

**Interpreting the Binary: Determining the Place of Intersex People in the Constitutional  
Right to Marry**

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

By

Onyango Tremmy Esther

129078

Prepared under the supervision of

Dr Jane Wathuta

February 2024

9,885 words (excluding footnotes and bibliography)

## TABLE OF CONTENTS

|  |             |
|--|-------------|
| <b>ACKNOWLEDGMENTS</b> .....   | <b>v</b>    |
| <b>DECLARATION</b> .....   | <b>vi</b>   |
| <b>ABSTRACT</b> .....  | <b>vii</b>  |
| <b>LIST OF ABBREVIATIONS</b> .....   | <b>viii</b> |
| <b>LIST OF CASES</b> .....   | <b>1</b>    |
| <b>LIST OF LEGAL INSTRUMENTS</b> .....   | <b>3</b>    |
| <b>CHAPTER 1: INTRODUCTION</b> .....   | <b>4</b>    |
| 1.1 Background.....  | 4           |
| 1.2 Statement of Problem.....  | 6           |
| 1.3 Research Objectives.....   | 6           |
| 1.4 Research Questions.....  | 6           |
| 1.5 Hypothesis .....   | 7           |
| 1.6 Justification.....   | 7           |
| 1.7 Theoretical Framework: Purposive Approach to Constitutional Interpretation ..... | 8           |
| 1.8 Literature Review.....   | 9           |
| 1.8.1 On the conflation of intersex rights with LGBTQ rights .....                   | 10          |
| 1.8.2 On intersex people and same-sex marriage.....                                  | 10          |
| 1.8.3 Contribution.....  | 11          |
| 1.9 Methodology.....   | 11          |
| 1.10 Chapter Breakdown.....  | 13          |
| <b>CHAPTER 2: THE INSTITUTION OF MARRIAGE</b> .....                                  | <b>14</b>   |
| 2.1 Introduction .....   | 14          |
| 2.2 Lessons from anthropology .....  | 15          |
| 2.2.1 On universalism.....   | 15          |
| 2.2.2 On cultural relativism.....  | 16          |
| 2.3 The Kenyan context .....   | 17          |

|  |   |           |
|--|---|-----------|
| 2.3.1  | Pre-colonial era.....   | 17        |
| 2.3.2  | Post-colonial era .....   | 18        |
| 2.4  | Core elements of a marriage.....                                | 19        |
| <b>CHAPTER 3: THE OPPOSITE SEX PROVISION.....</b>      |   | <b>21</b> |
| 3.1  | Introduction .....  | 21        |
| 3.2  | The Bomas Draft.....  | 21        |
| 3.3  | The Harmonised Draft.....                                       | 23        |
| 3.4  | Conclusion.....   | 24        |
| <b>CHAPTER 4: THE INTERSEX IDENTITY .....</b>          |   | <b>25</b> |
| 4.1  | Sex and gender.....   | 25        |
| 4.2  | Gender and self-identification .....                            | 27        |
| 4.3  | Conclusion.....   | 28        |
| <b>CHAPTER 5: CONCLUSION AND RECOMMENDATIONS .....</b> |   | <b>30</b> |
| 5.1  | Conclusion.....   | 30        |
| 5.2  | Recommendations.....  | 31        |
| 5.2.1  | Legal definition of the terms “sex” and “gender” .....          | 31        |
| 5.2.2  | Adjustment of marriage procedure .....                          | 32        |
| 5.2.3  | Education and training of Registrar and marriage officers ..... | 33        |
| 5.2.4  | Public awareness campaigns .....                                | 33        |
| <b>BIBLIOGRAPHY .....</b>                              |   | <b>34</b> |
|  | Books.....  | 34        |
|  | Chapters in Books .....   | 35        |
|  | Journal Articles .....  | 36        |
|  | Self-Published Articles.....                                    | 38        |
|  | Reports.....  | 38        |
|  | Institutional authors.....                                      | 39        |
|  | Dissertations and theses.....                                   | 40        |

Hansard Reports ..... 40  
Internet resources ..... 40



## ACKNOWLEDGMENTS

It takes a village to create something great, and so I take this opportunity to thank my village. To Dr Jane Wathuta, my supervisor, for her invaluable insights, guidance, and patience. To my family and friends, for their words of encouragement and advice. And to A, who was there from the beginning and whose support helped me over the finish line. This paper would not be what it is without you.



## DECLARATION

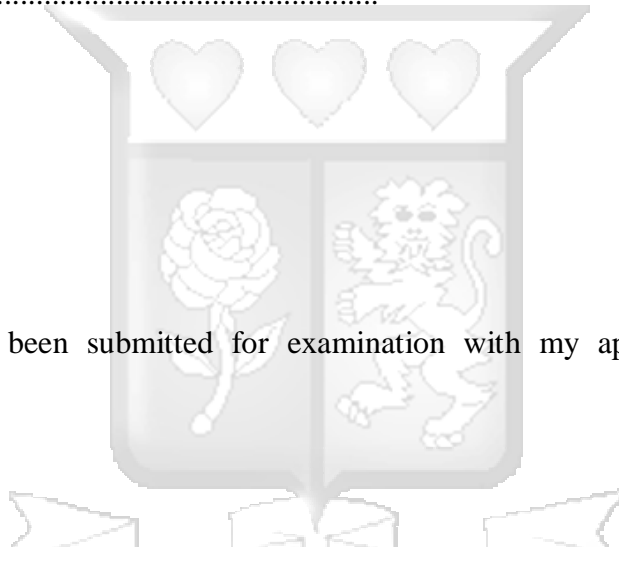
I, ONYANGO TREMMY ESTHER, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.



Signed: .....

Date: 26/01/2024

This dissertation has been submitted for examination with my approval as University Supervisor.



Signed: .....

Dr Jane Wathuta

## ABSTRACT

In the Kenyan Constitution, under Article 45(2), marriage is framed as a right arising only between persons of opposite sexes. The wording of this provision has long been taken to mean that a legal marriage can only occur between a man and a woman. Kenyan law has begun the process of recognising the intersex identity as a third sex, and with this process comes the question of whether or not the phrase “opposite sex” can include intersex people. This study therefore seeks to explore the constitutional interpretation of the binary sex phrasing in Article 45(2) with the aim of determining whether it can be construed in a manner that affords intersex people the right to marry. To achieve this objective, the study analyses sociological and anthropological approaches to marriage as well as its conceptualisation under Kenyan law. The place of the intersex identity is then determined in relation to the findings thereon.

The study utilises various methodologies to arrive at its conclusion. Marriage law in Kenya is appraised through historical and doctrinal study of the Constitution and other statutes to pinpoint the origin and intended use of the phrase “opposite sex”. Approaches to the intersex identity are explored through policy analysis of Kenya and other jurisdictions, supplemented by interdisciplinary findings from endocrinology and related medical fields. The study finds that marriage is a dynamic and varied institution, moulded in Kenyan law by the drafters of the Constitution with the aim of upholding Kenyan culture by excluding same-sex couples. Analysis of the intersex identity yields the conclusion that despite their constant conflation, sex and gender are distinct concepts, allowing intersex people the leeway to self-identify within the gender binary. Based on these findings, the study ultimately recommends that the binary phrasing of the right to marry should be seen as referring to gender rather than biological sex, an approach that allows intersex people to marry based on their self-identified gender.

## LIST OF ABBREVIATIONS

17beta-HSD3 – 17 $\beta$ -hydroxysteroid dehydrogenase III deficiency

CAH – congenital adrenal hyperplasia

DSD – 46,XX testicular difference of sex development

KS – Klinefelter syndrome

LGBTQ – lesbian, gay, bisexual, transgender, queer

PMDS – persistent Müllerian duct syndrome

TS – Turner’s syndrome



## LIST OF CASES

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

*Bellinger v Bellinger* (2003), The United Kingdom House of Lords.

*Corbett v Corbett* (1970), The High Court of England and Wales.

*Council of Imams and Preachers of Kenya, Malindi and 4 others v Attorney General and 5 others* (2015).

*E.T.M v R.W and another* (2011) eKLR.

*EG and 7 others v Attorney General; DKM and 9 others (Interested Parties); Katiba Institute and another (Amicus Curiae)* (2019) eKLR.

*Graision Shida Odhiambo and another v Republic* (2016) eKLR.

*Hyde v Hyde* (1886) LR 1 P&D 130.

*Jasbir Singh Rai and 3 others v Tarlochan Singh Rai Estate and 4 others* (2013) eKLR.

*Jesse Kamau and 25 others v Attorney General* (2010) eKLR.

*Kedipa v Chepkokwo* (2022) eKLR.

*Mary Wanjuhi Muigai v Attorney General and another* (2015) eKLR.

*MMM v Republic* (2021) eKLR.

*National Legal Services Authority v Union of India and Others* (2013), The Supreme Court of India.

*NGOs Co-ordination Board v EG and 4 others; Katiba Institute (Amicus Curiae)* (2023).

*R v Amkeyo* (1952) 19 E.A.C.A.

*R.M v Attorney General and 4 others* (2010) eKLR.

*Rangal Lemeiguran and others v Attorney General and 2 others* (2006) eKLR.

*Republic v Kenya National Examinations Council and another ex-parte Audrey Mbugua Ithibu* (2014) eKLR.

*Republic v Kenya National Examinations Council and another Ex-Parte Audrey Mbugua Ithibu* (2014) eKLR.

*S v Acheson* (1990), High Court of Namibia.

*SAM v SOA* (2022) eKLR.

