

**AN ANALYSIS OF THE LEGAL RIGHTS OF INTERSEX PEOPLE IN
KENYA**

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084410

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

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2018

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By

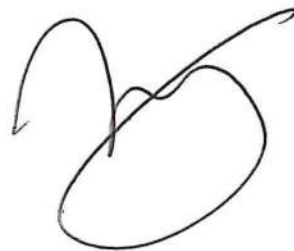
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Kariro

Prepared under the supervision of

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A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a circular flourish and a long horizontal stroke extending to the right.

[FEBRUARY 2018]

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I am indebted to my lecturers, my family, my friends and my colleagues who took time to read and give constructive guidance.

Dedications

I dedicate this thesis to my family and friends.

Abstract

According to the proponents of the natural law school of thought, human rights exist as result of higher law than that made by man. There are certain moral norms that bind us as rational beings regardless of where a person comes from. John Locke thus states that all human beings were by their own nature worthy to respect one another as equals. He explored this concept in "*The second Treaties of Civil Government*". In his Chapter 2 '*The State of Nature*' he affirms that all men are free to direct their actions and disposes of their possessions without seeking permission from anyone except within the limits imposed by the law of nature. In line with this state of equality no person has more power and authority than another as they are creatures of the same species and status. The protection of the life and dignity of men is thus a function of a legitimate government and a lack of such protection is a threat to the stability of human rights.

The objective of this study was to investigate whether the current legal framework protects and promotes the rights of intersex people. This was achieved by analyzing certain domestic legislation. It emerged through the discussion that there are hopeful signs towards the protection and the promotion of the rights of intersex people at the national level through the constitution of an intersex taskforce. The Constitution has not specifically made reference to the rights of intersex people but has put up mechanisms where there can be redress, where fundamental rights and freedoms have been infringed. The inclusion of the word intersex in the interpretation of sex would ensure the instances of institutional discrimination are reduced.

List of cases

Kenyan Cases

1. Baby A (minor suing through her mother) v Attorney General [2013] eKLR
2. Richard Muasya v Attorney General [2007] eKLR

South African Case

3. Minister of Finance & Another v Van Heerden 12 BLLR 118 (CC) (29 July 2004)
4. Du Toit v Minister for Welfare and Population Development CCT40/01 [2002] ZACC 20; 2002 10 BCLR 1006 (CC), 2003 2 SA 198 (CC)

List of Legal Instruments

National legislation

1. Births and Deaths Registration Act, Cap 149 Laws of Kenya
2. Constitution of Kenya 2010
3. Persons Deprived of Liberty Act, Act No 23 of 2014
4. Prisons Act, Cap 90

South Africa

5. Constitution of the Republic of South Africa 1996
6. Judicial Matters Amendment Act 22 of 2005
7. Promotion of Equality and the Prevention of Unfair Discrimination Act No. 4 of 2000

Malta

8. Constitution of Malta 1964
9. Equality of Men and Women 456 Law of Malta
10. Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015
11. Ministry of Education and Employment, ' Trans ,Gender Variant and Intersex students in Schools Policy' June 2015

CHAPTER 1

Introduction

The Constitution of Kenya¹ defines a marginalized group as ‘a group of people who because of laws or practice before, on or after the effective date, were or are disadvantaged by discrimination on one or more grounds in Article 27(4)’. Article 27(4)² states that, ‘The State shall not discriminate directly or indirectly against any person on the grounds of, race, sex, pregnancy, birth, language or ethnic and social origin’. This definition provides protection for groups facing discrimination in the country as it ensures that all persons are included within the law. Critiques have argued however that the definition is too broad therefore posing a challenge as many are now seeking protection under it making the definition redundant.³ A minority group facing discrimination is the intersex community in Kenya. In the case of *Baby 'A' & another v Attorney General & 6 others*⁴ the medical practitioners could not decide on what sex to indicate on the birth certificate of the baby after discovering that the child had both male and female reproductive organs. This resulted in an ‘X’ as a mark of the baby’s sex which the baby’s mother stated was a violation of the child’s dignity. In order for a birth to be successfully registered the child’s sex should be indicated on the birth certificate, the law does not provide for situations where there is an ambiguity of sex.⁵ The parents of the child born as an intersex have to decide whether their child will be male or female, as the child is an infant, he or she cannot participate in the decision-making process and decide whether he wants to be male or female. This study seeks to prove that it is important that the best interest of the child be considered. The assignment of gender should be done when the child is able to decide for him or herself what gender he or she should be, any gender assignment surgery should be done after permission by the court.

The right to recognition is a fundamental right entitled to all human beings including intersex persons, under the Constitution the right to recognition is found in Article 12(2).⁶ It states that ‘every citizen is entitled to identification details issued by the state’. However, the position in law is unclear as to how such recognition is actualized where an intersex child is born and the

¹ Article 260, *The Constitution of Kenya 2010*

² Article 27(4) *The Constitution of Kenya 2010*

³ Korir Sing' Oei A, ‘*Kenya at 50: Unrelied rights of minorities and indigenous people*’ Minorities Group Rights International

⁴ *Baby 'A' & Another v Attorney General and 6 others* [2013]eKLR

⁵ *Births and Deaths Registration Act*, Cap 149 Laws of Kenya

⁶ Article 12, *The Constitution of Kenya 2010*

child's parents cannot decide whether the child shall grow up as a male or a female. Before the enactment of the Persons Deprived of Liberty Act⁷ in 2014 there was no definition of the term intersex.

An intersex person is one whose biological sex is not clearly classified as either male or female at birth⁸. In Kenya an intersex is defined as a person certified by a competent medical practitioner to have both male and female reproductive organs.⁹ However the Act¹⁰ does not give any guidelines on the pertinent issues that affect intersex persons such as ; the issuance of birth certificates where the parents are unsure of what gender to assign their child because they may manifest into a gender opposite of that assigned to them. The provision of public toilets, the provision of prison systems and what schools intersexual people should attend. The preamble of the Yogyakarta Principles states that all human beings are born free and equal in dignity and rights, all should enjoy these rights without any distinctions based on age, race, color, sex, religion, language, and political or other opinions.¹¹ Moreover, the first principal in the Yogyakarta Principles emphasizes that all human beings of all sexual orientation and gender identities are entitled to the full enjoyment of human rights. It is therefore important that a legal framework be adopted in countries where intersex people are facing issues of discrimination and cannot access public amenities such as schools and prisons.

In light of these issues this research intends to analyze the legal rights of intersex people. These include the right to recognition through the issuance of a birth certificate and any national identification documents issued by the state, the right to access public amenities such as schools and public washrooms as well as the right to have a prison system that caters for intersex people. The aim of this research is to propose a working legal framework for intersex people that may be adopted in Kenya.

1.1 Statement of problem

Gender identity is something very simple to most people as they ascribe their gender to their sex however, what gender does one ascribe to when they are born with both male and female reproductive organs?

