, under the Registration of Births and Deaths Act.

⁶⁹ Siddharte Narrain, 'Gender Identity, Citizenship and State Recognition Claims' (2012) 8 *Social-Legal Review* 106.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² This position, as already observed, is an obligation placed on States by key human rights instruments. See for instance ICCPR, Article 24(2) and ACRWC, Article 6(2).

⁷³ Janis Ridsel et al, *Birth Registration in Emergencies: A review of Best Practices in Humanitarian Action* (Plan Limited 2014)10.

⁷⁴ C.J. Pawson and R. E. S. Tanner, 'The United Nations Convention on the Rights of the Child: Implementation in the 21st Century' (2005) 18 *Global Bioethics* 2.

⁷⁵ CRC, Article 7.

⁷⁶ *Ibid.* Article 7 (1) specifies, in mandatory language, the requirement that a child shall be registered immediately after birth and shall have the right from birth to a name and the right to acquire a nationality.

⁷⁷ ACRWC, Article 6(2).

⁷⁸ General Comment No. 7 of the ACRWC, Para 12.

General Comment further impresses on need to access this right by all children without discrimination.⁷⁹

The 2017 YP +10 provide that everyone has a right to obtain identity documents which include a birth certificate.⁸⁰ These Principles are more precise and significantly provide that everyone has the right to legal recognition without reference to and without requiring assignment or disclosure of amongst others, their sex/gender characteristics.⁸¹ Ridsel's study endorses the importance of a certificate of birth by pointing out that registering the birth of a person is the first legal acknowledgement of the existence of that person.⁸² And in Kenya, the Constitution has upheld the right to all identity documents for every citizen.⁸³ This it does by providing that a passport, together with any other document of registration or identification issued by the State to its citizens, are entitlements for every Kenyan. The Constitution therefore takes the initial and important step towards recognition and issuing of identity documents for all Kenyans as nationals of Kenya.⁸⁴

The now repealed Children Act of 2001 did contain a guarantee on registration of all children.⁸⁵ When it was enacted in 2001, the intention of the Act was to give all the children in Kenya a legal identity.⁸⁶ The drafters of the Children Act No. 29 of 2022 however, appear to have omitted this important guarantee from the current Act for unexplained reasons. This omission obviously creates a major gap in the recognition and registration of children's protective provisions.

Until the coming into place of the Children's Act 2022, there had been no mention of registration of intersex children in Kenya.⁸⁷ Despite the absence of the legal identity guarantee contained in the previous Act therefore, the 2022 Act is to be commended for laying the basis that may eventually lead to accurate registration of intersex children. This research uses the word 'may' intentionally because the 2022 Act has several shortcomings. In the first instance,

⁷⁹ Ibid.

⁸⁰ YP Plus 10, Principle 31. See also Additional State Obligations in Yogyakarta Principles Plus 10, 24, available at A5_yogyakartaWEB-2.pdf (yogyakartaprinciples.org), accessed on 12th December 2019.

⁸¹ Ibid, 31.

⁸² Janis Ridsel *et al*, *Birth Registration in Emergencies: A review of Best Practices in Humanitarian Action* (Plan Limited 2014)10.

⁸³ Constitution of Kenya 2010, Article 12.

⁸⁴ Article 14 of the Constitution of Kenya automatically confers citizenship at birth to anyone born to either a Kenyan mother or father, whether that person is born in Kenya.

⁸⁵ Children Act of 2001(now Repealed) Section 11.

⁸⁶ Ibid.

⁸⁷ Children's Act, No 29 of 2022.

and as earlier explained, the Act has failed to recognize the registration of intersex children as a way of giving them legal identity, as described by its predecessor.⁸⁸ And in Kenya, as already seen, there are a series of documents through which a person acquires a legal identity.⁸⁹ While the Act makes consequential amendments to the Births and Deaths Registration Act⁹⁰ to embrace children born intersex, seamless registration of intersex persons to give them an identity as persons of an intersex gender cannot be possible without an overhaul of the entire identity documents' issuance regimes, including the Act itself.⁹¹ Yet, registration of every birth occurring in Kenya is mandatory.⁹² The registration regime through which births are registered and certificates of birth issued requires that births be registered within three months of their occurrence.⁹³ This legal requirement for registration notwithstanding, the gaps in the legal framework still exist, despite the changes put in place through legislature.⁹⁴ This means that there's still no adequate legal platform through which intersex children and intersex persons in general can acquire accurate documentation.⁹⁵

The importance placed by the law, on registration of all persons at birth, essentially means that failure or refusal on the part of the government to register the birth of a person and to issue identity documents signifying the birth becomes the primary step towards legal non-recognition.⁹⁶ Without written proof of one's birth through documentation, it is extremely difficult to attain other national identity documents at later stages in life.⁹⁷ Possession of legal identity documentation which is accurate in all aspects is consequently vital.⁹⁸ Inaccurate identity documents cannot give the owner or bearer a secure, trusted identity. Accordingly, legal documents should capture truthful details and the specificity of the person being registered. There are usually human and legal impacts of having identity documents which are inaccurate as regards any particulars.⁹⁹ Inaccurate identity documents result in an insecure and untrusted

⁸⁸ Children Act 2001(now repealed).

⁸⁹ These documents have been itemised and are examined later in the chapter.

⁹⁰ Births and Deaths Registration Act, Chapter 149, Laws of Kenya.

⁹¹ Children Act, 2022. Sixth Schedule, Section 250.

⁹² See Section 9 of the Registration of Births and Deaths Act.

⁹³ Births and Deaths Registration Act, Sections 6 and 8.

⁹⁴ Children Act, 2022.

⁹⁵ This is due to the binary sex marker classification in the legal system.

⁹⁶ Susanne Duryea *et al*, *The Under Registration of Births in Latin America* (Working Paper, No. 551, Inter-American Development Bank, Research Department 2006)5.

⁹⁷ *Ibid*.

⁹⁸ Guillit Amakobe *et al*, *Gender Theatre: The Politics of Exclusion and Belonging in Kenya* in Nancy Nicol *et al* (eds) *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, Resistance and Hope* (University of London Press 2018).

⁹⁹ *Ibid*.

identity for the holder.¹⁰⁰ This is especially true when it comes to the sex/gender description entered in the identity documents, and where it is incongruent with the holder. Given that sex/gender is a central piece of material fact in identity documents, the accuracy of this information on any identity document becomes indispensable. Beginning with the birth certificate however, the legal landscape issuing identification documents is skewed against the intersex person. The result is that most intersex people live their lives either being unrecorded or being improperly recorded by the civil registration system, as the narratives from the respondents interviewed for this research disclose.¹⁰¹

The genesis of this exclusion, as is argued below, is the structure of the legal documentation regime. The process of birth registration in Kenya is achieved through civil registration.¹⁰² The identity documentation regime has been structured to commence with the registration and issuance of an acknowledgement of Birth Notification Form known as Form B1.¹⁰³ This form is meant to capture the particulars of a child immediately a child is born, thereby basically becoming the first official act of recognizing the fact of birth of a child in Kenya.¹⁰⁴ Form B1 hence becomes the first official government recording legally acknowledging the existence of a human being born in Kenya. It is the form that is subsequently used to apply for a birth certificate and therefore is the first step towards legal recognition.¹⁰⁵

The legal and administrative requirement is that Form B1 be completed on behalf of a child immediately the child is born in a medical facility.¹⁰⁶ Where a child is born at home or in a non-

¹⁰⁰ Lisa Mottet, 'Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People' (2013) 19 *Michigan Journal of Gender & Law* 451.

¹⁰¹ As a human being, Mercy, for instance, though a Kenyan citizen, has never been recorded by the country's civil registration system.

¹⁰² Civil registration has been defined as the administrative recording and documenting of the birth, death, and marital status of the individual citizen. In addition to birth registration, civil registration also entails the registration of the marital status and death of the individual citizen.

¹⁰³ The Acknowledgement of Birth Notification Form B1 is a form issued to the parent or parents of a child immediately at birth. It is issued under the Births and Deaths Registration Act Cap 149 of the Laws of Kenya, which is the legal regime concerned with registration of births in Kenya. Even though Section 250 of the Children Act 2022 amends the Births and Deaths Registration Act, its failure to provide for Rules establishing procedures including amendment of requisite forms such as Form B1 means that the gaps and inadequacies will persist for intersex persons. A sample Form B1, birth certificate application form and birth certificate are attached to Appendix 5 of this thesis.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* Form B1 and the subsequent certificate of birth are issued under the Births and Deaths Registration Act Cap 149.

¹⁰⁶ The entries are usually done by the parent(s) or guardian(s) of a child or by the medical facility personnel as the case may be.

medical institution, the form is completed through the chief at the community level.¹⁰⁷ As the first form of documentation capturing the existence of a human being in Kenya, Form B1 is intended to secure the accurate information in terms of describing the child who has started existing.¹⁰⁸ It is information from this form that is subsequently transferred to the records maintained by the government in the Register of births, and thereafter used to issue a birth certificate. The law has designed Form B1 in a prescribed format. It contains the sex / gender classification of an individual as part of the important descriptive information.¹⁰⁹ This information is a mandatory requirement and will inform the sex/gender characterization that will be entered in the birth certificate and in all other subsequent legal identity documents. It provides only two options: male and female. This two-option system and the fact that reflection of the sex/gender categorization is a mandatory requirement really, is the origin of the intersex person's non-recognition, misrecognition and non-documentation.

As already demonstrated, acknowledgement and identification of individuals in Kenya has historically essentially always operated on a binary arrangement when it comes to sex/gender labeling.¹¹⁰ Sex/gender acknowledgement of human beings in Kenya predates the compulsory paper documentation introduced by the colonial rule and subsequently adopted by independent Kenya. Indeed, the element of acknowledging the birth of a child was present in most traditional settings. Different African communities had various ways of recognizing children born into the society, and it almost always invariably took the form of identifying the child through the sex/gender component. Among the Kikuyu, for instance, immediately a child was born, the acknowledged took the form of sex/gender-based ululations: five for a male child and four for a female one.¹¹¹ Writing on the element of traditional identification through sex/gender categorization amongst the Shona tribe in Zimbabwe, Oyoo points out a trend similar to that of the Kikuyu community. The birth of female children would be acknowledged with three ululations while male children would be acknowledged with five.¹¹² The Somali tribe in Kenya

¹⁰⁷ Bernard Kathuri, 'Birth Notification Service for Civil Registration-the SOA Model (Master's Thesis, University of Nairobi, 2016) 1.

¹⁰⁸ Ibid. It is to be noted that existence of all children born in Kenya is not captured immediately they are born. The Notification of Birth form is only completed for children born in medical facilities and possibly at community level through the chief where the birth of a child is reported to a government office and the data is captured.

¹⁰⁹ The other important pieces of information that is required to be captured at the time of birth and subsequently in the birth certificate includes the name of the child, the date of birth, the nature of birth and the parentage of the child.

¹¹⁰ See chapter one.

¹¹¹ C.T. Kithinji, 'The Gender Question and Human Dignity' (1996) 11 *Wajibu* 4: 2.

¹¹² Christopher Oyoo Yaye, *Taming the Tide of Gender-Based Violence and HIV&AIDS in Kenya: The TAMAR Approach* (A Paper Presented by Christopher Oyoo Yaye, at Christian Connections for International Health 23rd Annual Conference on 'Technologies and Health: A Faith Based Perspective' 2009).

too, traditionally acknowledged the birth of a child through the sex/gender. High pitched shrilling ululations would signify the birth of a male child. There would be silence if it was a female child.¹¹³ Sex/gender categorization has therefore been and has remained a key component of identity recognition. It has also significantly been binary based and therefore intersex exclusionary.

Namaste confirms that in Africa, recognition of a person historically was and still is made from a binary standpoint.¹¹⁴ This binary position presupposes that people are only born male or female and will develop to be men and women. That presumption has traditionally been socially endorsed and continues to be reproduced over the course of history as the normative ideal.¹¹⁵ Consequently the law comes in to officially classify, characterize, and designate people as ‘male’ or ‘female’.¹¹⁶ And that is exactly what the legal system relating to the issuance of critical initial identity documents has done in Kenya.

Writing on the challenges that the Somali ethnic group has had while looking for citizenship in Kenya, Lochery observes that citizenship is usually tied to categories of groups and ethnic identities with bureaucratic processes being based on these categories.¹¹⁷ To borrow Lochery’s words, the bureaucracy pertaining to issuance of identity documentation has been tied to the sex/gender category and has maintained that binary sex system.¹¹⁸ This binary categorization rigidity has resulted in failure to have explicit recognition provisions in relation to birth registration for intersex persons in Kenya. This legal rigidity is what Mama A was confronted with, when she delivered her intersex child in one of the health facilities in Nairobi.¹¹⁹ Since the child had both male and female external genitalia, the child’s sex characteristic was indeterminate under the Kenyan regime. Mama A could only watch as the medical personnel assigned a question (?) mark against the column in Form B1, meant to fulfil the mandatory legal requirement for the sex/gender description of the child.¹²⁰ This query (?) mark was entered for obvious legal reasons: Form B1 contains options for male and female sex/gender markers

¹¹³ Joseph Kisaka, ‘Cultural Lag Facing Education of Girls in Secondary Schools: The Case of Garissa and Ijara Constituencies in Kenya’ (2015) 6 *Journal of Education and Practice* 27: 182.

¹¹⁴ Vivian K Namaste, *Invisible Lives: The Erasure of Transsexual and Transgendered People* (University of Chicago Press 2000) 144.

¹¹⁵ *Ibid.*

¹¹⁶ Ezie Chinyere, ‘Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination - The Need for Strict Scrutiny’. (2011) 20 *Columbia Journal of Gender and Law* 1: 160.

¹¹⁷ Emma Lochery, *Rendering Difference Visible: The Kenyan State and Its Somali Citizens*. (Oxford University Press 2012) 616–617.

¹¹⁸ *Ibid.*

¹¹⁹ Interview Mama A, the mother of Baby A in *Baby A* in Nairobi on 17th October 2019.

¹²⁰ *Ibid.*

only. Clearly, an intersex child was not contemplated by the law when this form was designed. Since this is the form that is presented to the Registrar of births to procure a certificate of birth, Baby A could not be issued with a birth certificate. This meant that the child was invisible for purposes of the law.¹²¹ This is what prompted Mama A to file the constitutional petition. She was *inter alia* seeking to have the court address itself to the element of violation of the right to legal recognition of intersex persons through failure by the legal regime responsible for birth registration, to accommodate intersex persons in the structure of the documentation.¹²²

The legislation through which births in Kenya are registered and which Mama A was challenging, has been in operation in Kenya since 1928.¹²³ The Act did not initially provide for compulsory registration of the births of Africans. However, phased mandatory registration for every citizen was introduced from 1963, when Kenya gained her independence.¹²⁴ It was therefore mandatory to register all births occurring in Kenya by the time Mama A delivered her child. Registration was made mandatory by virtue of Section 9 of the Act, which also made it a compulsory requirement to register all births occurring in the country.¹²⁵ Mama A was asking the court to think through the gaps in this registration regime. This was because presence of these gaps meant that though intersex children are born in Kenya, they could neither be accurately documented nor be issued with accurate identity documents at birth. According to Mama A, recognition would have ensured that provisions are made for intersex children to be accurately registered, correctly documented and birth documentation consistent with their reality issued. The court, however, missed the opportunity to reflect on the legal issues being raised in the petition as Mama A narrates below:

‘I delivered my baby in May 2009 in Nairobi. When the baby was shown to me, I noticed that my child had the genitals of both a male and a female child. When I was later given the form for getting a birth certificate, the place with the sex of the child had a question (?) mark. The child was operated on many times and in all the treatment notes, the sex of the child was marked with (?). It is true the judge said that my child should be given a birth certificate. I took the child back to the hospital and the doctors said that the male hormones were more than the female hormones. With the order from the Judge, I applied for a birth certificate for the child as a male. I am now raising the

¹²¹ This was one of the main issues raised in *Baby A*.

¹²² *Ibid.*

¹²³ The Births and Deaths Registration Act came into operation on 9th June 1928. Registration of births had been introduced in Kenya in 1904 though only Europeans and Americans were eligible for registration.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

child as a male. The child is now about ten years old, so his body has not started developing. I know from my interaction with other intersex people that sometimes intersex children can be given a birth certificate showing that they are male, but they become female as they grow. For my child, only time will tell. I can only wait.¹²⁶

The other pertinent issue that Mama A was trying to raise was that, for purposes of categorization of a person's sex/gender, registration documents should move from the binary to provide for the intersex sex/gender category. And the court did appear to have initially appreciated the severity of the existing gaps when it reprimanded the Respondents for oversimplifying such a serious matter. The basis of this chastisement was the Respondents' arguments that since no application for registration of a birth certificate had been made, the claim on violation of the child's rights for failure to issue one ought to be defeated. However, the court appears to contradict its initial appreciation when it advanced an equally and similarly simplistic argument by stating:

‘...it is pertinent to note that Baby ‘A’ has never been registered to date and has not been issued with a birth certificate. I did not have evidence before me that there was a denial of such registration, and I did not even hear the Petitioner to be contending that she indeed attempted to have such a registration.’¹²⁷

The court itself ended up oversimplifying and overlooking crucial gaps with regard to registration of intersex children and issuance of congruent birth certificates when it directed Mama A to proceed to apply to the 3rd Respondent for the registration of Baby A.¹²⁸ This directive by the court to Mama A, in total disregard of the existing legal gaps excluding intersex births, points to the struggles courts in Kenya have dealt with when called upon to resolve the predicaments facing intersex persons regarding documentation.¹²⁹ In the case of Baby A, it was not as simple as proceeding to apply for a birth certificate. The problem was so much bigger. What the court should have been more concerned with ought to have been the issue of the sex/gender marker that would be entered in the sex/gender marker column for the child, at the point of applying for the birth certificate. This is because, even as the court was directing the petitioner to proceed with the application for a birth certificate for Baby A, only male and female options are legally availed.¹³⁰ And even though a birth certificate was applied for and

¹²⁶ Interview with Mama A , Baby A's mother on 17th October 2019.

¹²⁷ *Baby A*, Para 69.

¹²⁸ *Baby A*, Para 71.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

issued, the dilemma for Baby A remains exactly the same as it was, when the mother moved to court for a solution. In this regard, Mama A continues:

‘*Walimuekea tu ‘male’ ningefanya nini*’ which is Swahili for ‘they’[registration authorities], just put (the sex/gender marker) for the child as ‘male’. What could I do?

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The law, at the time Baby A went to court did not contemplate the existence of any other sex except the traditionally ‘known’ and ‘accepted’ male and female. The court appears to have failed to appreciate this position. Consequently, Baby A ended up being forced into the male sex/gender marker. Mama A can only pray that the male sex/gender marker her child was squeezed into will not defy the child’s physical reality as the child’s body develops.¹³² By moving to court, Mama A was hoping to get an order that would ensure that her intersex child was certified in an accurate gender. She was looking not just for registration and issuance of a birth certificate, but for one with an accurate sex/gender description. Instead, the child ended up being fixed into the binary.¹³³

Even though the law is now beginning to envisage registration of intersex children, the legal framework is still in a state that will continue to present insurmountable challenges for intersex persons.¹³⁴ The specific provisions seeking to include intersex persons in the registration regime are not just ambiguous, but are likely to create situations not too dissimilar to the one Baby A was put in.¹³⁵ By directing the Registrar to include details of intersex persons in the Births and Deaths Registration Act without specifying that such details must explicitly entail intersex sex/gender description, the Children Act 2022 ends up creating uncertainties.¹³⁶ Both the Children Act, 2022 and the Births and Deaths Registration Act are open to the kind of interpretation the court made in *Baby A*.¹³⁷ Birth certificates for intersex persons may still fix them in the binary due to the haziness and lack of legal clarity identified above. This possibility is compounded by other identity issuance identity regimes and government policies, which

¹³¹ Translation by researcher.

¹³² Interview with Mama A, Baby A’s mother on 17th October 2019.

¹³³ Ibid.

¹³⁴ The Children Act No. 29 of 2022 has introduced the term intersex into the Act in at least eleven places.

¹³⁵ The Court in *Baby A*, directed Mama A to proceed to procure a birth certificate for Baby A, without considering that the only sex/gender description that would be inserted in the birth certificate would be either male or female only. Such an order left Baby A in the same situation as when the child was born and could not be documented..

¹³⁶ Children Act, No 29 of 2022, Section 250.

¹³⁷ Children Act, 2022. Section 250 of the Act makes consequential amendments to Sections 7 and 29 of the Registration of Births and Deaths Act.

have opted to retain the sex/gender classifications in the exclusive male and female categories.¹³⁸

The position therefore remains that the laws relating to registration of births are predicated on the assumption that everyone born in Kenya can be classified into the two distinct and plainly identifiable sexes of ‘male’ and ‘female’ categories. Not even the Constitution promulgated in 2010, which has been hailed for being people centered and praised for its progressiveness, has factored in the reality that not everyone in society is born male or female.¹³⁹ The Constitution incorporates a comprehensive Bill of Rights for all and provides for a wide variety of rights belonging to every individual, irrespective of any differences.¹⁴⁰ Yet, even though it is meant to be inclusive in relation to all the rights due to every individual, it is rigid and not inclusive when it comes to the sex marker differences. Since the Constitution has remained rigid, this has meant that the rest of the legal regime has remained equally rigid.¹⁴¹ As a result, the law governing birth registration has acquired and retained this rigidity. As seen, the recent changes to the law do not appear to be bold enough to provide for people whose genital organs do not fit in the male or female sex/gender categories. While the Citizenship and Immigration Act spells out the elements of entitlement to any document of registration or identification issued by the State to its citizens including the birth certificate,¹⁴² the intersex person has not been considered. The law has hence been and continues to be unyielding where it comes to sex/gender categorization for people born intersex. This rigidity has seen many intersex persons merely exist, without legal recognition for lack of birth registration. Mercy is a case in point. She narrates her situation as an undocumented Kenyan as follows:

‘I was born in Nairobi’s Kariobangi estate in 1996. My mother told me that I was born at Kenyatta National Hospital. She told me that I was born with both male and female genital organs but that my male organs were removed. I do not know if my birth was registered. I do not have a birth certificate. In fact, I do not have any government document’.¹⁴³

¹³⁸ Ministry of Health, *The National Reproductive Health Policy 2022 - 2032*, (Government of Kenya, 2022), 28.

¹³⁹ <https://www.ke.undp.org/content/kenya/en/home/presscenter/articles/2014/4-years-of-Kenya-onstitution.html> (Accessed on 12th December 2019).

¹⁴⁰ Chapter 4 of the Constitution is dedicated to the protection of fundamental rights and freedoms which all the citizens of Kenya are entitled to.

¹⁴¹ The Constitution, in its Preamble and at Article 19(3), grants every individual the rights and freedoms contained in the Bill of Rights.

¹⁴² Ibid. Section 22(g)i-v

¹⁴³ Interview with Mercy in Nairobi on 18th May 2019.

Mercy's does not have a birth.¹⁴⁴ She has been going around life without any document, including a birth certificate, and it is not from want of trying.¹⁴⁵ She has been to Kenyatta National Hospital where her mother says she was born many times but without any documentation, she has been unable to trace any record of her birth. This effectively means that the government does not recognize the fact of her existence. For all intents and purposes, Mercy is Stateless, yet Kenya is the only country she has ever known.¹⁴⁶

The law on identification begins to recognize an individual by *inter alia* acknowledging their sex/gender and registering that sex/gender when they are born. This aspect notwithstanding, and due to the legal binary sex categorization, none of the registration procedures currently in place allow for classification of the intersex person. This legal binary system subsisting in Kenya means that for an intersex person, two significant occurrences are likely. The first is that intersex person will fail to be classified and therefore will not be issued with any identification documents, thus being denied nationality.¹⁴⁷ The other is that the person will wrongly and incorrectly be classified, again with equally disastrous effects in terms of documentation for the person wrongly classified.

Wrong classification occurs when medical personnel (and sometimes parents), try to squeeze intersex people into one of the two legal sex/gender choices presented to them by the law, usually with catastrophic consequences for the individual so squeezed. According to Jane,¹⁴⁸ this is what happened to her child Sebbo: ¹⁴⁹

‘When I delivered Sebbo in 2004, I was forced to fill in Form B1 indicating that the child was female. With this form, I applied for and was given a birth certificate which reflected

¹⁴⁴ Mercy's narrative indicates that she was born in a hospital. She was probably 'documented' as a female through a Birth Notification Form B1, since her genitals were 'corrected' and also because she could only be documented as either a male or a female. Her undocumented status may therefore be either due to administrative inability to secure a birth certificate or because none was issued due to her ambiguous genitalia, as happened in the case of *Baby A*. Whatever the reason however, Mercy's statement to the effect that the government does not know that she exists demonstrates the hopelessness that intersex persons experience whilst living as undocumented individuals.

¹⁴⁵ Ibid.

¹⁴⁶ Without documents, one remains largely unknown to the government.

¹⁴⁷ Sex/gender non classification leading to non-issuance of birth documentation occurred in the case of *Baby A* and Mercy.

¹⁴⁸ Interview with Jane, the mother of Sebbo, an intersex child on 18th May 2019, in Nairobi. This Respondent specifically requested the researcher to use her real name so that she can draw the government's attention to the kind of suffering intersex persons and their parents are undergoing for lack of recognition. However, the researcher opted to assign her the pseudonym 'Jane' to protect her identity, given the fact that the desperation to get her child a 'correct' identity and certificate, has driven her to engage in unconventional and probably illegal processes to procure a 'second' birth certificate for her child.

¹⁴⁹ Sebbo is a pseudonym the researcher has assigned to Jane's child.

the sex of the child as female. This was after my child had been taken through several surgical and hormonal interventions aimed at forcing him into the female compartment of the legal registration forms.¹⁵⁰ With time, Sebbo' external features and mannerism have progressively become masculine. The testicles, which had been surgically mutilated in a bid to remove them to make him more female have also significantly reemerged. This is despite the multiple surgeries and hormonal medicalization the child was subjected to in order to 'make' him female. I have therefore been forced to give a 'broker'¹⁵¹ three thousand shillings to get me another birth certificate reflecting the child's sex/gender as male.¹⁵² I do not even know if this birth certificate is genuine or fake.'

As already seen, the process of registration of the birth in the official government records and subsequently, issuance of a birth certificate, is the first step towards legally recognizing any individual. This should mean that both the applicable law and the procedural processes ought to be structured in a way that accommodates every person, regardless of their biological genital appearances. This would ensure that situations creating the kind of suffering and uncertainty that Jane and her child Sebbo, have had to undergo are eradicated.¹⁵³

A birth certificate issued to any individual is what starts the journey towards official acknowledgement and recognition of a person's existence by the State. It also forms a permanent and official record of a child's existence, from which reference to all other identification documents will be made. Registration of birth and issuance of a birth certificate whose details are correct in all material particulars is therefore a critical step towards recognition. An official birth record really is what forms the first point of contact between a child and the State where the child is born. It can therefore be said to be the first fundamental right. But it certainly is also the door for accessing many other rights. Where births remain unregistered therefore, there is a legal implication that the unregistered person is not recognized as a person before the law.¹⁵⁴ That person's rights and freedoms also become susceptible to being compromised. Since such a person's existence has not officially been recorded anywhere

¹⁵⁰ According to Jane, her child underwent numerous surgeries and other forms of medicalization including hormonal treatment to force the child's body to conform to the known and accepted female bodies.

¹⁵¹ The term 'broker' is a colloquial term used for illegal middlemen who facilitate activities which are sometimes dubious and irregular in Kenya.

¹⁵² The researcher did not physically meet or speak to the child, but from the photographs shown to her by the child's mother, the child who is now in his adolescent years has developed the physical and facial features of a male person. The child however has grown visible breasts and feminine hips due to the hormonal therapy that the child has been subjected to over the years.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

, they cannot be included in any government statistical information.¹⁵⁵ It is for this reason that the United Nations Children's Fund (UNICEF) has stressed the importance of a birth certificate.¹⁵⁶ This global Children's protection body places the aspects of official registration of a child's birth and subsequent issuance of an official birth certificate as fundamental human right.¹⁵⁷ Reasons advanced for the importance placed on the birth certificate is that registration and issuance of a certificate of birth serve to establish a child's legal proof of identity.¹⁵⁸

Legal recognition through not just the issue of birth certificate, but through the issue of correct and accurate birth certificates for persons who are born intersex is therefore vital. Where the first document that one is entitled to at birth does not serve to do this, the intersex person starts their journey in life being legally invisible. This invisibility can and does have a domino effect on all the other subsequent documents. In the following section, the national identity card, another important identification document which shows proof of nationality in Kenya is examined. In analyzing the legal regime through which the national identity card is issued, this section demonstrates the legal glitches faced by intersex individuals resulting from the two sex/gender legal identity criterion.

2.2.2. THE NATIONAL IDENTITY CARD.

As previously seen, the birth registration process and subsequent procurement of a birth certificate is just the first step towards legal recognition in Kenya. Legal recognition thereafter continues through subsequent issuance of other official documents which become necessary throughout the trajectory of a person's life. This section discusses identification through the national identity card,¹⁵⁹ the legal regime surrounding the issuance of the national identity card and the impact of that regime on the intersex person.

According to Clarke, identification of all human beings living in a society is central to any society.¹⁶⁰ Clark defines human identification as the association of data with a particular human

¹⁵⁵ Ibid.

¹⁵⁶ The United Nations Children Emergency Fund (UNICEF). It has a mandate from the United Nations General Assembly (UNGA) to help children access basic needs and opportunities to enable them realize their full potential. UNICEF is also mandated to advocate for the protection of the rights of all children.

¹⁵⁷ Unicef.org. accessed on 12th December 2019.

¹⁵⁸ Ibid.

¹⁵⁹ A sample national identity card is annexed at Appendix 5 of this Thesis.

¹⁶⁰ Roger Clarke, 'Human Identification in Information Systems: Management Challenges and Public Policy Issues' (1994) 7 Journal of Information Technology & People 6-37.

being.¹⁶¹ The data is then stored in a tangible devise. It is this devise that is referred to as the national identity card.¹⁶²

National identity card schemes have been said to be the best method to store key information about citizens, thereby becoming the hallmark of citizenship.¹⁶³ A national identity card is also viewed as a crucial link to citizenship and nationality and in many jurisdictions Kenya included, it is the main legal and identification document.¹⁶⁴ More significantly, an identity card is an essential document not just for facilitating access to economic and sustenance rights, but to enable one to participate fully in society.¹⁶⁵ Research has demonstrated that individuals who are denied a national identity card for any reason whatsoever suffer lack of recognition.¹⁶⁶ Many are reduced to a second class status thereby suffering *de facto* statelessness.¹⁶⁷ The importance of an identity card as a crucial identification document can therefore not be overemphasized.

The origin of the national identity card in Kenya is neither pleasant nor uncontroversial. It was conceptualized by the colonial government as a racial tool against the African male.¹⁶⁸ It dates to pre-independent Kenya when the colonial government enacted the Native Registration Ordinance in 1915.¹⁶⁹ The colonial government made it mandatory for male persons of African descent to walk around with their registration details worn around their necks.¹⁷⁰ Those details were encased in a metal container referred to as *kipande*.¹⁷¹ The law was amended later to

¹⁶¹ Ibid.

¹⁶² Siddhartha Arora and Michael Ganley, *National e-ID Card Schemes: An Overview* (Royal Holloway Series 2008)2.

¹⁶³ Ibid.

¹⁶⁴ Kenya National Human Rights Commission (KNHRC), *An Identity Crisis? A Study on The Issuance of National Identity Cards in Kenya*. (KNHRC 2007)5.

¹⁶⁵ These socio-economic and sustenance rights and services which include the right to secure employment in both the formal and informal sector, own property and engage in bank transactions will be discussed in the subsequent chapter.

¹⁶⁶ Abraham Korir Sing'Oei, *Citizenship in Kenya: The Nubian Case* in Brad K. Blitz and Maureen Lynch (eds) *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* (Edward Elgar Publishing Limited 2011) 54.

¹⁶⁷ P. Sivapragasam, *From Statelessness to Citizenship: Up Country Tamils in Sri Lanka* in Brad K. Blitz and Maureen Lynch (eds) *Statelessness and Citizenship: A Comparative Study on the Benefits of Nationality* (Edward Elgar Publishing Limited 2011) 88.

¹⁶⁸ B.K. Chacha *et al*, *Racial and Ethnic Mobilization and Classification in Kenya* in Z Rocha and P. Aspinall (eds) *The Palgrave International Handbook of Mixed Racial and Ethnic Classification* (Palgrave Macmillan, Cham 2020).

¹⁶⁹ The main objective of this piece of legislation was to register African males aged sixteen years for purposes of recruiting them and controlling them in the labour market.

¹⁷⁰ Peter Karari, 'Modus Operandi of Oppressing the "Savages": The Kenyan British Colonial Experience (2018) 25 *Peace and Conflict Studies* 1: 6-7.

¹⁷¹ The *Kipande* consisted of a card with the individual's name, photograph, fingerprints and employment history encased in a metal tin. In Africa as in America, these new means of documentary identification were controversial. Indigenous Kenyans were unhappy with the *Kipande* and looked at it as a mark of servitude. They also thought

make it mandatory for all male persons above sixteen to be registered.¹⁷²The post-colonial government amended the law further and made it compulsory for both men and women aged eighteen years and above to be registered and be issued with an identity card.¹⁷³ Failure to register and obtain an identity card having acquired the age of eighteen currently constitutes an offence punishable under the law.¹⁷⁴

The controversial and unpleasant historical genesis of the identity card notwithstanding, the national identity card has today become an absolutely necessary piece of identity documentation.¹⁷⁵ It can be described as a hall mark of citizenship.¹⁷⁶ By being a crucial link to citizenship and nationality in Kenya, the national identity card is at the core of determining the extent to which an individual enjoys their rights and freedoms within the country's borders.¹⁷⁷

A national identity card confers on an individual a legal identity, an aspect that is now recognized as an essential element of development.¹⁷⁸ Legal identity is central to the rights set out in various human rights instruments such as the UDHR and CRC.¹⁷⁹ Further, effective legal identification has been considered important for the attainment of most of the Sustainable Development Goals (SDG's).¹⁸⁰ A fundamental way of conferring legal identity is therefore, through a national identity card. This then gives an individual the legal status contemplated by the international, regional and domestic legal instruments.¹⁸¹ The identity card, therefore becomes a necessary document throughout an individual's life to reflect a person's citizenship

that carrying a *kipande* made 'a man look like a slave or a dog'. See Presbyterian Church of East Africa archives (Nairobi), I/D/5: Kenya Missionary Council, See 'Report of the Kikuyu Province Sub Committee on Native Registration,' August 1933.in *Kronos* [online].vol.40,2014,292-312. Available at : <http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0259-01902014000100013&lng=en&nrm=iso>. (Accessed on 10th October 2020). Government-issued identity documents were seen as labelling a person, depriving him of the dignity and reputation he had struggled to earn. Robertson reports that passports were likewise controversially received. See Craig Robertson, *The Passport in America: The History of a Document* (Oxford University Press 2010) 2-5. A sample of the tin cases 'identity card, or 'Kipande' as it was known, is annexed at Appendix 5.

¹⁷² This was through the enactment of the Registration of Persons Ordinance Chapter 50, passed in 1947. See section 2.

¹⁷³ These amendments were made in 1978 and 1980.

¹⁷⁴ Registration of Person's Act, Chapter 107, Laws of Kenya, Section 14(2).

¹⁷⁵ Ben Oppenheim and Brenna Marea Powell, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya*.(Policy Paper) (Open Society Foundations 2015) 5.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ World Bank, *Identification for Development country Diagnostic: Kenya (ID4D)* (World Bank 2016)1.

¹⁷⁹ Ibid.

¹⁸⁰ <https://www.ke.undp.org/content/kenya/en/home/sustainable-development-goals.html>.(Accessed on 19th September 2020).

¹⁸¹ Provisions relating to recognition before the law for everyone are contained in the UDHR, Article 6; ICPPR, Article 16 and ACHPR, Article 5.

and nationality. More significantly, it is a mandatory government requirement once an individual attains the age of majority. Indeed, possession of some form of a national identity card is a legal requirement for purposes of accessing various rights and freedoms, key being the citizenship and nationality.¹⁸² Balaton - Chrimes for instance, stresses that an identity card is a necessary condition to signify full citizenship in Kenya.¹⁸³ Further, a national identity card is required to acquire a passport, obtain formal employment, enroll in tertiary institutions, purchase property, engage in businesses and secure employment, including casual employment.¹⁸⁴

The role that an identity card plays in Kenya in an individual's day to day life therefore cannot be overemphasized. For the intersex person however, applying for this document presents similar problems to those presented during the application of a birth certificate, right from the onset. This is due to the similar legal structure that requires the mandatory insertion of the sex/gender description of the individual applying for the identity card.

The legal regime for applying for a national identity card for Kenyans commences with Form B (136A), issued under Rule 4 of the Registration of Persons Act.¹⁸⁵ While this form does not specifically state 'sex' or 'gender',¹⁸⁶ it does contain a section meant to capture the individual characteristics which describe a person as either 'male' or 'female'.¹⁸⁷ Here, a person applying for the identity card is required to state whether they are male or female. No other option is provided. And just like Birth Notification Form B1 through which the certificate of birth is applied, the legal format in Form B (136A) contains a mandatory section for the applicant's specific descriptive particulars.¹⁸⁸ The descriptive information is required for purposes of capturing the accurate sex / gender description of the person to whom the identity card is issued.¹⁸⁹ If any aspect of the identity card contains any wrong description of the person to whom it is issued, that automatically amounts to misrecognition. This misrecognition will in turn result in non-recognition.

¹⁸² These include an identity card upon attaining the age of majority, a voter's card a driving license and a passport, issued under different legal regimes in Kenya.

¹⁸³ Samantha Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa: Political Marginalization of Kenya's Nubians* (Ashgate Publishing Limited 2015) 28.

¹⁸⁴ Ibid.

¹⁸⁵ An extract of this Form is attached at Appendix 5.

¹⁸⁶ Laurel Westbrook and Aliya Saperstein, *New Categories Are Not Enough: Rethinking the Measurements of Sex and Gender in Social Surveys* (Gender Society 2015) 535.

¹⁸⁷ The options are also given in Kiswahili, *mume ama mke*, Kiswahili for male or female.

¹⁸⁸ Ibid.

¹⁸⁹ *ibid*

Given that the form provides for only two sex/gender descriptions of male and female, this becomes a major lacuna for those born intersex. Procuring an identity card with the law as it is, for an intersex person, not only serves to facilitate non-recognition but also permeates misrecognition. Misrecognition translates into having a document which is meant to be useful acquiring the potential of being both repressive and divisive. The impact of having an identity card that is incongruous with a person's physical appearance is profound, as the following account from Rye demonstrates:

‘When I was born, my body displayed both male and female genital organs. My mother raised me as a girl and named me Rael Wairimu. These are feminine names in the community where I was born. My physical appearance however is that of a male, I feel like a male and identify as a man. When I attained the age of majority, I applied for a national identity card with the name Rael Wairimu and marked the ‘female’ box as my sex/gender category. I was consequently issued an identity card which identifies me as female. This has caused me a lot of problems due to the contradiction in the sex/gender description section of the identity card and my physical appearance. Many times, I am accused of impersonation when I present my identity card. There are times when I have been physically attacked and even arrested. It is very painful.’¹⁹⁰

As the law exists, an intersex person applying for an identity card is faced with two options, both of which will serve to deny them legal identity conferred by an identity card. The first is to opt to procure an identity card that does not correctly describe them in terms of sex/gender and the second is to opt not to procure one at all. It is impossible for an intersex person to procure a national identity card that correctly describes them in terms of sex categorization through the law as it stands.

Identity cards, as pointed out, ostensibly guarantee State protection of individual rights within Kenya.¹⁹¹ Based on this, procuring an identity card should be a fair process that is accessible to everyone entitled to it.¹⁹² Failure to issue a person with an identity card or issuing an individual

¹⁹⁰ Interview with Rye (pseudonym) in Nairobi on 18th May 2019. The name Rael Wairimu is also a pseudonym.

¹⁹¹ Samantha Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa: Political Marginalization of Kenya's Nubians* (Ashgate Publishing Limited 2015) 65.

¹⁹² *Ibid.*

with one that causes them more strife than protection basically serves to strip that individual of the sense of nationality and reduces them to a state of statelessness.¹⁹³

It is this state of being rendered stateless and being stripped off citizenship because of being born with the intersex gender that RM was trying to get the court to give a judicial solution to in the petition he had filed in court.¹⁹⁴ According to RM, his ambiguous genitalia as an intersex person meant that he could not secure an identity card since the law does not provide for situations where intersex persons can legitimately apply for or be issued with one.¹⁹⁵ As RM points out, the statutory forms through which these documents are applied for do not create room or provide for intersex people.¹⁹⁶

RM's argument before court is the reality of many intersex persons when it comes to applying for national identity cards. There is a clear failing in the structure of the law when it comes to an intersex person applying for an identity card. This has resulted in confusion and irregularities in this critical document for intersex persons. Assa, who lives in Nyalenda slums in Kisumu County, and who prefers to be identified with the female pronoun, knows this only too well as she narrates below:

‘I currently feel like a female, identify as a female and try to live my life as a female. When I was born, my mother applied for my birth certificate and registered me as a female. I grew up with a lot of confusion due to the fact that I had both male and female external genital organs. There are times when I felt like a girl and other times I felt like a boy. By the time I attained the age of eighteen years and needed to apply for an identity card, I was at the stage where I was feeling like a male person and so I decided to apply for the identity card as a male. Since the birth certificate that my mother had procured for me had female names and my sex was reflected as female, I could not use this document to apply for a national identity card. I had to lie to the registering authorities that I did not have a birth certificate after paying a ‘broker’, to ‘get’ me a ‘baptism certificate’ from one of the local churches. The fake baptism card described my

¹⁹³ Samantha Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa: Political Marginalization of Kenya's Nubians* (Ashgate Publishing Limited 2015) 71. Concepts of statelessness have their origins in instruments of international law promulgated after WW11. Statelessness is most commonly conceived as a condition characterized by lack of protection directly resulting from lack of nationality, either *de jure* in law or *de facto* in practice. Intersex persons are rendered statelessness both *de jure* and *de facto*. Yet, any child born in Kenya, of Kenyan parentage are automatic citizens and are entitled to automatic citizenship. At independence, citizenship was to be granted to all British protected persons living/residing in Kenya.

¹⁹⁴ RM.

¹⁹⁵ RM, Para 4.

¹⁹⁶ RM, Para 3.

sex/gender as ‘male’. With this, I was able to apply for a national identity card as a male. As I matured and grew older, my body acquired typical female characteristics. Now that my body has fully developed into a female body, I cannot use the national identity card which shows that I am male at all. I usually hide it. I would like to change it, but I do not know how.¹⁹⁷

For Assa, the identity card issued to her as a male person is not just incongruent with her sex/gender description and her physical reality, it is also in conflict with her birth certificate which describes her as a female person. As a citizen of Kenya, she stands misrecognized and consequently not recognized under the law. This has created a situation of inability to utilize the identity card to access the rights which possession of an identity card ordinarily facilitates to citizens.¹⁹⁸ The identity card that should be opening the doors for Assa as a citizen of Kenya has in effect shut them. She cannot use it to access any of her rights as a citizen and she has resulted to hiding it.¹⁹⁹ And to her statement that she would like to change it, the answer unfortunately is that she cannot legally do so since there are currently no provisions in the law allowing her to.

Procuring a national identity card which is accurate in all descriptive particulars is vital and necessary, if that form of identity is to enable the enjoyment and access to one’s rights. Unfortunately, the law has failed to make this possible for the intersex person. The domino negative effect in the procuring of the documentation for the intersex person therefore continues to be seen.²⁰⁰ This negative effect continues in the application process for and issue of travel documents as the section below establishes.²⁰¹

2.2.3 TRAVEL DOCUMENTS.

While a national identity card correctly identifying its holder in all material particulars is essential for accessing goods, services and rights internally, a passport, amongst other travel documents, has the power to open international borders and opportunities internationally for

¹⁹⁷ Interview with Assa on telephone from Kisumu on 16th August 2020. This respondent authorized the use of the real name but the researcher opted to use a pseudonym to protect the respondent’s identity in view of the illegalities the respondent has been forced to engage in for purposes of procuring an identity card.

¹⁹⁸ Assa requested the researcher to use the female pronoun when referring to her. She identifies as a female even though her identity card describes her as ‘male’.

¹⁹⁹ All these documents have a requirement for information regarding sex/gender categorization.

²⁰⁰ Ibid.

²⁰¹ Travel documents, in addition to a passport include any prescribed documents that may be of a temporary nature issued to a citizen to facilitate travel across international borders.

the holder.²⁰² In addition to the birth certificate and the national identity card therefore, the passport is a significant identity document which plays a significant part in terms of nationality and citizenship beyond Kenyan borders.²⁰³

Keshavarz describes a passport as a travel document issued by a national government to its citizens, which serves to verify the identity and nationality of the holder for purposes of international travel.²⁰⁴ It identifies the bearer as a citizen of the issuing country with permission to travel abroad.²⁰⁵ According to Craig, a passport identifies a person as it communicates that person's identity outside of one's territory.²⁰⁶ Since it is intended to identify the holder unambiguously, the passport has to be accurate in all material particulars.²⁰⁷

Historically, passports were systematically issued with the intention of establishing the bearers' personal and legal identity using a standardized document produced within a centralized structure.²⁰⁸ A passport now allows the bearer to either move freely or with some degree of restrictions across international borders, thus granting the holder the ability to claim the right to movement externally.²⁰⁹ Generally, having been issued by one's national government, a passport operates to identify its bearer as a citizen of the issuing country with permission to travel abroad and return under the home nation's protection.²¹⁰ A passport is therefore a critical link of the holder to their nationality and citizenship.

The Constitution of Kenya, 2010 gives everyone an entitlement to a passport as one of the official documents that Kenya provides to its citizens.²¹¹ The Kenya Citizenship and Immigration Act is the legislation currently in place to give effect to this constitutional entitlement.²¹² With a valid passport issued pursuant to these legal provisions, a Kenyan citizen acquires the right and freedom to enter and exit the country at will (subject to various visa requirements). This facilitates one's ability to enjoy the freedom of movement beyond

²⁰² John C Torpey, *The Invention of the Passport: Surveillance, Citizenship, and the State* (Cambridge University Press 2018) xii.

²⁰³ Ibid.

²⁰⁴ Mahmud Keshavarz, 'An Inquiry Into Passports, Camps and Borders' (Doctoral Thesis, Malmo University 2016) 112.

²⁰⁵ Ibid.

²⁰⁶ Craig Robertson, *The Passport in America: The History of a Document* (Oxford University Press 2010) 3.

²⁰⁷ Ibid.

²⁰⁸ Robertson(n616),14.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Constitution of Kenya 2010, Article 12(1)(b).

²¹² The Kenya Citizenship and Immigration No. 12 of 2011

international borders.²¹³ For the intersex person however, this right is curtailed by the legal framework on several fronts.²¹⁴

To apply for a passport, one must be in possession of a birth certificate. To have acquired a birth certificate, a persons' sex/ gender particulars which forms part of the mandatory details need to have been entered in the register of births and in the birth certificate itself.²¹⁵ The birth certificate's entry number is required to be inserted in the passport application forms.²¹⁶ For one to be issued a passport as an adult, one is required to present to the issuing authority, in addition to the birth certificate, a national identity card as proof of being a citizen of Kenya.²¹⁷ These requirements present major and critical challenges for the intersex person. The first is that an intersex person may not have been issued with either the birth certificate or the national identity card due to the legal hindrances already seen. Where the intersex person happens to have these documents, the possibility of having documents that do not reflect their true sex/gender description is real. In Mercy's words:

'since I could not procure either a birth certificate or an identity card, I do not know if I can get a passport,'

and in the case of Rye:

'Since I have a birth certificate and a national identity card describing me as female, I could only get a passport describing me as female, which creates a major problem for me when I need to travel.'

The next drawback is presented by the application procedural forms and the requirement to fill in the sex/gender description component.²¹⁸ Whether one is applying for a passport or any other form of travel document, the requisite application forms have a mandatory provision requiring the entry of the sex/gender of the applicant.²¹⁹ The options provided to choose from in the

²¹³ Ibid Section 22 (a).

²¹⁴ The domino negative effect continues.

²¹⁵ The birth certificate as seen before only gives two sex/gender options of male or female. An intersex person will therefore be forced to either opt for one of the two sexes, which will not be their accurate categorization, or have the question mark inserted as a result of which the person may not have a birth certificate. Without a certificate of birth, the passport cannot be issued, since it is one of the mandatory supporting documents supporting the fact that the applicant is a citizen of Kenya.

²¹⁶ This requirement also applies to any travel document including temporary travel forms, all of which are issued under the same legal regime.

²¹⁷ <https://dis.ecitizen.go.ke/services/2/apply>. (Accessed on 16th October 2017).

²¹⁸ In the context of Kenya, the sex or gender markers must be completed at the time of applying for the passport or travel document.

²¹⁹ See the passport and travel documents application forms available at <https://dis.ecitizen.go.ke/services/2/apply/2>. (Accessed on 16th October 2017). In the case of a child under eighteen

sex/gender column is either male or female. This means that an intersex person does not have an option. The result is that the intersex person will either be locked out of the application process altogether or be forced to enter inaccurate details at the application stage. This is the reality of the intersex person that RM was trying to put across to the court.²²⁰ In this regard, RM was drawing to the court's attention the existing gaps in the passport application process as structured by the law.²²¹ His contention was that Kenyan citizens who are born intersex were neither provided for in the application forms nor were they given facilities required for purposes of applying for and obtaining Kenyan passports.²²² According to RM, this meant that intersex persons cannot apply for or acquire passports.²²³ This omission means that the legal framework curtails their freedom of movement as it does their enjoyment of the right of free movement in and out of Kenya, contrary to the then Constitution.²²⁴ The court, unfortunately, appears to have missed RM's argument and may be said to have re-victimized intersex people when it stated as follow:

‘..the petitioner’s inability to obtain a national identity card and a passport is caused by the petitioner’s deliberate action of failing to register his birth (even as a late registration), to enable him to qualify to obtain a national identity card or passport..’²²⁵

Instead of addressing the failure in the structure of the law and its impact on the ability of an intersex person to obtain a passport by accurately presenting themselves as persons of the intersex gender in the application forms, the court shifted the blame to RM.²²⁶ The legal framework coupled with the structure for application of passports guaranteed in the now repealed constitution, which RM was challenging, was retained in the 2010 Constitution. That legal hindrance curtailing the freedom of movement for intersex persons, which RM was decrying, therefore still subsists years after RM had brought it to the attention of the court.²²⁷ Mama A advanced a similar argument in *Baby A*.²²⁸ Denial of a birth certificate by the operation

years, the important information in the application form in addition to gender is the entry number in the birth certificate, the birth certificate number

²²⁰ *RM*, Paras. 3, 20 and 21.

²²¹ *RM*, Para 21.

²²² *Ibid*

²²³ *Ibid*.

²²⁴ RM had petitioned the court citing violations of the provisions of Section 81 of the independence Constitution.

²²⁵ *RM*, Para 158.

²²⁶ *Ibid*.

²²⁷ *Ibid*.

²²⁸ *Baby A*.

of the law meant that her child was effectively denied a passport, should the child ever require one.²²⁹

And indeed, many intersex persons have been denied passports for being intersex. To the question if she has a passport or if she has ever applied for one, Caymo, one of the intersex respondents had this to say:

'Kama kitambulisho sina, passport nitatoa wapi?', which is *kiswahili* for: 'If I do not have a national identity card, where would I get a passport from?'²³⁰

"When I need to go to Uganda to try and earn a livelihood, I have to use *panya* routes", Caymo continues.²³¹ 'Without a passport, I cannot cross the border at the border control points because I will be arrested.'²³²

Xaba, who has the physical features of a man, identifies as a man but has a passport which describes him as female.²³³ This is because he procured his passport on the basis of his birth certificate, which equally describes him as female and contains female names. The tragedy for Xaba is that, his identity card bears male names. After his bodily features acquired a male appearance at adolescence having been brought up as a female, Xaba irregularly acquired a baptism card through which he applied for and obtained an identity card bearing 'male' as the sex/gender marker. This means that he cannot use his passport and identity card together. When he travels, he has to do a lot of explaining regarding his passport, which is in discordant with his physical appearance and contradicts his identity card.²³⁴

²²⁹ Ibid, Paras 3 and 23.

²³⁰ Interview with Caymo, an intersex person from Siaya County on telephone on 16th August 2020. The researcher opted to use only one name that is not easily identifiable due to the irregularities in the respondent's documentation.

²³¹A '*Panya*' route is the local name given to the informal and often unsafe pathways used by people who need to cross the border between two countries, but for one reason or another, fear arrests and thereby avoid passing through the formal border points. See Brenda Birungi and Eria Olowo Onyango, 'Positioning Women in Informal Cross-Border Transportation: The Boda-Boda Industry at the Uganda–Kenya Border' (2018) 5 *Acta Universitatis Sapientiae Communication* 58. *Panya* is the Kiswahili word for a rat. This implies that the people who are forced to use these unofficial border crossings have to scurry across like rats, usually because they are carrying on unofficial and sometimes illegal trading across the border points. In the case of Caymo and other intersex persons who may need to trade across the border, they have to scurry across the border like criminals for reasons that the law has failed them by disabling their ability to acquire a valid passport to enable them cross the border regularly like other law-abiding citizens. The law in this respect, has converted intersex persons into 'criminals.'

²³² Interview with Caymo from Siaya on telephone on 16th August 2020.

²³³ Interview with Xaba in Nairobi on the 18th May 2019. Although this respondent requested the researcher to use his real name, for reasons that he is an intersex persons' activist, the researcher opted to use the pseudonym Xaba due, to the illegalities committed by the respondent in the quest to procure the identity card.

²³⁴ Ibid.

Like Xaba, Rye has a passport which describes him as female. He usually endures a lot of humiliation and indignity every time he travels and has to be identified through his passport. He explains as follows:

‘When I show my passport to an immigration officer, they look at me, look at the passport and then tell me to step aside. If I am at the front of the queue, then I have to wait for everyone else to be cleared before the Immigration Officers come back to clear me. I am then subjected to a lot of humiliation and indignity as I explain why my name and sex/gender in the passport do not conform to my physical appearance.’²³⁵

The omission by the law to factor in the intersex person in the passport structure has caused and continues to cause the intersex person problems in relation to the passport and their right to protection as citizens of Kenya. This structure continues to affect intersex persons in a similar manner when acquiring a voter’s card, as the section below will show.

2.2.4 THE VOTER’S CARD.

The construction of sex/gender in Kenya, which construction has commonly been interpreted within the binary categorization of the traditionally known and accepted male and female only, has extended to and affected the entire documentation regime in Kenya.²³⁶ None of the registration procedures given under the various systems of law currently existing in Kenya allow for classification for intersex persons.²³⁷ Accordingly, all intersex people are classified as either male or female or not classified at all.²³⁸ Where the intersex persons are classified as either male or female, the classification is officially documented and reflected in all bureaucratic documentation.²³⁹ As already demonstrated from the previous sections and from the personal statements of intersex people, the male or female sex classification is sometimes flawed. This has led to many intersex persons being wrongly classified.

Life in Kenya is seen and understood as essentially being either male or female and the maleness or femaleness confirmed through the various documents one possesses. This situation

²³⁵ Interview with Rye in Nairobi on 18th May 2019.

²³⁶ All the registration and application forms seen provide for only two options which an applicant can choose from: male and female.

²³⁷ *Ibid.*

²³⁸ Failure to register the intersex person in the first instance means that the person cannot get the next necessary document or the next. This has been the case for Mercy and RM. Interview with Mercy in Nairobi on 18th May 2019 and RM respectively.

²³⁹ Guillit Amakobe *et al*, *Gender Theatre: The Politics of Exclusion and Belonging in Kenya* in Nancy Nicol *et al* (eds) *Envisioning Global LGBT Human Rights: (Neo)colonialism, Neoliberalism, Resistance and Hope* (University of London Press 2018) 21.

creates a demand that either the intersex tries to fit within the rigid documentation or be shut out of documentation which facilitate, not just socio-economic rights, but also civil and political rights.²⁴⁰ This section analyses the impact of non-recognition on an intersex's person's right to be documented as a voter, to acquire a voter's card and the right to participate in political life in general.²⁴¹ The section discusses how failure to register an intersex person as a voter and or wrong descriptive registration, has served to disenfranchise persons who are intersex, thereby denying them the right to vote and excluding them from political participation in their own countries.²⁴² Yet every adult person has a right to exercise the right to vote, a right viewed as a valued opportunity allowing an individual to have a feeling of being involved, having political influence, a sense of identity and self-determination in their society.²⁴³ The right to vote is now considered as an innate, natural and necessary right.²⁴⁴

The founding provision for the right to vote is to be found in the universal adult suffrage principle, an important franchise.²⁴⁵ Recognizing the importance of this franchise, the Constitution Kenya has also embraced it. An adult Kenyan citizen's right to exercise their right to vote is specified in Article 38(3) of the Constitution. The legislation currently giving effect to this right is the Elections Act.²⁴⁶ The right to vote is specifically contained in Section 3 (1) which states as follows:

‘An adult citizen shall exercise the right to vote as specified in Article 38(3) of the Constitution and in accordance with this Act...’²⁴⁷

The right to vote is therefore, unquestionably a constitutional right. Nobody qualified to vote should be denied this right for lack of documentation. The reality however is that the intersex

²⁴⁰ Most intersex persons interviewed for this research have either been forced to try and change themselves to fit into the bureaucratic documentation in Kenya and live as either male or female or completely be left out. Mercy for instance has been left out of the documentation process altogether and as she indicates, she possesses not a single official document.

²⁴¹ A voter's registration Card is issued under the Elections Act No 24, Laws of Kenya (Revised 2012).

²⁴² Where an intersex person has the notification of birth Form B1 marked with a question mark, then a birth certificate cannot be issued, which means a person cannot be issued with a passport, and or a national identity card which consequently means that when they acquire the age of majority and want to register as a voter, they cannot be issued with a voters' card and therefore cannot exercise this right.

²⁴³ John Hickman, 'Explaining Post-Election Violence in Kenya and Zimbabwe' (2011) 28 *Journal of Third World Studies* 1: 29.

²⁴⁴ Vincenzo Alfano, 'Is Democracy Possible Without a Restriction of the Suffrage?' (2014) 3 *Studia Humana* 3: 3. The universal adult suffrage principle, Universal suffrage which is also called universal franchise gives all adult citizens who wish to vote, the right to do so, regardless of their social status, race, gender, ethnicity, or any other differences. restriction, subject only to relatively minor exceptions.

²⁴⁵ T.G. Trollope, *Universal Suffrage, "Social Aspects of the Italian Revolution, in a Series of Letters from Florence: With a Sketch of Subsequent Events up to the Present Time* (Cambridge University Press 2014).

²⁴⁶ Ibid

²⁴⁷ Elections Act, Section 3.

person in Kenya has been disenfranchised and continues to have this right taken away from them through the structure of the documentation regime.

The Elections Act requires one to be registered in the Register of Voters to be able to exercise their right to vote.²⁴⁸ With respect to registration of a voter's card and compliance with the requirement of the law, production of either a national identity card or a passport are prerequisites for one to be registered as a voter and be placed on the Register of Voters.²⁴⁹ If a citizen of Kenya does not possess a national identity card or a Kenyan passport, then they will not be registered as a voter.²⁵⁰ For people who are born intersex as established above, the law does not enable them to legitimately obtain a national identity card or a passport that conforms with their true identity.²⁵¹ Accordingly, the Elections Act will not allow them to register as voters or procure a voters card with their true identity.²⁵² An intersex person will therefore either be excluded from acquiring a voter's card for lack of the supporting documents or will be registered in the Register of Voters and will be issued a voter's card that defies their physical reality.²⁵³ This is what Rye had to say regarding this:

'I registered as a voter with the identity card that I acquired reflecting that I am a female. This document bears female names. I have only voted once, when I was very young; about 19 years old. At the time, the election officials did not question me. When I tried to vote again in 2013 and presented my voter's card and my identity card which bears the names Rael Wairimu, which are typical feminine names, the election officials looked at me and started questioning if indeed the person before them was the true holder of the card that I was presenting to them. They also started calling each other telling me that they need to confirm if indeed I was the person on the election register. This traumatized me a lot and I went away without voting. I have never attempted to vote again.'²⁵⁴

²⁴⁸ Elections Act, Section 3 (2).

²⁴⁹ According to Section 5 (3) of the Elections Act, any citizen of Kenya who has attained the age of eighteen years as evidenced by either a national identity card or a Kenyan passport and whose name is not in the register of voters shall be registered as a voter upon application, in the prescribed manner.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² This is given that the statutory forms through which these documents are applied for do not create room or provide for intersex people.

²⁵³ Form A, issued under Rule 8 of the Election's Act is annexed to Appendix 5. The sex/gender description is a compulsory requirement.

²⁵⁴ Interview with Rye in Nairobi on 18th May 2019.

Even though Rye is an adult Kenyan citizen and has a constitutional right to vote, this right has been taken away from him in a democratic society.²⁵⁵ *RM* had sought to have the court address the fact that lack of a voter's card and lack of an identity card results in intersex persons being denied the right to vote.²⁵⁶ However, Rye's testimony proves that having a voter's card and a national identity card which are incompatible with one's appearance, also results in denial of the right to vote. Yet, no qualified person should have their right to vote taken away from them in established democracies. However, intersex as a sex/gender consideration, is used in Kenya as an exclusion factor. This makes the suffrage non-universal in Kenya, a country that prides itself in being an established democracy.²⁵⁷ *RM* tried to fight this element that makes the universal suffrage non suffrage, and the deprivation of the democratic right to vote for deserving citizens in an established democracy in his petition.²⁵⁸ Sadly for intersex persons, this is what the court had to say:

'As regards the petitioner's right to vote, this right was available to the petitioner provided he obtained an appropriate national identity card for identification purposes during the voting exercise. It is evident that the petitioner did not make any efforts to obtain a national identity card, nor did he make any effort to obtain a voter's card. We find that the petitioner was never denied his right to vote. Rather, it is the petitioner who disenfranchised himself by deliberately failing to meet the prerequisites for voting'.²⁵⁹

The court seems not to have appreciated the role played by the law as far as intersex persons are concerned. Rye made efforts to apply for an identity card and a voter's card, unlike *RM*, as per the court's observation.²⁶⁰ However, he is still disenfranchised despite being on the voter's register and possessing a voter's card.²⁶¹

Mercy is in the category of intersex people who do not possess any document that would allow her to apply for a voter's card or be registered as a voter.²⁶² Her name has never found its way

²⁵⁵ *Ibid.*

²⁵⁶ *RM*'s contention with respect to failure by the government to recognize intersex persons and to issue them with the two national documents namely the identity cards and voter's card was that this resulted in people who are born intersex being deprived of their democratic right to vote.

²⁵⁷ S.D. Schmid, *et al* 'Non-Universal Suffrage: Measuring Electoral Inclusion in Contemporary Democracies'. (2019)18 *European Political Science* 695.

²⁵⁸ *Ibid.*

²⁵⁹ *RM*, Para 136.

²⁶⁰ *Ibid.*

²⁶¹ This disenfranchisement will continue for intersex people for as long as Kenya is ordered along the two sex systems and as long as the law endorses the two-sex system.

²⁶² Mercy neither possesses an identity card nor a passport. She is therefore unable to register as a voter or vote.

into the voters' register, since she cannot be registered as a voter without a national identity card or a passport.²⁶³ Consequently, she has never been able to exercise her right to vote.²⁶⁴ With the law as it is, Mercy will never be able to exercise this right.²⁶⁵ Assa, on the other hand, narrates how she has managed to vote the few times she has succeeded in voting:

‘I normally wake up at the crack of dawn and accompanied by other women, I go to the voting center and present my voter’s card and identity card. I then vote and quickly go away before there is sufficient light for them to compare my physical appearance, which is typically female, and my identity and voter’s cards which describe me as a male.’²⁶⁶

The right to vote is unquestionably a human right. Mbodla, writing on the right for prisoners to vote, argues that this right does not only arise out of one being a human being but also through membership of a social order.²⁶⁷ To borrow Mbodla’s words, it is unacceptable that this franchise is stripped from certain citizens as a side effect of their being intersex.²⁶⁸ It is also unacceptable that the law should be playing a part in stripping the intersex person off this democratic and human right, yet the government has a responsibility to ensure that all its citizens are able to exercise the right.²⁶⁹ Like other human beings, people born intersex are entitled to legal recognition through correct registration and issue of correct official documents. Failure to so recognize them only serves to add on to their many challenges in the course of their lives. These challenges confront them regarding documents related to social security schemes, thus excluding them from the available benefits of those schemes in Kenya, as is discussed in the segment below.

2.2.5. SOCIAL SECURITY SCHEME IDENTITY DOCUMENTS.

Social security is not just a social necessity, it has been categorized as a human right.²⁷⁰ Everyone, as a member of society, has a right to social security.²⁷¹ Social security involves public protection measures put in place by a nation, to safeguard its members against economic

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Interview with Assa on telephone from Kisumu on the 16th August 2020.

²⁶⁷ Ntusi Mbodla. ‘Should Prisoners Have a Right to Vote?’ (2002) 46 *Journal of African Law* 1 : 92-94.

²⁶⁸ Mbodla’s argument is that imprisonment should never be used as an exclusion factor to deny eligible citizens the right to vote. This research makes a similar argument. The condition of being intersex should not continue being used as an exclusion tool to strip eligible intersex Kenyans the right to vote.

²⁶⁹ Ibid, 101.

²⁷⁰ International Labour Organization (ILO) 2012, *The Strategy of The International Labour Organization Social Security For All: Building Social Protection Floors And Comprehensive Social Security Systems* (International Labour Organization 2012) 13.

²⁷¹ Ibid.

and social distress that would be caused by *inter alia* sickness, old age and death.²⁷² It is a safety net that covers contingencies through provision of medical care in instances of ill health, other health needs and contingencies of social welfare in cases of old age and death. Two main components of social protection are social security and social insurance.²⁷³

Social protection is recognized in several international, regional, and sub-regional instruments as a standard put in place in the fight against poverty. These standards are to be found in the Universal Declaration of Human Rights (UDHR), which asserts that everyone, as a member of society, has the right to social protection.²⁷⁴ It goes on to specify that this right applies in the event of cases of sickness, disability, old age and other forms of lack of livelihood beyond one's control.²⁷⁵ The right to social protection is then reiterated by the International Covenant on Economic, Social and Cultural Rights (ICESCR). This Covenant requires States which are party to it to recognize everyone's right to social security and social insurance.²⁷⁶

The 1952 International Labour Organization (ILO) Social Security (Minimum Standards) Convention equally underscores the importance of social security.²⁷⁷ Regionally, the Regional Strategic Plan of the International Trade Union Confederation (ITUC) Africa Region, identifies social security and social protection as key areas which labour movements in Africa must focus on, in order to improve the welfare of the labour force.²⁷⁸ Nationally, the Constitution of Kenya gives the necessary guarantees for enjoyment of social security amongst economic and social rights which every Kenyan is entitled to.²⁷⁹

Masta and Omollo have defined social security as the sum of all regulations within a society which aims to guarantee an individual, not just physical survival, but also general protection against unforeseeable risks.²⁸⁰ Such risks may entail deterioration of a situation or consequences which would otherwise be borne by an individual or a group of individuals, if there was no

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ UDHR, Article 22

²⁷⁵ Ibid, Article 25.

²⁷⁶ ICSECR, Article 9.

²⁷⁷ The Social Security (Minimum Standards) Convention of 1952 (No. 102) views social security as part of the global ILO strategic policy framework for a decent work

²⁷⁸ Kwabena Nyarko Otoo and Clara Osei-Boateng, *Foundation Chapter : Social Protection Schemes In Africa* in (Trywell Kalusopa *et al* (eds) Social Protection Schemes in Africa(African Labour Researchers Network 2012) 13-18.

²⁷⁹ Social Security is guaranteed by the Constitution of Kenya as part of the economic and social rights that everyone is entitled to under Article 43.

²⁸⁰ Jane Masta and Jacob Omolo, *Social Protection In Kenya* in Trywell Kalusopa *et al* (eds) Social Protection Schemes in Africa(African Labour Researchers Network 2012) 122-125 .

external assistance.²⁸¹ Social security is therefore aimed at ensuring the general welfare of a community.²⁸²

Governments are responsible for their citizens in terms of social schemes. This accounts for why most governments have introduced social schemes for their people.²⁸³ To this end, Kenya has adopted two specific contingency measures for old age and medical care. The two social security contingency measures that the government of Kenya has put in place for its citizens are in the form of national social security and the social insurance programs. Like every other right in Kenya, however, accurate bureaucratic documentation is an essential facilitator of the enjoyment of these social protection rights.²⁸⁴ This section examines the identity documentation structure governing the national social security and the national health insurance, the two-government administered social security schemes in Kenya. It also details the impact of that structure on the intersex person. It argues that the legal structure continues to place the intersex person in a conundrum because of being in the grey area side of the law, thus locking them out of these two critical social security safety networks.

2.2.5.1 THE NATIONAL SOCIAL SECURITY FUND (NSSF) MEMBERSHIP CARD.

Social security provides benefits to individuals and their dependents by protecting them against low or declining living standards arising out of several basic risks including old age. Social security is recognized under international, regional, and domestic human rights provisions. To borrow from the UDHR, the founding human rights document:

‘Everyone, as a member of society, has the right to social security...’²⁸⁵

The UDHR further goes on to provide for:

“...the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond an individual’s control.”²⁸⁶

In Kenya, the Constitution, while providing guarantees for the rights of all persons, provides the equal protection and equal benefits for everyone.²⁸⁷ That social security is a human right globally, regionally and nationally recognized, is therefore not in question.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Wouter Ginneken, *Extending Social Security: Policies for Developing Countries* (International Labour Organization 2003) 10-12.

²⁸⁴ Ibid.

²⁸⁵ UDHR, Article 22.

²⁸⁶ Ibid, Article 25 (I).

²⁸⁷ Constitution of Kenya, 2010, Articles 27(2) and Article 43(1) (e).

National social security as a concept has always been present in traditional African settings, and in the spirit of *utu*, *ujamaa* and *ubuntu* philosophy.²⁸⁸ In precolonial Kenya, social security was availed and ensured by the extended family and by the society in general, to those unable to fend for themselves.²⁸⁹ The establishment of a provident fund for the protection of African workers was later conceived by the colonial government in 1956.²⁹⁰ The full actualization of this fund was however not achieved by independent Kenya until ten years later when the National Social Security Fund (NSSF) Act was passed.²⁹¹ The passing of the NSSF Act established the National Social Security Fund as a compulsory savings scheme, to serve as a social security for workers upon retirement.²⁹² The current social security regime is operated under the National Social Security Fund Act, 2013. This Act retained the mandatory contributions for Kenyan employees in the formal sector but also extended its coverage to the informal sector workers through voluntary contributions.²⁹³ These contributions are meant to operate as a cushion for Kenyans when they are no longer productive due to old age.²⁹⁴ The intersex person is however excluded from these benefits by the framework of the law under which the membership to the Fund is operated. Commencing with the procedural application for membership cards, the intersex person is confronted with many challenges, making it difficult, if not impossible to benefit from these services in their later lives.

The registration forms through which an individual applies for membership into the Fund is governed by the National Social Security Fund Act.²⁹⁵ The language of the application form cautions applicants to ‘complete the form accurately’ and ‘attach a copy of the identity card or a passport for Kenyan citizens’.²⁹⁶ For intersex persons who do not possess an identity card or a passport because the law has made it impossible for them to procure these identity documents, this requirement automatically shuts them from membership.²⁹⁷ Mercy is one such person who is excluded from membership, *ab initio*.²⁹⁸

²⁸⁸ PM Mulei, ‘Social Security in Kenya 1988’ (1998) 41 *International Social Security Review* 4: 433-435.

²⁸⁹ *Ibid.*, 433.

²⁹⁰ *Ibid.*

²⁹¹ The National Social Security Fund Act Chapter 258 of the Laws of Kenya was first passed in 1965. It has however undergone a number of amendments to become what it is today.

²⁹² The National Social Security Fund Act Chapter 258 of the Laws of Kenya.

²⁹³ *Ibid.*

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ See the application form at www.nssf.or.ke. (Accessed on 9th September 2020). A sample application form is attached at Appendix 5.

²⁹⁷ Interview with Mercy in Nairobi on 18th May 2019.

²⁹⁸ *Ibid.*

In the case of those intersex persons who may have been forced by the law to squeeze themselves into the available sex marker categories, the information they fill into the application form is usually far from being correct.²⁹⁹ When an intersex person is confronted with the reality of having to complete mandatory fields with an appropriate sex/gender, they are left with no option but to squeeze themselves into any of the two ‘appropriate’ options provided by the law.³⁰⁰ This then presents serious challenges which results in denial of social security. A membership card processed using ‘incorrect’ and or information conflicting with the reality creates serious problems for the claimant. Where the documents conflict, it will be difficult, if not impossible to benefit from the scheme.

Regarding this, Rye has this to say:

‘I have an NSSF card. I applied for it using the names and sex/gender in my identity card. I feel that the card does not belong to me. I have found it unnecessary to continue making voluntary contributions to the fund because I know that in my later years, if I make a claim, unless the law will have changed, I will not be able to benefit.’³⁰¹

Langa is also in the same quandary with Rye.³⁰² He possesses an NSSF membership card he believes will be of no use to him. He too has ceased making contributions.

The situation is no different for an intersex person seeking social protection availed to the citizens of Kenya through social health insurance as the following part shows.

2.2.5.2. NATIONAL HOSPITAL INSURANCE FUND (NHIF) MEMBERSHIP CARD.

In addition to social protection through social retirement benefits discussed above, the other key component of social protection that a nation has a responsibility to provide for its citizens is social health protection. According to Kimani *et al*, social health protection systems are mechanisms that countries use to address the challenges related to provision of access to health care services for their citizens.³⁰³ Social health protection is usually meant for the poor and vulnerable segments of the population.³⁰⁴ The benefits of extending social safeguards in health

²⁹⁹ As already seen from the narrations of the respondents interviewed, intersex persons are holding documents that have information that is not in consonance with who they truly are.

³⁰⁰ See Form for Member Registration (Revised 2015) SF/R&C/REG/DF/003 available at www.nssf.or.ke. (Accessed on 9th September 2020).

³⁰¹ Interview with Rye in Nairobi on 18th May 2019.

³⁰² Interview with Langa, an intersex person in Nairobi on 18th May 2019 and 26th October 2020.

³⁰³ J.K Kimani *et al*, ‘Determinants for Participation in a Public Health Insurance Program among Residents of Urban Slums in Nairobi, Kenya: Results from a Cross-Sectional Survey’ (2012) 12 BMC Health Services Research 66: 2.

³⁰⁴ *Ibid*.

include reducing financial barriers associated with access to health care services. Other benefits include protection from financial catastrophes and impoverishment related to health care expenditures through a social health insurance scheme.³⁰⁵

In Kenya, the social health insurance scheme is operated through the National Hospital Insurance Fund (NHIF).³⁰⁶ Sieverding *et al* view provision of social health insurance scheme as one of the ways that Kenya intends to fulfil its obligation towards universal health coverage.³⁰⁷ Chuma and Okungu place an emphasis on universal health coverage by observing that health financing approaches are central to universal health coverage.³⁰⁸ Mbau *et al*, add their voice to this emphasis by stating that Kenya, a lower middle-income country, has prioritized the attainment of Universal Health Coverage by the year 2022.³⁰⁹ They observe that the way Kenya has done this is by the expansion of health insurance coverage rendered through the National Hospital Insurance Fund (NHIF).³¹⁰

Kenya has one public health insurance scheme namely the National Hospital Insurance Fund (NHIF). The NHIF is a nonprofit institution created through an Act of Parliament in 1966, initially as a department in the Ministry of Health.³¹¹ Its objective was to provide for a national contributory hospital insurance scheme for all residents in Kenya. In this regard, the Fund's establishing Act provided for the enrolment into the Fund, of all Kenyans between the ages of 18 and 65. It also mandated employers to deduct monthly premiums from wages and salaries.³¹² The Act has now expanded the mandate of the Fund to benefit persons not in formal employment, who can make voluntary contributions.³¹³ However, just like the NSSF membership card, the NHIF membership card serves, by the design of the law, to lock out the intersex person.

³⁰⁵ Ibid.

³⁰⁶ The National Hospital Insurance Fund (NSSF) Act Chapter 255 of the Laws of Kenya was first passed in 1966 but has also undergone several revisions.

³⁰⁷ Maia Sieverding *et al*, 'Private Healthcare Provider Experiences with Social Health Insurance Schemes: Findings From A Qualitative Study In Ghana And Kenya' (2018) 13 PloS ONE 2: 3-4.

³⁰⁸ J Chuma and V Okungu, 'Viewing the Kenyan Health System through an Equity Lens: Implications for Universal Coverage' (2011) 10 International Journal for Equity in Health 22: 2-3.

³⁰⁹ Rahab Mbau *et al*, 'Examining Purchasing Reforms towards Universal Health Coverage by the National Hospital Insurance Fund in Kenya' (2020) 19 International Journal for Equity in Health 19: 1.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid.

³¹³ BM Muiya and A Kamau. (2013) 11 International Journal of Education and Research, 11: 1-10.