*Soobramoney v Minister of Health (KwaZulu-Natal)* (1998), Constitutional Court of South Africa.

*Sunil Babu Pant and others v Nepal Government* (2007), The Supreme Court of Nepal.

*Timothy M Njoya and 6 others v Attorney General and 3 others* (2004) eKLR.



## LIST OF LEGAL INSTRUMENTS

### **Legislation**

*Constitution of Kenya* (2010).

*Births and Deaths Registration Act* (1928).

*Children's Act* (2022).

*Interpretation and General Provisions Act* (1956).

*Intersex Persons Bill* (2023).

*Marriage Act* (2014).

*Marriage (General) Rules* (2014).

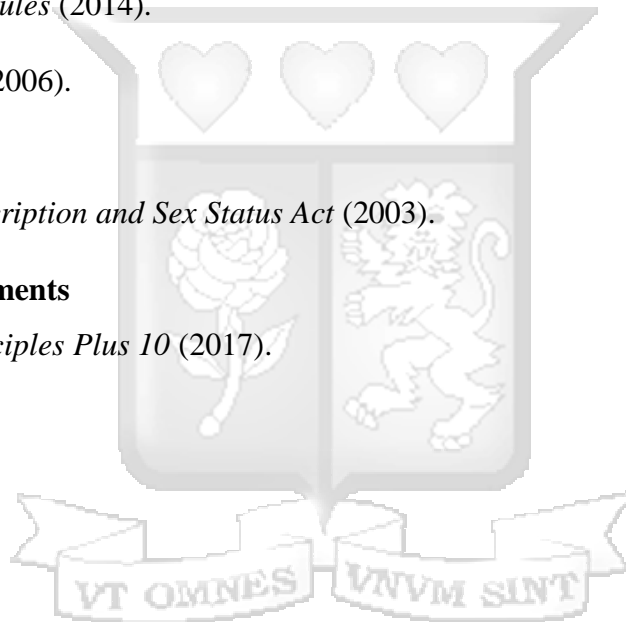
*Sexual Offences Act* (2006).

### **Foreign legislation**

*Alteration of Sex Description and Sex Status Act* (2003).

### **International Instruments**

*The Yogyakarta Principles Plus 10* (2017).



# CHAPTER 1: INTRODUCTION

## 1.1 Background

The word “sex” is not defined in the Kenyan Constitution. Where it has proven necessary, courts have relied on dictionary definitions that describe sex as the state of being a man or a woman, to the exclusion of intersex people.<sup>1</sup> An intersex person is defined, for the purposes of this study, as a person conceived and born with a biological sex characteristic that cannot be exclusively categorised in the common binary of female or male due to their inherent and mixed anatomical, hormonal, gonadal (ovaries and testes) or chromosomal (X and Y) patterns which could be apparent prior to, at birth, in childhood, puberty or adulthood.<sup>2</sup> As intersex people cannot be exclusively categorised male or female, the approach to sex adopted by courts has led them to face difficulties in obtaining identification documents like birth certificates<sup>3</sup> as well as challenges in being afforded appropriate detention measures in light of their sex.<sup>4</sup>

The Kenyan Constitution provides that marriage is between adults of opposite sexes.<sup>5</sup> Even though the heterogeneity of human sex characteristics is well documented revealing a minimum of forty different known intersex variants bearing a range of chromosomal compositions,<sup>6</sup> courts in Kenya have maintained a consistent approach of interpreting the phrase “opposite sex” to mean exclusively male and female persons. Brothers and sisters have been described as being “siblings of opposite sex”<sup>7</sup>; fathers and daughters likewise.<sup>8</sup> The provisions of the Sexual Offences Act that frame incest as an offence between males and females<sup>9</sup> have been viewed as strictly limiting the offence to persons of one sex as against persons of the opposite sex.<sup>10</sup> Even colloquial terms such as “boyfriend” and “girlfriend” have been taken to refer to persons of opposite sexes.<sup>11</sup>

---

<sup>1</sup> *Baby ‘A’ (Suing through the Mother E A) and another v Attorney General and 6 others* (2014) eKLR.

<sup>2</sup> Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya, *The Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya*, 2018, 12-13.

<sup>3</sup> *Baby ‘A’ (Suing through the Mother E A) and another v Attorney General and 6 others* (2014) eKLR.

<sup>4</sup> *R.M v Attorney General and 4 others* (2010) eKLR.

<sup>5</sup> Article 45(2), *Constitution of Kenya* (2010).

<sup>6</sup> Carpenter M, ‘Intersex Variations, Human Rights, and the International Classification of Diseases’<sup>20</sup> *Health and Human Rights* 2, 2018, 207.

<sup>7</sup> *Kedipa v Chepkokwo* (2022) eKLR.

<sup>8</sup> *SAM v SOA* (2022) eKLR.

<sup>9</sup> Section 20-21, *Sexual Offences Act* (2006).

<sup>10</sup> *MMM v Republic* (2021) eKLR.

<sup>11</sup> *Graision Shida Odhiambo and another v Republic* (2016) eKLR.

For this reason, courts have looked to decisions from foreign jurisdictions for guidance in the matters of intersex people and binary phrasing in the law.<sup>12</sup> These decisions have maintained that, for purposes of marriage, intersex persons should undergo medical assessment that will enable the court to declare them either males or females.<sup>13</sup> Obtaining such a declaration has been viewed as the only valid avenue available to intersex people who wish to exercise their right to marriage.<sup>14</sup> Indeed, it has been held that when it comes to marriage, other arms of government cannot expand the meaning of the term sex to include intersex persons when the legislature itself has not done so.<sup>15</sup>

In August of 2019, Kenya made history as the first African nation to count intersex people during a national census.<sup>16</sup> In addition to “male” and “female” sex markers, “intersex” was introduced as an option on the census questionnaires<sup>17</sup> and intersex persons were found to number 1,524.<sup>18</sup> This milestone came a year after the 2018 Taskforce Report recommended the expansion of the definition of “sex” to mean “a person who is male, female or intersex”.<sup>19</sup> In July of 2022, the 2001 Children’s Act was replaced by new legislation that makes clear provisions for the registration intersex children at birth,<sup>20</sup> for their sex to be treated as separate and distinct from their male and female counterparts,<sup>21</sup> and for their exclusion from male and female gender rules in foster care.<sup>22</sup> The first of these provisions has been implemented with the amendment of the Births and Registrations Act to make room for the entry of details of intersex children and intersex people into the registers of births and deaths.<sup>23</sup>

Cumulatively, these novelties present a challenge in the conventional approach to marriage as concerns intersex people. Legal recognition of one’s sex has been described as a facet of human dignity and a gateway to the access of other fundamental human rights.<sup>24</sup> Indeed, the right to

---

<sup>12</sup> *R.M v Attorney General and 4 others* (2010) eKLR.

<sup>13</sup> *Corbett v Corbett* (1970), The High Court of England and Wales.

<sup>14</sup> *Bellinger v Bellinger* (2003), The United Kingdom House of Lords.

<sup>15</sup> *R.M v Attorney General and 4 others* (2010) eKLR.

<sup>16</sup> Bhalla N, ‘Kenyan census results a 'big win' for intersex people’ Reuters, 4 November 2019 <https://www.reuters.com/article/us-kenya-lgbt-intersex-trfn-idUSKBN1XE1U9> on 9 January 2023.

<sup>17</sup> Kenya National Bureau of Statistics, *2019 Kenya Population and Housing Census Volume III: Distribution of Population by Age, Sex and Administrative Units*, 2019, 3.

<sup>18</sup> Kenya National Bureau of Statistics, *2019 Kenya Population and Housing Census Volume III*, 2019, 11.

<sup>19</sup> Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya, *The Report of the Taskforce*, 2018, 191.

<sup>20</sup> Section 7(3), *Children’s Act* (2022).

<sup>21</sup> Section 64(3), *Children’s Act* (2022).

<sup>22</sup> Section 174(3), *Children’s Act* (2022).

<sup>23</sup> Section 7(4), *Births and Deaths Registration Act* (1928).

<sup>24</sup> Ghoshal N and Knight K, ‘Rights in transition: Making legal recognition for transgender people a global priority’ Human Rights Watch: World Report 2016, 2016, 24.

marry in Kenya is directly dependent on one's identity as being "the opposite sex" of their intended spouse. As the legal landscape shifts towards recognition of the intersex identity, maintenance of the binary interpretation of the phrase "opposite sex" can be likened to a deadbolt firmly locking the gateway to the constitutional right to marry for intersex people.

## 1.2 Statement of Problem

The Constitution of Kenya provides that a legal marriage can only occur between persons of opposite sexes. Judicial interpretation of the phrase "opposite sex" as used in Article 45(2) limits it to the binary male and female sexes. While there is no definition of the word "sex" in the Constitution, the 2022 **Children's Act** makes provision for the legal recognition of intersex persons and intersex children. Thus, the continued use of the binary interpretation of the phrase "opposite sex" is exclusionary of intersex people and effectively bars them from the constitutional right to marry. All people, intersex or otherwise, are deserving of equal treatment before the law and wherever possible, equal enjoyment of their human rights. This study therefore seeks to investigate whether the phrase "opposite sex" can be interpreted in a manner that allows intersex people to enjoy the right to marry.

## 1.3 Research Objectives

- 1) To examine the basis of the institution of marriage and identify the elements at its core.
- 2) To investigate the origin of the opposite sex provision in Article 45(2) and identify the rationale behind its use.
- 3) To explore approaches to the intersex identity and distinguish the intersection between intersex and binary sex.