⁷ *Persons Deprived of Liberty Act 2014*

⁸ *Oxford Dictionary*

⁹ *Persons Deprived of Liberty Act (2014)*

¹⁰ *Persons Deprived of Liberty Act (2014)*

¹¹ *Yogyakarta Principles (March 2007)*

The Laws in Kenya have only described what an intersex person is however, the legislature has not given any legal framework that seek to grant certain rights to these people. The lack of a proper prison system has contributed to discrimination as well as inhuman and degrading treatment as seen in the case *R.M V Attorney General & 4 others*.¹²

The enactment of the Persons Deprived of Liberty Act is a step in the realization of the rights of intersex people however this group of people are still marginalized in the Kenyan community as many people shudder at their existence and many consider them an abomination.

1.2 Justification for the study

This study is justified as the law has provided for a definition of intersexual people thus recognizing them as persons who need and seek its protection. However, the law has not addressed important issues that affect intersexual people such as the registration of their births and if it is indeed in the best interest of the child if their parents assign them a gender which in the future they may not conform to due to their hormonal expression developing different from their physical self. The law has not addressed the issue of prison systems that cater for intersex people as seen in the case *R.M V Attorney General & 4 others*¹³. When an intersex person is arrested it is important that they are placed in a correctional facility that will not endanger their life or erode their dignity. There has been a failure by the legislature to give guidelines on the social amenities that intersex persons can enjoy such as public toilets and public schools. It is important that the legislature provides the public with a legal framework that will deal with this marginalized group, as there is still a lack of acceptance by the society of such people.

This thesis can be used as research material, as it will cover a wide range of cases from Kenya as well as other jurisdictions that have dealt with the recognition of intersex people. The different legislations that deal with the rights and freedoms of intersex people and their scope of application when it comes to intersex people, this will include the use of international legal instruments that may be used to enrich human rights laws in the country.

The recommendations given will be an insight as to the best legal framework that may be adapted in the country. This may be used by the executive to formulate policies in Kenya that will deal with the rights of intersex people.

¹² RM V Attorney General and 4 others [2010]eKLR

¹³ RM V Attorney General and 4 others [2010]eKLR

Hypothesis

1. Intersex persons suffer discrimination in Kenya, as they are unable to get birth certificates and access public amenities.
2. The legal framework does not sufficiently provide for intersex people contrary to the practices in South Africa and Malta.
3. Other countries have taken steps that Kenya can emulate.

1.3 Objectives of the study

This study seeks to achieve the following objectives:

- The main objective is to provide a feasible legal framework for intersex people
- To analyze the right to recognition of intersex persons
- To analyze the right to access public amenities
- To analyze the right to have a correctional system for intersex people

1.4 Research questions

This study explores the following research questions:

1. To what extent has the current legal framework provided for the recognition and protection of an intersex person?
2. To what extent is the right to recognition accorded to an intersex person?
3. To what extent can intersex people access public amenities in Kenya?
4. To what extent have the prison systems accommodated intersex people?

1.5 The scope and limitation of the study

The scope of this study was limited to covering the laws that apply to the rights of intersex people in Kenya. It was not intended to analyze all the legal rights that should be accorded to intersex people. At the end of the study the recommendations will detail how the legal system can provide a feasible legal framework for intersex people with regards to the problems addressed in the research paper.

As this is still a developing area of the law the study was limited to the resource reference materials used.

1.6 Chapter breakdown

The objectives of this thesis will be met within four chapters. Chapter one discusses the introduction to the issues faced by intersex people in Kenya thus setting the content and structure for the thesis. It will contain the prescribed methodology and approach, the assumptions, hypothesis and research questions taken in the study. The study shall be conducted through an analysis of international concepts, with the aid of secondary research such as books, journal articles and reports so as to understand and establish the sexual spectrum under which intersex people fall. The use of primary, secondary and tertiary sources of research will be used to establish and trace the historical developments in the advancement of intersex rights this will form the basis of chapter 2. Chapter 3 will study different comparative regimes that have catered for the rights of intersex people by placing them in a third gender category, drawing inspiration from South Africa and Malta. The Chapter will highlight the lessons that Kenya can learn from the different legal regimes which have implemented a third gender for intersex people. Chapter 4 will contain the conclusion of the thesis and recommendations.

CHAPTER 2

To what extent has the current legal framework provided for the rights of intersex people?

2.1. Introduction

Cultural aspects vary amongst different communities, to the extent that they are considered natural and invariant.¹⁴ Communities will decide on what practices they consider more arbitrary than others depending on their understanding and awareness of matters. The one assumption that many may consider universal is that the world consists of two sexes, which are male and female. Thus, instances of intersex people are seen as unnatural and problematic. One of the main challenges faced by persons in the intersex community is the lack of awareness and understanding of what it means to be intersex. The negative attitude the society has towards intersex people stems from the binary gender model, which classifies sex and gender into two different and distinct forms of masculine and feminine identities. This is maintained by a cisnormative¹⁵ system, which makes legitimate the claims of those who are comfortable in the gender and sex assigned to them at birth. Intersex people do not fall into the normal societal expectation. This leads to the creation of stereotypes towards them, which results in marginalization and discrimination within institutional frameworks.

The aim of this Chapter is to analyze the current legal framework in Kenya and whether it provides for the protection and the promotion of the rights of intersex people. The objectives of this Chapter will be met in three parts. The first part of the chapter will trace the historical developments in intersex law. This will be done by highlighting the developments on intersex law during the Independence Constitution era and after the promulgation of the 2010 Constitution through the use of case law. The second part of this Chapter will seek to analyze the current legal framework in Kenya, commenting on whether it ensures the promotion and the protection of the rights of intersex people. The third part of this Chapter will contain a conclusion of the findings.

This researcher paper intends to prove that the legal recognition of the rights of intersex people as legal phenomena creates room for political discourse in the field of human rights law. The

¹⁴ Robert B. Edgerton, *Pokot Intersexuality: An East African Example of the Resolution of Sexual Incongruity*, The Neuropsychiatric Institute, University of California, Los Angeles

¹⁵ This is the gender identity and gender expression that claims all persons of cisgender match the sex they were assigned at birth as well as the societal expectations attached to such gender. This constitutes what the society views are normal when it comes to gender and sex.

law determines the recognition of bodies which are allowed to exist without the intervention of medicine. It also legitimizes the alterations of bodies that are considered abnormal¹⁶ thus an intersex body is seen as a biological anomaly as well as a legal anomaly.