In addition to the requirement for the attachment of either a birth certificate or birth notification for applicants who have not attained the age of majority and a national identity card or passport for the adult applicants, the form through which application for membership into the NHIF is made is also founded on the assumption that people in society can only be born male or female.³¹⁴ It therefore provides for a male or female gender options only.³¹⁵ Yet the form requires that all the information an applicant provides be correct and accurate. If any of the information is seen as inconsistent, the bearer is denied the health insurance benefits. Rye narrates his experiences of being excluded from benefiting from this social health protection scheme for being intersex as follows:

‘I have been member of the National Hospital Insurance Fund since 2013. I applied for the card using my identity card. I opted for the female sex marker which is in my birth certificate and my national identity card. In 2016, I got sick and was admitted to hospital. I was admitted to a male ward as a male. NHIF however refused to pay the claim asserting that it was fraudulent. I have since stopped paying the voluntary contributions since the Fund is of no benefit to me as an intersex person’.³¹⁶

Given that scarce economic resources hamper accessibility to health insurance, social health insurance should be geared towards ensuring that certain populations, particularly the vulnerable ones, should never be excluded.³¹⁷ In the case of the intersex, exclusion stems from two reasons. First there are those people who are intersex who will not be able to get into the Fund *ab initio* because they do not possess any supporting identity documents, like Mercy.³¹⁸ Then there are those who may be able to get into the Fund, either through compulsory or voluntary contributions as the case of Rye, but stand to be excluded from benefiting from the scheme on the basis that their documents are in discordance and their physical realities. Both situations places the right to health for intersex persons in a precarious position.³¹⁹ In the words of Assa:

³¹⁴ NHIF 2 (Revised 2015) available at:

<http://www.nhif.or.ke/healthinsurance/uploads/customers/membersform.pdf> (Accessed on June 2019).

³¹⁵ *Ibid.*

³¹⁶ Interview with Rye in Nairobi on 18th May 2019.

³¹⁷ C. Carrin, *et al Social Health Insurance in Low- Income Developing Countries: New Roles for Government and Non-Profit Health Insurance Organizations in Africa and Asia*, in Xenier Scheil-Adlung (ed) *Building Social Security: The Challenge of Privatization*. International Social Security Series (Transaction Publishers 2001) 125-127.

³¹⁸ Such as in the case of Mercy and other intersex individuals who do not possess any form of identity documents and so would never be able to get into the Fund at all. This group can never go past the application process for lack of supporting documents.

³¹⁹ This is what happened to Rye. Although he was able to get into the fund and had been a contributor, he was blocked from any benefits because of being intersex.

‘I do not have a NHIF card. I would really want to have one but I cannot apply for it due to the nature of my documentation. I may never be able to register into this Fund, yet I cannot afford private health insurance.’³²⁰

Effective social security systems should promote social inclusion.³²¹ Kenya has an obligation to develop and enhance measures of social protection which are sustainable and adoptable to national circumstances and reality of the society. Kenya has the obligation to extend social security to all, through the establishment of an all-inclusive identity documentation regime.³²² This, Kenya has failed to do.

2.3. NON COMPULSORY ESSENTIAL IDENTITY DOCUMENTS.

In addition to the key identity documents examined in the preceding sections, there are other essential documents issued by the government Kenya to its nationals. Although this category of documents cannot strictly be referred to as identity documents, they nevertheless are vital in the sense that they identify their holders for purposes of consuming various goods and services which the State avails to its citizens. In this category are the drivers’ license and the Kenya Revenue Authority (KRA) Personal Identity Number (PIN) certificate. The next two segments examine the legal regimes surrounding issuance of these sets of essential documents and the negative impact the respective structures have on intersex persons whilst accessing the necessary goods and services accessed through them.

2.3.1. DRIVERS’ LICENSE.

A driving license is issued as an authority to allow a person to drive a motor vehicle of any class on Kenyan roads.³²³ No one is allowed to drive any kind of motor vehicle unless one is in possession of a driving license or a provisional license authorizing them to drive the class of vehicles that one intends to drive. In addition, any person driving on a road is required to carry their driving license or a provisional driving license. This is because the law requires that where a traffic officer asks for to inspect the said license, the driver should be able to produce it. The precise words of the Traffic Act are as follows:

³²⁰ Interview with Assa on telephone from Kisumu on 16th August 2020.

³²¹ International Labour Organization (ILO) 2012, *The Strategy of The International Labour Organization. Social Security for All: Building Social Protection Floors And Comprehensive Social Security Systems*, 32.

³²² Ibid.

³²³ Section 30 (1) of the Traffic Act Chapter 403 of the Laws of Kenya require that all drivers be licensed.

‘Any person driving a motor vehicle on a road shall carry his driving license or provisional license, and, on being so required by a police officer, produce it for examination.’³²⁴

The legal regime for the application for a driving license, like all the other documents regime examined above, is also structured along the binary. Driving licenses are applied through a prescribed form which is restricted to the binary gender options.³²⁵ Giving false information in relation to an application for a license constitutes an offence with a commensurate penalty.³²⁶ Effectively, these mandatory requirements automatically shut out intersex persons from having a valid driving license to be able to operate on Kenyan roads.

Onyango, an intersex person who lives in Kisumu, earns his livelihood by driving a *tuk tuk*.³²⁷ He has this to say about a driving license:

‘I do not have a license. I have to dodge the police so that I am not arrested for driving without a license. Many times, I have been a victim of extortion by the police. I am forced to give money so that they can allow me to pass’.³²⁸

Fredrick³²⁹ has had to scheme and devise other not so regular and not so legal ways of driving on Kenyan roads as he narrates below:

‘For me, I need to drive myself to get to different places that the nature of my business requires me to go. I taught myself to drive with my brother’s car and now I am a competent driver. I cannot get a driver’s license because my national identity card indicates that I am a female, but my physical features are those of a man. I now use my brother’s license to drive. I know that I am committing a crime, but I do not have a choice. I always fear that I will be caught one day.’³³⁰

³²⁴ The Traffic Act, Section 36 (3). Production of digital proof of a valid license is now possible through the National Transport and Safety Authority (NTSA) Self Help digital App. What is significant however is that, the actual driving license, both physical and digital, and the legal regime through which it is acquired, excludes the intersex person.

³²⁵ Ibid Section 16 (1).

³²⁶ Ibid Section 113.

³²⁷ A *Tuk tuk* is a three-wheeler motorcycle used as a public service goods or commercial vehicle in most parts of Kenya. To drive this, one is required to have a Class A driving License issued under the Traffic Act.

³²⁸ Interview with Onyango on telephone from Kisumu on 16th August 2020. This is a pseudonym that the researcher uses for this Respondent to protect his identity.

³²⁹ Interview with Fredrick on phone from Kisumu on 16th August 2020. Fredrick is a pseudonym that the researcher has used for this Respondent to protect his identity.

³³⁰ Ibid.

With the many roadblocks manned by police officers on Kenyan roads, Fredrick has been lucky not to have been arrested.³³¹ The gaps existing in the documentation legal framework has driven the intersex person to either live in the shadows like Onyango, or live irregularly by circumventing the law like Fredrick, through no fault of their own.

2.3.2. KENYA REVENUE AUTHORITY(KRA) PERSONAL IDENTITY NUMBER (PIN) CERTIFICATE.

The Kenya Revenue Authority (KRA) Personal Identity Number (PIN) certificate is an essential document in the lives Kenyans. It not only allows one to pay their taxes and therefore be in compliance with the law, but is also necessary in the facilitation of various financial transactions.³³² Such transactions include purchasing of movable and immovable assets, registering business entities and opening bank accounts among others. A KRA PIN certificate is therefore one of the most critical documents that any Kenyan adult should have.

The application for a KRA PIN certificate in Kenya has now been automated, making it much easier for Kenyans to procure this essential document. This ease of applying for a KRA PIN certificate has however not translated to a reality for the intersex persons. While the application form for a KRA PIN card does not contain the gender option, the process provided is still restrictive for an intersex person.³³³The system requires that one uploads a supporting document before the KRA PIN certificate is generated.³³⁴This means that one is required to be in possession of supporting documents such as a national identity card in the case of an individual applicant.³³⁵ Due to the intersection of the documents, as seen above, the intersex person may not have any supporting documents and for those who do, they may not be in consonance with their physical reality.³³⁶

To the question whether they have a KRA PIN card, Onyango and Assa both have the same response:

*'Hio ni gani?'*³³⁷ which is Kiswahili for 'which one is that'?'³³⁸

³³¹ Roadblocks on Kenyan roads are such frequent features that according to Lamont, 'grass has overgrown them'. Mark Lamont, 'Speed Governors, Road Safety and Infrastructural Overload in Post-Colonial Kenya, 1963-2013'. (2013) 83 Africa 3: 379.

³³² Timothy Wahome 'Efficiency of Cyber Café Operators in Issuance of Kenya Revenue Authority Personal Identification Numbers in Nyeri Town, Kenya' (University of Nairobi Master's Thesis 2012) 5-6.

³³³ <https://itax.kra.go.ke/KRA-Portal/eRegIndi.htm?actionCode=loadIndiOnlineForm> (Accessed on 16th June 2019).

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Interview with Assa and Onyango on telephone from Kisumu on 16th August 2020.

³³⁸ Translation by researcher.

These two intersex persons have no idea what a KRA PIN certificate is. Essentially, failure to secure the KRA PIN card means that the intersex person's rights to several social economic rights which are facilitated by the KRA PIN certificate automatically get curtailed.³³⁹

2.3.3. MARRIAGE CERTIFICATE.

Certification of Marriages in Kenya for purposes of giving the institution a legal status, is governed by the Marriage Act, 2014.³⁴⁰ Marriages contracted under both Statute and custom are certified through the issue of marriage certificates, under Rules 6(1) for the former and 5(2) for the latter.³⁴¹ With respect to the certificates issued following a statutory marriage, the description of the spouses is contained in the traditional description of 'bride' and 'groom', which is reflective of the biological female and male descriptions, in sync with the Constitution of Kenya.³⁴² With regard to the description of the parties to a customary marriage, the description is specified as husband and wife, again in the traditional binary of biological male and female. This automatically excludes documentation and acquisition of a legal status for marriages, both under statute and custom, where one or both parties are of the intersex gender. According to Rye:

‘ If I want to marry, how would I, a person with a female name, a national identity stating that I am female, and with both male and female genitalia, be described in a marriage certificate under the law in Kenya?’³⁴³

The binary restriction therefore means that the legal regime automatically precludes intersex spouses from all legal rights, protections and even obligations flowing from certification of their unions.

2.4. DIGITAL IDENTITY.

Kenya has, in recent years, introduced a number of digitization programs.³⁴⁴ This has been in a bid to create a digital data system for its citizens in response to the requirement by the Sustainable Development Goals (SDGs) and the international development community's digital ID programs intended for low and middle income countries.³⁴⁵ Two important digital

³³⁹ The magnitude of the impact of denial through the law of these essential documents is analyzed in the next chapter.

³⁴⁰ The Marriage Act No 4 of 2014, Laws of Kenya.

³⁴¹ Ibid, Rules 6(1) and 5(2), Marriage Act, respectively.

³⁴² Constitution of Kenya, 2010, Article 45.

³⁴³ Interview with Rye (pseudonym).

³⁴⁴ Grace Mutungu, 'The United Nations Guiding Principles on Business and Human Rights, Women and Digital ID in Kenya: A Decolonial Perspective' (2022)7 Business and Human Rights Journal 117.

³⁴⁵ Ibid.

identity programs currently being implemented are the *Huduma Namba*, (Kiswahili for ‘service number’)³⁴⁶ identification card and the National Education Management Information System (NEMIS).³⁴⁷ The following two segments examine these digital identity registration systems’ legal regime and the way they continue to exacerbate injustices for intersex persons, stemming from the historical exclusion discussed earlier.

2.4.1. HUDUMA NAMBA IDENTITY CARD.

The *Huduma Namba* Identity Card, is the latest identification document on the Kenyan legal documentation landscape. It was introduced by the National Integrated Identity Management System (NIIMS) established in 2019, through amendments to the Registration of Persons Act, Chapter 107, of the Laws of Kenya.³⁴⁸ The Amendments introduced a new section into the Act through which NIIMS was established.³⁴⁹ The functions of NIIMS, as stated in the Act, are *inter alia*:

“... to create, manage, maintain and operate a national population register as a single source of personal information of all Kenyan citizens and registered foreigners resident in Kenya

and

‘...to assign a unique national identification number to every person registered in the register’...³⁵⁰

The law has also given NIIMS the mandate to:

‘...to harmonize, incorporate and collate into the register, information from other databases in Government agencies relating to registration of persons...’³⁵¹

Principally, the NIIM system is intended to be a single source of personal information for everyone, through registration of all Kenyans.³⁵² It is meant to be an ongoing registration

³⁴⁶ Jaap Van der Straaten J , ‘Hundred Years of Servitude: From *Kipande* to *Huduma Namba* in Kenya’ (2019) Civil Registration Centre for Development (CRC4D) 10.

³⁴⁷ The NEMIS system is currently being used to register all learners in Kenya.

³⁴⁸ The Amendment to the Registration of Persons Act was effected through The Statute Law (Miscellaneous Amendments) Act No 18 of 2018, enacted by the National Assembly in 2018. This Act got Presidential assent in December of the same year, commencing operations in January 2019. Among the pieces of legislation that were amended through this Act was the Registration of Persons Act, Laws of Kenya. See Matungu (n 754) 117.

³⁴⁹ The amendments introduced a new section, being Section 9A , into the Act.

³⁵⁰ Ibid. Section 9 (1)(b).

³⁵¹ Ibid, Section 9 (1) (c).

³⁵² According to Section 9, the system is also intended to capture the data of all foreigners residing in Kenya as well.

process through which every person, above six years of age, is meant to be registered and issued a unique citizen service number which will have a linkage to delivery of various government services.³⁵³

The NIIMS system creates crucial gaps for intersex persons in many fronts. To begin with, the Digital Data Capture Form, the form through which the *Huduma Namba* digital identification cards are to be generated, requires those registering to insert the details of the numbers from several of their identification documents previously obtained.³⁵⁴ These include details from their national identity card, the National Hospital Insurance Fund (NHIF) card and the National Social Security Fund (NSSF) card. The form also requires the entry of details from the birth certificate, the driver's license and Kenya Revenue Authority (KRA) PIN certificate for recording.³⁵⁵ In the case of Mercy, who has never had any of the documents whose numbers need to be entered in the digital Data Capture Form for instance, registration in the portal is an impossibility.³⁵⁶

Second, intersex persons whose documents are sex / gender incongruent with their reality like Rye and Xaba, find themselves in an equally difficult position. They will either be forced to register using the incorrect identity documents that they are currently holding or not register at all.³⁵⁷ Even if they apply for registration using the numbers that are in their current documentation, they are likely to never benefit from *Huduma Namba* identification system due to the inconsistencies with their physical reality.

Further, by providing for only 'male' and 'female' check boxes /options, the registration format automatically excludes the intersex person and or opens up a gap that will lead to wrong sex/gender registration.

For the intersex person therefore, this new system can only be described as yet another legal tool coming in to continue to oppress them in their struggles for legal recognition through the

³⁵³ Jaap Van der Straaten J , 'Hundred Years of Servitude: From Kipande to *Huduma Namba* in Kenya' (2019) Civil Registration Centre for Development (CRC4D) 1.

³⁵⁴ See a sample Digital Data Capture Form available at <https://www.hudumanamba.go.ke/wp-content/uploads/2019/05/Huduma-namba-form.pdf> (Accessed on 16th August 2020). A sample is also attached at Appendix 5.

³⁵⁵ See a sample Digital Data Capture Form available at <https://www.hudumanamba.go.ke/wp-content/uploads/2019/05/Huduma-namba-form.pdf> (Accessed on 16th August 2020).

³⁵⁶ Interview with Mercy in Nairobi on 18th May 2019.

³⁵⁷ The Digital Data Capture Form, like all the other legal forms through which identification documents are applied for, are structured along the gender binary and do not contemplate an intersex person.

documentation regimes, which, as already demonstrated has been long and difficult.³⁵⁸ The current legal structure of this new process already has the potential to exclude all intersex persons from the benefits the *Huduma Namba* identification card is meant to bring to Kenyans, despite the advantages being touted.³⁵⁹ And if possession of the *Huduma Namba* identification card will be made a condition precedent to obtaining government services, intersex persons stand to suffer. Pegging access of services and goods on the *Huduma Namba* registration would mean that access to those goods and services will become an impossibility for intersex person.

And it was precisely this potential exclusion that the ‘Nubian Rights Forum and others’ were fighting when they filed several petitions seeking orders to declare the process unconstitutional and discriminatory to certain vulnerable members of society.³⁶⁰ The key argument advanced in favor of the Petitioners was that since the Nubian community has always had challenges acquiring identity documents under the existing legal system, the NIIMS system has the potential to exclude them, thus denying them government services.³⁶¹ The court rightly observed that the digital data identification system is the way of the future and correctly pointed out that there may be a segment of the population who run the risk of exclusion.³⁶² The intersex person belongs to that segment of the population who, the court in the Nubian case pointed out run this risk of exclusion. In the case of intersex persons however, it is not just a likelihood, it is a reality. With the legal structure of the current procedure for registration of the *Huduma Namba* identification card, they stand to be excluded from the NIIMS registration. Consequently, they would be excluded from accessing all the attendant services accessible through this digital identity card. This process, like the other identity procuring procedures detailed above, adds onto the exclusion, unequal treatment and discriminatory treatment subjected to intersex persons by the identity documents registration regime in Kenya.

³⁵⁸ Mercy and Rye have indicated the impossibility of obtaining any or accurate identity documents with the current legal regime.

³⁵⁹ His Excellency Uhuru Kenyatta, the immediate former President, when launching the *Huduma Namba* identification card during the 2020 *Mashujaa* day celebrations at the Gusii Stadium in Kisii County, emphasized that the *Huduma Namba* identification card, which would constitute the authentic single source of truth on personal identity in Kenya” would ‘ease the way Kenyans get government services’. See Business Daily 21st October 2020 available at <https://www.businessdailyafrica.com/bd/news/uhuru-first-huduma-namba-card-2485626> (Accessed on 22nd October 2020).

³⁶⁰ Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others [2020] eKLR. The Consolidated Petitions Numbers 56, 58 & 59 of 2019 were filed by Nubian Rights Forum, Kenya Human Rights Commission and Kenya National Commission on Human Rights as the 1st, 2nd and 3rd Petitioners respectively.

³⁶¹ Ibid.

³⁶² Ibid.

2.4.2. THE NATIONAL EDUCATION MANAGEMENT INFORMATION SYSTEM (NEMIS) IDENTITY SYSTEM.

Digital identification processes in Kenya have been extended to the education realm through the introduction, by the government through the Ministry of Education, of the National Education Management System (NEMIS).³⁶³ Through NEMIS, All learning institutions are now required to register all learners on a digital platform, using the birth certificate as the primary identification document.³⁶⁴ Thereafter, every learner will receive a personal identity number known as a Unique Personal Identifier (UPI).³⁶⁵ It is this number that will be used to track a students' performance from basic learning, secondary school and all the way to tertiary levels. The government has indicated that the tracking is vital because it will help with the formulation of improved policies and plans meant to enhance the education sector.³⁶⁶ The registering structure of this system being in the binary however creates yet another legal gap for intersex learners. It means that no intersex children will be registered from the onset. This exclusion will further mean that intersex children will be excluded from the government's plans and policies meant to benefit every child in the education sector. Without the digital registration, children born intersex will have difficulties accessing school, sitting for national examinations or advancing to the next level of the education structure.³⁶⁷

2.5. DEATH CERTIFICATE.

This research sets out to demonstrate that the legal gaps in the recognition and the identity documents' regime impacts an intersex person from the cradle to the grave. This final section of this chapter examines the gaps in the documentation regime issued to Kenyans after death, to demonstrate the negative impact the legal gaps have on intersex persons, even after death.

A death certificate is an essential document issued after the death of a person. As Rogena *et al* explain,³⁶⁸ the document is significant for several legal reasons, which include succession and

³⁶³ Grace Mutungu, 'The United Nations Guiding Principles on Business and Human Rights, Women and Digital ID in Kenya: A Decolonial Perspective' (2022)7 *Business and Human Rights Journal* 117: 127-128.

³⁶⁴ *Ibid.*

³⁶⁵ Matungu (n773)127.

³⁶⁶ <http://www.education.go.ke>.

³⁶⁷ Grace Mutungu, 'The United Nations Guiding Principles on Business and Human Rights, Women and Digital ID in Kenya: A Decolonial Perspective' (2022)7 *Business and Human Rights Journal* 117: 127-128.

³⁶⁸ Emily Rogena, *et al* 'A Review of Completeness, Correctness, and Order of Cause of Death Statements Among Decedents With Documented Causes of Death and HIV Status at Two Major Mortuaries in Kenya, 2015'. (2020) 73 *Journal of forensic and legal medicine* 73: 1-10.

inheritance matters and also for processing any legal claim.³⁶⁹ For these reasons, registration of a death and subsequent issue of a death certificate becomes a fundamental legal necessity.³⁷⁰

Registration of a death as a vital event was introduced in Kenya by the colonial government, though it was initially limited to foreigners.³⁷¹ When Kenya attained independence however, registration of all deaths occurring in the country became compulsory.³⁷² Every death of an individual, therefore, is a vital occurrence, requiring registration through the civil registration process.³⁷³

In Kenya, legal documentation after death consists of a permit for burial and the death certificate, both of which are issued under the Births and Deaths Registration Act.³⁷⁴ When someone dies, the notification of death is made to the State by the community through government agents,³⁷⁵ in the case of a death occurring away from a medical facility.³⁷⁶ In the case of a death occurring in a health institution, the government is notified by health personnel.³⁷⁷ A permit for burial is thereafter issued in accordance with the law.³⁷⁸ It is the permit for burial that is used to document the death in accordance with the civil registration process and subsequent issuance of a death certificate.³⁷⁹

Both the permit for burial and the death certificate are issued under the same legal regime as the Birth Notification and birth certificates, and take the same format in terms of sex/gender description.³⁸⁰ The two documents issued after death are structured in a manner that only accommodates the female and male sex, and specifically state so.³⁸¹ This effectively rules out inclusion of a deceased person who is intersex. The legal structure of these documents,

³⁶⁹ Ibid.

³⁷⁰ All succession and inheritance matters cannot be undertaken without the production of a death certificate as proof of death.

³⁷¹ Samwel Wakibi and Ezekiel Ngure, 'An Assessment of Knowledge, Attitude, and Practices of Birth and Death Registration in Kilifi County in the Coastal Region in Kenya' (2021) *BioMed Research International* 1-2.

³⁷² Ibid.

³⁷³ Carla AbouZahr et al, 'Civil Registration and Vital Statistics: Progress in The Data Revolution for Counting And Accountability' (2015) *Lancet* 1373-1385.

³⁷⁴ Births and Deaths Registration Act.

³⁷⁵ Government agents at the community level includes chiefs.

³⁷⁶ Justina Kivinda, 'Multi-agent based system for registration of deaths in Kenya' (Master's Thesis, University of Nairobi, 2012) 8.

³⁷⁷ Carla AbouZahr et al, 'Civil Registration and Vital Statistics: Progress in The Data Revolution for Counting And Accountability'. (2015) *Lancet* 1373-1385.

³⁷⁸ Births and Deaths Registration Act, Section 18. A permit for burial is also issued in situations where cremation will be done as well, see Section 21.

³⁷⁹ Justina Kivinda, 'Multi-agent based system for registration of deaths in Kenya' (Master's Thesis, University of Nairobi 2012) 8.

³⁸⁰ Births and Deaths Registration Act.

³⁸¹ A sample burial permit and death certificate are attached at Appendix 5.

conclude the domino effect of an intersex person's life of exclusion through legal identity, from the cradle to the grave.³⁸²

2.6. CONCLUSION.

This chapter set out to examine the legal regimes under which compulsory and other essential documents identifying their holders in Kenya are issued, to determine the gaps existing therein, and test the first hypothesis. Commencing with the birth notification form and the birth certificate, the first legal identity documents, the study demonstrates the gaps through which the intersex person is excluded. Similar gaps are seen in the national identity card, travel documents and social security membership documents, driving license and the KRA PIN certificate issuing regimes. All these crucial documents are structured in the binary sex/gender categorization, thereby excluding anyone born intersex. Even the digital identity registration systems commenced by the government post the the Persons' Deprived of Liberty Act, through which the term intersex was introduced in Kenya, still exclude the intersex person.³⁸³ Unless the regimes are amended, the result will be that as the country transitions to digital identification, official exclusion of intersex persons in Kenya will continue.

Yet, these sets of identity documents are essential for accessing crucial human rights in the spheres of health, education, and employment opportunities in Kenya. Intersex persons interviewed confirm the gaps and the manner in which they have been impacted. The narratives help affirmatively answer the first research question and achieve the first objective. Through the narratives, the first hypothesis which posits that there is a legal void in the documentation regime through which people in Kenya are conferred identity and citizenship documents is proven.

The chapter has thus helped demonstrate that the existing law, which contains the compulsory requirement of the sex/ gender description in all application forms identity documents, have all shut out the intersex person from the application process. Since the law is predicated on the assumption that every person should be classified into either of the two distinct and plainly identifiable sexes of male and female, the intersex gender marker does not have been provided

³⁸² See chapters one and two.

³⁸³ The NIIMS and NEMIS digital registration regimes as seen, are ongoing identity registration systems introduced in Kenya after the term intersex had found its way into the Kenyan Statutes through the Persons Deprived of Liberty Act, enacted in 2014. They however continue to perpetrate exclusion for the intersex person.

for. Accordingly, the intersex person remains unregistered and therefore undocumented.³⁸⁴ Those who are ‘registered’ find themselves squeezed into one of the two binaries, ultimately ending up with inaccurate ‘identity’ documents which become repressive for being discordant with their physical reality. These gaps have led to a section of people being excluded from the whole, contrary to the *Ubuntu* philosophy, which strives not to leave anyone behind, since, as Mangena rightly observes, person is a person amongst other persons.³⁸⁵

From Rasmussen and Wafer’s point of view, the identity documents examined in this chapter serve to confer credibility on the bearer.³⁸⁶ This credibility allows the bearer to navigate the complex demands in life, to present oneself as a credible in pursuit of their natural rights and needs as contemplated by naturalists.³⁸⁷ Without identity documents, access to a variety of rights during one’s life becomes an impossibility. The reality is that correct identification is required for purposes of attending school, to travel, secure employment and to conduct many other aspects of a person’s daily life. Indeed it would not be too farfetched to say that legal identity, demonstrated through identity documents, often determines a person’s destiny.

Needless to say, therefore, that the action of recognition by the government through accurate identity documents amounts to acceptance by one’s government, confirming that one exists, thus granting them an identity.³⁸⁸ Where a person lacks recognition and is not documented, that person lacks an identity, but even more significantly, numerous rights, including rights in the social and economic spheres end up being threatened. In Kenya where identity often determines destiny, having no identity documents at all or having documents reflecting an improper identity is bound to adversely impact a person’s access to socio- economic and sustenance rights. These rights include health in all its components, education and employment. The impact of non-recognition and non-documentation on these basic sustenance, economic and livelihood rights for an intersex person is the subject of analysis in the following chapter.

³⁸⁴ Without proper identity documents, one ends up being ‘de-citizenized’ and being stripped of nationality. Unregistered persons, as demonstrated in this chapter, are more or less denied citizenships and nationality.

³⁸⁵ Fainos Mangena, ‘African ethics through Ubuntu: A postmodern exposition’ (2016) 9 *Africology: The Journal of Pan African Studies* 2: 67.

³⁸⁶ Jacob Rasmussen and Alex Wafer, *Documentary evidence: Navigating Identity and Credibility in Africa’s Urban Estuaries* (2018) *African Studies* 15.

³⁸⁷ *Ibid.*

³⁸⁸ David E Wilkins, *Breaking into Intergovernmental Matrix: The Lumbee Tribe’s Efforts to Secure Federal Acknowledgments*. (University of Arizona Press 1993)123.

CHAPTER THREE.

IMPACT OF NON-RECOGNITION AND LACK OF DOCUMENTATION ON SOCIO-ECONOMIC RIGHTS OF AN INTERSEX PERSON.

3.1. INTRODUCTION.

The preceding chapters presents the argument that legal recognition is primarily achieved by registration and issuance of identity documents by the government to its citizens. It also establishes the critical role played by official identity documents towards legal recognition. Narrations by intersex persons reveal that non-recognition and the binary legal documentation 'norm' adopted in Kenya has resulted in gaps that has left many of them undocumented. Those 'documented' have ended up with ambiguous 'identity' documents reflecting the sex/gender imposed on them at birth, a sex/gender that is incongruent with their identity.¹ Gaps in the law and the binary structure of society, have led to intersex persons having 'identity' documents which misgender and therefore misrecognize them. 'Identity' documents which are in dissonance with one's physical appearance and biological composition can only misidentify who the person truly is.²

Situations of both non-documentation and possession of incorrect or ambiguous documentation essentially lead to negative legal and social limitations for the person concerned.³ These include limitations in access to a wide range of socio-economic rights necessary to sustain one's livelihood. Yet, the requirement that everyone should be able to freely access social economic rights means that everyone ought to enjoy the rights and entitlements necessary for one to sustain themselves and also to get by on a day-to-day basis. Accessibility to social economic and sustenance rights including the right to health, education and opportunities for employment should not just be unhindered, but should be made available for everyone regardless of their sex/gender or any other immutable characteristic.⁴ This category of rights is so connected and intertwined that denial of any one set almost always negatively affects the other. According to Munene and Okwany, there is a symbiotic relationship between these rights.⁵ Indeed,

¹ Interview with Rye and Jane in Nairobi on the 18th May 2019.

² Ibid.

³ Rye was for instance unable to access his legal right to social insurance for reasons that the description in his membership card is in consonance with his current true self.

⁴ Kithure Kindiki, *Legal Protection of Persons with Disabilities In Kenya: Human Rights Imperatives*, in Marcia Rioux et al (eds) *Critical perspectives on human rights and disability law* (Brill Nijhoff 2011)309-340.

⁵ Aurelia Munene & Auma Okwany, 'Interrogating The 'Artificial' Divide Between Health And Education For Children Aged 0-3 Years In Urban Poor Locales In Kenya'(2016) 6 *South African Journal of Childhood Education* 2: 8.

depending on the manner in which they are accessed or denied, the right to health, education and employment, can either end up building or constraining one another.⁶

This chapter examines this cluster of rights as it evaluates the impact of lack of identity documents and or possession of documents which are ambiguous on each of the selected rights. The study has opted to zero in on these three sets due to the fact that, as Munene and Okwany correctly point out, their nature is such that denial of one almost invariably adversely impacts the other.⁷ The negative effect of the gaps in the current documentation regime on the selected rights is evaluated from the perspectives of the personal experiences of people born intersex.

This chapter proceeds in three main parts through which the chapter tests the second hypothesis as it seeks to answer the first limb of the second research question and achieve the first limb of the second research objective. The first of these parts focuses on the impact of non-recognition and non-documentation on the health of people born with the intersex gender. Four key components of health, namely, physical, mental, reproductive and sexual health are evaluated in this part. The second part examines the right to education while the final one analyses employment opportunities in the face of the legal gaps existing in the identity documentation regime. Since accurate identity documents are essential for the enjoyment of all these rights, any form of hindrance affects the intersex person's entire life trajectory, as the narratives from the respondents illustrate.

3.2. RIGHT TO HEALTH.

The right to health is an important entitlement for every individual.⁸ Indeed, the attainment of health is not just central to but is completely dependent on the achievements and realization of many other human rights, including the right to life.⁹ The right to health is not limited to just physical health where the body is free from pain. The aspect of being of sound health is broad.¹⁰ Health encompasses several components all of which are critical for a human being to be considered healthy.¹¹ The right to health is therefore construed, not just from the point of view

⁶ Ibid.

⁷ Ibid.

⁸ Vincent Okungu Okongo. 'Towards Universal Health Coverage: Exploring Healthcare-Related Financial Risk Protection For The Informal Sector In Kenya' (PhD Thesis Faculty of Health Sciences, University of Cape Town 2015).

⁹ Eleanor Kinney, 'The International Human Right to Health: What Does This Mean for Our Nation and The World?' (2001) 34 *Indiana Law Review* 1460.

¹⁰ Ibid.

¹¹ Ibid.

of freedom from physical illness, but also from the attainment and maintenance of mental, reproductive and sexual wellbeing, angles which have hitherto been neglected in Kenya.¹² Holistic health accordingly incorporates, in addition to physical health, the components of mental health, reproductive and sexual health.¹³ An all-inclusive health is an integral part of every person's well wellbeing, the significance of which has been underpinned by several global, regional and domestic legal instruments. And as Ogendi posits, access to and interventions in healthcare should essentially be structured around the tripartite typology of respecting, protecting, and promoting human rights fulfilment.¹⁴

The following four subcategories therefore examine the manner in which the legal gaps created by non-recognition and non-documentation of persons of the intersex gender negatively impact these four universally acknowledged components of health.

3.2.1. RIGHT TO PHYSICAL HEALTH.

Physical health has been defined as the state of being free from illness and infirmity, in other words, the absence of illness.¹⁵ Looking at the right to physical health in its entirety, this right has been expanded to encompass not just the right to health, but the right to the highest attainable standard of health.¹⁶ This in itself implies a clear set of legal obligations on governments to ensure appropriate conditions for the access to and attainment of the highest standard of health. It also implies an obligation for governments to put in place systems that will help in enhancing the absence of physical pain for all its people without any discrimination.

Recognizing the importance of the right to health for every human being, several legal instruments have repeatedly reaffirmed the right over the course of history. Among the initial instruments to underscore the right is the Universal Declaration of Human Rights (UDHR).¹⁷ The use of the word 'universal' chosen by the drafters of this instrument serves to emphasize

¹²Lisa Owino *et al*, 'The Missing Link in Kenya's Universal Health Coverage Experiment: A Preventive And Promotive Approach To SRHR'(2020) 28 Sexual and Reproductive Health Matters 2: 89

¹³ Ibid.

¹⁴ Paul Ogendi *et al*, The Law and Ethics of Coronavirus Disease (Covid-19) in Kenya (2020) 4 Journal of Conflict Management and Sustainable Development 2: 22.

¹⁵ Veenhoven R, 'Healthy Happiness: Effects of Happiness on Physical Health and The Consequences for Preventive Health Care' (2008) 9 Journal of Happiness Studies 449-469.

¹⁶ The International Covenant on Economic and Social Cultural Rights,(ICESCR), the first instrument to specifically address economic and social cultural rights, captures this enhanced definition of the right to health at Article 12. Kenya ratified it in 1972.

¹⁷ The UDHR, having attained the status of customary international law is applicable even without ratification.

its key objectives in relation to the rights contained therein.¹⁸ Its intention is to set a specific standard for all the people everywhere.¹⁹ The rights contained in it are equal and inalienable for every member of the human family, and ideally ought to be equally availed to the intersex person who is a member of the human family. Regarding the right to health, the UDHR proclaims as follows:

‘Everyone has the right to a standard of living adequate for the health and well-being of *inter alia*, himself.’²⁰

But even before the adoption of the UDHR and subsequent international human rights instruments, the Constitution of the World Health Organization (WHO) had already captured this all-important right.²¹ While setting out its objectives, the WHO at Article 1 of its constitutive document, puts the attainment by all peoples of the highest possible levels of health as its main objective.²²

Other instruments through which the right to physical health is enshrined are the Convention on the Rights of the Child (CRC),²³ the Convention on the Rights of Persons with Disabilities (CRPD),²⁴ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁵ According to these instruments, everyone has the right to the highest attainable standard of health.²⁶ In relation to the protection and access to health for children, the provisions of two Articles of the CRC for instance stand out. These are Article 3 and 12. The significance of Article 12 is that it guarantees a child’s right to increasingly form and express their views freely regarding decisions concerning their health. This Article is specifically calling on State Parties to the Convention to enable a child who is capable of forming personal views, the right to express those views freely in all matters affecting them. The views of a child are meant to be given due weight in accordance with the age and maturity of the child.²⁷ In this regard, the specific provision states as follows:

¹⁸ UDHR, Preamble.

¹⁹ Ibid. The Preamble speaks to setting out a common standard to be applicable universally.

²⁰ UDHR, Article 25.

²¹ The World Health Organization (WHO) Constitution was adopted by the International Health Conference in 1946 entering into force in April 1948, while the UDHR was to follow in December of the same year.

²² Ibid.

²³ CRC, Articles 17, 23 and 24.

²⁴ CRPD, Article 25.

²⁵ CEDAW, Article 12.

²⁶ These instruments were adopted by the UN in 1989, 1979 and 2006 respectively. Kenya ratified them in 1990, 1984 and 2008 respectively. They all now form part of the law in Kenya as enunciated at Article 2(5) and (6) of the Constitution of Kenya 2010.

²⁷ Ibid.

‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child’.²⁸

On its part, Article 3 categorically provides that in all actions taken, the best interests of the child shall remain the primary consideration.²⁹ In addition to these measures, the CRC further requires State parties to ensure that every child enjoys the highest attainable standard of health.³⁰

The right to health for everyone in the African region is equally enshrined in key regional legal instruments.³¹ The African Charter on Human and Peoples Rights (ACHPR), was the first to lay the foundation of human rights in and for Africa.³² The objective of this document is to create a human rights instrument which is based on the African legal philosophy and also be responsive to the needs of the African people.³³ This was informed by the fact that majority of the African States were just gaining independence and there was need to have a document that they would align themselves to.³⁴ As it lays the foundation of human rights in Africa, ACHPR also places an obligation on State parties to enact legislation that will serve to give effect to the provisions of the Charter. It also establishes a Commission to oversee the rights enumerated therein for the people of Africa.³⁵

One of the key rights enumerated in ACHPR is the right to health. ACHPR categorically states that every individual shall have the right to enjoy the best attainable state of physical and mental health.³⁶ And for this right to be realized, ACHPR requires State parties to take all necessary measures to protect the health of its people.³⁷ These legal provisions have further been supplemented and complemented by key internationally accepted consensus documents, some of which Kenya has consented to.³⁸ These legal frameworks have been put together with the

²⁸ CRC, Article 12(1).

²⁹ Ibid, Article 3(1).

³⁰ Ibid, Article 24.

³¹ Kenya was among the founding countries of the Organization of African Unity (OAU), the precursor of the African Union (AU), through which the human rights instruments specific to the African region are adopted.

³² Richard Gittleman, *The African Charter on Human and People's Rights: A Legal Perspective* (1982) 22 Virginia Journal of International Law, 4: 668.

³³ Ibid.

³⁴ Ibid.

³⁵ Kenya ratified the ACHPR in 1992.

³⁶ ACHPR, Article 16.

³⁷ Article 17 of the ACHPR calls upon the States Parties to the Charter to take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

³⁸ Among these are the two sets of Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, the Yogyakarta Principles (2006) and Yogyakarta Principles plus

intention of ensuring the enhancement and protection of the right to health for every member of humanity.

At the domestic level, Kenya has recognized the importance of the all-inclusive right to the health of all its citizens, the Constitution of Kenya, 2010 being the first to do so by stating that:

‘Everyone has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care...’³⁹

These constitutional provisions have been given effect by the Health Act.⁴⁰ One of the key objectives of the Health Act is to enable access to the highest attainable health services at the national and county levels for everyone. In compliance with the constitutional provisions, the right to health extends to everyone including vulnerable members of the society.⁴¹ This applies to both private and public health institutions. Sadly, for most intersex persons, non-recognition and non-documentation means that none of these international, regional, or domestic protective provisions have been translated into reality. Several instances of violations of the right to health continues to occur and takes many dimensions as explained in the following sub segments:

3.2.1.1. DISCRIMINATION AND EXCLUSION.

Mbote *et al* point out that the right to health is a fundamental right which should be accessed free from any discrimination.⁴² For intersex persons however, discrimination and exclusion in accessing health care starts right from the moment an intersex person enters a health facility seeking curative health services. The registration forms used to identify a patient for purposes of accessing health care as well as the records in both private and public health facilities are all designed along the binary in terms of sex/gender.⁴³ The structure of these documents is an extension of the identity documentation regime in place in the country as analyzed in the previous chapter.⁴⁴ The binary sex/gender structure provided in the data gathering medical

10(2017).The Sustainable Development Goals 2030 also constitute the set of principles that many countries including Kenya have conceded to and try and aspire to.

³⁹ Constitution of Kenya, 2010, Article 43 (1)(a).

⁴⁰ The Health Act Number 21 of 2017 (Laws of Kenya).

⁴¹ Ibid, Section 3(c).

⁴² Patricia Kameri-Mbote, Devolved Health Care Service Delivery in Kenya within the Human Rights-Based Approach: Success or a Mirage (2017) East African Law Journal, 40.

⁴³ The researcher visited several public and private health facilities and confirmed that the outpatient and inpatient forms are structured in the binary. This structure restricts the intersex person in terms of choosing their appropriate gender.

⁴⁴ The structure of the various forms through which identity documents and certificates are applied for in Kenya was extensively analyzed in Chapter 2.

records, which is based on the historical and social perception that there can only be two sex/genders, forces an intersex patient to register as a patient in a sex/gender that they may not belong to.⁴⁵ The way an intersex person seeking healthcare services registers in a health institution mainly depends on the identity documentation they are holding and the name and sex/gender assigned to them at birth. Intersex persons encounter humiliating, traumatizing and discriminatory moments from the point their names are called for purposes of accessing medical care, especially if these do not match the names, sex/gender, and the physical appearance. KK, whose imposed name, sex/gender and identity documents are discordant with his physical features has experienced this many times as he narrates below:

‘When I visit a health facility as a patient, the forms through which I am required to give my details for purposes of identifying myself require me to register my sex/gender. I can only opt for ‘male’ or ‘female’, given that those are the only two options provided. My identity card bears the names Flo KK and my sex/gender as female, so those are the details that I am forced to record on the hospital forms, yet my physical features are masculine. When the registering clerk calls out my name and I stand up in response, the reaction is almost always usually the following:

‘Who are you? I called the patient Flo KK. Is it your daughter? Is it your wife? Is it someone that you have brought to the hospital?’⁴⁶

According to KK, this hostile reaction is because his typical male physical appearance and his documentation are completely at variance. The registering person cannot comprehend how the male person standing before him/her is the holder of the identity document and registration forms bearing female names and a female sex/gender. The health sector legal forms therefore initiate the discrimination process for the intersex person looking for health services. More challenges await the intersex person when they eventually reach the doctor, who will already have medical identity forms that will have misgendered the patient. The attending medical person will then continue misgendering the intersex person, and automatically bracket them in the sex/gender that the medical identity documents have forced them into. The medical person will proceed to take the necessary health history in accordance with the sex/gender stated in the medical forms. The nature of the treatment will also be alongside the sex/gender indicated on

⁴⁵ Gwendolyn B. Moscoe, ‘Beyond The Binary: A Proposal For Uniform Standards For Gender Identity And More Descriptive Sex Classifications In Electronic Medical Records’. (Master’s Thesis, Oregon Health & Science University 2014).

⁴⁶ Interview with Flo KK (referred to as KK seudonym), in Nairobi on the 16th December 2020.

the medical identity form, even though the patient may identify with the opposite sex/gender. This will be the case even though their medical needs will be unique because of being intersex. This means that access to healthcare services become inappropriate, inadequate, undeserving as well as disrespectful of their bodily diversity, contrary to what was contemplated by the Council of Europe.⁴⁷

Whenever KK visits a health facility, he always gets asked the question when he last menstruated, a standard medical inquiry usually reserved for patients of the female sex/gender. KK finds this inappropriate since he gets branded a female through the sex/gender marker on the hospital registration forms and the female sex/gender forced on him by the structure of the documents' regime in Kenya. The medical facilities therefore consider him a female for purposes of treatment, a sex/gender that he does not belong to. And so long as the documentation regime remains unaltered, the medical personnel will continue misgendering him by assuming that he is female. Accordingly, they will continue to construct irrelevant medical history questions for him.⁴⁸

KK has many times been too distressed to continue with the process of seeking medical attention for his ailments, resulting in denial of access to this all-important right. This means that the nature of the documentation that intersex persons are legally forced into serve to deny them the right to health.⁴⁹ This denial occurs and continues to occur despite its guarantee by human rights instruments, which require enabling access and enjoyment of the right to the highest attainable standard of health for all.

3.2.1.2. INTERSEX GENITAL MUTILATIONS.

One of the greatest violations of the right to health for intersex persons is occasioned through nonconsensual nontherapeutic so called 'corrective' surgeries and other forms of medicalization undertaken on infants and young intersex children.⁵⁰ Research has shown that various forms of intersex genital 'correction' procedures usually result in significant physical and psychological pain and harm that could possibly affect the victim's future life.⁵¹ These 'normalization' procedures continue to happen despite the universal legal requirement for

⁴⁷ Council of Europe, *Human Rights and Intersex People* Issue Paper Number 32 (Council of Europe, 2015)32-33.

⁴⁸ Interview with KK .

⁴⁹ Ibid.

⁵⁰ Kishka-Kamari Ford, First, Do No Harm : The Fiction of Legal Parental Consent to Genital Normalizing Surgery on Intersexed Infants, (2000) 19 Yale Law and Policy Review, 469.

⁵¹ Ibid, 469-470.

States to take effective measures to abolish all practices prejudicial to the health of children.⁵² Again, there's in place a prohibition against anyone being subjected to nonconsensual surgeries and medical procedures including surgeries to the genitalia. This is a legal right available under the legal framework applicable in Kenya at the various levels.⁵³ Article 3 and 12 of the CRC read together for instance, can be interpreted to mean that any form of medicalization permanently modifying a child's body, or affecting their general health, should expressly be consented to by the child in line with their best interests.⁵⁴ Indeed, intersex persons have moved the court in two landmark attempts, hoping to get a judicial pronouncement regarding violation of their right to health through unregulated surgical medicalization.⁵⁵ The forms of unregulated and intrusive surgical and other forms of medicalization are what Mama A, Baby A's mother, was trying to get the court to put a stop to, when she moved the court in one of these landmark cases.⁵⁶

Regarding the right to health and access to health services, Baby A's petition brought to the attention of the court the fact that children belonging to the intersex community, suffer and continue to suffer violations of *inter alia*, their right to holistic health. According to Mama A, intersex children end up getting their right to health violated because of their sexual disposition and usually ended up getting substandard healthcare services.⁵⁷ But more importantly, intersex persons continue to be subjected to the so called 'corrective' and usually unnecessary surgeries.⁵⁸ Mama A was pleading with the court to help stop the surgeries unless there was a therapeutic need to conduct them. This is because nontherapeutic surgeries amount to forced genital 'normalization', involuntary sterilization and unethical experimentation.⁵⁹ The procedures also often lead to irreversible changes to the body and interfere with the child's right to health including to their reproductive and sexual health later in life.

Mama A was bringing to the attention of the court the fact that intrusive surgeries of unknown extent and levels were conducted on her child, and on other intersex children, at Kenyatta

⁵² CRC, Article 24 (3).

⁵³ Kenya has in fact legislated against genital mutilation through the Prohibition of Female Genital Mutilation Act, No. 32 of 2011, (Laws of Kenya).

⁵⁴ CRC, Articles 3 and 12.

⁵⁵ *Baby A and RM*. In *Baby A* for instance, the Petitioners' contention was that the doctors at Kenyatta National Hospital, one of the major public referral hospitals in Kenya, were carrying out unexplained experiments and tests in a bid to determine Baby A's 'dominant sex', a demonstration of the need to address the violation of intersex persons' right to physical, reproductive and sexual health in Kenya.

⁵⁶ *Baby A*.

⁵⁷ *Ibid*, Para 25.

⁵⁸ *Ibid*, Para 4.

⁵⁹ *Ibid*.

National Hospital, the largest public hospital in Kenya. This was being done without any disclosure of information to the child's mother or her consent.⁶⁰ The court was therefore being called upon to stop such medicalization by directing that such surgeries be done only when the child was of an age to make an informed decision.⁶¹ The position then was, and still is, that if there is a medical need for medicalization to take place, a set of treatment protocols needs to be put in place and followed. Carrying out unnecessary medicalization on intersex genitalia without the child's informed consent violates the rights of intersex children as set out by the CRC.⁶² And if the medicalization is not in the immediate best interest of the child, there is a need to involve the child concerned before any surgery or medicalization is carried out.⁶³

Free, informed, and prior consent before any surgery or medical procedure is carried out, is a requirement under human rights and medical ethics currently in place and applicable in Kenya.⁶⁴ The Universal Declaration on Bioethics and Human Rights (UDBHR) for instance provides that all medical treatments must be performed with full consent of the person involved.

⁶⁵ The specific requirement provides as follows:

'Preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason....⁶⁶

The UDBHR emphatically points out that exceptions to this general principle should only be made in accordance with ethical and legal standards adopted by States.⁶⁷ Exceptions would also have to be consistent with the principles and provisions set out in Article 27 of the UDBHR, as well as other provisions set out in international human rights law instruments.⁶⁸ Being a Declaration, member States are required to incorporate the provisions of UDBHR into their

⁶⁰ This was contrary to the Constitutional entitlement to information as envisaged at Article 35 of the Constitution.

⁶¹ The Court was being called upon to make a declaration like the one made by the Constitutional Court in Columbia in cases which involved similar facts. The cases decided by the constitutional court of Colombia are comprehensively discussed in chapter five, but basically, they served to outlaw unnecessary genital realignment procedures which amounts to intersex genital mutilations (IGM).

⁶² CRC, Article 19(2).

⁶³ Interview with Mama A in Nairobi on 17th October 2019.

⁶⁴ Amnesty International note to the European Parliament, Available at <https://www.amnesty.org/documents/ior6/014/2011/en/> (Accessed on 16th December 2019).

⁶⁵ The United Nations Educational, Scientific and Cultural Organization (UNESCO) Universal Declaration on Bioethics and Human Rights (UDBHR) at Article 6(1). This instrument was adopted in 2005.

⁶⁶ Ibid.

⁶⁷ UDBHR, Article (6)2.

⁶⁸ Ibid Article 6(2).

national laws, regulations and policies.⁶⁹ Kenya has done this through a number of legislative provisions, among them the Constitution of Kenya, 2010.⁷⁰ Kenya has also incorporated the provisions of the UDBHR through adoption of the National Council for Science and Technology (NCST), now known as National Commission for Science Technology and Innovation (NACOSTI) Guidelines for Ethical Conduct of Biomedical Research Involving Human Subjects in Kenya, known as ‘Human Subjects’ Guidelines’.⁷¹

UDBHR further requires that if the person involved is incapable of giving consent, then the best interests of the person should be paramount in the decision making.⁷² The two sets of the Yogyakarta Principles additionally forbid forced genital corrective medical procedures.⁷³

These legal requirements and standards therefore impose the need for informed consent for biomedical research. When it comes to certain forms of treatment and or surgical and other interventions, the line is really blurred between actions of a physician offering the treatment and those of a researcher, given that the treatment is usually experimental and investigative.⁷⁴ Indeed, as the lived experiences of the intersex persons and their parents interviewed demonstrate, many cases become not just experimental but also investigative. Most of them end up being botched. This therefore increases the need for an informed consent from the person the subject of the medical experiment. This notwithstanding, nonconsensual non informed surgical operations and other forms of medicalization continue to be performed on intersex children continually affecting their right to holistic health. In *Baby A*, Mama A describes some of the health implications for the child resulting from the surgeries performed on him at Kenyatta National hospital and other medical facilities as follows:

‘The surgeries performed on Baby A, and which I was trying to bring to the attention of the court were conducted on the child to try and change the child’s external genital organs to fit those of a male and convert the child into a male. The series of surgeries, which were never explained to me, involved stitching up his vaginal opening. The child

⁶⁹ Adèle Langlois, ‘The UNESCO *Universal Declaration on Bioethics and Human Rights*: Perspectives from Kenya and South Africa’(2008) 16 *Health Care Anal* 1: 39–51.

⁷⁰ Chapter Four of the Constitution of Kenya 2010 contains a comprehensive Bill of Rights.

⁷¹ These Guidelines were adopted through the then National Council for Science and Technology (NCST), now National Commission for Science, Technology & Innovation (NACOSTI) which was established through the enactment of the 2013 Science and Technology and Innovation Act No.28 (Laws of Kenya).

⁷² NCST, Article 7(a).

⁷³ Principle 3 of the 2016 Yogyakarta Principles forbids forced sex reassignment surgeries while Principle 10 of the Yogyakarta Principles +10 secures the freedom from torture, cruel inhuman degrading treatment.

⁷⁴ M Wekesa, *Challenges In Regulation of Biomedical Research: The Case of Kenya*. (2015) 18 *Nigerian Journal of Clinical Practice*, 25-26.

was left with a huge scar that gets extremely painful and often itchy. Many times, you will find the child scratching the genital area even in public. The child then becomes, the subject of public stares and cruel jokes.⁷⁵

The interview with Jane affirms that her child suffered a similar fate:

‘Sebbo’s male genital organs were chopped off. This was followed by a regimen of application of female hormones to convert him into a female person. While his penis did not grow back, his gonads regenerated. They have now enlarged significantly.⁷⁶ The female hormonal medicalization made his breasts and hips significantly enlarge, yet the child identifies as a boy. The doctors therefore got it all wrong. My child was permanently affected.’⁷⁷

Mama Rosie’s child’s case is even more tragic. She recounts the violation of her child’s right to health as follows:

‘Rosie was born with both male and female genital organs. The doctors operated on the child when the child was an infant and removed the male genital organs. In the process, the child’s ‘tube for urinating was cut’. Now the child cannot control the urinating process. The urine just flows. The child is always leaking and smelling of urine. The child has to be in diapers throughout, which I cannot afford. For the past eleven years, I have been bringing the child to Kenyatta National Hospital once a month, but I don’t think there is anything the doctors will ever be able to do. This operation which I was told was going to help my child ended up destroying my child.’⁷⁸

Sebbo and Rosie were not given an opportunity to mature enough to give an informed consent. If they had, their right to physical health may not have been violated in the ways demonstrated above.

For Mercy, the fact that she was not provided with an opportunity to give an informed consent for the genital ‘normalization’ surgery that converted her into a ‘female’ means she continues

⁷⁵ Interview with Mama A in Nairobi on 17th October 2019.

⁷⁶ Ibid.

⁷⁷ Interview with Jane in Nairobi on 18th May 2019.

⁷⁸ Interview with Mama Rosie (pseudonym) on telephone from Kenyatta National Hospital, Nairobi on 17th December 2020.

to suffer the many documented repercussions on her right to health.⁷⁹ She is in constant genital pain, suffers discomfort and is prone to frequent infections to her genitals.⁸⁰ In the cases of Sebbo and Rosie, they were practically and effectively castrated. Literature has captured cases of this nature where children are castrated thereby affecting their right to all the dimensions of health for the rest of their lives.

Cases of intersex castration documented elsewhere include that of Daniela, a person born intersex and who was subjected to nonconsensual non informed genital procedures resulting in genital mutilation, castration and amputation.⁸¹ In Daniela's case, the doctors chopped the testicles and penis off and threw them into the bin. When they realized that they had made a mistake, they attempted to modify Daniela's genitalia into those of a female through a series of medical and surgical interventions. This saw Daniela spent most of her/his childhood in medical facilities undergoing countless examinations to her/his genitals and urethra. All these procedures were undertaken without consent from the child or parents.⁸² Sebbo and Rosie's right to physical health have similarly been affected. Their male genital anatomy was chopped off causing them a lot of physical pain and long term complications. Sebbo has for instance been in and out of hospital numerous times, spending months as an inpatient for successive surgical and other forms of medicalization, including hormonal interventions. This has been in a bid to complete the female 'editing' process began when the surgeons chopped off his male genitalia. Rosie has suffered and continues to suffer the effects of the surgical treatment the child underwent without the child's knowledge or consent. This would not have been the case had the children been accepted as intersex in the first place.

Failure by the law to recognize and document intersex persons has led to violations of protection from subjection to treatment detrimental to a person's physical health as the cases encapsulated above demonstrate. This failure has in addition led to violation of the right to mental health as the sub segment below establishes.

3.2.2. RIGHT TO MENTAL HEALTH.

Mental health has intricately been tied to physical health. For this reason, the World Health Organization (WHO) conceptualizes health as a state of complete physical, mental and social

⁷⁹ Cristian Conzalez Cabrera, *Law in Mediating Between the Rights of Parents and their Children Born with Intersex Traits in the United States*. (2018) 24 *William & Mary Journal of Women and the Law*, 462.

⁸⁰ Ibid.

⁸¹ Ibid, 460.

⁸² Ibid.

wellbeing.⁸³ Indeed, according to WHO, there cannot be physical health without mental health.⁸⁴ WHO's constituting instrument categorically affirms this by stating as follows:

‘Mental health is a state of complete physical, mental, and social wellbeing and not merely the absence of disease or infirmity.’⁸⁵

When the International Covenant on Economic and Social Cultural Rights (ICESCR) was eventually put in place with the sole objective of protecting social economic rights, the right to health was restated and expanded.⁸⁶ The restatement and expansion took the form of making two additions to what the UDHR had initially proclaimed.⁸⁷ The right to ‘mental health’ was added alongside ‘the highest attainable standard’. The ICESCR's comprehensive definition of this component of the health is contained at Article 12 and states as follows:

‘The States Parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’⁸⁸

Through these additions, the ICESCR is reinforcing this right by making provision for the right to the highest attainable standard of mental health alongside that of physical health for everyone, thus placing an obligation on State parties to comply with the requirements.⁸⁹ In addition to providing for the rights to dignity⁹⁰ and equality, the ICESCR consequently echoes the mandatory requirement that everyone shall have the right to the enjoyment of the highest attainable standard of physical and mental health.⁹¹ Indeed, the English case of *Regina v Newton and Stungo*,⁹² has determined that health means not just physical health but mental health as well.⁹³ In this regard, the global legal regime demands that Kenya, being a State Party to the Covenant, undertakes to not only achieve full realization of the right to health, but to also take steps to ensure the creation of conditions for access to health and health services for all.⁹⁴

⁸³ The Constitution establishing the World Health Organization was adopted by the International Health Conference in 1946 entering into force in 1948.

⁸⁴ World Health Organization, *Mental Health: Facing the Challenges Building the solutions*, Report from the WHO European Ministerial Conference. Copenhagen Denmark WHO Regional Office for Europe 2005. See also Global Health1 No Health without mental Health: Martin Prince *et al* (The Lancet, Elsevier 2007)859.

⁸⁵ The World Health Organization (2013) *Mental Health Action Plan 2013-2020* and World Health Organization (2015) *Mental Health Atlas*, 2014, have similar provisions.

⁸⁶ ICESCR, Article 12.

⁸⁷ *Ibid*.

⁸⁸ *Ibid*, Article 12 (1) 2.

⁸⁹ *Ibid*, Article 12.

⁹⁰ *Ibid*, Preamble.

⁹¹ *Ibid*, Article 12(1).

⁹² *Regina v Newton and Stungo* [1958] Crim LR 469).

⁹³ *Ibid*, Para 107.

⁹⁴ ICESCR, Article 12 (2) (d), sets out the steps to be taken by the States Parties to the Covenant to achieve the full realization of the right to health.

This in turn implies the requirement for the removal of conditions that come in the way of that access for any human being.

Kenya has, through the Ministry of Health, heeded this call by linking mental and physical health, and stressing that mental health is an integral part of health.⁹⁵ By adopting the WHO's definition of health, the Ministry has similarly viewed health not merely as being the absence of infirmity but as a state of complete physical, mental and social wellbeing.⁹⁶ The two prongs of mental and physical health are therefore inseparable. Indeed, it is unlikely that one can enjoy good physical health without sound mental health. As a result of this important linkage, mental health has been classified as a human right.⁹⁷

Mental health is a component of health that is dependent on many aspects. According to a report by the WHO, just like many physical illnesses, mental illness and behavioral conditions are the results of a complex interaction between biological, psychological and social disorders.⁹⁸ These disorders present themselves in the form of depression and suicidal tendencies, among others presentations. The multiple social, psychological and biological factors determine the level of the mental health of a person at any point in time.⁹⁹ A balance of these factors is, therefore, important for one to have sound health.

Despite the emphasis placed on the importance of presence of mental health, accessing this component of health has been quite challenging for intersex persons. Reasons for these challenges stem from non-recognition and failure to accurately and appropriately document persons born intersex. Failure by the regime to make legal recognition provisions for intersex births means that when a child is born intersex, that child is immediately rejected by the law. Following this rejection by the law, the available identity documents' regime attempts to force the intersex child into one of the available sex/gender brackets. The child may not necessarily belong to the bracket they are forced into. The result is that most intersex persons forced into a sex/gender they do not belong to are left in a state of mental confusion, sex/gender dysphoria mental trauma and depression as they grow up in a body clashing with their legal reality.¹⁰⁰

⁹⁵ Ministry of Health, *Kenya Mental Health policy (2015-2030)*, (Ministry of Health 2015) 6.

⁹⁶ World Health Organization, *Mental Health: Facing the Challenges Building the solutions*.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ World Health Organization, *Mental Health: Strengthening Our Response* (World Health Organization 2018). <https://www.who.int/news-room/fact-sheets/detail/mental-health-strengthening-our-response>. (Accessed on 3rd May 2020).

¹⁰⁰ Cristian Conzalez Cabrera, Law in Mediating Between the Rights of Parents and their Children Born with Intersex Traits in the United States (2018) 24 William & Mary Journal of Women and the Law 459.

Other mental health difficulties involve traumatic stress, anxiety, social withdrawal, depression, self-harm, and suicidal attempts. Some resort to committing suicide.¹⁰¹

When the law, the immediate family members and the community reject and disowns a person, grave mental health difficulties arise as Syd narrates below:

‘I know from my personal experiences that intersex people suffer rejection and I also know that rejection causes mental health problems. My parents rejected and disowned me when I was born different. Many times, I sought an explanation as to why I was the way I was, but my parents never had any answer for me. Instead, they found me a burden. Eventually at the age of thirteen, I had to go into the streets to fend for myself where I was doubly affected by the harsh street life because of my condition. I did not complete my schooling, I suffered stress which eventually translated into severe depression. I have been battling depression for many years. Many times, I attempted to kill myself’.¹⁰²

Syd is not the only intersex person who has attempted suicide because of being born intersex and being rejected. Mercy’s case is not any different. She underwent genital mutilation to convert her into a female at infancy. She got to know that she had been born intersex when she was old enough to question her mother regarding the scarring to her genital organs. Her body has now completely defied the known female features which the doctors and her parents tried to fit her into. She has been unable to fit in the society. Her mental health has as a result been severely affected. She suffers from psychological trauma, gender dysphoria and depression which are the documented repercussions of nonconsensual genital mutilations through genital ‘normalizations’.¹⁰³ According to Mercy’:

‘My depression has been so severe and so extreme that at some point in my life I turned to substance abuse, including *bhangi* (*Kiswahili* for cannabis sativa) to find solace. On more than two occasions I have contemplated suicide. I once attempted to kill myself’

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¹⁰¹ International Institute for Legislative Affairs (IILA)Kenya: *The Many Faces of Mental Health in Kenya*. (International Institute for Legislative Affairs (IILA)Kenya, 2019) 14-22.

¹⁰² Interview with Syd in Nairobi on 16th December 2019.

¹⁰³ Cristian Conzalez Cabrera, Law in Mediating Between the Rights of Parents and their Children Born with Intersex Traits in the United States. (2018) 24 William & Mary Journal of Women and the Law 462.

¹⁰⁴ Interview with Mercy.

Langa and Rye's experiences typify the experiences of many intersex persons born in a country where no legal recognition or documentation exists. Their experiences also typify the negative impact on intersex person's mental health.¹⁰⁵ They too suffered serious mental health issues and have attempted to kill themselves a number of times.¹⁰⁶ Both were hidden by their parents in the female sex marker, a sex marker that they do not belong to. Since both have pronounced male genitalia although they were raised as females, society has always made them feel abnormal and they have frequently been objects of public curiosity. They have both battled severe depression most of their lives.¹⁰⁷

Those battling depression and psychological turmoil are confronted by even further mental health challenges in the form of lack of accessibility to mental health services. Although the legal regime at various levels demands that adequate standards of mental health services be availed to all the people, intersex persons cannot always access these services. Psychiatric treatment is usually financially prohibitive in Kenya generally.¹⁰⁸ This means that such specialized treatment is even more prohibitive for most intersex persons. Since support services are unavailable, only a few are able to access the services. This becomes a huge struggle. Except for a few organizations that offer support through counselling services, intersex persons undergo a multitude of problems with regard to their mental health.¹⁰⁹ There is no guidance on how to handle the situation and most end up getting into damaging and self-harming practices or even worse, ending their lives.¹¹⁰ While Langa and Rye are lucky to be alive today, there are known cases of intersex persons who have committed suicide.¹¹¹

The negative impact of legal non-recognition and non-documentation of intersex persons on their physical and mental health rights is further compounded by the challenges that they have to undergo in relation to their sexual and reproductive health rights as the two subsections below establish.

¹⁰⁵ Interview with Langa and Rye respectively on 18th May 2019.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ International Institute for Legislative Affairs (IILA)Kenya: *The Many Faces of Mental Health in Kenya*. (International Institute for Legislative Affairs (IILA)Kenya, 2019) 32.

¹⁰⁹ Nongovernmental organizations such as 'Intersex Persons Society of Kenya' and 'Jinsiangu', have been attempting to provide psychological and psychosocial support to their members, but are usually overwhelmed by the demands.

¹¹⁰ Interview with KK and Syd in Nairobi on 16th December 2019.

¹¹¹ KK explains that he has, in the course of his work with a support organization he works with, come across cases of intersex persons who could not cope anymore and ended up taking their lives.

3.2.3. RIGHT TO REPRODUCTIVE HEALTH.

Reproductive health is the third but equally important component of health. Reproductive health rights have been described as those rights which uphold reproductive health and protect an individual's ability to decide whether or not to reproduce or to have children.¹¹² Access to reproductive health right means removing obstacles that would hinder access to or otherwise interfere with reproductive health services. Reproductive health right also relates to availability of reproductive health services. But most importantly, especially in the context of intersex persons, it means protection from nonconsensual interference with any of their reproductive organs, systems, functions, or processes. Reproductive health rights are zealously guarded universally and regionally by key instruments providing protection for the right to health. They are equally well guarded at the domestic level.

In Africa for instance, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), speaks to reproductive health rights as well as to sexual health rights.¹¹³ With regard to reproductive health, the Protocol significantly calls for the elimination of all harmful practices in addition to obligating State Parties to stop all practices which negatively affect women and girls. The Maputo Protocol goes further to call for the eradication of medicalization and para medicalization of genital mutilation.¹¹⁴ The right to access health care without discrimination is equally emphasized in the Maputo Protocol. This instrument proceeds to obligate State parties to remove impediments to the health services reserved for women. Such impediments have been listed as certain ideologies and belief-based barriers which affect the right to health. There is also the general obligation for the State to take necessary measures to prevent third parties from interfering with the enjoyment of women's sexual and reproductive rights.¹¹⁵

The Maputo Protocol is the only comprehensive human rights instrument addressing sexual and reproductive health rights in Africa. However, its remit is specific to girls and women. This means that there is complete absence of reproductive health rights protection for intersex persons since they do not fall in the category of 'girls' and 'women'. Yet, intersex persons need precisely the kind of protection that the Protocol offers especially in relation to prohibition

¹¹² Lance Gable, 'Reproductive Health as a Human Right'. (2010) 60 Western Reserve Law Review 4: 960.

¹¹³The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), was adopted in 2003 with the objective of strengthening the provisions of the ACHPR in promoting and protecting the rights of women in Africa. Kenya ratified it in 2010 subject to certain reservations.

¹¹⁴ Maputo Protocol, Article 5(b).

¹¹⁵ Ibid.

of non-consensual medicalization of their external genitalia. The Maputo Protocol seeks to prevent genital mutilations for people of the female sex/gender in the region of Africa. Kenya has indeed bolstered the protective provisions of this instrument through legislation.¹¹⁶ As pointed out to the court in *Baby A*, non-therapeutic surgeries are conducted on children born intersex under the guise of corrective surgery. Medicalization procedures meant to fix intersex persons into one or the other sex categorization legally recognized in Kenya which completely alter an intersex person's natural reproductive structure are also not uncommon.¹¹⁷ Indeed, genital mutilations regularly conducted on intersex children in Kenya are documented.¹¹⁸ They usually result in genital mutilations, involuntary sterilization, and sometimes outright castration/genital amputations. The nature of these procedures is such that they interfere with the reproductive health rights of the victims in many ways. Usually, they end up stripping the victim not just the right, but the capacity and capability to decide whether or not, to have children biologically later in life.

For Mercy, nonconsensual genital 'normalizations' has affected her reproductive health. Since her male reproductive organs were removed in a bid to document her as a female, she cannot have children biologically.¹¹⁹ For Sebbo, the surgical removal of his penis and testicles amounted to castration, in total violation of his right to reproductive health.¹²⁰ Subsequent hormonal medicalization to convert him into a 'female' only ended up creating more confusion for him as a person.¹²¹

The other major reproductive health challenge for intersex persons is with regard to their menstruation processes and the associated health complications. A study of the menstrual experiences of schoolgirls in Kenya shows that good menstrual management generally results in improved reproductive and sexual health wellbeing.¹²² For the intersex person however, non-documentation means that their menstruation needs are generally unmet, resulting in a major denial of their reproductive health rights. Syd for instance, even though he does not fit in the female sex/gender category, has a uterus and therefore menstruates. In his words,

¹¹⁶Prohibition Against Female Genital Mutilations Act No 32 of 2011(Laws of Kenya).

¹¹⁷Interview with Jane in Nairobi on 18th May 2019.

¹¹⁸ *Baby A*.

¹¹⁹ Interview with Mercy in Nairobi on 18th May 2019.

¹²⁰ Interview with Jane in Nairobi on 18th May 2019.

¹²¹ Ibid.

¹²² Linda Mason *et al*, 'We Keep It Secret So No One Should Know: A Qualitative Study to Explore Young Schoolgirls Attitudes and Experiences with Menstruation in Rural Western Kenya' (2013) 8 Plos 11: 1-11.

‘When I am menstruating, I have such a heavy flow and such painful cramps that I am unable to leave the house. I have not been able to get a gynecologist or any medical person who understands intersex conditions in Kenya to assess my ailments. The health facilities that I have gone to do not understand how a man can be menstruating. I therefore suffer in silence every time my menstrual cycle starts.’¹²³

When Syd was placed in a female sex/gender category and was documented as such, he ended up being misgendered. In reality, an intersex person is neither a male nor a female. An intersex person belongs to an intersex gender. Due to misgendering, Syd has had to undergo discriminatory, humiliating, and stigmatizing moments when trying to access reproductive health services. Many times, when he has gone to a health facility in search of medical assistance on account of his painful menstruation and abdominal cramps, health care workers have asked him:

‘how can a man be getting periods?’¹²⁴

Syd has consequently stopped seeking medical attention for his menstruation related problems since no one seems to understand his condition. He has instead opted to self-medicate.

Assa’s reproductive health problems are similar as she narrates below:¹²⁵

‘I get extremely painful and heavy periods. I have been to the ‘Russian’ Hospital in Kisumu many times, but there is no one there who knows how to treat me.’¹²⁶ No one seems to understand my condition.’

The fact of non-recognition and non-documentation not only means that reproductive health rights for intersex persons are not only violated but also that the right to access reproductive health services remain largely unfulfilled for those who need them. Non recognition and non-documentation has, in addition to affecting the above three components of health, equally affected the right to sexual health as the final sub segment below explains.

¹²³ Interview with Syd in Nairobi on 16th December 2019.

¹²⁴ Ibid.

¹²⁵ Interview with Assa on telephone from Kisumu on 16th August 2020.

¹²⁶ The ‘Russian hospital’ is the ‘Jaramogi Oginga Odinga Teaching and Referral Hospital’ in Kisumu. It is usually referred to as the ‘Russian’ hospital by the residents due to the funding it received from Russia during its construction in the early 1960’s.

3.2.4. RIGHT TO SEXUAL HEALTH.

In addition to the violation of the reproductive health rights and denial of access to reproductive health services examined in the preceding subsections, non-recognition and non-documentation have resulted in the curtailment of sexual health rights for intersex persons.

Sexual health is an important element of health that has been recognized under the human rights regime. This right encompasses the right for everyone to have a healthy sexual life. According to the World Health Organization (WHO), sexual health as currently understood, rests on the rights of individuals to freely express their sexuality in consensual relationships. Sexual health rights also include the right to participate in activities such as marriages and starting a family and to have access to the highest possible standards of sexual health.¹²⁷ Sexual health was first defined in the WHO Technical Report series in 1975. The Report describes sexual health as the integration of somatic, emotional, intellectual, and social aspect of sexual beings in ways that are positively enriching and that enhance personality.¹²⁸

And although the aspect of sexual health is rarely discussed, it is a right that has been in existence for several decades. Among the first international consensus documents to address sexual health alongside physical, mental and reproductive health was the Beijing Declaration and Plan of Action adopted during the Fourth Women's Conference in 1995.¹²⁹ The world Health Organization took this further by acknowledging the need to include sexual health as an important element of the health of an individual.¹³⁰ In one of its publications, WHO underscores the importance of sexual health by describing it as:

‘a state of physical, emotional, mental and social wellbeing in relation to sexuality’ where “achievement of the highest attainable standard of sexual health” is achieved’.¹³¹

Sexual health is linked to the enjoyment of the rights to non-discrimination, privacy, freedom from violence and coercion, as well as to rights to education, information and access to health

¹²⁷ World Health Organization. *Promoting Sexual and Reproductive Health for Persons with Disabilities*. (World Health Organization 2009)1.

¹²⁸ World Health Organization 2006, *Defining Sexual Health: Report of A Technical Consultation on Sexual Health* 2006) 1.

¹²⁹The Beijing Declaration and Plan of Action was adopted during the fourth World Conference on Women in 1995.<https://beijing20.unwomen.org/~media/headquarters/attachments/sections/csw>.

¹³⁰ World Health Organization *Developing sexual health programmes A framework for action* (World Health Organization 2010) 1-7.

¹³¹ World Health Organization. *Sexual Health, Human Rights and the Law*. (World Health Organization, 2015)

services.¹³² According to the WHO, harmonizing laws and regulations with human rights standards can foster the promotion of sexual health. This means that laws and practices that contradict human rights principles and are seen as having a negative impact on sexual health need to be done away with. The WHO therefore stresses that States have obligations to bring their laws and regulations which affect sexual health into alignment with human rights laws and standards.¹³³

The Committee on Economic and Social Cultural Rights (CESCR),¹³⁴ has taken the sexual health rights discussion further by stating that Article 12 of the ICESCR contains both freedoms and entitlements. The Committee specifically states as follows regarding these freedoms and entitlements:

‘Freedoms include the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment, and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.’¹³⁵

Here, the Committee is saying that the right to health which includes the right to sexual and reproductive health belongs to every human being and so governments of every nation must guarantee this for everyone.

The lived experiences of intersex persons confirm that surgeries and other forms of medicalization which permanently modify their bodies and have affected their sexual function, were conducted on them at infancy. This was at a time when they did not have capacity to give their express consent, contrary to Article 3 and 12 of the CRC. Read and interpreted together, these two Articles prohibit medical treatments of any form which permanently modify a child’s body and affects *inter alia* their sexual health, without the express consent of the child or in line with their best interests.¹³⁶

¹³² Ibid, 5.

¹³³ Ibid.

¹³⁴ The Committee on Economic and Social Cultural Rights (CESCR) is the body that monitors and oversees the State Parties compliance of the obligations placed upon them by the Covenant and its Additional Protocol.

¹³⁵ Ibid, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Document E/C.12/2000/4).

¹³⁶ Council of Europe, *Human Rights and Intersex People* Issue Paper Number 32 (Council of Europe 2015)33.

Failure by legislation to provide recognition and accurate documentation for intersex persons inevitably means that many are forced to undergo medical and surgical interventions and alteration of their genitalia to fit them into the legislated sex/gender provisions. Documented research has shown that genital modification may at times result in a myriad of health problem such as loss of sexual response and pleasure, genital pain, and discomfort during sex.¹³⁷ Other complications include frequent infections to the genitals, scarring and urinary incontinence as well as presence of cosmetically scarred and ‘unacceptable’ external genitalia.¹³⁸ These health problems are regular experiences for many intersex persons who have had their genitals surgically and medically altered.

In the case of Mercy, for instance, her medicalization involved attempts at feminizing her genitalia whereupon the male genital organs were removed, and a ‘vagina’ constructed.¹³⁹ The operation did her more harm than good in relation to her sexual health rights as she narrates below:

‘When my external male genitalia were removed, I think the doctors created for me a vagina. Due to the shallowness of the vagina however, I have chronic sexual health problems. I suffer from loss of sexual response and pleasure, pain in the genitals, lots of discomfort during sex and frequent infections. As a result of these problems, I am not able to sustain sexual relationships.’

Mercy appears to have undergone the process of vaginoplasty, which involves surgically creating a vaginal opening.¹⁴⁰ Clearly, this procedure was unsuccessful causing her more damage and suffering.

¹³⁷ Cristian Conzalez Cabrera, ‘Law in Mediating Between the Rights of Parents and their Children Born with Intersex Traits in the United State’ (2018) 24 William & Mary Journal of Women and the Law 462- 467.

¹³⁸ Ibid.