## 1.4 Research Questions

- 1)
  - (a) What is the basis of the institution of marriage?
  - (b) What are the elements at the core of marriage?
- 2)
  - (a) What is the origin of the opposite sex provision in Article 45(2)?
  - (b) What is the rationale behind the use of the opposite sex provision?
- 3)

- (a) What are some approaches to the intersex identity?
- (b) What is the intersection between intersex and binary sex?

### **1.5 Hypothesis**

Kenyan courts utilise an interpretation of the phrase “opposite sex” that situates the right to marry exclusively in the field of binary male and female with no room for intersex people. This is evident from prevailing interpretations of the term “sex” derived from dictionary definitions, colloquialisms, and social perceptions. Owing to the lack of a constitutional or legal definition of the word “sex”, this standpoint has allowed understandings of marriage law to remain static in the binary sex interpretation approach. However, the contemporary legal landscape has been changing course and making room for legal recognition of the intersex identity, necessitating adjustments of rights and freedoms rooted in one’s legal sex. In light of this, it is my hypothesis that the prevailing interpretation of the phrase “opposite sex” amounts to undue exclusion of intersex people from the constitutional right to marry. Persistence in this approach contravenes the spirit of equality and human dignity enshrined in the Constitution, a failing that is reconcilable with an inclusive legal definition of the term “sex” and a corresponding change in the interpretation of the phrase “opposite sex”.

### **1.6 Justification**

The Republic of Kenya is built on the fundamental respect for the inherent dignity of every person and the State’s duty to recognise, respect, and protect that dignity.<sup>25</sup> An individual’s sex identity is a key facet of their human dignity and legal recognition thereof is paramount to their wellbeing.<sup>26</sup> All State organs and persons are bound by the Constitution to uphold human dignity in the application or interpretation of any legislation.<sup>27</sup> This study is therefore important for the field of human rights law as it will propose an approach to interpreting Article 45(2) that upholds the principles of equality and human dignity enshrined in the Kenyan Constitution. Lawmakers, adjudicators, policymakers, and state officials will benefit from the research and findings in this study as they navigate and adjust the legal landscape in order to accommodate intersex people. As the State endeavours to provide legal protection for intersex people, this study will be a useful tool for mounting awareness campaigns targeting the general public as well as State actors and offices.

---

<sup>25</sup> Article 28, *Constitution of Kenya* (2010).

<sup>26</sup> *Republic v Kenya National Examinations Council and another ex-parte Audrey Mbugua Ithibu* (2014) eKLR.

<sup>27</sup> Article 10, *Constitution of Kenya* (2010).

## 1.7 Theoretical Framework: Purposive Approach to Constitutional Interpretation

Constitutions are a particular kind of law necessitating a particular kind of interpretation.<sup>28</sup> Over the years, the prevailing rules of legislative interpretation have been applied to constitutional texts to formulate various theories of constitutional construction.<sup>29</sup> This study is premised on the purposive approach to constitutional interpretation.

Aharan Barak describes purposive interpretation as a combination of two elements: the subjective consideration of the author's intent and the objective consideration of the legal system's fundamental values.<sup>30</sup> The Kenyan Constitution enshrines rules of statutory interpretation that dictate a similar approach: construction of the text should ensure development of the law consistent with the promotion of its underlying objects, the rule of law, and the Bill of Rights.<sup>31</sup> This entails espousal of the ideals and principles that underlie the free and democratic nature of Kenya and reflect the spirit of its highest law.<sup>32</sup>

Thus, the Constitution directs interpreters to apply the purposive approach with the goal of protecting and promoting the rights and freedoms of the people. This understanding has led to a pattern of jurisprudence that favours broad and liberal constitutional adjudication,<sup>33</sup> a tradition oriented towards emphasis on the protection of the Bill of Rights over and above competing claims of public order or state security.<sup>34</sup> Indeed, the Constitution itself dictates that courts are to adopt the interpretation most favourable to the furtherance of a human right or fundamental freedom.<sup>35</sup> However, this view erroneously conflates broadness and liberalness with purposive interpretation.<sup>36</sup> The purposive approach does not demand that the right be read broadly in every situation: in certain circumstances a narrow interpretation may be just as conducive to the satisfaction of the purpose of the Constitution.<sup>37</sup>

---

<sup>28</sup> Ribeiro G, 'What is constitutional interpretation?' 20 *International Journal of Constitutional Law* 3, 2022, 1130.

<sup>29</sup> Bobbit P, *Constitutional Interpretation*, Blackwell Publishing, Cambridge, 1991, 5.

<sup>30</sup> Barak A, *Purposive Interpretation in Law*, Princeton University Press, Princeton, 2005, 88.

<sup>31</sup> Article 259(1), *Constitution of Kenya* (2010).

<sup>32</sup> Article 20(4), *Constitution of Kenya* (2010).

<sup>33</sup> Lumumba P and Franceschi L, *The Constitution of Kenya, 2010: An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 675-676.

<sup>34</sup> Muigai G, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication' in Kichana P (ed) and Muthoni A and Wendoh P (compilers), *Constitutional Law Case Digest, Volume II*, Kenyan Section of the International Commission of Jurists, Nairobi, 2005, 176.

<sup>35</sup> Article 20(3), *Constitution of Kenya* (2010).

<sup>36</sup> *Soobramoney v Minister of Health (KwaZulu-Natal)* (1998), Constitutional Court of South Africa.

<sup>37</sup> Yongo C, 'Constitutional interpretation of rights and court powers in Kenya: Towards a more nuanced understanding' 27 *African Journal of International and Comparative Law* 2, 2019, 218.

Above all else, in applying the purposive approach, the interpreter ought to give decisive weight to the ultimate objects and intents underpinning the constitution at the time of interpretation.<sup>38</sup> A constitutional text is a “mirror reflecting the national soul; the identification of ideals and aspirations of a nation; the articulation of the values bonding its people”.<sup>39</sup> In order to realise ends of the Constitution, courts must transcend the letter of the text and apply its spirit, which stresses the ideals of justice, human dignity, and equality.<sup>40</sup>

The purposive approach would therefore favour the interpretation most consistent with the drafters’ intentions and reasoning at the time the Constitution was composed. It is trite law that courts should not be overly concerned with the literal meaning of terms if doing so would lead their pronouncements astray of the objects and purposes of the Constitution.<sup>41</sup> Courts in each generation are responsible for giving flesh and spirit to the dry bones of the constitution.<sup>42</sup> By interpreting the phrase “opposite sex” in a manner true to its original function, the purpose and objects of the Constitution will be upheld.

## 1.8 Literature Review

Existing studies on the legal position of intersex people in Kenya have conducted analyses of framework supporting their human rights and made generalised recommendations for reform in a variety of fields.<sup>43</sup> Reports published by human rights organisations have offered more extensive analyses, but have similarly concluded with broad, blanket recommendations.<sup>44,45</sup> The Taskforce Report briefly mentions the Marriage Act as a piece of legislation requiring a form of mandatory registration<sup>46</sup> but does not make recommendations for marriage law reform, nor does it delve into a discussion on intersex people’s relationship with the right to marry. Writers who have directly discussed the marriage of intersex people have done so from the perspective of the coital consummation provisions in Kenyan marriage law.<sup>47</sup> It has been

---

<sup>38</sup> Barak A, *Human Dignity: The Constitutional Value and the Constitutional Right*, Cambridge University Press, Cambridge, 2015, 70.

<sup>39</sup> *S v Acheson* (1990), High Court of Namibia.

<sup>40</sup> *Jasbir Singh Rai and 3 others v Tarlochan Singh Rai Estate and 4 others* (2013) eKLR.

<sup>41</sup> *Timothy M Njoya and 6 others v Attorney General and 3 others* (2004) eKLR.

<sup>42</sup> *Rangal Lemeiguran and others v Attorney General and 2 others* (2006) eKLR.

<sup>43</sup> Koe G, ‘An Analysis of the Legal Rights of Intersex People in Kenya’ Unpublished LLB Dissertation, Strathmore University Law School, Kenya, 2018, vi.

<sup>44</sup> Kenya National Commission on Human Rights, *Equal in Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya*, 2018, 5.

<sup>45</sup> Support Initiative for People with Congenital Disorders, *Baseline Survey on Intersex Realities in East Africa – Specific Focus on Uganda Kenya and Rwanda*, 2016, iv.

<sup>46</sup> Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya, *The Report of the Taskforce*, 2018, 191-202

<sup>47</sup> Matheka Teresia, ‘Speaking the Unspeakable! Interrogating the Rights and Legal Recognition of Intersex Persons in Kenya’ Published LLM Thesis, University of Zimbabwe, Zimbabwe, 2014, 45.

suggested that there is a need to reconsider the meaning of marriage to accommodate intersex people,<sup>48</sup> but no elaboration has been made thus far on what approach should be adopted.