2.2 The historical developments of the protection of the rights of intersex people in Kenya

Pre-independence Kenya was depicted as an era that promoted inequality. In 1920 Kenya was declared a British protectorate.¹⁷ The legislative council at that point was mainly led by representatives of the European settlers, there were two nominated Indian representatives and one official Arab nominated representative.¹⁸ There was no African representative.¹⁹ The view at this time was that African people lacked capacity to participate in the Legislative council.²⁰ In 1944 Eliud Mathu was nominated to the Legislative council.²¹ This intensified the agitation towards self-governance for the African people by groups such as the Mau Mau, which ceased independence on behalf of the Kenyan people in 1964.²² The Independence Constitution experienced drastic changes through various amendments carried out over the years.²³ The anti-discriminatory provision was provided for under Article 82²⁴ which prohibits the use of laws to make provisions that are discriminatory. Discrimination is defined in section 83 as “according different treatment to different people attributed whole or mainly to their characteristics either by race, tribe, place of origin, colour, creed or sex whereas persons of one such description are subjected to disabilities or restrictions to which persons of another description are not made subject or are accorded privileges which are not accorded to persons of another such description.”²⁵

The term sex had however not been defined in either sections 70 and 82 of the repealed Constitution. The case of *R.M v Attorney General and 4 others* highlighted the need to have a

¹⁶ Bird Jo, “Outside the law: Intersex, Medicine and Discourse Rights (2005)

¹⁷ Constitution Review commission of Kenya, ‘Final Report of the Kenya Review commission’ 2005 page 18-

¹⁸ Constitution Review commission of Kenya, ‘Final Report of the Kenya Review commission’ 2005 page 18-34

¹⁹ Constitution Review commission of Kenya, ‘Final Report of the Kenya Review commission’ 2005 page 18-34

²⁰ Constitution Review commission of Kenya, ‘Final Report of the Kenya Review commission’ 2005 page 18-34

²¹ Constitution Review commission of Kenya, ‘Final Report of the Kenya Review commission’ 2005 page 18-34

²² Constitution Review commission of Kenya, ‘Final Report of the Kenya Review commission’ 2005 page 18-34

²³ Constitution Review commission of Kenya, ‘Final Report of the Kenya Review commission’ 2005 page 18-34

²⁴ Article 82, The Constitution of the Republic of Kenya, 1963

²⁵ Article 82(3), The Constitution of the Republic of Kenya, 1963

definition for sex in order to determine whether the applicant had been discriminated on the basis of sex. The following brief will highlight the salient issues of the case.

2.4. The High Court Judgment in the R.M v Attorney General and 4 others

The High Court of Kenya has the burden of safeguarding and protecting the fundamental rights and freedoms of the Kenyan people. This is a Constitutionally granted responsibility, which enables a petitioner to move to the High Court and seek redress where he alleges a right has been violated or a right is being threatened.²⁶ This provision is important as it provides the enhancement of access to justice.

This research paper sought to interrogate the High Court Judgment in this case²⁷ due to its contribution to the jurisprudence of the Court. The petition was filed under the Independence Constitution, which was repealed by the promulgation of the 2010 Constitution on 27th August 2010. It is therefore important to note that references to the Constitution in the brief herein refer to the Independence Constitution.

The petitioner was an intersex person who had been convicted of robbery with violence; he sought a declaration from the Court that his status should be recognized under the Births and Deaths Registration Act.²⁸ He claimed he had suffered discrimination due to his status as an intersex person and the discrimination had led to his conviction. His claim was therefore that his detention was illegal in so far as the Prisons Act, as he should have been kept in a cell different from male inmates, as he was an intersex person.²⁹ The lack of a separate cell exposed him to inhumane and degrading treatment thus violating his Constitutional rights.³⁰

The Court in its judgment stated that the petitioner was entitled to protection against inhumane and degrading treatment, which was an absolute right limited in certain circumstances, by law. The petitioner was therefore awarded Kshs 500,000 and 20% of the cost as he had succeeded only one of the declarations he sought.

²⁶ Article 165, Constitution of Kenya (2010)

²⁷ R. M v Attorney General and 4 Other [2010] eKLR

²⁸ Birth and Deaths Registration Act, Cap 149 Laws of Kenya (2012)

²⁹ Prisons Act, Cap 90 Laws of Kenya

³⁰ Article 20(4)(a), Constitution of Kenya

The relevance of this case is shown in the analysis of the judgment, which painted Kenya as a conservative society, which was not ready to expand the bill of rights. The Court stated the following; It had not been convinced that the petitioner was representing the interests of a wider intersex community and thus the suit could not qualify as public interest litigation.³¹ Accordingly the Court identified the petitioner's condition as a rare phenomenon in the country and would be treated as an isolated case. This is a set back to the recognition of intersex people as statistics have shown there are more intersex people in the country than the Court had identified.³² The Court stated that it was not satisfied that the genital ambiguity of the petitioner negated the fact that his biological sexual construction had already been fixed at birth. Consequently, the Births and Deaths and Registration Act did not exclude the petitioner as an intersex persona as he falls within the particular sex provided for. This highlights the challenge faced by intersex people as they are put in the binary sex model. It is this paper's affirmation that intersex people don't fall within this binary sex model. They are in the middle of the sex spectrum as they have both male and female reproductive organs.³³ The Court claimed it could thus not expand the meaning of sex to include an intersex person when the legislature had not done so. This highlights the failure of the legislations to take into account the status of an intersex person, who does not fall within the two-sex module.

The Court was adamant that the inclusion of the word intersex within the category of "other statue" as per Article 2 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights would result in the recognition of a third gender which the Kenyan society was not ready for.

The discussion above has highlighted the Courts failure to adopt a broader and more liberal approach to constitutional interpretation which would enable the acceleration of the protection of intersex persons. The Courts have however adopted a more narrow and legalistic approach when it comes to the interpretation of the Constitution. This kind of constitutional interpretation might be the reason the courts are lacking in substantial jurisprudence on matters concerning the rights of intersex people and causing intersex petitioners not to move to court.

³¹ R v Attorney General and 4 others [2010] eKLR

³² <https://www.standardmedia.co.ke/lifestyle/article/2000099636/suffering-in-silence-the-difficult-life-of-intersex-individuals>

³³ Butler J, *'Sex and Gender in Simone De Beauvoir's Second Sex'* Yale University Press

2.5. High Court Judgment in the case Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 other

This research paper sought to interrogate the judgment in this case³⁴ due to its contribution to jurisprudence on issues concerning the rights of intersex people after the promulgation of the 2010 constitution. The 1st petitioner gave birth to a baby with both male and female genitalia. A question mark '(?)' was placed on the column indicating the child's sex.³⁵ The child had not been issued a birth certificate by the time the petition had gone to Court on 24th May 2013.³⁶ The 1st petitioner claimed the question mark offended the child's rights to legal recognition, eroded the child's dignity and violated the right of the child not to be subjected to inhumane and degrading treatment.³⁷ The Court in its judgment highlighted that the case brought forth the silent issues faced by intersex people, who are entitled to the fundamental rights and freedoms given in the Constitution.³⁸ Each party was to bear its own costs.³⁹