¹³⁹ Morgan Carpenter, ‘The Human Rights of Intersex People: Addressing Harmful Practices and the Rhetoric of Change’ (2016) 24 Reproductive Health Matters 47: 74-84. Feminization and masculinization procedures for people born with intersex genitalia, without informed consent, have been determined as constituting genital mutilation. Female mutilation is an act which is criminalized in Kenya through the provisions of the Prohibition Against Female Genital Mutilations Act No 32 of 2011(Laws of Kenya), and now under the Children Act No 29 (2022). Even though the new Children Act neither defines nor criminalizes intersex genital mutilation (IGM), it does find mention at Section 144(1).

¹⁴⁰ John Chigiti, *Intersex Persons and the Law in Kenya* (Quality Thoughts Publishing 2021)98.

Alteration of Syd's external genitalia has caused him similar violations to his sexual health rights. As a normal human being, Syd says that he also has sexual urges. Many times, however, potential sexual partners take a look at his altered and disfigured genitalia and leave.¹⁴¹

Loss of sexual response and pleasure, scarring and cosmetically 'unacceptable' genitalia which Mercy and Syd experience, are some of the documented lifetime and irreversible results of medically unnecessary surgical interventions on intersex genitalia. These will continue occurring so long as intersex, as an additional sex/gender, remains excluded by the law. According to Syd, unless intersex persons are recognized and documented, instances of intersex genital mutilations will never be reduced. Without recognition and official documentation of the intersex gender, society cannot appreciate that some people are born with male and female genitalia present together. Neither can society appreciate that such genitalia cannot be modified and converted to make people be who they may not have been born.¹⁴² Only the law can change this position.

The ICESCR provides that the right to health includes receiving information on sexual and reproductive health care even as it creates a prohibition of non-discrimination in access to health care services on any ground.¹⁴³ Interpreted broadly, this would mean that the sexual characteristic of a person should never be used as grounds for discrimination in matters of health. While emphasizing on State Parties' specific obligations in ensuring the right to health, the Convention, with respect to sexual and reproductive health, implores State parties to refrain from *inter alia* misrepresenting health related information.¹⁴⁴ This is a clear call for medical institutions to provide information on any form of medical intervention prior to administration, unless it is a life and death situation. In a country that takes its obligations seriously in this regard, Kenyatta National Hospital should not have undertaken the surgical and medical interventions conducted on Mercy and Baby A.¹⁴⁵

¹⁴¹ Interview with Syd in Nairobi on 16th December 2019.

¹⁴² Ibid.

¹⁴³ CESCR General Comment No. 14, Para 23.

¹⁴⁴ The intersex persons who were subjected to surgical genital alterations in infancy, and who were interviewed for this research, indicated that they have suffered denial of information regarding any medical treatments they have ever undergone. Majority are unaware of the exact procedures conducted on their bodies and there is no medical history to turn to. As seen earlier, Mercy has visited Kenyatta National Hospital many times but has never been able to access her medical records. She therefore cannot establish the nature or extent of the surgical and medical treatment she was subjected to in infancy. Interview with Mercy in Nairobi on 18th May, 2019.

¹⁴⁵ Baby A.

Issues of sexual and reproductive health rights were first highlighted within the framework of human rights in the 1994 conference on Population and development and subsequent Plan of Action.¹⁴⁶ They are now well encapsulated in human rights instruments and other consensus documents. Indeed, the 2030 Agenda for Sustainable Development includes goals and targets to be achieved around sexual and reproductive health.¹⁴⁷ It was in the face of continuing violations in this arena of sexual and reproductive health rights that the CESCR adopted General Comment No.22.¹⁴⁸ In this General Comment, the Committee addressed State obligations to ensure the realization of the right to sexual and reproductive health, reiterating that this right is an integral part to the right to health. The General Comment also recognizes that the full enjoyment of sexual and reproductive health rights is hindered by the intersectionality of discrimination.¹⁴⁹ Intersectionality disproportionately impacts vulnerable groups, and as is demonstrated above, intersectionality multiplies the negative impact thereby more severely affecting intersex persons.

The General Comment in addition sets out the freedoms and entitlements for everyone.¹⁵⁰ As regards matters concerning one's body, freedoms include the right to make free and responsible decisions and choices which are free of violence, coercion or discrimination.¹⁵¹ The entitlements include unhindered access to a whole range of health facilities, goods, services and information.¹⁵² These freedoms and entitlements are meant to ensure that all people access the full enjoyment of the right to sexual and reproductive health as set out by the ICESCR.¹⁵³ The General Comment further states that in the context of non-discrimination, the right to sexual and reproductive health requires that all persons be fully respected for their sexual orientation and gender identity status.¹⁵⁴ Where there is intersectionality and multiple discrimination, State Parties are required to take extra protective measures. These include putting in place laws, policies and programs that result in removal of whatever is hindering enjoyment of sexual and reproductive rights to groups who are disproportionately affected by

¹⁴⁶ Available at *programme_of_action_Web_ENGLISH.pdf* (*unfpa.org*) (Accessed on 29th July 2022).

¹⁴⁷ United Nations General Assembly (UNGA) Resolution adopted on 25 September 2015. Transforming our world: the 2030 Agenda for Sustainable Development. (United Nations A/RES/70/1). Even though the target is girls and women, Agenda 5.6 requires States to ensure universal access to sexual and reproductive health.

¹⁴⁸ CESCR, 'General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights). E/C.12/GC/22.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ ICESCR, Article 12.

¹⁵⁴ Gender in the context of this General Comment refers to the biological sex characteristics of a person.

intersectional discrimination. Non recognition and non-documentation of intersex persons in Kenya however means that the intersex persons cannot benefit and have not benefitted from any of these protective provisions.

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is also instructive on matters relating to the protection of sexual and reproductive health rights for everyone.¹⁵⁵ It defines discrimination against women as:

‘..any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’¹⁵⁶

However, given that this Convention was specifically drawn with women in mind, its provisions are only used to protect the female sex/gender. None of its protective provisions have been used in Kenya in the context of intersex persons. Intersex persons therefore continue suffering discrimination and exclusion and being subjected to treatment that is detrimental their sexual health.

This unfortunate situation subsists even after concerted efforts were made to redress the situation through judicial interventions discussed before. Baby A’s case for instance tried to get the court to address itself to the aspects of exclusion to holistic health arising from non-recognition and non-documentation.¹⁵⁷ The tragedy though was that even though the court agreed that there was an obvious lack of appropriate guidelines and regulations on how medical examinations and eventual corrective surgery if needed should be carried out, that was as far as the court went.¹⁵⁸ It failed to take a lead by setting out how such corrective surgeries ought to be carried out.¹⁵⁹ The court’s excuse was that it was not within its mandate to direct parties on the conduct of surgeries since there was no law that obligates it to exercise such a mandate, terming it ‘technical and professional’.¹⁶⁰ The court’s further claim was that it did not have the

¹⁵⁵ Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). Kenya is a party to this Convention having ratified it in 1984.

¹⁵⁶ CEDAW, Article 1.

¹⁵⁷ *Baby A*, Para 4.

¹⁵⁸ *Ibid*, Para 65,

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid*.

means, the mechanisms or the force to use in such circumstances. Its reasoning was based on Article 94(1) of the Constitution, which according to the court, mandated only Parliament to perform the legislative functions on behalf of the People.¹⁶¹ The court's reasoning narrowly interpreted the court's powers thus restricting it unnecessarily, given that courts are empowered to make laws through judicial decisions. Indeed, by restricting itself to the provisions of Article 165(3)(d) of the Constitution, the court confined itself to the role of interpretation of the law as handed down by the Legislature, thereby refusing to be progressive.¹⁶² Regrettably, the National Reproductive Health Policy 2022, completely fails to address the problem, either.¹⁶³ The result therefore is that such reconstructive surgeries will continue to be performed without any regulated protocols, resulting in permanent deformation to intersex genitalia, injuries and lifelong scars. The impact of violation of sexual health rights of the individuals concerned will therefore continue.¹⁶⁴

Physical, mental, reproductive and sexual health constitute vital strands of the right to health. As seen, these are closely interwoven and deeply interdependent. The intertwining of these four components of health means that they are all, collectively, important to the overall wellbeing of a person. The fundamental connection between all the four components also means that holistic health cannot be enjoyed in the absence of any of them. However, non-documentation and non-recognition, has continued to negatively impact the holistic right to health of the intersex person. The negative impact is also evident in the absence of access to medical care that is appropriate and respectful of the intersex sex/gender characteristics with which they were born. The problems created by these legal exclusions continue when intersex persons are in the pursuit of the socio-economic right to education as the next section of this chapter demonstrates.

3.3. RIGHT TO EDUCATION.

The negative causal sequence of non-recognition and non-documentation for the intersex flows onto the right to education. This segment describes the negative consequences of non-recognition and non-documentation on an intersex person's right to education.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ The National Reproductive Health Policy, 2022-2032.

¹⁶⁴ Interview with Mercy and Jane in Nairobi on the 18th May 2019.

According to Aringo and Kimathi, stigmatization forces most intersex persons to drop out of school before they complete basic and secondary school levels.¹⁶⁵ Without secondary school education, very few join higher learning institutions.¹⁶⁶ A study undertaken in 2011 by the Kenya Human Rights Commission decries the high school drop out for intersex persons, placing the percentage of those who are able to attend and complete school at only 5%.¹⁶⁷ The Task Force Report equally rails the low literate levels amongst intersex persons. It observes that while some intersex learners drop out of school due to stigma and social stereotyping, others are unable to continue post puberty, when the biological changes in their bodies defy the sex/gender assigned to them at birth.¹⁶⁸ As a result, only a paltry 5%, eventually attends school and transits to tertiary institutions.¹⁶⁹ This research has identified incidents of high school dropout and low transition rates to institutions of higher learning for intersex learners.¹⁷⁰ KK confirms that this is the actual position on the ground, and that, the literacy levels of intersex people in Kenya is disturbingly low.¹⁷¹ From his interaction with intersex persons, KK estimates that over 95% of persons who are born intersex either do not attend school or are forced to drop out before making any significant progress.¹⁷² KK attributes this to non-recognition of the intersex person as a sex/gender category and the resultant non-documentation and wrong documentation, all of which essentially lead to exclusion and stigma.

The current sad situation is not from lack of efforts to improve the situation through the law. Both *RM* and *Baby A* attempted to get judicial assistance on aspects of exclusion to education opportunities arising from non-recognition and non-documentation for persons born intersex.¹⁷³ In *RM*, the court closed its mind to the personal experiences as recounted by RM, which he underwent as he tried to access his right to education as an intersex person. The court failed to acknowledge the fact that RM was forced to drop out of school in class three due to his intersex status, preferring the version proffered by his grandparents, which seemed to

¹⁶⁵Margaret Aringo and Caroline Kimathi, *Words Matter: Stigmatization Narratives by the Intersex Persons in Kenya*, in Lucy Wakiaga, (ed) *Women's Contribution to Higher Education and Social Transformation*. Diversity and Inclusion Research (Springer Cham 2022) 221-225.

¹⁶⁶ *Ibid.*

¹⁶⁷ Kenya Human Rights Commission, *The Outlawed Amongst Us: A Study of The LGBTI Community's Search for Equality and Non-Discrimination in Kenya*. (Kenya Human Rights Commission 2011).

¹⁶⁸ Taskforce Report on Intersex Persons in Kenya, 181.

¹⁶⁹ *Ibid.*

¹⁷⁰ Interview with KK in Nairobi on the 16th December 2019.

¹⁷¹ As a program officer in an organization that works closely with intersex persons, KK has interacted very closely with intersex people and has information that stigma has forced very many intersex persons to drop out of school.

¹⁷² *Ibid.*

¹⁷³ *RM* and *Baby A*.

suggest that he dropped out of school because of truancy.¹⁷⁴ The reality however is that, accessing the right to education for intersex persons in Kenya is an uphill task.

As KK explains, getting an education in Kenya is not easy for an intersex person, in fact, it is particularly difficult.¹⁷⁵ The difficulties arise in terms of initial enrolling as well as staying in school until completion. The fact that intersex persons have not been officially recognized has had extremely negative implications on their right to education. Lack of legal recognition and or misrecognition for an intersex person can and has contributed to either limited access to or complete exclusion from schools, as well as denial of many educational opportunities. As in the case of denial of the right to health, the origin of denial of education opportunities is the legal documentation regime which shuts out the intersex person.

As already demonstrated in the preceding chapter, the current legal position is that all the cardinal documents in Kenya, are issued in the binary sex/gender categorization. Consequently, intersex persons either do not access any of them or acquire documents which misgender them.¹⁷⁶ For purposes of starting the process of accessing education and enrolling in school, a birth certificate is a mandatory requirement. The birth certificate in Kenya, as in the case of other identification documents is of course issued in the binary sex/gender classification. In most cases, an intersex child is not registered and is therefore not issued a birth certificate since the law is ‘unsure’ of the sex/gender category in which to place the child.¹⁷⁷ The easier alternative taken by the law is usually to place the child in either of the two binary categorizations. More often than not, the sex/gender chosen does not match with the child’s physical and biological characteristics as the child develops. In such a scenario, the intersex person ends up being ‘documented’ but with discordant documents. Either of these two situations presents reduced opportunities for access to many socio-economic rights amongst them education. If an intersex child is denied birth registration and does not get a birth certificate, or where an intersex person is issued a birth certificate that is conflicting with their

¹⁷⁴ *RM*, Para 135.

¹⁷⁵ Interview with KK in Nairobi on 16th December 2019.

¹⁷⁶ The application forms for identity documents examined in Chapter two show that they are structured in the binary and have no option for any other sex/gender description.

¹⁷⁷ In the case of Baby A and Tim the intersex child who inspired this study many years ago as explained in the Abstract section of this thesis, a question mark was inserted at the sex/gender marker provision. This was for understandable reasons, since the respective health facilities had no idea what sex/ gender the child should have been classified into in terms of sex/gender, and the documents availed to them by the law did not help.

sex/gender reality and physical appearance in a society that is binary based, the result is either complete exclusion or serious limitations for access to education.¹⁷⁸

The right to education is one of the key social economic rights held highly in Kenya. Indeed, Kenya has ratified most international treaties and international consensus documents all of which guarantee the right to education. These instruments include the UDHR,¹⁷⁹ ICESCR,¹⁸⁰ and the CRC.¹⁸¹ Others are the Convention against discrimination in Education (CEDE), which prohibits the denial of education for anyone for any reason,¹⁸² and the Sustainable Development Goals (SDG's).¹⁸³ These instruments all add to the universal call for the right to education for everyone. By virtue of Kenya's constitutional provisions, these form part of the country's laws.¹⁸⁴

Starting with the UDHR, its provisions confer the right to education on every person.¹⁸⁵ On its part, the ICESCR is especially comprehensive on the aspect of the right to education.¹⁸⁶ It begins by calling on State Parties to the Covenant to recognize the right to education for all.¹⁸⁷ The Covenant then proceeds to give the modalities through which State parties should ensure that this right is realized. The first is by availing free primary education for all.¹⁸⁸ Then there's the requirement for State parties to ensure that secondary, technical, vocational and higher education are made equally accessible to everyone as they look to progressively avail free education at these levels too.¹⁸⁹

The Children protection specific Convention, the CRC, echoes the provisions of the ICESCR with regard to the right of every child to receive an education.¹⁹⁰ It makes primary education not just free, but also compulsory for all children, while at the same time calling on State parties to also make secondary and higher education available and accessible for all.¹⁹¹ The CRC is

¹⁷⁸ Morgan Carpenter, 'The Human Rights of Intersex People: Addressing Harmful Practices and The Rhetoric of Change', 74-84.

¹⁷⁹ UDHR, Article 26.

¹⁸⁰ ICESCR, Article 13.

¹⁸¹ CRC, Article 28.

¹⁸² Convention against discrimination in Education (CEDE), Article 1.

¹⁸³ When the Millennium Development Goals (MDG's) came to an end in 2015, a Post 2015 Agenda, comprising of 17 Sustainable Development Goals (SDG's) were put in place, taking over from where the (MDG's) reached. Goal 2 of the SGD's provides for universal primary education for every child.

¹⁸⁴ Constitution of Kenya 2010, Article 2(6).

¹⁸⁵ UDHR, Article 26.

¹⁸⁶ ICESCR, Article 13.

¹⁸⁷ Ibid, Article 13(1).

¹⁸⁸ Ibid. Article 13(2)(a).

¹⁸⁹ Ibid, Article 13(2)(b) and (c).

¹⁹⁰ CRC, Article 28(1).

¹⁹¹ Ibid, Article 28(1)(c).

also quite instructive when it comes to access to education for all children. It makes a mandatory call on State parties to:

‘Take measures to encourage regular attendance at schools and reduction of drop-out rates’.¹⁹²

On their part, the SDG’s require States to ensure inclusive and equitable quality education and promote lifelong learning opportunities for everyone.¹⁹³

Regionally, the African Charter on Human and People’s Rights (ACHPR),¹⁹⁴ and the African Charter on the Rights and welfare of the Child (ACRWC),¹⁹⁵ complement the international legal provisions for the entitlement to education for everyone. While Article 17 of the ACHPR grants each and every individual in the region of Africa the right to an education,¹⁹⁶ the provisions of the ACRWC on the right to education are even more elaborate. This instrument is crafted in language along that contained in the ICESCR and the CRC. It begins by declaring that every child in the region of Africa shall have the right to education which should be compulsory and free.¹⁹⁷ It then moves on to make provisions for accessibility of secondary and higher education, emphasizing on the requirement for progressive realization for free and accessible education at the secondary and higher education levels. The instrument in addition calls on States to encourage regular attendance at schools so as to reduce dropout rates.¹⁹⁸ More significantly, the instrument calls on State parties to take special measures in respect of disadvantaged children to ensure access to education for all sections in the community.¹⁹⁹

At the domestic level, the Constitution contains precise provisions regarding the right to education in line with the international and regional requirements. Article 43 categorically grants each person in Kenya the right to education.²⁰⁰ But, even before the promulgation of the current Constitution in 2010, there was in place specific legislation providing for education for all. The Education Act which was enacted soon after independence contains a provision declaring that the Minister (of Education), shall promote the education of the people of

¹⁹² Ibid Article 28 (e).

¹⁹³ This is contained at the 4th of the 17 SDG’s.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ ACHPR, Article 17(1).

¹⁹⁷ ACRWC, Article 11(1).

¹⁹⁸ Ibid, Article 11(3)(d).

¹⁹⁹ Ibid, Article 11(3)(e).

²⁰⁰ Constitution of Kenya 2010, Article 43 (1) (f).

Kenya.²⁰¹ This in effect places a legal obligation on the State to provide education for all, including Kenyans who are intersex.²⁰² Upon the promulgation of the Constitution and to give effect to the Constitution, the Basic Education Act (No 14 of 2013) was enacted for purposes of regulating the requirements of provision of education in the country.²⁰³

The former Children Act required that all children be provided with an education.²⁰⁴ The provisions of that now repealed Act, regarding education, were a mirror reflection of the provisions of the CRC.²⁰⁵ The specific provision stated as follows:

‘Every child shall be entitled to education, the provision of which shall be the responsibility of the Government and the parents’.²⁰⁶

The former Act had also reinforced the requirements of the CRC by stating that:

‘Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child’.²⁰⁷

Like its predecessor, the Children Act, 2022, aligns itself with the CRC,²⁰⁸ and is anchored in the paramountcy of the best interests of the child principle. It also emphasizes the importance of education, mentioning this right at least fifty-seven times in its text,²⁰⁹ and underlines the right to free and compulsory basic education for every child in accordance with Article 53(1)(b) of the Constitution.²¹⁰ Further, the Act calls upon the Cabinet Secretary in charge of the education docket to develop and implement policies to ensure the realization of the constitutional right to basic education for every child.²¹¹ These provisions reflect the hallowed position held by human rights law at all levels in relation to the right to education. They also mean that no one should be denied the opportunity to acquire an education for whatever reason. And this is because education is considered both a basic human right and a basic need.²¹² Based

²⁰¹ The Education Act, Chapter 211 of the Laws of Kenya. This legislation was already in force in 1968.

²⁰² The Education Act, Section 3.

²⁰³ https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/RTE_Right_to_Education_Country_Factsheet_Kenya_2014.pdf (Accessed on 17th December 2019).

²⁰⁴ Children Act (2001) now repealed, Section 7.

²⁰⁵ CRC Article 28 and Section 7 of the repealed 2001 Children Act.

²⁰⁶ Children Act 2001 (now repealed), Section 7(2).

²⁰⁷ Ibid.

²⁰⁸ The Children Act, No 29 of 2022 at Section 3(b) aligns itself with the general rules of international law ratified in Kenya.

²⁰⁹ Children Act, No 29 of 2022.

²¹⁰ Ibid, Section 13 (1).

²¹¹ Ibid, Section 13(3).

²¹² Geoffrey Wango. *Kenya New Constitution and Education: Education in Kenya Under the new Constitution*. (Paper presented to the Task Force on the realignment of the education system to the constitution of Kenya. (2011). Wango. https://profiles.uonbi.ac.ke/gwango/files/kenya_new_constitution_education_in_kenya_under_the_new_constitution.pdf (Accessed on 12th December 2019).

on these legal requirements, Kenya is not just expected to, but is legally obligated, to adopt and implement measures to protect the right and access to education for everyone.²¹³

All these inclusion and nondiscriminatory provisions notwithstanding, legal non-recognition and non-documentation has seen many intersex children and intersex adolescents being denied the opportunity to enroll, attend, stay in or complete school. This situation exists even in the face of the requirements by the CRC for State parties to put in measures to help each child stay in school.²¹⁴

In the *Baby A*, Mama A was trying to bring to the forefront the impediments facing intersex children such as hers, in their future pursuit for education, due to lack of documentation, specifically the birth certificate. The court acknowledged the important linkage between legal recognition, a birth certificate and the right to education when it stated as follows:

‘A birth certificate is of great importance in all spheres of life and development of a child because it is the ticket to admission in school.... and without that document and or legal recognition, a child cannot realize or enjoy the rights, protection and guarantees made under part II of the Children’s Act, the Bill of Rights and Article 7 of the Convention on the Rights of the Child.’²¹⁵

This observation by the court is a confirmation of the negative impact on the right to accessing an education for anyone who is unable to procure a birth certificate because of existing legal impediments. Unfortunately for the intersex person, the court only stopped at making that observation, failing to proceed to make any progressive impact in this regard. Consequently, intersex children continue being denied education due to non-recognition and lack of identity documents.

This violation begins with the binary based birth certificate issuance regime. This raises a pertinent question regarding the manner in which the registration system treats intersex births. As already pointed out, some children born intersex will be registered either as males or females and will be issued birth certificates in the sex/gender classifications they are registered in.²¹⁶ Others will not be registered at all.²¹⁷ Those who are registered as either male or female, may

²¹³ Ibid.

²¹⁴ CRC, Article 28.

²¹⁵ *Baby A*, Para 4.

²¹⁶ This was the case with Langa, Rye and KK in Nairobi on the 18th May 2019 and 16th December 2019 respectively.

²¹⁷ This was the case with Mercy, as she states during her interview in Nairobi on the 18th May 2019.

be able to get enrolled in schools. Those who do not get registered at all and are consequently not issued birth certificates will not be able to enroll in schools, given that a birth certificate, as the court in *Baby A* rightly observed, is a mandatory requirement for enrolment to schools.²¹⁸

The fact that the intersex person is greatly challenged by the documentation required for the enrollment into schools and other educational facilities is what RM had been trying to bring to the attention of the court.²¹⁹ Several years after RM brought up this aspect of exclusion to the attention of the government through the judiciary, many intersex persons continue undergoing similar challenges as Sophie Wakise narrates below regarding her child:

‘My child has both male and female genital organs. Although I have been raising her as a girl, the child dresses and behaves like a typical boy. She cries when I dress her in girls’ clothing. She was born at home, and I have not been able to procure a birth certificate for her. At ten years, she has not enrolled in school. I was turned away when I went to enroll her in school three years ago. They told me I needed to have a birth certificate.’²²⁰

Sophie’s child is clearly being excluded from the education system for lack of the requisite documentation. But in addition to the birth certificate that does not factor in intersex persons, procedural statutory forms under the Ministry of Education do not provide for them either, as was pointed out in *RM*.²²¹ And the unfortunate reality is that intersex persons continue to be left out in all educational policies, even though they continue to be born. The current position for instance is that Kenya has put in place the National Education Management Information System (NEMIS) system to register all learners in Kenya.²²² This newly established system produces a unique identification number for every registered student. The number will track the students’ performance from basic the education level, secondary school and all the way to institutions of higher learning. According to the government, the tracking system is key because it will assist with formulation of better policies and plans for improving the education sector.²²³ The system is structured in the binary sex/gender system and does not recognize the intersex person. Basically, non-recognition of the intersex means that no intersex learner will be registered. Consequently, it will be difficult for the government to put in place plans or

²¹⁸ *Baby A*.

²¹⁹ *RM*, Para 94.

²²⁰ Interview with Sophie Wakise (pseudonym) on telephone from Mombasa on 4th October 2020.

²²¹ *RM*, Para 94.

²²² <http://nemis.education.go.ke>. (Accessed on 1st August 2020).

²²³ *Ibid*.

policies that will benefit anyone who is intersex. But more importantly, this system has already started to negatively impact on the intersex persons who have been fortunate enough to get enrolled in schools and who are in possession of sex/gender discordant documents. This is the situation with Sebbo as Janes narrates below:

‘My child was registered as a girl and was issued a birth certificate that shows that the child is female. The child has been attending school with this birth certificate. The child has however defied the female sex/gender and identifies himself as a boy. This has forced me to ‘secure’ another birth certificate that shows that his sex/gender is male. With this, I plan to take him to a boarding school far away where nobody will recognize him’.²²⁴

As Jane is trying to secure the right to education for Sebbo, non-recognition of intersex persons in Kenya has forced her to circumvent the law and use unorthodox ways of doing this.²²⁵ The birth certificate that she has irregularly secured for him as a male may help him advance in the education system to secondary and tertiary levels, but given the registration requirements through NEMIS, this is likely to cause him difficulties in future.²²⁶

And Jane’s child is among the lucky few who, though forced by the documentation regime to sidestep the law, may be able to continue securing an education. Many do not get to go far in their pursuit for this right. In his Petition, RM had attempted to have the court determine the impact of exclusion of the intersex person from educational opportunities as a result of non-recognition.²²⁷ Significantly, RM was trying to demonstrate the plight of those who are able to enroll in schools but have to constantly deal with the discriminatory and exclusionary infrastructure facilities.²²⁸ RM also shows the reality on the ground which is that a good number of intersex children who are fortunate enough to enroll in schools are forced to drop out due to stigma and discrimination.²²⁹ This stems from an educational system that is unsupportive of intersex students, not just in terms of documentation, but also infrastructure in learning institutions. Basic facilities such as toilets for intersex persons are lacking in schools. Writing on Prisoners in Kenya, Abuya and Mburu have pointed out the importance of basic facilities such as bathrooms and toilet facilities, and the role these amenities play in giving a person basic

²²⁴ Interview with Jane in Nairobi on the 18th May 2019.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ RM, Para 3 (k).

²²⁸ Ibid.

²²⁹ Taskforce Report on Intersex Persons, Kenya 171.

dignity.²³⁰ Toilets and bathing facilities are important to the life of any human being.²³¹ The availability of these facilities in schools or lack thereof has a direct impact on a person and is sufficient denial not just of their right to health because of the personal hygiene aspect, but also to their right to education.²³² Although RM raised this aspect more than a dozen years ago, there are intersex persons who have enrolled in schools but have had to give up their pursuit for education because the education sector has failed to provide basic facilities. This of course, amounts to discrimination and stigmatization.

And indeed, RM rightly pointed out to the court that the government has been guilty of a failure to set up intersex friendly infrastructure in the form of toilet facilities for intersex learners.²³³ Subsequently, intersex persons cannot enjoy the government supported free education facilities that other Kenyans enjoy due to stigmatization.²³⁴ According to RM, this was one of the reasons which forced him to drop out of school. The court chose not to believe RM. The reality however is that, RM is not the only intersex person who has been forced to give up their right to education owing to stigma resulting from inability to use a toilet for a very basic human need. These are the lived ordeals of many intersex persons who have attempted to exercise their right to education. According to Syd for example,

‘Going to the toilet as a young child in primary school meant a huge group of giggling and jeering students following me into the toilet facility to see ‘how’ I was urinating.’²³⁵

Even though Syd identifies as a male and has tried to live his life as one, he couldn’t use the urinals the other boys in school were using because his genital structure is that he needs to squat to urinate as he explains below:

‘My genitals are structured in a way that I urinate from a small hole that is below my male scrotum, so I need to squat to urinate. When I would squat to urinate in the presence of the girls, they would start screaming that I have a boy’s genitals. If I went to urinate with the boys, they would start laughing at me that I was urinating through my anus.’²³⁶

²³⁰ Edwin Abuya and Grace Mburu, ‘Prisoners in Kenya-Katika Tundu La Simba’(2016) 11 Journal of comparative Law 16.

²³¹ Ibid.

²³² Ibid.

²³³ RM, Para3(k).

²³⁴ Ibid, Para 3(n).

²³⁵ Interview with Syd in Nairobi on 16th December 2019.

²³⁶ Ibid.

Not knowing where he belonged made it extremely difficult for Syd to attend to calls of nature. Dejected, Syd would opt to go and relieve himself in the bushes, but even in the bushes, he was still not safe because giggling children would follow him to laugh and ridicule him. The ridicule eventually forced him to drop out of school.²³⁷

According to Rye, intersex people who somehow manage to enroll in school rarely get a chance to finalize due to the bullying and stigmatization in schools.²³⁸ In his words:

‘I was not able to go beyond Form two, due to the stigma I suffered for being intersex in an all-girls’ school. It was difficult for me to use the same toilets and bathroom facilities with the girls’.²³⁹

A toilet, and even a bathroom, constitutes a major aspect of a human need.²⁴⁰ Intersex persons do not know which toilet to go to.²⁴¹ In schools where intersex persons are not recognized and therefore basic amenities such as toilets are not provided, difficulties in accessing a toilet or bathroom facility can make it impossible to stay in school. Like Rye, Mercy was forced to drop out of primary school since she could not bear the tormenting from her peers.²⁴² Langa too suffered a similar fate as he explains below:

‘ Being an intersex student in a girl’s boarding school meant that the only way I could survive was to wake up at three am when the other students were asleep, and bathe in solitude. If I overslept, then I wouldn’t bathe at all. This would attract different kinds of jeers and humiliating comments from the other students.’²⁴³

Langa is one of the fortunate few. He was able to withstand the stigmatization and discrimination, complete secondary school and is now pursuing tertiary education.²⁴⁴ He however still has to tackle the added obstacle of bearing educational certificates that are discordant with the names and sex/gender imposed on him at birth. The identity documents are equally in conflict with the names and sex/gender that he has subsequently acquired.²⁴⁵

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Interview with Rye in Nairobi on 18th May 2019.

²⁴⁰ Edwin Abuya and Grace Mburu, ‘ Prisoners in Kenya-Katika Tundu la Simba’, 16.

²⁴¹ For an intersex person, the question of whether one stands or squats while urinating is a major issue

²⁴² Interview with Mercy in Nairobi on the 18th May 2019.

²⁴³ Interview with Langa in Nairobi on the 18th May 2019.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

Minor as it may sound, one of the hindrances in accessing education for intersex children is the dress code. For Samiz, school uniform was a challenging aspect of his educational process.²⁴⁶ Samiz has always identified as a boy and while he was raised as a girl and was taken to a girls' school by his parents, he couldn't bear being forced to wear a skirt. He was so disturbed by the uniform issue he eventually dropped out of school in Form two.²⁴⁷

Rye and KK, both of whom have worked extensively with intersex persons, estimate that at least 95% of intersex persons have been denied the right to education. This is all attributable to the documentation system and or lack of the identity documents. This thereof means that they cannot enroll in schools, and even where they enroll, they have been forced to drop out for the various reasons described above.²⁴⁸

A country whose legal regime neither acknowledges nor documents intersex persons results in that group of persons being discriminated upon, excluded and stigmatized. Stigma generally limits many areas of the victims' lives, including access to education as demonstrated above. This is the kind of stigmatization causing limitations that *RM* was trying to highlight. It was rather unfortunate that the court completely closed its mind to the legal problems created through stigmatization by declaring that social stigma is 'not a legal problem'.²⁴⁹ Yet social stigma is in fact a legal issue directly connected to discrimination and unequal treatment, which should be corrected first and foremost through the law. The word stigma traces its origin to the Greek word *stig*.²⁵⁰ It was derived from the practice by Greek slave owners of pricking the skins of the slaves to 'mark' them.²⁵¹ The term stigma is therefore associated with a sign of disapproval by one group which draws a line demarcating themselves from the 'other' group or groups. Those stigmatizing the others consider the ones being stigmatized as deviating from the accepted 'normal' norms.²⁵² The disapproving group then labels and stigmatizes those 'others. The labelling and stigmatizing leads to discrimination and unequal treatment.²⁵³

Discrimination is an issue that has been prohibited from time immemorial by international and regional legal instruments as well as by the Constitution of Kenya.²⁵⁴ For the court in *RM* to

²⁴⁶ Interview with Samiz (pseudonym), on telephone from Mombasa on 4th October 2020.

²⁴⁷ Ibid.

²⁴⁸ Interview with Rye and KK in in Nairobi on the 18th May 2019 and 16th December 2019 respectively.

²⁴⁹ *RM*, Para 145.

²⁵⁰ Gerhard Falk, *Stigma: How We treat Outsiders* (Prometheus Books 2001) 17-18.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

state that social stigma is not a legal issue and that it was best left to society to be educated and to train itself on how not to socially stigmatize others was certainly a major setback. The court instead of addressing discriminatory treatment through stigma which deny intersex persons their right to education ended up stamping it.

The right to education for everyone including persons born intersex is primal. It is not easy to overstate this right, but suffice to say that it is a gateway to most other rights. Consequently, it is a legal obligation on the part of any government to ensure that it is not only available to all, but to also remove all obstacles that limit this access for anyone. This obligation is contained in the Constitution and the various other human rights instruments that Kenya is party to, as stated earlier.²⁵⁵ The fact that the government has not created a safe learning environment for intersex learners in learning institutions, and has failed to remove hostile barriers faced by intersex persons in pursuit of education signifies a major failing on its part.

Education usually opens avenues for earning a living for individuals who are able to access this right.²⁵⁶ This therefore means that lack of education affects one's socio-economic right to employment leading to economic disempowerment. The section below discusses the limitations on employment opportunities for intersex persons, stemming from non-recognition and non-documentation.

3. 4. RIGHT TO EMPLOYMENT.

Research has shown that accessing employment is generally a major challenge for those seeking employment in Kenya.²⁵⁷ This means that intersectionality and multiple discrimination disproportionately and doubly impact intersex people within the general unemployment problem in the country.

As pointed out earlier, there is a strong correlation between all socio-economic rights, particularly education and employment, both in the formal and informal sector.²⁵⁸ The interdependence of the right to education and access to employment opportunities is particularly obvious. Without an education, it is difficult to get employment and where one

²⁵⁵ Constitution of Kenya, 2010, Article 43.

²⁵⁶ Aurelia Munene & Auma Okwany, 'Interrogating the 'artificial' divide between health and education for children aged 0-3 years in urban poor locales in Kenya' (2016) 6 *South African Journal of Childhood Education* 2: 8.

²⁵⁷ Fred Nyamitago Monari *et al* 'Modelling Economic Determinants of Youth Unemployment Using Multiple Linear Regression: A Case Study of Kenya' (2020) 5 *International Journal of Statistics and Applied Mathematics* 6: 7.

²⁵⁸ Munene and Okwany, (n1056).

manages to secure some form of employment, their negotiating skills would be limited, resulting in exploitation.

The preceding section has demonstrated that due to the many obstacles that come in the way of accessing education for intersex learners, majority of them hardly have any educational qualifications.²⁵⁹ The limited educational opportunities resulting from non-recognition and non-documentation directly impact employment prospects. When navigating the employment arena and lacking skills that come about from certain levels education, most end up taking up rudimentary work which can barely sustain them in the current harsh economic realities.

Failure to recognize and document the intersex person has hence caused and continues to cause silent and latent discrimination, exclusion and exploitation for the intersex person. Most end up being denied the right to work as well as opportunities to compete equitably in the job market. And yet, the right to work constitutes one of the key human rights.²⁶⁰ Indeed the right to work finds support in the natural law theory.²⁶¹ Being able to work is a natural law right which provides a person the essential means of gaining economic empowerment and earning a decent living and a life of dignity.²⁶² Where certain members of society are unable to obtain employment due to discrimination based on various considerations, this becomes a major human rights concern.²⁶³ The right to work has been recognized as a human right that should be available to everyone without discrimination.²⁶⁴ This right is considered a fundamental right and has been codified in several human rights instruments, including the UDHR and ICESCR.²⁶⁵ Several internationally recognized consensus instruments also underpin this right. The 1958 (Discrimination and Occupation) Convention for instance, demands that each of the State Parties to the Convention, pursues national policies designed to promote equality of opportunity and treatment for everyone and to eliminate discrimination on any grounds.²⁶⁶ The UDHR, is the first international human rights legal instrument to underscore the right to work for everyone. It begins by stating that every person has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against

²⁵⁹ These obstacles include stigmatization, humiliation, discrimination and public ridicule, amongst others.

²⁶⁰ Guy Mundlak, 'The Right to Work: Linking human rights and Employment Policy'(2007)146 International Labour Review 189.

²⁶¹ Patricia Werhane, et al, *Employment and Employee Rights* (Blackwell Publishing Limited 2004) 14.

²⁶² Ibid.

²⁶³ Guy Mundlak, (n1060).

²⁶⁴ Ibid.

²⁶⁵ These include the UDHR and the ICESCR.

²⁶⁶ Discrimination (Employment and Occupation) Convention, 1958 (No. 111), Articles 1 and 2. Kenya is a State party to this Convention having ratified it in 2001.

unemployment.²⁶⁷ In particular, the right to work is thoroughly elaborated by Articles 6 and 7 of the ICESCR.²⁶⁸ These Articles deal respectively with the right to gain a living and the right to fair and favorable conditions of work.²⁶⁹ The Convention on the Rights of Persons with Disabilities (CRPD) while cross referencing the prescriptions of the ICESCR stresses the importance of applying a disability lens to the right to work and employment for persons with disabilities.²⁷⁰ The CRPD here is speaking to recognition of vulnerable members of society for reasons that due to their various unique differences, they need special and additional attention.

Human rights legal instruments have been called upon, from time to time, to address specific vulnerable groups in society. In 1979, the global community concerned with the treatment of women, put in place the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), to address the discrimination against this sex/gender on the basis of sex. Women had, for generations, suffered through the denial of amongst other needs, the opportunities for employment. The simple reason for this differential treatment was because they had been born female in a male dominated world. This instrument, while recognizing the right to work as an inalienable right of all humans obligates States to:

‘Take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.’²⁷¹

CEDAW thus came in to address discrimination against a specific sex/gender category and has significantly improved the place of women in matters of employment.

The other instrument which has added its voice to the call for the right to employment is the Declaration on The Right to Development (DRTD).²⁷² It does this by providing that States must take all measures towards the realization of the right to development. This is in a bid to ensure equality of opportunity for all in access to basic resources including *inter alia*, education and employment.²⁷³ The DRTD also calls upon States to take additional measures to ensure that

²⁶⁷ UDHR, Article 23.

²⁶⁸ ICESCR, Articles 6 and 7.

²⁶⁹ Ibid.

²⁷⁰ Convention on the Rights of Persons with Disabilities (CRPD), Article 7. Kenya ratified the CRPD in 2008. Its provisions have been domesticated in the Persons with Disabilities Act, No 14 of 2003(Revised 2012) (Laws of Kenya).

²⁷¹ CEDAW, Article 11(1).

²⁷² Declaration on The Right to Development (DRTD). This instrument was adopted by General Assembly resolution 41/128 of 4 December 1986.

²⁷³ Ibid, Article 8 (1).

appropriate economic and social reforms are carried out with a view to eradicating all social injustices.²⁷⁴

Prior to the coming in place of the United Nations legal instruments discussed above, the International Labour Organization (ILO), had recognized the importance of the right to work and the right to employment way back in 1919. ILO, through its Constitution, was by this time, already calling for the removal of unemployment as a measure to eradicate social injustice, hardships and privation from the nations.²⁷⁵ Subsequent supplementary ILO documents have continued to reinstate and reinforce this call. The ILO Convention Number 122 Concerning Employment Policy of 1964 (ILO Convention No. 122),²⁷⁶ the ILO Recommendation No 169 Concerning Employment 1984 (ILO Recommendation No. 169) and the Employment Policy (Supplementary Provisions)²⁷⁷ are cases in point.

The ILO Convention Number 122 Concerning Employment Policy 1964 calls upon member states to declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.²⁷⁸ This call is with a view to stimulate economic growth and development, so as to raise levels of living and overcome unemployment and remove underemployment.²⁷⁹ The Policy aims at ensuring that there is work for everyone who is available for and is seeking to work. It specifies that availability of work should be irrespective of any considerations such as race, colour, sex/gender, religion, political opinion, national extraction or social origin or any other ground. The intention of the policy is to enhance the realization of the right to work for everyone in accordance with the proclamation towards protection against unemployment found in the UDHR.²⁸⁰

On its part, the ILO Recommendation Number 169 and the Supplementary Provisions *inter alia* address the right to work and to employment of disadvantaged groups and persons. Consequently, it calls upon State parties to ILO to adopt measures that will respond to the needs

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ The ILO Convention Number 122 Concerning Employment Policy of 1964 (ILO Convention No. 122). The Convention entered into force on 15th July 1966. Kenya has been an ILO member since 1964 and has domesticated the anti-discriminatory labour standards in its national law. See International Labour Standards country profile: Kenya (ilo.org) (Accessed on 7th August 2022).

²⁷⁷ The ILO Recommendation No 169 Concerning Employment 1984 (ILO Recommendation No.169) and the the Employment Policy (Supplementary Provisions) were adopted in Geneva during the 70th ILC session on 26th June 1984.

²⁷⁸ ILO Convention No. 122.

²⁷⁹ Ibid, Article 1.

²⁸⁰ UDHR, Preamble.

of all categories of people, particularly those who have difficulties finding employment. Intersex persons would fall in this group.²⁸¹

Regionally, the right to work under equitable and satisfactory conditions including the right to receive equal pay for equal work has been captured by the African Charter on Human and Peoples Rights (ACHPR).²⁸² This came about following the realization that women in Africa by virtue of belonging to a vulnerable and disadvantaged group by virtue of sex/gender, were facing discrimination and therefore required special attention. Because of this factor, the African Union found it necessary to adopt an instrument specifically focusing on its women. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) therefore came into being. Its key focus is the protection of women in many respects including their economic and welfare rights.²⁸³ For the first time in Africa, targeted and specific protection has been given to a group of humans based on sex/gender categorizations. This is with a view to removing the vulnerability, marginalization, and discrimination they historically faced due to their sex/gender characteristics. Regarding the right to work and to employment, this instrument calls on State parties to put in place measures, including legislative ones, to guarantee equal opportunities for women in work, career advancements and other economic opportunities.²⁸⁴ These provisions relating to the right to work and to employment have however not mentioned the right to work for intersex persons.

The human rights framework can and has, as seen above, targeted certain disadvantaged groups in society, including women and persons with disabilities and created protective legal mechanisms specifically for them. No such specific and targeted legislation has been adopted for the intersex constituency, a vulnerable sex/gender group. And yet, just like women who were excluded by the male sex/gender dominated world, people born with the intersex gender are excluded and discriminated against by the exclusive male and female sex/gender dominated society that Kenya is. And as long as specific protective provisions for the intersex gender are not created at various levels, the law will continue having glaring gaps, which will always negatively impact their socio-economic and sustenance rights including employment opportunities.

²⁸¹ ILO, Recommendation No.169, Article 15.

²⁸² ACHPR, Article 15.

²⁸³ Maputo Protocol, Article 13.

²⁸⁴ Ibid, Article 13.

RM had attempted to have the court pronounce itself with respect to violation of the right to employment for intersex persons because of this exclusion.²⁸⁵ His petition, in addition to bringing up the aspects of violation of health and education rights as discussed earlier, also raised the important question of the right to employment. According to RM, intersex persons suffer from discrimination and will always stand disadvantaged when seeking or maintaining employment as long as they are not recognized under the law. What RM was raising is the reality for most intersex persons as Godia narrates below:

‘After being forced to drop out of school due to stigmatization for being intersex, I have tried many times to get a job so that I can sustain myself. Recently, I managed to get one as a waitress in a hotel in Kisumu. One of my colleagues, after seeing my national identity card which bears male names and a male gender description, informed my employer that I was a man pretending to be a woman. I was sacked on the spot. Word has also now gone around town that I am a strange creature, and I am now unable to secure employment because of my condition’.²⁸⁶

Though the Constitution of Kenya does not expressly provide for the right to work, Article 41 provides for the right to fair labour practices for those who are employed.²⁸⁷ The fair labour practices include the right to a fair remuneration and reasonable working conditions.²⁸⁸ The Constitution further prohibits direct or indirect discrimination against any person on any grounds including sex.²⁸⁹ Intersex persons however suffer unfair labour practices, as the case of Godia, who was accused of being a ‘man pretending to be a woman’ and sacked on the spot demonstrates.²⁹⁰ Mercy has had to endure many instances of mistreatment in the workforce and is constantly discriminated by being denied fair remuneration.²⁹¹

Anti-discriminatory provisions are contained in employment laws in Kenya as well. The Employment Act for instance prohibits discrimination on very wide grounds. These have been listed as including race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status, and HIV status.²⁹² These protections are however watered down by the Act itself in the case of a person born intersex seeking

²⁸⁵ *RM*, Para 32.

²⁸⁶ Interview with Godia (pseudonym) on telephone from Kisumu on 16th August 2020.

²⁸⁷ The Constitution of Kenya, 2010, Article 41(1).

²⁸⁸ *Ibid*, Article 41(2)(a) and (b) respectively.

²⁸⁹ *Ibid*, Article 27(4).

²⁹⁰ Interview with Godia.

²⁹¹ Interview with Mercy in Nairobi on the 18th May 2019.

²⁹² The Employment Act No.11 of 2007, (Laws of Kenya), Section 5 (3) (a).

employment. This is through the mandatory contract particulars which must include the sex/gender of the employee.²⁹³ Given that the sex/gender can only be in the binary, as in all other government registration documents, the intersex person is excluded and outrightly discriminated against.

Further, as Mercy narrates, intersex persons cannot benefit from any of the anti-discriminatory provisions of the constitution or the employment Act. They will continue being discriminated against based on their sex characteristics so long as the law continues to be crafted in a manner that excludes their unique gender as she states below:

‘Without an education and without any identity documents, I can only access menial jobs. Most of the times, even these are not readily available. I ordinarily look for work as a house help, but I have been outrightly rejected and denied employment by potential employers several times on account of my physical appearance. A few who have been courageous enough to employ me grossly exploit me by overworking and underpaying me. I think they know that I have no option because of how I look and the fact that I do not have any government documents.’²⁹⁴

Ideally and in reality, for a person to be engaged for work, one requires the whole regimen of documents officially given in Kenya. It would be difficult, if not impossible for an employer to hire anyone without a national identity card and a Kenya Revenue Authority (KRA) Personal Identification Number (PIN) certificate. A driver’s license is a mandatory requirement for anyone seeking work in the transport sector as a driver. For professional engagements, educational certificates are a necessity. One cannot open a bank account without identification documents which comprises of either a national identity card or a passport and a KRA PIN certificate. Engaging in virtual mobile money transactions using services such as *Mpesa* and *Mshwari* is also a huge challenge for anyone who is undocumented or with discordant documents.

When one does not have identity documents at all, or when one is in possession of the documents but they are discordant with their physical appearances in a society that is binary based, several challenges arise affecting their economic positions. Such is Godia’s case, whose national identity card is in discordant with her physical appearance and so she was accused of

²⁹³ Ibid, Section 10.

²⁹⁴ Interview with Mercy(n1).

impersonation. This has significantly reduced if not completely closed the door of employment opportunities for her.²⁹⁵

The reality therefore is that lack of recognition and non-documentation impacts negatively on the right to work for persons born intersex in Kenya. As Mercy's situation demonstrates, without documentation, one's bargaining power in the field of employment is significantly reduced, leading to increased risks of being exploited.²⁹⁶ This is because persons who are not recognized by the law have little bargaining power.²⁹⁷ And as long as they are not recognized, intersex persons will never be able to benefit from employment laws prohibiting discrimination. Similarly, getting equal opportunities for employment with their male and female counterparts will also be impossible.

Non documentation and inaccurate identity documents also means limitations for intersex persons to open bank accounts, obtain credit and escape exploitation in employment. Without recognition and without the ability to procure these documents, intersex persons remain disadvantaged in education and thereafter in seeking employment. The court in *RM* indeed pointed out this critical linkage between education and employment opportunities. *RM* raised this connection concerning his inability to secure employment on account of his lack of an education.²⁹⁸ The court acknowledged this correlation and correctly observed that *RM*'s efforts in seeking employment at a later stage in his life were frustrated because he did not have any educational background.²⁹⁹ Indeed, the court did pinpoint the interdependence between education and employment opportunities when it observed that had *RM* had an education, it would have enhanced his bargaining power in the labour market.³⁰⁰ Nevertheless, the court defeated its own argument and failed to appreciate that the reason *RM* did not have educational certificates resulted from his inability to remain in school on account of his intersex status. Instead of protecting *RM*, the court ended up victim blaming him.

RM's reality is the sad reality for majority of intersex persons in Kenya. They remain disadvantaged in the areas of socio economic and sustenance rights for being intersex. The unfortunate certainty remains notwithstanding the presence of the protective human rights'

²⁹⁵ Interview with Godia on telephone from Kisumu on 16th August 2020.

²⁹⁶ Interview with Mercy in Nairobi on the 18th May 2019.

²⁹⁷ Michael Bochenek and Kyle Knight, 'Establishing a 3rd Gender Category in Nepal' (2012) *Emory International Law Review* 40.

²⁹⁸ *RM*, Para 135.

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

legal provisions available at the global, regional, and domestic levels. If no intentional specific and targeted legislation for protection of economic and sustenance rights for intersex persons is enacted at all levels, the regrettable reality will likely continue.

3.5. CONCLUSION.

Intersex persons have the right to access all the socio-economic rights guaranteed under the web of human rights instruments and the Constitution of Kenya, 2010. They have a right to access these rights equally with everyone else and without discrimination on any ground, especially on account of their intersex status. Regarding health, everyone is entitled to this right in all its dimensions. This entitlement should be appropriate and respectful of the sex/gender characteristics with which intersex persons were born.³⁰¹ Concerning educational and employment opportunities, intersex persons require specific legal guarantees to give them opportunities corresponding to what other members of the society have. Enjoyment of health, education and employment opportunities are interdependent and indivisible rights which give the recipient, not just a sense of human dignity but the ability to develop a person's self-worth and security.³⁰² When lacunas in the law exclude and preclude intersex persons by disallowing their accurate documentation, then violations will persist indefinitely, even though they are zealously guarded for everyone.³⁰³ Applying the natural law and positivists legal thinking, this chapter has responded to the first segment of the second research question and achieved the first limb of the second research objective. It supports the first limb of the second hypothesis that the gaps in the identity documents' issuing regimes in Kenya negatively impact intersex persons in pursuit of their social economic rights.

Human rights are interdependent and indivisible, and when one set of rights is violated, the violation almost always invariably adversely impacts other rights. Consequently, the legal deficiencies identified in the identity documentation regime which so negatively impact the rights discussed in chapter three equally impacts other human needs, which though unquantifiable, are equally fundamental. These gaps hinder intersex persons' right to autonomy, personhood and curtails their human development. They end up being stripped of their human dignity and cannot enjoy a variety of personal development rights including personal liberty and security, family life and even dignity in death like other members of the human community. This is the subject of discussion in the following chapter, which continues

³⁰¹ Council of Europe, *Human Rights and Intersex People* Issue Paper Number 32 (Council of Europe, 2015) 16.

³⁰² *Ibid.*

³⁰³ The Constitution of Kenya 2010, Article 43(1)(a).

to test the second hypothesis as it seeks to answer the second limb of the second research question and achieve the second limb of the second research objective.

CHAPTER FOUR.

NON-RECOGNITION , NON-DOCUMENTATION AND THE HUMAN NEEDS OF AN INTERSEX PERSON.

'I'm a man without a penis'.¹

4.1. INTRODUCTION.

Empirical research has determined that the human race consists of people who are born with either male, female or intersex sex/genders characteristics.² The voices of the respondents in the preceding two chapters have demonstrated that intersex people form part of the Kenyan population.³ Being a naturally occurring congenital condition, intersex persons will continue being born alongside the male and female sex /genders currently recognized by the law in the country.⁴ This is a factual reality that lends credence to the historically documented existence of intersex persons in most Kenyan communities. Although they were and still are, derogatorily referred to as *terer*, *hundha*, *kiugu*, *malinda* and *nyot gath* by certain communities as seen before,⁵ their existence is a reality. This study has, through the personal accounts of the intersex persons narrated in chapter three, established that the failure to recognize and document them accurately has created a legal vacuum. The vacuum drastically curtails access to their rights to health, education, and employment.⁶ These categories of rights are crucial in enabling every human being advance their socio- economic interests and improve the quality of their lives. The limitations occasioned by the legal gaps therefore cause what can only be described as intersex induced poverty, which in turn negatively impacts the quality of their lives.⁷

But these livelihood rights are not the only ones adversely impacted. Non recognition, inaccurate and or non-documentation equally adversely affects unquantifiable human needs of

¹ Interview with KK on the 16th December 2019. KK strongly and bitterly feels that if the law had been such that he could be recognised and documented as an intersex person, the doctors would not have surgically attempted to reassign him a female sex/gender, a procedure which eventually left him 'a man without a penis'.

² Jack Drescher, 'From Bisexuality to Intersexuality: Rethinking Gender Categories' (2007) 43 Contemporary Psychoanalysis 1: 205-212.

³ The position was equally confirmed by the 2019 August census, when, at least 1,524 intersex persons were counted as part of the Kenyan population.

⁴ Nancy Ehrenreich and Mark Barr, 'Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of 'Cultural Practices' (2005) 40 Harvard Civil Liberties Law Review 97-100.

⁵ Taskforce Report on Intersex Persons, Kenya, 42. These derogatory ethnic names were and are still used among the Pokot, Swahili, Kikuyu, Kamba and Luo tribes respectively.

⁶ Chapter three analyses a cluster of socio-economic rights denied intersex persons due to legal non recognition and non-documentation.

⁷ 'Intersex induced poverty' is a term coined by this researcher, following the field study's revelation, that many intersex persons are unable to sustain themselves due to the non-recognition and non-documentation legal quagmire they find themselves in, which in turn has hindered access to economic empowerment.

intersex persons. This chapter therefore continues with the examination of the concrete problems faced by intersex persons in the form of denial of access to unquantifiable human needs.

Literature reviewed for this research illustrates that, studies that would elucidate the deep and personal feelings of intersex persons who have been denied their human needs and the opportunity to exercise rights of a personal nature in Kenya, are limited. Scholars writing from perspectives of other jurisdictions have however shown that certain unquantifiable rights and needs are critical elements for a holistic life for everyone.⁸ This chapter documents the effects of denial of these needs for an intersex person from a Kenyan perspective. It explores access to human needs which are not necessarily tangible, but which are considered vital in terms of providing everyone an opportunity for a full life.⁹ In this regard, the chapter continues testing the second hypothesis as it responds to the second limb of the second research objective and question. The chapter is premised on the philosophical assumption that the sanctity of human dignity finds expression in both material and non-material/unquantifiable conditions. Since all these are essential for human survival, happiness and the wholeness of a human being, the chapter posits that none of these should be curtailed or limited.

Mahbub posits that the central focus on human development should be a human being's welfare.¹⁰ Sen bolsters Mahbub's argument by stating that capabilities and freedoms are enhanced where opportunities, which are necessary for one to make personal choices, are granted.¹¹ Drawing from Mahbub and Sen's angles of reasoning, this chapter presents a broad argument on two fronts. First that the existing deficiencies in the legal recognition and identity documents' regimes strips people born intersex of their human dignity, and second, that the vacuum deprives them the freedom and capability to choose welfare needs constituting human development.¹² Yet, access to opportunities for capabilities which allow a person to live a life

⁸ See Chapter one.

⁹ Dejo Oluwu, *An Integrative Rights based Approach to human Development in Africa* (Pretoria University Press 2009) 221-222.

¹⁰ Mahbub ul Haq, *Reflections on Human Development* (Oxford University Press 1995) vii.

¹¹ Amarta Sen, *Development as Freedom* (Anchor Books 2000) 75-77.

¹² Francis Stewart, 'Basic Needs Strategies, Human Rights and The Right to Development' (1989) *Human Rights Quarterly* 347.

that is fully human must never be diminished.¹³ If that happens, an individual's human development ends up being limited and, in some cases, completely denied.¹⁴

The rights and needs contemplated by Sen are personal in nature. They protect every individual's physical, psychological and moral identity, as well as the external expression of that identity in one's community, thereby serving to complete a person. This category of human needs also allows one to complete their humanness as they relate with other members of the community as contemplated by the *ubuntu* philosophy.¹⁵ The legal impediments which curtail access to nonmaterial human needs and the negative impact of the limitation is therefore the focus of this chapter.

The chapter is organized in four parts. The first focuses on the vacuum existing in the recognition and documentation regime and how the vacuum impacts the dignity of an intersex person. Various manifestations of violation of dignity including stigmatization, discrimination and unequal treatment are demonstrated in the first part. The second part examines the impact of non-recognition and non-documentation on the autonomy of an intersex person together with the right for one to correctly identify in one's true gender. In the third part, the fundamental rights and freedoms relating to self-determination, liberty, security and personal integrity are analyzed. The fourth and final part discusses the impact of the legal gaps on the personal rights of people born intersex. Four areas are earmarked for analysis in the final part of this chapter namely, the right to a name, the right to marriage, the right to parenthood and dignity after death. The unquantifiable and non-economic human rights and needs identified for discussion in this chapter are all vital and flow from a person's dignity.¹⁶ Consequently, an analysis of the link between dignity and the nontangible rights and freedoms is shown in each part.

4.2. DIGNITY.

Human dignity is sacrosanct. Its centrality cannot be overemphasized. Indeed courts in many jurisdictions have captured this fundamental significance. In Kenya, the *Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 others v Cabinet Secretary Ministry of Health*

¹³ Martha Nussbaum, 'The Human Development Approach and its Implementation' (2009) 24 *Hypatia* 3: 211-215.

¹⁴ Des Gasper, Development as Freedom, Moving Economics Beyond Commodities: The Cautious Boldness of Amartya Sen (2000) 12 *Journal of International Development* 989-100.

¹⁵ Thaddeus Metz, *Toward an African Moral Theory* in Isaac E. Ukpokolo (ed), *Themes, Issues and Problems in African Philosophy* (Palgrave, Macmillan 2017) 106.

¹⁶ Article 29 of the Constitution of Kenya, 2010, articulates the right to freedom and security of the person. These are provisions to be found in major human rights instruments including the UDHR, Article 3; the ICCPR, Article 9 and the ACHPR, Article 6.

& 4 others¹⁷ is a case in point. Whilst underpinning the significance of this right in this case, the High Court describes human dignity as that component which constitutes the basis and the inspiration for the recognition given to other specific protections afforded by the Bill of Rights.¹⁸ This description is moved forward in *William Musembi*,¹⁹ where the High Court stresses the importance of dignity as follow:

‘The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.’²⁰

Here, the High Court seems to be taking a stand that appears to ground human rights protection to the inherent worth of the human person.²¹ And even though the Court of Appeal faults the High Court for making compensation to evictees who had been determined to be trespassers, the importance of dignity is still upheld when the court states as follows:

‘The manner in which the evictees were evicted and their houses and business structures demolished was in violation of their right to human dignity.’²²

And by upholding the award of damages given by the High Court following an appeal from the Court of Appeal’s decision, the Supreme court affirms that dignity is an important aspect for a human being, the violation of which deserves compensation.²³

Courts in other jurisdictions have equally cemented the value of human dignity. In South Africa, for instance, the Constitutional Court has stated that human dignity, alongside the right to life, is not just the most important of all human rights, but is the source of all other rights.²⁴ Similarly, in India, the Supreme Court has pointed out that human dignity is so intertwined with the development of a nation, that it is actually human dignity, rather than economic growth, which can be said to be the true measure of the development of a nation.²⁵ Human dignity is, therefore, a core value in everyone’s life. In Kenya, inherent dignity for everyone is

¹⁷ Kenya Legal and Ethical Network on HIV & AIDS (KELIN) & 3 Others v Cabinet Secretary Ministry of Health & 4 others.[2016] eKLR.

¹⁸ Ibid, Para 101.

¹⁹ William Musembi and 13 others v Moi Educational Centre Co. Ltd & 3 others [2014] eKLR.

²⁰ Ibid, Para 81.

²¹ Ibid.

²² Moi Education Centre Co. Ltd v William Musembi & 16 others [2017] eKLR, Para 73.

²³ William Musembi and 13 others v Moi Educational Centre Co. Ltd & 3 others [2021] eKLR, Para 1.

²⁴ S v Makwanyane and another (1995) ZACC 3. Para 84.

²⁵ National Legal Services Authority V Union of India and Others, Civil Original Jurisdiction Writ Petition (Civil) No.400 of 2012.Para 99.

constitutionally guaranteed.²⁶ So is every person's right to have that dignity respected and protected.²⁷

The society in Kenya has generally accepted that life begins at conception, with that position being constitutionally entrenched.²⁸ The Children Act 2022, by providing that a child's actual chronological age is to be calculated from the date of conception, appears to affirm this position.²⁹ In this regard, Kenya subscribes to the theory that a fetus has a complete human body at conception.³⁰ Starting from this premise, the implication is that by the time a person is born, they already have an innate human dignity regardless of whether they are born male, female or intersex. This position then legally entitles every person to all measures of dignity the minute they are born, as prescribed under the natural law theory.³¹ The government's obligation to acknowledge and protect that dignity therefore starts with birth registration and issuance of identity documents recognizing the birth, immediately it occurs.³² It is however this process of birth registration and documentation that can be said to be what translates into the genesis of the violation of the right to human dignity for an intersex person.³³

As explained earlier, denial of the right to birth registration for intersex persons, as well as denial of a birth certificate, both of which commences at birth, takes two forms. The first occurs where an intersex person gets misgendered through the imposition of a sex/gender which the person does not ultimately develop into. The misgendering is then documented through issuance of the birth Notification Form B1 with the wrong sex/gender description. The birth certificate is subsequently issued pursuant to the incorrect information contained in Form B1.³⁴ That is the situation that Rye, Langa and KK, amongst other intersex persons, find themselves in.³⁵ The second scenario is where administratively, phrases such as 'unknown'; 'query' and question mark (?) are inserted in the column meant to describe a child's sex/gender

²⁶ Constitution of Kenya, 2010, Article 27 (1) and (2).

²⁷ Ibid, Article 28.

²⁸ Ibid. Article 26 categorically states that the life of a person begins at conception.

²⁹ Children Act, No 29 of 2022, Section 2. This provision is likely to bring legal controversies regarding the manner in which age can be calculated from the date of conception, but it seems that the intention of the drafters is to have the age of Kenyans calculated from the date of conception moving forward.

³⁰ Tom Joel Obengo, *The Quest for Human Dignity in the Ethics of Pregnancy Termination* (Wipf and Stock Publishers 2016) 26.

³¹ See the discussion in Chapter two.

³² Ibid.

³³ The structure of Form B1, the first official document to capture a birth is binary based. Sample Form B1 and the birth certificate issued in accordance with Form B1 are attached to the research at Appendix 5.

³⁴ Ibid.

³⁵ Interview with Rye, Langa and KK in Nairobi on 18th May 2019 and 16th December 2019.

on the documents capturing data immediately after birth.³⁶ For Baby A, a question mark ‘(?)’ was inserted against the child’s sex/ gender description. This question (?) mark was what was used to capture data relating to Baby A’s sex/gender in the Birth Notification Form B1, an official identity document.³⁷ In the case of Tim,³⁸ the information inserted in Form B1 against the sex/gender description was ‘query boy?’; ‘query girl’? When the first registration document procedurally used to capture data of a child bears unknown entries, the implication is that there exists a legal doubt whether the child born is a human being deserving of rights and freedoms innately entitled to everyone else. Situations of either misrecognition or non-recognition effectively leads to denial of birth registration and subsequent identity documents for the person concerned. In the first scenario, the holder of documents with a sex/gender description which defies their physical reality cannot use them. Such a person is not in a dissimilar position with the one who holds no documents at all. The second scenario means that a person whose sex/gender cannot be ascertained by the law cannot be issued identity documents at all. Yet, identity documentation is one way of affording people dignity. Indeed, documents issued at birth become the first to declare a person a human being formally and publicly, thus affording them dignity.

The presence of doubtful phrases on birth documentation means that the sacrosanctity of the intersex person is immediately taken away. This has the impact of dehumanizing the person being described through doubtful words.³⁹ In effect, this marks the beginning of a degrading and dehumanizing trajectory for the person concerned. The word ‘unknown’, a ‘query’ or question mark, or the symbol (‘?’), on an official document, seems to indicate that the law is itself in doubt as to whether it should recognize the concerned person as a human being or not. Since legal recognition gives a person a sense of dignity, formal identity documents confer legal protection and respect for that person’s dignity, putting them at par with everyone else. Respecting a person’s dignity ensures that the person is treated equally with everyone else, hence, eliminating all manner of discriminatory practices. Given that the Constitution under the Bill of Rights (BOR) guarantees protection for all persons, the import is that everyone ought to

³⁶ *Baby A.*

³⁷ *Ibid.* Baby A had a question mark ‘(?)’ inserted at the column used to describe sex/gender identity provided in Form B1, which the government uses to capture the data for newly born children immediately after birth.

³⁸ Tim is the intersex child whose identity documentation so intrigued this researcher many years ago, that it inspired this research. See the Abstract part of this thesis.

³⁹ *Ibid.* When the child ‘Tim’ was born and was immediately declared as ‘of an unknown sex/gender’, the child was not considered a human being anymore. The child immediately became an object of medical and social curiosity. His mother’s room became a beehive of activity with people coming to peer and witness the ‘strange phenomena’. See the Abstract part of this research.

have their dignity protected.⁴⁰ Where a legal process used to document human beings at birth results in differential and discriminatory treatment for some citizens, that process ends up taking away their humanness and all other attendant rights and freedoms. But perhaps to fully comprehend the impact of this vacuum on the human dignity of an intersex person, it is important to first put the term dignity in its legal context.

4.2.1 THE MEANING OF DIGNITY.

As a legal concept, dignity has been referred to as an abstract that is not exactly definable.⁴¹ This fact notwithstanding, most scholars agree that recognition of the various forms of violation of a person's dignity can be defined.⁴² Drawing from the etymological root of the term *dignitas*⁴³ meaning 'worth' or 'intrinsic worth' of a human being, it is quite clear that dignity is an important aspect in the human rights discourse.⁴⁴ And even though it is a difficult concept to capture in precise terms, it is evident, as observed by the Constitutional Court of South Africa, that the universal protection of dignity requires States to acknowledge the value and worth of each individual member of society.⁴⁵ The age-old African *ubuntu* philosophy has been linked to the concepts of a person's dignity and integrity, two components that give people their intrinsic worth, through birth and within the community.⁴⁶ It would, therefore, be quite accurate to describe dignity as the source of a person's innate rights and freedoms. Indeed many rights and freedoms are anchored on human dignity.⁴⁷

The significance of dignity has received jurisprudential affirmations in many jurisdictions. The Constitutional and Human Rights Court in Kenya for example, affirms human dignity by describing it as follows:

'Human dignity is that intangible element that makes a human being complete. It goes to the heart of human identity. Every human has a value... each individual has inherent

⁴⁰The Constitution of Kenya, 2010, Article 20(2).

⁴¹ Oscar Schachter, 'Human Dignity as a Formative Concept'(1983)77The American law journal of International Law, 848-849.

⁴² Ibid.

⁴³ Iain Currie and Johan de Waal. *The Bill of Rights Handbook* (Juta & Company 2005) 251.

⁴⁴ Oscar Schachter (n41).

⁴⁵ National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC, Para 28.

⁴⁶Ramathate Dolamo, 'Botho/Ubuntu: The Heart of African Ethics' (2013) 112 Scriptura Journal of Contextual Hermeneutics in South Africa 1-3.

⁴⁷ Ibid, 4.

dignity which our Constitution protects. Human dignity is the cornerstone of the other human rights enshrined in the Constitution'.⁴⁸

Scholars have indeed observed that human dignity is the foundational source of a person's innate rights, from which other rights emanate.⁴⁹

Undeniably, therefore, human dignity is a crucial feature in the human rights discourse given its numerous mentions in human rights instruments. In fact, it would be quite accurate to assert that human dignity occupies a hallowed place in the interactive international, regional, and domestic web of the human rights regime.

The Constitution of Kenya for instance not only embraces dignity as a right, but also as a supreme value and a guide to constitutional interpretation.⁵⁰ Dignity appears as a motivating principle in the BOR. Indeed, the term dignity finds mention in at least fourteen places in the Constitution.⁵¹ The term equally features prominently in all key human rights documents.⁵² The Charter of the United Nations (UN Charter) starts by committing its members to the dignity and worth of the human person.⁵³ On a similar note, the UDHR asserts inherent "dignity" and the equal and inalienable rights of all persons.⁵⁴ The UDHR goes on to formulate that all persons are born free and equal in dignity and rights. This formulation appears to put dignity and human rights as equal ideas.⁵⁵ The text of the ICCPR and that of its twin the ICESCR, take this affirmation further. They both recognize that the rights they contain 'derive from the inherent dignity of the human person.'⁵⁶ These formulations contained in the UDHR, ICCPR and ICESCR, the three instruments said to constitute the International Bill of Rights (IBOR),

⁴⁸ Republic v Kenya National Examinations Council & another *ex-parte* Audrey Mbugua Ithibu [2014] eKLR Para 133.

⁴⁹ Donrich W Jordaan, 'Autonomy As an Element of Human Dignity in South African Case Law' (2009) 49 Journal of Philosophy Science & Law 3: 5-7.

⁵⁰ Rainer Ebert and Reginald Oduor, *The Concept of Human Dignity in German and Kenyan Constitutional Law* (Thought and Practice 2012) 44-45.

⁵¹ The term dignity appears in the Constitution of Kenya at Article 10, as part of the National values; Article 19 (2) relating to the Bill of Rights; Article 20 on the interpretation of the Bill of Rights; Article 24 regarding the limitations of rights and freedoms; Article 28 as a substantive right; Article 54 in relation to the rights of persons with disabilities; Article 57 regarding rights of older members of society; Article 73 on leadership and integrity matters and at Article 244 in relation to the objects and functions of the National Police service, amongst other places in the Constitution.

⁵² Donrich W Jordaan, 'Autonomy As an Element of Human Dignity in South African Case Law' (2009) 49 Journal of Philosophy Science & Law 3: 43.

⁵³ UN Charter, Preamble.

⁵⁴ UDHR, Preamble. The UDHR makes mention of dignity at least four other times in Articles 1, 22 and 23.

⁵⁵ UDHR Preamble and Article 1.

⁵⁶ ICCPR and ICESCR at the Preamble.

seem to be making the claim that dignity is the foundation of all human rights.⁵⁷ And that really, is the whole point of human rights: to respect, protect and promote the dignity of the human person in all aspects of their lives.

The human rights regime in Africa echoes the formulations found in the IBOR. The African Charter on Human and Peoples Rights (ACHPR), is the first to provide the right to the respect of the dignity inherent in a human being for every individual.⁵⁸ The African Charter on The Rights and Welfare of the Child (ACRWC), equally recognizes the importance of upholding the dignity of the child as it calls on State parties to put in place measures to eliminate harmful practices affecting the welfare and dignity of children.⁵⁹

The concept of human dignity is also rooted in religious tradition and teachings. These equally underpin the sacredness of every individual by virtue of being human.⁶⁰ The Bible seems to suggest that the inviolability of the individual means that every person is endowed with human worth and equal value. It does this by proclaiming that God created man in His own image.⁶¹ Islam also emphasizes and supports the claim to human dignity as an inherently divine concept bestowed on all humankind as affirmed in the UDHR.⁶² Indeed, texts from the Quran appear to endow human dignity on everyone, without any limitation.⁶³ The rationale underlying these religious wordings suggest sacredness of human life. It is also an indication that human dignity is considered part of the law of nature, as theorized by naturalists. Dignity can, therefore, be said to be an inalienable human component in a society that values human rights.

The interpretation of the human rights instruments, religious texts as well as the Constitution of Kenya, point to the argument that since all human beings are born with dignity, it should never be repressed. It also means that there's certain treatment that everyone should be accorded and certain treatment that no one should be subjected to.⁶⁴ In other words, human dignity entails

⁵⁷ The UDHR, ICCPR and the ICESCR jointly form the International Bill of Rights (IBOR).

⁵⁸ ACHPR, Article 5.

⁵⁹ ACRWC, Preamble and Article 1.

⁶⁰ Rainer Ebert and Reginald Oduor, *The Concept of Human Dignity in German and Kenyan Constitutional Law*. (Thought and Practice, 2012) 44-45.

⁶¹ International Bible Society, *The Holy Bible*, New International Version, (1973)3. Genesis 1: 27 proclaims that all human beings have been created 'in the image of God'. In this sense, men are endowed with God's inalienable dignity. Galatians 3: 28 appears to be propounding the principle of equality before God when it states that there is neither Jew nor Greek, neither bound nor free neither male nor female, for all are one in Christ Jesus.

⁶² Seyed Amir Hossein Asghari, 'Understanding Human Dignity in Shi'i Islam: Debates, Challenges, and Solutions for Contemporary Issues'. (2023) *Religions* 14: 505.

⁶³ Holy Quran, 17:70

⁶⁴ Doron Shultziner, *Human Dignity: Functions and Meanings* (The Berkeley Electronic Press, 2003) 4-13.

certain treatment that a human being should receive and certain treatment that a person must never be subjected to, purely by virtue of being human.

Molefe points out that dignity should revolve around not just avoiding fundamental harms such as degradation, stigmatization, dehumanization, and humiliation, but also treating every human being with ‘specialness’ and ‘preciousness’.⁶⁵ And indeed, courts in Kenya, while describing human dignity as that intangible element which makes a human being complete, have confirmed that violation of dignity can take many forms.⁶⁶ Such forms include stigmatization, humiliation, degradation, rejection and dehumanization.⁶⁷ Unfortunately this is the sad reality for people born with the intersex gender in Kenya.

The fact that recognition of people in Kenya is socially and politically seen with reference to documented strictly binary biological genitalia becomes fundamentally instrumental in causing repression for intersex persons’ dignity. Repression of dignity can be manifested in several different ways.⁶⁸ In the case of people born with the intersex gender, manifestation of repression of dignity includes being subjected to discriminatory and differential treatment, being stigmatized, dehumanized and rejected. Further repression of their dignity involves denying them treatment that they ought to get. The following subsections examine the impact of the various forms of repression of human dignity for persons born intersex who remain undocumented in Kenya.

4.2.2. DISCRIMINATION AND UNEQUAL TREATMENT.

Equality for all stands out as one of the foundational constitutional guarantees in Kenya.⁶⁹ So too, does the principle of nondiscrimination as contemplated by the UDHR amongst other foundational human rights instruments.⁷⁰ These are guarantees meant to offer protection from discriminatory practices and unequal treatment based on any parameters whatsoever.⁷¹ In Kenya, the Court of Appeal in *Ol Pejeta Ranching Limited vs David Wanjau Muhoro*

⁶⁵ Motsamai Molefe, *Human Dignity in African Philosophy. A Very Short Introduction* (Springer 2022)7-8.

⁶⁶ Republic v Kenya National Examinations Council & another *ex-parte* Audrey Mbugua Ithibu [2014] eKLR.

⁶⁷ Ibid.

⁶⁸ Ralf Stoecker, ‘Three Crucial Turns on The Road to An Adequate Understanding Of Human Dignity’ in Paulus Kaufmann *et al* (eds) *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (2011) 24 Library of Ethics and Applied Philosophy 5-9.

⁶⁹ Constitution of Kenya, 2010, Preamble, Articles 10 and 27.

⁷⁰ Constitution of Kenya, 2010, Article 27 and UDHR, Article 7 respectively.

⁷¹ Constitution of Kenya, 2010, Article 27.

determined that discrimination based on personal characteristics, whether direct or indirect, is prohibited.⁷²

The nature of the documentation regime in Kenya has however become the source of discriminatory and unfavorable treatment in the day to day lives of intersex persons. The study has so far revealed that the structure of the documentation regime results in either non-issue or issue of incorrect 'identity' documents. This in turn permits discrimination and inequality to thrive in the pursuit of health, education, employment and human needs, despite anti-discrimination guarantees given under human rights law.

Rye explains the discrimination and unequal practices meted against intersex persons as follows:

'Being intersex is generally considered unnatural and abnormal. Incidents of being discriminated against, being treated as less human and being shut out of many opportunities available for other Kenyans is a constant. The situation is made worse where you don't have an identity card, or you have an identity card that looks like it does not belong to you'.⁷³

Mercy has been subjected to many incidents of discrimination and unfavorable treatment during her life.⁷⁴ When seeking employment, potential employers show open discomfort with her personal characteristics. She recounts one incident where she was looking for employment as a nanny and the potential employer looked at her and told her to her face:

'We ni mwanamke ama ni muanaume? Ni mwanamke gani ako na ndevu?'. 'Na hata hauna kitambulisho. Ukitoroka nitakutoa wapi', which is Kiswahili for 'Are you a man or a woman...which woman has a beard? 'And you do not even have an identity card. If you disappear, where will I get you from?'⁷⁵

Needless to say, Mercy was not hired.