### *1.8.1 On the conflation of intersex rights with LGBTQ rights*

Discussions around intersex people are regularly conflated with those of the LGBTQ community. An 'I' is often included in the acronym and intersex persons are thereafter discussed under blanket terms alongside the aforementioned groups. For instance, it has been contended that the Constitution and the Marriage Act are discriminatory and exclusionary towards "LGBTIQ" people.<sup>49</sup> Kuria and Maranya have similarly discussed "intersex, transgender and gender-diverse persons" under the acronym "ITGDPs", describing them as excluded from legal protection against domestic violence in marriage as the Constitution only recognises opposite-sex marriage.<sup>50</sup> Research has further detailed the "othering" of same-sex relationships and marriages that affects "LGBTQI" individuals and pressures them to enter into heterosexual marriages.<sup>51</sup>

### *1.8.2 On intersex people and same-sex marriage*

In the global arena, the continued use of binary sex language in legal reform has been flagged as exclusionary to intersex people. In the United Kingdom, the UK Intersex Association raised concerns to the Public Bill Committee concerning the wording of a Bill intended to legalise same-sex marriage. The Director of the Association argued that even if the proposed legislation expanded the definition of marriage beyond heterosexual confines, intersex individuals would still be excluded due to the Bill's framing in terms of binary male and female.<sup>52</sup> A similar situation has been faced in Australia where Wilson has maintained that proposed marriage equality legislation is still intersex exclusive as it rests on the legal assumption that there are only male and female individuals in the jurisdiction.<sup>53</sup>

---

<sup>48</sup> Cheruiyot B, 'The Legal Status of Intersex Persons with Special Reference to Kenya' Unpublished LLB Dissertation, Moi University, Kenya, 2019, 39.

<sup>49</sup> Ngari P, 'The Trends on Awareness of the Rights of the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) People in Kenya' Unpublished MA in International Relations Dissertation, 2022, 83.

<sup>50</sup> Kuria M and Maranya S, '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' 33 *Stellenbosch Law Review* 1, 2022, 100-122.

<sup>51</sup> Vestile A, 'A Qualitative Study of Lived Experiences of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Community in Nairobi With Regards to Finding and Maintaining Jobs' Unpublished MSc in International Development Studies, Norwegian University of Life Sciences, Norway, 2021, 64.

<sup>52</sup> <https://publications.parliament.uk/pa/cm201213/cmpublic/marriage/memo/m07.htm> on 12 January 2023.

<sup>53</sup> Wilson G, 'Intersex people and marriage; An analysis by Gina Wilson' Intersex Human Rights Australia, 2018 <https://ihra.org.au/21183/intersex-people-and-marriage-analysis/> on 12 January 2023.

In the EU, Germany has led the charge as the first country in the world to introduce a sex marker for intersex people on birth certificates. However, this move has been criticised with the contention that such a seismic change to the understanding of sex without corresponding changes to the existing legal regime governing marriage and anti-discrimination mechanisms<sup>54</sup> has effectively rendered German intersex people, in many instances, unable to marry.<sup>55</sup>

Overall, scholarly research has found that the prevailing use of binary sex language in legislation is exclusive and detrimental to intersex people. Where marriage is discussed, some writers have argued that the expansion of LGBTQ rights will benefit intersex people while others have held that legal language is the main barrier to intersex rights.

### *1.8.3 Contribution*

Previous studies have linked intersex people to LGBTQ issues and same-sex marriage, blurring the lines between biological sex identity, gender identity, and sexual orientation. This study will therefore be a useful tool in the field of sex, sexuality, and the law as it highlights intersex persons as a unique **biological sex** identity. Additionally, previous studies have been limited to discussing intersex people as an unrecognised group. This study is novel in its basis on the legal recognition of intersex people in Kenya and the effect of this recognition on other laws.

## **1.9 Methodology**

This research endeavours to explore the meaning of a provision of the Constitution and the various ways in which it can be interpreted. Such examination calls for a qualitative analysis of secondary materials including published reports, news articles, journal articles, books, and online materials on the topics of sex and statutory interpretation. The study will make use of the Constitution of Kenya, 2010 as well as the preceding Draft Constitutions as its major primary sources. The study will, in general, employ inductive means to infer general rules and conclusions from specific observations and facts. The second chapter, for example, will endeavour to identify the basis of the institution of marriage and the elements at its core through an analysis of universal facts applicable to all marriages. The third chapter will determine the origin of the opposite sex provision and the rationale behind its use by examining specific statements made by the drafters as well as the prevailing social atmosphere at the time of drafting. The fourth chapter will draw on a variety of approaches to the intersex identity and

---

<sup>54</sup> Travis, M 'Accommodating intersexuality in European Union anti-discrimination law' 21 *European Law Journal* 2, 2014, 52.

<sup>55</sup> Garland F and Travis M, 'Legislating intersex equality: building the resilience of intersex people through law' 38 *Legal Studies* 4, 2018, 600.

the intersection between sex and gender to arrive at a generalised view of how intersex people can fit within the institution of marriage.

The observations driving the inductive conclusions will be drawn from a variety of sources. The first chapter's examination of the institution of marriage will be two-fold: a philosophical analysis of the perspectives of sociologists as well as social, economic, and cultural anthropologists; and a historical analysis of the development of marriage in Kenya. This analysis will utilise scholarly articles on the topics of universalism, cultural relativism, traditional African marriage, and the impact of colonialism thereupon alongside statutes and reports reflecting the forces behind the wording of the marriage law as it exists in Kenya today. The Hansard Reports and preparatory documents responsible for the form of the Marriage Act will be used to shed further light on the institution of marriage in Kenya.

The study will then discuss the phrase "opposite sex" in an effort to determine its origin and the rationale behind its use in the Kenyan Constitution. This will entail a historical analysis of the preceding Draft Constitutions and the Bills that influenced their forms, as well as the reports of the various commissions charged with the drafting and review of the Constitution. This analysis will be bolstered by reports from human rights institutions and scholarly articles detailing the prevailing social atmosphere at the time of drafting and the impact this may have had on the words chosen to frame the constitutional right to marry. A critical analysis of caselaw discussing the purported rationales behind the use of binary sex language will further support the findings sought in this chapter.

Finally, the approaches to the intersex identity will be explored through policy analysis from within Kenyan as well as other jurisdictions, primarily Australia and South Africa, to identify the understanding of intersex most attuned to their inclusion in the constitutional right to marry. An examination of the intersection between sex and gender is necessary to enrich conclusions drawn in this chapter. Such examination will be carried out through an interdisciplinary foray into the fields of genetics, endocrinology, and sexology to explore the concept of biological sex and the classifications of binary and intersex in addition to distinguishing the various intersex conditions and the manner in which they manifest from individual to individual. The findings from this study will be juxtaposed against a critical analysis of gender identity and expression from scholarly articles and feminist theory to determine the intersection between sex and gender, and pinpoint the place of the intersex identity within these two spectrums.

Further analysis of policy and foreign doctrine will enable identification of the approach most suited to the inclusion of intersex people in the constitutional right to marry.

### **1.10 Chapter Breakdown**

Chapter one forms the introduction of this study. It lays out the foundation of the subsequent chapters by detailing, among other things, the research objectives, conceptual framework, and hypothesis of the study. Chapter two is an investigation of the basis of the institution of marriage with the aim of identifying the elements at its core. This chapter is geared towards identifying the foundation underpinning the prevailing approach to marriage in Kenya and investigating the form marriage was intended to take and the reasons for that form. This will establish whether marriage as an institution should be accessible to intersex people and lay the groundwork for the argument on what interpretation of the law should be used to maintain the intended form of marriage.

Chapter three is the crux of the paper: it analyses the origin of the phrase “opposite sex” to establish whether intersex people are excluded from the right to marry because of it. In this endeavour, the purposive approach to constitutional interpretation is applied to determine the reasoning of the drafters and intention behind this choice of words. Chapter four sets out to establish the best practice in understanding the intersex identity as it relates to sex characteristics, gender identity, and expression to establish whether intersex people fit within the intended form and meaning of marriage as envisioned by the drafters of the Constitution. This chapter seeks an answer that is congruent with the theoretical foundation and philosophical basis of marriage identified in chapter two while simultaneously maintaining the underlying purpose and function of the phrase “opposite sex” identified in chapter 3.

The fifth chapter of the study makes recommendations as to how Article 45(2) should be interpreted to prevent undue exclusion as well as adjustments that should be made to the Marriage Act 2014 and other legislation to reflect the proposed approach.

## CHAPTER 2: THE INSTITUTION OF MARRIAGE

### 2.1 Introduction

*He who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god: he is no part of a state. A social instinct is implanted in all men by nature, and yet he who first founded the state was the greatest of benefactors. For man, when perfected, is the best of animals, but, when separated from law and justice, he is the worst of all.*<sup>56</sup>

Human beings are fundamentally social creatures. Whether from a biological, ecological, physiological, or psychological point of view,<sup>57</sup> inter-personal relationships are a core element of human life.<sup>58</sup> No man is an island; from birth and all throughout life, human survival is dependent on secure and enduring social connections; a mass of networks of relatedness that radiate from each individual<sup>59</sup> and guarantee a minimally good life.<sup>60</sup> The intrinsic need for human contact has manifested over time into patterns of behaviour<sup>61</sup> which in turn form the structured institutions that underpin contemporary human society.<sup>62</sup>

Society is a dialectic construct: it is created by man and it in turn creates and moulds man.<sup>63</sup> As such, it evolves as man evolves,<sup>64</sup> undergoing morphological changes driven by modernisation, globalisation, economic development.<sup>65</sup> Even so, a certain aspect of social life remains core and constant: all human societies recognise, respect, and organise themselves around the relationships of consanguinity between parents, their offspring, and their offspring's offspring and relationships of affinity wrought through marriage.<sup>66</sup> These relationships are universal<sup>67</sup>

---

<sup>56</sup> Aristotle, *Politics* (translated by Benjamin Jowett), Oxford University Press, Oxford, 1885, xv.

<sup>57</sup> Doby J, 'Man the Species and the Individual: A Sociological Perspective' 49 *Social Forces* 970, 1.

<sup>58</sup> Fox R, *Kinship and Marriage*, Cambridge University Press, Cambridge 1996, 27.