The relevance of this particular case is seen in the analysis of the judgment, which highlighted the need for a legal framework that addresses the issues faced by intersex people. The Court interrogated; whether Baby 'A' suffered lack of recognition as the baby had not been registered as a Kenyan nor issued with a birth certificate.⁴⁰ The Court was not convinced by the evidence submitted by the petitioner that Baby 'A' had faced discrimination and therefor ruled that the fundamental rights and freedoms of the child had not been violated.⁴¹ The petitioner wanted the baby's birth certificate to contain a category that caters for an intersex child.⁴² This the court stated would mean the introduction of a third gender. Such action would expand the mandate of the Court beyond that given to it by the Constitution.⁴³ This goes to prove the need for a legal framework that would allow the inclusion of intersex within the meaning of sex. The Court emphasized the need to collect data on intersex people.⁴⁴ This would serve as a tool for policy making for the protection of intersex people as marginalized persons. The High

³⁴ High Court Judgment in the case Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2013] eKLR

³⁵ Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others [2013] eKLR

³⁶ [2013] eKLR

³⁷ [2013] eKLR

³⁸ [2013] eKLR

³⁹ [2013] eKLR

⁴⁰ [2013] eKLR

⁴¹ [2013] eKLR

⁴² [2013] eKLR

⁴³ [2013] eKLR

⁴⁴ [2013] eKLR

Court urged the legislator to draft regulations that speak to questions such as; how medical intervention should be carried out on intersex people and how corrective surgery would be carried out on an intersex person.⁴⁵

2.6 A commentary on the current legal framework on the legal rights of intersex people

One of the challenges faced by an intersex person is the denial of the status of an intersex person beyond the gender binary model that classifies a person as either male or female. Earlier in 2017 there was the establishment of an intersex Taskforce by the Attorney General.⁴⁶ The Taskforce was constituted to analyze policy, legal, institutional and administrative reforms regarding intersex people in Kenya.⁴⁷ The terms of reference of the Taskforce include:

- The compilation of comprehensive data regarding the number, distribution and challenges of intersex people⁴⁸
- Reviewing literature based on a comparative approach to care, treatment and protection of intersex persons⁴⁹
- An examination of the existing policy, institutional, legislative medical and administrative structures and systems governing intersex people⁵⁰
- A recommendation of a comprehensive reform to safeguard the interests of intersex people⁵¹
- An implementation matrix which states the immediate, medium and long-term reforms governing intersex people⁵²
- An undertaking of other activities for the discharge of the mandates of the Taskforce⁵³

The creation of an intersex task force is a progressive step towards the realization of the issues concerning intersex people and the promotion of the rights and freedoms of intersex people. However, there hasn't been more progress made beyond the formation of the task force.

⁴⁵ High Court Judgment in the case *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others* [2013] eKLR

⁴⁶ The Kenyan Gazette, Gazette Notice No 4904, 26th May 2017

⁴⁷ The Kenyan Gazette, Gazette Notice No 4904, 26th May 2017

⁴⁸ The Kenyan Gazette, Gazette Notice No 4904, 26th May 2017

⁴⁹ The Kenyan Gazette, Gazette Notice No 4904, 26th May 2017

⁵⁰ The Kenyan Gazette, Gazette Notice No 4904, 26th May 2017

⁵¹ The Kenyan Gazette, Gazette Notice No 4904, 26th May 2017

⁵² The Kenyan Gazette, Gazette Notice No 4904, 26th May 2017

⁵³ The Kenyan Gazette, Gazette Notice No 4904, 26th May 2017

In order to understand the gaps in the law with relation to the treatment of intersex people this section of the chapter will analyze the current legal framework in Kenya and its contribution towards the protection of rights and freedoms of intersex people. This will be done through an analysis of the following Acts; The Constitution, The Births and Deaths Registration Act, Persons Deprived of Liberty Act and The Prisons Act.

I). The Constitution

The promulgation of the 2010 Constitution brought a renewed commitment towards the protection of fundamental rights and freedoms. Article 10⁵⁴ of the Constitution provides for national values and principles of governance. Article 10(b) provides for the principles of human dignity, non-discrimination and protection of the marginalized.⁵⁵ The Constitution asserts that the bill of rights binds all State organs and persons.⁵⁶ Every person shall thus enjoy the fundamental freedoms and rights in the bill of rights to the fullest extent consistent with the nature of the fundamental right or freedom.⁵⁷ The Constitutional provisions are expressed in mandatory provisions which means there is no derogation by the State from discrimination.

A marginalized group has been defined in Article 260 of the Constitution as ‘ a group of people who because of laws or practice before, on or after the effective date, were or are disadvantaged by discrimination on one or more grounds in Article 27(4).⁵⁸ Article 27(4) states, ‘the State shall not discriminate directly or indirectly against any person on the grounds or race, sex, pregnancy, birth, language or ethnic and social origin’. The Constitution thus lists the instances under which people may face discrimination and sex is one of them. In the case of *Baby ‘A’ & Another v Attorney General*⁵⁹ the 1st petitioner claimed her child had been discriminated against on the basis of sex which lead to the child not being issued with a birth certificate. The lack of issuance of a birth certificate would thus violate the child’s right to recognition and affect his status as a Kenyan citizen due to the lack of a Kenyan passport and other documents of registration or identification, which are issued by the State of Kenya.⁶⁰

⁵⁴ Article 10, Constitution of Kenya (2010)

⁵⁵ Article 10, Constitution of Kenya (2010)

⁵⁶ Article 20(1), Constitution of Kenya (2010)

⁵⁷ Article 20(2), Constitution of Kenya (2010)

⁵⁸ Article 260, Constitution of Kenya (2010)

⁵⁹ *Baby ‘A’ & Another v Attorney General and 6 others* [2013] eKLR

⁶⁰ Article 20(1)(b), Constitution of Kenya (2010)

Article 2(6) of the Constitution provides that any treaty and convention ratified by Kenya form part of the laws of Kenya.⁶¹ Article 21(4) further requires the State to enact and implement legislation so as to achieve its objectives towards the promotion and the protection of the fundamental rights and freedoms. Kenya has ratified⁶² most international and regional international human rights instruments such as; The International Covenant on Civil and Political Rights,⁶³ International Covenant on Economic, Social and Cultural Rights,⁶⁴ and as such they form part of the laws of Kenya. The introduction of such legislation as a part of Kenyan law places a burden on the legislature to ensure it continues to introduce legislation that safeguard the fundamental rights and freedoms of intersex people. One concept presented in the Constitution to ensure the protection of fundamental rights and freedoms is affirmative action and the suppression of discrimination is affirmative action. It is defined in Article 260 of the Constitution as, 'measures deigned to overcome or ameliorate an inequality or the systematic denial or infringement of a right or fundamental freedom'.⁶⁵ Article 27(7) gives the conditions for the use of affirmative action as the establishment of a genuine need.⁶⁶ Affirmative action is thus an avenue to ensure the elimination of discrimination.