Yet another employer, taking pity on her desperation, told her that he would hire her, but offered a significantly reduced salary. The employer explicitly told her:

⁷² OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR

⁷³ Interview with Rye in Nairobi on the 18th May 2019.

⁷⁴ Interview with Mercy in Nairobi on the 18th May 2019.

⁷⁵ Ibid.

'Ukiwa vile uko, hakuna mwenye atakupatia kazi. (The way you look, no one else will hire you').⁷⁶

Godia's experiences with discrimination and unequal treatment based on her personal characteristics are similar to Mercy's as she states below:

'I was once given a job in a restaurant in Kisumu. I was, however, sacked on the spot when my employer saw that my identity card describes me as a man while my physical appearance is that of a woman'.⁷⁷

These forms of discrimination and unequal treatment subjected to both Mercy and Godia for being intersex, are contrary to the equality and non-discrimination principles, both of which are well enunciated in the human rights regime.⁷⁸ The UN Charter intends that these principles be applicable to all peoples of all nations.⁷⁹ It is therefore unfortunate that a category of people is precluded from benefiting from this golden thread which runs through and weaves together the human rights discourse.⁸⁰

Equality and nondiscrimination principles are equally found in the regional human rights regime with the ACHPR setting the tone by duly according the same rights to everyone in the region of Africa. It further prohibits any form of domination of a section of people by others.⁸¹ Regrettably, intersex persons, due to lack of recognition and accurate documentation, usually find themselves under the domination of others. Ngugi wa Thiong'o, writing on the impact of domination of a nation observes that such domination neutralizes and paralyzes the dominated nation.⁸² These sentiments can be transposed to intersex persons. The systemic discrimination and unequal treatment by the law results in a form of domination which is likely to take away an intersex person's ability to self-determine. Consequently, the domination neutralizes and paralyzes them, reducing and placing them beneath others in society. They become a stigmatized category of human beings, as explained in the subsection below.

⁷⁶ Ibid.

⁷⁷ Interview with Godia on telephone from Kisumu on 16th August 2020.

⁷⁸ Ibid.

⁷⁹ UN Charter, Preamble, Articles 1(1) and 55.

⁸⁰ Similar provisions are incorporated in the Preambles of the UDHR, ICCPR and ICCSCR.

⁸¹ ACHPR, Article 19.

⁸² Ngugi wa Thion'go, *Writers in Politics: A Re-engagement with Issues of Literature & Society* (East African Publishers 1997(ed)) 9.

4.2.3. STIGMATIZATION.

In the words of Ainley *et al*, stigma is a phenomenon that constantly affects anyone who slips beyond what is considered as the ‘bounds of social acceptance’.⁸³ Ainley *et al*’s description captures the full import of stigma as first explained by Goffman in his 1963 work.⁸⁴ Goffman viewed stigma as a deeply discrediting attribute which reduces the stigmatized person from a whole and usual person to a tainted and discounted one.⁸⁵ According to Gichuru *et al*, stigma brings about a process where society feels the need to isolate or ‘to push out’ those stigmatized.⁸⁶ In other words, stigma is a social process through which social inequality and discrimination is legitimized.⁸⁷

Stigma can and does take many forms. Indeed, as Akatukwasa *et al* observe, stigma can and does have many dimensions.⁸⁸ These include verbal, psychological and physical abuses, public ridicule and social exclusion.⁸⁹ Aringo and Kimathi add that hurling hateful words at a fellow human being, treating a person in a manner meant to degrade that person, humiliating a person and even rejecting them all constitute stigmatization.⁹⁰

In addressing the aspect of stigmatization, certain jurisdictions have developed jurisprudence relating to the definition of stigma. In *Centre for Child Law and Others*, for example, the Constitutional Court of South Africa refers to stigma as a social marking of rejection.⁹¹ Here, the Court describes stigma as:

‘..the social branding of condemnation, denunciation, ostracism and the judgement placed upon the brow of the rejected other by society’.⁹²

⁸³ Ainlay, et al. *Stigma Reconsidered* in Ainlay, et al (eds) *The Dilemma of Difference: Perspectives in Social Psychology* (Springer 1986). 1

⁸⁴ Leah Gilbert, ‘The mercurial piece of the puzzle’: Understanding stigma and HIV/AIDS in South Africa’ (2016)13 *Sahara Journal of Social Aspects of HIV/AIDS* 1: 9.

⁸⁵ Goffman, E. *Stigma: Notes on the management of spoiled identity* (Prentice-Hall 1963) 2-3.

⁸⁶ Evans Gichuru *et al*, ‘Engaging religious leaders to support HIV prevention and care for gays, bisexual men, and other men who have sex with men in coastal Kenya’ (2018) 28 *Critical Public Health* 3: 298.

⁸⁷ Klaus Geiselhart: ‘Stigma and Discrimination -An Integrative Perspective: Spatial Disparities and Their Impact on The Introduction of An Antiretroviral Therapy Scheme for HIV And Aids Treatment in Botswana’ (2010) 64 *Erdkund* 34-35.

⁸⁸ Cecilia Akatukwasa *et al*, ‘Dimensions of HIV-Related Stigma in Rural Communities in Kenya and Uganda at the Start of a Large HIV ‘Test and Treat’ Trial (2021) 16 *PLoS ONE* 5: 1-17.

⁸⁹ *Ibid*.

⁹⁰ Margaret Aringo and Caroline Kimathi. *Words Matter: Stigmatization Narratives by the Intersex Persons in Kenya*, in Lucy Wakiaga, (ed) *Women’s Contribution to Higher Education and Social Transformation. Diversity and Inclusion Research* (Springer Cham, 2022) 221-225.

⁹¹ *Centre for Child Law and Others v Media 24 Limited and Others* (CCT261/18) [2019] ZACC 46. Para 136.

⁹² *Ibid*.

In the context of intersex persons in Kenya, stigma arises from a section of society's negative attitude towards them for possessing a different attribute in the form of double genitalia. To some people, possessing double genitalia is an attribute that falls outside legal and social expectations of exclusively male and female genitalia, making it 'unacceptable'. The unfortunate fact is that this social attitude towards intersex persons finds backing in the law. Since the law has failed to recognize or accurately document intersex persons, it can be said that the law endorses society's stigmatizing attitude. This in turn results in several dimensions of stigmatizing acts including dehumanization, harassment, and rejection. These then become the negative attitudes which find support in the silence of the law as *RM* was trying to point out to the court.⁹³ Regrettably, Kenya lost the opportunity to jurisprudentially define stigma and preferred to dismiss it as a social, rather than a legal problem requiring legal intervention.⁹⁴ And yet stigma for intersex persons commences at birth and continues to adulthood and beyond. The conflict between an intersex person's physical reality and the failure by the law to recognize or document them has led to feelings of vulnerability, humiliation, and constant anxiety. These feelings are compounded by the social stigma they are constantly subjected to not just in learning and other institutions as previously seen, but in the communities where they live. ApSiya captures the stigma, ridicule, humiliation, rejection and ostracization that s/he was subjected to in school and social spaces as follows:

'I was born with 'twin' genitals... those for a man and also for a woman. Because of this I was mocked, abused, suffered humiliation and rejection. Everyone at home, in school, in the village, in the market and even in church used to laugh at me and call me 'awuor nyar dichuo', which in the Luo language means a woman with beards and other male parts. Others called me 'gumo' which means a man with female parts. The people in and around me did not consider me a human being. I was a degraded outcast and I ended up hating myself. I wanted to die.'⁹⁵

ApSiya's experiences while growing up fall into Yebei *et al's* description of stigma.⁹⁶ Yebei *et al* consider stigma as one of the many discrediting attributes which reduce an individual into a

⁹³ *RM* Para 3(n).

⁹⁴ *Ibid*, Para 145

⁹⁵ Interview with ApSiya (pseudonym) in Ndiwa, Homa Bay County on 23rd May 2022. This Respondent requested the Researcher to use the name that he/she has adopted, but to maintain his/her anonymity, the researcher has opted to use a pseudonym. The Respondent also requested the researcher to use both male and female pronouns while referring to her, because, according to her, she is both.

⁹⁶ Violet N Yebei *et al*, 'Felt Stigma Among People Living With HIV/AIDS In Rural and Urban Kenya' (2008) 8 African Health Sciences 2: 97.

degraded person.⁹⁷ Society targeted ApSiya due to his/her intersex condition, which it perceived as a physical imperfection and therefore, not human.⁹⁸ And it is the legal binary sex/gender *status quo* situation prevailing in Kenya that unfortunately perpetuates such a perception. Since the intersex gender finds no legal grounding, people born in that sex/gender are perceived as having physical imperfections to their genitalia. They are also seen as imperfect beings for not belonging to either of the two recognized and documented sex/gender characterizations. This has resulted in them being regarded with a degrading attitude, which diminishes their human worth. Stigma, ridicule, and rejection by society is a constant for them. The stigma is exacerbated by the mockery and name calling that many suffer throughout their lives, as Jane explains in relation to her child:

‘The people in the school and the neighborhood where we live refer to Sebbo as *‘yule ‘dame’anakuanga chali*, (colloquial Kiswahili word for ‘that girl who is also a boy’).

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For Caymo, the demeaning name her/his community has chosen to use in reference to her/him is ‘unisex’.¹⁰⁰ This leaves Caymo feeling abnormal and subhuman.¹⁰¹

Stigma meted through name calling, mockery and dehumanization amongst other forms, is therefore part of the daily realities for people born intersex in Kenya. RM’s attempt to bring this to the attention of the court through his own lived experiences however failed.¹⁰² Consequently, stigma and its devastating effects on intersex persons has not found any legal attention in Kenya.¹⁰³

Rejection is another manifestation of stigma. According to Mama A, an intersex person is confronted with rejection right from birth. This is because many people do not want to associate themselves with anything that is different from the norm.¹⁰⁴ The documentation regime started by rejecting her child by labeling him with a question mark (?). Her husband followed suit by doubting the humanness of the child as she narrates below:

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Translation by researcher.

¹⁰⁰ Interview with Caymo on telephone from Siaya on 16th August 2020. Like every young person today, Caymo feels the need to dress up as a female, the sex/gender he/she is comfortable with and post her/his photos on social media including Facebook, only to be met with derogatory comments making reference to her/him as ‘unisex’ because of the facial hair.

¹⁰¹ Ibid.

¹⁰² *RM*, Para 145.

¹⁰³ Ibid.

¹⁰⁴ Interview with Mama A in Nairobi on 17th October 2019.

‘My husband started yelling at me the minute he looked at Baby A. He asked me, what is this ‘thing’?. He told me that the baby was not human because he contained two sets of genitalia. Thereafter he left the marriage, and I was left to raise Baby A alone. I feel stigmatized, isolated, and rejected. Many times I thought of killing myself and the child’.¹⁰⁵

The feelings of stigma, rejection, and dehumanization that Baby A’s father directed at the child led the mother to devalue the child to the extent of contemplating killing the child alongside herself. The child was eventually documented and issued a birth certificate after the court directed the Registrar of Births and Deaths to do so. However, the child still ended up being misgendered in the male sex/gender, since that is the only gender the legal forms provide for. And in a country that documents only binary opposites, the child still lives a life surrounded by stigma, rejection, and dehumanization as the mother narrates below:

‘My child is a loner and does not interact with other children. He is constantly laughed at and mocked when he scratches the scar where his vagina was sewed up.¹⁰⁶ He does not fit into the male gender which the surgery and the birth certificate issued to him fixed him in. He does not mix with the girls either. He lives his life in isolation.’¹⁰⁷

Mama A’s prayer is that the child’s physical traits at puberty will not defy the male gender he has been forced to live in.¹⁰⁸

ApSiya tells a similar story:

‘Growing up, boys chased me away when I attempted to mix or play with them. The girls chased me away too. Both rejected me. I used to coil and hide. I did not want to be seen by anybody. Nobody wanted to be with me.’¹⁰⁹

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Interview with ApSiya in Ndiwa, Homa Bay County on 23rd May 2023.

As Aringo and Kimathi explain, living with constant stigma severely adversely affects the quality of intersex persons lives.¹¹⁰The narratives by ApSiya, Baby A's mother and the others interviewed for this study clearly depict this.

As stated, stigma for people born intersex, begins immediately at birth and usually continues to adulthood, as Riziki recounts below:

'I suffered rejection from birth because my parents had never seen or heard of a child being born with both male and female genital organs. My parents did not know if I was a boy or a girl, so they rejected me. Growing up, I also did not know where I belonged. I also consider myself abnormal and so I keep away from people.'¹¹¹

The result is that Riziki hated herself even as her own parents and society stigmatized and rejected her as she explains:

'I hated myself. I lived my life in hiding. I did not know what intersex was.'¹¹²I got to know about intersex when my grandmother died. I heard that when she was being prepared for burial the women discovered that she had both male and female genital organs'. That is when I knew she was like me'.¹¹³

From Riziki's narration, it appears that she got to know something about the intersex condition when her own grandmother, who apparently was also intersex died. Her grandmother must have kept her condition hidden until society discovered it when her body was being washed during the *ghusl* ceremony in accordance with Islamic burial preparation rites.¹¹⁴According to Riziki, when the women who performed the *ghusl* burial rites on her grandmother's body realized that she had both male and female genitalia, she was immediately labelled a witch.¹¹⁵ For Riziki's grandmother, stigma, labelling, ridicule, and mockery followed her even after death.¹¹⁶

¹¹⁰ Margaret Aringo and Caroline Kimathi. *Words Matter: Stigmatization Narratives by the Intersex Persons in Kenya*.

¹¹¹ Interview with Riziki (pseudonym) on telephone from Mombasa on 4th October 2020.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Adekoya - Igwebuiki, 'A Comparative Analysis of Burial Rites in Christianity and Islam'(2021)*African Journal of Arts and Humanities*,153. The *ghusl* ceremony is part of the compulsory burial rites performed amongst people who profess the Islamic faith. It involves washing of a corpse before interment.

¹¹⁵ Ibid.

¹¹⁶ As discussed later in this chapter, existing literature and jurisprudential pronouncements indicate that dignity should be extended to the dead as well.

Jones *et al* explain that stigma involves the negative marking of a person by the society.¹¹⁷ The society uses this ‘marking’ to perceive the person as ‘flawed’ or ‘spoiled’ within the social context.¹¹⁸ Stigma is further used to devalue a person’s social identity.¹¹⁹ This is the position where Riziki has found herself. She knows that she is a devalued and ‘marked’ person, just like her grandmother was devalued and ‘marked’ even after death. Without legal protection by way of recognition, Riziki only awaits more rejection. This has forced her into further isolation. The lived experiences of intersex persons interviewed for this study demonstrate harrowing existences of rejection and living in hiding for fear of being molested and stigmatized.¹²⁰ Many others are hidden and shunned by their families for the same reasons.¹²¹ In schools and other public places, the stigma and differential treatment takes the form of being bullied and dealt with relentless torment.¹²² Rye, for instance, was forced to desert the home where he was born and brought up due to stigma and torment, which eventually extended to physical violence.¹²³ Before fleeing his home to an area where he was unknown, Rye had been forced to drop out of school for similar reasons.¹²⁴ Such incidents of stigmatization, discriminatory and differential treatment are all attributable to lack of legal recognition. Personal narratives all seem to suggest that the society treats intersex persons the way it does because the law has not bothered to document them or acknowledge their existence, so they lack legal protection.¹²⁵

According to KK, many intersex persons and parents of intersex children lacked the courage to present themselves as being of the intersex gender and be documented in that gender during the national census held in August 2019.¹²⁶ They opted to hide their intersex status for fear of being marked and subsequently being subjected to stigma.¹²⁷ Some parents also decided not to go public about the intersex status of their children fearing that they would be profiled,

¹¹⁷ Jones E. E. Farina *et al*, *Social Stigma. The Psychology of Marked Relationships* (New York Freeman 1984) 9.

¹¹⁸ Crocker B Major and C Steele, *Social Stigma* in S. Fiske *et al*, (eds) *Handbook Of Social Psychology* (Mc Graw-Hill 1998) 505.

¹¹⁹ *Ibid*.

¹²⁰ *RM*, Para 32.

¹²¹ *Ibid*.

¹²² *Ibid*.

¹²³ Interview with Rye in Nairobi on 18th May 2019.

¹²⁴ *Ibid*. Although the court in *RM* failed to acknowledge the levels of stigma intersex persons go through, *RM* had given a detailed chronology of the stigma that he suffered during his life trajectory as an intersex person in a country which has denied people born intersex recognition and identity documents.

¹²⁵ These are the words of the Respondents actively agitating for legal recognition and issuance of accurate documentation and who were interviewed for this research. They include Rye, Langa, KK, Syd and ApSiya.

¹²⁶ Interview with KK in Nairobi on 16th December 2019. As the program officer of *Jinsiangu*, KK interacts with many intersex persons and parents/guardians of children born with the intersex gender, hence he had these facts.

¹²⁷ *Ibid*.

stigmatized, mocked, and ridiculed.¹²⁸ For them, it is better if no one ever gets to know they are intersex.¹²⁹ This is the same fear that forces intersex persons to be reclusive and separate themselves from the outside world.

Goffman's description of stigma is quite apt for intersex persons.¹³⁰ Pervasive discrimination, unequal treatment and stigma forces people into feelings of shame. Intersex persons have felt discredited, tainted, discounted, and are forced into a shameful existence. In the words of ApSiya:

'Wherever I went, a crowd would gather and start debating whether I was a woman or a man. A decision would then be made to strip me naked to see what 'this thing' was. I would then be stripped naked like an animal. I was stripped naked so many times that at some point I thought I should just be walking around naked so that whoever wants to see the 'thing' can just see. I have never seen a man, or a woman or a boy or a girl stripped naked to check what is beneath them. I used to ask myself, why always me?'¹³¹

Stigma forces people to react in varying ways. Some get into conflict with the law. A study conducted on the treatment of transgender and intersex inmates in the State of New York Men's Prisons affirms this position.¹³² This was the case with RM, who reacted to the stigma, discrimination and unequal treatment by engaging in criminal activities.¹³³ Others like Baby A become loners.¹³⁴ Yet others engage in self-destructive behavior including substance abuse, attempted suicide, and actual suicide.¹³⁵ ApSiya says that society made him/her feel more of an animal than a human being, making him permanently depressed. He/she attempted suicide several times, as did Langa and Rye.¹³⁶

From the above narratives, it is evident that legal gaps emanating from legal non recognition and non-documentation exacerbates stigma in society for intersex persons. Lack of legal protection permits negative social branding to continue unabated. Denial of dignity, discriminatory treatment and stigma has led to the dismantling of individual self-determination

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Goffman, E. *Stigma: Notes on the management of spoiled identity*.

¹³¹ Interview with ApSiya in Ndhiwa, Homa Bay County on 23rd May 2022.

¹³² Sylvia Rivera Law Project (SRLP), *Its War in Here.* A Report on the Treatment of Transgender and Intersex People in New York State Men's Prisons (Sylvia Rivera Law Project (SRLP) 2007) 10-11.

¹³³ RM, Para 32.

¹³⁴ Interview with Mama A, Baby A's mother in Nairobi on 18th May 2019.

¹³⁵ Interview with KK in Nairobi on 16th December 2019.

¹³⁶ Interview with Rye, Langa and ApSiya in Nairobi and Ndiwa respectively.

for intersex persons, as seen in the parts discussed above. This has had the impact of taking away not just their individual rights, but also the ability to make personal decisions without interference from others.¹³⁷ Non recognition and non-documentation reduces intersex person to ‘creatures’ to be dominated by society. This is the kind of domination that Ngugi wa Thiongo says results in social repression that affects the human body, mind, and soul.¹³⁸ It is society which determines who they are and who they should be, in effect affecting their social needs, their identity, and depriving them of their autonomy as human beings, as the section below explains.

4.3. AUTONOMY AND IDENTITY.

Jurisprudence in Kenya has pointed out that human dignity is intertwined with and affects many aspects of a person’s everyday life and interactions.¹³⁹ Courts have further confirmed that denial of an identity and autonomy, which is *inter alia* acquired through a name, can end up unnecessarily blighting a person’s life.¹⁴⁰ These jurisprudential pronouncements are pointers to the fact that any action interfering with a person’s dignity ultimately affects many areas of their lives, including their individual autonomy and identity as a human person.¹⁴¹ Scholars have often explained that human dignity is not just intertwined with identity and moral integrity, but also with autonomy.¹⁴² According to Dahbour, self-determination applied as a political concept, can be used at the individual level to mean possession of freedom by an individual, to determine the conditions within which they want to live their personal lives.¹⁴³ The notions of dignity, identity and moral integrity therefore all allow free self-determination.¹⁴⁴ Indeed, scholars have identified an affinity between dignity, autonomy, and identity.¹⁴⁵ Botha for instance, emphasizes the affinity between human dignity and all other rights, which he ties to

¹³⁷ The political concept of self-determination can be used at the individual level to mean the freedom of an individual to determine the conditions within which they want to live their personal lives. See Omar Dahbour: ‘Self Determination in Political Philosophy and International Law’ (1993)16 History of European Ideas, 879.

¹³⁸ Ngugi wa Thion’go, *Writers in Politics: A Re-engagement with Issues of Literature & Society* (East African Publishers 1981) 20-35.

¹³⁹ Justice Majanja, in ‘Kituo Cha Sheria & 8 others v Attorney General’ [2013] eKLR Para 68, while declaring a government directive aimed at moving all refugees to refugee camps unconstitutional, observed that a person’s family, where they work, their neighbors and schools all contribute to the dignity of the individual. This shows that a human being’s dignity is tied to their interaction with other human beings.

¹⁴⁰ L.N.W v Attorney General & 3 others [2016] eKLR, Para 108.

¹⁴¹ Donrich W Jordaan, ‘Autonomy As an Element of Human Dignity in South African Case Law’ (2009) 49 Journal of Philosophy Science & Law 3: 1-6.

¹⁴² Henk Botha, ‘Human Dignity in Comparative Perspective,’(2009) 2 Stellenbosch Law Review Journal,188.

¹⁴³ Omar Dahbour, ‘Self Determination in Political Philosophy, and International Law’.(1993) 16 History of European Ideas 879.

¹⁴⁴ Ibid.

¹⁴⁵ Henk Botha (n142)189.

the *ubuntu* philosophy, one of the theories on which this research is anchored.¹⁴⁶ Identity acquired through one's autonomy is rooted deeply in a person's identity.¹⁴⁷ Everyone has their own unique autonomy and identity and this is what is linked into that of others in the *Ubuntu* spirit.¹⁴⁸ Anyone who is denied their identity and autonomy is deprived of their humanness contrary to the *ubuntu* philosophy, as the following two sub sections demonstrate.

4.3.1. IDENTITY.

Sex/gender identity which is officially assigned to a person, has been referred to as a powerful factor towards recognition.¹⁴⁹ It marks the status by which one can gain or lose access to certain rights, responsibilities and privileges.¹⁵⁰ It has actually been said that identity is what makes people unique but at the same time identical to others.¹⁵¹ Identity is also what expresses the differences between human beings, making it central to legal recognition.

One of the key provisions enunciated by the 2006 Yogyakarta Principles is that, every person's gender identity is not only integral to their personality, but also forms part of the most basic aspects of self-determination, dignity, and freedom.¹⁵² Accordingly, no one should be subjected to any pressure to conceal, suppress or deny their sex/gender identity.¹⁵³ Identity is hence always an essential component of who one is, in all places.¹⁵⁴

Identifying a human being through sex/gender thus becomes a key component of identity. This is because a person's sex has been accepted as a central aspect of one's sense of self and identity.¹⁵⁵ In Kenya, as already observed, identity is predicated on the binary biological sex/gender characteristics. This means that due to their unique biological predication, intersex persons are denied identity. The fact that intersex persons are denied legal identity as a distinct sex/gender category means that they are not seen as belonging anywhere in terms of sex/gender documentation.

¹⁴⁶ Henk Botha (n142)179.

¹⁴⁷ Coleman TE, 'Reflecting on the Role and Impact of the Constitutional Value of *ubuntu* on the Concept of Contractual Freedom and Autonomy in South Africa' (2021) 24 Potchefstroom Electronic Law Journal 1: 1- 2.

¹⁴⁸ Drucilla Cornel and Van Markle Karin, 'Ubuntu feminism: Tentative Reflections' (2015) 36 *Verbum Eccles* 2.

¹⁴⁹ Michael Ryan, 'Gender Identity Laws: The Legal Status of Global Sex/Gender Identity Recognition' (2018) 8 *LGBTQ Policy Journal* 3.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² 2016 Yogyakarta Principles, Principle 3.

¹⁵³ *Ibid.*

¹⁵⁴ Rogena Sterling, *Identity and its Protection as the Aim and Purpose of International Human Rights Law: The Case of (Inter)sex Identity and its Protection*. (Doctoral Thesis, The University of Waikato 2018) 8.

¹⁵⁵ Julie Tilsen *et al.* *The Gender Binary Theory lived Experience* (47 *International Journal of Narrative Therapy and community work* 2007) 48.

Speaking on aspects of gender equality amongst the currently recognized binary gender categories, Aura and Oduor describe gender-based equality as a social order that enables everyone to share the same opportunities (and constraints) in the economic, social and political realms.¹⁵⁶ Drawing from this description, gender recognition must involve considering everyone as equal with everyone else, but at the same time being unique and distinct.¹⁵⁷ Since intersex gender does not fit in the biological definition of either man or woman, there is little doubt that they end up without a legal sex/gender identity.¹⁵⁸

The importance of legal sex/gender identity for intersex persons was underscored when Kenya observed the ‘World Intersex Awareness Day’ for the first time in 2012. During the launch, a group of intersex persons started a campaign dubbed ‘Let me be me’. Through this campaign, intersex persons initiated a call to the government to allow them to identify and self-determine themselves as nature made them. That call is still alive now as it was over a decade ago.¹⁵⁹ Intersex persons would like the law to stop manipulating them and documenting them in its current rigid gender classifications. Indeed, according to KK,

‘We want to be identified and documented as belonging to the intersex gender because we are intersex.’

KK’s statement makes a fundamental legal argument. Sex/gender in Kenya constitutes a key identifying feature.¹⁶⁰ It is sex/gender description, as cited by society, that determines the socio-political status of life for everyone in Kenya. Being documented as either men or women when they are not, or not being documented at all, leaves intersex people experiencing intense identity confusion.¹⁶¹ The confusion is compounded by the legal identity documents’ structure. For those who have somehow been able to procure identity documents, the law has forced their

¹⁵⁶ Ruth Aura Odhiambo and Maurice Oduor, ‘Gender Equality in the New Constitutional Dispensation of Kenya in constitutional law in Kenya’ (2010) Available online at <http://dx.doi.org/10.2139/ssrn.1726378> (Accessed on 29th September 2021).

¹⁵⁷ Nancy Fraser, ‘Rethinking Recognition’ (2000) 3 *New Left Review* 109.

¹⁵⁸ On 26th October 2012, Kenya observed the ‘World Intersex Awareness Day’ for the first time. 26th October has been dedicated globally as a day for creating awareness on the intersex condition. Except for one respondent, all the intersex persons interviewed for this research expressed the desire to be allowed to identify as nature made them. They want the law and society to stop manipulating them into what the existing law wants them to be.

¹⁵⁹ *Ibid.*

¹⁶⁰ All the documents conferring legal identity examined in chapter two above require that a person identifies themselves through sex/gender characterization.

¹⁶¹ KK himself has suffered a lot of confusion in his life. He had his penis amputated in infancy, was documented and raised as a girl, yet, he feels and identifies as a male. He has had to live as a man without a penis, and in possession of documentation that describes his sex/gender as female.

real and personal sex/gender identity to be dissociated from their identity documents. The legally imposed sex/gender, which in some cases has misgendered many, is manifested in all the official records.¹⁶² The sex/gender description which is documented in their identity documents, is what then becomes their socio-legal existence. Those without any form of identity documents effectively remain without any form of legal identity and their social legal existence then becomes problematic.¹⁶³ Both situations negatively impact their identity as seen above, but also their autonomy as explained below.

4.3.2. AUTONOMY.

Autonomy has been defined as the power to not just determine for oneself who one is and how one wants to be, but also the ability to independently pursue and freely fulfil one's personal and social goals.¹⁶⁴ The term autonomy is said to have originated from two Greek words: *auto* meaning self and *nomos* meaning law.¹⁶⁵ Taken together, these terms mean to be one's law or to be able to self-determine, a key element of human dignity.¹⁶⁶ Hysom is one of the scholars who connects autonomy with human dignity.¹⁶⁷ According to him, human dignity can only be valued and respected if individuals are able to develop their humanness to the full extent of its potential.¹⁶⁸ And since, as Hysom observes, every human being is uniquely talented, part of respecting the dignity of each person would be awareness and recognition of this uniqueness. Hysom's proposition suggests that an individual's human dignity cannot be fully respected or valued, unless the individual is permitted to develop his or her unique talents optimally.¹⁶⁹

But in addition to Hysom's observation, there is a correlation between autonomy and human development.¹⁷⁰ In fact, autonomy has been considered as a necessary condition for the achievement of an individual's own good, which comes through personal development, self-

¹⁶² Bourdieu Pierre, *The Biological Illusion* in Jessica Evans *et al*, *Identity A Reader*.(Sage Publications 2000) 299.

¹⁶³ *Ibid*.

¹⁶⁴ John Eckelaar 'Personal Rights and Human Rights' (2002)2 *Human Rights Law Review*185.

¹⁶⁵ Donrich W Jordaan. 'Autonomy As an Element of Human Dignity in South African Case Law' (2009) 49 *Journal of Philosophy Science & Law*, 4

¹⁶⁶ *Ibid*.

¹⁶⁷ Nicholas Hysom was the Chief Legal Advisor of the late President Nelson Mandela. See Donrich W Jordaan, 'Autonomy As an Element of Human Dignity in South African Case Law' (2009) 49 *Journal of Philosophy Science & Law* 3: 4 and13.

¹⁶⁸ Donrich W Jordaan, 'Autonomy As an Element of Human Dignity in South African Case Law' (2009) 49 *Journal of Philosophy Science & Law* 3: 7.

¹⁶⁹ *Ibid*.

¹⁷⁰ Ronald Inglehart and Daphna Oyserman, 'Individualism, Autonomy and Self-Expression: The Human Development Syndrome'(2004) *International Studies in Sociology And Social Anthropology* 24.

expression and self-realization.¹⁷¹ As a philosophical foundation of autonomy, this can be simplified to mean that personal development is an element of human dignity. Since autonomy is an integral part of that personal development, it therefore becomes an integral element of human dignity.¹⁷²

Even though the concept of autonomy does not find textual mention in the Constitution of Kenya 2010, its importance in the human rights discourse has nevertheless been affirmed in case law. While decrying the habit of forced treatment for tuberculosis patients for instance, the High Court observes that treatment of that nature should be administered voluntarily and with informed consent so as promote autonomy.¹⁷³ Similarly, in the *Aids Law Project*, a three-Judge bench points out that the aspect of privacy for HIV patients is grounded in legal, ethical and human rights principles of autonomy and justice.¹⁷⁴ The Constitutional Court of South Africa has similarly explicitly confirmed that autonomy is a core element of human dignity. It affirms this proposition by stating that autonomy flows from the recognition of an individual's self-worth.¹⁷⁵

Jurisprudentially, autonomy has been defined as the ability to regulate one's own affairs.¹⁷⁶ This definition implies that autonomy corresponds with personal self-determination and human beings being able to choose how to live their lives within the framework of a broader community.¹⁷⁷ Judge Sachs moves the jurisprudential description forward in *Bernstein and Others v Bester NO and Others*.¹⁷⁸ According to him, States must not only refrain from interfering with individual choices, but should also create conditions within which individuals can effectively make those choices.¹⁷⁹ In this way, States will enhance autonomy and human dignity in a social context, thus fulfilling the duty to promote the values of the constitution.¹⁸⁰ The fact that self-autonomy and the ability to regulate one's affairs has been found to be the essence of freedoms and a vital part of dignity as seen above, means that in the case of intersex persons in Kenya, self-autonomy is taken away by the fact that they do not get recognized or documented as intersex.

¹⁷¹ Ibid.

¹⁷² Donrich W Jordaan, (n168)5.

¹⁷³ Daniel Ng'etich & 2 others v Attorney General & 3 others [2016] eKLR, Para 54.

¹⁷⁴ Aids Law Project v Attorney General & 3 others [2015] eKLR, Para 86.

¹⁷⁵ NM and Others v Smith and Others [2007] ZACC 6. Para 13.1.

¹⁷⁶ Ncobo Judge in *Barkhuizen v Napier* (CCT72/05) [2007] ZACC 5 para 57.

¹⁷⁷ O Regan in NM and Others v Smith and Others (CCT69/05) [2007] ZACC 6 (4 April 2007). Para 131.

¹⁷⁸ *Bernstein and Others v Bester NO and Others* (CCT23/95) [1996] ZACC 2, Para. 150 and 151.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

Dignity, well-being, and capabilities of a person are only possible and free when there is autonomy. Autonomy therefore amounts to the capability to determine both who one is and how one lives. As Valdes asserts, autonomy occurs through having control over one's capacity to experience and express oneself.¹⁸¹ Autonomy also occurs when one has the control to shape and direct one's personality and to realize one's fate, both socially and sexually.¹⁸²

When one considers the sex/gender reassignment procedures forcefully imposed on intersex persons to enable the structure of the law to determine which sex/gender to fix and document them into, one cannot help but connect this to stripping of the autonomy of the persons concerned. It is noteworthy that sex reassignment procedures have been equated to torture, cruel and inhuman treatment, because they severely affect the mental and physical integrity as well as the autonomy of the intersex person concerned.¹⁸³ The surgical and other medical procedures usually end up stripping intersex persons off their identity and autonomy as well as the freedom to express and to determine who they are.

But also, autonomy is expressible in matters that may appear as trivial as simply talking and expressing oneself through speech. While voice and speech have been credited with forming part of a person's personality and identity,¹⁸⁴ for Kip, non-recognition and non-documentation means that he cannot express his identity or personality through speaking. The sound of Kip's voice is what society associates with the female gender. This means that he attracts a lot of negative attention when he speaks as he narrates below:

‘When I introduce myself using masculine names, everyone listening to my feminine voice breaks into laughter’. This forces me to immediately stop talking. I now never attempt to speak in public’.¹⁸⁵

Kip's voice deviates from what Mwhaki refers to as ‘expected characteristics of what is considered normal’.¹⁸⁶ Being so obviously incongruous with his masculine appearance, society considers his voice abnormal, making him the subject of cruel jokes every time he attempts to

¹⁸¹ Francisco Valdes, ‘Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & (and) Sexual Orientation to Its Origins’ (1996) 8 *Yale Journal of L & Human Rights* 162.

¹⁸² Marshall Jill, *Autonomy, Identity, and Integrity under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 93.

¹⁸³ United Nations Human Rights Council A/HRC/22/53 (2013) 18.

¹⁸⁴ Brett Welch *et al*, ‘Listeners’ Perceptions of Speaker Personality Traits Based on Speech’ (2021) *Journal of Speech, Language, and Hearing Research* 1–10.

¹⁸⁵ Interview with Kip (pseudonym) on telephone in Nairobi on 20th October 2020.

¹⁸⁶ Alice Mwhaki, ‘Viewing Speech Pathology as Aspect of Applied Linguistics’ (2002) 38 *Poznan Studies in Contemporary Linguistic*, 240-241.

speak.¹⁸⁷ To shield himself from this humiliation, Kip has taken to never speaking in public.¹⁸⁸ There being limited legal comprehension of the intersex condition in Kenya, the development of Kip's personality through speech has remained severely curtailed.

To develop one's personality, one requires freedom. Indeed, alongside dignity and equality, freedom is considered a key foundational value in the human rights discourse. Freedom is equally integral to the development of a person's personality.¹⁸⁹ In addition, freedom has been linked to the ability of a person to grow and develop rationally as a dignified human being, something that is essential in the human society.¹⁹⁰ Freedom and or liberty has repeatedly been echoed in the human rights instruments as well as in the constitution of Kenya.¹⁹¹ There is an innate recognition that everyone is born free and equal in dignity and rights.¹⁹² Although everyone may be born free and equal, for the intersex person, freedom remains inhibited and or totally denied throughout their development. Yet, according to the human rights instruments' and constitutional guarantees, the idea of a free human being, can only be achieved if conditions are created whereby everyone can enjoy one's rights and freedoms. Freedom underlines the equality and dignity of people, derived from the inherent dignity of the human person. The freedom to develop one's personality cannot occur outside of the society in which one lives. In fact, as Dolamo argues, freedom is not just a necessary part of society. It is conditional to the society.¹⁹³ Denial of identity and autonomy through the operation of the law means that people born intersex are deprived of the freedom to live like other human beings within the communities they live in. Deprivation of autonomy over their bodies also means that they are stripped of the freedom to determine who they are or what happens to them. Since identity means the freedom of one deciding who they are or who they want to be, this means that non recognition transfers this freedom to other people to decide who intersex persons should be. It also means that other people get the freedom to decide the sex/gender intersex persons should be documented in. This is usually after subjecting them to medically unnecessary sex/gender realignment/ reassignment surgeries. Nonrecognition and non-documentation therefore takes away the freedom to be who they want to be. This situation

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Joseph R Slaughter, *Human Rights Inc: The World, Novel, Narration Form ad International Law*. (Fordham University Press 2007) 40.

¹⁹⁰ Ibid, 41

¹⁹¹ Freedom is integral to two key interpretive articles of the UDHR namely Articles 1 and 29.

¹⁹² UDHR, Article 1.

¹⁹³ Ramathate Dolamo, 'Botho/Ubuntu: The Heart of African Ethics' (2013) 112 *Scriptura Journal of Contextual Hermeneutics in South Africa* 4.

essentially impacts on their right to liberty and security as members of humans, as is explained below.

4.4. SELF-DETERMINATION, PHYSICAL INTEGRITY AND SECURITY.

Freedom, liberty and security of a human being have been linked to autonomy and dignity. In *Ferreira v Levin NO and others*,¹⁹⁴ Justice Sachs uses the term autonomy to explicitly make reference to elements of freedom and personal security. And when it comes to the protection of a person's liberty, freedom and security, reference must always be made to the provisions of the UDHR, ICCPR as well as the ACHPR, all of which guarantee the protection of a person's liberty and security.¹⁹⁵ The Human Rights Committee in its General Comment while monitoring and interpreting the ICCPR, explains that security of the person as contemplated by the Covenant, concerns freedom from injury to both body and mind.¹⁹⁶ This is what the Committee terms bodily and mental integrity.¹⁹⁷ Moreover, the Committee has specifically noted that States are required to respond to patterns of violence affecting the physical and mental integrity of the citizens. This is especially important where the violence is perpetrated against vulnerable groups or against people, based on *inter alia* their sex/gender identity.¹⁹⁸ This obligation on State parties exists where the violence is perpetrated on anyone by both State and non-State actors.¹⁹⁹ In so far as the physical integrity of the intersex person is concerned, the Council of Europe's Parliamentary Assembly on Children's right to physical integrity added its voice to this call in 2013.²⁰⁰ This voice is a call on its member states to undertake additional research aimed at increasing knowledge about specific situation of intersex people.²⁰¹ In 2011 the United Nations, through its Committee on Economic Social and Cultural Rights (CESCR), while considering reports submitted by Germany, made a similar call.²⁰² The CESCR urged Germany to step up measures, including legislative ones, on the identity and health aspects of transsexual

¹⁹⁴ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13 Ibid, Para 151.

¹⁹⁵ UDHR Article 3, ICCPR, Article 9 and ACHPR Article 6.

¹⁹⁶ UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, available at: <https://www.refworld.org/docid/553e0f984.html> (Accessed on 20th November 2021).

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ OHCHR, *Background Note on Human Rights Violations against Intersex People*. <https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf>. (Accessed on 29th September 2021).

²⁰¹ Ibid.

²⁰² Committee on Economic, Social and Cultural Rights (CESCR), Forty-sixth session, *E/C.12/DEU/CO/5.2011,26*.

and intersex persons. These calls are with a view to ensuring that these two vulnerable groups are no longer discriminated against and that their personal and integrity rights, amongst other rights are respected.²⁰³ The intention is to ensure that no intersex person is subjected to surgeries or any other form of medicalization or treatment that is medically unnecessary.²⁰⁴

In Kenya, as demonstrated by the preceding chapters, non-regulated sex/gender reassignment and sex/gender ‘alignment’ surgeries and other forms of medicalization procedures are conducted on intersex persons as a matter of course.²⁰⁵ These are conducted in childhood and usually without informed written consent from either the parent or the guardian of the child.²⁰⁶ The result is not just an affront on the rights to liberty and physical security of the intersex patient, but also to their mental integrity, contrary to the guarantees provided under the UDHR and ICCPR.²⁰⁷ The narratives of the Respondents interviewed for this study indicate that sex reassignment procedures have debilitating physical, emotional and psychological effects on the people who have undergone them.²⁰⁸ In most cases, the violence is perpetrated by the State with the State’s silent acquiescence and often, in public health facilities.²⁰⁹ Other times it may be by private clinics. But whether conducted in public or private health institutions, Kenya as a country, has an obligation to disallow and put a stop to such surgeries, especially since they are currently being conducted without any legal governing regulations.²¹⁰ Kenya has failed to do this. Even the National Reproductive Health Policy (2022-2032) launched in July 2022, has not put in place any guidelines.²¹¹ What it has done is to lay, what it calls, groundwork for resourcing an avenue for professionally and scientifically guiding intersex transitions to a definitive sex/gender identity.²¹² It is of concern that the only direction that the framework, if any, put in place through the Policy, can only be exclusively male or female, given that it has retained the definition of sex/gender in the binary male and female.²¹³ The intention of putting

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ See the discussion on the violation on the right to physical, reproductive and sexual health in chapter three.

²⁰⁶ Interview with KK.KK was reassigned the female gender as a child, and at a time when he was incapable of giving written consent. To the best of his knowledge, none was obtained from his parents. In the case of Jane, the hospital operating on her child neither sought her consent nor informed her of the nature of the series of medical interventions being subjected to Sebbo, before, during or even after the various forms of experimental treatments. And yet, Section 100(2) (b) the Health Act No 21 of 2017 specifically disallows non therapeutic experimentation procedures being conducted a minor without prior consent.

²⁰⁷UDHR, Article 3 and ICCPR, Article 9.

²⁰⁸ Interview with Mercy, Jane and KK in Nairobi on the 18th May 2019 and 16th December 2019.

²⁰⁹ This was the case in Jane’s child, Mercy, and Baby A.

²¹⁰ *Baby A* and *RM* .

²¹¹ National Reproductive Health policy 2022-2032, Kenya, 28.

²¹² Ibid.

²¹³ Ibid.

in place a multidisciplinary team to diagnose and ‘treat intersex genitalia’ is equally concerning because, according to the Policy, intersex condition is a disease requiring treatment.²¹⁴ By adopting a stand that seemingly validates ‘corrective’ medicalization to ‘place’ intersex persons in a ‘correct’ sex,²¹⁵ the Policy effectively defeats the fight against non-therapeutic sex/gender reassignment procedures. The various positions taken by the Policy only complicates the challenges for intersex persons in this regard.

In addition to violating a victim’s privacy, the sex reassignment/realignment procedures ultimately rob the victim of the opportunity to make fundamental private decisions about who they are and how they want to express their identity.²¹⁶ That these unregulated medical procedures have a profound impact on the victims is not in doubt.²¹⁷ A key impact is sterilization, a medical procedure that ultimately deprives the victim the choice to determine whether or not to create a biological family through biological parenthood.²¹⁸ Since unregulated surgeries and other forms of medicalization have been found to affect a person’s mental and bodily integrity, this means that their overall autonomy and identity is negatively impacted.²¹⁹ International human rights law bodies have contended that protection of both mental integrity and autonomy is part of the right to liberty and security of the person.²²⁰ Consequently, persons born with the intersex gender have a right to be free from any medical interventions which result in harming their physical and psychological wellbeing and autonomy.²²¹ Further, studies by the UN have demonstrated that a huge percentage of the surgical and other procedures that are conducted on intersex genitalia are not medically necessary.²²² They are mainly cosmetic and appear to be purely for purposes of constructing the intersex genitalia into a sex /gender that is familiar to the law and to society.²²³ Indeed, there is no medical evidence that any of the

²¹⁴ (n205).

²¹⁵ National Reproductive Health policy 2022-2032, Kenya, 28-29.

²¹⁶ Cristian Conzalez Cabrera, Law in Mediating Between the Rights of Parents and their Children Born with Intersex Traits in the United States. (2018) 24 William & Mary Journal of Women and the Law, 483.

²¹⁷ Alice Dreger, *Ambiguous Sex or Ambivalent Medicine? Ethical issues in the treatment of intersexuality*. (Hastings Centre Report 1998) 171.

²¹⁸ Julie Greenberg, ‘Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination?’ (2012) 45 Loyola of Los Angeles Law Review 859-858.

²¹⁹ Ibid.

²²⁰ Jill Marshall, *Personal Freedom through Human Rights Law?: Autonomy, Identity and Integrity under the European Convention on Human Rights*. (Martinus Nijhoff Publishers 2009) 49-68.

²²¹ Cristian González Cabrera, *The Role of International Human Rights Law in Mediating Between the Rights of Parents and Their Children Born with Intersex Traits in the United States*, 481.

²²² See for example the United Nations General Assembly, (UNGA) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*. (A/HRC/22/53) (February 2013) Para 88 on Lesbian, gay, bisexual, transgender and Intersex persons.

²²³ Ibid.

treatment procedures are vital for health, either during infancy, childhood or adulthood.²²⁴ Usually, no tests are undertaken, and surgeons seem to be fumbling in the dark. Jane's experiences with her child captures this aspect:

‘When Sebbo was taken through the many operations and what I later came to learn was hormonal therapy at Kenyatta National and Moi Teaching and Referral Hospitals, the decision to operate was based on just a visual examination of the child's double genitalia. There were no tests or x-rays conducted. I do not know why they concluded that that there was any medical need to perform the surgeries’. They told me that they must give the child medicine to make her a girl. Later, I came to know that it was hormonal therapy. This is what made my child grow enlarged breasts and hips, and that is why the other children refer to her as *‘yule dame anakuanga chali.’*²²⁵ (that girl who is also a boy).²²⁶

In this case, Sebbo's healthy penis and testicles were removed and a regimen of hormonal treatment spanning several years administered to the child. There were no medical protocols followed.²²⁷ The result of these unregulated and uncontrolled surgeries and other forms of medical interventions left the child with long term effects. Not only have the gonads regenerated, the child has also developed breasts and widened feminine hips. These are attributable to the hormonal therapy subjected on the child in an attempt to ‘edit’ and modify the child into the female sex/gender. These medical and surgical procedures violated Sebbo's bodily integrity, autonomy and self-determination, leaving the child in total confusion in terms of self-identity.²²⁸

People born intersex in Kenya also suffer violations with respect to their private life. They are denied freedom from being subjected to torture and other degrading punishment, all of which are protections given by human rights instruments that Kenya has signed and fortified.²²⁹ The right to freedom from torture includes the right not to be subjected to any forms of experimentation. Medical personnel in Kenya, however, appear to be doing nothing but experimenting with intersex genitals through what is termed as ‘normalizing’ or ‘corrective’

²²⁴ Ibid.

²²⁵ Interview with Jane in Nairobi on 18th May 2019.

²²⁶ Translation by the Researcher.

²²⁷ Ibid (n225).

²²⁸ Sebbo's case above, is a clear case of a child whose rights to private life, bodily integrity and freedom from torture has continually been violated. The numerous forms of experimental medicalization have constituted cruel and inhuman treatment to a child who did not even understand what was happening to him.

²²⁹ Ibid.

procedures.²³⁰ These procedures not only amount to violation of the right to physical and mental integrity, but also to what the UDHR, ICCPR and ACHPR refer to as torture, cruel inhuman and degrading treatment.²³¹ Protection from cruel and inhuman treatment in effect has the practical effect of safeguarding the dignity of every human being. For this reason, the Report of the Special Rapporteur on torture and other cruel, inhumane, and degrading treatment or punishment has called upon all States to repeal any law allowing intrusive and irreversible treatments on intersex persons.²³² Such includes forced genital ‘normalizing’ surgeries, involuntary sterilization, unethical experimentation and other conversion therapies which are prohibited especially when they are administered without the free and informed consent of the recipient. Those prohibitions notwithstanding, what baby Erica, a child born intersex, is now experiencing, is nothing short of has been banned.²³³

The case of Erica, as narrated by KK, is another disturbing example of the impact of non-recognition and non-documentation in stripping an individual of their right to physical and mental integrity. KK describes Erica’s situation as follows:

‘Erica was born intersex in 2006. For most of her life, this child has been confined to Kenyatta National Hospital. The child has been converted into a medical subject of curiosity and an object of scientific and medical experiments. Erica is always undergoing this or that operation. Doctors and nurses continually surround the child prodding the genitals. The child is always in pain and is constantly crying.’²³⁴

The various forms of medicalization being conducted on Erica are in total disregard, not just to the child’s right to autonomy and self-determination but also to her freedom from physical and mental torture.²³⁵ The suffering that this child undergoes, according to KK, is extensive and deep rooted. Every time KK goes to see the child in hospital, he finds the child crying. In the process of trying to modify the child into a sex/gender that the child was not born into, the medical teams no longer view the child as a human being. The child neither has the knowledge

²³⁰ According to Jane, the medical personnel appeared to have no idea on what they were doing with her child. They were simply experimenting.

²³¹ UDHR, ICCPR and ACHPR Articles 5, 7 and 5 respectively.

²³² United Nations General Assembly (UNGA) *Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment* Report of the Special Rapporteur.

²³³ Interview with KK in Nairobi on 16th December 2019. KK helps support Erica’s treatment through one of the local nongovernmental organization dealing with intersex matters in Kenya.

²³⁴ Ibid.

²³⁵ According to KK, the different medical teams who have constantly been experimenting with Erica’s genital area have never given any explanations regarding Erica’s treatments.

that she has been converted into a human object of research and neither has she consented to being one.²³⁶

Erica's harrowing experience is not too dissimilar to the documented and equally disturbing case of 'Little Albert'.²³⁷ Here, a scientist used an infant as an object of scientific experiments to try to prove to the world that fear is an innate trait, and that human beings are born preprogrammed with emotions.²³⁸ The scientist conditioned Little Albert to fear a white rat which he associated with loud noise. After several months of the experiments, Little Albert developed hydrocephalus from which he died at the age of six years.²³⁹ The scientist, in trying to prove his theory, did not put into consideration the long-term repercussion of the experiments on the child.²⁴⁰ Similarly, in attempting to convert Erica into a 'perfect' human being in terms of sex/gender, the State, through Kenyatta National Hospital one of its actors, continues to destroy the child physically and psychologically, without any consideration to the child's aftermath. She spends her time being photographed and prodded by the medical fraternity who all appear to be eager to document this relatively 'rare' medical condition. This is with absolutely no regard or respect for the protection of the child's dignity as a human being and the best interests principle of the child as set out in the Constitution and child specific human rights instruments.²⁴¹ But even more similar to the case of Erica and that of other people born with the intersex gender who are constantly being genitally edited and modified, is the genetic editing of the twin girls produced through the He Jiankui's experiments in 2018.²⁴² He Jiankui, a Chinese researcher, was widely condemned for helping produce genetically edited babies who could apparently withstand the AIDS virus.²⁴³

It is unacceptable, on all levels, for human beings to try to edit, modify or create 'perfect' human beings, without any regard to the autonomy, identity, self-determination or dignity of those being edited, modified or created. It is also wrong, on all levels for human beings to

²³⁶ Interview with KK.

²³⁷ Ben Harris, 'Whatever happened to little Albert?' (1979) 34 *American psychologist* 2: 151-160.

²³⁸ *Ibid.*

²³⁹ Nancy Digdon, et al, 'Watson's Alleged Little Albert Scandal: Historical Breakthrough or New Watson Myth?' (2014). 35 *Revista de Historia de la Psicología* 1: 47.

²⁴⁰ *Ibid.*

²⁴¹ See Article 28 which affirms that every person has inherent dignity and the right to have that dignity respected and protected. Further, the CRC, Article 3 and the ACRWC, Article 4, both underpin the importance of the best interest principle while dealing with any matter concerning a child.

²⁴² Henry T. Greely, 'CRISPR'd Babies: Human Germline Genome Editing In The 'He Jiankui Affair' (2019) *Journal of Law and the Biosciences* 111-183.

²⁴³ *Ibid.*

interfere with the autonomy, identity and self-determination of fellow human beings, all of which must never be interfered with. Intersex persons are calling on the law to stop doctors from ‘editing’ and ‘modifying’ their genitals without their knowledge and or consent.²⁴⁴ But unless the law steps in and puts a stop to this by allowing them to be documented as intersex, the ‘editing’ and ‘shaping’ intersex genital organs into male or female will continue.

The violation of bodily and mental integrity, which intersex persons regrettably regularly get subjected to by both State and non-state actors with the State’s acquiesce, are not dissimilar to what happened in the infamous Tuskegee Syphilis study either.²⁴⁵ Here the American government used hundreds of poor black men as human guinea pigs in a completely misguided syphilis study spanning a period of over forty years.²⁴⁶ This extremely hazardous research was done with neither the knowledge nor the consent of any of the ‘participants.’²⁴⁷ The result was a total destruction of their lives. While many died from the disease several others suffered debilitating impacts of untreated syphilis. A Class Action suit was instituted by the survivors and representatives of the deceased victims of the study.²⁴⁸ The case was settled for \$10 million dollars as a form of compensations by the government to the survivors and the estates of the deceased. Other forms of compensation included an apology from former President Bill Clinton for the government’s role in the study in the following words:

‘What was done cannot be undone, but we can end the silence. What the United States government did was shameful, and I am sorry’.²⁴⁹

In the context of the *ubuntu* philosophy, the power to reason is a distinguishing feature of a human person.²⁵⁰ A human being, regardless of the sex/gender they are born with, is distinct from an impersonal nature by virtue of their human ability to reason. This is what makes a person to be conscious of themselves, to determine themselves and shape their own

²⁴⁴ Interview with KK in Nairobi on the 16th May 2019.

²⁴⁵ Fred D Gray, *The Tuskegee Syphilis Study: The Real Story and Beyond*. (New South Books 1998) 14-15.

²⁴⁶ Ibid.

²⁴⁷ Adebayo Ogungbure, ‘The Tuskegee Syphilis Study: Some Ethical Reflections’ (2011) 3 *Thought and Practice* 2: 75.

²⁴⁸ *Pollard v. United States*, 384 F. Supp. 304 (Middle District of Alabama). This case had initially been filed on behalf of Charlie Pollard, one of the involuntary participant in the study, but was later expanded into a class-action lawsuit. It was subsequently broadened to include other living participants and members of families of the deceased participants. See also Laura Barrett, ‘Tuskegee Syphilis Study of 1932-1973 and the Rise of Bioethics as Shown through Government Documents and Actions’ (2019) 47 *DttP*, 11.

²⁴⁹ Stephen Thomas *et al*, ‘Light on the shadow of the syphilis study at Tuskegee’ (2000) 3 *Health Promotion Practice* 3 : 236.

²⁵⁰ Christine Wanjiru Gichure, ‘Human Nature/Identity: The Ubuntu Worldview and Beyond’ in John P. Hogan (ed) *Human Nature: Stable and/or Changing?* (2013)30 *Cultural Heritage and Contemporary Change Series VII, Seminars: Culture and Values* 116-146.

environment. A human being ought not be reduced to an impersonal object that is medically manipulatable to conform with what is socially acceptable or legally provided for. When this happens and a human being ends up being viewed as not fitting into what is socially acceptable, the realization of their potential as contemplated by the Constitution is curtailed.²⁵¹ The ordering of social life should be such that the law serves to protect the dignity of all individuals regardless of the sex/gender that they are born with.²⁵² This would be in tandem with the philosophy of natural law which emphasizes on the law as conferring absolute rights on the individual person as part of the law of God.

With regard to nonconsensual medicalization, many intersex people are requesting that the law documents them as intersex, which will allow them to determine who they are, who they should be and who they want to be.²⁵³ This will allow them to plot and develop their own personalities like everyone else.²⁵⁴ As Raz puts it, respecting human dignity entails treating everyone as a person who is capable of planning and plotting their own future.²⁵⁵ Raz is basically pointing out that people ought to be allowed to be responsible human beings who have the capacity to develop their identity and make their own choices as human persons.²⁵⁶ Unfortunately for the intersex person, the absence of legal protection means that the physical and psychological manipulation of their bodies will continue.²⁵⁷ They will continue being fixed in a sex/gender that ‘conforms’ with the legal and social cultural understanding of sex/gender that is binary based, and they will continue being wrongly documented.²⁵⁸

But this is not all. Kenya still views intersex bodies as not conforming to the normal and acceptable structure. As indicated earlier, a review of the recently launched National Reproductive Health Policy is a clear demonstration of this position. While retaining the definition of sex/gender in the binary male and female, the Policy endorses the misconception that intersex genitalia is a disabling condition, a disease requiring diagnosis and treatment.²⁵⁹ So long as intersex bodies are seen as not conforming to the normal male and female genitalia, the current documents’ regimes’ expectation of specific binary descriptions will remain. These

²⁵¹Constitution of Kenya 2010, Article 19 (2) speaks to human dignity of every individual and to the promotion of the realization of the potential of all human beings.

²⁵² Ibid.

²⁵³ Ibid, interview with KK and Syd in Nairobi on 16th December 2019.

²⁵⁴ Jill Marshall, *Human Rights Law, and Personal Identity* (Routledge 2014)216.

²⁵⁵Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 2009) 221.

²⁵⁶ Ibid.

²⁵⁷ According to KK, intersex surgeries are still being conducted in medical facilities both private and public.

²⁵⁸ Ibid.

²⁵⁹ The National Reproductive Health Policy 2022-2032, Kenya.

regimes will continue furthering the legal misnomer relating to their presence. Consequently, the structure of the law will continue to violate needs including those of a personal nature. The section below examines the forms and nature of these denials.

4. 5.PERSONALITY RIGHTS.

As seen above, the Constitution of Kenya expressly provides for the right to freedom and security of the person.²⁶⁰ In the context of the intersex person, these provisions mean freedom not to be subjected to either physical, psychological, or other forms of violence or torture. Freedom also translates to the right not to be treated in a cruel inhuman or degrading manner, treatment of the kind the intersex persons are continually subjected to. The Constitution in addition proclaims that every individual, by virtue of being a citizen of Kenya, is entitled not just to the rights and privileges, but also to the benefits that accrue to every citizen.²⁶¹ Its drafters, just like the drafters of the IBOR and counterpart instruments in the African region, can be said to have had, as their subjects of concern, the human person. Consequently, the respective provisions simultaneously stipulate that the fundamental civil, social and political protections and privileges necessary for the free and full development of a person's human personality ought to be taken care of. Personality rights are important for a person to be whole. In this regard, scholars have identified several non-tangible human needs as constituting personality rights.²⁶² Falling in the category of non-tangible and personal human needs are the right to a name, to express one's feelings and to self-determine through marriage and procreation. The right to a dignified interment after death is also considered a personal right, being the final right that a human being should be entitled to.

The fact that the law does not recognize, or document intersex persons is reflected in society's position, which also does not recognize a person without reference to their anatomical sex. There is an erroneous legal and social expectation in Kenya that a person can only be born as either a male or a female, and must consequently grow up to be either a woman or a man. This then becomes the major source of the exclusion, limitations and barriers that intersex persons face in this regard. The sub sections below explore the legal barriers created by this erroneous legal and social expectation, as well as its impact on intersex persons whilst in the pursuit of enjoyment of their personality rights and freedoms during and after death.

²⁶⁰ The Constitution of Kenya 2010, Article 29.

²⁶¹ Ibid, Article 12(1)(a).

²⁶² Johann Neethling, 'Personality Rights: A Comparative Overview' (2005) 38 The Comparative and International Law Journal of Southern Africa 2 : 213-215.

4.5.1.THE RIGHT TO A NAME.

As Butler observes, a name is an important component of every human being's identity.²⁶³ The importance of a name in Kenya is demonstrated by the fact that, as Mbiti observes, all names given to children had, and still have special connotations in most African communities.²⁶⁴ Indeed, names in the African context identify a person with a key event or the rebirth of an important person in the community, bringing rejoicing in the spirit of *ubuntu*.²⁶⁵ A person's name is therefore one of the first identifying features towards recognizing them. But having a name through which one is referred to is not just crucial for social relations, it is also an important legal necessity that defines a person's identity in the current world.²⁶⁶ Statutory provisions at all levels bolster this position. At the international level, the Convention on the Rights of the Child (CRC), gives a child the entitlement to a name from the time of birth. Where a child has been deprived of a name and an identity, State parties are required to take appropriate measures to remedy that.²⁶⁷ Judicial decisions have also reinforced this right. Justice Mumbi Ngugi, for instance, while determining that children born out of wedlock are entitled to have their fathers' name on their documents, affirms the proposition that everyone is entitled to a name and an identity.²⁶⁸

International jurisprudence has also demonstrated the importance of a person's name and the connection a name has to their legal identity. This is particularly clear in the argument before the Human Rights Committee in a communication filed against the government of the Netherlands by two claimants.²⁶⁹ Here, the victims who had been denied authority to change their names approached the Committee citing violation of their rights under *inter alia*, Article 17 of the ICCPR.²⁷⁰ The Committee confirmed that a person's name is an important part of that person's identity and that its protection is central to Article 17 of the Covenant.²⁷¹ Further, according to the Committee, since privacy protects the special individual qualities of human existence and a person's identity, that identity obviously includes a person's name.²⁷²

²⁶³ Margaret Butler, *Names are Important* in Dana Neacsu & David Holt (eds) *Sexual Orientation, Gender Identities, and the Law: A Research* (William S. Hein & Co 2018) xxxix.

²⁶⁴ John S Mbiti, *African Religions and Philosophy* (Anchor Books 1970)154.

²⁶⁵ *Ibid.*, 215.

²⁶⁶ Every identity document examined in chapter two is required to have a name as a critical identifying feature.

²⁶⁷ CRC, Articles 7 and 8.

²⁶⁸ *L.N.W v Attorney General & 3 others* [2016] *eKLR*, para 10.

²⁶⁹ *Coeriel et al. v. The Netherlands*, Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991 (1994).

²⁷⁰ Article 17 of the ICCPR provides for protection from unlawful and arbitrary interference with the privacy of a person.

²⁷¹ *Ibid.*

²⁷² *Ibid.*

Regionally, the ACRWC has given every child the right to a name right from birth.²⁷³ At the domestic level, the right to a name and identity are echoed in the Constitution and the Children Act, 2022.²⁷⁴

The right to a name has therefore been accepted as one of the key personality rights which allow one to have an identity.²⁷⁵ Indeed in Kenya, the naming of a child amongst many communities, is not only a sacred but a respected event.²⁷⁶ According to Kayeli, the naming of a child is a symbolic act that is important for identification purposes.²⁷⁷ To confer a name to a person is to confer identity and personality.²⁷⁸ For most tribes in Kenya, naming is binary based and alternates between the paternal (male) and maternal (female) lineages, depending on the position of birth of the child concerned.²⁷⁹ The naming system gives a legal identity based on customary law.²⁸⁰ For the intersex person, the binary based cultural naming system presents a major problem for the right to a name as Langa explains:

‘My official documents contain the name Margret Wangui.²⁸¹ These are names typically reserved for the female gender in my community. The society does not understand how I, a male person, has names belonging to a female gender. This has brought a lot of confusion regarding my identity and personality’.²⁸²

Rye has had similar problems when it comes to identifying himself through his given names as he narrates below:

When I was born, my parents gave me the name Rael Wairimu,²⁸³ names typically identified as girls’ names. I did not derive an identity from the female names assigned to me and through which I was and remain documented. When I went to withdraw

²⁷³ ACRWC Article 6 (1).

²⁷⁴ Constitution of Kenya 2010, Article 53(1)(a) and the Children Act, 2022, Section 7(1).

²⁷⁵ Johann Neethling, ‘Personality Rights: A Comparative Overview’ (2005) 38 *The Comparative and International Law Journal of Southern Africa* 2 : 213-215.

²⁷⁶ Margaret A Ogolla, *The River and The Source* (Focus Books 2004).

²⁷⁷ Edith Chamwama Kayeli, ‘The Role and Meaning of Birth, Naming, Initiation, Marriage and Death Rituals Among The Logoli Of Western Kenya In View of Inculturating Related Sacraments In The Roman Catholic Church’ (Ph.D. Thesis, University of Nairobi 2012)15.

²⁷⁸ Ibid.

²⁷⁹ Ibid, 54.

²⁸⁰ Kayeli, (n277).

²⁸¹ The Respondent’s real given names, which also appear in his identity documents have been altered to protect his identity.

²⁸² Interview with Langa on 18th May 2019.

²⁸³ The Respondent’s real names have been altered to protect his identity.

money from a bank one time for instance, I was accused of being an imposter and was nearly arrested.²⁸⁴

For Langa, the woes of acquiring an identity through a name started immediately he was born, due to the customary law naming process as he narrates below:

‘I was born at home and was meant to be named after my father’s father under the Kikuyu patriarchal naming system, if I had been born a ‘pure male’. However, my father said his father would not be named after ‘that creature’. Before my people decided to give me a female name and raise me as one, I remained nameless and sex/genderless for a period of three weeks following my birth.’²⁸⁵

For the intersex person, the difficulties presented by the binary naming system in Kenya is heightened by the binary pronoun system. When pronouns are gendered in the binary, they will often be inaccurate and in dissonance with the preferred intersex person’s pronoun.²⁸⁶ Since the law does not provide for sex/gender neutral pronouns, intersex persons continuously get referred to with incongruent pronouns, further perpetuating the sex/gender confusion. To try and mitigate the confusion, ApSiya has decided to use both:

‘Although my identity card and passport describe me as a male person, I have decided that you can refer to me as he / she or him/ her because I am both’.²⁸⁷

In deciding to use both pronouns simultaneously, Apsiya is forced to take the law into his/her own hands due to the existing vacuum. As Abuya and Githinji correctly observe, many victims who are excluded by the law use this strategy in a bid to surmount difficulties created by gaps in the law.²⁸⁸ Such strategies however hardly present lasting solutions.²⁸⁹

The challenges associated with the legal denial of the right and access to an accurate identity through a name and pronoun are only the tip of iceberg of the problems intersex persons must contend with when it comes to identity, privacy, and other related rights. The exclusion by the

²⁸⁴ Interview with Rye in Nairobi on the 18th May 2019.

²⁸⁵ Langa, narrating his life as an intersex person and the problems a discordant name caused him, during the 16 Days of Activism Against Gender Based Violence; End GBV Webinar Series held on 6th December 2021.

²⁸⁶ Green, E.R. & Maurer, L.M. *The Teaching Transgender Toolkit: A Facilitator’s Guide to Increasing Knowledge, Decreasing Prejudice & Building Skills*. (2015) Planned Parenthood of The Southern Finger Lakes: Out For Health, 53-57.

²⁸⁷ Interview with ApSiya in Ndiwa, Homa Bay County on 23rd May 2022.

²⁸⁸ Edwin O. Abuya & Jane W. Githinji, ‘Access to University Education by Learners with Physical Disabilities: Combating the Barriers’ (2021) 27 Buffalo Human Rights Law Review 1: 44-45.

²⁸⁹ Ibid.

law permeates many areas of their personal nonmaterial rights, particularly the right to marry, the right to found a family through parenthood and dignity at death. The sections below explain the impact of non-recognition and non-documentation on these three spheres of an individual's human needs in that order.

4.5.2 RIGHT TO MARRIAGE.

The UDHR, ICCPR, ICESCR and the ACHPR all have similar provisions geared towards the protection of the family.²⁹⁰ These provisions prohibit State parties from arbitrarily or unlawfully interfering with one's privacy or family.²⁹¹ There is an equal expectation, that State parties to these instruments must put in place measures that allow everyone to access the rights related to privacy and family.

The Human Rights Committee has held that the right to family and privacy refers in part to the sphere of a person's life, in which one can express their identity. This has been interpreted to relate to situations of entering relationships with others.²⁹² The Constitution of Kenya equally underscores the importance of the family by giving every adult the right to relate by marrying and having a family.²⁹³ The family unit has therefore been constitutionally established as a natural and fundamental element of society, a basis of social order and a natural right contemplated under the natural law theory.²⁹⁴ The legal union that constitutes a marriage is of course a critical component towards the exercise of the right to family. Historically, it is a marriage that was seen as creating a family. Indeed, alongside birth and adoption, marriage has been described as one of the fundamental means of family formation in Kenya.²⁹⁵ And undeniably, the family unit finds protection through the network of human rights at the three levels.²⁹⁶ Marriage, one of the components through which the family unit is created, equally finds protection and recognition through these instruments.²⁹⁷ This protection is however a mirage for the intersex person in Kenya, who suffer legal exclusion at all the three levels.

²⁹⁰UDHR, Articles 12 and 16; ICCPR Article 17; ICESCR Article 10 and ACHPR Articles 18 and 27.

²⁹¹ Ibid.

²⁹²Coeriel *et al.* v. The Netherlands, Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991 (1994).

²⁹³Constitution of Kenya 2010, Article 45(2).

²⁹⁴ Monicah Wanjiru Kareithi, 'A Historical-Legal Analysis of Woman-To-Woman Marriage in Kenya' (Doctoral Thesis, University of Pretoria 2018).

²⁹⁵ Dorothy O. Rombo *et al.*, *Public Policy and Families in Kenya* in Mihaela Robila (ed) *Handbook of Family Policies Across the Globe*. (Springer 2014)33.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

The integrity of the family through marriage for the intersex person neither finds protection in any of the international or African human rights regime nor in the Constitution of Kenya. By providing that every adult has the right to marry but restricting marriage rights to persons of the opposite sex/gender, the intersex person immediately gets constitutional exclusion from the marriage institution.²⁹⁸ This exclusion is further validated by the legislative provisions through which marriages in Kenya are regulated, documented and acquire legal recognition. These explicitly define marriage as a union between a man and a woman.²⁹⁹ Similar exclusions are to be found in the IBOR and the ACHPR.³⁰⁰ And given that human dignity is a value that informs the interpretation of other rights, it must be seen as being intricately linked to the right to marriage.³⁰¹ Indeed, the right to dignity has been interpreted to afford protection to the institutions of marriage and family life.³⁰² By failing to consider documenting marriage unions for people of the intersex gender and explicitly prohibiting marriage relations between non-binary persons, the law perpetrates violation of human dignity.³⁰³

The decision to marry and sustain a family has been characterized as a matter of defining significance for many, if not most people.³⁰⁴ Marriage is viewed as allowing people the ability to achieve personal fulfilment, an aspect of life that is considered by many to be of central significance.³⁰⁵ Where this is constitutionally and legislatively denied, then the law in that respect perpetrates a violation to the right to dignity. The result is that it completely limits the interactions of intersex persons with other human beings in the institution of marriage. Since many aspects of family life in Kenya are regulated by either customary or statutory law, opportunities for intersex persons to legitimately marry and have a family face constitutional and statutory prohibitions.

²⁹⁸ Ibid.

²⁹⁹ The Marriage Act No. 4 of 2014, (Laws of Kenya) Section 3.

³⁰⁰ Article 16 (2) of the UDHR restricts marriage to men and women. The right to marry and to create a family which the ICCPR recognizes at Article 23 (2), is equally restricted to men and women. The ICESCR is less restrictive since it does not speak of men and women, preferring to use the term spouses, a more gender-neutral description. The ACHPR is interestingly silent on the aspect of marriage.

³⁰¹ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936; 2000, Para 28.

³⁰² Ibid.

³⁰³ The Constitution of Kenya 2010 and the existing marriage laws including customary law marriages in Kenya, limit marriage unions between biological males and females, thereby denying recognition and protection for unions in the form of marriage between persons of non-binary sex/gender descriptions.

³⁰⁴ *RM*, Para 30, 36 and 37 tried to bring this aspect of exclusion to the attention of the court.

³⁰⁵ Ibid.

By officially defining marriage as a union between a man and woman whether in a monogamous or polygamous relationship, the law automatically restricts marriages to the binary male and female.³⁰⁶ This is the situation that RM was trying to bring to the attention of the court through his prayer which he crafted as follows:

‘A declaration that the petitioner and intersexuals, have been left out on issues of marriage and adoption and in the process of deciding the gender or sex they belong to upon attaining the age of majority.’³⁰⁷

The systems of law through which marriage is protected, being structured in the binary, means that intersex persons who opt to engage in marriage relationships don’t just find themselves in a legal quagmire, but without any legal legitimacy, as Rye explains below:

‘I am ‘married’ to a biological female spouse and we have a child together. Since the law describes me as a female, my relationship with a fellow female cannot be recognized, either by the Constitution or by any other marriage regime in Kenya, including customary law. My marriage cannot also be documented. My family which consists of my spouse and child, does not have legal validity according to the Constitution. But more importantly, in the event of any legal dispute between me and my spouse, neither me, my spouse or child would have any legal protection ordinarily afforded to the male and female members of society, since there would be no legal documents to produce in support of the union.’³⁰⁸

ApSiya is similarly married to a female spouse and they have a son together. Apsiya’s marriage, like Rye’s, does not find legal recognition under statute or under custom for reasons he explains below:

‘When I wanted to pay dowry for my wife as per Luo custom, the elders refused to recognize me as a husband.’³⁰⁹

Consequently, ApSiya’s ‘marriage’ cannot enjoy the rights or legal protection accorded to marriages between male and female sex/genders in case of any eventuality. The union can neither be registered nor documented since it has not been celebrated under Luo customary

³⁰⁶ The Marriage Act No. 4 of 2014, (Laws of Kenya).

³⁰⁷ *RM*, Prayer (h)Para 3.

³⁰⁸ Interview with Rye.

³⁰⁹ Interview with ApSiya.

marriage rites as prescribed by the Marriage Act.³¹⁰ Neither can a certificate of marriage be issued, since the Act requires proof of compliance with customary rituals of marriages of a specific community before a customary marriage is registered and a certificate issued.³¹¹

Regarding the enjoyment of the personal right to marry and found a family to its full extent as recognized by human rights instruments at the various levels, and which is denied to intersex persons in Kenya through the operation of the law, Kip hopelessly observes as follows:

‘My name and identity card present me as a female and my voice is what is typically considered feminine. But I am a man and I identify myself as such. I would like to marry and get a family. What choice does the law give me to do this? What chance do I have to lead a normal and regular life like any other member of society? None!’

Some intersex persons like RM have unsuccessfully attempted to engage with the institution of marriage but couldn’t sustain it.³¹² For others, the quest to fulfill their human needs through intimate relationships has made them objects of threats, blackmail and extortion from would be intimate partners. Such is the case of Riziki as she narrates below:

‘My boyfriend screamed and ran away immediately he realized that I had a penis in addition to a vagina the day we attempted to have sex. He did not stop there but he started calling me, threatening to ‘expose’ me. I had to buy his ‘silence’ by giving him money’,³¹³

Riziki says that she has never recovered from the trauma caused by the boyfriend’s reaction and has kept away from any intimate relationships since that encounter. According to Riziki, not being recognized by the law means that many intersex persons live in fear of being ‘exposed.’

Personal relationships acquired through the marriage institution are important not just for human existence, but also for the development of a person as a relational and dignified human being. This is because the human development of an individual is shaped through relationships with other human beings, as the *ubuntu* philosophy explains. No one can exist or become human in isolation. In this sense, relations such as those created through marriages are central to one’s

³¹⁰ The Marriage Act No. 4 of 2014, Section 6 (1) d.

³¹¹The Marriage Act No. 4 of 2014, Section 55(1)2. Sample marriage certificates issued for both statutory and customary marriages under the Act are annexed at Appendix 5.

³¹² RM, Para 5.

³¹³ Interview with Riziki on telephone from Mombasa on 4th October 2020.

dignity and development.³¹⁴ In addition, legal recognition of intimate relationships through marriage unions constitute an important form of public and community recognition. According to Bamforth, marriage is a symbol of participation in the society and the community.³¹⁵ Indeed, in many communities in Kenya, marriage is a major social marker signifying a fundamental step towards entry into adulthood and the respect that comes with it.³¹⁶ This is therefore an essential human need denied people born intersex through specific legal exclusion and the structure of the documents.

The right to marriage is closely tied to the right to having children. Rombo *et al* observe that having children, either through natural birth or adoption, is an essential component of creating a family.³¹⁷ Unfortunately, being neither male nor female in a binary based society means that decisions to have children, either biological or adoptive, for intersex persons, remains hampered by the law. The following section examines the legal constraints intersex persons face in this important area of personality rights.

4.5.3. RIGHT TO PARENTHOOD.

Non recognition and non-documentation has meant that there is no regulation in place to protect intersex people from genital ‘normalizing’ surgeries and other sex reassignment/realignment medicalization procedures. These forms of medical intrusions, being permanent and irreversible, have serious health complications associated with them. But more significantly, these procedures usually ultimately rob many intersex persons the opportunity to make the fundamental decision on whether they want to be parents. Intersex ‘genital corrective’ procedures have a profound impact on the victims’ ability to become biological parents. Many of the procedures end up sterilizing the victims and rendering them impotent.³¹⁸ In the case of KK, the surgical removal of his male genitalia effectively ended up being a castration, ultimately denying him the personal choice of siring children biologically as he laments below:

³¹⁴ Ibid.