<sup>59</sup> Tonkinson R, *The Mardu Aborigines: Living the Dream in Australia's Desert*, Holt, Rinehart and Winston, New York, 1991, 57.

<sup>60</sup> Brownlee K, *Being Sure of Each Other: An Essay on Social Rights and Freedoms*, Oxford University Press, Oxford, 2020, 8.

<sup>61</sup> Redhead D and Power E, 'Social hierarchies and social networks in humans' 377 *Philosophical Transactions of the Royal Society B: Biological Sciences* 1845, 2022, 6.

<sup>62</sup> Dousset L, 'Understanding Human Relations (Kinship Systems)' in Thieberger N (ed) *The Oxford Handbook of Linguistic Fieldwork*, Oxford University Press, 2011, 210.

<sup>63</sup> Berger P, *The Sacred Canopy: Elements of a Sociological Theory of Religion*, Doubleday and Company, New York, 1967, 3.

<sup>64</sup> Nolan P and Lenski G, *Human Societies: An Introduction to Macrosociology*, 11 ed, Paradigm Publishers, London, 2009, 5-6.

<sup>65</sup> Georgas J 'Family: Variations and Changes Across Cultures' 6 *Online Readings in Psychology and Culture* 3, 2003, 12-15.

<sup>66</sup> Kottak C, *Anthropology: The Exploration of Human Diversity*, McGraw Hill, New York, 2004, 487.

<sup>67</sup> Read D, 'Kinship Terminology' in Wright J (ed) *International Encyclopaedia of the Social and Behavioural Sciences*, 2 ed, Elsevier, Oxford, 2015, 62.

and remain steadfast pillars of society even through the storm of changing realities of modern times.<sup>68</sup>

## 2.2 Lessons from anthropology

### 2.2.1 *On universalism*

Marriage is a custom almost universally present across cultures and in the history of the human race.<sup>69</sup> Despite this, marriage has escaped being bound by a universally recognised and accepted definition. To avoid ethnocentrism, marriage may be described as a union between two or more people sanctioned by the culture and norms of their society that establishing rights and duties between the parties and in relation to their children, their in-laws and their society as a whole.<sup>70</sup> Anthropologists have put forth a myriad of competing definitions of marriage with the aim of encompassing the expansive range of marital practices spanning time and cultures.<sup>71</sup> However, even within a singular culture, “definitions of marriage have careened from one extreme to another and everywhere in between”.<sup>72</sup> Thus, cultural anthropologists have been on a quest for a catch-all description of marriage composed of elements seen to be universal across all cultures.

Initial attempts defined marriage as “a union between a man and a woman such that the children born to the woman are the recognised legitimate offspring of both partners”.<sup>73</sup> This position was challenged by British anthropologist Kathleen Gough following her studies of various cultures in East Africa and Southeast Asia. Gough documented the practices of ghost marriage among the Nuer of Sudan and polyandry among the Nayar of India and proposed that marriage in anthropology ought to be understood as “a relationship established between a woman and one or more other persons, which provides a child born to the woman under circumstances not prohibited by the rules of relationship, is accorded full birth-status rights common to normal members of his society or social stratum”.<sup>74</sup> This approach was based on Gough’s observance of the absence of the conventional role of the husband in Nayar marriage traditions, and appeared to have the catch-all effect that anthropologists had been seeking. Tested against a

---

<sup>68</sup> Itao K and Kaneko K, ‘Evolution of kinship structures driven by marriage tie and competition’ 117 *Proceedings of the National Academy of Sciences of the United States of America* 5, 2020, 2380.

<sup>69</sup> Ember C, Gonzalez B and McCloskey D, ‘Marriage and Family’ Human Relations Area Files, 2021, 1.

<sup>70</sup> Haviland W, Prins H, McBride B, and Walrath D, *Cultural Anthropology: The Human Challenge*, 13 ed, Cengage Learning, Boston, 2011, 120.

<sup>71</sup> Bell D, ‘Defining marriage and legitimacy’ 38 *Current Anthropology* 2, 1997, 238.

<sup>72</sup> Gerstman E, *Same-sex marriage and the Constitution*, Cambridge University Press, Cambridge, 2004, 22.

<sup>73</sup> Royal Anthropological Institute, *Notes and Queries on Anthropology*, 1951, 110.

<sup>74</sup> Gough K, ‘The Nayars and the Definition of Marriage’ 89 *Royal Anthropological Institute of Great Britain and Ireland* 1, 1959, 23-24.

variety of cultural practices such as ghost marriage<sup>75</sup> and woman-to-woman marriage,<sup>76</sup> Gough's definition held water.

Naturally, Gough was not without her critics. Economic anthropologist Duran Bell argued that in civilisations where illegitimacy was more or less irrelevant in relation to the social or legal status of a child, placing emphasis on legitimacy of offspring was a circular mode of reasoning.<sup>77</sup> This argument prompted more generalised definitions of marriage such as the one advanced by sociologist Edvard Westermarck: "a more or less durable connection between male and female lasting beyond the mere act of propagation until after the birth of the offspring".<sup>78</sup> Westermarck would later generalise his approach to this relationship even further to "a relation of one or more men to one or more women that is recognised by custom or law".<sup>79</sup>

### 2.2.2 *On cultural relativism*

As the quest for a catch-all definition of marriage progressed, some scholars began to question the feasibility of a definitive answer ever being found. Social anthropologist Edmund Leach was of the opinion that there was no definition of marriage capable of uniform application across all cultures; he proposed that marriage ought to be understood as an institution establishing a bundle of rights with an allowance for specific rights to differ across cultures.<sup>80</sup> Rather than seeking a universally applicable definition of marriage, Leach advanced an approach to the anthropological study of marriage that considered the cultural context of the practices and beliefs being observed.

Cultural relativism as a theory advances a position opposite to universalism: there is no universal yardstick by which all cultures can be measured; all beliefs, values, and social norms should be understood relative to the context of the culture in which they arise rather than being judged based on external principles or differing ways of life.<sup>81</sup> The Greek philosopher Herodotus wrote that "everyone without exception believes his own native customs, and the religion he was brought up in, to be the best; and that being so, it is unlikely that anyone but a

---

<sup>75</sup> Burton J, 'Ghost Marriage and the Cattle Trade among the Atuot of the Southern Sudan' 48 *Africa* 4, 1978, 398-405.

<sup>76</sup> Cadigan R, 'Woman-to-woman marriage: practices and benefits in Sub-Saharan Africa' 29 *Journal of Comparative Family Studies* 1, 1998, 89.

<sup>77</sup> Bell D, 'Defining marriage and legitimacy' 38 *Current Anthropology* 2, 1997, 238

<sup>78</sup> Westermarck E, *History of Human Marriage Vol. 1 (1922)*, Kessinger Publishing, Montana, 2003, 71.

<sup>79</sup> Westermarck E, *The Future of Marriage in Western Civilisation*, Books for Libraries Press, 2013, 3.

<sup>80</sup> Leach E, 'Polyandry, Inheritance, and the Definition of Marriage' 55 *Man* 12, 1955, 183.

<sup>81</sup> Union of International Associations, 'Cultural Relativism', *The Encyclopaedia of World Problems and Human Potential*, 4<sup>th</sup> October 2020 <http://encyclopedia.uia.org/en/problem/140048> on 20<sup>th</sup> December 2023.

madman would mock at such things”.<sup>82</sup> Cultural relativism as an approach in anthropology highlights the fact that, although certain principles may appear to be true and self-evidently so, all humans are subject to cultural bias.<sup>83</sup> Indeed, “what is right or good for one individual or society is not right or good for another, even if the situations are similar, meaning that not merely what is thought to be right or good by one is right or good by another...but that what is really right or good in one case is not so in another”.<sup>84</sup>

American anthropologist Ruth Benedict emphasised the importance of cultural relativism to the field of anthropology: “it is only in the study of man himself that the major social sciences have substituted the study of one local variation, that of Western civilisation. Any understanding of the totality of humanity must be based on as wide and varied a sample of individual cultures as possible. It is only by appreciating different cultures that one can realise the extent to which a belief or activity is culture-bound rather than natural or universal. Cultural relativism is thus an important principle to keep in mind as it calls to attention the importance of a variation in any sample size that is used to derive generalisations about humanity”.<sup>85</sup> Like-minded scholars would also point to the significance of considering local context in the analysis of a culture’s social activities and cultural beliefs,<sup>86</sup> as well as the understanding that an individual’s ideals and conceptions may be absolute within their own society, but relative everywhere else.<sup>87</sup>

Although the quest for a catch-all definition of marriage was admirable, it remains true that different cultures do things differently, and their laws should reflect that. Thus, it bears considering the purpose and form of marriage for the Kenyan people.

## **2.3 The Kenyan context**

### *2.3.1 Pre-colonial era*

Prior to colonialism, the ethnic groups living in the territory that would later become Kenya generally existed and governed themselves independently of each other, save for occasional cross-tribal interactions such as trade.<sup>88</sup> Despite the diversity of ways of life among them, the

---

<sup>82</sup> Herodotus, de Selincourt A, and Marincola J, *The Histories*, Penguin Books, 2003, 38.

<sup>83</sup> Cook J, ‘Cultural Relativism as an Ethnocentric Notion’ in Bechler R and Drengson (eds) *In The Philosophy of Society*, Methuen, London, 1978, 69.

<sup>84</sup> Frankena W, *Ethics*, Prentice-Hall, New Jersey, 1973, 41.