There are institutions that address the structural discrimination faced by intersex people. These institutions are Constitutionally mandated under Chapter 15. The Kenya National Human Rights Commission is established under Article 59 of the Constitution. The Commission in its preamble is mandated to observe and respect the diversity of the Kenyan people by ensuring there is impartiality and gender equality.⁶⁷ This provision ensures the realization of egalitarianism for all human beings despite their sex or gender. In pursuit of its mandate the Commission is expected to investigate or research on matters concerning human rights and make recommendation to State organs.⁶⁸ It is important to note the participation of the Commission in the *R.M v Attorney General and 6 others* case. This shows the continued commitment of the Commission to ensure equality before the law.

⁶¹ Article 2(6), Constitution of Kenya (2010)

⁶² Kenya Human Rights Commission, 'Towards Equality and anti-discrimination' An overview of international and domestic law on Anti-discrimination, 25 January 2010

⁶³ International Convention on Civil and Political Rights, General Assembly Resolution 2200A(XXI)1966

⁶⁴ International Covenant on Economic, Social, and Political Rights, General Assembly Resolution 2200A(XXI)1966

⁶⁵ Article 260, Constitution of Kenya 2010

⁶⁶ Article 27(7), Constitution of Kenya 2010

⁶⁷ Kenya Human Rights Commission Act, Preamble

⁶⁸ Section 8, Kenya Human Rights Commission Act

The discussion above has highlighted Constitutional provisions which underline the attempt to promote the realization of the rights of intersex persons.

II). The Births and Registration Act

In its preambular text the Births and Deaths Registration Act⁶⁹ states its purpose as the notification and the registration of births and deaths.

In order to register a birth, one must indicate the sex of the child in the registration certificate. The Act provides for the mode of registration in section 10⁷⁰ which shall be done by providing the particulars of the birth. On the particulars in the form is the sex of the child.⁷¹ This form only provides for the registration of either a male child or a female child in line with the sex binary model leaving out intersex people. It is this paper's assertion that this has led to little data on the number of intersex children born in the country which has contributed to the structural discrimination faced by intersex persons.

III). The Prisons Act

The Act defines the category of prisoners as either male or female. Section 36 of the Prisons Act⁷² explicitly provides for the separation of female prisoners when dealing with the admission, control and discharge of prisoners. The Act⁷³ states where there is a female prisoner there shall be the presence of a female officer. The Act is silent on the kind of procedure to be taken and what measures should be taken with regards to the search and detention of an intersex person. The case of *R.M v Attorney General and 4 others*⁷⁴ the petitioner claimed the lack of a prisons provision that catered for him exposed him to inhumane and degrading treatment by fellow inmates. He further claimed abuse by prison officers who would subject him to arbitrary strip searches which aimed to humiliate him and subsequently degrade him. This case shows the institutional discriminations that expose intersex people to inhumane and degrading treatment.

⁶⁹ The Births and Deaths Registration Act, Cap 149(2012)

⁷⁰ Section 10, Births and Deaths Registration Act, Cap 149(2012)

⁷¹ Appendix 2

⁷² Section 36, Prisons Act, Cap 90(2016)

⁷³ Section 28, Prisons Act, Cap 90(2016)

⁷⁴ *R.M v Attorney General and 4 others*

IV). Persons Deprived of Liberty Act

The Persons Deprived of Liberty Act⁷⁵ is ‘an Act of parliament which gives effect to Articles 29(f) and 51 of the Constitution and for connected purposes’. It is the first act that defines an intersex person as ‘a person certified by a competent medical practitioner to have both male and female reproductive organs’. The act therefore recognizes the status of intersex people as persons who needs the protection of the law especially where they are detained. Article 3 of the Act states that every person deprived of liberty is entitled to the fundamental rights and freedoms given in the Constitution. The Act mandates an institution that detains such persons, to maintain a log of the personal details of the detainee, the physical conditions they were held in, steps taken to ensure the detained person has been subjected to due process and the medical history of the detainee.⁷⁶ The right to humane treatment has been recognized as a fundamental right in the Constitution as well as in the Act.

The Act has thus provided for the recognition of the status of intersex people as dignified persons who are worthy of the protection of the law. However, the Act does not provide for separate holding cells of intersex people, this may still expose intersex people to situations where they are likely to face abuse in holding cells.

2.7 Conclusion

This Chapter sought to answer the research question, ‘to what extent has the current legal framework provided for the rights of intersex people’. The discussion herein has proved that there is a widespread failure to take into account the status of an intersex person who falls outside the two-sex model. The law is neutral as it fails to adequately provide for the protection of intersex people therefore leading to inequality and discrimination of intersex people. The small steps taken to ensure the protection of the rights of intersex people have however been disarrayed with uncertainties. Internationally and domestically the discussion on the rights of intersex people have been incorrectly applied as they have fallen under the Lesbians, Gay, Bisexual and Trans(LGBT) movement on grounds of sexual orientation, gender expression and identity. There needs to be a discussion that deals with intersex right in a broader application separate from the LGBT community.

⁷⁵ Persons Deprived of Liberty Act (2014)

⁷⁶ Article 3, Persons Deprived of Liberty Act

CHAPTER 3

Lessons from other jurisdiction on the protection of the rights of intersex people.

3.1 Introduction

In Chapter 2, the researcher traced the history of the protection of the rights of intersex people and the state of discrimination they face on the grounds of sex. The researcher has demonstrated the different instances of the protection of the rights of intersex people within the Constitution by analyzing the time periods between the Independence Constitution and after the promulgation of the 2010 Constitution. The protection of the rights of intersex people within the Independence Constitution era depicted Kenya as a conservative society which was incapable of debating matters of sex and gender identity.⁷⁷ After the promulgation of the 2010 Constitution intersex matters have now made their ways to the Court and are being debated on. The establishment of the intersex taskforce has enable the realization of the problems faced by people in the intersex community.

This research paper highlighted the main challenge faced by intersex people as the denial of their existence beyond the sex binary model. Sexual variant people do not fit into this rigid model, as they are at the center of a sex spectrum due to the fact that they have both male and female reproductive organs.⁷⁸ There is therefore an obligation to transform the traditional ideas of sex and gender and reconcile them with ideas that are more inclusive of intersex people. Such ideas include the assessment of sexuality concerned with identities that go beyond the binary categorization of a man or a woman. There is therefore an obligation to transform the traditional ideas of sex and gender and reconcile them with ideas that are more inclusive of intersex people. Such ideas include the assessing of sexuality concerned with identities that go beyond the binary categorization of a man or a woman.⁷⁹

⁷⁷ R.M v Attorney General and 4 Others [2010]eKLR

⁷⁸ Fausto-Sterling Anne, 'The Five Sexes' <https://cr1.ucsd.edu/~elman/Courses/HDP1/2000/LectureNotes/fausto-sterling.pdf>

⁷⁹ Fausto-Sterling Anne, 'The Five Sexes' <https://cr1.ucsd.edu/~elman/Courses/HDP1/2000/LectureNotes/fausto-sterling.pdf>

This chapter seeks to give a broader understanding of the promotion and the protection of the rights of intersex people by analyzing other jurisdictions namely South Africa and Malta for lessons on the protection and the promotion of the rights of intersex people. The choice of these countries is justified as they have made progressive steps towards the realization of the rights of intersex people.