³¹⁵ Nicholas Bamforth, ‘Sexuality And Citizenship In Contemporary Constitutional Argument’(2012)10, International Journal of Constitutional Law 2: 490.

³¹⁶ Isabel Pike *et al*, ‘Making Sense of Marriage: Gender and The Transition to Adulthood in Nairobi Kenya’ (2018) 80 Journal of marriage and Family 1298.

³¹⁷ Dorothy O. Rombo *et al*, *Public Policy and Families in Kenya* in Mihaela Robila (ed) Handbook of Family Policies Across the Globe. (Springer 2014)33.

³¹⁸ Alice Dreger, *Ambiguous Sex or Ambivalent Medicine? Ethical issues in the treatment of intersexuality*, 171.

‘The operation that was conducted on me as an infant left me a man without a penis. As a man without a penis, my personal right to decide if or not to have children was taken away from me. I was castrated and now cannot have children even if I wanted to.’³¹⁹

The right to form a family is also one of the key aspects constituting personal rights recognized under International Human Rights Law.³²⁰ Consequently, there cannot be any doubt that this right also relates to respecting aspects of an individual’s decision to parenthood through procreation. Any involuntary form of sterilization would consequently amount to a violation in this regard. Indeed, in the United States case of *Skinner V Oklahoma*, the court observed that sterilization amounts to the denial of the right to procreation.³²¹

Sterilization, in relation to reproduction health, is defined as a process that intentionally renders an individual incapable of bearing children.³²² Forced sterilization occurs where medical procedures, which result in interfering with the victims’ reproductive health capabilities, are conducted on a victim without their knowledge and or consent.³²³ In the case of many intersex persons, the procedures are done without giving the victim an opportunity to provide consent to the procedure, considering that most of them undergo the process at infancy.³²⁴ Yet there are clear directives that no child should undergo non-therapeutic sterilization, without full, free and informed consent of the child.³²⁵ Regarding intersex children, the Committee on the Rights of the Child has specifically condemned sterilization surgeries. It terms them as unwanted and

³¹⁹ Interview with KK in Nairobi on 16th December 2019. KK, whose penis was amputated at infancy in a bid to fix him into the available documentation structure, laments that his right to decide if or not to have biological children was taken away from him.

³²⁰ UDHR Article 12 and 16; ICCPR, Article 23.

³²¹ *Skinner v Oklahoma Ex Rel. Williamson*, Attorney General. 316 U.S. 535 (1942) Para 541.

³²² In *Ms. A. S. vs. Hungary*, the Committee on the Elimination of All Forms of Discrimination against Women established that sterilization of a woman without her full and informed consent amounted to violation of Article 16 of the Convention, which provides *inter alia*, for the right to decide to have children and the number of children to have. The Committee further held that the sterilization permanently deprived the victim her natural reproductive capacity. (CEDAW/C/36/D/4/2004).

³²³ Centre for Reproductive Rights Fact Sheet, *A.S. v Hungary: A signature is Not Enough*, (Centre for Reproductive Rights Fact Sheet, December 2008) 1-5. Hungary https://reproductiverights.org/wp-content/uploads/2020/12/AS_v_Hungary_Informed_Consent.pdf, (Accessed on 7th December 2021).

³²⁴ The narratives of the respondents demonstrate that many intersex surgeries are conducted at infancy. Children born intersex are more often than not treated as a medical emergency whose ‘correction’ is supposed to happen as soon as possible due to the heavy stigma associated with being born with double genitalia. This was what happened to Sebbo, KK and Erica. However, there is no guarantee that early and immediate surgeries to align the sex of the child will coincide with the child’s physical identity or biological appearance.

³²⁵ Yogyakarta Principles Plus 10, Principle 10. At Principle 10, the Yogyakarta Principles call upon States to prohibit any practices that allow intrusive and irreversible treatments on the basis of various considerations including sex characteristics. Sterilization has been named as one of those practices, especially when it is involuntary and administered or enforced without the person concerned giving prior free and informed consent.

faults them for being performed only as a prerequisite to receiving gender affirmative treatment and gender-marker changes.³²⁶

As the intersex respondents' personal narratives have demonstrated, sex realignment/reassignment procedures are usually conducted on intersex infants or during early childhood.³²⁷ In some cases, these have resulted in the termination of a person's reproductive capabilities, as was the case with KK.³²⁸ The possibilities of being rendered biologically incapable of having children because of these sex alignment procedures and other forms of medicalization are therefore exceptionally high.³²⁹

Forced sterilization procedures have been linked to the interference with a person's autonomy and self-determination and have been frowned upon by several jurisdictions. In December 2022, the Constitutional and human rights Division of the High Court of Kenya determined that forceful sterilization procedures, without a patient's free and informed consent amounted to violation of the patient's rights to dignity and autonomous identity.³³⁰ And where the forced sterilization is conducted on the basis of a woman's HIV status, the court found that such action amounts to discrimination, and awarded the victim damages of Kenya shillings Three Million.³³¹ This award was jointly against the hospital which conducted the bilateral tubiligation process that rendered the victim incapable of exercising her right to reproductive health and the County government of Nairobi for failing to protect her rights from the non-State actor.³³²

The Supreme Court in Namibia, in a matter involving a similar case of forced sterilization, had this to say:

'Individual autonomy and self-determination are the overriding principles towards which our jurisprudence should move in this area of the law... these principles require

³²⁶ World Health Organization, (WHO) *Eliminating forced, coercive and otherwise involuntary sterilization: an interagency statement*, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. (World Health Organization 2014) 7-8.

³²⁷ Baby A, Sebbo, Erica and KK were put through the surgical alterations and other forms of medicalization including hormonal treatment in infancy and early childhood.

³²⁸ Interview with KK in Nairobi on 16th December 2019.

³²⁹ KK's personal statement is that he was rendered biologically incapable of having children because his reproductive organs including his penis and testicles were surgically removed in a bid to realign him with a female gender, yet he was not born female. He was born intersex.

³³⁰ *L.A.W and Two Others v Marura Maternity & Nursing Home and Others* [Constitutional Petition No. 606 of 2014] (unreported).

³³¹ *Ibid*, Para 253.

³³² *Ibid*, Para 252-253.

that in deciding whether or not to undergo an elective procedure, the patient must have the final word.³³³

Other jurisdictions have also awarded damages against perpetrators of forced sterilization without informed consent. In the Canadian case of *Muir v The Queen in right of Alberta*,³³⁴ a woman had been subjected to forced surgical sterilization ostensibly due to an intellectual disability. The sterilization procedure had been conducted without her informed consent.³³⁵ The Alberta Court of Queen's Bench compensated her in the amount of Canadian \$375,280.³³⁶ This amount constituted \$250,280 for pain and suffering and \$125 000 as aggravated damages for the stigma and the humiliation she experienced.³³⁷

ApSiya is fortunate in that s/he did not undergo forced sex reassignment/realignment surgery nor have her/his reproductive capabilities interfered with. S/he therefore has a uterus and has been able to conceive and birth a daughter who is now a teenager.³³⁸ In terms of documentation, however, ApSiya cannot enjoy his/her rights to parenthood. Given that the structure of the documentation regime cannot recognize ApSiya as a birthing parent, s/he has been unable to obtain an accurate birth certificate for the child.³³⁹ These challenges are directly attributable to failure by the law to recognize and document intersex persons in their true gender.

In addition to being subjected to forced procedures which render them infertile, intersex persons are usually predisposed to being incapable of having children because of the biological genetic framework that makes them of the intersex gender.³⁴⁰ Consequently, some intersex persons, even those who have not been subjected to intersex genital mutilation, may be unable to exercise the natural parenthood route due to this fact of nature.³⁴¹ However, despite this reality, the law does not accord intersex persons the options available to other citizens regarding alternative means of exercising the right to be parents. While the binary gender persons in Kenya can utilize legal routes towards parenthood through adoption or even guardianship, those

³³³ Government of the Republic of Namibia v LM and Others (SA-2012/49) [2014] NASC 19 (03 November 2014).

³³⁴ *Muir v The Queen in right of Alberta*, 132 D.L.R. (4th) 695.

³³⁵ *Ibid.*

³³⁶ Approximately Kshs 33,775,00/= as at December 2022.

³³⁷ *Muir v The Queen in right of Alberta*, 132 D.L.R. (4th) 695 available at: <https://eugenicsnewgenics.files.wordpress.com/2014/01/muir-v-alberta.pdf>. (Accessed on 10th October 2021).

³³⁸ Interview with ApSiya on 23rd May 2022.

³³⁹ *Ibid.*

³⁴⁰ Equal Rights for Intersex People, 'Testimony of an Intersex Person'. (10 The Equal Rights Review 2013)138. https://www.equalrightstrust.org/ertdocumentbank/ERR10_testimony.pdf (Accessed on 28th July 2021).

³⁴¹ Interview with Rye on 18th May 2019.

routes are statutorily regulated in a way that not only discriminates but completely exclude intersex persons.

Adoption, a non-natural but legal parenthood route, is now provided for under the Constitution and the Children's Act, 2022.³⁴² These are therefore the instructive legal instruments in matters of child adoption in Kenya. In any matter concerning a child, the Constitution states that a child's best interests is of paramount importance.³⁴³ This research recognizes the gains for intersex children in relation to adoption, which have been included in the Children Act 2022. Unlike the provisions contained in its predecessor, the current Children Act permits intersex children to be eligible for adoption, thus allowing them the right to be in alternative families, where there may be a need.³⁴⁴ The restriction on an intersex adult wishing to adopt a child however remains. The limitations on potential adoptive parents contained Section 158 (3) of the now repealed Children's Act have been retained in Section 174(2) of the Children Act 2022. The limitations contained in both the former and current Acts completely bar an intersex adult from taking this alternate parenthood route. Further, the law stipulates that an applicant or joint applicant will only be availed to a male or female applicant. This stipulation is of course in line with the binary set up of the Kenyan law, and it automatically shuts out a person born intersex as a potential adoptive parent. An intersex person is therefore legally barred from exercising the right to create a family through the adoptive route as well, thereby removing the freedom of enjoyment of the personal right to parenthood. In addition, the documentation issued after an adoption process also does not contemplate an intersex parent. The High Court has now declared that adoptive children should be issued with birth certificates based on the information from the adoptive register.³⁴⁵ This declaration however does not mitigate the position for intersex parents adopting children. Birth certificates issued from an adoptive register are equally structured to accommodate adoptive binary parents only.³⁴⁶

The freedom to enjoy personal rights without any legal hindrances not only allows an individual to secure a sense of humanity but also enables that individual to live and thrive in the immutable

³⁴² While the Constitution, 2010 does not specifically provide for adoption, Article 15(3) does entitle citizenship to a child adopted by a Kenyan citizen. Part XIV of the Children Act, 2022 which has replaced Part XII of the Children Act, 2001 (now repealed), is quite elaborate on the prerequisites for adopting a child in Kenya. Like its predecessor, the current Children Act equally excludes intersex adults from exploring the nontraditional parenthood route of adoption.

³⁴³ Constitution of Kenya 2010, Article 53 (2).

³⁴⁴ Children Act, 2022, Section 174(4).

³⁴⁵ *Organization For National Empowerment v Principal Registrar of Birth and Deaths & Another* [2013] eKLR, Para 23.

³⁴⁶ A Sample birth certificate issued after an adoption process is attached at Appendix 5.

facets of life, including social interaction with other human beings.³⁴⁷ Such interactions also enable people exercise their right to full development as human beings.³⁴⁸ The converse, therefore, means that a person denied these rights through the operation of the law, is denied the rights from the cradle to the grave. The impact of non-recognition and non-documentation of an intersex person on the right to be treated with dignity after they die forms the subject of discussion in the final subsection of this chapter.

4.5.4 RIGHTS AT AND AFTER DEATH.

The question of whether a person's right to human dignity vests after a person dies has been the subject of discussion in many jurisdictions. In India, the Supreme Court in the *Pt. Parmanand Katara* case, observed that a dead body is entitled to a decent burial or cremation.³⁴⁹ In the words of the court:

‘ ...the right to dignity and fair treatment under Article 21 of the Constitution of India is not only available to a living man, but also to his body after his death’.³⁵⁰

The opportunity to determine whether a dead person still has human dignity capable of being violated, was presented to the court in Kenya, in *Joan Akoth Ajuang & another v Michael Owuor Osodo the Chief Ukwala Location & 3 others*.³⁵¹ The deceased in this case died at the height of the Covid 19 disease and according to the Petitioner, his body was disposed of like ‘a stray dog’, contrary to his constitutional right to dignity at death.³⁵² The Respondents’ contention was that a deceased cannot claim violation of any right or freedom, since the dead are not capable of enjoying human rights and freedoms. A further argument presented by the Respondents was that, there is no dignity that can be attributed to death, since a dead person does not enjoy the rights and privileges of a living person.³⁵³ In agreeing with the Petitioner, the court made a finding similar to the Supreme Court of India in the *Pt. Parmanand Katara*. It confirmed that the right to dignity and fair treatment prevails even after death.³⁵⁴

³⁴⁷ Jed Rubenfeld, ‘The Right to Privacy’ (1989)102 Harvard Law Review 4: 739-754.

³⁴⁸ Ibid.

³⁴⁹ Pt. Parmanand Katara Advocate v Union of India and Others (1995 (3) SCC 248).

³⁵⁰ Ibid.

³⁵¹ Joan Akoth Ajuang & another v Michael Owuor Osodo the Chief Ukwala Location & 3 others [2020] eKLR. Para 163.

³⁵² Ibid, Para 22.

³⁵³ Ibid, Para 107.

³⁵⁴ Ibid.

The principle of dignity allows those living as well as the dying the peace of mind to know that their wishes would be respected when they die.³⁵⁵ Respecting those wishes would include the knowledge that one would be accorded a decent interment upon death. Kabira and Kibugi note that the right to a decent burial has long been recognized at common law.³⁵⁶ Their argument, which is quite accurate, is that even when a person dies, that person does not lose their dignity.³⁵⁷ Indeed, from ancient times, Africans have treated their dead with utmost respect. A decent interment is therefore normally expected for every human being in accordance with respectable and accepted norms.³⁵⁸ In Kenya, most customs generally place a lot of significance on where and how a person is buried.³⁵⁹ Death and burial practices form cultural and social components of most societies.³⁶⁰ The value of culture in relation to burial in Kenya was well articulated in *Virginia Edith Wamboi Otiemo v Joash Ochieng Ougo & another*, where the court upheld the customs regarding burial.³⁶¹ It therefore follows that under most customs in Kenya, people are considered to still have human dignity capable of being violated even after death. Aristotle appears to propound this philosophical argument when he states that:

‘Both good and evil are thought to happen to a dead person...Take, for example, honours and dishonours, and the good and bad fortunes of his children or his descendants generally.’³⁶²

Similarly, Smolensky, in disputing the proposition that the dead do not have any rights, states as follows:

‘Various legal institutions have spent considerable time trying to protect the rights of the dead. As a result, most testamentary distributions, burial requests, and organ donation designations are held to be valid even if they contradict the preferences of the

³⁵⁵J. B. Ojwang *et al* (eds), *The S. M. Otiemo Case: Death and Burial in Modern Kenya* (Nairobi University Press 1989).

³⁵⁶ Nkatha Kabira and Robert Kibugi, ‘Saving The Soul Of An African Constitution: Learning From Kenya’s Experience With Constitutionalism During COVID-19’ (2020) 20 African Human Rights Law Journal 438.

³⁵⁷ *Ibid*, 454.

³⁵⁸ Martin Olando, ‘Cremation and Burial: Which way for the African Christian Context?’ (2019) 2 *Jumuga Journal of Education, Oral Studies, and Human Sciences* 1: 2.

³⁵⁹ Evans Monari, ‘Burial Law: Reflections on the SM Otiemo case’ (1988) 31 *Howard Law Journal* 667.

³⁶⁰ M.D.Okech Owiti, ‘*The S.M. Otiemo Case: Some Socio-legal Issues*’ in JB Ojwang *et al* *The S.M. Otiemo Case: Death and Burial in Modern Kenya* (Nairobi University Press 1989).

³⁶¹ *Virginia Edith Wamboi Otiemo v Joash Ochieng Ougo & another* (1987) *eKLR*.

³⁶² Bernard N. Schumacher, ‘*Death and Mortality in Contemporary Philosophy*’ (Cambridge University Press 2005)175. In *Joan Akoth Ajuang*, the Petitioner relied on Aristotle’s philosophy in making her argument that the dead have interests that can either be protected or harmed after they die, and therefore, the undignified interment that the government had subjected her husband to amounted to dishonoring the dead.

living. Certain destructions of property requested in wills are honoured even though they may have a negative impact on the living...³⁶³

The argument presented is that, while legal rules affecting the dead often have a practical aspect, one of the primary but yet unrecognized forces driving the creation of these legal rules are cultural norms, including dignity and respect for a deceased' wishes, which need to be respected.³⁶⁴ And the argument that the dead deserve respect seems to have a constitutional basis. The Constitution of Kenya, 2010 for instance, does posthumously give honour to those who heroically struggled to bring freedom and justice to Kenya.³⁶⁵ This appears to suggest that the law recognizes the dignity and human worth of a person even after they have died. Indeed, it has been argued that the life of an African does not end in death because, their spirituality is holistic and impacts on the whole of life as guided by the *ubuntu* philosophy.³⁶⁶

The protection of human worth and dignity of a person therefore does not and should not end with the death of the person. And because of the *ubuntu philosophy* as propounded by Mbiti in the statement 'I am because we are and since we are therefore I am', a person doesn't relinquish their social legal existence when they physically die.³⁶⁷ The import of this therefore is that no one should be degraded or debased even after death. The dignity of a person is inviolable and must be protected and always respected during and after death. And the law in Kenya recognises this by criminalizing any act which can be interpreted to constitute indignity to a human corpse.³⁶⁸ The kind of indignity that Riziki's grandmother was treated with after death, and the kind of undignified interment that she was subjected to, is something that the law ought to protect intersex persons from upon death.³⁶⁹

Syd explains the indignity that intersex persons are subjected to when they die through his narration of the sad story of an intersex grandmother as follows:

'There is an old intersex woman who lived in the village where I was born. I know about her because when I started reaching out to intersex persons through our organisation, I

³⁶³ Kirsten Rabe Smolensky, 'Rights of The Dead' (2009) 37 Hofstra Law Review 765.

³⁶⁴ Ibid, 767.

³⁶⁵ Constitution of Kenya, 2010, Preamble. The honour bestowed to those who heroically struggled to bring freedom and justice to Kenya in the preamble is in reference to Kenyans who are already dead, but played a significant part in making Kenya a nation.

³⁶⁶ Sibangilizwe Maphosa and Mpikhelelo Maseko, 'Psychology of African: Understanding Ubuntu through a Death in the Family in an African Village – Matabeleland South Province Zimbabwe' (2016) 4 (8) Research Journal of Psychology 2.

³⁶⁷ John S Mbiti, *African Religions and Philosophy* (Anchor Books 1970) 189.

³⁶⁸ Penal Code Chapter 63 of the Laws of Kenya, Sections 136 and 137.

³⁶⁹ See interview with Riziki on telephone from Mombasa on 4th October 2020.

used to interact with her a lot. She was ostracised during her lifetime for being intersex and did not have any identification documents including an identity card by the time she died. She was subjected to a lot of indignity after death because the community refused to allow her body to be buried within the family compound. She was buried in a public cemetery and no burial rights were conducted for her. Everyone said that if her body was honoured, it would bring bad luck because other children like her would be born into the family'.³⁷⁰

In terms of documentation, Syd does not know if the old woman was issued with a permit for burial or death certificate.³⁷¹ He however knows that she did not have an identity card and because she did not have any formal education, she could not have had any certificates.

Looking at the format of the current documents issued to Kenyans after death, it is obvious that intersex persons remain misgendered even at death.³⁷² The permit for burial issued under the law is structured to only accommodate female and male deceased persons and specifically states so. The information regarding sex/gender contained in the death certificate equally rules out inclusion of a deceased person who was intersex in life. The legal structure of these documents issued upon the death of a person therefore mean that a person of the intersex gender cannot be recognised on the final certificate issued at the end of everyone's life.³⁷³ And even though the Children Act, 2022 has determined that an intersex child be registered at birth, the gap remains in terms of documentation when an intersex child dies.³⁷⁴ Intersex children who die remain without dignity at death because they, like their adult counterparts, cannot get accurate documentation reflecting their true sex/gender even at death. The legal lacuna therefore subsists even in the face of legislation meant to plug the gaps.³⁷⁵

³⁷⁰ Interview with Syd in Nairobi on 16th December 2019.

³⁷¹ Burial permits and death certificates are also issued in the binary, as evidenced by the samples attached at Appendix 5.

³⁷² Death Certificates are issued under the same legal regime as birth certificates and take the same format in terms of sex/gender description.

³⁷³ Ibid.

³⁷⁴ Children Act, 2022, Sections 7(3) and 250. The Children Act has done well to call for registration of an intersex child's birth, its shortcomings, in the sense that it does not make provision for the mechanisms through which an intersex person will accurately be registered, notwithstanding. It however fails to recognize that intersex children may die and require dignity at death through accurate documentation reflecting their true sex/gender.

³⁷⁵ Legal changes formulated in the form of the children Act, 2022, still contains glaring gaps in terms of accurate documentation for intersex persons.

4.6. CONCLUSION.

This chapter is driven by the second hypothesis which posits that legal gaps, shortcomings and inadequacies existing in recognition through the documentation regime in Kenya greatly inhibit access to concrete rights and human needs of people born intersex. The chapter continues to examine the second limb of the second objective and second research question targeting human needs that are not necessarily tangible. The aim of the second research objective and question, which mirror each other, is to explore the way these legal voids adversely impact unquantifiable human needs of the intersex person. To this end, the chapter has demonstrated, through lived experiences, that people born intersex remain disadvantaged from the cradle to the grave. Non recognition and the documents' structure have not just created legal bottlenecks in their lives' trajectory, but continue to expose them to violations negatively impacting many aspects of their humanity. They have been stripped of their human dignity, identity, autonomy and self-determination, contrary to the natural law and African humanness propounded under the *ubuntu* philosophy.

Kenya, in its transformational constitution, prides itself in being a just society where everyone's needs are taken care of within the true spirit of *ubuntu*. The expectation therefore is that the Africanness and humanity theorized under *ubuntu* should be extended to intersex persons through the positivists approach, to complete the justness of the society contemplated by natural law theorists. A just society should not have in place insular and exclusionary legal structures which expose a group of the populace to many forms of harms. A just society requires that all citizens be afforded equal opportunities to enjoy all the social and economic rights and concomitant unquantifiable rights, and past injustices should be corrected through the corrective justice theory.

This study has this far established the inhibiting and limiting legal landscape which persons born intersex must contend with, in relation to identity documents during their lifespan and after. Since the Constitution guarantees all its citizens rights, privileges and benefits which include accurate documentation, intersex persons must not be omitted. For the intersex person to be on equal standing with every other citizen however, Kenya needs to engage in ways that Oluwu refers to as basically charting a practical and purposive path.³⁷⁶ This ropes in the corrective justice theory meant to correct past injustices.

³⁷⁶ Dejo Oluwu, *An Integrative Rights based Approach to human Development in Africa*, 226.

The following chapter sets out to explore models through which such practical, purposive and corrective mitigating mechanisms can be charted, with a view to undertaking mitigation measures to remedy the challenges and help seal the gaps identified. To guide the purposive and practical charting of this mitigating path, the research posits that Kenya does not have to invent the wheel. Other jurisdictions have undertaken various protective measures and therefore, there are many models to borrow from. Chapter five, therefore, evaluates the various transformative and progressive techniques undertaken elsewhere, as it seeks to achieve the final research objective and answer the final research question. In this regard, approaches utilized in five selected jurisdictions namely, South Africa, Malta, Columbia, Germany and India are analyzed. The research is very intentional in proposing models that would appropriately apply in the Kenyan situation without the danger of eroding the gains made so far. The analysis in Chapter five will assist in achieving the final research objective, which is to evaluate the best practices available elsewhere that can be borrowed to mitigate the challenges intersex persons in Kenya are facing. This will also assist in making suggestions for appropriate legal and other measures to help seal the gaps identified in the research.

CHAPTER FIVE.

RECOGNITION AND IDENTITY DOCUMENTS' ENABLING FRAMEWORKS: PERSPECTIVES FROM VARIOUS JURISDICTIONS.

5.1 INTRODUCTION.

In this age of increased human rights recognition and protection, it is disconcerting that intersex persons in Kenya continue to suffer a litany of violation of rights and denial of their human needs, owing to lack of recognition and lack of accurate identity documents. This disturbing reality has been demonstrated in chapters two, three and four of this research. However, Kenya's situation may be a reflection of both the global and African regional levels, which are yet to adopt direct legal instruments to specifically address intersex human rights and needs.¹This position seems to suggest that the violations have historically not received the universal attention they deserve.² Direct legislation providing recognition and safeguarding the attendant rights and needs accessed through identity documents discussed in previous chapters is absent at these critical levels.³This position subsists in the face of the vulnerability created by the intersex innate unique biological sex characteristics in a largely binary ordered setting.⁴The exclusion perhaps explains the legal hesitancy which some countries, appear to be in, with regard to enacting processes to accurately document intersex persons at the domestic level.⁵

¹Joke Swiebel, 'Lesbian, Gay, Bisexual and Transgender Human Rights: The Search for an International Strategy' (2009) 15 Contemporary Politics 1: 19-20. See also Athalia Phindile Shabangu, 'Services Provision is also the Rights for Lesbians, Gays, Bisexuals, Transgender, Intersex, and Queer People' (Master's Thesis, Faculty of Law, University of the Free State 2022) 22.

²As pointed out in earlier, when a meeting was convened by the United Nations in 2015 where the human rights situation of intersex persons was specifically addressed globally for the first time ever, Zeid Ra'ad the then United Nations Commissioner for Human Rights, admitted that he very knew little about intersex persons. www.ohcr.org (Accessed on 16th November 2016).

³ As seen, challenges facing various vulnerable groups including Women, children and persons with disabilities have specifically been addressed by global and regional human rights instruments. At the global level, these have included the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). The region of Africa has the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) (2003) and the African Charter on the Rights and Welfare of the child, (ACRWC) which address the rights of women and children respectively. The 2018 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with disabilities caters for disability rights. Kenya has in turn put in place its own domestic legal framework relating to disability rights through the Persons with Disabilities No. 14, 2003. The vulnerability of these specific groups, and their presence as members of society, have been legally acknowledged and their unique human rights and needs addressed. The situation is however different for the intersex person who appears to be disregarded at all levels.

⁴ Even though the 2006 Yogyakarta Principles and the 2017 Additional Principles focus on gender non-conforming persons including intersex persons, it is to be noted that while these serve to set international standards for States to follow they do not impose legal obligations.

⁵With the exception of some legislative provisions which mention persons of the intersex gender found in the Persons deprived of Liberty Act, the National Police Service Standing Orders, and now the recently enacted

Non recognition leading to non-documentation for intersex people in a world that is generally binary ordered, usually presents universal jurisdictional challenges.⁶For this reason, and even in the absence of global and regional human rights instrument, some jurisdictions have adopted meaningful legal responses through various approaches to address these challenges. These approaches have resulted in momentous milestones translating into improved protection of human rights and needs for people born intersex in those jurisdictions.

In a bid to explore possible solutions for intersex persons' concrete challenges, this research, as its third and final objective, examines how Kenya can mitigate identified problems by borrowing from such progressive jurisdictions.⁷ The chapter therefore seeks to respond to this objective as it answers the third research question. To do so, the chapter undertakes an illustrative study of different frameworks utilized in five jurisdictions. These jurisdictions have employed various legal and other models through which significant achievements towards recognizing and accurately documenting people born intersex have been recorded. The human rights based approach is utilized while the arguments made in the chapter are anchored on the corrective justice theory analyzed in chapter one.⁸ The chapter examines various processes employed in the jurisdictions identified, to determine if and how, they have corrected hindrances to access to intersex persons' social economic right's and human needs. While some of the jurisdictions have engaged purely judicial processes or legislative measures, others have engaged a blend of both legislation and judicial processes. In this regard, the research examines the models used in South Africa, Malta, Colombia, Germany and India. The historical and philosophical approaches are applied where applicable, to establish the background informing the context of the approaches in the jurisdictions selected for analysis.

The reasons for choosing the approaches utilized in the identified countries are varied. The choice of those used in South Africa is informed by the fact that it was the first country in Africa to have used legislative reforms to spearhead intersex persons' issues as human rights concerns. Further, given the focus of this study, the consideration is that Kenya can identify better with approaches adopted in an African country.

Children Act,2022, Kenya does not have any specific constitutional or legislative law explicitly directed at protecting intersex persons through recognition or documentation. The shortcomings in the Children Act, 2022 have been analyzed in the preceding chapters.

⁶ The various challenges have been detailed in chapters two, three and four.

⁷ Ibid.

⁸ See discussions in chapter one.

The legal processes adopted by Colombia are equally important for Kenya. During the hearing *RM*, the first case to ever juridically address human rights violations for intersex persons in Kenya, jurisprudence developed by the Constitutional Court of Colombia was heavily relied on.⁹ Even though *RM* failed in most of the claims before court, it cannot be denied that it was this case that caught the attention of authorities in Kenya, triggering some of the significant milestones that have since occurred.¹⁰ *Baby A*, equally strenuously relied on the legal position created through jurisprudence in Colombia. Here, the Petitioners tried to persuade the High court to make declarations similar to those made by the Constitutional Court in Colombia.¹¹ For these reasons, this study considers a review of the protective processes used in Colombia important.

There are jurisdictions, which have used models involving jurisprudential pronouncements which have in turn led to legislative reforms, resulting in a blended jurisprudential and legislative process. Such include Malta¹² and Germany. These two countries have therefore been selected for the effectiveness demonstrated in the blended approach used to document intersex persons in their true gender, thus expressly enabling access to certain rights and needs. When it comes to India, society there has, for thousands of years, acknowledged the existence of a gender that is neither male nor female. India has historically disparagingly referred to members of that sex/gender as *hijra*.¹³ It also lumps all non-binary members of society including the intersex, eunuchs, and transgender into this category. The Supreme Court in India, however, through the protective non-binary persons' rights' umbrella, has made impactful articulations regarding intersex rights, hence the choice of India. The analysis of the different models and processes used in the selected jurisdictions illustrates that protection of human rights and needs of intersex persons is achievable. They therefore serve as good precedent setting approaches to borrow from.

⁹*RM*, paras 34,44, and 59.

¹⁰ *Ibid*, Para 106. Soon after the High Court conceded that the country did not have an official definition of an intersex person, Parliament legislated on the Persons Deprived of Liberty Act which inserted the term intersex into the Kenyan law. This was the first time in Kenya's legal history that the term intersex appeared in any legal text. Policy reforms were thereafter made to the Police Act, to be followed by the 2019 census, through which intersex as a distinct gender was factored in. More recently, the Children Act, 2022 and the National Reproductive Health Policy 2022-2032 have mentioned the term intersex.

¹¹*Baby A*, Paras 32, 39 and 64.

¹² The 2015 UNOHRC Report indeed named Malta as one of the countries that have made demonstrable progress to recognize the rights of intersex individuals.

¹³ Jennifer Rellis, 'Please Write 'E' in This Box, Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India' (2008) 14 Michigan Journal of Gender & Law 2: 227.

The discussions in this chapter are undertaken in five parts, each dedicated to analyzing the processes utilized in each jurisdiction identified for the study. Protection through issuance of accurate documentation, access to socio economic rights and unquantifiable needs where applicable, are then evaluated in different limbs of each section. The first and second parts of the chapter examine the approaches employed in South Africa and Malta respectively. The final three analyze those used in Columbia, Germany and India in that order. In each part, the progressive approaches taken either through legislation and or judicial pronouncements, directly impacting on the material and unquantifiable human needs identified in chapters two, three and four are detailed. These are examined with a view to drawing recommendations which can be appropriately apply to the Kenyan context in the final chapter of this study. Other non-legal measures utilized in the identified jurisdictions are simultaneously discussed with the legal mechanisms where applicable.

5.2. LEGISLATIVE AND ACTIVISM MODELS. (SOUTH AFRICA)

5.2.1. INTRODUCTION.

Discussions around recognition and protection of intersex persons' rights in South Africa cannot be held without mentioning the highly publicized case of Caster Semenya. Semenya was born intersex and was documented in the female sex/gender.¹⁴ When Semenya refused to undergo medicalization to lower the testosterone levels in her body, the former International Association of Athletics Federation (IAAF), (now World Athletics), reacted by banning her from participating in the female sporting event.¹⁵ This action was a clear demonstration of the unequal and discriminatory treatment subjected to intersex persons globally.¹⁶ As a nation however, South Africa stood by Semenya. In fact, the then Sports Minister declared as follows:

‘We will go to the highest levels to contest the decision [to ban her].’¹⁷

This was not just demonstrative of national support for a person being subjected to unequal treatment on account of their sex/gender differences, but a condemnation of discriminatory

¹⁴ Castor Semenya v International Association of Athletics Federations (IAFF) CAS 2018/0/5794 and CAS 2018/0/5798.

¹⁵ Ibid.

¹⁶ Cheryl Cooky and Shari Dworkin, ‘Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy’ (2013) 50 *Journal of Sex Research* 2:103-105.

Mokgadi Caster Semenya case – judgment by Federal Supreme Court of Switzerland of 25 August 2020. Available at [Caster Judgment of_25_August_2020-final_.pdf](#) (up.ac.za) (Accessed on 8th January 2022).

¹⁷ Poyoshi Mitra, *Male Female or Other: The Untold Stories of Female Athletes with Intersex Variations in India* in Jennifer Hargreaves and Eric Anderson (eds), *Routledge Handbook of Sports, Gender and Sexuality* (Routledge 2014)387.

practices against intersex persons in South Africa. From a legal point of view as well, South Africa is said to be one of the most progressive jurisdictions in the world in terms of protective legislation for people whose sex/gender identities exist outside of the binary sex categorization.¹⁸ This has seen the country adopt legislative approaches to accept intersex as an innate sex/gender, distinct and separate from the traditional male and female categories, and to document them accordingly.¹⁹ Having made that acceptance, South Africa has gone further. Being an inherent congenital condition, the country has also acknowledged that the condition gives rise to specific unique and essential needs, which have to be accorded the legal attention they deserve.²⁰

South Africa's reasons for being this attentive to the vulnerability of intersex person could probably be attributed to the apartheid struggle in the country where human beings were historically discriminated and treated unequally for many years.²¹ The apartheid regime had seen the country witness with horror, human beings being segregated and unfairly discriminated on account of their innate and biological skin differences.²² It is therefore unsurprising that it became the first country in Africa to enact a constitution meant to protect its people from discrimination on account of numerous innate considerations.²³ Indeed, a key foundational principle of the first independent Constitution of South Africa was equality and non-discrimination. These principles of equality and nondiscrimination have served to bring intersex persons under the ambit of constitutional protection offered for every person under Section 9 of the constitution.²⁴

But to buttress the application of the principles of equality and nondiscrimination for intersex persons, the South African Parliament took further steps by enacting the Promotion of Equality

¹⁸ Tamar Klein, 'Querying Medical and Legal Discourses of Queer Sexes And Genders In South Africa' (2008) 10 *Anthropology Matters Journal*, 2:13-14

¹⁹ Busisiwe Deyi, *First Class Constitution, Second Class Citizen: Exploring the Adoption of the Third Gender Category in South Africa* in Sylvie Namase and Adrian Jjuko (eds), *Protecting the Human Rights of sexual Minorities in Contemporary Africa*. (Pretoria University Press 2017) 140-148.

²⁰ *Ibid.*

²¹ Kevin Durrheim *et al*, *Race Trouble: Race, Identity and Inequality in Post-apartheid South Africa* (Lexington Books 2011)6.

²² Mavis B. Mhlauli *et al*. 'Understanding Apartheid in South Africa Through the Racial Contract' (2015) 5 *International Journal of Asian Social Science* 4: 203-205.

²³ The Constitution of South Africa (1996), through the equality Principle at Section 9 (3), provides that the State will not unfairly discriminate, directly or indirectly, against anyone on any ground including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

²⁴ A parallel of Article 9 of the Constitution of South Africa can be drawn from Article 27 of the Constitution of Kenya 2010. This Article provides for equal treatment and freedom from discrimination for all Kenyan citizens. The Constitution of Kenya can therefore also be said to be founded on the principle of equal treatment and protection under the law.

and Prevention of Unfair Discrimination Act (PEPUDA).²⁵ PEPUDA, also known as the Equality Act, was enacted mainly to give effect to the equality and nondiscrimination principles envisaged by section 9 of the Constitution. The aim was to prohibit discrimination directed at anyone, by any party and for any considerations.²⁶ Parliament was to later expand the provisions of PEPUDA to specifically bring persons born with the intersex gender within the protective ambit of this equality legislation. This feat was achieved in 2005 through two amendments to PEPUDA introduced through the Judicial Matters Amendment Act.²⁷ The substantive contents of these two amendments saw legislation expressly acknowledging intersex persons as a distinct sex/gender in South Africa, come into place.²⁸ In addition, these amendments saw the inclusion of the intersex gender, as a sex/gender category, alongside the traditionally accepted male and female sex/genders.

The Act defines a person born intersex as a person:

‘Whose congenital sexual differentiation is atypical to whatever degree’.²⁹

And even though PEPUDA does not go to the length of explaining the intersex condition in non-technical terms, it now contains, as its objectives, principles of equality, fairness, equity, social progress, justice, human dignity and freedom in line with the constitution.³⁰ These insertions therefore see the extension of the application of these objectives to intersex persons. While the Act does not directly touch on documentation, it does put in place measures for equal treatment for everyone, so as to fulfil the letter and spirit of the Constitution.

In terms of documenting intersex persons and offering direct protection to them in South Africa however, the Alteration of Sex Description and Sex Status Act, usually referred to as the Sex Status Act, is more specific.³¹ It is the Sex Status Act that has made it possible for steps to be taken enabling legal recognition through identity documents.³² Accurate documentation has in

²⁵ The Promotion of Equality and prevention of Unfair Discrimination Act (PEPUDA) No. 4 of 2000: Government Gazette, 9th February 2000. South Africa adopted this piece of legislation to give effect to sections (9) and Item 23 (1) of the 6th schedule of the constitution of South Africa.

²⁶ PEPUDA, Section 6 as read with item 23(1) of Schedule 6 of the Constitution, prohibits unfair discrimination against anyone by both State and non-State actors.

²⁷ The Judicial Matters Amendment Act No. 22 of 2005: Government Gazette 11, January 2006.

²⁸ Ibid, Judicial Matters Amendment Act Sections 16 a) and (b).

²⁹ Ibid, Judicial Matters Amendment Act Section 1.

³⁰ PEPUDA, Preamble.

³¹ The Alteration of Sex Description and Sex Status Act, Act No. 49 of 2003 (Sex Status Act). Government Gazette 15th March 2004. www.gov.za. (Accessed on 31st December 2021).

³² Rye Thoreson, ‘Beyond Equality: The Post-Apartheid Counter narrative of Trans and Intersex Movements in South Africa’ (2013) 112 African Affairs 449: 653.

turn helped secure many of the material and unquantifiable needs of intersex persons as the following subsection shows.

5.2.2. PROTECTION THROUGH ACCURATE DOCUMENTATION.

This research has continually posited that accurate documentation for intersex persons is key to accessing various human rights and needs. The research has also demonstrated, through real life experiences, the constraints arising from exclusion in this regard.³³ It is therefore important to examine how South Africa has adopted a unique legal approach towards identity for people with variations of gender identity and or sex development amongst its citizens.

An important aspect of this Act is the inclusion of the term intersex within the definition of sex/gender in the definition clause.³⁴ By defining an intersex person as a person whose ‘congenital sexual differentiation is atypical to whatever degree’, it places intersex persons amongst the existing sex/gender categorizations.³⁵ The Act goes further and allows for the alteration of the sex description of individuals in certain circumstances. This is yet another recognition that intersex persons may, due to certain circumstances, wish to alter their sex/gender and to document the acquired sex/gender.³⁶ The circumstances envisaged through this provision are where individuals may have had their sex organs altered through surgical or other medical treatments.³⁷ The Act also contemplates changes, where sex organs have been altered by evolvment due to natural development resulting in natural sex/gender changes.³⁸

This Act is also commendable because of its generally all-encompassing features. Its nature is such that it provides a legal avenue through which an intersex person earlier documented in a wrong sex/gender, can have their birth certificate corrected. And where evolvment may have occurred in one’s sex/gender identity making the birth certificate discordant with the gender of the holder like in the cases of Rye, Langa and Syd, the Act provides for a legal corrective avenue.³⁹

In addition to making it possible to correct the sex description inserted in birth certificates where the need arises, the Act also provides comprehensive procedures through which such

³³See chapters two, three and four.

³⁴ PEPUDA, Section 1.

³⁵ Ibid.

³⁶The Sex Status Act, Preamble.

³⁷ Ibid, Section 2(i).

³⁸Such a situation would greatly benefit Rye, Langa and Syd, all of whom were assigned a female sex/gender at birth only to subsequently evolve into the male gender. They would be able to seamlessly and legally alter their documents to match with their reality.

³⁹ Ibid.

alterations are to be effected.⁴⁰ According to the Act, a person who wishes to alter the sex/gender description marker contained in their birth certificate, is allowed to do so through the office of the Director General of the National Department of Home Affairs.⁴¹ If there's a refusal from the Director General, the Act gives the applicant the right to appeal to the Minister of Home Affairs and if this is also declined, a right of appeal against the refusal before a Magistrate is provided for.⁴²

Once an order for alteration of the sex/gender marker in the certificate has been allowed pursuant to the provisions of the Act, the same is translated into reality for intersex persons vide the provisions of Section 4.⁴³ In South Africa, registration of Births and Deaths and issuance of documentation in relation to births and deaths is undertaken through the 1992 Births and Deaths Act.⁴⁴ Initially the Act did not contain the term intersex and neither did it allow changes to the sex/gender marker. It was the Sex Status Act that inserted into the Births and Deaths Act, an additional Section, namely Section 27A. The Births and Deaths Registration Act now factors in the changes introduced by the Sex Status Act regarding the birth certificate for intersex persons.⁴⁵ An intersex person in South Africa is now able to successfully alter their sex/gender description and legally procure an amended birth certificate, reflecting the accurate sex/gender characteristics issued to them.⁴⁶ This is unlike situations in Kenya where a parent like Jane was forced to circumvent the law by illegally obtaining a dubious birth certificate. These legislative provisions therefore make it possible for intersex persons in South Africa to have their documentation adjusted within the law, to conform with their sex/gender descriptions.⁴⁷ The law has also given them an assurance that any changes in their sex descriptions will not adversely impact any rights acquired or accrued before the alteration of the sex description or alteration of their documentation.⁴⁸

The existence of these specific legislative provisions means that the usual documentation challenges that intersex persons ordinarily undergo are addressed and resolved under the law.⁴⁹ Indeed, the preamble of the Sex Status Act indicates that the country had in mind, the intersex

⁴⁰The Sex Status Act, Section 2 (1) and (2) (a)-(d).

⁴¹ Ibid Section 2 (4).

⁴² Ibid Section 2(6).

⁴³ Ibid, Sex Status Act, Section 4.

⁴⁴ The Birth and Deaths Registration Act 51 of 1992, available at www.gov.za. (Accessed on 31st December 2021).

⁴⁵ Sex Status Act, Section 3.

⁴⁶ Ibid, Section 3(2).

⁴⁷ Ibid, Section 3(3).

⁴⁸ Ibid.

⁴⁹ Ibid.

person as part of the population of South Africa.⁵⁰ The legal avenue allowing changes in the sex description appearing in a birth certificate effectively frees intersex persons from being permanently confined in a sex/gender which is incongruent with their official identity documents.⁵¹ This opportunity is unavailable under the law in Kenya. As Rye narrates, even where an intersex person alters their name through a Deed Poll under the Registration of Documents Act, it is virtually impossible to alter the description of the sex/gender in the birth certificate, or any other certificate for that matter.⁵²

5.2.3. PROTECTION OF SOCIAL ECONOMIC RIGHTS.

Since intersex persons in South Africa can alter their identity documents to conform to their physical appearances if the need arises, social economic rights in the areas of education and employment become more accessible, unlike in the case of Kenya. With respect to access to employment, intersex persons find protection under PEPUDA. By prohibiting the creation of barriers in equal access to employment opportunities based on sex/gender differences, PEPUDA removes the kind of discriminatory treatment Mercy continues being subjected to in employment circles.⁵³ PEPUDA seeks to prohibit discriminatory treatment in employment circles of the nature that impairs a person's dignity.⁵⁴ And where discriminatory practices occur in the employment arena, the Equality Courts created under the PEPUDA are mandated to give redress to the affected person.⁵⁵ Redress includes award of damages.⁵⁶ Absence of protective provisions in Kenya means that intersex persons continue suffering Mercy's fate. Mercy's dignity is continually impaired through rejection by potential employers, due to her intersex status, and she has no legal recourse.⁵⁷

South Africa has also put in place measures to protect intersex persons from harmful medical interventions ordinarily conducted at will in several jurisdictions. In Kenya for instance, sex/gender alignment/editing surgeries and other forms of treatments in infancy are common

⁵⁰ The key objectives of the Sex Status Act as set out in the Preamble, is to provide for the alteration of the sex description of certain individuals in certain circumstances, as well and to amend the Births and Deaths Registration Act, 1992, where such amendment is necessitated by these changes.

⁵¹ This is different from the situation of intersex persons in Kenya as narrated by the Respondents in previous chapters.

⁵² Interview with Rye.

⁵³ Interview with Mercy on 18th May 2019.

⁵⁴ PEPUDA, Section 6.

⁵⁵ Through PEPUDA, all Magistrates' Courts have been designated to serve as Equality Courts. See PEPUDA, Chapter 4.

⁵⁶ PEPUDA, Section 1.

⁵⁷ Interview with Mercy.

occurrences.⁵⁸ Thereafter the intersex person whose sex/ gender is medically and surgically modified is documented in the sex/gender that the person is reassigned to by the medical processes.⁵⁹ The birth certificate is then issued in that sex/gender. This sex/gender correction and normalization procedures is usually in total disregard to the various and often debilitating effects on the various components of their health as analyzed in chapter three.⁶⁰ In South Africa however, the situation is different. To protect intersex minors and young people's health rights, and even though not entrenched in legislation, South Africa has put in place protocols demanding that any decision on surgical treatment must be taken through a medical team.⁶¹ The team consists of a psychologist, an endocrinologist, the parents of the child and the surgeon.⁶² These are the kind of guidelines that Baby A was trying to get the court to give directions on, which the court declined to.⁶³

Blended approaches of the nature put in place through PEPUDA, the Sex Status Act and medical protocols in South Africa would certainly benefit intersex persons in Kenya by addressing their socio-economic rights which are constantly violated. Regrettably, none are in place. The Children's Act 2022 and the National Reproductive Health Policy 2022-2032, fairly recent legislative and policy responses, were intended *inter alia*, to address intersex persons' challenges. These two instruments had a perfect opportunity to introduce corrective legal measures which they both missed.

5.2.4. PROTECTION OF UNQUANTIFIABLE HUMAN NEEDS.

Equality, nondiscrimination, and dignity are key nonmaterial human needs addressed through legislation in South Africa. Remedial mechanisms have been entrenched in the law through the creation of the special equality courts described earlier.⁶⁴ The courts preside over cases touching on issues of unequal treatment, discriminatory practices and harassment on any ground constitutionally prohibited.⁶⁵ Equality courts have power to issue declaratory orders to victims of discrimination and to obligate the government to institute measures that are inclusive

⁵⁸ *RM and Baby A*.

⁵⁹ Sebbo and KK were assigned the female sex/gender identity and documented as females, yet they are not females. Interview with Jane, Sebbo's mother and KK on 18th May 2019 and 16th December 2019 respectively.

⁶⁰ See chapter three.

⁶¹ Tamar Klein, 'Querying Medical and Legal Discourses of Queer Sexes And Genders In South Africa' (2008) 10 *Anthropology Matters Journal* 2: 13-14.

⁶² *Ibid*.

⁶³ *Baby A*, Paras 6, 20, 33 and 62.

⁶⁴ PEPUDA, Preamble.

⁶⁵ PEPUDA, Section 1.

to protect the rights of everyone.⁶⁶ Since PEPUDA prohibits the proliferation of discrimination which results in the violation of human rights, intersex persons find protection from various forms of discrimination under its umbrella.⁶⁷

Equality is the primary focus of PEPUDA, hence the name 'Equality Act'. By preventing discrimination on grounds that undermine human dignity, the Act recognizes everyone's inherent worth, regardless of their gender identity.⁶⁸ This is the message the court is putting across in *September v Subramone and others*.⁶⁹ In this case, the court observes that the act of preventing the Applicant, a transgender person, from exercising her unique gender identity even in prison, takes away her entitlement to be treated with respect, concern and dignity.⁷⁰ The research recognizes that intersex persons may not necessarily be transgender. However, they face similar discrimination and stigmatization and equally require their dignity and autonomy protected in the ways set out in the case.⁷¹ A general prohibition on discrimination and unfair treatment based on any consideration including sex/gender identity is therefore created under the law in South Africa.⁷² These are significant provisions through which intersex persons find protection to their dignity, autonomy, and self-determination.

In terms of the right to marriage, South Africa has, through jurisprudential pronouncements, declared and confirmed that this is an inalienable right belonging to everyone living in South Africa, irrespective of any considerations.⁷³ Further, the country, through various pro-equality laws and jurisprudential pronouncements, has brought in sex/gender inclusivity. The country has done this by moving away from the tendency of regarding sex/gender as being fixed in the binary.⁷⁴ This has therefore meant that the right to marriage for intersex persons, amongst other sex/gender non-conforming persons, is not as precarious as it used to be.⁷⁵ In Kenya however,

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ PEPUDA, Section 1 xxii(b)i

⁶⁹ *September Vs Subramone and Others ZAEQC4 All SA 927 (WCC) 2019.*

⁷⁰ Ibid, Para. 157.

⁷¹ Ibid.

⁷² PEPUDA, section 6.

⁷³ *Minister of Home Affairs v Fourie [2005] ZACC 19.*

⁷⁴ Rye Thoreson, *Beyond Equality: The Post-Apartheid Counter narrative of Trans and Intersex Movements in South Africa* (African Affairs 2013) 656.

⁷⁵ Ibid, 649.

family unions through marriage for intersex people remain uncertain and precarious, given that no legal anchors exist for them.⁷⁶

The successes resulting in recognition and accurate documentation for intersex persons in South Africa have been achieved through battles fought and won from many fronts. These have included legal and social battles through national support, activism and advocacy. In the case of Semenya, for instance, the country formally rallied behind her following the discriminatory treatment she received from the World's Athletics' body, an indication of national and political support.⁷⁷ Activism and advocacy spearheaded by intersex activists have also played major roles in fighting past egregious legislative and judicial pronouncements. Historically, legal positions had made it impossible for intersex persons, amongst other sex/gender non-conforming groups, to legally alter their sex/gender descriptions in identity documents.⁷⁸ The Births and Deaths Act for example, had in 1992, undergone amendments following which the right to alter identity documents to conform with a person's desired sex/gender reality was withdrawn.⁷⁹ Activism and advocacy played a significant role in having those repugnant legal positions done away with.⁸⁰

With regard to extra legal action, Sally Gross stands out as one of South Africa's key figures in advocacy and activism which brought progressive changes for intersex persons in South Africa.⁸¹ An intersex person herself who had been misclassified as a male and hounded out of South Africa,⁸² Gross spearheaded many of the protective measures entrenched in the South African law today. Gross was also a political activist and a member of the African National Congress (ANC) during the apartheid regime. She combined her political activism with LGBTI activism through the Intersex Society of South Africa (ISOSA), an organization which she founded. This greatly contributed to the anti-discrimination laws and laws incorporating sex

⁷⁶ Interview with Rye and ApSiya on 18th May 2019 and 23rd May 2022 respectively. Their testimonies with regard to their respective family unions in what should constitute marriages lack legal recognition, a major gap for intersex persons.

⁷⁷ Poyoshi Mitra, *Male Female or Other: The Untold Stories of Female Athletes with Intersex Variations in India* in Jennifer Hargreaves and Eric Anderson (eds), *Routledge Handbook of Sports, Gender and Sexuality* (Routledge, 2014)387.

⁷⁸ Rye Thoreson, *Beyond Equality: The Post-Apartheid Counter narrative of Trans and Intersex Movements in South Africa* (African Affairs) 649.

⁷⁹The amendment to the Births and Deaths Act No.52 had been introduced through Section 33(3). See also Nadzeya Husakouskaya, *Rethinking gender and human rights through transgender and intersex experiences in South Africa, Agenda: Empowering women for gender equity* (Routledge 2013) 12.

⁸⁰ Tamar Klein, 'Intersex and transgender activism in South Africa' (2009)3 *Liminalis*, 1: 5-41.

⁸¹ *Ibid.*

⁸² Tiffany Jones, 'South African Contributions to LGBTI Education Issues (2019) 19 *Sex Education* 4 : 460-462.

and gender provisions into the South African legal framework.⁸³ Gross's organization was later renamed Intersex South Africa (ISSA). Although the organization became dormant following Gross's death, it was later revived and still works, not just towards supporting intersex persons in the country, but also in creating awareness of all intersex issues.⁸⁴

The models of activism and advocacy used in South Africa have therefore had positive impacts, helping change both the law and society's thinking. This is however not to say that the models are not without problems. Deyi explains that some of the processes of protecting a third gender have been contested and have had challenges, particularly with regard to implementation.⁸⁵ The models, which are based on constitutional demands to ensure basic rights and equality for everyone in South Africa have however been mostly successful and are worth emulating.⁸⁶

5.3. JUDICIAL DECISIONS AND LEGISLATIVE FRAMEWORKS. (MALTA).

5.3.1. INTRODUCTION.

Malta, like South Africa, has put in place a progressive legal framework for the protection of persons born Intersex. Indeed, this framework has been found to be so effective that it is usually cited as a model which other nations should emulate when enacting protective and recognition measures for intersex persons.⁸⁷ For Malta, however, positive protective legislation for intersex persons emanated from rigorous litigation, initiated not by an intersex, but by a transgender person, in the celebrated *Joanne Cassar* case, at the European Court of Human Rights.⁸⁸ It was *Joanne Cassar*, coupled with persuasion from the Council of European Union, which forced Malta to adopt legislative approaches targeting intersex human rights, making it the first country globally to do so.⁸⁹

In this case, Joanne Cassar, a transgender woman, had been born with biological male genitalia and documented as a male.⁹⁰ At the age of 23, Cassar underwent a sex reassignment surgery

⁸³ Ibid.

⁸⁴ Intersex South Africa (ISSA) - Astraea Lesbian Foundation For Justice (astraeafoundation.org) (Accessed on 1st December 2022).

⁸⁵ Busisiwe Deyi, *First Class Constitution, Second Class Citizen: Exploring the Adoption of the Third Gender Category in South Africa* in Sylvie Namase and Adrian Jjuko (eds), *Protecting the human rights of sexual minorities in contemporary Africa*. (Pretoria University Press 2017) 140-148.

⁸⁶ Ibid, 148.

⁸⁷ Fae Garland *et al*, *Law and Intersex in Norway: Challenges and Opportunities* (Division for Equality and Inclusion, The Norwegian Directorate for Children, Youth and Family Affairs 2012) 6.

⁸⁸ *Joanne Cassar v Malta* (Application No. 36982/11) (ECHR).<https://hudoc.echr.coe.int/fre?i=001-111018>. (Accessed on 4th March 2022).

⁸⁹ Elizabeth Keikantse Phile, 'Law and Silence of Intersex Status: A threat to Human Rights in Botswana' (LL.M Thesis, University of Pretoria 2016) 35.

⁹⁰ Grégor Puppincq, *Joanne Cassar V. Malta : 'On The Deconstruction of The Right to Marry and Found a Family By The European Court Of Human Rights'* (2012) 2 Ave Maria International Law Journal 2: 120-121.

and was duly registered and documented as a female. She later desired to get married as a female. However, she could not get the marriage banns published because of Malta's restrictive laws on sex/gender identity. Maltese laws were structured in a way that did not allow marriages between persons who were not of the opposite sex/genders. Although Cassar's surgery converted her male genitalia to female ones, she retained the prostate gland and was therefore considered male under Maltese law. Consequently, she could not be allowed to marry a male partner.⁹¹ This forced Cassar to file an application before the European Court of Human Rights (ECHR) against the government of Malta, to fight such discriminatory provisions which targeted persons of non-conforming gender identities thereby denying them their natural right to marry and found a family.⁹²

The case was not heard to conclusion because the Maltese government approached Cassar for an amicable settlement.⁹³ The negotiated settlement nevertheless achieved far reaching impacts, particularly where intersex rights through accurate documentation are concerned.⁹⁴ Part of the negotiations in the Cassar settlement included an undertaking from the Maltese government that it would present a Bill before parliament with specific focus on what Cassar had been pursuing.⁹⁵ And true to its word, Malta amended its Civil Code to allow transgender people to be fully recognized in their acquired gender and to marry spouses belonging to a gender of their choice.⁹⁶ The significance of this case for intersex persons however is that, the negotiations between Cassar and the Maltese government led to critical legal changes which positively impacted on their human rights and needs as well.⁹⁷ Legislative provisions directly touching on the legal protection afforded to people of diverse gender descriptions, where intersex persons fall, were adopted through various legislative instruments.

To begin with, Constitutional reforms introduced into the Maltese Constitution, the ground of gender identity, amongst the listed prohibited grounds of discrimination.⁹⁸ Second, the Procedural Standards in Examining Applications for Refugee Status were amended to include

⁹¹ Ibid, 122-123.

⁹² Joan Cassar v Malta, Para 1.

⁹³ Nicoletta Pikramenou, *Intersex Rights: Living Between Sexes* (Springer 2019) 183.

⁹⁴ Ibid, 185.

⁹⁵ Ibid.

⁹⁶ These provisions were introduced through the Civil Code (Amendment) Act, 2013 (ACT No. VII of 2013).

⁹⁷ https://meae.gov.mt/mt/Public_Consultations/MSDC/Documents/GIGESC%20-%20Outcome%20Report.pdf (Accessed on 2nd January 2022).

⁹⁸ The Constitution of Malta (Amendment) Act 2014 (ACT No. X of 2004).

sex/gender identity within the definition of a particular social group for asylum purposes.⁹⁹ But even more significant for people born intersex was the work of the ‘Lesbian, Gay, Bisexual, Transgender Intersex (LGBTI) Consultative Council’, which the Maltese government established following the Cassar case.¹⁰⁰ The mandate of the Council was to engage in consultative meetings with various stakeholders and collect views to assist the government on its intention to introduce legislation to allow the self-identity of transgender and intersex people respected by the law.¹⁰¹ Following the meetings, the Council developed the Gender Identity, Gender Expression and Sex Characteristics (GIGECS) Bill.¹⁰² This Bill was adopted into law in 2015, bringing into operation the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESCA).¹⁰³ By introducing a series of gains into the law ranging from legal recognition, access to accurate documentation and prohibition of non-informed nonconsensual sex reassignment interventions, GIGESCA certainly is a revolutionary piece of legislation.¹⁰⁴

The Act commences by specifying that its intention is to provide for the recognition and registration of the gender of a person, to regulate the effects of sex changes and to recognize and protect the sex characteristics of an individual.¹⁰⁵ It then goes on to list the gains, which are visible, right from the definitions of gender identity and the right to gender identity, as contained in the Act.¹⁰⁶ It defines the right to gender identity as follows:

‘All persons being citizens of Malta have the right to the recognition of their gender identity; the free development of their person according to their gender identity; to be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein’.¹⁰⁷

Through the inclusion of bodily integrity and physical autonomy in the definition of the right to sex/gender identity components, the Act captures unquantifiable human needs of an intersex

⁹⁹ Procedural Standards in Examining Applications for Refugee Status within the definition of a particular social group for asylum purposes (Amendment) Regulations, 2014 (L.N. 161 of 2014).

¹⁰⁰ Ulrika Westerlund and Richard Köhler, *Human Rights and Gender Identity Best Practice Catalogue*, (TGEU-Transgender Europe 2016) 41.

¹⁰¹ *Ibid.*, 21.

¹⁰² *Ibid.*

¹⁰³ Gender Identity, Gender Expression and Sex Characteristics Act (GIGESCA), Chapter 540.

¹⁰⁴ Ulrika Westerlund and Richard Köhler, *Human Rights and Gender Identity Best Practice Catalogue*, (TGEU-Transgender Europe, 2016) 41.

¹⁰⁵ GIGESCA, Preamble.

¹⁰⁶ GIGESCA, Article 3.

¹⁰⁷ GIGESCA, Section 3 (a-c).

person.¹⁰⁸This has the effect of giving holistic protection to the rights of intersex persons in the various aspects of their material and unquantifiable human needs, by protecting their autonomy and dignity.¹⁰⁹

To properly guide recognition, GIGESCA prohibits discrimination based on sex characteristics in both public and private spheres.¹¹⁰The Act further explains that sex characteristics include anatomical features of a person made up of primary traits such as genitalia, reproductive organs, hormonal and chromosomal structures. It also expands sex characteristics to include secondary attributes like bodily muscle mass, hair distribution including facial hair and beards, breasts, and general physical structures.¹¹¹ This inclusion captures key bodily features that are to be found on most intersex persons.

The comprehensive legal protection covered by GIGESCA in terms of recognition of intersex persons immediately trickles down to protection of their social economic and livelihood rights.

5.3.2. ACCESS TO ACCURATE DOCUMENTATION.

While GIGESCA does not contain the textual mention of the term intersex, it has nevertheless, been influential in addressing the right to accurate documentation for intersex persons.¹¹² This is because the Act permits a person to change not just their name, but also the gender marker recorded in their birth certificate so as to reflect their self-determined gender identity.¹¹³ To do this, a person seeking the sex/ gender alteration is only required to submit a public deed containing their birth certificate, the preferred new name and sex/gender together with a declaration indicating that the preferred sex/gender does not correspond with the one given at birth.¹¹⁴ Upon change of the name and gender in the birth certificate, the Act makes provisions for amendment of all other official documents including the identity card.¹¹⁵This helps to synchronize all the identity certificates and remove all contradictions. The legal alteration also extends to all other identity documents issued after the birth certificate, identity card or any

¹⁰⁸ GIGESCA, Section 3 (d).

¹⁰⁹ Ibid.

¹¹⁰ GIGESCA, Section 13 (1)-(3).

¹¹¹ GIGESCA, Section 2.

¹¹²GIGESCA, Preamble. As set out in the Preamble, the main objective of this Act is to recognize and register the gender of a person where there's a change, to regulate the effects of the change as well as to recognize and protect the sex characteristics of a person. This holistic approach to gender and sex characteristics ensures that persons born with the intersex gender fall within the ambit of the Act's protection.

¹¹³ GIGESCA, section 4 (2.)

¹¹⁴ Ibid.

¹¹⁵ GIGESCA, Section 10 (2).

other identity document issued under any legislation in Malta.¹¹⁶ The broad application of this provision means that an individual gets a leeway to align all identity documents acquired during one's life's trajectory to conform with their true sex/gender.

While the Kenyan identity documents issuance system permits the alteration of a name through a Deed Poll for change of name, the alteration of the sex/gender marker annotated in the official identity documents is not legally possible.¹¹⁷ Even where an intersex person was assigned a sex/gender which is incongruent with their reality at birth, there is no legal avenue to alter the documents to what is accurate.¹¹⁸ Consequently, unlike in Malta, many intersex people in Kenya, who can exercise the right to change their names through a Deed Poll, have no legal recourse through which they can change the sex/gender marker to reflect their true gender. The best they can do is acquire Statutory Declarations and Affidavits confirming that they are one and the same person, despite the obvious inconsistencies in the sex/gender description contained in the identity documents and their physical appearances.¹¹⁹ This is the only way to get by in their day to day lives.¹²⁰ The recently enacted Children Act, 2022 now obligates the government to take measures to ensure proper registration and documentation of children born intersex at birth.¹²¹ However, and not to water down the progressive provisions it brings into the law, the Act does not bridge the gap in the documentation regime for intersex persons. Certain bolts and nuts need to be firmly in place, if the Act is to have any positive impact. Procedural provisions are missing. Placing acquisition of accurate documentation as a right to be progressively realized is also very problematic for intersex persons.¹²² Given that research has demonstrated the grave and weighty impact of non-recognition and non-documentation,¹²³ progressive realization and application compounds the problem. Recognition and accurate documentation for everyone should be immediate and must commence at birth. Further the fact that the Act is silent on how to resolve the existing discordancy in the identity documents for

¹¹⁶ The Identity Card and other Identity Documents Act. <https://legislation.mt/eli/cap/258/eng/pdf>. (Accessed on 10th January 2022).

¹¹⁷ Registration of Documents Act, Chapter 285 (Laws of Kenya), Rules 3,5 and 7. The procedure given for change of identity under these rules is exclusive to change of name. The Act makes no provision for change of sex/gender in the identity documents.

¹¹⁸ Ibid.

¹¹⁹ Interview with ApSiya on 23rd May 2022.

¹²⁰ Ibid interview with Langa on 18th May 2019. Langa has to travel with an affidavit confirming that he is one and the same person described in his passport, due to the disparity in the sex/gender description and his physical characteristics.

¹²¹ Children Act, 2022, Section 7(3).

¹²² Children Act, 2022, Section 5(I). The Act, at Part 11 where the right to registration of intersex persons fall, specifies that these rights will progressively be realised.

¹²³ These grave consequences have been demonstrated through the intersex person's narratives as they navigate through various situations in life and after.

intersex persons born before the enactment of the Act, unlike the clear provisions of GIGESCA, makes it ineffectual in terms of solving historical problems. Absence of provisions to harmonize existing documents for those born intersex creates a major challenge.

More protective approaches adopted by GIGESCA, but missing from the law in Kenya, are to be seen in provisions allowing change of name and sex/gender on behalf of intersex minors.¹²⁴ Procedural application is also clearly set out, in that, it must be made through an application in the civil court.¹²⁵ To determine whether or not to allow such changes in the case of the child, the court is of course guided by the best interests of the child principle as contemplated by the CRC.¹²⁶ Other key issues that the court considers before making a determination is the age and maturity of the child concerned.¹²⁷ GIGESCA has put in place these precautions to ensure that the change of name and sex/gender based on an application by the parents of a minor is not influenced by any other social factors. The best interests of the child principle is always the paramount guiding factor.¹²⁸

An option for non-immediate registration at birth where a child's gender is not immediately determinable at birth is yet another benefit availed under GIGESCA.¹²⁹ The flexibility of this provision means that progressive change, rather than hurried and urgent imposition of a gender or sex marker is legally possible. This prevents situations currently existing in Kenya where, a gender/ sex marker is urgently imposed and documented in a child's Notification of Birth Form BI, and subsequently in the birth certificate. The Children Act 2022 does not correct this possibility either as demonstrated above. Unless and until it does, an imposed and documented sex/gender which may fail to correspond to the sex/gender a person ultimately grows or develops into, will continue being inserted in intersex children's identity documents. This will continue creating a clash between the reality and identity documents for intersex persons in Kenya.¹³⁰

5.3.3 PROTECTION OF SOCIO-ECONOMIC RIGHTS.

Considering that the right to health is a critical component of social economic rights, Malta has factored in the negative effects of surgeries on intersex persons, by putting in place, through a

¹²⁴ GIGESCA, Section 7 (2).

¹²⁵ GIGESCA, Section 14. Minors are described as persons who have not attained the age of sixteen years.

¹²⁶ Ibid.

¹²⁷ GIGESCA, Section 7 (2).

¹²⁸ GIGESCA, Section 7(2)(a).

¹²⁹ GIGESCA, Section 7 (4).

¹³⁰ This was for the example the case with KK, Rye, Langa and Syd.

legislative model, certain provisions for health services and treatment protocols. GIGESCA has in this regard therefore factored the right to health for people born intersex.¹³¹ Children who are born intersex in Malta therefore find automatic legal protection from the dangers of being subjected to nonconsensual non - informed and non-therapeutic genital mutilation procedures.

¹³² In the words of the Act:

‘It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor, which treatment and/or intervention can be deferred until the person to be treated can provide informed consent.’¹³³

The import of this provision is to proscribe surgical interventions to the genitalia of any child, especially where the surgery can be deferred until the child has attained an age capable of understanding and consenting to the procedures.¹³⁴ Sex realignment treatments through surgical and other medical interventions, undertaken to alter the sex characteristics of a minor, can therefore only be conducted if the minor gives informed consent.¹³⁵ A minor is given an option of consenting through a person exercising parental authority over them.¹³⁶ These consent requirements mean that intersex persons are protected from sex realignment/reassignment surgeries and other forms of medicalization driven purely by social factors in a bid to document them in the known binary.¹³⁷ In making informed consent requirements, Malta underpins their importance before any life changing medicalization processes are performed on intersex genitalia. This is because more often than not, these procedures amount to intersex genital mutilation (IGM).¹³⁸ Similar protective provisions are however missing from the Children Act, 2022, even though it has been hailed as being progressive in terms of protecting intersex children.¹³⁹ The Act glosses over intersex genital mutilation (IGM) only once in its text.¹⁴⁰ It

¹³¹ GIGESCA Sections 15 and 16 respectively.

¹³² GIGESCA (S.14) (1).

¹³³ GIGESCA, Section 14 (1).

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Informed consent requirements are meant to ensure that the person concerned is not subjected to any form of treatment that they do not understand or that they have not willingly agreed to.

¹³⁸ By criminalizing non therapeutic sex assignment procedures, GIGESCA creates an avenue for intersex persons to consent to any medical interventions to their genitalia only when they have capacity to understand and consent. GIGESCA, Section 14 (1) and (2).

¹³⁹ See for example Landmark Kenya intersex rights law takes effect (losangelesblade.com) (Accessed on 23rd August 2022). See also Sensitization on the Children Act 2022; Intersex - YouTube, from a Webinar hosted on 23rd August 2022 on the Children Act 2022: Intersex Children by the Nairobi Branch of the Law Society of Kenya.

¹⁴⁰ Children Act 2022, Section 144(1).

does this not for purposes of prohibiting the act, but only while including an intersex person who has undergone or is likely to be subjected to IGM, to the list of children needing care and protection.¹⁴¹ While this provision is important for intersex children in Kenya, it does not address IGM in a manner that would protect them from these procedures, even though most result in permanent debilitating effects on the recipients. The Act also fails to take into consideration the fact that IGM occur in health facilities as explained by Mama A and Jane.¹⁴² Seeing that the Act does not prohibit IGM, the procedures are likely to continue unabated in Kenya, even where they serve no medical necessity.

The Maltese government does concede that the need for medical interventions to intersex genitalia without the consent of the individual concerned may be necessary in exceptional circumstances. However, even in such instances, a treatment protocol put in place by the law must be observed.¹⁴³ The Act therefore requires that consent be given through an agreement between a person exercising parental authority over the minor and an inter disciplinary team.¹⁴⁴ This team, which is established by the Act, is mandated to review the necessity of the proposed corrective surgery/medicalization. The team permits medical and surgical interventions only in very exceptional circumstances.¹⁴⁵ Further, the team, whose membership consists of appropriate professionals, is guided by the best interests of the child and never by any social factors.¹⁴⁶ Before a sex alteration process is undertaken therefore, the law requires the views of a child to be considered especially where the age assessment and maturity of a child allows the child to give their personal views.¹⁴⁷

The presence of legal provisions of the nature found in GIGESCA serve to protect children born intersex from the devastating effects of the ‘normalizing’ surgeries of the kind that KK and Sebbo underwent.¹⁴⁸ Similarly, Erica would not be confined in hospital these many years undergoing endless experimentation to her body, without anyone questioning what she wants,

¹⁴¹ Ibid.

¹⁴² Interview with Mama A, Baby A’s mother and Jane respectively. These Respondents explain that IGM is conducted on healthy intersex genitalia in health institutions without the knowledge or consent of the parents and certainly without the knowledge and consent of the intersex child who are infants and incapable of understanding or consenting. By simply listing such a child on the list of those who require care and protection, the Children Act 2022 does not address the core problem of IGM and leaves intersex infants exposed to the practice.

¹⁴³ Ibid, GIGESCA, Section 15.

¹⁴⁴ GIGESCA, Section 14 (2).

¹⁴⁵ GIGESCA, Section 15.

¹⁴⁶ GIGESCA, Section 14 (5).

¹⁴⁷ GIGESCA, Section 7 (2)(b). In the case of children of tender years, unless the medicalization is required as a matter of urgency, then it cannot be conducted. And even in emergency cases, the protocols put in place by the Act must be followed.

¹⁴⁸ Interview with KK and Jane on 16th December 2019 and 18th May 2019 respectively.

or informing her what is being done to her genitalia, if such protective provisions existed.¹⁴⁹ Indeed, to afford protection on the rights to bodily integrity and physical autonomy of the person concerned, GIGESCA now criminalizes nonconsensual non informed sex alignment procedures which are driven purely by non-medical considerations.¹⁵⁰

The establishment of the treatment Protocols put together by the Working Group established under the Act is yet another important protective measure for persons born intersex in Malta.¹⁵¹ Baby A's Petition had raised a prayer for the establishment of similar treatment protocols.¹⁵² The plea in *Baby A*, was for the court to give guidelines aimed at regulating surgeries that are being conducted on genitalia of children born intersex in Kenya, since none exist in any form.¹⁵³ This would then ensure that any interventions performed on the children will be in line with Article 19(2) of the CRC.¹⁵⁴ The High Court conceded that no such guidelines existed even though they were necessary.¹⁵⁵ Regrettably for intersex persons in Kenya, none have been put in place several years later.¹⁵⁶

Kenya therefore has nothing to guide the medicalization and surgical alterations of intersex genitalia. Yet, it would not have been so difficult to put together a team of suitable stakeholders drawn from human rights experts, psychologists, and medical professionals, similar to what Malta has done. In Malta, the composition of the team is carefully selected. It must have a medical doctor of not less than twelve years standing in the medical field, experts in human rights issues, psychosocial professionals and medical experts.¹⁵⁷ Abuya and Wachira underpin the critical aspect of reliance on expert knowledge whilst making decisions involving human rights for vulnerable members of the community.¹⁵⁸ The expertise composition selected under GIGESCA is therefore to ensure that treatment protocols existing at any given point are in line with current medical practices as well as human rights standards.¹⁵⁹ The legislative framework model put in place in Malta therefore ensures that the right to health, bodily and physical

¹⁴⁹ Interview with KK regarding Erica on 16th December 2019.

¹⁵⁰ This was through the amendment to Section 14 of the Act introduced in 2016. Penal sanctions are also provided and apply to medical personnel who perform non-consensual non informed forms of medicalizations.

¹⁵¹ GIGESCA, Section 16.

¹⁵² *Baby A*.

¹⁵³ *Baby A*, Para 6.

¹⁵⁴ *Baby A*, Para 5.

¹⁵⁵ *Baby A*, Para 65.

¹⁵⁶ Neither the Children Act 2022 nor the National Reproductive Health Policy 2022-2032 propose the establishment of these critical protocols.

¹⁵⁷ GIGESCA, Section 16 (3) and (4).

¹⁵⁸ Edwin Odhiambo Abuya and George Mukundi Wachira. 'Assessing Asylum Claims in Africa: Missing or Meeting Standards?' (2006) 53 *Netherlands International Law Review* 2: 193-195.

¹⁵⁹ GIGESCA, Section 16(1).

autonomy, all of which are paramount considerations for every person, find automatic protection under the law.

As detailed in chapter three of this research, medical interventions through surgery and other forms of medicalizations, are perhaps some of the major negative impacts on the right to health for intersex persons. In Malta however, intersex persons find protection against this vice through the law which goes to the extent of criminalizing medical interventions conducted without the consent of the party involved.¹⁶⁰ Any medical person engaging in non-informed, nonconsensual, non-therapeutic sex reassignment procedures therefore violates the provisions of the Act, and is subject to penal consequences.¹⁶¹ This protection safeguards children born intersex from medically unnecessary sex/gender reassignment interventions, until they attain the capacity to give consent and make any informed decisions. Similar protections are missing in Kenya as detailed above. The fact that no legal guidelines exist to direct surgeries on intersex genitalia means that intersex children remain exposed to ‘corrective’ medical interventions for non-therapeutic considerations.¹⁶²

Further protection regarding socio economic rights in Malta is also seen in the education sphere for intersex learners. The protection to this right has been made possible by the ‘Trans, Gender Variant, and Intersex Students in Schools Policy’, launched in 2015.¹⁶³ The policy was established with the aim of giving effect to the protective provisions of GIGESCA concerning the right to education. It was developed within the context of the Framework of the ten-year Education Strategy for Malta, running between 2014 and 2024.¹⁶⁴ The key objective of the policy is to see the creation of a school environment which is safe and free from any form of discrimination for all students in Malta. Harassment, stigmatization and all other forms of bullying on account of sex/gender identity, gender variance, sex characteristics or being intersex are prohibited under the policy.¹⁶⁵ Through this policy, Malta is fulfilling its obligations

¹⁶⁰ GIGESCA, Section 14 (2) and (3).

¹⁶¹ GIGESCA Section 14(3).