<sup>85</sup> Benedict R, *Patterns of Culture*, Houghton Mifflin Company, Boston, 1934, 3.

<sup>86</sup> Heyer V, ‘In Reply to Elgin Williams’ 50 *American Anthropologist* 1, 1948, 163.

<sup>87</sup> Boas F, ‘The Principles of Ethnological Classification’, in Stocking G (ed) *A Franz Boas Reader: The Shaping of American Anthropology, 1883-1911*, University of Chicago Press, Chicago, 1974, 62.

<sup>88</sup> Ojwang J, ‘Constitutional trends in Africa: The Kenya case,’ 10 *Transnational Law and Contemporary Problems* 1, 2000, 519.

institution of marriage was common across the various ethnic groups. Marriage was generally understood as a rite of passage; a necessary step that every individual was expected to take in the path of life with the aim of widening their kinship network and cementing their new relationships through procreation.<sup>89</sup> In contrast to the Western conception of a contractual union involving formalities between the two parties, traditional Kenyan marriage was a union of two families and the community. Most communities had some form of betrothal ceremony or procedure and followed by the exchange of bride price to signify the marriage agreement. Dissolution of marriage was an extrajudicial process involving community leadership and conciliatory efforts before the marriage bond could be severed. Grounds for dissolution were similar among communities: witchcraft, theft, adultery, and physical violence.

British colonialism greatly impacted the institution of marriage in Kenya. Kenya became a protectorate in 1895. Two years later, British and Indian statutes were imported and applied in the Kenyan legal system following the East African Order in Council. This led to a period of subjugation of customary polygamous marriage in favour of monogamous Christian marriage.<sup>90</sup> In a landmark case, Lord Penzance stated that “marriage as understood in Christendom, may be defined as the voluntary union for life of one man and one woman to the exclusion of all others”<sup>91</sup> despite marriage in traditional customary law providing for polygamous unions. The importation of British law into Kenya and the subjugation of traditional customary law only went further as the years went by. Under the 1930 Native Tribunals Ordinance, application of customary law was restricted by the repugnancy rule, a metric that was often, if not always, that which the British saw it to be.<sup>92</sup>

### 2.3.2 *Post-colonial era*

Following independence in 1963, President Jomo Kenyatta mandated two commissions to conduct research and collect public opinion on marriage, divorce, and succession in Kenya as the marriage laws left behind by the colonial power were numerous, conflicting, and difficult to manage administratively.<sup>93</sup> The Report of the Commission on Succession was accepted by legislators and used to draft and pass the Law of Succession Act in 1981. The 1968 Report on

---

<sup>89</sup> National Council for Population and Development, *Youth: Curbing Early Marriages Improves their Prospects*, 2013, 1.

<sup>90</sup> *R v Amkeyo* (1952) 19 E.A.C.A.

<sup>91</sup> *Hyde v Hyde* (1886) LR 1 P&D 130.

<sup>92</sup> Folger R, Cropanzano R, Goldman B, ‘What is the relationship between justice and morality?’ in Grenberg J and Colquitt J (ed), 1 ed, *Handbook of Organisational Justice*, Lawrence Erlbaum Associates Publishers, 2005, 216.

<sup>93</sup> Cotran E, ‘Marriage, divorce and succession laws in Kenya: Is integration or unification possible?’ 40 *Journal of African Law* 2, 1996, 196.

Marriage and Divorce, however, caused quite a stir due to the highly contested recommendation that both polygamous and monogamous marriages be recognised in the law.<sup>94</sup> This issue was one in a long series of setbacks that would see Kenya remain without a comprehensive law on marriage until the year 2014.

Four years prior to this, Kenya adopted the 2010 Constitution, a document designed to be the gateway into a new era of enhanced respect for human rights, the rule of law, and constitutionalism.<sup>95</sup> This was the culmination of nearly five decades of struggles that sought to fundamentally change the backward economic, social, political, and cultural developments within the country.<sup>96</sup> The opposite-sex approach to marriage was enshrined in Article 45(2) and a unified Marriage Act was finally enacted in line with this. Parliamentary debates on the Marriage Bill reveal that the prevention of gay marriages and lesbianism was a primary concern of legislators as they considered topics such as the marriage regimes in Kenya and the definition of a spouse.<sup>97</sup>

#### **2.4 Core elements of a marriage**

Ultimately, marriage in Kenyan law is defined as the voluntary union of a man and a woman whether in a monogamous or polygamous union registered in accordance with the Marriage Act.<sup>98</sup> A marriage may further be identified as Christian, civil, customary, Hindu, or Islamic, with the primary difference lying in the monogamous or polygamous nature of the marriage.<sup>99</sup> The purpose of marriage, as described by Justice JB Ojwang is to provide emotional support for the parties, and to give a structure for mutual sustenance in respect of those workday activities that move the process of living...the primary incidents of the marriage bond include intimacy, kind feelings and emotional support, and the exclusive sensations and joys of the marital union and its precious bond.<sup>100</sup> Thus, the institution of marriage as a whole and as conceptualised in Kenya, hinges primarily on the relationships it builds between the parties, their families, and within society in general.

There is no universal requirement that marriage be conceptualised as a union strictly between individuals of the opposite sex. Analysis of history demonstrates that this conceptualisation enshrined in law was first introduced in Kenya by colonial actors and later reinforced in the

---

<sup>94</sup> Kiage P, *Family Law in Kenya: Marriage, Divorce, and Children*, LawAfrica Publishing, 2016, 22.

<sup>95</sup> Kiage P, *Family Law in Kenya: Marriage, Divorce, and Children*, 24.

<sup>96</sup> <https://www.bbc.com/news/world-africa-53935125> on 24 January 2024.

<sup>97</sup> National Assembly Hansard Report, 20 March 2014, 34

<sup>98</sup> Section 3, *Marriage Act* (2014).

<sup>99</sup> Section 6, *Marriage Act* (2014).

<sup>100</sup> *E.T.M v R.W and another* (2011) eKLR.

Constitution and the Marriage Act. The legislators responsible for the final form of the Act seemed keen to prevent legal recognition of same-sex marriages, purportedly to maintain the spirit of Article 45(2).<sup>101</sup> Thus, it would seem prudent to investigate the roots of this constitutional provision to gain some insight into the restriction of marriage as an institution between persons of the opposite sex.



---

<sup>101</sup> National Assembly Hansard Report, 11 March 2021, 24.

## CHAPTER 3: THE OPPOSITE SEX PROVISION

### 3.1 Introduction

*A constitution is not just a higher law, not just a supreme law, not just a law to which all other laws are subject. A constitution must express national purpose, national spirit, and national aspirations – and it should have the words to match.*<sup>102</sup>

The choice of words in a constitutional text is not a matter to be taken lightly.<sup>103</sup> Provisions of law touching on marriage and the family impact the deepest, most intimate aspects of peoples' lives.<sup>104</sup> As such, the use of terminology to define and frame such a pivotal sphere of life must be a deliberate and purposeful endeavour.<sup>105</sup> Prior to the promulgation of the 2010 Constitution, Kenya's preceding constitutional texts did not in any way define or frame the right to marry.<sup>106</sup> Demands for an amended, progressive constitution in the early 1990s kickstarted a wave of constitutional reforms<sup>107</sup> that would see the right to marry constitutionalised, modified, and amended to its current form in present day. This chapter will therefore outline the history of constitutional right to marry, and in particular, investigate the reasoning behind the use of the phrase "opposite sex" to frame the right to marry in Kenya.

### 3.2 The Bomas Draft

Following the revision of the 1963 Constitution to the 1969 Constitution, the process of drafting what would eventually become the 2010 Constitution began in 1997. The Constitution of Kenya Review Act established a Commission responsible for the drafting of a Bill to alter the constitutions based on national views collected through public participation. The Commission's Draft Bill was presented for discussion at a meeting of government and other stakeholders at the Bomas of Kenya, resulting in an amended document referred to as "the Bomas Draft". Article 41 of the Draft expressly prohibited same-sex marriage and provided for opposite-sex marriage and the right to found a family. This provision represents the first ever framing of the constitutional right to marry, with specific reference to persons of opposite or

---

<sup>102</sup> Blaustein A, 'Constitution Drafting: The Good, the Bad, and the Beautiful' 2 *The Scribes Journal of Legal Writing* 1, 1991, 49.

<sup>103</sup> Department of Justice and Constitutional Development, *Drafting the Constitution – Topics, Detail, Language*, 1995, 11-12.

<sup>104</sup> Eekelaar J, *Family Law and Personal Life*, Oxford University Press, Oxford, 2006, ix.

<sup>105</sup> Twomey A, 'The dilemmas of drafting a Constitution for a new state' 28 *Australasian Parliamentary Review* 2, 2013, 22.

<sup>106</sup> Chitere P, Chweya L, Masya J, Tostensen A, and Waiganjo K, 'Kenya Constitutional Documents: A Comparative Analysis' Chr. Michelsen Institute, 2006, 46-49.

<sup>107</sup> Murunga G, 'Elite Compromises and the Content of the 2010 Constitution' in Murunga G, Okello D, and Sjögren A (eds) *Kenya: the Struggle for a New Constitutional Order*, Zed Books, London, 2014, 150.

same sexes. The wording of the Draft Bill that preceded the Bomas Draft was substantially different. It merely prescribed that parties to a marriage had to be at least eighteen years old and accorded them the right to found a family.<sup>108</sup> The Draft Bill made no mention of the phrase “opposite sex”, nor did it prohibit same-sex marriage. It is thus clear that at some point between the presentation Draft Bill and the finalisation of Bomas Draft, the framing of the right to marry underwent a fundamental transformation.