The objectives of this chapter will be met in three parts. The first part will focus on the South African legal framework through an analysis of the various legislative and institutional frameworks that have been put in place in order to realize the protection and the promotion of the rights of intersex people. The second part will analyze the legal framework in Malta. The analysis of these countries will enable the researcher to conclude and highlight the lessons that Kenya ought to borrow and learn from.

3.2 The Republic of South Africa

To what extent has the South African Legal framework provided for the rights of intersex people?

The Constitution of the Republic of South Africa

The history of the Republic of South Africa has been marked with oppression and exclusion through the apartheid regime which advanced the rights of specific groups of people and disadvantaged the rights of minority groups. Due to the disenfranchisement of Black South Africans, the South African Constitution was founded on the principle of equality.⁸⁰ This principle is found in Article 9 of the Constitution⁸¹ which provides for equality and the equal protection and benefit before the law.⁸² This equality includes the equal and full enjoyment of fundamental rights and freedoms.⁸³

⁸⁰ Murray Christina, 'A constitutional Beginning: Making South Africa's Final Constitution' University of Arkansas at Little Rock Law Review, Volume 23 Issue 3(2001)

⁸¹ Article 9(1), Constitution of the Republic of South Africa, Act 108 of 1996

⁸² Article 9(1), Constitution of the Republic of South Africa, Act 108 of 1996

⁸³ Article 9(2), Constitution of the Republic of South Africa Act 108 of 1996

The Constitution⁸⁴ contains an anti-discriminatory clause which places an obligation on the State not to discriminate on the basis of sex,⁸⁵ race,⁸⁶ gender,⁸⁷ marital status,⁸⁸ ethnic or social origin,⁸⁹ color,⁹⁰ sexual orientation,⁹¹ age,⁹² religion,⁹³ conscience,⁹⁴ belief,⁹⁵ culture,⁹⁶ language⁹⁷ and birth.⁹⁸ The limitation of rights within the Constitution⁹⁹ is imperiled to the general application of the law subject to a reasonable and justifiable explanation espoused in an open and democratic society taking into account; the nature of the right,¹⁰⁰ the necessity of the limitation,¹⁰¹ the nature and extent of the limitations¹⁰², the relationship between the limitation and its purpose,¹⁰³ and the least restrictive means.¹⁰⁴ The State is therefore obliged to respect, promote and uphold the Bill of Rights¹⁰⁵.

Substantive equality, is an approach to egalitarianism that allows the treatment of individuals as principal equals through the recognition and accommodation of people's differences.¹⁰⁶ This form of equality requires the analytical effect of laws, policies and practices that are disadvantageous to individual or groups and whether they reinforce the disenfranchisement of groups that are already suffering discrimination.¹⁰⁷ This analysis tries to eliminate the barriers which subjugate certain groups of people from the private and public sphere.¹⁰⁸ This concept of equality is manifested through the rights to affirmative action. It is envisioned in the Constitution as a way to advocate for the equal rights and freedoms of persons who may be discriminated against based on the grounds mentioned in Article 9(3). This was stated by the court in the case of *Minister of Finance & another v Van Heerden*¹⁰⁹ where the Court¹¹⁰ highlighted affirmative action as a necessary step towards the promotion, protection and

⁸⁴ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁸⁵ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁸⁶ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁸⁷ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁸⁸ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁸⁹ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁹⁰ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁹¹ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁹² Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁹³ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁹⁴ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁹⁵ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁹⁶ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁹⁷ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁹⁸ Article 9(3), Constitution of the Republic of South Africa Act 108 of 1996

⁹⁹ Article 36, Constitution of the Republic of South Africa Act 108 of 1996

¹⁰⁰ Article 36(a), Constitution of the Republic of South Africa Act 108 of 1996

¹⁰¹ Article 36(b), Constitution of the Republic of South Africa Act 108 of 1996

¹⁰² Article 36(c), Constitution of the Republic of South Africa Act 108 of 1996

¹⁰³ Article 36(d), Constitution of the Republic of South Africa Act 108 of 1996

¹⁰⁴ Article 36(e), Constitution of the Republic of South Africa Act 108 of 1996

¹⁰⁵ Article 7, Constitution of the Republic of South Africa Act 108 of 1996

¹⁰⁶ Smith Anne, 'Equality constitutional adjudication in South Africa' African Human Rights Law Journal (2014) 14AHLJ 609-632

¹⁰⁷ Smith Anne, 'Equality constitutional adjudication in South Africa' African Human Rights Law Journal (2014) 14AHLJ 609-632

¹⁰⁸ Smith Anne, 'Equality constitutional adjudication in South Africa' African Human Rights Law Journal (2014) 14AHLJ 609-632

¹⁰⁹ Minister of Finance & Another v Van Heerden 12 BLLR 118 (CC) (29 July 2004)

¹¹⁰ High Court of South Africa

achievement of equality.¹¹¹ This measure ought to be taken to enable the advancement of the rights of people who have been discriminated unfairly so as to enhance and archive equality.¹¹² The Constitutional Court in *Du Toit v Minister for Welfare and Population Development*¹¹³ found a violation of the right to equality due to direct discrimination. Subsequently the Court found certain provisions of the Child Care Act 1983 and the Guardianship Act 1993, were a violation of the equality principle as they prevented a lesbian couple in a permanent relationship from adopting children.¹¹⁴ The provisions were discriminatory on the grounds of sexual orientation and marital status.¹¹⁵ In its obiter the Court expand the definition of the words family, spouse and domestic relationship.¹¹⁶ The Court has been praised for recognizing and emphasizing the importance of accepting different people within the society by ensuring the realization of their fundamental rights and freedoms.

Affirmative action thus constitutes a measure of substantive equality beyond the mere requirement of formal equality. This framework within the South African Constitution ensures the protection of the rights of minorities such as intersex people.

3.3 The Promotion of Equality and the Prevention of Unfair Discrimination Act No 4 of 2000

The enactment of the Promotion of Equality and the Prevention of Unfair Discrimination Act, was to give effect to Article 9 read together with item 23(1) Schedule 6 of the Constitution of the Republic of South Africa, in order to prevent and prohibit unfair discrimination and harassment thus enhancing equality and elimination of unfair discrimination.¹¹⁷ Equality under this Act means the full enjoyment of rights and freedoms as espoused in the Constitution with regards to *de jure* and *de facto* equality¹¹⁸ this captures both the formal and substantive equality within the Constitutional framework.