¹⁶² Kayombo, Samiselo, ‘Baby ‘A’ and Another v Attorney General and Others [2014] eKLR,’ (2021) 4 *SAIPAR Case Review*, 1: 18-19

¹⁶³ Trans, Gender Variant and Intersex Students in Schools Policy, 2014-2024.pdf (gov.mt) (Accessed on 31st December 2021).

¹⁶⁴ Dolores Gauci (ed), *Trans, Gender Variant and Intersex Students in Schools Policy* (Ministry of Education and Employment 2015).

¹⁶⁵ Trans, Gender Variant and Intersex Students in Schools Policy, 8.

to ensure that every child secures an education without any hindrance, as intended under the ICESCR.¹⁶⁶

In addition to providing protection of the dignity of intersex children in schools, the policy seeks to ensure that the right to education for every child is fulfilled.¹⁶⁷ This is in stark contrast to Kenya, where the absence of a policy framework protecting intersex learners has seen many of them drop out of school due to bullying, discrimination, stigmatization and harassment.¹⁶⁸ This has contributed to denial of their right to access education as constitutionally provided.

¹⁶⁹

The fact that GIGESCA permits alteration of school certificates to remove discrepancies between the sex/gender description and the name of the holder, goes to prove the extent to which access to education for intersex persons as gender variant human beings is being facilitated in Malta.¹⁷⁰ In this regard, the possibility of changing the gendered characteristics in educational certificates to align to the holder's sex/gender description and physical appearance as contemplated in GIGESCA is given effect by the Maltese Educational policy.¹⁷¹

Kenya had also been presented with a similar opportunity to determine aspects of amendments to the name and sex/gendered particulars for gender variant persons with respect to educational certificates. This was in *Republic v Kenya National Examination Council ex parte Audrey Mbugua*.¹⁷² Audrey, a transgender person, had petitioned the court to compel Kenya National Examinations Council (KNEC), to alter her name to the female one she had adopted and to remove the male gender marker from her educational certificates. The court did make a positive pronouncement regarding the name change. It also allowed amendments to the sex/gendered component in the certificates through removal of the sex/gender marker.¹⁷³ However, no determination was made regarding change of the sex/gender from male to female and vice versa. Further, the decision in the case was very specific to Audrey Mbugua, and educational certificates in Kenya still contain the sex/gender marker categorized in the binary male and

¹⁶⁶ ICESCR Article, 13.

¹⁶⁷ Trans, Gender Variant and Intersex Students in Schools Policy (Malta).

¹⁶⁸ Interview with Rye and Syd in Nairobi on 16th December 2019. Both respondents were forced to drop out of school because of bullying, humiliation, and stigmatization.

¹⁶⁹ *RM*, Para 145. *RM* had attempted to bring this fact to the attention of the court, but the court rejected his argument insisting that he played truant in school and was therefore to blame for his own misfortune.

¹⁷⁰ GIGESCA, Section 10(3).

¹⁷¹ Trans, Gender Variant and Intersex Students in Schools Policy (Malta).

¹⁷² *Republic v Kenya National Examinations Council & another ex-parte Audrey Mbugua Ithibu* [2014] eKLR.

¹⁷³ *Ibid.*

female.¹⁷⁴ This means that intersex persons who have settled on a sex/gender they are comfortable with, and which is different from the one assigned to them at birth and raised in, have no legal avenue through which to amend their certificates.¹⁷⁵ That is the quandary Rye, Langa and KK, amongst others find themselves in.¹⁷⁶ They are in possession of documents which are completely worthless for purposes of accessing social economic rights. The jurisprudential approach has failed to correct that situation. No educational policy like that of Malta exists in Kenya.¹⁷⁷ This then leaves intersex learners in a dilemma regarding educational certificates.

5.3.4. UNQUANTIFIABLE HUMAN NEEDS.

The various blended models that have been used to recognize and document the intersex person in Malta have also translated into protection of the unquantifiable needs, including the right to equality and prohibition against of discrimination in both the private and public sectors.¹⁷⁸ This has created a situation where intersex persons, amongst other gender variant persons in Malta, are not prejudiced in any way, due to either name change, or amendments to the sex/gender component in any of their documents.¹⁷⁹ This guarantees them the right to enjoy their autonomy, dignity and acquired identity through their acquired or amended documents without facing any discrimination.¹⁸⁰ The broad protection encompasses protection of the rights to physical and bodily integrity and autonomy as a person of the intersex gender. By adding sex, gender and sex characteristics as protected grounds of discrimination, intersex persons fall within the protection of all the rights enshrined in the constitution of Malta.¹⁸¹

In the case of marriages for intersex persons in Malta, *Joanne Cassar* firmly established the right to marry for persons of sex/gender non-conforming in Malta thereby removing all legal bars.¹⁸² Intersex persons can therefore express their natural right to marry and to found a family

¹⁷⁴ The decision in Audrey Mbugua's case means that the only option left for sex/gender non-conforming persons in Kenya would be to remove the sex/gender marker from their certificates, which would then constitute incomplete certificates as argued in Germany's Constitutional Complaint I BvR which is comprehensively underlined later in the chapter.

¹⁷⁵ Intersex persons would have to go through the long court process to have the sex/gender marker removed based on the precedent set by Audrey Mbugua's case, which was upheld by the Court of Appeal in Kenya National Examinations Council v Republic & 2 others [2019] eKLR.

¹⁷⁶ Interview with Rye, Langa and KK.

¹⁷⁷ Malta's Trans, Gender Variant and Intersex Students in Schools Policy, (Malta).

¹⁷⁸ GIGESCA, Section 13 (3).

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ GIGESCA, Article 45 as amended in Act X of 2014.

¹⁸² Grégor Puppinc, 'Joanne Cassar V. Malta : On The Deconstruction of The Right to Marry and Found a Family By The European Court Of Human Rights' (2012) 2 Ave Maria International Law Journal 2: 120-121.

as is contemplated under the natural law theory.¹⁸³ Several other legal initiatives have been put in place in an attempt to bring in equality for everyone in this area. In 2017, the Maltese government introduced the Marriage Act and Other Laws (Amendment Act), through which all distinctions between different sex couples and same sex couples were removed.¹⁸⁴ This in effect equalized marriages between binary spouses and non-binary members of the society. And while intersex persons may not necessarily be in the same sex category as transgender persons, a marriage relationship between an intersex person would find protection under these provisions.¹⁸⁵ Marriage equality legislation has in addition seen non binary couples being authorized to adopt children, both domestically and internationally, thereby allowing everyone the right to parenthood through the non-biological method.¹⁸⁶

The unique extraterritorially application of GIGESCA means that the protective provisions extend to intersex persons entering Malta from foreign jurisdictions, if their documentation has been duly altered through an order of a foreign court.¹⁸⁷ Those recognized in a particular sex/gender and have a preferred sex/gender marker included in their birth certificate and other identity documents are recognized in Malta.¹⁸⁸ Absence of such a model in Kenya means that anyone whose identity documents contain a sex/gender not conforming to the male or female sex/genders categorizations coming into the country, would find themselves in a legal dilemma.

The passage of specific protective legislation including GIGESCA has meant that the government of Malta has set in motion the process of fulfilling its obligations to all its citizens, including those with atypical sex/gender identities.¹⁸⁹ And even though legislation is not enough and some loopholes still exist which need to be addressed using other tools including public education, scholars have commended Malta's legislation as a good starting point.¹⁹⁰

¹⁸³ Ibid 123-126.

¹⁸⁴ Act XXIII of 2017.

¹⁸⁵ LGBTIQ Equality Strategy & Action Plan 2018-2022, 8, Available at www.lgbtiq.gov.mt (Accessed on 5th August 2022).

¹⁸⁶ LGBTIQ Equality Strategy & Action Plan 2018-2022, 2

¹⁸⁷ GIGESCA, Section 9 (2).

¹⁸⁸ Ibid.

¹⁸⁹ Bruno Zahra, 'Satisfaction and Well-Being in the Life Trajectories of Male-to-Female Transsexual People' (Master's Thesis, University of Malta 2017).

¹⁹⁰ Ibid, 101

5.4. A PURELY JUDICIAL MODEL. (COLOMBIA).

5.4.1. INTRODUCTION.

Colombia, unlike South Africa and Malta, has not legislated on intersex persons' issues. However, the country, through jurisprudence, has introduced what Ní Mhuirthile refers to, as a 'duty' for Columbian authorities, to register intersex persons and accord them a legal personality through which they can access and enjoy their fundamental rights and freedoms.¹⁹¹ Columbia has therefore established a strong normative foundation through which the rights of intersex and other gender variant person can be safeguarded.¹⁹² These achievements have been through judicial pronouncements from the Constitutional Court of Colombia, which has interpreted the Constitutional provisions very progressively. The pronouncements have seen the Court set fundamental precedents in favour of sex/gender variant people, where intersex persons fall.¹⁹³

The precedents set by the Constitutional Court have had global far-reaching effects. Indeed, when agitation for legal recognition for intersex persons in Kenya was first initiated through litigation, jurisprudence from Colombia was extensively quoted and heavily relied upon.¹⁹⁴ The first time a court in Kenya was called upon to decide on intersex matters was through a strong call to the High Court, to display the kind of judicial foresight demonstrated by Columbia.¹⁹⁵ To this end, the judicial protection model used by Columbia is therefore quite meaningful.

5.4.2 ACCESS TO ACCURATE DOCUMENTATION.

Although specific legislation is still lacking in relation to accurate documentation for intersex persons in Columbia, the Constitutional Court has extensively discussed issues of sex/gender diverse persons and consistently produced a legal framework for intersex's broad protection.¹⁹⁶ The legal framework so created has been developed through an approach involving innovative and bold interpretation of the general provisions of the Constitution.¹⁹⁷ The right to dignity, equality and creation of an environment for everyone to develop their identity without any

¹⁹¹Tanya Ní Mhuirthile *et al*, 'Human rights eBrief' (2022) INIA- Intersex New Interdisciplinary Approaches 36.

¹⁹² Katherine Romero and Rebecca Reingold, 'Advancing adolescent capacity to consent to transgender-related health care in Colombia and the USA' (2013) 21 *Reproductive Health Matters* 41:188-187.

¹⁹³ *Ibid*, 189.

¹⁹⁴ *RM and Baby A*.

¹⁹⁵ Christa Tobler, *Equality and Non-Discrimination under the ECHR and EU Law: A Comparison Focusing on Discrimination against LGBTI Persons*. (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 2014) 538-539.

¹⁹⁶ Rubio Marin *et al*, *Colombia, the Colombian Constitutional Court* in Jens Scherpe *et al*, (eds) *The Legal Status of Intersex Persons* (Cambridge: *Intersentia*, 2018) 319-338.

¹⁹⁷ *Ibid*.

limitations, are some key fundamental areas progressively interpreted to provide the positive legal environment currently existing for intersex persons in Columbia.¹⁹⁸

5.4.3. ACCESS TO SOCIAL ECONOMIC RIGHTS.

In terms of the right to health and protection from intersex genital mutilations (IGM) occasioned through surgical interventions, Columbia has been very attentive to the long-term negative implications the procedures have on the health of those concerned.¹⁹⁹ It was the first country globally to ever deliberate on the practice of nonconsensual nontherapeutic genital ‘normalizing’ procedures through surgery and other forms of medicalization.²⁰⁰ Through the model of judicial decisions, the country has gradually established a framework concerning aspects of unnecessary sex reassignment procedures for intersex persons in the country.

It is to be noted from the onset that the court decisions in Columbia have not prohibited medical interventions to intersex genital, *per se*.²⁰¹ Neither has Columbia enacted any legislation in this regard. And because of this failure, the Columbian model has been criticized.²⁰² Indeed, scholars have observed that the Constitutional Court ought to have taken the various opportunities presented by the cases before it, to recognize intersex as a minority group requiring constitutional protection. This omission by the Court has meant that medical interventions on intersex genitalia remain un-prohibited. However, one of the key reasons why these decisions have been hailed globally is because they restrict the ability of doctors, surgeons, and parents from performing sex readjustment and other surgical modifications and interventions at whim. Three cases, usually referred to as *Gonzalez*, *Ramos* and *Cruz*, stand out for their progressiveness in this regard.²⁰³

Ramos involved an eight-year-old child.²⁰⁴ Though born with both male and female genitalia, the child here had been declared female at birth and raised as one. Tests conducted at three

¹⁹⁸ The Constitution of Colombia. Articles 1, 13, and 16 respectively, available at https://www.constituteproject.org/constitution/Colombia_2015.pdf?lang=en. (Accessed on 10th January 2022).

¹⁹⁹ *Ibid*.

²⁰⁰ Robert Hupf, ‘Allyship to The Intersex Community on Cosmetic, Non-Consensual Genital ‘Normalizing’ Surgery’ (2015) 22 *William & Mary Journal of Women and The Law* 98.

²⁰¹ Silvan Agius, *Human Rights and intersex people, Issue Paper* (Council of Europe Commissioner for Human Rights, 2015) 49.

²⁰² Angela Kolbe, *Intersex, A Blank Space in German Law*, in Morgan Holmes (ed) *Critical Intersex* (Routledge 2016) 158-159.

²⁰³ *Sentencia* No. T-337/99 (*Ramos*) and *Sentencia* No. T-551/99 (*Cruz*). *Corte Constitucional de Colombia [Constitutional Court of Columbia and Colombia]; [1999] Corte Constitucional de Colombia [Constitutional Court of Columbia]*. Available at <https://www.icj.org/sogicasebook/sentencia-su-33799-constitutional-court-of-colombia-12-may-1999/>(Accessed on 10th January 2022).

²⁰⁴ *Ibid Sentencia* No-337/99, *Ramos* case.

years of age showed the presence of a three-centimeter phallus which resembled a penis, a scrotum, labia folds and interior gonads. It was then that a medical team recommended genital-conforming surgery including a procedure to remodel the clitoris and the vagina, and to remove the gonads, in essence, to convert the child into the female sex/gender. The medical team's decision was based on their view that the child's genital organs would 'never' quite function as those of a male.²⁰⁵ The mother of the child was ready to consent for the surgical interventions to be carried out. However, the medical team refused to perform the surgery. Their refusal was informed by the 1995 *Gonzalez* case where the Court had declared that parental permission could not be substituted for consent from the concerned child in treatments of that nature.²⁰⁶ In *Gonzalez*, the Court had held that involuntary modification of the sex/gender could not be undertaken without full knowledge and consent of the person concerned and further, that a child's consent could not be substituted with that of a parent in such situations.²⁰⁷ On the basis of the *Gonzalez* decision therefore, the medical team in *Ramos* could not act contrary to what the Court had earlier directed.²⁰⁸ The child's mother's request was therefore refused by the medical team.

With this refusal, the child's mother moved to the Constitutional Court seeking authority to have the child undergo genital conforming surgical modifications, so that she could continue raising the child as a female.²⁰⁹ Her prayer was that she be granted permission to substitute the consent of the child with hers. Her argument was that since the child was still a minor, she could not make decisions for herself. The mother's further contention was that if the medical team were to wait for the child to have the capacity to decide, it would be too late. Waiting would also impair the child's normal psychological, physical and social development, according to the mother.²¹⁰ She therefore needed permission from the court to give consent for the surgical modifications at that stage in the child's life. To her, the surgical interventions were necessary to allow her child to grow with a 'clear' sex/gender identity.

In declining the mother's prayers, the Court made some fundamental pronouncements regarding sex/gender reassignment surgeries for persons born intersex. The Court began by

²⁰⁵ Ibid.

²⁰⁶ *Sentencia* T-447/95, *Gonzalez* case. A detailed analysis of this case and its significance is undertaken below.

²⁰⁷ Stefano Osella and Ruth Rubio-Marin, 'The Right to Gender Recognition before the Colombian Constitutional Court: A Queer and *Travesti* Theory Analysis' (2021) 40 *Bulletin of Latin American Research* 5,656.

²⁰⁸ T-447/95, Para 13.1.

²⁰⁹ Judgment SU-337/99.

²¹⁰ *Sentencia* SU 337/99, Constitutional Court of Colombia (12 May 1999) | International Commission of Jurists (icj.org) (Accessed on 10th January 2022).

noting that intersex cases presented a special issue of consent. It then pointed out that parents and guardians were usually partially responsible for medical decisions concerning children since children were under their care. The Court however clarified that this did not amount to transfer of total control to the parents and guardians, pointing out that children were still not under their absolute control. To the Court, a child of eight years already has a sense of autonomy, has developed a sex/gender identity, has become aware of his or her genitalia and is therefore already self-aware. In the court's view therefore, a child of that age already possesses a full cognitive, social and emotional understanding of his or her body. This also means that the child already has a sex/gender identity firmly in place. There is consequently need, for the Court to protect all that and not take it away, simply because a parent wanted it to. To the Court, a child would be better served by allowing the child to define his or her sex/gender identity during puberty with the help of counselling. By that age, the child would have greater autonomy and should therefore benefit from greater constitutional protection. This would probably be better than to allow parents to consent to modification of the genitalia through sex alteration/reassignment on the child's behalf. The court therefore determined that when it comes to children of five years or older, surgery should be postponed until the child is able to give individual consent.²¹¹

Accordingly, the Court directed that in cases requiring surgery for intersex children, a medical team of urologists, endocrinologists, geneticists, gynecologists and psychiatrists be involved to address all the physical and mental aspects of the child's gender identity.²¹² This team was also required not just to identify and disclose all other available medical and non-medical interventions, but to also set out the possible harms and benefits of each approach.²¹³ And even as this happened, the Court's directions were that the family of the child should be clearly appraised of all risks, side effects and dangers. Any decision made would also be based on the specific sex/gender that the child would best be able to adapt to throughout life. The court placed a further obligation on the medical team it established, by requiring that the team assesses intersex children prior to making any recommendations on a case-to-case basis. This was for the obvious reasons that a one size fits all strategy does not always work.²¹⁴

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

In denying the consent sought by the child's mother in this case, the Court expressed its views in the following words:

'Intersexuality appeals to our capacity for tolerance and challenges our ability to accept differences. Public authorities, the medical community and citizens in general have a duty to open a space for these people [who have been] silenced up till now'.²¹⁵

In this way, the court brings out the reality that sometimes parents make decisions which may be illegal, due to their own panic and pressure from the society. There is therefore need for parents to understand that children are neither their property nor the property of society. The Court in *Ramos* decision thus determines that, a child is a person with a developing freedom and autonomy, all of which require constitutional protection. This was more so where something as important as sex adjustment therapy which is not just invasive, but also risks the health and life of the child concerned. In such cases, according to the court, the consent of the person directly affected becomes necessary.

The *Cruz* judgement involved a situation where the Court was likewise being called upon to grant consent to a parent in a similar matter, for a similar sex reassignment medicalization.²¹⁶ Here, the father of a child with genital ambiguity known as female pseudo hermaphroditism, approached the court for an order to compel the relevant authorities to carry out additional surgery.²¹⁷ The additional surgery was meant to further remodel the child's genitalia because by the time this matter was being taken to court, the child had already been subjected to genital 'constructive' modifications through earlier surgeries.

The Court in this matter begins by admonishing the medical community for not giving the parents of the child an option before conducting the initial surgeries, which had altered the child's genitals.²¹⁸ But there's another crucial aspect emerging from the decision of the Court in this case. The Court gave a directive to the medical community to first establish a protocol prior to any intersex treatments. Such a medical protocol would ensure that parents of intersex children do not just consent to genital reconstruction surgeries and medicalizations until it has been absolutely established that such interventions are in the best interests of the child. Before this fact has been ascertained, doctors and surgeons are required to not conduct any form of

²¹⁵ *Ramos*.

²¹⁶ *Gonzalez*.

²¹⁷ *Ibid*.

²¹⁸ *Ibid*.

medicalization to intersex genitalia. In the court's view, applying the best interest of the child as contemplated by the CRC is key. It would prevent parents, who react out of panic, fear or societal pressure immediately they see intersex genitalia, from consenting to surgery when such surgery may not be in the best interests of the child.

One aspect of the holding in *Cruz* appears to be a departure from the Constitutional Court's earlier decisions in the *Gonzalez* and *Ramos* cases. The Court apparently seems to be agreeing that parents and guardians can make medical decisions on behalf of the children. For this reason, scholars have criticized the *Cruz* decision.²¹⁹ In Semler's opinion for instance, *Cruz* dulls the effects of *Gonzalez* and *Ramos*, by declaring that parents of intersex persons below the age of five years could provide consent for intersex medicalization on behalf of the children.²²⁰ However, looking at the decision in its entirety the Court has qualified its position by pointing out that parents of intersex children would be allowed to make decisions on their children's behalf, only in situations where the best interest of the child is truly established.²²¹ And even then, the decision would have to be made on behalf of the child with consent given, following detailed information of the risks and benefits of having or refraining from having the procedures.²²² The *Cruz* decision therefore creates what is termed as a 'qualified and persistent' form of new informed consent, which offers reasonable protection from unnecessary sex/gender editing procedures.

As earlier indicated, the two 1999 *Ramos* and *Cruz* cases were not the first to present the Constitutional Court of Columbia an opportunity to consider human rights implications in matters involving sex reassignment interventions for intersex persons.²²³ The tone had earlier been set in the 1995 *Gonzalez* decision, where sex reassignment surgical procedures had been undertaken on an individual during infancy, and without his informed consent.²²⁴ The child in *Gonzalez*, had not been born intersex. Rather he had been born with exclusive male genitalia, but as an infant, his penis had been destroyed in a botched and traumatic circumcision surgery.²²⁵ His parents had consented to a sex reassignment surgery to make him female and

²¹⁹ Kaitlin Semler, *Let the Child Decide: Surgical Intervention After Parental Consent Should No Longer Be Considered the Best Option for Children with Intersex Conditions* (Law School Student Scholarship 2010)16.

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Sentencia* No. T-477/95[1995] (*Gonzalez* Case).

²²⁴ Ryan L. White, 'Preferred Private Parts: Importing Intersex Autonomy for *M.C. v. Aaronson*' (2014) 37 *Fordham International Law Journal* 3: 798.

²²⁵ *Ibid.*

thereafter, raised him as a girl. He however never felt or identified as a female, and when he later discovered what had happened to him in infancy, he sued the doctors who had performed the sex reassignment surgery on him as an infant without his knowledge and or consent.²²⁶

The Court, in a precedent setting decision, made a finding in favour of the young man, faulting the doctors for performing the sex adjustment surgery even though the parents had consented to it. In the court's view, the doctors ought to have delayed the surgery until the individual in question got an opportunity to comprehend the nature of the surgery that was going to be conducted on him. This way, he would have been able to give meaningful consent.²²⁷ Effectively the Constitutional Court is saying that the surgeons were wrong to assign a female sex/gender, where the male genitalia of the victim were damaged in an accident, and that the parents had no right to choose the sex to be assigned to the child. This 1995 decision was what informed the hesitation of the doctors who had been asked to conduct interventions in the *Ramos* case, even though the mother had given consent.²²⁸

As said earlier, the decisions by the Constitutional Court in Columbia have not led to medical interventions on intersex genitalia being legislatively prohibited. However, the fact that these decisions emanate from the highest court signify Columbia's commitment in upholding the rights of intersex children and to allow them grow up free of mutilations to their genitalia. By denouncing uninformed, nonconsensual sex/gender alteration treatments, the decisions have set a legal framework restricting the ability of parents to give in to social pressure to impose sex/genders of the parents' or society's choice, for non-medical reasons. Indeed, in Colombia, the legal position is that medical interventions to infantile intersex genitalia can lawful be done only after following extremely stringent informed consent procedures.²²⁹ And this position emanates from judicial decisions, which have acquired what Jaramillo refers to as a sovereign status.²³⁰

In the face of these decisions even if not entrenched in legislation, doctors and surgeons in Columbia cannot conduct sex readjustments procedures at will as happens in Kenya. The jurisprudence has thereby put in place a framework that would enable the country to formulate

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ *Ramos*.

²²⁹ Melanie Newbold, 'When Parents Choose Gender: Intersex, Gender and the Law' (2016) 24 *Medical Law Review* 4: 474-496.

²³⁰ Javier Tamayo Jaramillo. 'The Colombian Constitutional Court, A Sovereign Without Control'. Berkeley Law (blog). Accessed 23 May 2022. <https://www.law.berkeley.edu/research/the-robbins-collection/the-colombianconstitutional-court-a-sovereign>.

the necessary legislative framework. And although they haven't led to legislative reforms, they firmly demonstrate that under the right circumstances, constitutions can and do present remedies and offer alternatives where there's inactivity of legislation.²³¹ Progressive jurisdictions therefore can, and have used judicial precedents' model to improve the lives of those who have been unduly marginalized.²³² This is an admirable tool worth emulating in Kenya.

5.5. BLENDED MODEL. (GERMANY).

5.5.1. INTRODUCTION.

Though similar to Malta and South Africa, the situation in Germany slightly differs from that of Columbia in that, a blend of both legislation and jurisprudential pronouncements have led to a protective framework for people of the intersex gender there. This has however not always been the case. According to Von Wahl, the government's initial position appears to have been leaning towards early surgical interventions as the 'best interests of the child'.²³³ Germany therefore paid very little attention to intersex persons through legislation. Various forms of mobilizations through intersex legal discourses was however to remarkably change this position. In 2012 for instance, the German Ethics Council known as *Ethikrat* came up with proposals to reform the law.²³⁴ *Ethikrat* started by publishing an opinion suggesting that it was wrong for legal systems in Europe, including Germany, to continue with the presumption of a strict binary sex/gender categorization. According to *Ethikrat*, this was especially wrong because it was evident that nature presented a different scenario.²³⁵ Such publications are what forced Germany to start paying attention to intersex persons' issues. More recent developments have seen the country become the first in Europe to move from the traditional gender binary to a sex/gender triad,²³⁶ through the introduction of a third sex/gender category in the country.

²³¹ Tanya Ní Mhuirthile, *et al.* 'Human rights eBrief' (2022) INIA- Intersex New Interdisciplinary Approaches' 1-47.

²³² Stefano Osella and Ruth Rubio-Marin, 'The Right to Gender Recognition before the Colombian Constitutional Court: A Queer and Travesti Theory Analysis' (2021) 40 *Bulletin of Latin American Research* 5: 661.

²³³ Angelika von Wahl, Angelika. 'From Object to Subject: Intersex Activism and the rise and fall of the Gender Binary in Germany.' (2021) 28 *Social Politics: International Studies in Gender, State & Society* 3: 762-767. See also Angelika Von Wahl, *From Private Wrongs to Public Rights: The Politics of Intersex Activism in the Merkel Era.* (German Politics 2021).

²³⁴ European Union Agency for Fundamental Rights (FRA), *The Fundamental Rights Situation of Intersex People* (FRA Focus 04/2015) 2. Available at: fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf (Accessed on 31st January 2022).

²³⁵ *Ibid.*

²³⁶ Angelika Von Wahl, *From Private Wrongs to Public Rights: The Politics of Intersex Activism in the Merkel Era* (German Politics 2021).

In Germany, the intersex person finds protection in the first instance, under the general right of personality, found in Article 2(1) as read with Article 1(1) of the ‘Basic Law’ (*Grundgesetz*) (*GG*), formulated in 1949,²³⁷ which is the equivalent of a Constitution in Germany.²³⁸ These Constitutional provisions are aimed at protecting the sex/gender identity of those who cannot be assigned either the “male” or “female” gender permanently. The provisions also now offer protection against discrimination based on sex/gender.²³⁹

5.5.2. ACCESS TO ACCURATE DOCUMENTATION.

Documentation in Germany is issued through the Civil Status Act, which is known as *Personenstandsgesetz*, (PStG).²⁴⁰ The PStG has over the years undergone several amendments seeking to make it sex/ gender inclusive, and it has eventually done so. Currently, the Act is intersex sex/gender inclusive as well.²⁴¹

As of 2016 however, the Act contained a provision through which children whose sex/gender, could not be fixed in the male or female category, would end up being documented without specifying the child’s sex/gender in their birth registration.²⁴² The fact that the law allowed a blank entry meant that, intersex children were being left without a sex/gender description in their documents, meaning that the law considered them sexless/genderless. It also meant that their documentation would be incomplete. The reasoning behind leaving the sex/gender marker on intersex children birth registration documents was said to be to ease pressure from parents to document them in either one or the other binary classifications. For intersex persons however, such incomplete identity documents would not be useful, since the blank sex/gender non entry would create identity documents with missing data, and therefore inadequate. This situation is what led to a legal battle through which an intersex person challenged the constitutionality of the offending legal provisions allowing a negative or blank ‘legal’ entry in formal documents.²⁴³ The case resulted in what is referred to as the ‘Intersex Judgment’, a judgement that has seen intersex rights to access accurate documentation protected in Germany.²⁴⁴ The basis of this challenge was that a law requiring registration of the sex/gender

²³⁷ GG - englisch (gesetze-im-internet.de) (Accessed on 31st December 2021).

²³⁸ Donald P Kommers, ‘The basic law: A Fifty-Year Assessment’ (2000) 53 SMUL 477.

²³⁹ GG, Article (3)3.

²⁴⁰ Jens Theilen, *Subversion Subverted: Developments in German Civil Status Law on the Recognition of Intersex and Non-Binary Persons* in Eva Brems et al (eds.) *Protecting Trans* Rights in the Age of Gender Self-Determination* (Intersentia 2019) 3.

²⁴¹ Ibid.

²⁴² A negative non entry in an accepted legal system simply resulted in documentation with missing data.

²⁴³ Constitutional Complaint 1 BvR 2019/16.

²⁴⁴ Ibid.

and at the same time, disallowing entries other than the binary ‘male’ and ‘female’ sex/genders, violated fundamental constitutional rights for those who did not fit in the binary classifications.²⁴⁵

In this matter, the complainant, an intersex person, was assigned the female gender at birth and registered as a girl in the birth register. Subsequently, the Complainant requested the Registry of Births to correct the Complainant’s birth registration by deleting what had previously been entered as a female sex/gender and replace it with ‘inter/diverse’. It was the Claimant’s alternative claim that the Registry should only enter the word ‘diverse’ in the sex/gender category. The Complainant’s reasons were that the Complainant could not permanently identify with either the female or the male sex/gender and therefore, such entries were oppressive. And so was the blank/negative entry, which essentially left the person sexless/genderless in addition to leaving the concerned person with incomplete identity documents. The Registry rejected the Complainant’s request pointing out that under the German civil status law, a child must be assigned either the female or the male gender in the birth register. The Registry also emphasized that, if it wasn’t possible to record either of the two sex/genders in the birth registration documents, then German law provided for a ‘no gender’ or blank non-entry.²⁴⁶

Upon this refusal, the Complainant moved to the *Amtsgericht*, which is the local court, but the complainant’s request was equally unsuccessful there.²⁴⁷ The Complainant then challenged the constitutionality of the offending provision in the German Federal Constitutional Court.²⁴⁸ The complainant’s assertion in the Constitutional court was that if a child cannot be assigned either of the two known sex/genders, it amounted to discrimination for the law to insist on a person’s civil status being documented in the birth register without an indication of the person’s sex/gender. The impugned provisions of the law provided as follows:

‘When a child is born, its sex, too, must be documented in the birth register under German civil status law. The child must be assigned either the female or the male sex. If this is not possible, the entry is left blank. [...]’²⁴⁹

²⁴⁵ The PStG, demanded the registration of a legal gender, but disallowed an affirmative registration of any other sex/gender, save for female and male ones. Any other sex/gender would be represented by blank spaces in the documents.

²⁴⁶ PStG (§ 21(1) no. 3, § 22(3)).

²⁴⁷ R Nacke, *Enforcement of Rights and Claims through the Courts and Arbitration Tribunals* in M. Wendler *et al*, (eds) *Key Aspects of German Business Law* (Springer 2008) 331.

²⁴⁸ *Ibid*.

²⁴⁹ Civil Status Act (*Personenstandsgesetz – PStG*) 22 (1a).

According to the Complainant, refusal by the law to make provision for a third sex/gender option in the documentation regime violated several rights protected under the German Basic Law. Included here was the violation of the general right to personality. The complaint further asserted that the law demonstrated discriminatory practices and unequal treatment on the basis of sex/gender.²⁵⁰

The complainant set out two grounds in the complaint. The first was that refusal to allow a third option beside male or female, violated the right to free development of the personality and guarantee of human dignity as set out under Germany's Basic Law.²⁵¹ The second ground was that such failure constituted discrimination based on sex/gender, and was thus an infringement of the right to equality before the law as guaranteed under the Basic Law.²⁵²

The judgement, which was delivered in October 2017, has been hailed as a milestone for the protection of intersex persons in Germany. In it, the Court agreed with both limbs of the Complainant's complaint.²⁵³ According to the Court, the interpretation of the cited articles of the Basic Law served to protect the gender identity of persons who could only be classified as male or female.²⁵⁴ The Court further noted that the existence of a legal provision requiring people to be documented as either male or female deprived those falling outside of that binary, the opportunity to be identified in a manner that corresponded with their true legal gender.²⁵⁵ Further, by permitting the option of leaving a person's gender identity in legal documents unspecified and or blank, the law was negatively impacting on the development of the personality of an intersex person. In addition, such negative non entries impaired intersex persons' ability to remain true to their sex/gender identity. This was especially true given that it is not every intersex person who wants to identify as either male or female. Indeed, there are those who want to be identified, recognized, and documented as who they truly are.²⁵⁶

What is striking about this judgement is that, the government was given a time span within which to come up with an arrangement regarding sex/gender classification in the Civil Status

²⁵⁰ These were all rights protected under Articles (2)1 of PStG as read in conjunction with Article 1(1); Article 3(3) and Article 3(1) of the German Basic Law receptively.

²⁵¹ PStG Articles 2(1) as read with Articles 1(I) of the Basic Law (*GG*).

²⁵² *Ibid*, Articles (3)(1) and 3(3).

²⁵³ Henk Botha, 'Beyond Sexual Binaries? The German Federal Constitutional Court and the Rights of Intersex people' (2018) 21 *Potchefstroom Electronic Law Journal* 1.

²⁵⁴ Constitutional Complaint 1 BvR 2019/16.

²⁵⁵ *Ibid*.

²⁵⁶ *Ibid*.

Act and make it compatible with the Basic Law, specifically, the 31st December 2018.²⁵⁷ This was a judicial directive to the government. And in response to this, the German Cabinet moved with haste and approved a Bill, seeking to give effect to the demands of the judgement. The Bill saw the introduction of a third sex/gender category known as ‘diverse’. The German Parliament was to later enact this Bill into law in November 2018, legally affirming the legal gender of people who are born with intersex or other sex/gender variances.

In Germany, it is therefore now possible to gain formal and legal acknowledgement and be documented as a person of neither the male nor the female gender.²⁵⁸ *Baby A* had challenged similar ‘negative,’ and blank non-entries in identity documents. The negative non entries through insertion of doubtful phrases including a question (?) mark eventually leaves intersex persons with missing data in their birth registration documents.²⁵⁹ The judgement in this case however is in striking contrast to that in *Baby A*.²⁶⁰ The Constitutional and Human Rights Court in Kenya had the opportunity to exercise its judicial authority to ensure that gender diverse persons are provided for like the Constitutional Court in Germany did. It however chose not to, instead sending Mama A to apply for a birth certificate for Baby A, through the offending regime, where Baby A could only opt for male or female sex/genders.²⁶¹

While intersex persons in Kenya remain fixed in the rigid binary alternatives or with negative gender/sex entries or blanks in their official identity documents, their counterparts in Germany are not. Neither are those in Germany left with missing data which would otherwise impact their identity through documentation.²⁶² They have options supported by legislation, thanks to progressive jurisprudence and legislative blended models.²⁶³

5.5.3. PROTECTION OF SOCIO-ECONOMIC RIGHTS.

On the right to health, Germany had not, until recently, legislated against intersex genital mutilations or put in place medical sex/gender reassignment protocols. The first time it did so

²⁵⁷ Full text of the judgement available at *Bundesverfassungsgericht - Decisions - Civil status law must allow a third gender option* (Accessed on 31st December 2021).

²⁵⁸ Peter Dune, ‘Acknowledging or Erasing Intersex Experiences: Gender Diversity in German Law’ (2019) 70 NILQ,163.

²⁵⁹ Ibid.

²⁶⁰ *Baby A*.

²⁶¹ Interview with Mama A.

²⁶² *Baby A*’s case and the entry in Tim’s birth Notification Form.

²⁶³ *Baby A*’, para 65.

was in March 2021, when the country adopted a draft law prohibiting non-emergency and non-vital medical interventions for intersex persons.²⁶⁴

Absence of legislative framework however, had not deterred Germany from considering nonconsensual non-informed surgical manipulations, or deciding that they formed serious human rights violations. Absence of specific legislation had also not stopped Germany from holding to account those responsible for the suffering of the patients concerned. A good example is *Re Volling*.²⁶⁵ This case involved an intersex claimant who filed suit against a surgeon who had removed her female sexual and reproductive parts, including the uterus, fallopian tubes, and ovaries some thirty years earlier

The Plaintiff who now identifies as a female had been born in 1959 with intersex traits which presented as ambiguous genitalia, but had been raised as a male. Whilst growing up, she did exhibit features ordinarily associated with the male gender including growing facial hair at puberty. At the age of 14 years and during an unrelated appendectomy operation, doctors detected the existence of female reproductive organs in her body including ovaries and fallopian tubes. Although she identified as a male at that point and possessed both male and female organs, the doctors concluded that she was 60% female. Later, further analysis of her chromosomes was undertaken which disclosed that she had a normal female chromosomal pattern. The doctors withheld this information from her and instead, proceeded to conduct an extremely invasive surgery in 1977. During the procedure, no male anatomy was detected, but the surgeon discovered and removed a normal female anatomy including a pre-pubertal uterus, normal sized ovaries and a blindly ending vagina.²⁶⁶ After the surgery, she continued to live as a male, but later identified as female.

In 2006, she investigated her medical records and was shocked to discover the true nature and extent of the medical and surgical invasions to her body almost thirty years earlier and the fact that surgeons concealed from her the existence of the female chromosomal pattern. She then filed suit against the surgeons. Her argument was that she never consented to the procedures and neither did she fully understand them. In particular, she argued that she was not informed that the procedures would result in the removal of fully formed and exclusively female

²⁶⁴ press-release_German-Ban_igm_30-03-2021_.pdf (oiieurope.org) (Accessed on 7th July 2022).

²⁶⁵ Regional Court Cologne 25 O/179/07. Available at <https://www.icj.org/wp-content/uploads/2008/02/In-re-Volling-Regional-Court-Cologne-Germany-English.pdf>. (Accessed on 31st December 2021).

²⁶⁶ Ibid.

anatomy. Her further contention was that, removal of her female anatomy obligated her to live life within a sex/gender she did not belong to for many years. In addition, she contended that the surgeries had deprived her of the opportunity to obtain alternative treatment or explore a life with a true sex/gender identity, instead confining her in a wrong sex/gender. Her third contention was that the treatment she was subjected to caused her other medical problems including chronic urinary tract infections.

The Court agreed with her. It pointed out that she was not appropriately informed about the extent, nature or content of the surgery.²⁶⁷ The court also faulted the surgeons for failing to abstain from surgical intervention until the Claimant had properly been informed of the condition, to enable her to make an informed decision.²⁶⁸ The actions by the surgeon of failing to obtain her full and informed consent before carrying out an operation which resulted in the removal of her exclusively female organs, according to the court, were therefore wrong. For all these reasons, the court found that the Claimant was entitled to redress by way of damages.²⁶⁹ It therefore proceeded to award her damages for pain and suffering.²⁷⁰ This was a clear demonstration that even in the absence of legislative provisions, the judicial process could still protect an intersex person's right to bodily integrity.

In terms of education and employment in Germany, the 'General Act on Equal Treatment Act' is important.²⁷¹ The significance of this Act is that it prohibits discrimination on a wide set of grounds. These include sexual orientation, sex/gender identity and sex characteristics, where intersex status falls.²⁷² Discrimination on these grounds is banned in a broad range of fields including education and employment, as well as access to the provision of and access to other goods and services such as housing. The 'Federal Anti-Discrimination Agency', has overseen the enforcement of this provision ever since inception.²⁷³ This means that intersex persons

²⁶⁷ Re Völling, paras 24-32.

²⁶⁸ *ibid*

²⁶⁹ *Ibid*.

²⁷⁰ Christine Völling was awarded 100,000 euros (equivalent of Kshs 13,062,000/= in December 2022) See Christine Völling Wins Damages For Non-Consensual Surgery In Civil Suit Against Surgeon (OII Australia-Intersex Australia, 7 September 2009) < <https://oii.org.au/3501/christiane-voelling-wins-damages-nonconsensual-surgery> (Accessed on 21st December 2022).

²⁷¹ The General Act on Equal Treatment Act came into force on 14th August 2006.

²⁷² Organization for Economic Co-operation and Development (OECD), *Over the Rainbow? The Road to LGBTI Inclusion*. (OECD, 2020). Available at <https://www.oecd.org/germany/OECD-LGBTI-2020-Over-The-Rainbow-GERMANY.pdf>. (Accessed on 31st December 2021).

²⁷³ *Ibid*.

cannot be subjected to the kind of discriminatory attitudes which intersex persons in Kenya are constantly subjected to in the spheres of education and employment.²⁷⁴

5.5.4. PROTECTION OF UNQUANTIFIABLE RIGHTS.

The coming into force of the ‘General Act on Equal Treatment’, is a clear indication that Germany allows intersex persons to utilize their legal records to self-identity in a way that reflects their reality.²⁷⁵ Moreover, the presence of provisions prohibiting discrimination on the basis of sex would specifically forbid all forms of discrimination against intersex persons who want to identify as such.²⁷⁶ This Act, coupled with case law and the provisions in the Basic Law of Germany regarding equality and nondiscrimination, dignity and autonomy, ensures that key intangible rights are well taken care of.²⁷⁷

While these measures have been significant, scholars are calling for additional measures in the form of general advocacy for social change.²⁷⁸

5.6. CORRECTING HISTORICAL INJUSTICES THROUGH JUDICIAL DECISIONS MODEL. (INDIA).

5.6.1 INTRODUCTION.

India generally accepts and socially acknowledges the existence people who are intersex, even though it is by lumping them in a sex /gender minority category derogatively referred to as *hijra*.²⁷⁹ The term *hijra*, is one that has been used to refer to people who are neither men nor women, but who have existed in the Indian and other Asian Pacific countries for thousands of years.²⁸⁰ Accordingly, people who cannot be classified as either men or women such as eunuchs and hermaphrodites, the derogatory term for intersex, have historically been lumped into the *hijra* umbrella category.²⁸¹

The historical and social presence of persons who are intersex in India has however not always translated to protection for them. Instead, the *hijra* community, though socially present, has

²⁷⁴ Ibid.

²⁷⁵ Laws on the Internet (gesetze-im-internet.de)

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Limor Meoded Danon and Katinka Schweizer. ‘Psychosocial approaches and discursive gaps in intersex healthcare: Findings from an Israeli–German Action Research Study’ (2020) 23 Culture, Health & Sexuality, 4: 441-456.

²⁷⁹ Serena Nanda, *Neither Man nor Woman: The Hijras of India* (Wadsworth Publishing 1999)13.

²⁸⁰ Jennifer Rellis, ‘Please Write ‘E’ in This Box Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India’ (2008) 14 Michigan Journal of Gender & Law 227.

²⁸¹ Ibid.

always remained ostracized and discriminated against for the fact of being innately neither men nor women. India had in fact historically criminalized this category of people through legislation, namely the Criminal Tribes Act, which was intended to render all *hijras* extinct.²⁸² This was informed by the fact that all sexual acts considered non procreative were criminalized.²⁸³ During the recent past however, a lot has changed in India's legal landscape regarding recognition of the human rights of people born intersex in the country, particularly through law emanating from jurisprudential pronouncements.

5.6.2. LEGAL RECOGNITION.

The historical development of intersex rights in India was interestingly initially started through the overlapping, misinterpreting and invisibilizing people born with the intersex gender. A case in point is the 2011 census in India, where persons who identify as a third gender (*hijras*) were counted for the first-time and intersex persons were grouped in this category.²⁸⁴ Indeed intersex persons in India have always been imbricated with other gender non-conforming persons. When, the 'Transgender Rights Bill' was being drawn for instance, the drafters described the intersex condition as a type of transgender.²⁸⁵

The case of India is however quite remarkable, regarding recognition and protection of people born intersex. Indeed, even though not directly, India has still managed to protect the rights of intersex under the umbrella of transgender rights. This is through the use of the blended approaches of legislation and judicial pronouncements.

When it comes to legislative instruments, the 2019 'Transgender Persons (Protection of Rights) Act' is significant.²⁸⁶ It is to be noted however, that this Act does not explicitly mention intersex persons in its title and has considerably been criticized due to this omission.²⁸⁷ Nevertheless,

²⁸²Pyali Chatterjee, 'Hermaphroditism: A Medico Legal Issues related to Gender Identity of Third Gender In India' (2022) 14 Journal Of South India Medico-Legal Association 2:125.

²⁸³Jennifer Rellis, 'Please Write 'E' in This Box Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India' (2008) 14 Michigan Journal of Gender & Law 229.

²⁸⁴Vasant More, 'Problems of transgender community in India: A sociological study' (2021)Vivek Research Journal 89.

²⁸⁵This form of misinterpretation of who an intersex person is, caused the Human Rights Watch (HRW), to call not just for the renaming of the Bill, but to also include explicit mention and explicit protection for intersex persons who were not mentioned beyond the definition section of the Bill.

²⁸⁶Transgender Persons (Protection of Rights) Act, (2019).

²⁸⁷Part of the criticism facing this Act is that it only protects transgender people and appears to consider intersex people as part of the transgender thus not just misinterpreting who an intersex person is but amounting to invisibility for intersex people. See Jennifer Rellis, 'Please Write 'E' in This Box Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India' (2008) 14 Michigan Journal of Gender & Law 227.

the Act is somewhat still beneficial to intersex persons. The shortcomings regarding absence of specific intersex protective provisions notwithstanding, it is still lauded for providing not just a comprehensive definition for intersex persons but for pointing out the innate sex characteristics as the distinguishing factors.²⁸⁸

The Act defines an intersex person as:

‘a person with intersex variations, who at birth demonstrates a variation in their primary sexual characteristics, external genitalia, chromosomes or hormones that are different from the normal female or male body’.²⁸⁹

The comprehensive definition is however watered down and introduces confusion when the Act proceeds to conflate intersex variations with transgender variations.²⁹⁰ Nonetheless, intersex persons’ accurate definition finds a place in the law in India. This is in contrast to the definition contained in the Children Act 2022, which appears to have skirted around the definition, avoiding the mention of external genitalia, a key component of the intersex condition.²⁹¹

Judicial recognition of intersex persons in India however appears to be more pronounced in protecting intersex persons rights, even though interfaced with rights of other categories of vulnerable people. The first judicial acknowledgement of intersex persons was in 2014 in the *National Legal Services Authority v Union of India* (NALSA).²⁹² Although the NALSA case was taken before the Supreme Court under the transgender umbrella, the Court nevertheless seized the opportunity and ventilated on issues which positively impact intersex persons.²⁹³

The NALSA case was initiated through writs presented to the Supreme Court by the transgender community in India.²⁹⁴ In the writs, the transgender community was decrying the discrimination and exclusion to which they were subjected in private and public spaces including schools, hospitals, workplaces and many other spheres of their lives.²⁹⁵ The reason for these discriminatory treatments was because their bodies and minds, innately defied the

²⁸⁸ Amit Kumar Singh, ‘From Colonial Castaways to Current Tribulation: Tragedy of Indian Hijra’ (2022)40 *Unisia* 2: 298.

²⁸⁹ Transgender Persons (Protection of Rights) Act, (2019) Section 2(i).

²⁹⁰ Transgender Persons (Protection of Rights) Act, Section 2(k).

²⁹¹ Children Act, 2022 Section 2.

²⁹² *National Legal Services Authority v Union of India and Others*. (2014) 5 SCC 438, (NALSA case). (<https://translaw.clpr.org.in/wp-content/uploads/2018/09/Nalsa.pdf>) (Accessed on 16th January 2022).

²⁹³ NALSA case, Paras 23,36,39,41 and 44.

²⁹⁴ NALSA case, Paras 1 and 2.

²⁹⁵ *Ibid*, Para. 48.

biological sex/gender ordinarily known in society. They thus called on the Court to address these discriminatory and exclusionary treatments as well as the attendant trauma, agony and pain it caused them in various spheres of their lives in both public and private places.²⁹⁶

The Court allowed the writs, and agreed that indeed, discrimination and social exclusion on grounds of sex/gender was rampant in India.²⁹⁷ It observed further that people were being treated discriminatorily on grounds that they do not conform to the binary male and female sex differentiation, a differentiation which society has constructed.²⁹⁸ The court termed the discrimination and unequal treatment occurring in India as unfortunate, especially given the fact that everyone requires equality as encapsulated under the provisions of the UDHR and ICCPR.²⁹⁹ The court further faulted the Indian law for generally recognizing the paradigm of binary sex/genders of male and female, but lacking suitable legislation protecting nonbinary members of the community.³⁰⁰ It decried the fact that lack of protective legislation for other sex/genders ended up permitting sex/gender binary systems of laws in many spheres of life, including marriage, adoption, inheritance and succession.³⁰¹ These sex/gender binary exclusive laws served to exclude members of other sex/genders, yet they too are equal members of the community.³⁰² Consequently the court called on India to follow international conventions providing for protection of excluded members of society.³⁰³ But more significantly, the court called upon the Indian Parliament to make laws that would enable the enforcement of the international human rights requirements.³⁰⁴

In this instance, the Court did not hesitate to exercise its judicial power to direct the Indian government to utilize the provisions of Article 253 of the Constitution. This Article gives Parliament power to make laws for purposes of domesticating the requirements of international human rights instruments.³⁰⁵ Domesticating human rights provisions would serve to give effect to recognition of the transgender and *hijra* members of the society, thus including intersex persons under the protective umbrella.

²⁹⁶ Ibid, Para 1.

²⁹⁷ Ibid, Para 46.

²⁹⁸ Ibid.

²⁹⁹ UDHR, Articles 1,3 and 5 and ICCPR Articles 5 and 7 respectively.

³⁰⁰ NALSA case, Para 49.

³⁰¹ NALSA case, Paras. 6, 49 and 75.

³⁰² NALSA case, Para 49.

³⁰³ NALSA case, Para 47.

³⁰⁴ Ibid.

³⁰⁵ NALSA case, Para. 50.

It was the Court's further view that, non recognition of certain members of the society denies them equal protection with the other members of the society. This in turn left them vulnerable to many forms of human rights violations, such as extreme discrimination in all spheres of society, especially in the fields of health care, education, and employment.

While examining the impact of discrimination and exclusion to which non-binary members of society are subjected to on their dignity and autonomy, the Court observed that such discriminatory treatment leads to a denial of basic rights and needs such as access to public toilets.³⁰⁶ Even though access to public toilets is a matter that most people take for granted, it is a major challenge for gender nonconforming persons. The kind of traumatizing experiences earlier narrated by Syd, as he sought to use a public toilet, was something that the Supreme Court of India was able to pick.³⁰⁷ Given that in India, like in Kenya, no separate toilet facilities are provided, intersex persons choose to use facilities of the sex/gender they identify with or are more comfortable in. Unfortunately, the gender they identify with is not always the sex/gender that they physically look like, or society will brand them in. Maintaining personal dignity by being able to access basic human needs can then create a major security concern, as Rye experienced while trying to access a public toilet facility as he narrated to the researcher:

‘I was documented and raised as a female though I now identify as a male. I however have certain features which make me look like a female. On one occasion, feeling more secure in a female public toilet, I was accosted by women who were screaming that there was a man in the toilet who wanted to rape them. A crowd gathered and started debating whether I was a man or a woman and as they debated, I was lucky to get an opportunity to slip through the hostile crowd and quickly disappear to safety’.³⁰⁸

The stand taken by the Supreme Court in India is diametrically opposite of the one taken by the court in *RM* and *Baby A* decisions in Kenya. The Court in India directed the government to make certain key changes in relation to people who are neither male nor female.³⁰⁹ In particular, the judges instructed the government to proceed to give legal recognition to people who are neither male nor female, including *hijras*, the category where intersex persons fall. The

³⁰⁶ Ibid, Para. 55

³⁰⁷ Interview with Syd on 16th December 2019. Syd always resulted in going to relieve himself in the bush, due to the humiliating experiences he experienced as he tried to access either a girls or boys only toilet in school.

³⁰⁸ Interview with Rye on 18th May 2019. For Syd, the issue of using a public toilet becomes more of a security and safety concern for him

³⁰⁹ NALSA case, para 129.

government was further directed to not only recognize them as a third gender, but to also ensure protection of their rights as is constitutionally and legislatively provided.³¹⁰ Additionally, the Court instructed India to put in place affirmative action measures in relation to protection of their socio-economic rights. Included here were the right to educational and employment opportunities as well as the right to health in all its components namely physical, mental, reproductive and sexual health. Regarding access to health and maintenance of the dignity of the non-binary sex/gender persons, the court directed the government to provide medical care, hospitals and separate public and other facilities.³¹¹ The importance of human dignity therefore did not escape the court's attention. In this regard, the Court directed the government to take such measures that will assist members of the third gender to regain their respect and place in society. This would enable them enjoy their cultural and social life like every other member of the society.

The positive measures identified by the Supreme Court as needing government immediate attention speak to access to both material and unquantifiable needs of the intersex person.³¹² Even more significantly, the government was directed to put in place extra-legal measures leading to the creation of public awareness for an all-inclusive protection. These would not only help remove the 'untouchable' tag generally placed on *hijras*, but would also help them feel as part and parcel of society.³¹³

On the issue of recognition through documentation for intersex persons, jurisprudence in India has similarly played a significant role towards accurately documenting intersex persons. An example is to be found in the Gujarat High Court case of *Mulla Faizal v State of Gujarat*, where, an intersex person was allowed to change the name and sex/gender description in the birth certificate.³¹⁴

The facts of this case were that the Applicant Mulla Faizal, had been assigned a female gender and recorded as one at birth, despite exhibiting intersex characteristics. As an adult he started to exhibit male characteristics and proceeded to obtain medical and psychological certificates which showed his gender as male.³¹⁵ He also underwent surgical procedures to align himself

³¹⁰ Ibid.

³¹¹ NALSA, Para 129(6).

³¹² NALSA para 129.

³¹³ NALSA, Para 129(8).

³¹⁴ *Mulla Faizal v State of Gujarat*, (2000)2 GLR.

³¹⁵ Ibid, Para. 2.

with the male gender.³¹⁶ After completing the transition, he proceeded to make an application to the District Registrar of Births and Deaths with the aim of changing his name and the sex/gender on his birth certificate, to align with his real sex/gender. His application was rejected.³¹⁷ This rejection prompted him to file suit against the District Registrar of Births and Deaths, but his suit in the lower court was dismissed. Faizal then moved the High Court on appeal. His argument was that he had erroneously been registered as a female, yet he had displayed intersex characteristics at the time of birth and therefore, his application to change his documents should be allowed.³¹⁸ The Appeal Court agreed with him, observing that the law placed an obligation on the Registrar, to make any necessary changes to correct any erroneous entries on birth documents. According to the Court, Faizal was entitled, under the law, to alter the entry of his sex in the birth register.³¹⁹

The existence of jurisprudence emanating from the courts in India is fundamental as it demonstrates that courts have the power to issue rulings that can lead to the enactment of progressive legislation. The precedent provided by the Faizal case demonstrates that an intersex person's birth certificate in India can be rectified if they were assigned a sex/gender at birth which they do not physically conform to or identify with, something that Kenya can borrow from.

5.6.3. PROTECTION OF SOCIAL ECONOMIC RIGHTS.

As seen, jurisprudence developed through constitutional interpretation has seen courts in India become a tool for advancing the rights of intersex people. In relation to protection of social economic rights in the area of health for instance, the Madras High Court case of *Arunkumar and Another v The Inspector General of Registration and Others* is significant.³²⁰ Here, the Court seized the opportunity presented to by the case to deliberate on intersex genital mutilations. It then proceeded to issue a landmark judgement on the right to health and prohibition of nonconsensual non informed intersex genital manipulations. This way, the Court captured recognition for and respect for the right to bodily integrity for intersex children.

³¹⁶ Ibid, Para 3.

³¹⁷ Ibid, Para 5.

³¹⁸ Ibid.

³¹⁹ Registration of Births and Deaths Act of India (1969), Section 15 as read with Rule 12.

³²⁰ *Arunkumar and Another v The Inspector General of Registration and Others* W.P. (MD) No. 4125 of 2019 and W.M.P. (MD) No. 3220 of 2019.

The significance of this case is that it safeguards the rights of intersex children to health and bodily autonomy. It speaks to what intersex persons in Kenya are asking: to be allowed to grow up and reach an age where they can give informed consent on whether or not, to undergo sex/gender reassignment surgeries. These are aspects that the Court has connected to the right to bodily autonomy.³²¹ To the Court, every human being has the right to choose what is done to their bodies. In echoing the Constitutional Court of Columbia's decisions in the *Sentensia* cases,³²² the Court in India affirms that, consent issued by parents can never be as effective as that issued by the individual concerned.³²³ This case has seen the court ban any medical procedures performed on intersex children at birth by directing Tamil Nadu Government to issue a Government Order banning sex reassignment surgeries at infancy.³²⁴ The basis of this order was the realization that conducting such surgeries on infants and children deprived them of not just their right to health, but also their right to bodily autonomy. The court went an extra-legal step and directed the government to introduce programs geared towards awareness creation on intersex persons in the country.³²⁵ Pursuant to this judgement, the government introduced a Government Order banning sex reassignment surgeries in compliance with the directive given by the court.³²⁶ This order became the first in India to ban such surgeries.

As regards intersex persons' right to employment, the Madras High Court case of *Nangai v The Superintendent of Police* is worth noting.³²⁷ Nangai had been born intersex but was assigned and registered with the female sex/gender at birth. She attended an all-girls' school, women colleges and had all her documents, including her birth certificate, medical records, family card and census data identifying her as female. In 2009, she was successfully selected for the position of a women police constable and upon being cleared for the position, was sent for training, but was first required to undergo a medical examination. It was during the medical examination that she was discovered 'not to be female'. She was thereafter subjected to a series of medical examinations spanning a period of over four months, which interrupted the training she was required to undergo. Due to these interruptions, she was dismissed on grounds that she

³²¹ Ibid.

³²² *Gonzalez, Ramos and Cruz* cases.

³²³ Ibid.

³²⁴ Ibid.

³²⁵ Mohamed Imranullah, '*T.N. bans sex reassignment surgeries on intersex infants, children*' (The Hindu Chennai, 28th August 2019).

³²⁶ Government Order (G.O. (Ms) N0. 355 of 13.08.2019).

³²⁷ *Nangai v The Superintendent of Police* (2014) 4 MLJ.

had missed the training, had missed the examinations and that she had falsely applied for a woman's position while she was not. She moved to the High court to challenge the termination.

The court agreed with Nangai and lifted the order for termination, citing violations to several of her rights guaranteed under the Constitution. These included the violation to her right to equality, nondiscrimination, freedom of speech and expression, life and personal liberty.³²⁸The court therefore accorded Nangai the freedom to self-identify in her true sex/gender identity, including with a third sex/gender identity.³²⁹The Court further observed that given that intersex persons have been present in India since time immemorial, it was time the law recognized them and treated them normally, with dignity and equally with those fitting in the binary model.³³⁰

Just like in cases of other gender non-conforming conditions, being intersex presents a myriad of complexities due to the traditional and routine heteronormative sex/gender construction.³³¹ As in the other countries analyzed, it has been observed that these complexities call for more to be done. Scholars have indeed called for more measures to address the specific intricacies and the needs of those who are heteronormative non-compliant in society.³³²

5.7. CONCLUSION.

The various models utilized in the five illustrations above demonstrate that Kenya can employ a variety of approaches both legal and extra-legal. These can be used to steer recognition of intersex persons and protection of their rights and needs, even in the midst of a legal, culturally and politically limited two gender system which has historically not had a place for them.

This research has established that there are legal gaps and inadequacies in the identity documents issuance regime in chapter two. It has also shown, in chapters three and four, the manner in which these gaps have negatively impacted certain social economic rights and human needs of intersex persons, hence answering both limbs of the first and second research questions and achieving the first and second research objectives. Chapter five has answered the third and final question as it achieves the third objective. It does this by evaluating available best practices utilized by five jurisdictions, to mitigate and ameliorate the problems identified in

³²⁸ These rights are guaranteed under Articles 14, 15, 16, 19(1)(a) and 21 of the Constitution of India.

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Jeremy D Kidd and Tarynn M. Witten. 'Transgender and transsexual identities: The Next Strange Fruit-Hate Crimes, Violence and Genocide against The Global Trans-Communities' (2008) 6 *Journal of Hate Studies* 3: 31-32.

³³² Deeksha Pandey, and Muthusamy Sivakami. 'How Inclusive Is the Transgender Persons Act? Evidence From the Ground' (2022) 4 *Journal of Psychosexual Health*.1: 51-52.

chapters two, three and four. Chapter five has anchored its arguments on the natural law and corrective justice theories, which will inform the suggestions for appropriate legal and other measures to address the gaps, which is undertaken in chapter six.

But that is not to say that Kenya has not engaged with any progressive measures at all. Indeed, this research acknowledges that there are some gains made in the recent past touching on intersex issues. Following the two petitions which generated the documentation discourse for intersex persons in Kenya³³³ certain positive developments have occurred around recognition of intersex persons. If the opportunities presented through these developments are properly seized, they may lead to accurate identity documentation and protection of the rights and needs of people born intersex. These developments include the enactment of the Persons Deprived of Liberty Act in 2014³³⁴ and the publication of the Task Force Report on intersex persons in 2018.³³⁵ The Children Act of 2022, despite its shortcomings analyzed earlier, can also be said to be a step in the right direction.³³⁶ The most significant milestone was when Kenya made history by becoming the first Nation in Africa to include intersex as the third sex/gender identity category in its national census.³³⁷ This was also the first time in its own history of documenting its citizens, that Kenya recorded people who are of the intersex gender alongside the traditionally acknowledged male and female ones.³³⁸ During the census held in August 2019, at least 1,524 Kenyan citizens were officially identified as human beings with the intersex gender.³³⁹ These numbers however are not an accurate representation of the statistical position of intersex persons in Kenya because this research established that there were many who chose to remain in the shadows due to the stigma associated with the condition.³⁴⁰ This is confirmed by the fact that the intersex population was found to be too small to be included in the age, sex,

³³³ *RM and Baby A* .

³³⁴ Persons Deprived of Liberty Act.

³³⁵ Intersex Task Force Report.

³³⁶ The Children Act, No 29 of 2022.

³³⁷ Kenya National Bureau of Statistics, *Kenya Population and Housing Census: Volume III Distribution of Population Age, By Sex and Administrative Units (Government Printer, 2019)* 3.

³³⁸ The first census in Kenya was conducted in 1897 following the establishment of Kenya as one of the British Colonies earlier on in 1895. None of the subsequent censuses documented the intersex sex/gender category until August 2019.

³³⁹ Kenya National Bureau of Statistics, *Kenya Population and Housing Census: Volume III Distribution of Population Age, By Sex and Administrative Units (Government Printer, 2019)* 3.

³⁴⁰ Interview with KK. According to KK, there are several intersex persons and parents of intersex children known to him who did not disclose to the census officials that they are intersex. They chose to stick with the gender description assigned to them at birth. The reasons were either because they were too scared of the attendant stigma or because the census clerks did not give them an opportunity to do opt for the intersex gender, instead assuming of their gender based on the physical appearance or assigned names. The official census data may therefore not be an accurate representation of the intersex data in Kenya.

County or Sub County distribution.³⁴¹ However, the presence of this data is a clear affirmation that Kenya cannot and should not, continue sex/gender binarizing its citizens.

There is now official confirmation, through statistical data, that at least 1,524 Kenyans belong to another sex/gender category that is neither male nor female.³⁴² Being neither male nor female therefore, it is a legal misnomer for the law to categorize them as either one or the other. It is an even greater misnomer to fail to categorize them at all.³⁴³ It is the continued perpetuation of this legal misnomer, as seen in the previous chapters, that has created such huge legal gaps, that have so adversely impacted their social economic conditions and their human needs.

And while the gains identified are fundamental and of absolute importance for the intersex person in Kenya, they barely scratch the surface in tackling the violations endured for lack of recognition, being documented in the wrong gender or not being documented at all. Again, some of the recent developments in Kenya appear to be dulling the few gains achieved. The National Reproductive Health Policy 2022- 2032, as earlier explained, is a case in point.³⁴⁴ The Policy, which is meant to guide the reproductive health rights of all Kenyans for ten years beginning 2022, has failed to acknowledge the intersex gender. It has declared that it retains the definition of sex/gender in Kenya as constituting male and females only.³⁴⁵ By describing the intersex condition as a ‘disabling developmental disorder’, the Policy, as earlier explained, implies the need for ‘treatment’ and thus seemingly endorses IGM to healthy intersex genitalia.³⁴⁶ Such a confounding position of an official government document guiding key aspects of health implies that Kenya has a long way to go in terms of accepting and recognizing the intersex person as a member of the community, deserving of equal rights and freedoms.

The following and final Chapter of this research considers various legal and other mechanisms which can be utilized to help seal the gaps and mitigate this existing negative position in Kenya. In the hope of achieving this, the chapter borrows some models applied in the five jurisdictions analyzed in this chapter, as it proposes ways of appropriately applying them in the Kenyan context. By using some of the progressive and transformative models, the selected jurisdictions

³⁴¹ Kenya National Bureau of Statistics, *Kenya Population and Housing Census: Volume III Distribution of Population Age, By Sex and Administrative Units* (Government Printer, 2019) 3.

³⁴² Ibid.

³⁴³ When intersex persons are identified through doubtful references and marks such as ‘query’, ‘unknown’ and question (?) mark, they do not get categorized under the law. The result is that they either end up with ambiguous inaccurate and discordant documentation or without any form of identity documents.

³⁴⁴ Ministry of Health, *The National Reproductive Health Policy 2022 – 2032* (Government of Kenya, 2022).

³⁴⁵ Ibid, 28.

³⁴⁶ Ibid.

have started recognizing and accurately documenting persons of the intersex gender. This has seen people born intersex afforded a legal identity through which they can access their human rights and needs equally with other citizens. Recommendations will be drawn from legal and other tools not necessarily anchored in law, but which have nevertheless led to significant legal and social acceptance for people born intersex.

CHAPTER SIX.

LESSONS LEARNT, RECOMMENDATIONS AND CONCLUSION.

‘Allow me to be different but treat me the same.’¹

6.1 INTRODUCTION.

The central focus of this study has been the examination of lacunae existing in the recognition and identity documentation regime in relation to people born intersex in Kenya. It has been driven by the key hypothesis that gaps and inadequacies in the current identity documents issuance laws have excluded them, thereby negatively impacting their human rights and needs.² To this end, the study has engaged in an exploration of the identity documentation issuance regimes, mainly through doctrinal and qualitative research. The research has involved listening to the voices of intersex persons, parents and guardians of children born with the intersex congenital condition. The purpose, as set out in the main hypothesis of the study, has been to evaluate if and how, the identity documentation regime in Kenya has discriminated against and excluded people born with this unique sex/gender. The exploration has been undertaken in chapters two, three and four. These chapters have determined that indeed, the identity documentation issuance regimes consist of gaps through which intersex persons have been excluded, thus negatively impacting not just their livelihood rights but also their human needs.³ In chapter five, and with a view to borrowing best mitigating practices to help seal the gaps, the study analyses various approaches applied in five jurisdictions.⁴ This has been to determine the legal and extra-legal measures availed to intersex persons in those jurisdictions in the context of the historical, cultural, and political systems of the specific countries.⁵ The research embarks on this analysis as it seeks to make recommendations for appropriate legislative, administrative and quasi-legal measures to ameliorate the situation for intersex persons in Kenya’s context.

¹ Apart from one intersex person who expressed a desire to undergo sex reassignment surgery, all the other intersex persons interviewed for this research are calling on the government to protect them by allowing them to be different, but to also treat them in the same manner it treats their male and female sex/gender counterparts.

² See chapter two, three and four.

³ Ibid.

⁴ The study analyses corrective models adopted by South Africa, Malta, Columbia, Germany and India.

⁵ The researcher acknowledges that even as recommendations are made for Kenya to borrow from the jurisdictions examined, it will be important to be cautious. Recommendations can never be made in a one size fits all format. Certain adjustments have to be made given the differences in Kenya’s legal systems, historical, cultural, and political background from each of the jurisdictions selected for this research.

It is against this backdrop that this chapter makes several recommendations as it concludes the research. The chapter is divided into three parts and has three key objectives. The first objective is to recapitulate the crucial findings of the study undertaken in the first five chapters. Here, the chapter evaluates how each of the objectives are met, if and how the research questions are answered and if and how the hypotheses the research set out to test have been tested. The chapter's second objective is to make specific recommendations which will hopefully lead to recognition and accurate documentation and also to their legal and social inclusion and acceptance. As the research seeks to achieve the second objective of this chapter, it highlights and discusses possible opposing arguments and limitations the suggested interventions are likely to face. However, it is the researcher's expectation that the proposals made will be implemented by both State and non-State actors, to enhance access to human rights and needs of the research's key target group. The third and final objective of this chapter is to wrap up and conclude the study.

6.2 SUMMARY OF THE FINDINGS.

Through review of relevant literature in the area of study coupled with narratives from concerned individuals, this research has shown that there is a part of the population which cannot and should not be documented as exclusively male or female.⁶ This is because they are neither. Nevertheless they are still Kenyan citizens who belong to the intersex gender, a sex/gender which is distinctly, anatomically and biologically different from either of the two sex/gender categories currently recognized and documented by the law. The study also establishes that the structure of the documentation regime through which identity documents are issued in the country, excludes them and fails to classify them in their true sex/gender. Consequently, they have ended up being either misgendered and documented wrongly or not being gendered and therefore not being documented at all.⁷ Those misgendered have been forced to go through life with identity documents which are discordant with their reality, while those not gendered have no identity documents at all.

⁶ The researcher has interviewed intersex adults, parents and guardians of intersex children during a field study exercise that took her to Nairobi, Mombasa, Kisumu, Siaya and Homa bay Counties of the Republic of Kenya. The data collected during the field study has created empirical evidence to confirm that even though a part of the population considers the existence of intersex persons a myth, they really exist and form part of the society. The 2019 National Census data has also confirmed that at least 1,524 people exist in Kenya, a society which is legally, politically and socio/culturally boxed in a two sex/gender system, failing to create a space for them.

⁷ KK, Rye and Langa, amongst others, have narrated how being misgendered forced them to end up being documented in the wrong sex/gender and also being issued incongruent 'identity' documentation, which is of no use to them. Others like Mercy who were not gendered at all have ended up being completely excluded from the documentation regime.

The study has examined the limitations created by misgendering people and issuing identity documents incongruent with one's reality to the realization of human rights and needs. The negative impact of non-possession of identity documents which every citizen is entitled to has also been examined. The research has determined that these challenges are attributable to the fact that identity documents are critical in facilitating access to several human rights and needs for everyone. Through narratives drawn from lived life experiences of intersex persons, parents and guardians of intersex children, the study has described the manner in which the exclusion chokes access to various rights and needs. The study has thereby shown how that exclusion negatively impacts an intersex person's whole existence, from the cradle to the grave.

The study aligns the first hypothesis to the first research question and objective and has determined what the fundamental gaps, shortcomings and glaring legal voids in the law relating to the identity documents' issuance regime are, thus proving that hypothesis. The legal void has meant that the existing system fails to recognise persons born intersex in Kenya. Through the accounts of intersex persons, the research establishes that the void is extremely huge. In fact, it is so huge that it not only leads to denial of a legal identity for them but also immensely negatively impacts access to crucial human rights and needs from the time they are born and even after they die. An evaluation of the series of the identity documents issued during a Kenyan's lifetime, from the time of birth all the way to after death, demonstrates the inequality and discriminatory practices to which intersex persons are subjected to.⁸

Chapter two has been dedicated to the exploration of the key identity documents issued and an analysis of the legal issuing regimes to identify the legal existing gaps. It starts with the birth registration and certification documents, which are generally the first legal documents commencing the legal recognition process for everyone in Kenya. The study then moves on to the national identity card, travel documents and the voter's card. Others examined in chapter two are social security documents namely the NHIF and NSSF identity documents. The issuing regimes for the driving license and the Kenya Revenue Authority Personal Identification (KRA PIN) certificate are also examined. The latest and ongoing digital identification documents introduced in Kenya through the NIIMS and NEMIS programs are also analysed. These are all identity documents which are crucial for accessing crucial human rights in the spheres of health, education and employment opportunities in Kenya.

⁸ The evaluation of key identity documents issued in the course of a persons' lifetime and at death is comprehensively undertaken in chapter two.

The research then proceeds to evaluate documents necessary for enjoyment of various human needs. In this category is the marriage certificate issuing regime and adoption processes and certificates granted to parents who adopt children. Finally, the documents issued at the end of everyone's life which include the burial/interment permit and the death certificate are evaluated.

An examination of all these key identity documents and the regimes under which each of them is issued points to glaring voids through which intersex persons remain excluded. The narratives from the persons concerned confirm just how adversely these gaps have affected and continue to affect them. Chapter two therefore, answers research question one and achieves the first objective. The first hypothesis which posits that the current identity documentation issuance legal regime in Kenya has failed to recognize and accurately document persons born with the intersex gender in Kenya is accordingly proven.

The second hypothesis, which is structured in two limbs, posits that failure to recognize and accurately document intersex persons has hampered access to their socio-economic rights and other unquantifiable human needs, thus negatively impacting their lives.. Yet every individual is entitled to these rights and needs. This hypothesis is linked to the second research question and objective, both of which are also structured in two limbs. These seek to show, and do show, in the first limb, how intersex persons have been disadvantaged in pursuit of a cluster of their socio-economic rights, namely the right to health, education, and employment. In the second limb, the research illustrates the manner in which selected unquantifiable human needs for intersex persons have negatively been impacted by the exclusion. The research therefore achieves, in these two limbs, its primary objective and overarching research question, both of which are broken down into specific components, as set out in the chapter one. The gaps in the law relating to recognition through identity documents and the impact on concrete human rights and unquantifiable human needs are all identified and analysed in chapters three and four. Chapter three covers the first limb where the adverse impact on a selected cluster of social economic and livelihood rights are examined. The focus here is firstly, the right to health in all its components namely physical, mental, reproductive and sexual health. The impact on access to education and to employment opportunities are also encapsulated here.

Chapter four continues with the exploration of the second limb of the second hypothesis, research objective and research question, whose focus is the non-tangible human needs, which are equally important for every human being to live a wholesome life. Addressed here are dignity in life and at death, autonomy, and identity. Personal rights including physical and

mental security, the right to personal integrity as well as rights to marriage and to parenthood are also discussed. The way the existing documentation regimes have negatively impacted these unquantifiable rights for intersex persons is demonstrated directly from the voices of the intersex persons themselves. The research acknowledges that attempts at recognizing and documenting intersex persons through piecemeal legislative and policy changes such as the Persons Deprived of Liberty Act, the Children Act 2022 and the National Reproductive Health Policy 2022-2032 have been made. However, the research has also shown that these piecemeal attempts have still left discrimination and exclusion against intersex persons intact. The discrimination and unequal treatment will likely continue as long as the identity documents issuance regime, on which access to all other rights majorly rests, remains unchanged.

The study then proceeds to answer the third research question. This question seeks to find out if Kenya can bridge the legal gaps and ameliorate the suffering established in chapters two, three and four, by borrowing from models used in certain progressive jurisdictions. Chapter five therefore examines different approaches applied by five jurisdictions, which have resulted in some measure of recognition and accurate documentation for people born intersex. The extent to which the models have responded to the challenges in the identified jurisdictions is critically examined. The result is that the third research question is affirmatively answered in chapter five as the final objective is achieved. The lessons learnt from the research, best practices and experiences drawn from the five jurisdictions are then used in proposing appropriate mitigating interventions in this chapter. These are undertaken in the following part.

6.3 RECOMMENDATIONS.

The findings in this study establish that there are several variables that lead to non-recognition through non-documentation and or inaccurate documentation of persons born intersex in Kenya. The research also demonstrates that situations of both non-documentation and inaccurate documentation lead to denial of intersex persons' human rights and needs. Absence of specific and or appropriate legislative provisions granting intersex persons legal recognition and accurately documenting them in their true sex/gender identity is a key factor in this.⁹ This absence, as previously seen, is indicative of the exclusionary documentation regime which has structured the Kenyan society in a binary division without room for any other gender. The exclusively male and female binary based sex/gender divide has further influenced the social

⁹This research acknowledges that significant gains have been accomplished for intersex persons through a number of legal frameworks as explained in chapters one and five. However, in terms of complete legal recognition and accurate documentation, the situation is still wanting.

exclusionary attitudes, thereby bringing in several other levels of challenges. These multiple layers mean that the challenges cannot be understood or resolved from a purely legal perspective. Being multi-faceted, they require multi-faceted corrective approaches. While some measures address historical violations and concentrate on correcting the current situation, others are geared towards prevention of future violations. The sections below therefore enumerate and explain the various approaches the study considers appropriate for use towards ameliorating the existing negative situation for intersex persons in Kenya.

6.3.1. CORRECTIVE APPROACHES THROUGH THE LAW.

Human rights violations caused by non-recognition and documentation of intersex persons can be mitigated through a variety of legal approaches. These may involve legislative reforms by enacting new legislation and or amending existing legislature. Others may consist of policy formulation processes and judicial interventions. The next three subsections of this part delve into the possible legal routes that can be employed to help seal the gaps and alleviate the negative effects demonstrated by the study.