In 2005, the Technical Working Group assigned to deal with the Bill of Rights reported on its proceedings and deliberations that influenced the final form of the Draft. The Group wrote that:<sup>109</sup>

*“Marriage should only be between persons of the opposite sexes...the Constitution should clearly state that marriages between homosexuals are prohibited...some married people have connections with lesbianism...Kenya should make its own laws even if that means going against international trends in human rights e.g. on gay rights...there is need to protect our culture.”*

The Group recommended thereafter the insertion phrase ‘a person of the opposite sex’ into the provision alongside a new clause designed to address the issue of homosexuality, lesbianism, and any unions arising therefrom. Following further discussions, the Group resolved to axe the phrase “a person of the opposite sex” and instead compose an additional sub-clause that would outlaw same-sex marriages.<sup>110</sup> The end result was that the annotated version of the Draft Bill submitted by the Group maintained the original approach to marriage (no restrictions in terms of sex) modified by a new sub-clause specifically prohibiting same-sex marriage.<sup>111</sup>

When the annotated Draft Bill was brought before the Constitutional Conference, the wording of the right to marry was flagged as a cross-cutting issue with transitional and consequential implications.<sup>112</sup> After much deliberation, the phrase “opposite sex” was reintroduced while the sub-clause prohibiting same-sex marriage was adopted without amendment,<sup>113</sup> leading to the final form of Article 41 of the Bomas Draft as it was published to the public.

---

<sup>108</sup> Constitution of Kenya Review Commission, *Report of the Constitution of Kenya Review Commission Volume 2: The Draft Bill to Amend the Constitution*, 2002, 33.

<sup>109</sup> Constitution of Kenya Review Commission, *The Final Report of Technical Working Group “B” on Citizenship and the Bill of Rights*, 2005, 20-21.

<sup>110</sup> Constitution of Kenya Review Commission, *The Final Report of Technical Working Group “B”*, 335.

<sup>111</sup> Constitution of Kenya Review Commission, *The Final Report of Technical Working Group “B”*, 377.

<sup>112</sup> Constitution of Kenya Review Commission, *The Report of the Rapporteur General to the National Constitutional Conference*, 2003, 65.

<sup>113</sup> Constitution of Kenya Review Commission, *The Report of the Rapporteur General*, 2003, 96.

### 3.3 The Harmonised Draft

By the end of the Constitutional Conference, deliberations had produced three competing drafts: the original Draft Bill; the Bomas Draft produced after amendments to the Bill; and the Wako Draft, a revised document produced by Amos Wako, the Attorney General at the time.<sup>114</sup> The Wako Draft was put to a public vote in 2005 and was ultimately rejected by the majority. The next wave of constitutional reform began off in 2008. The Committee of Experts of Constitutional Review published a document known as “the Harmonised Draft”; the harbinger of the 2010 Constitution. Article 42 of this Draft matched the current Article 45(2) word for word and additionally provided for the right to found a family.

Upon its release to the public in November of 2009, the Draft was met with “overwhelming opposition” from Christian leaders on the grounds that the right to found a family left a loophole for same-sex unions and homosexuality.<sup>115</sup> Popular and media debate fanned the flames of conspiracy as numerous distortions were made implying the Draft legalised same-sex marriages.<sup>116</sup> Those fears were not entirely unfounded: a month prior to the release of the Draft, a representative of the Committee of Experts had intimated that, “On several occasions, some British MPs have approached us on the gay matter. They wanted us to include homosexual and lesbians’ rights in the draft. But we told them that such a thing cannot happen because if we did so, a majority of Kenyans will reject the draft during the forthcoming referendum.”<sup>117</sup> Judging by the public outcry in response to the Draft, Kenyans remained unconvinced that the Committee had not compromised or ceded to those requests in some way.

This legacy has followed Kenya into contemporary times. Speaking before the United Nations Office at Geneva, former Secretary for Justice and Constitutional Affairs Geoffrey Kibara stated that: “Currently there is serious opposition to decriminalizing same-sex relationships. In fact, during the constitution-making process, public views were received on this and they were overwhelmingly towards continuing the current criminalization of same-sex relationships.”<sup>118</sup> To date, Kenya maintains this position in its Universal Period Reviews, insisting that

---

<sup>114</sup> Fitzgerald J, ‘The Road to Equality? The Right to Equality in Kenya’s New Constitution’ 5 *The Equal Rights Review* 1, 2010, 55.

<sup>115</sup> Human Rights Watch, *The Issue is Violence: Attacks on LGBT People on Kenya’s Coast*, 2015, 14.

<sup>116</sup> Wewa N and Mwangi V, ‘Referendums in Kenya: KNCHR’s Journey Towards Ensuring Political Accountability and Respect for Human Rights in Kenya’s Constitutional Process Making’ Kenya National Human Rights Commission, 2021, 14.

<sup>117</sup> Ringa M, ‘Kenya: Law Review Experts Rule Out Rights for Homosexuals’ Daily Nation, 18 October 2009 <https://allafrica.com/stories/200910190050.html> on 14 January 2024.

<sup>118</sup> United Nations Office at Geneva, *Human Rights Committee Examines the Report of Kenya*, 2012 <https://www.ungeneva.org/en/news-media/meeting-summary/2012/07/human-rights-committee-examines-report-kenya> on 22 January 2023.

intolerance towards same-sex relations remains serious and overwhelming<sup>119</sup> as such taboo acts are considered repugnant to morality and the cultural sensibilities of the people of Kenya; they go against the order of nature.<sup>120</sup>

The public was afforded the opportunity to examine the Draft and forward proposals and amendments to their representatives in December of 2009. A revised document incorporating these contributions was sent to the Parliamentary Select Committee in January of 2010 and a revision of that draft was returned to the Committee of Experts. This text was published as a proposed Constitution and dubbed “the Popular Version”. In February, it was presented to Parliament for any final amendments deemed necessary. The Popular Version framed marriage as a right as between adults of the opposite sex and did not contain the right to found a family. It was presented for referendum in June of 2010 and adopted by popular vote. Thus was the phrase “opposite sex” entered into the Constitution of Kenya 2010.

### 3.4 Conclusion

From the foregoing, it is clear that in choosing the language that would frame the right to marry, the drafters of the Constitution were predominantly concerned with prohibiting same-sex marriages. Interpreting Article 45(2) from the purposive approach would thus yield the result that the use of the phrase “opposite sex” is meant in contrast to same-sex unions with the intent to prohibit them. This position is bolstered by the fact that decriminalisation of same-sex relations in Kenya has been decried as a contradiction of Article 45(2): “cohabitation of same-sex persons would be a violation of the spirit and tenor of the Constitution. Decriminalisation of same-sex relations would be tantamount to allowing same-sex unions in direct contravention of Article 45.”<sup>121</sup>

---

<sup>119</sup> United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Kenya*, 8<sup>th</sup> Universal Periodic Review, A/HRC/15/8, 17 June 2010.

<sup>120</sup> United Nations Human Rights Committee, *Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Third Periodic Report of States Parties, Kenya*, CCPR/C/KEN/3, 2011, 20.

<sup>121</sup> *EG and 7 others v Attorney General; DKM and 9 others (Interested Parties); Katiba Institute and another (Amicus Curiae)* (2019) eKLR.

## CHAPTER 4: THE INTERSEX IDENTITY

*First, the comprehension of scattered particulars in one idea; as in our definition of love, which whether true or false certainly gave clearness and consistency to the discourse, the speaker should define his several notions and so make his meaning clear.*<sup>122</sup>

The definition of a term provides the conditions of classification, or the characteristics that must be proven true of an entity to justify its classification as belonging to a particular group.<sup>123</sup> Without proper definitions, concepts may be misunderstood, and groups of people may be misclassified. Sex is not defined in Kenyan law, but precedent demonstrates that it is generally conflated with gender. The High Court has held that “the term sex as used in the Constitution encompasses the two categories of male and female gender only. To interpret the term sex as including intersex would be akin to introducing intersex as a third category of gender in addition to male and female”.<sup>124</sup> The Supreme Court described heterosexuality (opposite-sex attraction) as “being attracted to the opposite gender” and homosexuality (same-sex attraction) and “being attracted to the same gender”.<sup>125</sup> Marriage has been declared a right arising “only as between two adults of opposite gender”.<sup>126</sup> This chapter will therefore explore the distinctions and intersections between gender and sex, with a view to establishing whether the opposite sex provision can be constructed in a manner that enables intersex people to marry within the law.

### 4.1 Sex and gender

In the everyday speech, a layman may use the term “sex” to refer to gender and “gender” to refer to sex.<sup>127</sup> However, the two words describe distinct concepts: sex denotes the biological composition of an organism, while gender designates<sup>128</sup> as well as social expectation or roles typically associated with a particular sex.<sup>129</sup> Biology informs sex; sex informs gender. Why then is the conflation of sex and gender considered inappropriate, if the line connecting them is so direct? Gender and sex are typically viewed as binary. Binary gender relies on binary sex; binary sex relies on binary biology; but biology is not always binary.

---

<sup>122</sup> Plato, *Phaedrus* (translated by Benjamin Jowett), C. Scribner’s Sons, New York, 1871, 43.

<sup>123</sup> Macagno F, ‘Definitions in Law’ 2 *Bulletin Suisse de Linguistique Appliquée* 1, 2010, 2011.

<sup>124</sup> *R.M v Attorney General and 4 others* (2010) eKLR.