Sex has been defined in the Act to include an intersex person. This has been done through an amendment by the Judicial Matters Amendment Act which expressly includes an intersex

¹¹¹ Minister of Finance & Another v Van Heerden 12 BLLR 118 (CC)(29 July 2004)

¹¹² Minister of Finance & Another v Van Heerden 12 BLLR 118 (CC)(29 July 2004)

¹¹³ Du Toit v Minister for Welfare and Population Development CCT40/01 [2002] ZACC 20;2002 10 BCLR 1006 (CC),2003 2 SA 198 (CC)

¹¹⁴ Du Toit v Minister for Welfare and Population Development CCT40/01 [2002] ZACC 20;2002 10 BCLR 1006 (CC),2003 2 SA 198 (CC)

¹¹⁵ Du Toit v Minister for Welfare and Population Development CCT40/01 [2002] ZACC 20;2002 10 BCLR 1006 (CC),2003 2 SA 198 (CC)

¹¹⁶ Du Toit v Minister for Welfare and Population Development CCT40/01 [2002] ZACC 20;2002 10 BCLR 1006 (CC),2003 2 SA 198 (CC)

¹¹⁷ Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

¹¹⁸ Section 1, Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

person to the definition of sex.¹¹⁹ This definition of sex is therefore relevant as sex is a prohibited ground of discrimination under Article 9 of the Constitution. The Act consequently prohibits the harassment, use of hate speech and the publication of information that is discriminatory. Therefore, ensuring the elimination of systematic discrimination faced by intersex people.

The onus of proof in this Act shifts from the victim to the offender. Once the victim has established a prima facie case against the offender on the grounds that, the offender acted in a manner that would deny the victim equality within the law by perpetuating discriminatory acts that offend the dignity of the person.¹²⁰ The Act accordingly establishes Equality Courts which are mandated to hold inquiries determining whether there has been unfair discrimination, hate speech or harassment against one by another based on the grounds listed in Article 9 of the Constitution.¹²¹ The court has the power to make declaratory, interim and other measures to compensate the injured party.¹²² This offers victims of discrimination a remedy against an act of discrimination.

The Act places a burden on the State and on persons exercising public power to put up measures that prevent the violation of human rights through the propagation of discrimination.¹²³ This burden also extends to the wider community. The sensitization of the public through public campaigns and programs that have been geared towards the promotion of equality will enable the realization of equality within Article 9 of the Constitution.¹²⁴

¹¹⁹ Judicial Matters Amendment Act No 22 of 2005

¹²⁰ Section 13, Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

¹²¹ Section 21, Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

¹²² Section 21, Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

¹²³ Section 21, Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

¹²⁴ Section 26, Promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000

3.4 Malta

To what extent has the Legal Framework in Malta provided for the rights of intersex people?

One of the most crucial issue facing intersex people in Malta is the use of medical intervention to change gender markers. When the government launched their new educational policy for trans, gender variant and intersex people there was a renewed hope for the protection and the promotion of the rights of intersex people. The promulgation of the Gender Expression, Gender Identity and Sex Characteristics Act in April 2015 was seen as an important step towards the promotion of the rights of sexual variant people. The policy documents highlighted the need to make schools more inclusive of trans, gender variant and intersex people.

3.5 Constitution of Malt

Article 45, of the Constitution of Malta as amended in Act X of 2014 contains anti-discriminatory grounds of sex, sexual orientation and gender identity amongst other grounds.¹²⁵ This provision read together with the Equality of Men and Women Act¹²⁶ provides protection against discrimination on grounds of sex characteristics and gender expression. The term ‘discriminatory’ in the Constitution means, ‘according different treatment to different people attributed whole or mainly to their characteristics either by race, place of origin, colour, creed, sexual orientation or gender identity by according privilege to persons of other such discrimination’¹²⁷. The provisions of the Constitution are expressed in mandatory terms thus meaning the protection against discrimination on the grounds of sex cannot be derogated from.¹²⁸ Article 45(4) provides a list of exceptions where Article 45(1) shall not apply such use where laws are made for the allocation of public funds and revenue, with respect to persons who are not citizens of Malta and where there is a state of emergency amongst other exceptions.

¹²⁵ Article 45, Constitution of Malta 1964

¹²⁶ Equality of Men and Women Act Chapter 456 Law of Malta

¹²⁷ Article 45, Constitution of Malta 1964

¹²⁸ Article 45, Constitution of Malta 1964

3.6 Gender Expression, Gender Identity and Sex Characteristics Act

The Gender Expression, Gender Identity and Sex Characteristics Act¹²⁹ provides for the recognition and registration of the gender of the person and the regulatory effect of such a change as well as the protection of the sex characteristic of a person. Section 4 of the Act gives persons the ability to change their gender provided they are Maltese. The State recognizes the need to have persons choose their own gender as well as have the recognition of such chosen gender. This highlights the Principle of self-determination as one is able to have a record of their self-determined gender.¹³⁰ One may change their gender by submitting a request of a note of enrollment.¹³¹ Where a minor wish to change their gender the person exercising parental responsibility may do so on behalf of the minor, by filling an application to the Registry of the Civil Court. This is done through a request that the Court change the gender and the first name of the child to that which the child identifies with. This is a progressive step for intersex persons and in particular intersex children who may have undergone surgery or had a particular gender ascribed to them at birth. They are able to change their gender to reflect the gender they identify with.¹³² The best interest of the child as aligned with the Convention on the Rights of the Child are taken into account before such an application is brought before the Court.¹³³

The Act reiterates the principle of self-determination by criminalizing any medical intervention on a person, such as sex reassignment surgery, without the consent of such a person.¹³⁴ In instances where an intersex child is born the child can't subsequently consent to sex reassignment surgery due to their status as a minor.¹³⁵ They can therefore consent once they reach a consenting age which could be the age of majority or an age where they are considered mature to make such a decision.¹³⁶ Throughout the Act there is a constant echo of having legislation that respects ones' body integrity and body autonomy.

3.7 Malta Educational Policy

The word intersex has been defined in the Malta Educational Policy which was launched after the passing of the Gender Expression, Gender Identity and Sex Characteristics Act. According to this policy an intersex person is one, 'who cannot be classified as male or female with regard

¹²⁹ Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015

¹³⁰ Section 4(1), Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015

¹³¹ Section 4(2), Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015

¹³² Section 7(1), Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015

¹³³ Section 7(2), Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015

¹³⁴ Article 14, Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015

¹³⁵ Article 14, Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015

¹³⁶ Article 7, Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015

to their chromosomal, gonadal, or anatomical sex'.¹³⁷ The aim of the policy is to foster a school environment that is inclusive, safe, free from harassment and discrimination for all the stakeholders of the school regardless of their sex, sexual orientation, gender identity, gender expression and or sex characteristics.¹³⁸

The policy acknowledges the need for advocacy on intersex issues separate from that of sexual orientation, gender identity and gender expression of other members in the LGBTQI community.¹³⁹ The policy aims to provide support to intersex children and their families by ensuring the active awareness of intersex issues. This enables the reduction of discrimination in the school systems.

3.8 What lessons can Kenya Learn from Malta and South Africa in order to protect and promote the rights of intersex people?

The discussion above has highlighted the various strides made in intersex law in South Africa and Malta. Through the discussion it has emerged that both South Africa and Malta are examples of countries that are tackling contemporary issues of sex and gender identity. This study has analyzed the different legislative and institutional frameworks used for the protection and the promotion of the rights of intersex people. This section of the paper will highlight the lessons that Kenya could learn in order to ensure the promotion and the protection of the rights of intersex people.