6.3.1.1. THE LEGISLATIVE PROCESS ROUTE.

The presence of the law does not always work miracles and it would be illusory to suppose that changes in law and policy only would do so for intersex persons. However, the legal process route is always the best starting point for most changes in society. As positivists argue, rights should be validated through codification and therefore find fulfilment in legislation. Explicit constitutional and legislative provisions not just acknowledging, but also specifically documenting persons of the intersex gender would therefore form an anchoring mast for other mitigating measures. Legislation should therefore be the starting point towards sealing the gaps. Mitigation through the legislative route can be achieved in several ways and through various actors as explained below:

a) Constitutional reforms.

Constitutional protections have been at the heart of numerous decisions in Kenya for a while now.¹⁰ The constitutional process can therefore be one way to afford accurate documentation for the intersex gender. Indeed, both Baby A and RM litigated their cases based on constitutional protections.¹¹ They however did not find the constitutional safeguards they were looking for. This is probably because the Constitution of Kenya 2010, even though hailed for

¹⁰ Yash Pal Ghai, *Constitutions and constitutionalism: The fate of the 2010 Constitution*, in Godwin Murunga *et al* (eds) Kenya: The Struggle for a New Constitutional Order (Zed Books 2014)134.

¹¹ *Baby A and RM*.

its progressiveness, contains a glaring gap in that it excludes sex characteristics as a prohibited ground of discrimination.¹² The fact that the Court in both cases did not have any direct constitutional provision to anchor the petitioners' prayers on may have been one of the factors influencing the negative decisions ultimately arrived at in both cases.

The opportunity to protect intersex persons based on their sex/gender characteristics had been missed from the onset during the constitutional review process. As earlier pointed out, after the discussion on persons of non-conforming gender and sexual identities was vehemently opposed, their inclusion was abandoned.¹³ This vehement opposition is of course attributable to the mindset of the society at the time of the constitution making process.¹⁴ A lot has however changed in the Kenyan legal landscape concerning intersex persons since then.¹⁵ Now Kenya can be said to have come of age and does appear to be more open in acknowledging people who are different in terms of genital framework. The fact that Kenya, has through a national census, officially recorded intersex as a third gender, seems to suggest that the society is opening up to people who were historically and culturally considered 'abnormal', for not conforming to the binary sex/gender classification. This can be said to be a pointer that society is not static and should not be held hostage by the views of past generations.¹⁶ As seen, the political negotiations with the Constitution of Kenya Review Commission ended up creating a gap in the Bill of Rights section of the Constitution.¹⁷ Because of this gap, sex/gender characteristic was left out from the list of prohibited grounds, thereby excluding intersex persons from the protective umbrella of the equality and freedom from discrimination principles.¹⁸ This research accordingly makes a recommendation for constitutional reform to expand the Constitution of Kenya 2010, to incorporate sex /gender characteristics in the list of prohibited grounds of discrimination.¹⁹ South Africa has done this by incorporating the

¹² Constitution of Kenya, 2010, Article 27(4), lists the prohibited grounds for discrimination in Kenya. It however does not include sex characteristics as one of the grounds, unlike its South African counterpart, which has now factored in sex characteristics as a prohibited ground.

¹³ Seth Muchoma Wekesa, *Decriminalization of Homosexuality in Kenya: The Prospects and Challenges*, in Sylvie Namase and Adrian Jjuko, (eds), *Protecting the human rights of sexual minorities in contemporary Africa*. (Pretoria University Press 2017)88.

¹⁴ Ibid.

¹⁵ The various progressive changes achieved for intersex persons have been evaluated in the previous chapters.

¹⁶ Akech Migai, 'The Basic Structure "Doctrine" and the Politics of Constitutional Change in Kenya: A Case of Judicial Adventurism?' (Available at SSRN 4270138 ,2022) 28.

¹⁷ Seth Muchoma Wekesa, *Decriminalization of Homosexuality in Kenya: The Prospects and Challenges*, in Sylvie Namase and Adrian Jjuko, (eds), *Protecting the human rights of sexual minorities in contemporary Africa*. (Pretoria University Press 2017)88.

¹⁸ Constitution of Kenya, Article 27(4)

¹⁹ This can be achieved through the expansion of Article 27 (4) of the Constitution of Kenya, 2010, which lists the prohibited grounds of discrimination.

principles of equality and non-discrimination in its constitution. The country has then buttressed these provisions through amendments to PEPUDA which were introduced through the Judicial Matters Amendment Act. If discrimination based on sex/gender characteristic is anchored in the constitution, the country would be required to adopt specific legislation to provide for intersex as a sex/gender category, alongside the currently recognized male and female sex/gender classifications.²⁰As citizens protected from discrimination on the ground of the intersex gender status, intersex persons would be entitled to all the rights privileges and benefits constitutionally guaranteed to other citizens.²¹And these would include issuance of correctly sex/gendered personal identity documents including a birth certificate and all other documents of registration and identification contemplated by the Constitution. ²²

The study acknowledges that amending a national constitution is not an easy process. It requires not just the goodwill of the people but political goodwill as well. ²³ However, the Supreme Court has determined that citizens can amend the constitution as long as the allowable procedures are adhered to.²⁴This research recommends that the duty bearer for this process be the State spearheaded by the Kenya National Human Rights and Equality Commission (KNCHR). As it discharges its constitutional mandate as set out in the Constitution,²⁵ KNCHR has been focusing on special interest groups including intersex persons.²⁶ Through its sensitization and public awareness programs, KNCHR has the capability to mobilize human rights groups and the general public to initiate the constitutional amendment process reserved for citizens under the popular initiative route.²⁷ Amendment initiatives aimed at correcting gaps existing through failure to accommodate certain members of the society, who end up being rendered vulnerable through no fault of their own, have been used in many jurisdictions. South Africa and Malta are good examples of jurisdictions that have undertaken specific constitutional reforms as a tool to constitutionally shelter previously excluded groups. These jurisdictions have seen the inclusion of sex characteristics being factored in the constitution as

²⁰ The Judicial Matters Amendment Act No. 22 of 2005.

²¹ Constitution of Kenya 2010, Article 12 (1)(a).

²² The Constitution, Article 12(1)(b), lists the identity documents that every Kenyan citizen is entitled to as a matter of right.

²³ Petition No. 12 of 2021 (Consolidated with Petitions Nos. 11 & 13 of 2021 [BBI judgement], Available at <https://www.judiciary.go.ke/download/petition-no-12-of-2021-consolidated-with-petitions-11-13-of-2021-building-bridges-initiative-bbi-full-supreme-court-judgement/> (Accessed on 10th May 2022).

²⁴ Akech Migai, 'The Basic Structure "Doctrine" and the Politics of Constitutional Change in Kenya: A Case of Judicial Adventurism?' (Available at SSRN 4270138, 2022)42.

²⁵Constitution of Kenya, Article 59(2).

²⁶ <https://www.knchr.org/Our-Work/Special-Interest-Groups/Intersex-Persons>, accessed on 21st December 2022.

²⁷ Constitution of Kenya, Chapter sixteen provides for the mode of amending the Constitution.

a prohibited grounds of discrimination, thus providing constitutional protection to sex/gender fluid groups.

b) Other Legislative Reforms.

Legislative reforms intended to put a halt to situations where people born intersex are either squeezed into the male or female brackets or are left out altogether during documentation issuance processes are important for Kenya. These can be achieved in two ways. The first is to introduce intersex specific provisions through amendments to existing legislation. The second is through engaging a legislative framework exclusively geared towards enacting an all-inclusive intersex specific protective legislation. In terms of legislative amendments, drastic and radical legal shifts would need to be made to the entire regime through which identity documentation is issued. Two key pieces of legislation are responsible for issuance of identity documents. The first is the Births and Deaths Registration Act while the other is the Registration of Persons Act.²⁸ While the Births and Deaths Registration Act has now included the term intersex in four places pursuant to the Children Act, 2022,²⁹ the Registration of Persons Act does not. Further, in the absence of procedural Rules, both Acts categorize Kenyans only in the binary opposites. It is therefore not possible to make any intersex gender entry in any of the identity documents through the two pieces of legislation, given that the gender is nonexistent. The first step would therefore be to amend these two Acts, amend all procedural application forms and the structure of the certificates issued pursuant to them. Inclusion of the intersex gender option would ensure that intersex persons are not squeezed into the two available sex/ genders or left out altogether.³⁰ They would accurately be documented and issued with a birth certificate, an identity card and eventually a death certificate that reflects their true gender.

And indeed, proposals to amend these laws are already in place, specifically the Registration of Persons (Amendment) Bill currently pending in Senate.³¹ The objective is to amend the law in order to make provision for the registration of persons born with both male and female reproductive organs.³² Two sets of proposed amendments have been made with regard to the

²⁸ Registration of Persons Act, Revised 2012, Chapter 107, (Laws of Kenya).

²⁹ The Births and Deaths Registration, Act Revised 2012, Chapter 149 (Laws of Kenya), though now amended to include the term intersex pursuant to the Children Act No. 29 of 2022, still contains gaps in terms of procedural rules. Section 29, of the Act provides, in very weak language, that the Minister 'may' make rules with regard to *interalia* forms to include intersex persons for purposes of the Act.

³⁰ *Ibid.*

³¹ The Registration of Persons (Amendment) Bill, 2019.

³² *Ibid.*, Statement of the Objects and Reasons for the Bill

Registration of Persons Act. The first seeks to insert an addition into section 3 of the Act which will not only include intersex as a form of sex description, alongside male and female, but also to introduce the definition of an intersex person.³³ The proposed amendment seeks to have the definition of an intersex person introduced into the Act. If passed into law, the Act will define an intersex person as :

‘as a person who is born with physical or genetic features that are neither fully male nor fully female, has a combination of both male and female or is neither male nor female’³⁴

The second proposed amendment seeks to facilitate the change of particulars to align the sex/gender description in the identity card with the physical features of an intersex person who may have undergone sex reassignment procedures.³⁵ The Bill also seeks to introduce another key amendment to the documentation regime in relation to the Births and Deaths Registration Act.³⁶ It seeks to align the definition of sex contained at Section 2 of the Act with the expanded definition that will be included through the amendment to the Registration of Persons Act seen above.³⁷ While this Bill does not cover corrections to the entire documentation regime, successful introduction of the amendments would be beneficial. However, what would be more useful is to amend the registration forms including the birth notification Form B, the birth certificate issued subsequently, and the identity cards issued to an intersex person to reflect their unique but true sex/gender. This would give an intersex person the legal leeway to alter their gender to one which they either develop into or are comfortable with, as is the case with Malta and Germany.³⁸ If incorporated into law, these amendments would help reduce the erroneous and discriminatory assumption that human beings in Kenya can only be categorized in the binary opposites of male and female. This research does not make the proposition that inclusion of a third gender through legislation will be an automatic solution to the many concrete problems faced by intersex people. Rather, it recommends that with a third gender being anchored in legislation, the exclusion of intersex persons will be removed and all other avenues of accepting the intersex persons into society will be anchored in the law. In so doing

³³ The Registration of Persons (Amendment) Bill, 2019, Section 2 a-c available at <http://kenyalaw.org/kl/index.php?id=9129>(Accessed on 30th April 2022).

³⁴ Ibid.

³⁵ Ibid, Registration of Persons Amendment Bill, 2019, Section 3.

³⁶ The Births and Deaths Registration Act, (Revised 2012) Chapter 149(Laws of Kenya).

³⁷ Ibid, Section 4.

³⁸ The position of these two countries was comprehensively explained in Chapter five.

Kenya will be following the example of Germany which has adopted the third sex/gender option to safeguard the rights of non-binary persons, where intersex persons fall.

Mention has already been made to the Children Act which became operational on 26th July 2022. The hits and misses of the Act have also been analyzed.³⁹ This Act has repealed the Children Act enacted in 2001,⁴⁰ and has, as its main objective, the intention to put into effect several provisions of the Constitution dealing with all matters touching on children.⁴¹ In this respect, the Act has attempted to include the intersex child within its objectives by introducing the definition of an intersex child as follows:

‘Intersex child’ means a child with a congenital condition in which the biological sex characteristics cannot be exclusively categorized in the common binary of female or male due to inherent and mixed anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent prior to, at birth, in childhood, puberty or adulthood’.⁴²

The shortcomings of this Act regarding a clear explanation of who an intersex person is, and its failure to proscribe intersex genital mutilations (IGM), or to implement mechanisms towards accurate documentation have been evaluated at length earlier in this research.⁴³ Although the Act seeks to provide for registration and issuance of a birth certificate for every child including an intersex child immediately after birth, gaps in the procedural operationalization are evident. The Act has left it to the Chief Justice to formulate the Rules of Procedure. Absence of these rules therefore means that any rights embodied by the legislation remain as ‘*dead as a dodo*’, as pointed by Justice Dugdale in *Joseph Maina Mbacha & Three Others v. The Attorney General*.⁴⁴ And as Thionkolu observes,⁴⁵ formulation of such rules can take a long time, as happened in the case of *Gibson Kamau Kuria v The Attorney General*,⁴⁶ where the rules were not made until sixteen years later. Proposals are therefore made for the immediate enactment of the procedural rules through which all prescribed forms for issuance of birth certificates in

³⁹ The shortcomings of this Act in relation to facilitating recognition and accurate issuance of identity documents for intersex persons were exhaustively analyzed at pages 150, 209, 224 and 254 of this research, amongst other places.

⁴⁰ Children Act No. 29 of 2022

⁴¹ These provisions include *inter alia* Articles 27, 47, 48, 49, 50, and 51 of the Constitution of Kenya, 2010.

⁴² Children Act, No. 29 of 2022, Section 2.

⁴³ Chapter one.

⁴⁴ *Joseph Maina Mbacha & Three Others v The Attorney General* (High Court Misc. Application No. 356 of 89) (unreported).

⁴⁵ Muthomi Thionkolu, *Landmarks from El Mann to the Saitoti Ruling; Searching a Philosophy of Constitutional Interpretation in Kenya*. (Research Gate 2017) 2.

⁴⁶ *Gibson Kamau Kuria v The Attorney General*, High Court Misc. Application No. 279 of 1985. (Unreported).

the correct gender for intersex children will be undertaken. It is also important to amend the Act to capture the fact that what intersex children require is not just mere registration as contemplated by section 3 of the Act, but accurate registration.⁴⁷ This would remove the kind of problematic situation Mama A found herself in, when the court directed her to ‘move with speed’ to apply for Baby A’s birth certificate.⁴⁸ While Mama A did move with speed and applied for the birth certificate for Baby A as directed by the court, the result was that the child was issued an inaccurate birth certificate. The child was not documented or issued a birth certificate as an intersex, but as a male. The petition by Mama A was thus rendered nugatory. And unless the provisions of the Children Act, 2022 are made explicit, the dangers of them becoming specific intersex non protective remains a reality.

Kenya does permit the amendment of identity documents through the process of swearing a Deed Poll and registering the same in the Registration of Documents Registry followed by Gazettement.⁴⁹ However, the process prescribed by the Registration of Documents Act does not make provision for sex/gender change.⁵⁰ Rye has already been confronted with this hurdle.⁵¹ Although he is in the process of legally changing his name to the masculine names that he has now adopted, the change will leave him with masculine features and a masculine name but still with a female sex/gender classification.⁵² This will not make a difference to the dissonance in his identity documents or remove the challenges presented by those documents.⁵³ This research therefore recommends that the process of amending the documentation regime includes an amendment to the Registration of Documents Act, to allow an intersex person change both their name and sex/gender description on all their identity documents. But these are not the only gaps that need to be urgently sealed. The legal forms through which application for identity documents examined in chapter two are all structured in the binary male and female categorizations. Urgent mechanisms therefore need to be put in place to amend the procedural rules and each individual application forms through which each identity document evaluated earlier is applied for. The key actors for the process is the Chief Justice and the Minister in charge of Interior and Coordination of National Government.

⁴⁷ Children Act, No. 29 of 2022, Section 3.

⁴⁸ *Baby A*, Para 71(iv).

⁴⁹ Registration of Documents Act, Chapter 285 (Laws of Kenya).

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, interview with Rye.

⁵² *Ibid.*, Interview with Rye.

⁵³ *Ibid.*

Birth registration and certification and the national identity cards usually inform most of the other documents officially issued to citizens in Kenya. Creation of appropriate rules of procedure by the State through the Chief Justice and the relevant Ministries may automatically flow into the other documentation issuing regimes. But the regimes issuing the KRA PIN certificate, the NHIF and NSSF cards, passport, driving license, voters card, the digital identity systems and eventually the death certificate all need to simultaneously be amended, for a more holistic safeguard.⁵⁴

Recommendations are therefore made for Kenya, through the National Assembly, to amend legislative provisions or enact intersex specific legislation to accommodate the intersex gender alongside the male and female sex/gender descriptions. If this is done, many of the documentation paradoxes would be addressed. Inclusion of intersex descriptions in the documentation issuing legislation would no doubt have a cascading effect on legislation governing certain human needs. Documentation of Marriages in Kenya is a case in point. In South Africa, changes in legislation saw the broadening of the definition of the term sex to include intersex.⁵⁵ This was made possible through the introduction of South Africa's anti-discrimination laws, which also removed the element of describing marriages as a union between a male and a female.⁵⁶ Kenya can draw from South Africa's example and amend the Marriage Act through which marriages are documented and certificates issued to give them a legal status.⁵⁷ This would see removal of the provisions excluding other sex/genders from the constitutional provisions.⁵⁸ But that would have to be subject to the constitutional reforms recommended above, which would see the restriction of the definition of marriage contained in the Constitution expanded to be all inclusive. As it is, Kenya rigidly identifies itself with Justice Ormond's definition of marriage which was seen as being between persons who are biologically and exclusively male and female as determined in the *Corbett v Corbett case*.⁵⁹ The position is entrenched in the Constitution, which grants every adult the right to marry a person of the opposite sex.⁶⁰ This has meant that marriages where one or both contracting parties is intersex, cannot receive legal recognition or be documented.

⁵⁴ The gaps and inadequacies in the documentation regimes through which the various certificates are issued were comprehensively outlined in Chapter two.

⁵⁵ Ibid.

⁵⁶ Civil Union Act, No. 17 of 2006. Available at <https://www.gov.za/documents/civil-union-act>. (Accessed on 1st June 2022).

⁵⁷ Marriage Act, No. 4 2014 (Laws of Kenya).

⁵⁸ Constitution of Kenya 2010, Article 45 (2).

⁵⁹ *Corbett v Corbett* [1970]2 All E.R 33.

⁶⁰ Constitution of Kenya, 2010, Article 45.

The research is alive to the fact that this would be a very dicey situation, given the cultural, political, and legal framework, which has seen sexual relationships between people who are not binary opposites of male and female remaining criminalized.⁶¹ A careful approach would be needed to first create a specific and clear distinction between unions where one of the contracting partners is intersex and same sex proscribed unions. Perhaps then, society would be open to having marriage unions involving an intersex person included in the law. Such inclusiveness may consequently result in marriage institutions where one or both partners are of the intersex gender, are recognized and documented. The partners in the marriages would therefore enjoy the rights, benefits and protection offered through marriage certificates. As they currently exist, neither ApSiya's nor Rye's marriage is legal, since there is no document evidencing their existence, and there is no law under which they can be documented. Their spousal rights, privileges, benefits and obligations during and even after marriage therefore remain unprotected.⁶²

In terms of making legislative progress, commendable strides have already been initiated as observed above. It is nevertheless necessary to fast track these strides by pushing for the pending Bills to become law and amending those laws which have been passed with certain lacunas and shortcomings in place. To correct the gaps in the documentation regime, intentional steps towards constitutional reform, amendment of all pieces of legislation through which documents are issued and or enactment of protection legislation need to be urgently undertaken. These will enable documentation to be issued reflecting the persons true sex/gender and thus, help ease the documentation dilemma that intersex persons are forced to contend with. The primary duty bearer is the State on whom the obligation towards fulfilment everyone's rights rests. Other actors include the Kenya Law Reform Commission, whose key mandate is to review and harmonize the existing laws in Kenya.⁶³

c) Explicit prohibition of non-therapeutic sex reassignment procedures.

Recognizing intersex persons and issuing them with identity documents in their correct sex/gender would no doubt translate to enhanced protection in several areas of their lives. Since an intersex gender would become a legally recognized, known and socially accepted sex/gender category, there would be no need to subject intersex persons to urgent and unnecessary surgical

⁶¹ The Penal Code, Chapter 63 (Laws of Kenya), Section 61.

⁶² Interview with ApSiya and Rye, both of whom are in undocumented and non-documentable marriage unions. The law would not accommodate these two intersex persons in the event of matrimonial rights and obligations during and in the event of a dissolution of the union.

⁶³ Kenya Law Reform Commission KLRC - Kenya Law Reform Commission (KLRC).

and other forms of medicalization processes to realign their sex/gender to the known. The voices of those who have undergone what is usually referred to as ‘corrective and normalization’ sex realignment treatments, for no known therapeutic reasons, confirm that these procedures are nothing short of intersex genital mutilations (IGM).⁶⁴ For them, IGM is one of the worst forms of gender-based violence (SGBV) committed against people born with double genitalia.⁶⁵ Indeed, as already observed, many jurisdictions have condemned IGM and equated it to female genital mutilation (FGM). FGM has globally been documented as a harmful form of violence culturally committed against women and girls on account of their sex/gender. Many countries have criminalized FGM through legislation and rebuked it through judicial pronouncements. In *Tatu Kamau v Attorney General & 2 others (Tatu Kamau)*,⁶⁶ the court decries the practice and observes its negative impact on the right to health, human dignity and even the right to life in instances when the procedure results in death. According to the court, that is the reason why FGM has been banned through the provisions of international and regional human rights instruments. Any practice which undermines the set human rights standards the way FGM and IGM, does must remain proscribed. But IGM has also explicitly been recognized as constituting torture, cruel inhuman and degrading treatment, a series of acts prohibited under the Constitution.⁶⁷ And Kenya has put in place legislation that criminally holds to account perpetrators of SGBV and FGM, both of which can be deduced from IGM procedures.⁶⁸ There is, however no legislation proscribing or criminalizing IGM.

The research acknowledges that actions which result into intersex genital mutilations (IGM) and sexual and gender based violence (SGBV) committed under the guise of so called ‘curative treatments’ may not always constitute a criminal intention. In most cases, the objective is to try and document intersex persons in one of the available gender options, certify them in that sex/gender and satisfy society’s expectations.⁶⁹ The non-intended consequences of IGM can, however, never be a justification for causing anyone the kind of violence intersex persons

⁶⁴ Interview with KK and Jane.

⁶⁵ Ibid.

⁶⁶ *Tatu Kamau v Attorney General & 2 others; Equality Now & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* [2021] eKLR, Para 214.

⁶⁷ KNCHR, *Equal in Rights and Dignity promoting the Rights of Intersex persons in Kenya* and the Intersex Task Force Report, 2018, 63-65 and 104.

⁶⁸ SGBV and FGM are both acts of violence perpetrated on the victims on account of their innate gender, and both of which are criminalized in Kenya under the Sexual Offences Act (SOA), Protection Against Domestic Violence (PADVA) and the Prohibition Against Female Genital Mutilations Act Kenya.

⁶⁹ The society has a predetermined expectation that a child in Kenya can only be born either male or female.

undergo on account of their sex/gender.⁷⁰ Indeed, intersex persons and parents of intersex children interviewed, strongly condemn these non-therapeutic treatments based on personal suffering and irreversible experiences.⁷¹ They deeply feel that sex reassignment surgeries should never be carried out without the informed consent of the recipient and certainly never in infancy, unless there is an urgent medical necessity.⁷² If they do, then the procedures should constitute IGM and SGBV and the perpetrators should be dealt with in accordance with the law.

This research therefore recommends that treatments involving surgical modification of intersex genitalia performed purely for purposes of realigning and fashioning it into genitalia that can be documented in the binary be proscribed. This can be done through the introduction of amendments to the existing legislation which criminalizes both FGM and various forms of SGBV.⁷³ IGM can be included as a form of SGBV, and genital mutilation as defined in the SOA and Anti FGM Act respectively. The two pieces of legislation can be expanded to include intersex genitalia.⁷⁴ The primary duty holder in the legislative process is the State through the bicameral legislature consisting of the National Assembly and the Senate, both of which are vested with the authority to make laws in Kenya.⁷⁵ Intersex persons however have the opportunity to not just move their representatives in the two houses, but also to participate in the revision and amendment processes. The Constitution of Kenya creates an avenue for them to do this.⁷⁶ Amendments to the law introducing penal sanctions may help address some of the gaps which so fundamentally negatively impact the right to health for most intersex persons. The legal repercussions that are likely to attach, may help reduce instances of IGM without justifiable medical reasons.

Legal consequences can also attach through investigations and subsequent prosecution and punishment of any medical person who undertakes the nontherapeutic ‘treatments’. But also, parents or guardians of intersex children who permit unnecessary medical interventions purely for social reasons should also be held to account.⁷⁷ This would ensure that those responsible

⁷⁰ This should be in the same way that FGM can never be justified on account of sex/gender, even where it is intended to comply with certain cultural requirements, as was determined by the High Court in *Tatu Kamau* .

⁷¹ Interview with intersex persons, parents and guardians of children who have been subjected to the surgical and other forms of treatments, including hormonal interventions for no apparent therapeutic need.

⁷² Ibid.

⁷³ The Sexual Offences Act and Prohibition of Female Genital Mutilations Act respectively.

⁷⁴ Ibid.

⁷⁵ Karuti Kanyinga, *Kenya: Democracy and political participation* (Open Society Foundation 2014)81.

⁷⁶ Constitution of Kenya, Articles 118 and 119.

⁷⁷ Ibid.

for medically unfounded surgical and medical procedures, which end up drastically affecting many aspects of intersex persons lives, are brought to account. This may help discourage the practice.⁷⁸

The research appreciates the dangers and limitations posed by proposed criminal responsibility for medical personnel and parents/guardians of intersex children who may be complicit in any intersex genital mutilations. It further acknowledges that prosecuting medical personnel and parents or guardians of intersex persons constitutes drastic measures. This is because the intersex condition is a phenomenon that creates some social and medical urgency, given that it is almost undiscussed and therefore mostly not understood in Kenya.⁷⁹ But drastic, as these legal measures may seem, they are necessary. Indeed, most parents and medical personnel act due to pressure to conform with societal binary norms to declare and document a child as a girl or a boy. According to one paediatric surgeon interviewed for this research, who wishes to remain anonymous:

‘I have undertaken ‘corrective’ procedures on a child born intersex acting from pressure from a mother who wanted to be able to describe her child in a definite sex/gender. Even though I agree it is best to delay permanent medicalization, sometimes pressure from parents is too much.’⁸⁰

Medical personnel need to acknowledge and explain to parents that the presence of intersex genitalia is not a disease requiring treatment, correction, or normalisation at birth. Due regard must be given to the permanent and irreversible future debilitating effects of the nature and kind that KK, Erica and Sebbo have been subjected to.⁸¹ The measures recommended in this section would therefore serve to allow intersex children grow as intersex and thereafter decide for themselves, with proper information and capacity to consent, if or not they would like to have their genitals remodelled.

Putting in place the drastic legal measures suggested above would certainly come with certain pitfalls. While such measures are likely to discourage the performance of nontherapeutic

⁷⁸ Under the Prohibition of Female Genital Mutilations Act, anyone who aids or abets the commission of the practice including parents can be held culpable.

⁷⁹ Ibid.

⁸⁰ Interview with XA, a paediatric surgeon from a private hospital in Nairobi on 20th May 2019. This respondent requested absolute anonymity for fear of backlash from her community.

⁸¹ Interview with KK and Jane.

medically unnecessary interventions conducted purely for social reasons, they may also deter necessary medical interventions, thus exposing those who need the interventions. Utmost care therefore needs to be taken.

It is not possible for any society to have legislation that specifically recognizes and protects every right or proscribes every action. However, intersex specific legal provisions undertaken through initiatives by the specified actors are necessary. These would act as umbrella legislations, to cover rights and prohibit actions that occur because of non-documentation, and from which hopefully, other protections would flow.

d) Policy reforms in the health, education, and employment sectors.

This research, in chapter three, examines human rights violations suffered by intersex persons in the spheres of health, education and employment, due to lack of accurate identity documents.⁸² The research demonstrates the manner in which intersex persons have had, and continue to have, access to these three key socio- economic rights limited, due to lack of legal recognition and proper identity documents.⁸³ While this is a legal research and the recommendations made are mainly geared towards legislative reforms to address the various gaps, the research recognizes that legislative reforms cannot be divorced from policy reforms. Policies are planning tools which guide actions for purposes of service delivery.⁸⁴ It is Policy that articulates what is contained in law, convert the law into reality and help provide working solutions for identified problems.⁸⁵ Specific but urgent reforms aimed at correcting legal anomalies identified in the health, education and employment sectors for people born intersex should therefore be undertaken through policy adjustments. Several actors are responsible for policy formulation. The principal duty bearer would be the State through the Kenya Institute for Public Policy Research and Analysis (KIPPRA), which has the legal mandate to advice government on Policy matters.⁸⁶ This would be in collaboration with other specific stakeholders in the health, education and health sectors as recommended below:

i) Policy Reforms in the health sector.

⁸² As explained in Chapter three.

⁸³ Ibid.

⁸⁴ Betty Priss Njoki, Policy Making Process in Kenya: A case Study of the Preparation of the Biosafety Act, 2009' Master of Arts Thesis, University of Nairobi, 2011. 3-5.

⁸⁵ KIPPRA-Policy_Formulation-Brochure_Revised Accessed on 1st December 2022.

⁸⁶ Who We Are – KIPPRA Accessed on 1st December 2022.

Starting with the health sector, this study portrays that discrimination and unequal treatment arises in the first instance from the forms used for registration of an intersex patients seeking health services.⁸⁷ Since both outpatient and inpatient registration forms do not capture intersex persons, they present a key challenge during access to health care.⁸⁸ Policy change is one way of reforming this. A policy of introducing intersex gender inclusive patient registration forms in both public and private hospitals would be the first step to accurately capture the patient's important details for purposes of treatment. When a patient who is intersex has the option of ticking intersex as their true gender, the medical person dealing with their case immediately knows that this is a unique patient who is neither male nor female. This will no doubt reduce instances of humiliation and discrimination that Syd and KK have had to undergo, since initial registration documents will have captured their correct gender.⁸⁹ Restructuring of the patients' records can be made internally in both private and public health facilities, with the respective hospital administration being the key actors.

Another component of the policy changes aimed at resolving issues in the health sector should include reformation of the Patient's Charter in relation to medical interventions on intersex genitalia ordinarily carried out without consent in writing.⁹⁰ While the Charter protects every patient from non-consensual non informed treatments of any nature, it is silent when it comes to medical interventions to intersex genitalia constituting IGM.⁹¹ Presenting research demonstrating the reality of the devastating impact of IGM to Policy framers may show the reality. There is therefore an urgent need to amend the Charter to protect intersex persons from being subjected to interventions of any form to their genitalia, without the concerned person's informed consent. Unless an urgent medical justification can be shown, these should as a general rule be banned.⁹² In this regard, the research recognises that situations may exist where medical interventions must be undertaken in infancy as a matter of medical emergency and therefore are justifiable. Literature has documented cases where necessary biological functions such as elimination of body waste including urine and or faeces is rendered impossible because of the formation of the intersex genitalia.⁹³ In such cases, immediate intervention is urgent and

⁸⁷ Interview with KK .

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Chapter three.

⁹¹ Ibid.

⁹² Brian Dearp, 'Zero Tolerance for Genital Mutilation: A Review of Moral Justifications' (2020)12 *Current Sexual Health Reports* : 1 287-288.

⁹³ Sharon Preves, 'Sexing the intersexed: an analysis of sociocultural responses to intersexuality' (2002)27 *Journal of women in Culture and Society* 2: 545.

necessary. It is therefore recommended that the Charter not only captures this aspect but also lists examples of emergency needs.

But the Charter should also include provisions to the effect that thorough medical diagnostic investigations be conducted before any surgery is undertaken. These tests would be for purposes of establishing beyond any doubt, that the interventions are absolutely necessary at that point in the infant's life and as a matter of emergency. This research recommends further that in such a situation, the final decision to surgically intervene should only be arrived at after full consultation with a multidisciplinary board as happens in Columbia and Malta.⁹⁴ Such a decision arrived at by a multidisciplinary team is also what both *RM* and *Baby A* were proposing.⁹⁵

But even where immediate intervention must be undertaken in infancy, the research recommends that necessary information including the benefits and possible future risks be provided in writing to the parents or guardian of the child, and a consent thereafter obtained. This would be like the 'qualified and persistent' form of consent prescribed by the Constitutional court in the *Gonzalez* case in Columbia.⁹⁶ A written informed consent must thereafter be obtained in line with the provisions of the Health Act.⁹⁷ Reform of the Charter would be the responsibility of the State through the Ministry of Health, but also in consultation with key stake holders including intersex support groups and KNHRC.

Further all the medical procedures undertaken should comprehensively be documented and availed for the patient's reference later in life, should the patient so require, in line with the Constitutional right to information.⁹⁸ This would ensure that cases such as those of Mercy, Baby A, and Jane's child, who were put through medical and surgical interventions of unknown nature and extent during infancy, and which they cannot establish in adulthood, no longer happen.⁹⁹ In many of the cases seen in this research, the empirical evidence is that the presence of double genitalia is neither life threatening nor a medical emergency.¹⁰⁰ In such cases,

⁹⁴ Chapter five.

⁹⁵ *RM* and *Baby A*, Para 49 and 20 respectively.

⁹⁶ *Sentensia* T-447/95, *Gonzalez* case.

⁹⁷ Health Act No. 21 of 2017, Section 9.

⁹⁸ Constitution, 2010, Article 35.

⁹⁹ Interview with Mercy, Baby A's mother and Jane.

¹⁰⁰ For example, KK and Sebbo, Jane's child's cases. From the facts put before court, there was no evidence of immediate threat to Baby A's life shown to justify the modification and mutilation of the child's genitalia either.

irreversible surgical or any other form of medicalization without the person's direct consent should never be a priority.

Policy reform to capture the unique health needs of the intersex persons is useful, but it is important that the health needs be accurately addressed to avoid more challenges for those the reforms are meant to address. Looking at the National Reproductive Health Policy 2022-2032 unveiled in July 2022, for instance, it is clear that the public officers responsible for its development did not factor in the unique needs of the intersex person.¹⁰¹ While the policy captures the intersex person at least fourteen times, and there are a few commendable provisions regarding protection measures, the policy does create real problems for the intersex person. The first problem arises with the definition of a person born intersex. This definition, with reference to previous literature, considers the intersex condition as a 'disorder'.¹⁰² The Policy compounds the problem further by referring to the intersex condition as a 'disabling developmental state presenting with ambiguous genitalia at birth.'¹⁰³ Such a description is likely to lead to a situation where the parents of an intersex child and the medical team, to immediately think of the condition as a 'disease', a 'disorder' and a 'disabling condition' requiring immediate and urgent attention. Equating the intersex condition with disorders and disabling conditions is usually what has led to medical interventions to 'remove' the disorder and the disabling aspects, thus constituting IGM, which the policy does not prohibit.¹⁰⁴ The Policy for instance captures SGBV and FGM as factors affecting reproductive health rights of certain members of society in Kenya and aligns it to the legal frameworks prohibiting these vices.¹⁰⁵ However, it makes no mention of IGM, an equally debilitating practice directed at intersex genitalia and negatively impacting their reproductive health rights as earlier demonstrated.¹⁰⁶ This situation calls for urgent amendment for not bearing in mind the wellbeing of the target group.

Sihanya has underpinned the need for public policy makers to undertake their mandate with the wellbeing of the people targeted by the policy in mind.¹⁰⁷ While the Reproductive Health Policy is meant to improve the wellbeing of everyone including intersex persons in Kenya, clearly, the formulators did not have what Sihanya contemplates in mind. Restructuring the Policy by the

¹⁰¹ Ministry of Health, *The National Reproductive Health Policy 2022 – 2032* (Government of Kenya, 2022).

¹⁰² National Reproductive Health Policy 2022-2032, Kenya ix.

¹⁰³ Ibid, 28.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid, 3.

¹⁰⁶ Interview with KK.KK cannot exercise his reproductive health rights due to the IGM he was forcefully put through in infancy.

¹⁰⁷ Ben Sihanya, 'Constitutional Responsibilities of Public Officers in (un)making Public Policy Rules and Regulations in Kenya' (2017) 9 *The Nairobi Law Monthly*.

Ministry of Health, to make adequate protection for intersex persons' health needs is therefore necessary. First, the Policy needs to recognize that intersex is a sex/gender category distinctively and biologically different from the male and female categories. By retaining the sex/gender categorization in the female and male sex/gender categories in Kenya therefore, the Policy excludes those who are born intersex, and this needs amendment.¹⁰⁸ Second, even though it is meant to take care of the health and wellbeing of everyone including those born intersex in matters of reproductive health, the definition of the intersex condition flies in the face of this protection. A Policy recognizing the wellbeing of the intersex person as a separate and unique gender with unique health needs is therefore critical. It is therefore necessary for the Ministry of Health to formulate a better policy framework which captures the most serious aspects of the needs of intersex persons as already detailed.¹⁰⁹

ii) Policy reforms in the education sector.

Empirical evidence collected in the course of this study, which is confirmed by documented data, indicates that the dropout rate for intersex learners is at least 95%.¹¹⁰ This worrying school dropout rate has been attributed to several reasons. These include stigma, lack of acceptance due to ignorance of the condition and lack of basic facilities such as intersex friendly toilets.¹¹¹ Alarming dropout rates for any child ought to be a matter of concern to the Ministry of Education, given that education is a critical social economic right, access to which impacts a great deal on other rights.¹¹² This ought to be a pointer to the State through the Ministry, to put in place reforms which facilitate inclusive education for all. This would be in line with the UNESCO guidelines which underpin the value of inclusive education. These require measures that address and respond to the diversity of needs of all learners through increasing participation in learning cultures for all communities to reduce exclusion within the education sector.¹¹³ Further, inclusive education is an internationally recognized right for everyone regardless of their circumstances.¹¹⁴

¹⁰⁸ The National Reproductive Health Policy 2022-2032,28.

¹⁰⁹ Ibid. The body of the Policy does not contain any provision prohibiting nontherapeutic intersex genital manipulations, leaving it open to doctors and parents to continue to operate on intersex genitalia unabated.

¹¹⁰ Interview with Rye and KK. See also Kenya Human Rights Commission, *The Outlawed Amongst Us: A Study of The LGBTI Community's Search for Equality and Non-Discrimination in Kenya* (Kenya Human Rights Commission 2011).

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ UNESCO Guidelines for inclusion in education. <https://unesdoc.unesco.org> (Accessed on 15th July 2022).

¹¹⁴ CRPD, Article 24 forbids the exclusion of children with disabilities from learning opportunities.

This research therefore suggests that the State, through the Ministry of Education, puts in place urgent policy reforms in the education sector generally, and in learning institutions specifically, to ensure inclusion of intersex learners. Such reforms should be geared towards not just ensuring removal of all hurdles preventing intersex persons from joining schools, but also to ensure that they remain in school and benefit from education like any other member of the society.

Another key reform would be through changes in the curriculum currently offered in basic education studies. It would be useful to include information explaining to children the existence of three sex/gender categories in the science and biology syllabuses. Children understanding early in life, that contrary to what has always been believed, there are some children who are born as boys, others as girls and others intersex, is key to acceptance. When children are taught that biologically people can be born in the three sex/gender categories, then it will be easier to understand and accept that even though different, children born intersex are also children. Like the rest of them. If these key facts are infused into the education system, society will learn from an early age that a third sex/gender category exists, and it is not abnormal. Once this acceptance has been made, intersex children will be accepted and just as boys and girls have accepted each other and have been leaning in harmony, girls, boys and intersex children will harmoniously coexist, as each accesses their right to education.

Review of the curriculum and restructuring of textbooks through which sex/gender is taught is therefore necessary. The principle actor in these reforms would be the State through the Institute for Curriculum Development (KICD), the government arm mandated to design, develop, and implement reforms in the curriculum for both primary and secondary school levels. Learning material should document the intersex gender as a sex/gender that one can biologically be born with, and that being different, does not make them subhuman.

Knowledge and information through education to peers, teachers and everyone in the school environment is likely to enhance acceptance. If accepted as part of the population in the education sector, levels of dropouts caused by stigmatization can reduce, hence allowing intersex learners to access their right to education. The responsibility of ensuring that intersex learners are accepted in schools would rest with the School Principals, teachers and the entire administrative arm of the various learning institutions.

This research has established that a key cause of extreme stigma for intersex persons, especially at puberty, is the start of menstruation. The menstruation process has historically been a cause of school dropout, not just for intersex persons, but for adolescent girls generally. Indeed, the situation was so dire in Kenya that the government amended the Education Act to make provision for free, quality, and sufficient sanitary pads for every female learner registered in school. These provisions were put in place positively targeting female learners, because their biological framework qualifies them as special needs students. Many intersex persons have been forced to drop out of school because of menstruation related problems and the stigma associated with it. As ApSiyā explains:

‘.. there I was, a ‘boy’, wearing a shirt and blue shorts, with menstrual blood coming out of me and running down my legs, and with the entire school, including the teachers, surrounding me and laughing at me...’ After that, how could I come back to that school again?

With such a hostile environment surrounding them, it is difficult for intersex learners to proceed with school. Educating students and teachers that intersex children may menstruate, since some of them have female reproductive organs, is important and should be included in the policy requirements. But also, just like the government has taken up the obligation to provide sanitary pads for every female school going child to help keep them in school, intersex children should be included in this noble intention.

And as the education sector addresses the right to dignity through provision of sanitary towels for intersex children, attention needs to be given to basic facilities such as toilets, which intersex persons can use without compromising their dignity like Syd was made to by the jeering of his peers.¹¹⁵ Malta has introduced gender neutral toilets in all public spaces, including schools. Kenya can borrow this model from Malta.¹¹⁶ All that the school administration needs to do, is designate one toilet for intersex learners who, due to their genital framework, may need to either squat or stand. In any case, schools have designated separate toilet facilities for male and female learners, thereby preserving the dignity of each sex/gender.

¹¹⁵ Interview with Syd on 16th December 2019.

¹¹⁶ LGBTIQ Equality Strategy & Action Plan 2018-2022, 12.

Another area requiring urgent change to incorporate intersex learners is the academic certification process.¹¹⁷ This is with regard to the sex/gender markers which are indicated as either male or female. An option for curing this would be for KNEC to restructure its certification process to include an intersex gender marker, alongside the male and female markers. The research, in making these suggestions, has not lost sight of the importance of the country to collect and retain sex/gender disaggregated data, which is collected during certification processes. This data is used to track learners' progress and as well as for purposes of eliminating sex/gender based barriers in educational institutions, and would be useful even for intersex persons themselves. Consequently, a more workable recommendation would be for KNEC to collect the sex/gender classification data as is normally done, have it archived for future tracking and policy purposes, but remove the sex/gender option mandatory requirement in educational certificates from the face of the certificate physically issued to the learner.¹¹⁸ This way, intersex persons will not find their academic documents fixed into a sex/gender category that they do not belong to, as is the case of Rye and Langa.¹¹⁹ In any case, as the High Court observed in *Audrey Mbugua*, there is no legal requirement for education certificates to have a sex/gender marker.¹²⁰ Not having a gender marker on a certificate does not dilute the quality of the certificate.¹²¹ This would therefore be a better option for intersex persons. And where intersex persons have certificates issued in the wrong gender, then KNEC should make it possible to make the necessary alterations. Avenues to alter the certificates would ensure that intersex persons do not have to possess discordant certificates which are not only of no value, but are even more repressive.¹²² The Court of Appeal has now confirmed that the Kenya National Examination Council has the responsibility of effecting changes in academic certificates and or issue new certificates, and can do this even without a policy framework.¹²³ However, policy framework is necessary to capture these changes and locate them within the legal framework. Intersex persons would then be able to have their academic documents changed with ease, should the need arise in future.

¹¹⁷ In the Kenyan educational system, the body mandated with certification is the Kenya National Examination Council (KNEC).

¹¹⁸ Even though the aspect of the gender marker was addressed comprehensively by both the High Court and the Court of Appeal in *Audrey Mbugua*, the decision there was specific to Audrey and did not constitute policy. Every intersex person would therefore have to file suit to have the sex/gender marker removed from all their educational certificates, which may not be possible for many.

¹¹⁹ Interview with Rye and Langa.

¹²⁰ *Republic v Kenya National Examinations Council & another ex-parte Audrey Mbugua Ithibu* [2014] eKLR.

¹²¹ *Ibid.*

¹²² Rye, Langa and KK have certificates that are all discordant with their gender thereby being of no value.

¹²³ *Kenya National Examinations Council v Republic & 2 others* [2019] eKLR. (*Audrey Mbugua*)

To streamline these changes, recommendations are made for the government through the Ministry of Education, to put in place a comprehensive education policy similar to what the Maltese government has put in place.¹²⁴ Such a policy would ensure removal of discriminatory practices towards intersex learners, create a safe learning environment and remove contradictory certification processes.

iii) Policy Reforms in the Employment Sector.

The study has been able to point out the correlation between lack of education and diminished employment opportunities.¹²⁵ Since intersex persons' access to education is imperiled by many reasons including stigmatization aspects which forces them to drop out of school, they are in effect doubly impacted. Without an education, it becomes difficult to compete in the employment sector. This is the case for Mercy, who has to contend with menial jobs, which are also difficult to get, because of her intersex status, which is mostly not understood.¹²⁶ The fact that she has no form of education means that her employment opportunities and bargaining power is enormously limited.

The court in *RM* was being urged to acknowledge the correlation between lack of education and reduced employment opportunities.¹²⁷ And even though the court declined to make this linkage, it is a reality for intersex persons as Mercy's case demonstrates.¹²⁸ If the recommendations made regarding education are put in place, intersex persons may be able to remain in school, get an education like other learners and eventually secure accurate legally acknowledgeable academic documents. This way they will be able to competitively engage with the employment market equally with other Kenyans of the male and female sex/genders categories, without being disadvantaged *ab initio*.

For these changes to seamlessly happen however, policies in employment would need to be in place to accommodate them. To begin with, and by virtue of belonging to a minority sex /gender and vulnerable group, affirmative action measures as constitutionally provided need to be initiated.¹²⁹ And for purposes of their comfort at the workplaces, provision of neutral toilets in every building should be a requirement, just like constitutionally provided for members of the

¹²⁴ Malta Educational Policy.

¹²⁵ Interview with Mercy.

¹²⁶ Ibid.

¹²⁷ *RM*.

¹²⁸ Interview with Mercy.

¹²⁹ Constitution of Kenya 2010, Article 27(6).

population with varying unique needs.¹³⁰ The responsibility of changing policies in this regard lies with the State through the Ministry of Labor. Other duty bearers include respective employers in both the public and private sectors, to ensure that toilet facilities are availed and that no one is discriminated or stigmatized on account of their intersex status.

The process of policy making is complex and involves several factors such as undertaking of further research in specific areas as well as lobbying. Policy change can also be hindered by government, society and other bureaucracy processes. However, it is important that the processes are started.

6.3.1.2 THE JUDICIAL PROCESS ROUTE.

From the depositions of the intersex persons interviewed, it is clear that historical injustices of immeasurable levels have been committed on them due to the omission by the law to recognize or issue them with accurate identity documents. They have had access to their socio-economic rights and other human needs curtailed without recourse. They have had their bodies amputated and mutilated without legal redress.¹³¹ Exploring the angle of legally redressing historical violations in Kenya through judicial processes at the domestic, regional, and international levels would be worthwhile. This would be in line with the corrective justice theory. And that possibility exists now more than before because the Constitution now provides a wider platform and a bigger space to litigate on various human rights violations. Cases can be taken to court based on the right to access justice for all.¹³² This is also advantageous in that the Constitution provides that filing of such cases should not be impeded by unreasonable court fees.¹³³ Litigation can be initiated based on curtailment of access to social economic rights.¹³⁴ It can also be commenced on the basis of equality and nondiscrimination in the process of provision of identity documents.¹³⁵ With the extensive Bill of Rights enshrined in the Constitution, intersex persons can take advantage of the expanded basis for litigation aimed at arriving at provisions for accurate identity documents and attendant rights. The platform is now much

¹³⁰ Through Article 54 (i)(e) of the Constitution of Kenya, 2010, both public and private entities are obligated to provide devices to ensure accessibility arising from the innate conditions that persons with disabilities must contend with. Consequently, accessible ramps and disability friendly toilets have been created in all public places. Using the same provision, separate toilet facilities can be created for intersex persons for the preservation of their dignity.

¹³¹ Cases of *KK, Erica and Sebbo*.

¹³² Constitution, of Kenya 2010, Article 48.

¹³³ *Ibid.*

¹³⁴ Constitution, Article 43.

¹³⁵ Both *RM* and *Baby A*, were *inter alia* anchored on these principles.

wider for every Kenyan to draw from. The judicial process route can take several dimensions as is suggested below:

i) Public Interest Litigation (PIL) and Class Action Suits (CAS).

Public interest litigation (PIL) or class action suits (CAS) as they are known in certain jurisdictions, may be a good approach for drawing attention to the challenges that intersex persons have faced and continue to face due to non-recognition and inaccurate documentation. Historically, PIL has been used as a strategy to shape social policy, remedy long standing social injustices and bring about social justice through social change.¹³⁶ The 1954 seminal US case of *Brown v Board of Education* exemplifies this position.¹³⁷ In this case, the Petitioner did not assert any private injury and neither did he claim any damages. However, the case and the media attention that it attracted, forced the American society to focus on the injustices being occasioned in public schools in America's education sector through racial discrimination.¹³⁸

The strategy undertaken in the *Brown v Board of Education* case can be used to bring to the fore, discrimination and inequality against intersex persons in all the realms examined in the previous chapters. With the broadening of the *locus standi* component by the Constitution, it means that it is now easier for anyone concerned with the injustices meted on them to utilize the PIL strategy. The Constitution allows any person, with or without direct interest in a matter, to institute court proceedings, so long as they can show that a right or fundamental freedom has been infringed, denied, or violated.¹³⁹ Through these provisions, any person can take up the cause on behalf of intersex persons whose rights and needs have been infringed, denied, and or violated through deprivation of identity documents which everyone is entitled to.¹⁴⁰ But also, intersex persons who have directly suffered systemic violation of social economic rights and unquantifiable needs, can themselves engage the courts by filing individual or class action suits.¹⁴¹

And precedent setting cases have been filed against the government and government agencies in Kenya in the past. These cases have not just been groundbreaking but have also attracted

¹³⁶ Kenyans for Peace with Truth and Justice (KPTJ), Africa Centre for Open Governance (AfriCog) and Katiba Institute, *A Guide to Public Interest Litigation (PIL) in Kenya*, (Kenyans for Peace with Truth and Justice (KPTJ) 2014)1-2.

¹³⁷ *Brown v Board of Education* (347 US 483)1954.

¹³⁸ KPTJ, AfriCog and Katiba Institute, 2.

¹³⁹ Constitution of Kenya, Articles 22(1) and 258(1).

¹⁴⁰ The Constitution through Articles 22(2) and 258(2) allows individuals who are directly affected to file suits on their own behalf and on behalf of others in the same class.

¹⁴¹ *Ibid*, Article 258(2).

positive international media attention. One such case is *CK and 11 Others v the Commissioner of Police*, popularly referred to as ‘the 160 girls’ case.¹⁴² Here, a group of girls challenged the government’s inaction through the failure to investigate and prosecute prevalent defilement cases against young girls in Meru County. Kamau and Kamau, commenting on the case, observe that in addition to drawing a lot of media attention, the case has had important implications in terms of how government will handle cases of that nature in future.¹⁴³ Such media attention for intersex persons would probably have a positive impact.

The research is fully aware the litigation route may not be an easy one for intersex persons with respect to some of the claims, given lapses in time.¹⁴⁴ However, precedents do exist in different jurisdictions where such time limitations have been waived. Judicial victories have for instance been recorded in places like Colombia and Germany, where time limitations were disregarded and successful litigation undertaken.¹⁴⁵ The Tuskegee Syphilis study CAS is another good example.¹⁴⁶ Even though these precedents are of persuasive value only, Kenya could borrow from them and hope for some measure of success. But in Kenya also, the Court of Appeal has, in a number of landmark judgements, determined that the Statute of Limitation can be suspended, when it comes to violation of human rights.¹⁴⁷ The Court of Appeal sitting in Kisumu has affirmed this position when in *Zehrabanu Janmohammed (S.C) (suing as the Executrix of the Estate of Daniel Toroitich Arap Moi & another v Susan Cherubet Chelugui & Another (suing as the Administrators of the Estate of the Late Noah Kipngeny Chelugui) & four others*,¹⁴⁸ it states as follows:

‘In our view, subject to the limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act’.¹⁴⁹

¹⁴² C K (A Child) through Ripples International as her guardian & next friend) & 11 others v Commissioner of Police / Inspector General of the National Police Service & 3 others [2013] eKLR.

¹⁴³ Winifred Kamau and Kieya Kamau, *Case Comment: Victory for 160 Girls in Defilement Constitutional Challenge: Petition No. 8 of 2012, High Court of Meru, C.K. (A Child) & 11 Others v. Commissioner of Police/Inspector-General of the National Police Service & 2 Others*. Available at Kenya Law: Case Comment – Victory for 160 Girls in Defilement Constitutional Challenge (Accessed on 1st August 2022).

¹⁴⁴ Civil actions in Kenya are subject to time limits as set out in the Limitations of Actions Act, Chapter 22 of the Laws of Kenya.

¹⁴⁵ Colombia’s *Sentensia cases* and Germany’s *Re Volling case*.

¹⁴⁶ Tuskegee Syphilis study class action suit.

¹⁴⁷ Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR.

¹⁴⁸ *Zehrabanu Janmohammed (S.C) (suing as the Executrix of the Estate of Daniel Toroitich Arap Moi and another v Susan Cherubet Chelugui & Another (suing as the Administrators of the Estate of the Late Noah Kipngeny Chelugui) and four others*. (Civil Appeal No. 159 of 2019(unreported)) Available at kenyalaw.org/caselaw/caselawreport/index_original. (Accessed on 4th August 2022).

¹⁴⁹ *Ibid*, Para 62.

The court has of course clarified that every case depends on its own merits.¹⁵⁰ But this research has also demonstrated that denial of legal recognition and accurate documentation violates human rights and needs of intersex persons, guaranteed under the constitution. It can therefore be argued that violations suffered by intersex persons fall under the purview of suits that the court intends to remove from the shackles of the Statute of Limitation.

Litigation can however be double edged and must be approached with caution. Bad precedents can be retrogressive and can have the potential to erode any gains made. However, sometimes any exposure, positive or negative, may have an impactful event later.¹⁵¹ So, even if the litigation strategy may not be successful in terms of getting remedies for the aggrieved persons due to the limitation provisions entrenched in the law, it still may serve a purpose. Cases of PIL and CAS nature, even where unsuccessful, have been known to generate positive public outrage and inform the public that certain injustices are occurring against a specific group of people through no fault of their own.¹⁵² This outrage would hopefully spur some form of social, political and other actions leading to positive change.¹⁵³

ii) Institution of criminal prosecutions.

According to Abuya, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), can be used as a practical tool to enhance protection of certain categories of people who find themselves in situations of vulnerability.¹⁵⁴ And indeed, the Committee Against Torture,¹⁵⁵ in its Concluding Observations on the Seventh Periodic Report on France, did make a recommendation which is key for this research in terms of practical tools for protection of intersex persons.¹⁵⁶ Here, the Committee gave specific directions to State parties to CAT to arrange to investigate cases where sex reassignment interventions have occurred on intersex persons without an informed consent.¹⁵⁷ Kenya is a State Party to CAT.¹⁵⁸ In addition, Kenya legislated the Prevention Against Torture Act in 2017, with the aim of

¹⁵⁰ Ibid.

¹⁵¹ RM opened the intersex debate publicly in the legal sphere. Even though RM was not successful in most of the issues he was raising, the case had the impact of parliament legislating the Persons Deprived of Liberty Act, amongst other positive milestones already examined.

¹⁵² Brown v Board of Education and Tuskegee Syphilis CAS/PIL cases are good illustrations.

¹⁵³ KPTJ, AfriCog and Katiba Institute, *A Guide to Public Interest Litigation (PIL) in Kenya*, 1.

¹⁵⁴ Edwin Abuya, 'Reinforcing Refugee Protection in the Wake of the War on Terror' (2007) 30 Boston College International and Comparative Law Review 2:2, 277.

¹⁵⁵ The Committee Against Torture is the monitoring body on The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

¹⁵⁶ This was at the CAT Committees' 1396th and 1399th meetings, held on 19 and 20 April 2016. (CAT/C/FRA/7).

¹⁵⁷ Ibid, Para 35(d).

¹⁵⁸ Kenya ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1997. FHRI_PRI_Kenya_CAT50.pdf (ohchr.org) (Accessed on 12th December 2020).

implementing its obligations under CAT.¹⁵⁹ Nonconsensual, non-informed and nontherapeutic genital modifications on intersex genitalia have been confirmed to constitute intersex genital mutilation (IGM). IGM has in turn been determined to constitute torture, cruel and inhuman treatment. Consequently, Kenya bears the duty and obligation to conduct investigations into any non-therapeutic procedures conducted on intersex genitalia in the past.¹⁶⁰ Further, surgical and other forms of medicalization aimed at modifying and reassigning sex/gender of the nature conducted on Mercy, KK, Erica and Sebbo, amount to acts that constitute SGBV and IGM. IGM has been equated to FGM. Practices constituting FGM and SGBV are criminally proscribed in Kenya.¹⁶¹ There is therefore no reason why the Directorate of Criminal Investigations (DCI) and the Office of the Director of Public Prosecutions (ODPP), should not commence investigations and subsequent prosecutions in response to the Committee's directives.¹⁶² And unlike the time limitations constraints in civil redress suggested above, the general rule is that there's no time limit for institution of criminal charges in Kenya.¹⁶³ Criminal liability should therefore attach on parents, surgeons and medical institutions historically responsible for IGM and SGBV occasioned on intersex genitalia in the guise of 'corrective' and 'normalization' procedures. As Lord Scarmon observes, these actions constitute criminal offences of assault.¹⁶⁴

This research has established that many intersex persons undergo genital mutilations and SGBV during their infancy. While there may not be documentary evidence in all cases given the secrecy in which intersex conditions have been treated in the past, some victims are more than willing to record statements.¹⁶⁵ For instance, in the case of Sebbo, Jane, the mother, is certain about the dates and public hospitals where the genital mutilation and gender-based violence was committed against her child.¹⁶⁶ Investigations and subsequent criminal prosecutions can be undertaken and the specific institutions being forced to provide information, which is now

¹⁵⁹ The Prevention Against Torture Act, No. 12 of 2017.

¹⁶⁰ United Nations General Assembly, (UNGA) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez.* (A/HRC/22/53)

¹⁶¹ SGBV and FGM are proscribed in Kenya under the Sexual Offences Act and Prohibition Against Female Genital Mutilations Act.

¹⁶² Committee on CAT.

¹⁶³ Momanyi Bwonon'ga, *Procedures in Criminal Law in Kenya* (East African Publishers Limited 1994)99.

¹⁶⁴ Lord Scarmon in *Sidaway v Bethlem Royal Hospital Governors & others* (1985) 1 All E.R. 643 at 649

¹⁶⁵ Interview with Mercy. Mercy has made numerous trips to Kenyatta national hospital trying to get documents to explain what happened to her to no avail. Mercy has now given up any hope of ever being documented or acquiring any identity documents and has resigned to living an undocumented life and to the challenges that come with that.

¹⁶⁶ Interview with Jane.

a right under the law.¹⁶⁷Institution of criminal investigations and possible prosecutions may deter parents and guardians from requesting and consenting to immediate and urgent cosmetic genital modifications in any form at birth.¹⁶⁸This would allow intersex children to mature enough to understand their condition and decide for themselves.

This penal route could however prove to be counterproductive and may act to dissuade medical personnel from performing treatments in justifiable medical emergency situations. However, the creation by the State through the Ministry of Health, of a multidisciplinary decision-making team as suggested in the National Reproductive Health Policy, and its entrenchment in the Patients' Charter would help resolve this likely predicament.¹⁶⁹

iii) Interventions through human rights law at global and regional levels.

The principles of international and regional human rights law are now firmly entrenched in Kenya's legal framework.¹⁷⁰This entrenchment means that the government's obligations to tackle human rights violations, address root causes for such violations and make rights effective for everybody is equally well entrenched. Human rights law requires every State party to human rights instruments to ensure observance of the tripartite requirement to respect, protect and fulfil. In terms of the protection component, the government is under an obligation to offer equal protection to each and every member of the population. But in the case of intersex persons, this obligation calls for special protection because of their vulnerability. Special protection entails protection from hate, bullying and stigmatization in the health, employment, and education sectors. It also involves protection from discrimination in respect of their nonmaterial needs including dignity, autonomy, identity and access to personal rights. On the obligation to fulfil component, the government is required to address social attitudes through which discrimination, social exclusion and ostracization is enabled. Obligation to fulfil also entails the adoption of appropriate legislative provisions and administrative adjustments geared towards legal recognition and documentation of intersex persons in their true sex/ gender. The restructuring of all the forms through which identity documents are applied for and issued, falls

¹⁶⁷Constitution of Kenya, 2010, Article 35 and The Access to Information Act, No. 31 of 2016(Laws of Kenya).

¹⁶⁸ Malta has through Statue, criminalised IGM, being the first country in the world to do so. Indeed, what Malta has done is to equalise the penalties applicable to FGM to those applicable to IGM through the Law Act XIII of 2018.

¹⁶⁹ Ministry of Health, *The National Reproductive Health Policy 2022 - 2032*, (Government of Kenya, 2022).

¹⁷⁰ Constitution of Kenya 2010, Article 2.

under the obligation to fulfil. This will help seal the legal gaps and remove discrimination and inequality in fulfilment of human rights law principles and requirements.¹⁷¹

The major actors here are civil society organizations. These can utilize human rights law to present complaints to various human rights treaty bodies regionally and internationally, on violation of the right to legal recognition and accurate documentation on behalf of intersex persons. While decisions made by human rights bodies at the international, regional or subregional levels, may not have the full force of the law, they may nevertheless lead to international and regional pressure. This kind of pressure could force the country to undertake legal reforms to remove discriminatory provisions and introduce equality practices. They may also provoke public reactions which may help push for positive change towards recognition and accurate documentation.

Legal approaches through legislative, policy and judicial processes at all levels are important. So is review and adjustment of the law through statute policy and administrative action. Push for change through human rights law avenue is also key. However, legal tools by themselves can never be enough. Looking for positive change through legal means is just one component of a much broader and multifaceted strategy necessary to address all the issues surrounding the challenges intersex people encounter for being unrecognized undocumented citizens in Kenya. As Abuya observes, both legal and non-legal measures are required to ensure the enjoyment of core human rights.¹⁷² Passage of law is a positive step. So is litigation through various forms. Legal processes alone however, cannot be the exclusive vehicles of change and neither can they guarantee access to socio-economic rights or enjoyment of nonquantifiable needs which intersex persons have been denied for so long. Blending legal models and several other forms of non-legal tools is hence essential.¹⁷³The following section explores and recommends a series of extra-legal strategies that can be used alongside the legal approaches, to try and bring about positive change.

6.3.2 EXTRA-LEGAL APPROACHES.

Exclusion of persons of the intersex gender from the legal and documentation regime is heavily embedded in the heteronormative beliefs by the Kenyan society. These beliefs have entrenched

¹⁷¹ The Equality and non-discrimination principles cut across all human rights instruments, regionally and internationally.

¹⁷²Edwin Abuya and Dulo Nyaoro, 'Victims of Armed Conflict and Persecution in South Africa' (32 (1) Hastings International and Comparative Law Review 2009) 48.

¹⁷³ Ibid, 27.

the notion that people can only be binary based. To remove this mindset and promote acceptance of an additional sex/gender, a much broader cross cultural, political, and other extra-legal strategies need to be put in place, both at national and county levels as proposed below.

i) Breaking sex/gender binary barriers.

As Fanon points out, intolerant attitudes and prejudices usually arise because of social barriers.¹⁷⁴ Such barriers mean that people hold beliefs so strong that it is difficult to accept any other, even when confronted with evidence that works against such beliefs.¹⁷⁵ Such is the case with the sex/gender classification in Kenya, where the binary belief is so strong, that it has created a sex/gender binary barrier so powerful, that legal provisions by themselves may not succeed in breaking.¹⁷⁶ The binary barrier has birthed two wrong social assumptions with respect to sex/gender classifications. The first is that people can only be born in exclusively male or female sex/gender binaries. The second is that a child can be reassigned a sex/gender category that they were not born into and be successfully raised and socialized into that sex/gender.¹⁷⁷ The fact that KK was surgically reassigned a female gender and raised in it did not mean he became female.¹⁷⁸ Instead, the surgical operation made it impossible for him to live in his real and true sex/gender. And unlike what Dr Money would have had the world believe, a child will not always grow up to identify with the sex/gender associated with the reshaped, edited or remodeled physical genitalia.¹⁷⁹ These binary sex/gender beliefs therefore need to be dismantled. To do this, society needs to start considering intersex gender as a congenital and biological condition that a child can be born with, for it to gain the acceptance it deserves within the Kenyan society. Starting conversations involving possibilities of an intersex birth, coupled with explanations to disabuse the erroneous belief that forcing a sex/gender category on a human being can work, would be a good starting point. The responsibility falls on all members of society who understand the intersex condition, to educate others, and help break the binary mindset. Support from the State through the local administrative arms including Chiefs would help create more awareness.

¹⁷⁴ Franz Fanon, *Wretched of the Earth* (2004) 230, as cited in Seth Muchuma Wekesa, 'A Constitutional Approach to the Decriminalization of Homosexuality in Africa: A Comparison with Kenya, South Africa and Uganda' (Doctoral Thesis, Faculty of Law, University of Pretoria 2016) 319.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Interview with KK .

¹⁷⁸ Ibid.

¹⁷⁹ Kevin Behrens, 'A Principled Ethical Approach to Intersex Pediatric Surgeries' (2020) *BMC Medical Ethics* 3.

ii) Awareness creation, public education, and sensitization of society.

Breaking the binary sex/gender barriers and accepting the intersex gender as part of the population can help reduce levels of stigma, rejection, ostracization and other forms of discrimination. Awareness creation, public education and sensitization of the society is a critical strategy to do this. If majority in society is made aware that people can be, and are born male, female or intersex, intersex births won't be treated as social emergencies needing immediate 'normalizing' medical interventions to binarize them and document them as such. The emotional, physical and identity documents' confusion, and accompanying distress would therefore be limited. Awareness can dismantle barriers and remove social taboos in the community. Understanding the intersex phenomenon and availability of information would help to remove ignorance.

Many people have incorrect ideas of who intersex persons are. A class discussion the researcher had with law students in one of the public universities in Kenya, as a guest lecturer, revealed the extent of this ignorance.¹⁸⁰ To one of the students, discussions about intersex persons is just a roundabout way of legalizing homosexuality.¹⁸¹ And it is not just ordinary people and students of law who are poorly informed on who intersex persons are. The extent of the lack of knowledge of who intersex persons are, was revealed during the Judicial Service Commission recruitment exercise for the position of the Court of Appeal judges held in June 2022.¹⁸² One candidate, who was then serving as a Judge of the High Court of Kenya, in response to the question who intersex persons are, used rather offensive terms to describe them as:

‘..they are the ones with double...double entry.’¹⁸³

The interviewing panel found the answer amusing and laughed at the description given by the candidate. However, the sad reality is that if a judicial officer can be this poorly informed about intersex persons, this is just a reflection of the extent of ignorance out there regarding the condition.¹⁸⁴ Awareness creation through education for purposes of accepting intersex people as ordinary human beings, who happen to have special needs because of their unique intersex condition is therefore key.

¹⁸⁰ The researcher was speaking on the topic *'The Regulation of Private Life'* in a Law, Democracy & Governance virtual class on the 2nd December 2021.

¹⁸¹ Ibid.

¹⁸² The interviews were conducted between June and July 2022.

¹⁸³ Judicial Service Commission Judge on the Court of Appeal interviews live. <https://fb.watch/dWZKItSW5V/>.

¹⁸⁴ The interview was captured live on television and the researcher was listening in.

Awareness creation, public education and sensitization can be done through several ways as suggested below:

a) By the judiciary through training of its staff at all levels.

This research has determined that it is not just ordinary people who are poorly informed about the condition that constitutes intersex. The ignorant and insensitive comment made by the judicial appointment candidate explained earlier¹⁸⁵ points to the need for judicial officers to be trained to appreciate law in its social context. Judicial officers need to be trained that intersex persons are part of the society and as other members of society, can, at some point, be before them litigating their issues as guaranteed in the Constitution, and such stigmatizing terms should never be part of their vocabulary.

b) By the government through government Agencies and with government support.

The government has an obligation to sensitize and create awareness about intersex persons to the general populace. This may be done through public education and sensitization processes/programs in the judiciary and other government offices. Educating the public on issues of intersex and requiring government officers in public and private spheres to recognize and document them as intersex will help eradicate stigma and discrimination in many private and public spheres.

c) Awareness through the media.

Media, in all its forms, including print, audio and visual, in both formal and informal spaces, has now become a widespread medium to deal with issues that were hitherto only whispered about.¹⁸⁶Matters of intersex persons in Kenya were first brought to light through *RM*, after *JC*, came across a news item in one of the local dailies about a hermaphrodite who been sentenced to death for the offence of robbery with violence.¹⁸⁷*JC* followed up on the matter and reached out to *RM* in prison.¹⁸⁸Thereafter, he filed the petition bringing out the human rights violations to which intersex persons were being subjected to through *inter alia*, the failure to recognize and document them in their true sex/gender.¹⁸⁹*RM* was followed by *Baby A*, which was seeking similar orders, amongst them, the right to be legally recognized and to be issued an accurate

¹⁸⁵Judicial Service Commission Judge on the Court of Appeal interviews live. <https://fb.watch/dWZKItSW5V/>.

¹⁸⁶ Fergus Kerrigan, 'Getting to Rights: The Human Rights of Lesbian GB. Transgender and Intersex Persons in Africa' (2013) Danish Institute for Human Rights 55.

¹⁸⁷ Interview with *JC* in Nairobi on 16th January 2017.

¹⁸⁸ *Ibid.*

¹⁸⁹ *RM.*

birth certificate.¹⁹⁰ Even though intersex persons are yet to be issued identity documents including birth certificates in their true gender, the two cases certainly played a major part in starting the conversation. Credit for this goes to the tiny article in the print media which caught JC's attention.¹⁹¹

Following these two cases, Gama Africa Foundation, through Gathoni wa Muchomba, a then prominent media personality, was to pick up and progress the conversation through the media. Gathoni did this by starting a media awareness campaign dubbed 'Let me be me'.¹⁹² Through her broadcast in audio and billboard media campaigns, the Intersex Awareness Day was launched on 26th October 2016 for the first time in Kenya.¹⁹³ Since her entry into the political arena however, the aggressive broadcast campaigns have not been followed through. Nevertheless, nonpolitical civil Society organizations including the Kenya National Human Rights Commission (KNHRC) have taken up this mode of sensitization. Indeed, KNHRC held an intersex awareness day in Embu on the 26th October 2020 which, even though televised on national television was extremely low key.¹⁹⁴ Apparently, none was held in 2021 and 2022, and if none is held in 2023, the momentum will most likely fizzle out.

The State, through Kenya National Human Rights and Equality Commission has taken up the mandate of creating awareness. It therefore needs to embark on aggressive and more regular media awareness campaigns of the nature started by Gathoni. KNHRC can coordinate the campaigns working jointly with relevant non-governmental bodies, such as the Intersex Persons Society of Kenya, so as to reach a wider audience and keep the conversation alive.

Awareness creation through digital media in both formal and informal spaces such as Facebook, Twitter, Instagram and other social media forums, can also be productive, in terms of giving intersex persons visibility and acting as a means of public sensitization. This research acknowledges that media, particularly unregulated media, can be a double-edged sword.¹⁹⁵ In the case of Caymo, for instance, social media has only served to cause him more stigma.¹⁹⁶

¹⁹⁰ *Baby A*.

¹⁹¹ Interview with JC in Nairobi on 14th February 2017.

¹⁹² Gathoni wa Muchomba was then a news anchor with Kameme FM, a vernacular radio service. She was later elected as the Kiambu County Government Women Representative and is currently the Member of Parliament for Githunguri Constituency in Kiambu County.

¹⁹³ *Ibid*.

¹⁹⁴ <https://www.youtube.com/watch?v=JoLSwOxAJkU>.

¹⁹⁵ Njogu *et al*, Fighting Sexual and Gender Based Violence Against Non-Typical Sex/ Gender Victims in Kenya: The Case of Intersex Persons (2022) 2 Kenya Law Review 8: 71.

¹⁹⁶ Interview with Caymo .

However, even where the media elicits negative responses, media attention can and does open up discussions on topics that were previously not spoken about, hence helping break taboos. If JC had not seen the tiny article in the newspaper or acted on it, perhaps the whole debate on intersex persons may not have started in Kenya when it did, and the gains so far achieved may not have been realized. The two cases filed in court following that article brought about mixed feelings amongst the Kenyan society. Nevertheless, the fact that the voices of both support and dissent were captured meant that the discussion was accessible to a wider audience and helped create a platform for more engagements.¹⁹⁷

Song and dances recorded and shared through public forums such as *YouTube* can also be an effective mode of awareness creation through media. ApSiya has been using this forum for several years. He/she creates songs and dance depicting the intersex condition in vernacular and according to him/her, this has helped educate many people about his/her condition.¹⁹⁸

d) Awareness through Activism and Advocacy.

Activism and advocacy are critical strategies that can play a major role in enlightening the public on issues bedeviling a group of people.¹⁹⁹ And historically, activism has had important impacts on the areas intended to be impacted. In the case of South Africa for example, the achievements for people born intersex, as seen in chapter five, cannot be discussed without mentioning the activism undertaken by Sally Gross.²⁰⁰ Her activism through the then ISOSA, now ISSA, saw many positive changes occurring. Key among these is of course the enactment of the Alteration of sex Description and Sex Status Act, through which intersex persons are not just documented but allowed to alter their identity documents to the sex/gender they are comfortable with.²⁰¹ Interventions by activists therefore can help bring in important legal changes.²⁰²

¹⁹⁷ Some of these engagements have led to the enactment of legislation, the institution of a national Task force and decisions and the inclusion of intersex persons in the national census

¹⁹⁸ Interview with ApSiya.

¹⁹⁹ Edwin O. Abuya & Jane W. Githinji, 'Access to University Education by Learners with Physical Disabilities: Combating the Barriers' (2021) 27 *Buffalo Human Rights Law Review* 1: 44-45. 42-43.

²⁰⁰ See the discussions in Chapter five.

²⁰¹ Alteration of Sex Descriptions and Sex Status Act (Sex Status Act) 2003, Section 2.

²⁰² Tamar Klein, 'Querying Medical and Legal Discourses of Queer Sexes And Genders In South Africa' (2008) 10 *Anthropology Matters Journal* 2: 9.

KNCHR has now taken up, as one of its core mandates the aspect of ensuring the protection and promotion of human rights of intersex persons, amongst other members of society.²⁰³ However, specific activism for intersex persons has been undertaken by only a few non-governmental organizations. These include the Intersex Persons Society of Kenya (IPSK), *Jinsiangu* and the Gender Minority and Advocacy Trust (GMAT). Funding for these organizations is however always a challenge.²⁰⁴ Consequently, they are not able to reach as many people as is necessary to make an impactful change.²⁰⁵ In addition, these organizations are based in Nairobi and therefore their presence is limited. Yet research has shown that intersex persons are distributed countrywide.²⁰⁶ Government funding for these organizations can help them broaden their activism pursuits nationwide, with a likelihood of better responses.

e) Awareness through Innovative legal/ media activities.

Violation of intersex persons rights can be told through drama and film. Given that many people do not quite understand the intersex phenomena, it is important to address and sensitize as wide an audience as possible, in order to create an impact that will bring meaningful change. Educative documentary films telling intersex personal stories and infusing these with the violation of rights according to the law would be a novel way of educating the public on both the intersex condition as well as the law surrounding the condition. According to Kabata, while law and legal issues are often viewed as intimidating and authoritative, fusing legal issues into film and drama can be amusing, pleasurable and educative.²⁰⁷ Film and drama can therefore be used to deconstruct complex legal and social questions relating to the intersex phenomenon. And when presented as visual pleasant representations it is likely to be more captivating. But more importantly, the idea of giving the intersex persons an opportunity to tell their own stories, in their own words before an audience, can be very empowering. This medium can therefore play a major role in creating awareness. Law schools, in both private and public universities, can adopt this method, as part of their clinical legal programs, with the students learning as they educate communities.

²⁰³ KNCHR has taken up this mandate pursuant to Article 59 of the Constitution, 2010 and Section 8 of the KNCHR Act, 2011.

²⁰⁴ Interview with Rye.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Speech by Dr. Faith Kabata, Kenyatta University School of Law during her remarks at the Launch of the documentary 'Journey to Justice' on the 13th of June 2021. <https://t.co/yHG1FCegB3>. The researcher was physically present during the launch.

f) Awareness and education through religious institutions.