In South Africa, The Promotion of Equality and the Prevention of Unfair Discrimination Act adds an intersex person to the definition of sex.¹⁴⁰ This could be done in Kenya through the expansion of the word sex in the Bill of Rights, any amendments to the Bill of rights have to be done through a referendum.¹⁴¹ A referendum shall approve a proposed amendment where; at least twenty five percent of the registered voters in each of at least half of the counties voted in the referendum and the referendum is supported by a majority of the voters.¹⁴² If the proposed amendment does not pass then the expansion of the Bill of Rights will not take place leaving intersex people outside the law again. The Persons Deprived of Liberty Act

¹³⁷ Ministry of Education and Employment, 'Trans ,Gender Variant and Intersex students in Schools Policy' June 2015

¹³⁸ Ministry of Education and Employment, 'Trans ,Gender Variant and Intersex students in Schools Policy' June 2015

¹³⁹ Ministry of Education and Employment, 'Trans ,Gender Variant and Intersex students in Schools Policy' June 2015

¹⁴⁰ Judicial Matters Amendment Act No 22 of 2005

¹⁴¹ Article 255(1), Constitution of Kenya 2010

¹⁴² Article 255(2), Constitution of Kenya 2010

acknowledges the existence of intersex people. However, without a definition of sex which includes an intersex person in the Constitution an intersex person may not seek redress for discrimination on the grounds of sex directly as one would do in South Africa.

One of the ways of fixing what many have termed the ‘intersex condition’ is through medical intervention. The State of Malta has criminalized the use of unconsented medical intervention to correct an intersex body even where the intersex person is a minor.¹⁴³ This emphasizes the fundamental right to self-determination and body autonomy as an inherent right. Kenya could take such steps by ensuring criminal penalties are given to persons who perform medical intervention to an intersex person are punished. The High Court in the case of *Baby ‘A’*¹⁴⁴ urged the legislator to draft regulations that speak to questions such as; how medical intervention should be carried out on intersex people and how corrective surgery would be carried out on an intersex person.¹⁴⁵

Awareness campaigns can be conducted which advocate for the rights of intersex people separate from those made by members of the LGBTQI movement.

3.9 Conclusion

The study carried out in this Chapter proceeded on the following hypothesis and research questions, the hypothesis being other jurisdictions have taken steps that Kenya can emulate in the protection and the promotion of the rights of intersex people. The first research question was an investigation of the South African legal system and what measures have been taken for the protection and the promotion of the rights of intersex people. The second research question sought to look at the Maltese legal system and the extent it has provided for the rights of intersex people. The final research question addressed in this Chapter highlighted lessons Kenya could borrow from both South Africa and Malta towards the protection of the rights of intersex people.

This Chapter emphasized the recognition of intersex issues separate from that of sexual orientation, gender identity and gender expression of other members in the LGBTQI

¹⁴³ Article 14, Gender Expression, Gender Identity and Sex Characteristics Act No XI of 2015

¹⁴⁴ High Court Judgment in the case *Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others* [2013] eKLR

¹⁴⁵ High Court Judgment in the case *Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others* [2013] eKLR

community members.¹⁴⁶ This would serve to ensure the sensitization of the community on intersex rights and issues. Furthermore, this Chapter highlighted key South African and Maltese legislative framework that Kenya could borrow and advocate for through the constituted intersex taskforce.

¹⁴⁶ Ministry of Education and Employment, 'Trans ,Gender Variant and Intersex students in Schools Policy' June 2015

CHAPTER 4

Conclusion and Recommendations

4.1 Introduction

This study proceeded on the following hypothesis, the first assumption being intersex people in Kenya suffer discrimination as they are unable to get birth certificates and access public amenities. The second hypothesis was that, the legal framework does not sufficiently provide for intersex people contrary to practices in South Africa and Malta. Thirdly, other countries have taken steps that Kenya can emulate.

This study sought to test the accuracy of the above assumptions. Chapter 1 set the scope for the study by setting out the statement of the problem, the objectives of the study, the assumptions of the study and the justification for the study. In order to ascertain the accuracy of the first hypothesis, the researcher provided a historical background for the protection and promotion of the rights of intersex people. This was done by highlighting, the lack of protection and promotion of the rights of intersex people during the Independence Constitution era and the justification for the protection of the rights of intersex people after the promulgation of the 2010 Constitution. This study was based on a normative framework that sought to analyze the different legislative framework in place for the protection and promotion of the rights of intersex people. This formed the basis of Chapter 2. The second and third assumptions were tested in Chapter 3 which highlighted the gaps in the law that Kenya could fill borrowing from other jurisdictions.

It was proven in this study, that intersex persons form part of the marginalized in this country and there have been legislative steps made to ensure the promotion and the protection of their rights. It also emerged through the discussion that there are hopeful signs towards the protection and the promotion of the rights of intersex people at the national level through the constitution of an intersex taskforce. The inclusion of the word intersex in the interpretation of sex would ensure the instances of institutional discrimination are reduced.

The researcher considered various national statutory provisions so as to elaborate the institutional discrimination faced by intersex people. Subsequently the researcher reviewed the Prisons Act, the Registration of Births and Deaths Act and the Persons Deprived of Liberty Act. Through the analysis of these Acts the researcher discovered that the binary sex model

was a major obstacle to the advancement of the rights of intersex people. The inclusion of the word sex to mean either male or female in all identification documents directly discriminates against intersex people who are at the middle of the sex spectrum.

It is this paper's assertion that formal equality is not enough to address the instances of discrimination faced by intersex people thus the requirement of substantive equality would lead to the realization of the rights of intersex people.

4.2 Recommendations

The recommendations posed by this research paper will contribute to the knowledge and advocacy of the rights of intersex people. The research paper proposes reforms in the various legislative framework especially the inclusion of intersex to the definition of sex. This will also reduce the instances of confusion of the needs of intersex persons with other gender expression or sexual orientation issues. There should therefore be educational and consultative workshops to educate the society on the need to promote and protect the rights of persons in the intersex community. This could be carried out by the Kenya Human Rights Commission which is mandated to keep a log of human rights issues that affect the Kenyan people.

This paper affirms the need for guidelines on the use of medical intervention. These guidelines should ensure consent by parties as an overriding interest before the use of medical intervention on an intersex body. These guidelines could be drafted by the Intersex Taskforce. The Taskforce should highlight the need to have criminal sanctions where medical intervention is carried out without the consent of an intersex person. This should also apply in cases involving an intersex minor, the minor should be allowed to choose their gender identity and have surgery depending on their age and level of maturity.

4.3 Limitations of the study

The scope of this study was limited to covering specific national legislation with respect to the fundamental rights and freedoms of intersex people in Kenya. The recommendations given are an attempt to show how there can be a greater realization of the fundamental rights and freedoms of intersex people.

The research paper was limited in terms of reference materials due to the fact that this is still a relatively new area of study.

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