According to Mbote *et al*, religion is a medium that has permeated many areas of social life in Kenya.²⁰⁸ Indeed, religious organizations have been known to historically exert substantial control over the framing of issues dealing with sexuality, gender identity and generally most issues considered significant to morality.²⁰⁹ Religious based institutions therefore play and have continued to play a central role in debates on legislation and policy. It was for instance evident, during the Constitutional review process in Kenya, the kind of influence that religion can have in determination of matters of national interest.²¹⁰ This same religious influence was equally seen in *RM*, which was the first attempt to fight for the recognition of intersex persons through the courts. In *RM*, religion's strong but negative perspective towards inclusion of intersex as a gender, was demonstrated through the submissions filed by the Kenyan Christian Lawyers Professional Forum Limited, an organization consisting of Christians in the legal profession.²¹¹ This organization joined the petition as an interested party and vehemently opposed it based on religious grounds.²¹² According to the organization, the aspect of classifying people as male or female has a religious basis and finds grounding in the Bible, specifically the book of Genesis, which reads as follows:

'So, God created them in the image of God, male and female he created them'²¹³

The organization maintained that the definition of sex/gender is divine, containing only the male and female sex/genders with no 'in between.'²¹⁴ Its position was to use religion, which it did, in a concerted effort to increase repression for intersex Persons in Kenya. The court in *RM*, was therefore presented with arguments based on Christian theology, which were all anti-intersex recognition.²¹⁵

Similar sentiments from religion were seen during the period prior to the 2019 census, when it became clear to faith-based organizations that the intersex person was going to be included as

²⁰⁸ David Kuria Mbote, *et al*, 'Kenyan Religious Leaders' Views on Same-Sex Sexuality and Gender Nonconformity: Religious Freedom v Constitutional Rights' (2016) *The Journal of Sex Research* 2-3.

²⁰⁹ *Ibid*.

²¹⁰ Seth Muchoma Wekesa, *Decriminalization of Homosexuality in Kenya: The Prospects and Challenges*, in Sylvie Namase and Adrian Jjuko (eds), *Protecting the human rights of sexual minorities in contemporary Africa*. (Pretoria University Press 2017)88.

²¹¹ The Kenya Christian Professionals Forum Ltd is a company limited by guarantee comprising of Christian professionals from various denominations and from diverse professional fields in Kenya sharing common values on issues of family, life and religious freedom and social justices.

²¹² *RM*, Para 78.

²¹³ The Holy Bible (NIV), Genesis 1: 27.

²¹⁴ *Ibid*.

²¹⁵ *RM*.

a separate and distinct sex/gender. The broader Kenya Christian Professional Forum (KCPF), started an online campaign dubbed ‘stop introduction of a third sex.’²¹⁶ They were resisting what they termed as Kenya National Bureau of Statistics (KNBS) plans to deconstruct the social fabric in Kenya through the introduction of a third sex/gender as part of Kenya’s population.²¹⁷ To them, this was a way of introducing deviant ideologies of homosexuality and transgenderisms. Their further argument was that according to religion and the basic fact of natural law of biology and reproduction, there exists only two sexes/ genders: female and male.

KCPF’s membership consists of Christian professionals in various disciplines including renowned Advocates of the High Court of Kenya, medical doctors and surgeons.²¹⁸ According to the members of KCPF, which reason was also used as a basis of resisting inclusion of a third sex/gender category, the intersex condition is a physical disability to the reproductive organs, which can be medically ‘corrected’ to become either male or female. Their further argument was that as a disability, the intersex condition should find protection under the Disability Act and the provisions of the Constitution covering the rights of persons born with disabilities.²¹⁹ Fortunately for the intersex person, the online campaign created to resist their inclusion in the census appears to have been quickly abandoned. The legal action threatened against the KNBS was eventually not followed through. The intersex gender was therefore included in the Census.

The abandonment of the quest to resist the official counting of intersex persons separately from the female and male sex/genders in 2019, appears to mark the shifting of the negative ground by religion regarding discussions relating to the intersex persons. What needs to be put in place now, through religious organizations, is taking up the process of educating the congregation. The first step would be to educate as many religious leaders as possible and accurately inform them who intersex persons are and what their unique human rights and needs consist of.

Educating religious leaders on the aspect of intersex conditions is critical but is bound to be difficult. During the data collection process for this study, the researcher came across a great deal of ignorance amongst religious leaders. Some of the responses on who intersex persons were, included:

²¹⁶Stop the introduction of a third sex in the 2019 census. CitizenGO (Accessed on 1st August 2019). By the 1st of August 2019, at least 5,704 people had signed the petition seeking to exclude intersex persons from the census.

²¹⁷ Ibid.

²¹⁸ KCPF – Kenya Christian Professionals Forum. (Accessed on 31st May 2022).

²¹⁹ This is with reference to Article 260 Constitution of Kenya 2010.

‘Intersex is a choice.’²²⁰

Another religious leader reprimanded the researcher as follows:

‘As a member of the Mother’s Union, is this what you are preaching’?²²¹

Yet another one enquired of this researcher:

‘What would you do if your son was intersex? Don’t you know that the Bible condemns homosexuality’?²²²

Another one in relation to what is probably an intersex phenomenon referred to:

‘Women with beards’ in the name of equality’.²²³

To avoid major downsides in the fight for protection of the rights of intersex persons, it is important to comprehensively and carefully address the ignorance and misperceptions surrounding the intersex phenomenon demonstrated by utterances coming from religious leaders.²²⁴ But since religious based organizations play a huge role in forming and leading public opinion in many spheres of life in society, dialogues with these institutions should be explored and encouraged to help create awareness. Indeed, since the intersex debate appears to have shifted a lot in the recent past even in religious circles, it is important to involve religious leaders in explaining to their congregants, the difference between intersex as a congenital condition and homosexuality as a sexual preference, based on religious teachings. While this research is not advocating for condemnation of any person who identifies as a homosexual, it posits that delinking of sexual preference from the congenital condition aspects may make the intersex phenomena awareness a lot more acceptable from the religious perspective. In preaching the unity of all Christians and locating it in scriptures as set out in the book of Galatians, it may be possible to emphasis human rights of all persons by portraying humanity beyond the socially constructed sex/ binaries. The specific verse from the book of Galatians which the researcher has in mind reads as follow:

²²⁰ Interview with AB, (Pseudonym) a Vicar in the Anglican Church on the 12th July 2019.

²²¹ Ibid.

²²² Ibid.

²²³ The researcher was listening to a sermon being delivered by a Catholic priest in a function in Nyahururu on the 25th July 2022.

²²⁴ Ignorance regarding who an intersex person is or is not, permeates many societies in Africa. During a discussion with a fellow PhD student in a Doctoral fellowship this researcher attended in Ethiopia in December 2018, the PhD student told this researcher: ‘We do not discuss intersex matters in Ethiopia. Intersex is illegal’.

‘...there is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus.’²²⁵

If religious leaders can accept that those born male, female and intersex are all God’s creations as set out in the Bible and preach this, then intersex persons may be more acceptable in society, given the influence of the church on society.²²⁶

But the perspectives of religious leaders towards people who are born intersex needs to be changed through information and empirical evidence. Once they are convinced and they preach this, they are likely to reach a wider audience in view of the influence of religion in Kenya.²²⁷ This would change more, if youth leaders in majority of the churches are involved in trainings to show people that God created male, female and intersex genders. The Youth can be trained by intersex persons who can share their personal experiences, and then they can in turn train others. The trainees can even be issued with certificates.²²⁸ Education in the religious sphere to dismantle ignorance is therefore critical. Not all may be hostile when confronted with empirical facts. The State has a role to play in this form and forum as well. Government usually uses the local administration to spread important messages such as vaccination drives in public gatherings including religious congregations. Similar messages can be passed to the general population in religious settings. If key religious organizations accept intersex persons as God’s creation, this may help remove certain taboos in society associated with the condition, thereby creating more acceptance.

g) Awareness by delinking the (I) from the LGBT(I)Q Acronym.

Religious leaders are not the only members of the society who erroneously conflate the intersex condition with lesbians, gays bisexual transgender and queer (LGBTQ) persons, thereby including them in the homophobic attitude attached to homosexuality. Research in Kenya has shown that many people in Kenya conflate intersex with LGBTQ.²²⁹ This conflation can be said to be a huge contributor to stigma and impairs intersex person’s ability to receive legal recognition and documentation. It may also be one of the reasons fueling society’s resistance

²²⁵ The Holy Bible in Galatians 3: 28.

²²⁶ Ibid.

²²⁷ David Kuria Mbote *et al*, ‘Kenyan Religious Leaders’ Views on Same-Sex Sexuality and Gender Nonconformity: Religious Freedom v Constitutional Rights’ (2016) *The Journal of Sex Research* 2-3.

²²⁸ David Mbote *et al*, ‘Facing Our Fears: The Impact of a 4-Day Training Intervention to Reduce Negative Perspectives on Sexual and Gender Minorities among Religious Leaders in Kenya’ (2022) *Journal of Sex and Research* 7.

²²⁹ Interview with AB, a Vicar in one of the Anglican Churches.

to acceptance and documenting of intersex persons.²³⁰ This of course, can be attributed to the fact that since, the law in Kenya criminalizes homosexuality, anyone associated with it is criminalized. *EG & 7 others v Attorney General consolidated with DKM & 9 others, (Eric Gitari)*, is a good example of this conflation.²³¹ Here, the intention of the petition was to challenge the constitutionality of the provisions of the Penal Code which criminalizes sexual practices between male persons. The focus of the case was therefore sexual orientation and sexual preferences. However, intersex persons were conflated in the matter and appear in the judgement at least twenty-five times in the acronym LGBTI.²³² Actually, the Petitioners indicated that they were presenting the petition on behalf of homosexuals, and explained further that homosexuals ‘more precisely refers to Lesbians, Gays, Bisexuals, Transgenders, Intersex and Queers (LGBTIQ)’.²³³ This explanation may not necessarily be accurate with regard to intersex persons. In the context of same sex relationships, this conflation implies that intersex persons are criminals under the law and should be subjected to societal disapproval. This conflation thus fuels society and religion’s resistance towards acceptance of people born intersex.

While everyone requires constitutional protection and no one should be subjected to homophobic attributes or rejection,²³⁴ to better protect and promote the rights identified by this research for people born intersex, delinking and educating the society on the unique intersex needs as distinct special needs separate from the needs of the LGBT community is critical. This will help remove the negative lumping of intersex issues together with LGBT issues.

This form of education and awareness will also help demystify and separate matters of sexual orientation and sexual preference from the congenital condition that requires a much broader response. Education that helps with the differentiation between intersex persons and persons of other divergent sexual orientation, may remove the shame, fear of prosecution and stigma associated with homosexuality. This may help sensitize the society but also demystify the condition.²³⁵ It is important to educate society and explain to them what constitutes sexuality

²³⁰ KNCHR, *Equal in Rights and Dignity promoting the Rights of Intersex persons in Kenya*, 8.

²³¹ *EG & 7 others v Attorney General consolidated with DKM & 9 others (Interested Parties) consolidated with Katiba Institute & another (Amicus Curiae)*, 2019 eKLR.

²³² *Ibid.*

²³³ *Eric Gitari*, Para 3.

²³⁴ Seth Muchuma Wekesa, ‘A Constitutional Approach to the Decriminalization of Homosexuality in Africa: A Comparison with Kenya, South Africa and Uganda’ (Doctoral Thesis, Faculty of Law, University of Pretoria 2016).

²³⁵ Marce Epprecht, *Sexuality and social justice in Africa: Rethinking Homophobia and Forging Resistance* (Zed books Limited 2013)61.

and sexual orientation is terms of sexual feelings, sexual behavior and sexual preference and differentiate that from congenital and biological genital framework that defines intersex. This way, society will understand that the discourse on intersex issues goes beyond expressing their sexual desires and preferences. It goes to denial of access to health, educational opportunities, employment, and other human needs such as identity and dignity on account of a condition that they were born with. It goes to human needs as basic as going to the toilet. It is that dire for people born intersex. Non-governmental organizations advocating for the rights of the LBTQ community therefore need to delink the ‘I’ from the ‘LGBTIQ’ alphabet, to stop the eclipsing of the immediate and concrete needs of the intersex in health, education and employment spheres, in the sexual orientation and sexual preferences debates.

iii) Political intervention.

The position of legal exclusion through the documentation regime that the intersex persons find themselves in, is an architecture of legislation. Legislation in Kenya is a major purview of politicians at both national and county levels. This therefore means that there is need for political intervention if any change is to be achieved through the legislative models proposed earlier. Enacted legislation can then form a basis for implementation within the society. It would therefore be important to secure the proper political intervention. The research however acknowledges that securing the support of politicians is no mean feat and there are many downsides. For instance, former nominated Senator Isaac Mwaura’s bill, which sought to amend the Registration of Person’s Act to include intersex persons, appears to have been abandoned with no action since 2019.²³⁶ So was the media campaign initiated by Gathoni wa Muchomba before entering elective politics. Despite the challenges with politicians however, activism through political intervention can be explored because it can and does lead to gradual change.

iv) More Visibility.

The research establishes that many people born intersex live in the shadows. There is always the fear of being ‘discovered’ and being subjected to stigma, hostility and even possible physical violence.²³⁷ Indeed, although the census gave intersex persons an opportunity for visibility by being counted as part of the population, many opted to be documented in the shadows of the male and or female sex/genders that they were put in at birth.²³⁸ This was

²³⁶ Kenya Law: Senate Bills - 2019, (Accessed on 4th August 2022).

²³⁷ Interview with Riziki.

²³⁸ Interview with KK.

attributed to the fear of stigma and victimization.²³⁹ Consequently, the census found the data of intersex persons collected too small to classify according to Counties.²⁴⁰ As a person who frequently interacts with intersex persons, KK's suggestion is that there is an urgent need to assert the intersex identity through increased visibility by encouraging them to come out and not to continue living in the shadows.²⁴¹ Local civil society organizations supporting intersex persons are already engaging in the process, but lack sufficient funding. With government support, these organizations can reach more intersex persons, parents and guardians of intersex children, to encourage them to live in the open. This may enhance increased acceptance and probably push the community to be more receptive.

v) Availability of medical assistance where necessary.

Both *RM* and *Baby A* argue that sex reassignment surgeries should be performed only in cases of emergency medical necessity and only with informed consent.²⁴² In the absence of urgent medical reasons, decisions on whether an intersex person should be subjected to a sex reassignment procedure should be left to the person concerned, with full information and capability to decide. And situations like those do exist. In the case of *RM*, he would have wanted to pursue the option of sex reassignment surgery, but his parents were too poor to afford it.²⁴³ This research has also come across two cases where the respondents, Godia and Marion, would like to undergo sex reassignment procedures and be documented in the female gender, which each of them feels comfortable in.²⁴⁴ However, they have both been prevented from doing so by the prohibitively high cost and unavailability of specialists in the area.²⁴⁵ The court in *RM* acknowledges that there is no local medical expertise in the area of sex reassignment procedures in Kenya.²⁴⁶ According to Syd, the cost of tests to determine the sex/gender one is likely to better identify with are high.²⁴⁷ So are treatments in the form of surgical and hormonal interventions.²⁴⁸ This has been confirmed by the Court in *RM*, when it points out that sex reassignment procedures of the kind that intersex persons would require, would be expensive

²³⁹ Ibid.

²⁴⁰ Kenya National Bureau of Statistics, *Kenya Population and Housing Census: Volume III Distribution of Population Age, By Sex and Administrative Units*, 3.

²⁴¹ Interview with KK.

²⁴² *RM* and *Baby A*.

²⁴³ *RM*, Paras 5 and 33.

²⁴⁴ Interview with Godia from Kisumu on telephone on 16th August 2020 and with Marion (pseudonym) from Kisumu on 23rd May 2022 respectively.

²⁴⁵ Interview with Marion from Kisumu on 23rd May 2022.

²⁴⁶ *RM*, Para 142.

²⁴⁷ Interview with Syd, 16th December 2019.

²⁴⁸ Ibid.

and beyond the reach of people like RM.²⁴⁹The Court however downplays the importance of the procedures for those who would like to have them, by claiming that there is no justification to spend government's limited resources on a condition that has not been shown to be more precarious than cancer or HIV.²⁵⁰ The reality however is that, for those who would like to have the procedures like Godia and Marion, the intersex condition sits on them like a cancer or HIV, both mentally and physically.²⁵¹But there are also other intersex persons capable of making decisions who are not even aware that such possibilities exist. Yet others like ApSiya, would like to have some corrective medical interventions that does not amount to sex reassignment, but which would make their lives easier. Apsiya's is set to have a hysterectomy procedure to remove the uterus so that s/he does not have to go through the embarrassing episodes of stained clothes during menstruation cycles.²⁵² S/He can however not have it done locally because of the stigma, but also currently lacks the resources to have the procedure outside the country.²⁵³ This research recommends that medical care and services for any intersex condition related medical intervention, be availed through government support, for those who require it. This also should include follow up services at government expense and in public hospitals, as a means of providing universal health care for all. This should be coupled with trainings for medical personnel on how to deal with needs of intersex persons without violating their rights. This responsibility falls on the government, which bears the obligation to provide universal health care for all the citizens. Provision of universal health includes, psychosocial support where necessary to enable intersex persons and their families cope with any attendant trauma.²⁵⁴

vi) Immediate Implementation of the recommendations of the Task Force Report.

The 'Report of the Task Force on Intersex Persons in Kenya', has made key recommendations which are yet to be implemented. The Report has put in place an Implementation Committee with time lines in the form of short term, mid-term and long-term implementation matrix identified. Key actors in each process have also been identified.²⁵⁵ Immediate implementation

²⁴⁹ RM, Para 142.

²⁵⁰ Ibid.

²⁵¹ Ibid, interview with Marion.

²⁵² Interview with ApSiya.

²⁵³ Ibid.

²⁵⁴ World Health Organization, *The WHO special initiative for mental health (2019-2023): Universal Health Coverage for Mental Health* (World Health Organization, 2019)1-4.

²⁵⁵ Ibid.

would inform policy and other changes that can lead to recognition and accurate identity documentation, and help ameliorate the violations identified by this research.²⁵⁶

In terms of implementing the reports that would help seal the gaps identified in this research, the following recommendations are made:

a) Right to health and prohibition of intersex genital mutilations (IGM).

In order to protect the right to health for persons born with the intersex gender, the government needs to put an immediate stop to intersex genital mutilations. To guard against these unnecessary surgical and other forms of interventions on intersex genitalia, the government, through the Ministry of Health (MOH) jointly with other relevant bodies including the Kenya Medical Practitioners and Dentist Board (KMPDB), should establish protocols to govern all procedures to intersex genitalia. These protocols should clearly stipulate that any surgical or hormonal interventions, in both public and private health establishments, should never be carried out, unless in cases of immediate medical emergency. And even then, these should be after informed consent has been obtained. The protocols should also specify how surgical and hormonal interventions considered to be constituting medical emergencies should be dealt with, to put a stop to the kind of intrusive interventions Erica is currently undergoing. The government should also rope in representatives from public and private hospitals and also human rights organizations including KNHCR, *Jinsiangu* and the Intersex Persons Society of Kenya, through which intersex persons' participation will be engaged.

b) Right to education.

This research has established that non recognition and failure to document intersex persons in their accurate gender, has led to hindrances in the pursuit of education, leading to not just low enrolment, but also high dropout levels. This has been attributed mainly to bullying, discrimination and stigma. The 'Taskforce Report on Intersex Persons, Kenya', also acknowledges these as aspects limiting access to education. This research recommends that the State, through the Ministry of Education, puts in place measures to create a safe environment for intersex learners. Intersex persons interviewed for this research, who have had their right to education curtailed, are calling for support from everyone in the learning institutions, to understand them and their unique needs, respect them and make their lives easier in these institutions. The learning institutions' Administration at all levels, should educate all learners

²⁵⁶ Intersex Task Force Report, 2018.

to learn to live with their intersex counterparts, in the same way that male and female learners live and learn together. Incidents of bullying and stigmatization from peers, parents, teachers and everyone else in all learning institutions should be prohibited. Several parties are responsible. The Ministry of Education is of course the key actor in the creation of the anti-bullying and anti-discrimination policies. However, individual learning institutions, at all levels are also responsible for the formulation of individual anti-discrimination policies as well as proper enforcement procedures.

c) Right to employment.

Intersex persons have demonstrated that the employment environment is hostile, insecure and causes them a climate of vulnerability on account of their intersex gender. This was also an observation made in the ‘Taskforce Report on Intersex Persons, Kenya’. In view of the correlation between education levels and employment opportunities identified in this research, reforms to the education sector removing the hindrances to accessing education for intersex persons may result in better employment opportunities for them. However, more needs to be done. Given the historical exclusion, affirmative action measures in the employment field, may help seal this gap by creating improved access to employment. Removal of binary based conditions when advertising employment opportunities needs to be discouraged, now that it is a known fact that there is in existence, another sex/gender. The actors here are every employer in both the private and public sectors. In addition, employment policies should be such that they accommodate male, female and intersex genders by creating comfortable and conducive working environments and facilities. In this way, intersex persons will get to enjoy all the rights, freedoms and security contemplated in the constitution and human rights instruments.²⁵⁷

vii) Balancing the documentation debate.

This research has been premised on identifying the gaps on recognition through access to accurate identity documents for persons of the intersex gender, and ways to seal the gaps. The research however acknowledges that discussions around documentation reflecting the intersex gender may be double-edged, making the whole debate dicey and delicate. While there are situations where many intersex persons would want their documents labelled with the intersex sex/gender, the research has come across those who are against it for fear of being exposed,

²⁵⁷ ACPHR, Article 6.

and labeled.²⁵⁸ This aspect was also demonstrated during the census, where many intersex persons opted to remain hidden in either the male or female sex/genders for fear of being exposed and thereafter subjected to the associated stigma.²⁵⁹ The documentation debate is therefore one that needs to be undertaken nationally. This would help the country discuss and decide whether the sex/gender marker in identity documents serves to perpetrate discrimination, whether it is really necessary, if it should be made optional or removed altogether. But then again, the sex/gender marker appearing on the face of identity documents affects every member of the society. There are those who are exclusively male or female and would not want their sex/ gender identification removed from any of their identity documents. Proposals for a complete removal of the sex/gender is therefore likely to create a major backlash and resistance from members of society who are exclusively male or female. Only further research is likely to come up with concrete data for purposes of proposals on the most appropriate way forward.

viii) Towards expanded research, teaching and publications.

Research interrogating specific intersex persons' human rights and needs in Kenya, particularly from the angle of non-recognition and lack of accurate identity documents is limited. Lack of scientific information may therefore be the basis of the huge knowledge gap and ignorance as to who an intersex person is. In the recent past however, a number of scholarly works have been published, which have attempted to bring to light the plight of intersex persons.²⁶⁰ Human rights institutions have also started capturing intersex issues through various publications.²⁶¹ However, the challenges that people born intersex have to deal with in Kenya are so huge and so complicated that a lot of research is required to capture them all.²⁶² Expanding research in the area of intersex rights and needs is therefore critical. It will help bring forth and build more knowledge on intersex issues within the current family structures and attitudes.

Knowledge creation through research would therefore help bring out to the fore, the kind of oppression intersex persons undergo, the reasons for the oppression and possible solutions. Intersex persons require an avenue to reclaim or claim their position in family and communities and in the country, which can only be demonstrated through adequate investigative research. They need to have their social lives, which they have been deprived of, reinstated, their dignity

²⁵⁸ Interview with Marion.

²⁵⁹ Interview with KK .

²⁶⁰ John Chigiti, *Intersex Persons and the Law* (Quality Thoughts Publishing 2021).

²⁶¹ KNHCR has compiled a few publications which are available at <https://www.knchr.org>.

²⁶² This was a statement from Rye to the researcher when she was speaking to him at the beginning of this research.

affirmed, and their citizenship protected through documentation. In the course of this research, the researcher encountered many disturbing narrations of lived life experiences. Heart wrenching as the narrations were however, they gave this researcher an opportunity to understand and situate the suffering into denial of access to human rights and needs. The researcher was also given an opportunity to examine the failings and limitations in the law. The possibility of recommending solutions with a view to building a more just society where everyone is properly documented, where everyone is allowed to access their rights and needs was also presented. Research, therefore, is a formidable tool for change. So is teaching, especially in institutions of higher learning, which constitutes part of research dissemination. In December 2022, the researcher was presented with an opportunity to experience the effectiveness of sharing research findings to a Human Rights Law Class in one of the public universities in Kenya. Many students were able to engage with the reality of the human rights violations intersex persons are undergoing in Kenya. Research and teaching are core mandates of universities and therefore, the key actors in this aspect will be lecturers in both public and private universities, particularly in the human rights units.

The uniqueness of the intersex genitalia creates challenges in many aspects of the affected persons lives. These aspects include legal, medical as well as social cultural aspects. Increased interdisciplinary research and teaching should therefore be encouraged and supported by the government as much as possible.

ix) Rallying behind the ‘Nothing about us without us’ slogan.

Several recommendations have been made to ameliorate the situation that intersex persons find themselves in. Solutions in terms of changes in the law and formulation of policy in various sectors have been. Education, awareness, and advocacy processes have been suggested. However, anything that needs to be put in place must include intersex persons. In terms of public participation as constitutionally provided,²⁶³ intersex persons must be involved every step of the way. Any programs designed on behalf of intersex persons must include intersex persons themselves. The famous slogan ‘Nothing about us without us’, developed through the disability movement, appropriately applies to intersex persons.²⁶⁴ Persons with disabilities decided that they not only have rights in the community but also that they had a say in how the

²⁶³ The Constitution of Kenya 2010 provides for public participation in most matters affecting the public at both national and county government levels. Constitution of Kenya 2010, Article 196.

²⁶⁴ Maxwell Opoku and William Nketsia, ‘Nothing About us, Without us : Voices of Leaders of Disabled People’s Organisation in Management of Disability Fund (2021) 4 Social Sciences & Humanities 2.

community treated them.²⁶⁵ Consequently, they started taking control of their lives resisting all attempts to surrender control of their lives to others. It was this agitation that led to the enactment of a persons with disabilities specific convention in 2006, the Convention on the Rights of Persons with Disabilities (CRPD).²⁶⁶ The provisions of the Convention have been domesticated in Kenya through the adoption of the Persons with Disabilities Act.²⁶⁷ Its disability specific protective provisions have also been enshrined in several Articles of the Constitution.²⁶⁸ Persons with disabilities are consequently able to claim what is best for themselves through law, policy, and special programs.²⁶⁹

Similarly, only intersex persons can personally articulate the barriers erected against them by the documents' regime in Kenya. Consequently, they must be involved in all legal, policy or other framework changes and programs.

It is disheartening for instance, to note that intersex persons were excluded during the formulation of the National Reproductive Health Policy 2022-2032.²⁷⁰ Looking at the list of contributors and participating organizations, it is quite clear that there was no representation on behalf of intersex persons.²⁷¹ It is therefore unsurprising that even though the Policy does factor in the person born intersex, key protective issues, including an accurate definition, have been left out. Such issues would have been adequately canvassed if some contributors were people who are intersex, or organizations well versed with intersex challenges. Intersex persons should, as far as is practically possible, be involved in all matters concerning legal, policy and even extra-legal changes impacting on their lives. There are already in place, vibrant Kenyan based organizations advocating intersex persons rights. These include Intersex Persons Society of Kenya, *Jinsiangu* and the national human rights organization, KNHRC. These organizations should be consulted in all matters involving intersex persons.

6.4. CONCLUSION.

In the process of interrogating the impact of non-recognition and non-documentation on the human rights of and non-tangible needs of intersex persons, this study posits that everyone

²⁶⁵ Ibid.

²⁶⁶ Convention On the Rights of Persons with Disabilities (CRPD).

²⁶⁷ Persons with Disabilities Act No. 14 of 2003, Laws of Kenya.

²⁶⁸ Constitution of Kenya, 2010 Articles 54 and others.

²⁶⁹ It is now compulsory, for buildings to have ramps and for schools to have disability equipment to enable persons with disabilities overcome constraints while accessing certain facilities.

²⁷⁰ Ministry of Health, *The National Reproductive Health Policy 2022 - 2032*, (Government of Kenya, 2022) 52-54.

²⁷¹ Ibid.

ought to be given the opportunity to access their natural rights and their human needs. Such access should be regardless of the sex/gender characteristics that one is born in. Access to these rights and needs are actualized when individuals are recognized by the law and society and issued accurate identity documents to facilitate the access. What emerges from the research is that intersex persons are not just marginalized for being born in a sex/gender that cannot be documented in Kenya, but also discriminated due to non the documentation. Consequently, their access to various rights and human needs is greatly impaired and severely compromised. The research has however been able to highlight that even though the situation appears grim for them, there are several glimpses of hope considering the deliberate and intentional undertakings which have occurred in Kenya. There are, therefore, many obstacles as seen, but there are also many opportunities to make the lives of intersex persons better.

It is the hope of this researcher that the positive undertakings already in place are given more impetus through the law. Further, it is hoped that the various recommendations the research has made are adopted. If that happens, that may lead to people born with both male and female genitalia, and who wish to live their lives in a sex/gender of their choice, being accepted by both the law and society, being accurately documented and acquiring gender congruent identity documents.

To borrow from Winedu, the Kenyan society must not continue in a state of anachronism, where it fails to perceive intersex persons as they are, instead, discarding them or trying to modify them and get them into what it requires them to be.²⁷² Changes must be made in the law and society to ensure issuance of documents in accurate sex/gender descriptions. This may in turn translate to recognition and acceptance within society. But in the meantime, the intersex person must be protected from a life of rejection, ostracization, physical and verbal assaults and the various other ordeals they are subjected to. They need to be raised in and to live in a world that does not make them feel subhuman.

Intersex persons acknowledge that their genital organs are differently formed from their male and or female counterparts. But this does not make them lesser human beings. In KK's words:

‘Allow me to be different but treat me the same.’²⁷³

²⁷² Windu Kwasi, *Philosophy and an African Culture* (Cambridge University Press 1980) 2.

²⁷³ This was the parting shot from KK. Other intersex persons interviewed for this research expressed similar sentiments.

And as Sally Gross pointed out, there's need to understand and accept that a person born intersex person is part of the human diversity.²⁷⁴ An intersex person is neither a threat nor a pathology.²⁷⁵ Diversity in the genetic formation of human beings' genitalia ought to be as insignificant as diversity in the pigmentation of the eyes and skin colour, and should never be a source of discriminatory or unequal treatment for the person. The law and society in Kenya need to understand and accept that intersex persons have every right to be accepted and provided for by the law. And to borrow from Mwaura, Kenya bears the duty to ensure that measures are in place to prevent human rights violations being committed against intersex persons in the first place. Where violations have occurred, the obligation extends to measures to right the wrongs and prevent future wrongs.²⁷⁶

While it is true Kenya has made significant strides on paper, it is now time for actualization. This will be achieved through what Carlson refers to as translating 'promises in legal texts into reality'.²⁷⁷ Any legal mechanisms put in place must be purposive and facilitative of the enjoyment of all human rights and needs of all without leaving anyone behind. This way, as Mutunga says, the footprint of justice, in this case social justice, will be expanded for all.²⁷⁸

²⁷⁴ Sally Gross, *The Chronicle of An Intersexed Activist's Journey* in Sylvia Tamale (ed.) *African Sexualities: A Reader* (Pambazuka Press 2011) 235-237.

²⁷⁵ *Ibid.*

²⁷⁶ Kiarie Mwaura, 'Internationalization of Costs to Corporate Groups: Post -Whole Relationships Human Rights Norms and the futility of the Corporate Veil' (2012) 11 *Journal of International Law* 1:86.

²⁷⁷ Laura Carlson, 'The Paris Principles, NHRIS, And Enabling Legal Frameworks' (2021) 2 *Rutgers International Law and Human Rights Journal* 1: 93.

²⁷⁸ Willy Mutunga, *Beacons of Judiciary Transformation: Selected Speeches, Writings and Judicial Opinions of Chief Justice Willy Mutunga* (Sheria Publishing House 2021) 321.

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Kenya Law: Case Comment – Victory for 160 Girls in Defilement Constitutional Challenge.
kenyalaw.org/caselaw/caselawreport/index_original.
KIPPRA-Policy_Formulation-Brochure_Revised
Landmark Kenya intersex rights law takes effect (losangelesblade.com)
Sensitization on the Children Act 2022; Intersex - YouTube f
www.ohcr.org
What is intersex? – Intersex Human Rights Australia (ihra.org.au)

APPENDICES

APPENDIX.

APPENDIX 1: SAMPLE INFORMED CONSENT.

APPENDIX 2: SAMPLE INTERVIEW TOOL.

APPENDIX 3: RESEARCH PERMITS /AUTHORIZATIONS.

APPENDIX 4: LIST OF RESPONDENTS/INTERVIEWEES AND INFORMAL
DISCUSSANTS

APPENDIX 5: SAMPLE GOVERNMENT ISSUED IDENTITY DOCUMENTS AND
APPLICATION FORMS.

APPENDIX 1: SAMPLE INFORMED CONSENT

CONSENT FOR PARTICIPATION IN THE RESEARCH.

Good morning/ afternoon.

1. Introduction.

My name is Wambui Njogu, a Ph.D student at the University of Nairobi, School of Law. I am conducting research for the PhD thesis under the working title: Creating a Legal Space for Intersex Persons in Kenya. The research is informed by the hypothesis that the existing laws in Kenya do not or do not adequately address the human rights needs of this category of people in society. The purpose of the research is to establish the extent to which the law is protecting or not protecting the rights of intersex persons in Kenya, and also to explore on the legal and societal approaches that can be used to improve the human rights situation of intersex persons in Kenya.

I will give you all the information necessary then kindly request you to participate in this research. If you would like me to clarify any point, please ask me to do so.

2. Reasons for the research.

The information from this research will be used in my thesis for the doctorate of law degree that I am undertaking at the University of Nairobi School of Law. It is my hope that the information gathered in this research will assist the country in identifying the gaps and hurdles that come in the way of an intersex individual's full enjoyment of their rights as a human being, as it gives pointers to possible solutions, with a possible overall effect of a more effective legal response to the difficulties that the intersex may be facing.

3. Other targeted respondents.

The research targets the following other respondents who will be drawn from Kenya and other jurisdictions:

- a) Identified Intersex individual(s) in Kenya.
- b) Identified parents' guardians of intersex persons.
- c) Medical doctors and nurses from selected public hospitals in Kenya.
- d) Media representative(s) working with intersex persons.
- e) The Hon the Attorney General or his representative.

- f) A representatives from the Kenya Law Reform Commission.
- g) A representatives from the Kenya National Human Rights Commissions.
- h) Intersex persons from jurisdictions that the research will seek to draw illustrative lessons from including Australia, India, Germany and South Africa.
- i) Specific judges in Kenya who have dealt with human rights violations of intersex persons in Kenya.
- j) Advocates of the High Court of Kenya who have actively been agitating for the rights of intersex persons in Kenya.

All the respondents who will express willingness to participate in this study will be requested to sign an informed consent to confirm their willingness to participate.

4. The Procedure.

When you give your consent to participate, I will ask you questions on the topic under research for about half an hour, or longer, if you permit, and I will record your responses. If you allow, I can record your responses. Your responses will be cited in the research but unless you specifically request me to, your name will not be disclosed, and I will use a suitable pseudonym, which you will have the right to choose.

5. Right to refuse to participate or withdraw.

Your participation in this research is completely voluntary. You can decline to sign this consent or answer any of the questions that I will ask you. You can also skip any of the question that you are not willing to answer. After you have given your consent to participate in the research, you have the right to withdraw at any stage during the interview, if you decide to do so.

Even after the conclusion of the research, you will still retain your right to have the data that you have given withdrawn from the study and your wish will be respected.

6. Benefits.

This research may not benefit you directly as an individual, but it may play a significant role in informing reform in law and policy for the benefit of the intersex individual in Kenya, now and in future.

- 9) Do you think that the law has done enough for intersex persons in Kenya?
- 10) If no, what suggestions would you make?

TYPE B. (To be administered the parent / guardian of an intersex child).

PART 1 Code: P011

Code: P011

Age

Education

Child.

PART 2

- 1) Do you know what it means to be intersex?
- 2) Has the condition impacted the way the child relates with other children
- 3) What about you as a parent
- 4) Do you talk about this child's condition with the child or other members of society?
- 5) If yes who and what is the reaction?
- 6) Has the child ever been discriminated because of the condition? Give examples/
situations
- 7) Have you sought medical intervention for the child for medical intervention?
- 8) What is your view of the medical interventions including correctional surgery?
- 9) Do you think that the law has done enough for intersex persons in Kenya?
- 10) If no, what suggestions would you make?

Thank you very much for your time.

APPENDIX 2: SAMPLE INTERVIEW TOOL

INTERVIEW TOOL.

My name is Wambui Njogu. I am a Ph.D student at the University of Nairobi, School of Law. I am conducting research on intersex persons in Kenya to establish the extent to which the Law has or has failed to recognize them and how that has impacted on their rights and place in society. I appreciate you taking your time to fill out this questionnaire. Your personal details will be kept strictly confidential but your responses will be used to develop the research.

TYPE A. (To be administered to an intersex adult).

PART 1.

Code: **A011**

Age

Education

PART 2.

- 1) Do you know what it means to be intersex?
- 2) Which (if any) of the following government documents do you possess?
 - Birth certificate.
 - School certificates.
 - Identity card.
 - Passport.
 - Certificate of good conduct.
 - Voter's card?
- 3) What sex has been assigned to you in these documents?
- 4) What sex do you identify with?
- 5) Has your condition impacted the way you relate with society in school and work place?
- 6) Have you ever been discriminated because of your condition? Give examples/ situations.
- 7) Have you undergone medical intervention for your condition?
- 8) What is your view of the medical interventions including correctional surgery?

7. Risks.

The nature of this research may be invasive emotionally and psychologically and there may be discomfort occasioned by the discussion of topics that are ordinarily not discussed in this region. I will however make every effort possible to conduct the interviews as professionally as possible and with as much sensitivity as possible. If for any reason you are not comfortable with the approach that I may take, you will be free to notify me and I will adjust to what you are more comfortable with.

8. Confidentiality.

Confidentiality and privacy shall be ensured throughout the research process, the data entry and the analysis stages.

Thank you.

CONSENT CERTIFICATE

I have read and understood the abovementioned information. I have also had the opportunity to ask questions regarding all aspects and all the questions asked have been answered to my satisfaction. I hereby consent voluntarily to participate in this research as a respondent. I also understand that I have the right to withdraw from the research at any time.

I hereby give consent for my personal particulars to be disclosed in this study.

Code:

▶ Date:

Signature.

Place

County

RESEARCHER'S CERTIFICATE.

I have accurately read and witnessed the accurate reading of the information and the consent to the potential respondent and the respondent has had an opportunity to ask questions which questions I have answered to the best of my ability as a researcher. I hereby confirm that the respondent has given this consent freely.

Name of Researcher:

Date:

Signature:

Place.....



UNIVERSITY OF NAIROBI
FACULTY OF HEALTH SCIENCES
P O BOX 19676 Code 00202
Telegrams: varsity
Tel:(254-020) 2726300 Ext 44355

KNH-UON ERC

Email: uonknh_erc@uonbi.ac.ke
Website: <http://www.erc.uonbi.ac.ke>
Facebook: <https://www.facebook.com/uonknh.erc>
Twitter: @UONKNH_ERC https://twitter.com/UONKNH_ERC



KENYATTA NATIONAL HOSPITAL
P O BOX 20723 Code 00202
Tel: 726300-9
Fax: 725272
Telegrams: MEDSUP, Nairobi

Ref: KNH-ERC/A/136

5th April, 2022

Mary Wambui Njogu
PHD Candidate
Reg. No. G80/51541/2017
School of Law
College of Humanities and Social Sciences
University of Nairobi



Dear Mary

**RESEARCH PROPOSAL: NON RECOGNITION OF INTERSEX PERSONS AND ITS IMPACT ON THEIR HUMAN RIGHTS;
THE KENYAN CASE (P228/03/2022)**

This is to inform you that KNH-UoN ERC has reviewed and approved your above research proposal. Your application approval number is **P228/03/2022**. The approval period is 5th April 2022– 4th April 2023.


This approval is,subject to compliance with the following requirements;

- i. Only approved documents including (informed consents, study instruments, MTA) will be used.
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by KNH-UoN ERC.
- iii. Death and life threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to KNH-UoN ERC 72 hours of notification.
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to KNH-UoN ERC within 72 hours.
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to KNH-UoN ERC.

Protect to discover

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke> and also obtain other clearances needed.

Yours sincerely,


DR. BEATRICE K.M. AMUGUNE
SECRETARY, KNH-UoN ERC

c.c. The Dean, Faculty of Health Sciences, UoN
The Senior Director, CS, KNH
The Chairperson, KNH- UoN ERC
The Assistant Director, Health Information, KNH
The Director, School of Law, UoN
Supervisors: Dr. Elizabeth Muli, School of Law, UoN
Prof. Edwin Abuya, School of Law, UoN
Dr. Seth Wekesa, School of Law, UoN



UNIVERSITY OF NAIROBI
COLLEGE OF HUMANITIES & SOCIAL SCIENCES
SCHOOL OF LAW, PARKLANDS CAMPUS
OFFICE OF THE DEAN

Telephone: 254-020- 2314371-5
Cell Phones: 0724-922 608/ 0734-273 568
E-mail: deanlaw@uonbi.ac.ke

P.O Box 30197
00100 G.P.O.
Nairobi,
Kenya.

February 17, 2020

National Commission for Science
Technology & Innovation
P.O. Box 30623
NAIROBI

Dear Sir/Madam,

RE: MARY WAMBUI NJOGU - G80/51541/2017

This is to confirm that the above named is a *bonafide* student at the University of Nairobi School of Law.

Ms. Njogu is undertaking research leading to the award of Doctor of Philosophy degree in Law (PhD). She would like to obtain a permit in order to collect data for her thesis on the title "*Non Recognition of Intersex Persons and its Impact on their Human Rights: The Kenyan Case.*"

Any assistance accorded to her will be appreciated.

Yours faithfully,

ANNMARIA MAHAGA (MRS)
ASSISTANT REGISTRAR
SCHOOL OF LAW





Republic of Kenya
MINISTRY OF EDUCATION
STATE DEPARTMENT OF BASIC EDUCATION

Telegrams: "SCHOOLING", Nairobi
Telephone: Nairobi 020 2453699
Email: rccnairobi@gmail.com
cdenairobi@gmail.com

REGIONAL COORDINATOR OF EDUCATION
NAIROBI REGION
NYAYO HOUSE
P.O. Box 74629 - 00200
NAIROBI

When replying please quote

Ref: RCE/NRB/GEN/I/VOL. 1

DATE: 30th April, 2019

Mary Wambui Njogu
University of Nairobi
P O Box 30197-00100
NAIROBI

RE: RESEARCH AUTHORIZATION

We are in receipt of a letter from the National Commission for Science, Technology and Innovation regarding research authorization in Nairobi County on "**Non recognition of intersex persons and its impact on their human rights: The Kenyan case.**"

This office has no objection and authority is hereby granted for a period ending **8th June, 2020** as indicated in the request letter.

Kindly inform the Sub County Director of Education of the Sub County you intend to visit.



JAMES KIMOTHO
FOR: REGIONAL COORDINATOR OF EDUCATION
NAIROBI

C.C

Director General/CEO
Nation Commission for Science, Technology and Innovation
NAIROBI



NAIROBI CITY COUNTY



TELEGRAM "SCHOOLING"
TELEPHONE: 2221166/224281
EXT: 2426 /2590

CITY HALL ANNEXE:
P. O. BOX 30298 GPO- 00100
NAIROBI, KENYA

EDUCATION, YOUTH AFFAIRS & SOCIAL SERVICES SECTOR
EDUCATION DEPARTMENT

Ref: G/NC/141/VOL. VI/107

30th April, 2019


Mary Wambui Njogu
University of Nairobi
P.O. Box 30197-00100
NAIROBI.

RE: RESEARCH AUTHORIZATION

Following your application to carry out Research and Subsequent approval by National Commission for Science, Technology and Innovation vide letter Ref: *NACOSTI/P/18/22822/23095 dated 13th June, 2019;*

I am pleased to inform you that authority has been granted to you to carry out research on "Non recognition of intersex persons and its impact on their human rights: The Kenyan case." in Nairobi County for the period ending 8th June, 2019.

On conclusion of the study, you are expected to submit a copy of the research findings to the undersigned:


George P. Letema
CHIEF ADVISOR TO SCHOOLS



Copy to: Chief Officer – Education, Social Services & Gender
Director city Education

APPENDIX 3: RESEARCH PERMITS / AUTHORIZATIONS



UNIVERSITY OF NAIROBI
COLLEGE OF HUMANITIES & SOCIAL SCIENCES
SCHOOL OF LAW, PARKLANDS CAMPUS
OFFICE OF THE DEAN

Telephone: 254-020- 2314371-5
Cell Phones: 0724-922 608/ 0734-273 568
E-mail: deanlaw@uonbi.ac.ke

P.O Box 30197
00100 G.P.O.
Nairobi,
Kenya.

17 May, 2018

National Commission for Science,
Technology & Innovation
P.O. Box 30623
Nairobi

Dear Sir/Madam

RE: MARY WAMBUI NJOGU - G80/51541/2017

This is to confirm that the above named is a bonafide student at the University of Nairobi School of Law.

Ms. Njogu is undertaking research leading to the award of Doctor of Philosophy degree in Law (Ph.D). She would like to obtain a permit in order to collect data for her thesis on the title "*Non Recognition of Intersex Persons and its Impact on their Human Rights: The Kenyan Case.*"

Any assistance accorded to her will be appreciated.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'Njaramba Gichuki'.

DR. NJARAMBA GICHUKI
CHAIR,
POSTGRADUATE STUDIES COMMITTEE



106

NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

Telephone: +254-20-2213471,
2241349,3310571,2219420
Fax: +254-20-318245,318249
Email: dg@nacosti.go.ke
Website: www.nacosti.go.ke
When replying please quote

NACOSTI, Upper Kabete
Off Wariyaki Way
P.O. Box 30623-00100
NAIROBI-KENYA

Ref. No. **NACOSTI/P/18/22822/23095**

Date: **13th June, 2018**

Mary Wambui Njogu
University of Nairobi
P.O. Box 30197-00100
NAIROBI

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on "*Non recognition of intersex persons and its impact on their human rights: The Kenyan case.*" I am pleased to inform you that you have been authorized to undertake research in **Nairobi County** for the period ending **8th June, 2019**.


You are advised to report to **the County Commissioner and the County Director of Education, Nairobi County** before embarking on the research project.

Kindly note that, as an applicant who has been licensed under the Science, Technology and Innovation Act, 2013 to conduct research in Kenya, you shall deposit a **copy** of the final research report to the Commission within **one year** of completion. The soft copy of the same should be submitted through the Online Research Information System.


BONIFACE WANYAMA
FOR: DIRECTOR-GENERAL/CEO

Copy to:

The County Commissioner
Nairobi County.

 Approved
30/04/2019

The County Director of Education
Nairobi County.

COUNTY COMMISSIONER
NAIROBI COUNTY
P.O. BOX 30623-00100, NBI
TEL: 351000

APPENDIX 4:**LIST OF RESPONDENTS / INTERVIEWEES, INFORMAL DISCUSSANTS AND
SELECTED RAW DATA**

S/No	Code:	Name/Pseudo name	Date of Interview	Place of Interview
1.	AOI. 1	Rye Miruiru	18.05.2019	Nairobi
2.	AOI. 2	Mercy	18.05.2019	Nairobi
3.	AOI. 3	Xaba	18.05.2019	Nairobi
4.	AOI. 4	Langa	18.05.2019 & 26.10.2020	Nairobi.
5.	POI. 1	Jane (Sebbo's mother)	18.05.2019	Nairobi
6.	C2 R. 1	XA	20.05.2019	Nairobi
7.	C2 R. 2	AB	12.07.2019	Kiambu
8.	POI. 2	Mama A	17.10.2019	Nairobi
9.	AOI. 5	Van	10.12.2019	Beijing
10.	AOI. 6	KK	16.12.2019	Nairobi
11.	AOI. 7	M C	17.04.2020	On email
12.	AOI. 8	Assa	16.08.2020	Kisumu
13.	AOI. 9	Caymo	16.08.2020	Siaya.
14.	AOI. 10	Onyango	16.08.2020	Kisumu
15.	AOI. 11	Fredrick	16.08.2020	Kisumu
16.	AOI. 12	Godia	16.08.2020	Kisumu
17.	POI. 3	Sophie Wakise	04.10.2020	Mombasa
18.	AOI. 13	Samiz	04.10.2020	Mombasa
19.	AOI. 14	Riziki	04.10.2020	Mombasa
20.	AOI. 15	Vicky	04.10.2020	Mombasa
21.	AOI. 16	YZ	04.10.2020	Mombasa

21.	AOI. 16	YZ	04.10.2020	Mombasa
22.	AOI. 17	Kip	20.10.2020	Nairobi
23.	AOI. 18	Syd	16.12.2019	Nairobi
24.	POI. 4	Mama Rosie	17.12.2020	Nairobi
25.	AOI. 19	Daru	23.05.2022	Ndhiwa, Homa Bay.
26.	AOI. 20	Marion	23.05.2022	Kisumu
27.	AOI. 21	ApSiya	23.05.2022	Homa Bay
28.	AOI. 22	Senta	13.12.2022	Kisumu
29.	C2 R. 3	JC	26.12.2022	Nairobi
Informal Discussants.				
30.	IDS. 1	JC	16.01.2017 & 14.02.2017	Nairobi
31.	IDS. 2	BM	31.07.2018	The Hague, Netherlands
32.	IDS. 3	JS	31.07.2018	The Hague, Netherlands
33.	IDS. 4	KW	31.07.2018	The Hague, Netherlands
34.	IDS. 5	KP	31.07.2018 & 2.08.2018	The Hague, Netherlands
35.	IDS. 6	RG	31.07.2018 & 2.08.2018	The Hague, Netherlands
36.	IDS. 7	Alva M	31.07.2018 & 02.08.2018	Amsterdam, Netherlands
37.	IDS. 8	CC	31.07.2018 & 02.08.2018	Amsterdam, Netherlands
38.	IDS. 9	MM	31.07.2018 & 02.08.2018	Amsterdam, Netherlands

39.	IDS. 10	EL	03.12.2018	Addis Ababa, Ethiopia
40.	IDS. 11	VZ	05.12.2018	Addis Ababa, Ethiopia
41.	IDS. 12	MS	07.12.2019	Changsha, China
42.	IDS. 13	GO	07.12.2019	Changsha, China
43.	IDS. 14	VDG	07.12.2019	Changsha, China
44.	IDS. 15	OO	07.12.2019	Changsha, China
45.	IDS. 16	SO	07.12.2019	Changsha, China
46.	IDS. 17	PO	08.12.2019	Changsha, China
47.	IDS. 18	IW	08.12.2019	Changsha, China
48.	IDS. 19	NN	08.12.2019	Changsha, China
49.	IDS. 20	KK	08.12.2019	Changsha, China
50.	IDS. 21	SU	08.12.2019	Changsha, China
51.	IDS. 22	HW	08.12.2019	Changsha, China
52.	IDS. 23	ML	08.12.2019	Changsha, China
53.	IDS. 24	A I	26.02.2020	Nairobi
54.	IDS. 25	Dr. KF	20.11.2017	Nairobi
55.	IDS. 26	DrDW	09.10.2019	Addis Ababa, Ethiopia
56.	IDS. 27	DrM	09.10.2019	Addis Ababa, Ethiopia
57.	IDS. 28	M T	09.10.2019	Addis Ababa, Ethiopia
58.	IDS. 29	EF	09.10. 2019	Addis Ababa, Ethiopia
59.	IDS. 30	PrT	09.10. 2019	Addis Ababa, Ethiopia
60.	IDS. 31	DrBB	09.10. 2019	Addis Ababa, Ethiopia

61.	IDS. 32	DrMD	09.10. 2019	Addis Ababa, Ethiopia
62.	IDS. 33	NM	09.10. 2019	Addis Ababa, Ethiopia
63.	IDS. 34	EA	09.10. 2019	Addis Ababa, Ethiopia

CODING GUIDE:

AO1- Adult intersex person.

PO1-Parent/guardian of an intersex child.

C2 R- Category 2 Respondent.

IDS- Informal Discussant.

APPENDIX 5:

SAMPLE IDENTITY DOCUMENTATION AND APPLICATION FORMS

- 1) Form B1- Birth Notification Form
 - 2) Sample Birth Certificate
 - 3) Application for birth certificate form
 - 4) Sample Birth Certificate Issued After An Adoption Process
 - 5) National Identity card application Form B136A.
 - 6) Sample National Identity Card
 - 7) Colonial government Identity Card. (*Kipande*)
 - 8) Sample NSSF Membership Application Form
 - 9) Sample NSSF Membership Card
 - 10) Sample NHIF Membership Application Form
 - 11) Sample NHIF Membership Card
 - 12) Sample Passport Application Form
 - 13) Sample Kenyan Passport
 - 14) Digital Data Capture Form
 - 15) Sample Marriage Certificate for Statutory Marriages
 - 16) Sample Marriage Certificate for Customary Marriages
 - 17) Sample Burial Permit
 - 18) Sample Death Certificate
-

THE BIRTHS AND DEATHS REGISTRATION ACT (CAP. 149)
ACKNOWLEDGEMENT OF BIRTH NOTIFICATION (FOR PARENTS)

Serial No. BI AA

1. NAME

First name

Middle Name

Father's name

2. DATE OF BIRTH

Day

Month

3. SEX

Male

Female

4. TYPE OF BIRTH

Single

Twin

OTHER, SPECIFY

5. NATURE OF BIRTH

Born Alive

Born Dead

7. PLACE OF BIRTH

Sub-location of Estate and Town or health institution

Sub-County

8. NAME OF MOTHER

First name

Middle name

Father's name

NOTIFICATION ISSUED TO

ID No.

Date

Note - To obtain a birth certificate, present this notification to the Sub-County Registrar of Births where this birth occurred

CERTIFICATE OF BIRTH

Born in the		NAIROBI		District in the		NAIROBI		Province	
Entry No.		Where Born		Hosp.		Name			
Date of Birth		Sex		Male		Name and Surname of Father			
Name and Maiden Name of Mother									
Name and Description of Informant		Sgd. Midwife							
Name of Registering Officer						Date of Registration			

I, _____ District/Assistant

Registrar for _____ District, hereby certify that this certificate is compiled from an entry/return in the Register of Births in the District.

District/Assistant Registrar

Given under the Seal of the Principal Civil Registrar on the _____ day of _____, 20____

This certificate is issued in pursuance of the Births and Deaths Registration Act (Cap. 149) which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Registrar shall be received as evidence of the dates and facts therein contained without any other proof of such entry.

Note: A Certificate of Birth is not Proof of Kenyan Citizenship.

OFFICE OF THE PRESIDENT
DEPARTMENT OF CIVIL REGISTRATION
APPLICATION FOR A BIRTH CERTIFICATE

Application No. CA Date

Fee Paid M.R. No. Cashier's Sign

To be Completed in Capital Letters

For Official Use Only

- 1. District of birth
- 2. Province of birth
- 3. Notification No.
- 4. Exact place of birth
- 5. Name of child
- 6. Date of birth
- 7. Sex of Child
- 8. Full names of father
- 9. Name of Mother before marriage
- 10. Name and address of Applicant
- Signature

- 1. Entry No.
- 2. Description of informant
- 3. Name of registering officer
- 4. Date of registration
- 5. Record checked by
- 6. Date checked
- 7. Signature:
- 8. Fee paid
- 9. Assessed by
- 10. Date assessed
- 11. Signature
- 12. Approved by
- 13. Date approved
- 14. Signature

Applicant's name

Child's name Date of birth

Date presented Application number

REPUBLIC OF KENYA

CERTIFICATE OF BIRTH

Birth in the _____		District in the _____		Province _____
Entry No.		Where Born	Name	
Date of Birth		Sex	Male	Name and Surname of Father
Name and Maiden Name of Mother				
Name and Description of Informant		Sgd. Parent		
Name of Registering officer		Date of Registration		

E. M. Kitoo

District Assistant Registrar

Central Records Division

Registrar for _____ District, hereby certify that this certificate is compiled from an entry/return in the Register of Births in the District.

District Assistant Registrar

Given under the Seal of the Director of Civil Registration on the _____ day of _____

This certificate is issued in pursuance of the Births and Deaths Registration Act (Cap. 149) which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Director of Civil Registration shall be received as evidence of the dates and facts therein contained without any other proof of such entry.

DPK

Reg. 136 A

R



REG. 136 C SERIAL NUMBER

2

SERIAL NO. _____

FINGERPRINT CLASSIFICATION



JAMHURI YA KENYA/REPUBLIC OF KENYA
SHERIA YA USAJILI WA WATU
(Kifunga 107)
THE REGISTRATION OF PERSONS ACT
(Cap.107)

NAMBARI YA KITAMBULISHO _____
(Identity Card No.)

OMBI LA KITAMBULISHO/APPLICATION FOR IDENTITY CARD

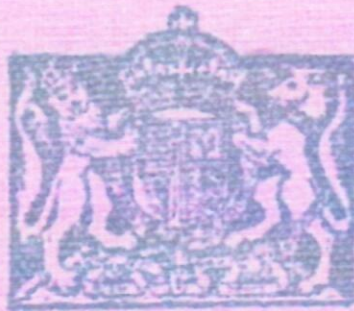
1. Majina Kamill _____
(Full Names)
2. Tarehe ya Kuzaliwa _____
(Date of Birth)
3. Mume/Mke _____
(Male/Female)
4. Majina ya Baba _____
(Father's Name)
5. Majina ya Mama _____
(Mother's Name)
6. Marital Status _____
7. Majina ya Mume _____
(Husband's Full Names)
8. Nambari ya Kitambulisho ya Mume _____
(Husband's ID/No.)
9. Wilaya ya Kuzaliwa _____
(District of Birth)
10. Kabila _____
(Tribe)
11. Ukoo _____
(Clan)
12. Mlango _____
(Family)
13. Wilaya ya Makao _____
(Home District)
14. Taarafa _____
(Division)
15. Eneo la Mbunge _____
(Constituency)
16. Mtaa _____
(Location)
17. Mtaa Mdogo _____
(Sub-location)
18. Kijiji _____
(Village/Estate)
19. Anwani _____
(Village/Estate)
20. Anwani _____
(Home Address)
21. Kazi _____
(Occupation)



KIPANDE CHAIN



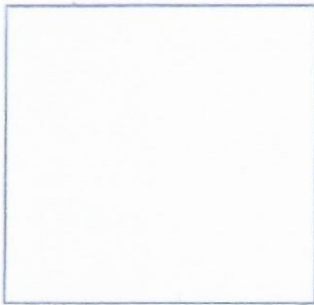
ISSUED FROM 1919-1947



**COLONY AND PROTECTORATE
OF KENYA**

IDENTITY CARD

**ISSUED UNDER THE PROVISIONS
OF THE
REGISTRATION OF PERSONS
ORDINANCE, 1947**



PHOTO

 Employer No.

 Employee No.
NSSF Employer & Employee Numbers

P. O. BOX 30599 – 00100, NAIROBI

TEL.No: 020 2729911, 2710552

E-mail mt@nssfkenya.co.ke; info@nssfkenya.co.ke

APPLICATION FORM FOR MEMBER REGISTRATION (REVISED 2015)

Please complete this form accurately and attach a copy of ID Card/Passport/Alien card:

Fields Marked *are Mandatory

Tick as appropriate

 Employee Voluntary
PART A
PERSONAL DETAILS

 *Surname: *First Name:

 *Middle Name: *Nationality:

 *ID/PP/Alien No

 Date of Reg: Issued By:

 *Date of Birth: Payroll No:

 *KRA PIN
FOR EMPLOYED APPLICANTS

 *Place of Employment:

 *Postal Address:

 Postal Code:

 *Date of Employment: *Gender: Male Female

***HOME DETAILS (Insert as per ID)**

 County: District

 District of Birth: Location:

 Sub location: **RESIDENCE DETAILS:**

 Name of Estate: Floor & Room No:

 Name of Building: House No:

 Street/Road: E-Mail Address:

NATIONAL SOCIAL SECURITY FUND
MEMBERSHIP CARD
(KADI YA UANACHAMA)



Member No :
Full Name :
ID/PP Number:
Date of Birth : / /
Gender : FEMALE
County :
Reg Date : / /
Employer's No: 00
Issuing Office : Hill Branch





NATIONAL HOSPITAL INSURANCE FUND

P. O. Box 30443 - 00100, NAIROBI, KENYA

Website: www.nhif.or.ke Email: info@nhif.or.ke

Folio No:

REGISTRATION FORM

Tick where applicable Employed Self Employed Organized Groups Sponsored
 Tick where required Registration Choice/Change facility

Guidelines:

1. Attach Copies of Identification cards for both the contributor and spouse.
2. For new registration of employed persons attach an introduction letter from employer.

PART I: MEMBER DETAILS

Surname: Other Names:
 NHIF No: National I.D./Passport/Alien I.D No.:
 Date of Birth (DD/MM/YYYY): Gender (Male/Female):
 Employer/Organized Group Code: Sponsor Code:
 Payroll/Personal No.: Mobile Phone No.:
 Place of Residence (sub county):
 E-Mail Address:
 Postal Address: Post Code:

PART II: SPOUSE DETAILS

Surname: Other Names:
 National I.D./Passport/Alien I.D. No.: Date of Birth (DD/MM/YYYY):
 Gender (Male/Female): Mobile Phone No.:

PART III: CHILDREN DETAILS AND CHOICE/ CHANGE OF FACILITY

Guidelines:

1. Please attach a copy of Birth Certificate for each child. For children under six (6) months, a birth notification is acceptable.
2. To choose an outpatient medical facility, please refer to the list of our accredited outpatient health facilities available in the N.H.I.F Website and Offices countrywide.
3. To access benefits one **MUST** be a duly registered member and must have declared their dependant.
4. To choose an OPC Facility, attach a copy of the contributor's National ID

	Name	Date of Birth			Gender M/F	Code	Preferred Medical Facility Name
		Date	Month	Year			
PRINCIPAL							
SPOUSE							
CHILD 1							
CHILD 2							
CHILD 3							
CHILD 4							
CHILD 5							
CHILD 6							
CHILD 7							
CHILD 8							
CHILD 9							
CHILD 10							

NHF NATIONAL HOSPITAL
INSURANCE FUND
MEMBERSHIP CARD

Membership No. _____ NHIF Admin. Code No. _____

Name _____

Category: **MEMBER** Valid From _____

YOB _____

Employer Code _____ Print Station **HQ**

OMBI LA KUTAKA PASPOTI YA KENYA APPLICATION FOR A KENYA PASSPORT

Majina Kamili }
Full Names }

Tafadhali soma maagizo kwa makini kabla ya kujaza fomu.
Please read instructions carefully before completing the form

R.....	
Receiving Officer	
Name	
Signature.....	
Stamp	
Indexing Officer	
Name	
Signature.....	
Stamp	

MAAGIZO

1. Maelezo: Tafadhali ufahamu vyema kwamba wale wote wanaoomba paspoti ni lazima wajaze Sehemu zote. Sehemu ya 3, ni lazima kujazwa na mwombaji ambaye ni mwanamke aliyeolewa.

2. Upendekezi wa ombi. Mwombaji lazima apendekezwe katika sehemu ya 7 na mwananchi wa Kenya kama vile mhuduma wa kidini, daktari, mwanasheria, mtumishi wa serekali wa cheo cha juu au mtumishi wa benki ambaye anamfahamu mwombaji, lakini asiwe jamaa wakaribu.

3. Picha. Picha tatu zilizopigwa hivi karibuni lazima ziambatane na fomu. Picha hizi lazima ziwe za uso wote, bila kuvaa kofia au kitambaa. Pia picha isiwe ndani ya fremu. Ukubwa wa picha usizidi inchi 2 ½ kwa inchi 2 upana wala usipungue inchi 2 kwa inchi 1 ½. Ni lazima picha hizi ziwe katika karatasi nyembamba ya kawaida ya picha na wala isiwe inang'ara. Kwa upande wa nyuma wa picha moja, anayependekeza aandike maneno yafuatayo: Ninathibitisha kwamba picha hii ni sura hasa ya muombaji paspoti. Bw./Bi./Bint. Na atie sahihi yake.

4. Ada hivi sasa ya paspoti ya kurasa 32 ni Sh. 4,500, kurasa 48 ni Sh.6,000, kurasa 64 ni Sh. 7500. Diplomatic ni sh. 7,500, paspoti iliyopotea ni Sh. 12,000, paspoti iliyoharibiwa ni Sh. 10,000 na paspoti ya EA paspoti Sh. 900. Ni lazima malipo haya yawe fedha taslimu au hundi ya benki. Risiti rasmi itatolewa.

5. Fomu ya maombi ipelekwe na mwenye kuomba binafsi katika Ofisi kuu yapaspoti, Nyayo House, Nairobi, Mombasa (Uhuru na Kazi Building), Kisumu (Reinsurance Plaza), au Eldoret (Public Works), Garissa, Nakuru(Ofisi ys PC), Embu(Ofisi ya PC) katika muda usiopungua siku 20 kabla ya tarehe ya kusafiri.

6. Paspoti haiwezi kutolewa au kuongezwa muda wake hapa nchini kwa niaba ya mtu ambaye tayari yuko nje ya Kenya. Mtu huyo anapaswa kuwasilisha ombi lake kwenye ofisi ya ubalozi wa Kenya uliyo karibui naye, na katika nchi ambako Kenya haina uwakilishi wa kibalozi, katika ofisi ya ubalozi wa Uingereza iliyo karibu naye. Paspoti hazitumwi nje ya Kenya kwa njia ya Posta.

7. Hati za kuonyesha ni raia wa Kenya ni lazima zitolewe.

8. Fomu zote za maombi ya paspoti ziambatanishwe na paspoti ya awali kama ipo, Kitambulisho cha Kenya aina ya kisasa, cheti cha kuzaliwa na kopi za kila moja ya hati hizi ambazo zimethibitishwa.

9. Habari zote zitakazotolewa zitahifadhiwa kama siri ya serikali na hazitajulishwa mtu yeyote asiyestahili.

NOTES

1. Instructions. Kindly note that all applicants must complete all Sections. Section 3 must be completed where the applicant is married and evidence of the same produced.

2. Recommendation of application. The application must be recommended in Section 7 by a citizen of Kenya, such as a minister of religion, a medical or legal practitioner, an established civil servant or bank official personally acquainted with the applicant but not by an immediate relative.

3. Photographs. Three copies of a recent photograph of the applicant must be taken full face without hat, and the photographs must not be mounted. The size of the face must not be more than 2 ½ inches by 2 inches or less than 2 inches by 1 ½ inches. The photographs must be printed on normal thin photographic paper and must not be glazed. The recommender is supposed to endorse on the reverse side of one copy of the photograph with the words: "I certify that this is a true likeness of the applicant Mr. /Mrs. / Ms..... and add his/her signature.

4. The current fee for a 32 page passport is Sh. 4,500, 48 page passport is Sh.6,000, 64 page passport is Sh.7,500, Diplomatic Sh. 7,500, Lost passport Sh. 12,000, Mutilated passport Sh. 10,000 and EA passport Sh. 900. This fee must be paid in cash or by bankers' cheque and an official receipt issued.

5. Application for a passport must be submitted personally by the applicant to the Passport Control Office, Nyayo House, Nairobi, or to the Branch Passport Control Offices:- Uhuru Na Kazi Building, Mombasa, New PC's Office Kisumu, Public Works Building, Eldoret, Garissa, Nakuru PC's office and Embu PC's office at least 20 days before the scheduled date of travel. Forms may be downloaded from www.immigration.go.ke

6. A passport cannot be issued or renewed by a Passport Control Officer on behalf of a person already abroad. Such persons should apply to the nearest Kenya Mission abroad or, where there is no Kenya representative, to the nearest United Kingdom Mission. Passports are not sent out of Kenya by post.

7. Documentary evidence of Kenya citizenship must be produced.

8. All applications must be accompanied by a previous passport, if any or current national Kenya Identity Card, Birth Certificates plus certified photocopies of each.

9. Information will be treated confidentially and shall not be passed to any unauthorized persons.

(6) *Watoto wako*

Particulars of legitimate /legally adopted child /children

<i>Majina Kamili</i> Full Names	<i>Mahali pa Kuzaliwa</i> Place of Birth	<i>Tarehe ya kuzaliwa</i> Date of Birth	<i>Uhusiano na mwombaji</i> Relationship to applicant	<i>Mwanamume</i> Male	<i>Mwanamke</i> Female

(7) **MDHAMINI**(Tazama maelezo ya kujaza nambari 2 na 3)

Natoa uhakikisho kwamba anaomba paspoti ni mtu ninaemfahamu binafsi na kwamba naamini maelezo alioandika hapa ni ya kweli. Mimi ni mwananchi wa Kenya.

RECOMMENDER (refer to notes no.s 2 and 3)

I certify that the applicant is personally known to me, and that to the best of my knowledge/ belief the facts stated in this form are correct. I am a citizen of Kenya

Majina Kamili

Full Names:

Nambari ya Kitambulisho

ID No. (Attach certified copy):

Kazi

Profession/Occupation:

E-Mail:

Anwani

Address P. O. Box:

Tel:

Sahihi

Signature:

Tarehe

Date:

(8) **UAMUZI**

Mimi niliyetia sahihi yangu hapa naomba nipewe paspoti. Naidhinisha: -

- (a) Kwamba maelezo yaliyotolewa katika fomu hii ya maombi ni ya kweli nijuavyo mimi mwenyewe na kuamini.
(b) Kwamba sijapata uraia wa nchi nyingine.
(c) Kwamba sijawahi kuwa na, au kuomba paspoti yoyote
au (d) Kwamba pasi zote nilizopewa nimerudisha isipokuwa paspoti au cheti cha kusafiri No: ambayo /ambacho kiko pamoja na fomu hii ya maombi, tena sijapeleka maombi mengine ya pasi tangu nipewe paspoti au cheti hiki cha kusafiri.

(Futa kwenye mstari "C" au "D" yale yasiyokuhusu)

I declare

- (a) That the information given in this application is correct to the best of my knowledge and belief.
(b) That I have not acquired citizenship of another country.
(c) That I have not previously held or applied for a passport of any description.
(d) That all previous passports granted to me have been surrendered other than passport or travel document No. Which is now attached, and that I have made no other application for a passport or travel document was issued to me.
(e) I (Emigrant/ Parent/ gurdian)..... of P.O. Boxand I.D Number hereby agree to bind myself to pay the Government any charges and expenses (including expenses of repatriation from overseas of the Emigrant and Dependents, if any) which may be incurred by the Government of Kenya in respect of myself..

(Delete "C" or "D" whichever is inapplicable)

Sahihi

Signature:

Tarehe

Date:



REPUBLIC OF KENYA

CONFIDENTIAL



FORM: HN001



DATE

DIGITAL DATA CAPTURE FORM

Serial Number: _____ (If a child's Age < 6yrs fill the Bio Data Information, Birth Certificate /Notification Entry No, Parent's Details and Exit!)

SECTION I

Bio Data Information					
Name: <small>First Name</small>		<small>Middle Name</small>		<small>Surname</small>	
Gender: <input type="checkbox"/> Male <input type="checkbox"/> Female		Date of Birth: <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>			
Place of Birth Details					
Country:	County:	Sub-County:	Division:	Location:	Sub-Location:
Disability					
Are you living with disability? <input type="checkbox"/> Yes <input type="checkbox"/> No		If yes, specify: _____		Disability Registration Number <input type="text"/>	
Citizenship Information					
Citizen			Non-Citizen		
ID/No. <input type="text"/>	Birth Certificate Entry No. <input type="text"/>		Nationality: <input type="text"/>	Country of Origin: <input type="text"/>	
NHIF No. <input type="text"/>	Driver's Licence No. <input type="text"/>		Passport No. <input type="text"/>	Alien ID. No./Refugee No. <input type="text"/>	
NSSF No. <input type="text"/>	KRA PIN No. <input type="text"/>		(Expiry date) <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>	(Expiry date) <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>	
Passport No. <input type="text"/>			Status: <input type="checkbox"/> Work Permit <input type="checkbox"/> Special Pass <input type="checkbox"/> Dependant Pass		
(Expiry date) <input type="text"/> <input type="text"/> <input type="text"/> <input type="text"/>			<input type="checkbox"/> Pupil Pass <input type="checkbox"/> Intern <input type="checkbox"/> Refugee		
			<input type="checkbox"/> Asylum <input type="checkbox"/> Stateless <input type="checkbox"/> Other		
Marital Status		Spouse Details		ID/Passport No.	
<input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Separated <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed		Spouse Name <small>First Name</small>		<input type="text"/>	
		<small>Middle Name</small>		<input type="text"/>	
		<small>Surname</small>		<input type="text"/>	
		1. _____		<input type="text"/>	
		2. _____		<input type="text"/>	
		3. _____		<input type="text"/>	
		4. _____		<input type="text"/>	
		5. _____		<input type="text"/>	
Parents/Guardian Details					
Father's Name: <small>First Name</small>		<small>Middle Name</small>		<small>Surname</small>	
				<input type="checkbox"/> Deceased <input type="checkbox"/> Alive	
				ID/No. / Passport No. <input type="text"/>	
Mother's Name: <small>First Name</small>		<small>Middle Name</small>		<small>Surname</small>	
				<input type="checkbox"/> Deceased <input type="checkbox"/> Alive	
				ID/No. / Passport No. <input type="text"/>	
Guardian Individual Name: <small>First Name</small>		<small>Middle Name</small>		<small>Surname</small>	
				<input type="checkbox"/> Deceased <input type="checkbox"/> Alive	
				ID/No. / Passport No. <input type="text"/>	
Guardian Institution Name: _____				Registration No. <input type="text"/>	

Huduma Namba Registration is mandatory as per Section 9A of the Registration of Persons Act (Cap.107). It will enable the Government to provide you with services. This form and the registration process is absolutely free of charge.

Republic of Kenya

Marriage Act, 2014

[Rule 6(1).]

Form MH7

Marriage Certificate

MARRIAGE CERTIFICATE

Serial No.

Marriage solemnized at in sub-county, county in the Republic of Kenya.

Date of marriage.	Marriage Entry No.	
Bridegroom's Name	Age.	Marital status.
Residence at time of marriage.	County.	Sub-county.
Occupation.		
Parents Names.		

Father's name.	Mother's name.	
Occupation.	Occupation.	
Residence.	Residence.	
Bride's name.	Age.	Marital status.
Residence at the time of marriage.	County.	Sub-county.
Occupation.		
Parents Names.		

Father's Name.	Mother's Name.
Occupation.	Occupation.
Residence.	Residence.

Married in the By Registrar's Certificate No.

Special License by

This marriage was solemnized	Bride	in the presence of
	Groom		between of

CERTIFICATE OF CUSTOMARY MARRIAGE

Serial No.

Marriage solemnised under customary law in the
 Sub county County

Date of Registration.	Registration Entry No:	
Husband's Name	Age.	Marital Status
Residence at time of marriage.	County.	Sub-county.
Occupation.		
Parents Names.		
Father's name.	Mother's name.	
Occupation.	Occupation.	
Residence.	Residence.	
Wife's name.	Age.	Marital Status
Residence at the time of marriage.	County.	Sub-county.
Occupation.		
Parents Name.		
Father's Name	Mother's Name.	
Occupation.	Occupation.	
Residence.	Residence.	

Registered in the:	by Acknowledgment Certificate	
No.		
By:		
The marriage	}	in the
was		presence
Solemnized		of
between		

Note: A customary marriage is polygamous or potentially polygamous.

REPUBLIC OF KENYA

FORM DI

THE BIRTHS AND DEATHS REGISTRATION ACT
(Cap. 149)

PERMIT FOR BURIAL

Serial No. DA _____ IP Number _____
1. NAME OF DECEASED _____
First Name Middle Name Father's or husband's name

2. IDENTIFICATION / PASSPORT NUMBER _____

3. SEX: Male Female

4. AGE _____

Year / Month / Day

DATE OF DEATH _____

Day / Month / Year

9. USUAL RESIDENCE _____

Sub-location or estate and town

Sub-county

After making due inquiry as to cause of the death of the above named deceased person, I hereby authorize the interment of the body.

18. DATE: _____

Day / Month / Year

19. REGISTRATION ASSISTANT FOR _____

20. SIGNATURE _____

PERMIT ISSUED TO (NAME): _____

ID No _____

SIGNATURE _____

Note: To obtain death certificate, present this permit to the Sub-county Registrar of Deaths in the Sub-county where the death occurred.

REPUBLIC OF KENYA

CERTIFICATE OF DEATH **B N°**

Death in the		District in the		Province	
No.	Name and Surname of deceased	Age			
Sex	Residence	Occupation			
Date of Death	Cause of Death				
Place of Death	Signature of Registering Officer		Date of Registration		
Signature, Description and Residence of Informant					

Certified to be a true copy of a return/an entry in the Register of Deaths in the District above mentioned.

Given under the seal of the Principal Registrar on the day of 19

This certificate is issued in pursuance of the Births and Deaths Registration Act which provides that a certified copy of any entry in any register or return purporting to be sealed or stamped with the seal of the Principal Registrar shall be received as evidence of the dates and facts thereon contained without any or other proof of such entry.

Typed By: (.....)

Checked by: (.....)

FEE PAID: Fifty Shillings

CA.