<sup>125</sup> *NGOs Co-ordination Board v EG and 4 others; Katiba Institute (Amicus Curiae)* (2023).

<sup>126</sup> *Council of Imams and Preachers of Kenya, Malindi and 4 others v Attorney General and 5 others* (2015).

<sup>127</sup> Udry R, ‘The Nature of Gender’ 31 *Demography* 4, 1994, 561-573.

<sup>128</sup> UNGA, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, UN A/73/152, 12 July 2018, 3.

<sup>129</sup> Carlson N, *Psychology: The Science of Behavior*, 4 ed, Pearson, London, 2010, 140-141.

It is true that to a certain extent, biology is typically dichotomous, determined in the first instance by the expression of sex chromosomes X and Y.<sup>130</sup> The configuration XX corresponds to a genetic female while XY denotes a genetic male. Following this line of thinking, an individual with XX chromosomes would be of the feminine gender while XY chromosomes points to a person of the masculine gender. The line becomes slightly less direct in the case of an individual with Klinefelter syndrome (KS), as they are born with an extra copy of the X-chromosome. A person with Turner's syndrome (TS) is similarly not easy to place; they are born partially or completely missing one X-chromosome.

People with KS are generally regarded as male due to Y-chromosome in their genetic makeup (XXY) while those with TS are regarded as female due its absence (X0). However, genetics is only one facet of biological sex. Chromosomes dictate the expression of a variety of other features such as secondary sex characteristics, internal and external genitalia, gonads, and hormonal states,<sup>131</sup> all relevant in determining a person's sex. The female sex is associated with development of breasts, a female reproductive system including ovaries, a uterus, vagina, and vulva, and a menstrual cycle. The male sex is associated with facial hair, a male reproductive system including testes and a penis, and a certain level of the hormone testosterone. A person with KS is considered genetically male but may develop breasts and fail to develop testes.<sup>132</sup> A person with TS, genetically female, may lack breasts and fail to menstruate.<sup>133</sup> Individuals with congenital adrenal hyperplasia (CAH) may be genetically male or female but develop external genitalia incongruent with their genetics.<sup>134</sup> The same is true for other conditions such as 17beta-HSD3,<sup>135</sup> and DSD,<sup>136</sup> PMDS.<sup>137</sup>

---

<sup>130</sup> Bhargava A, Arnold A, Bangasser D, Denton K, Gupta A, Krause L, Mayer E, McCarthy M, Miller W, Raznahan A, and Verma R 'Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement' 42 *Endocrine Reviews* 3, 2021, 219-258.

<sup>131</sup> Stoller R, *Sex and Gender: The Development of Masculinity and Femininity*, Karnac Books, London, 1984, vi.

<sup>132</sup> Kanakis G and Nieschlag E, 'Klinefelter syndrome: more than hypogonadism' 86 *Metabolism* 1, 2018, 135.

<sup>133</sup> Sybert V and McCauley E, 'Turner's syndrome' 351 *The New England Journal of Medicine* 12, 2004, 1227.

<sup>134</sup> Momodu I, Lee B, and Singh G, 'Congenital Adrenal Hyperplasia' National Centre for Biotechnology Information, 2023 <https://www.ncbi.nlm.nih.gov/books/NBK448098/> on 21 January 2024.

<sup>135</sup> Intersex variant causing atypical or mixed genitalia in genetic males. See Mendonca B, Gomes N, Costa E, Inacio M, Martin R, Nishi M, Carvalho F, Tibor F, and Domenice S, '46,XY disorder of sex development (DSD) due to 17β-hydroxysteroid dehydrogenase type 3 deficiency' 165 *The Journal of Steroid Biochemistry and Molecular Biology* 1, 2017, 79-85.

<sup>136</sup> Intersex variant causing male genitalia in genetic females. See Vorona E, Zitzmann M, Gromoll J, Schüring A, and Nieschlag E, 'Clinical, Endocrinological, and Epigenetic Features of the 46,XX Male Syndrome, Compared with 47,XXY Klinefelter Patients' 92 *The Journal of Clinical Endocrinology and Metabolism* 9, 2007, 3458-3465.

<sup>137</sup> Intersex variant causing female internal gonads to develop in genetic males. See Renu D, Rao B, and Ranganath K, 'Persistent mullerian duct syndrome' 20 *The Indian Journal of Radiology and Imaging* 1, 2010, 72-74.

Individuals with the conditions described would all be classed as intersex due to inconsistencies in the biological components meant to determine their sex. The spectrum of intersex variants and the diversity of configurations within them serves to illustrate the disjoint in conflating binary sex and gender with biology. Sex is not necessarily a strict binary, and the legal recognition of the intersex identity in Kenya is evidence of this. International best practice directs that domestic laws distinguish “sex characteristics” from gender identity and gender expression.<sup>138</sup> When viewed as two distinct concepts, gender may maintain its binary nature<sup>139</sup> based on societal norms while the legal understanding of sex remains free to adapt and reflect the biological diversity of the human race.

## 4.2 Gender and self-identification

Gender is a personal identity shaped by an individual sense of self as well as societal influence and expectations.<sup>140</sup> For this reason, the understanding of gender may vary over time and across cultures.<sup>141</sup> The Bugis people of Indonesia culturally recognise five distinct genders<sup>142</sup> while certain individuals in indigenous North American cultures are regarded as being simultaneously male and female, or “two-spirit”.<sup>143</sup> Societies such as contemporary Kenya maintain a binary approach to gender that directly corresponds to binary sex. This begs the question of what gender should be ascribed to intersex people who do not fit strictly in this classification.

Countries such as Nepal have taken the approach of creating a corresponding legal third gender following the recognition of intersex as a legal sex.<sup>144</sup> Intersex rights activists have argued against this approach, stating that intersex is not a gender identity and should not be referred to as such; rather, intersex should be viewed as a set of sex characteristics within which a variety of gender identities can be expressed.<sup>145</sup> In Australia, a 2016 survey of intersex people found that when prompted, participants identified themselves with range of gender markers including

---

<sup>138</sup> Preamble, *The Yogyakarta Principles Plus 10*, 10 November 2017.

<sup>139</sup> Hyde J, Bigler R, Joel D, Tate C, van Anders S, ‘The future of sex and gender in psychology: Five challenges to the gender binary’ *74 American Psychologist* 2, 2019, 171-193.

<sup>140</sup> Dobres M, *Gender in the Earliest Human Societies: A Companion to Global Gender History*, John Wiley and Sons, Ltd, New Jersey 2020, 183–204.

<sup>141</sup> Haig D, ‘The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001’ *33 Archives of Sexual Behavior* 2, 2004, 87–96.

<sup>142</sup> Graham S, *Challenging Gender Norms: Five Genders Among Bugis in Indonesia. Case Studies in Cultural Anthropology*, Thomson Wadsworth, California, 2006, xi.

<sup>143</sup> Pruden H and Edmo S, ‘Two-Spirit People: Sex, Gender and Sexuality in Historic and Contemporary Native America’ National Congress of American Indians Policy Research Center, 2016, 4.

<sup>144</sup> *Sunil Babu Pant and others v Nepal Government* (2007), The Supreme Court of Nepal.

<sup>145</sup> Intersex Human Rights Australia, *Intersex is not a gender identity, and the implications for legislation*, 2019 <https://ihra.org.au/17680/intersex-characteristics-not-gender-identity/> on 21 January 2024.

“woman”, “man”, “X”, “other”, and “unsure”.<sup>146</sup> Medial studies have shown that individuals with the 17beta-HSD3 variant who are socialised as female in childhood typically self-identify as male in adulthood; Hewitt and Warne describe it as a “well known, spontaneous change of gender identity from female to male that occurs after the onset of puberty”.<sup>147</sup> Studies on gender dysphoria and sexuality have found that a portion of intersex people identify themselves as one of the two binary genders and categorise their sexual orientation as heterosexual.<sup>148</sup> Thus, it is evident that intersex people have the capacity to self-identify as male or female even though their biological sex does not strictly fit into either category.

In the global arena, some jurisdictions provide for legal recognition of the right to self-identification of sex and gender. Speaking for the Supreme Court of India, Justice Sikri held that “if democracy is based on the recognition of the individuality and dignity of man, as *a fortiori* we must recognize the right of a human being to choose his sex/gender identity which is integral to their personality and is one of the most basic aspects of self-determination dignity and freedom. In fact, there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity”.<sup>149</sup> The High Court of Kenya placed reliance on this statement in a case concerning a transgender woman, holding that she had the right to have the male gender mark removed from her high school certificate.<sup>150</sup>

### 4.3 Conclusion

The colloquial conflation of sex with gender in Keya makes it arguable that the outlawing of same-sex marriage denotes a ban on same-gender marriage, and the legal protection of opposite-sex marriage is an endorsement of opposite-gender marriage. The union of a masculine gender and feminine gender individual is an opposite-sex union, while that of persons of the same gender is a same-sex union. Article 45(2) dictates that parties to a marriage must be adults of opposite sexes. This provision of law can also be interpreted to mean that the parties must be of opposite genders. Adopting this approach in combination with allowing intersex people to self-identify their gender as either masculine or feminine would enable them to marry within the terms of the Constitution. An intersex person would still be registered

---

<sup>146</sup> Jones T, Hart B, Carpenter M, Ansara G, Leonard W, Lucke J, *Intersex: Stories and Statistics from Australia*, Open Book Publishers, Cambridge, 2016, 56.

<sup>147</sup> Hewitt J, Warne G, ‘Management of disorders of sex development’ 3 *Pediatric Health* 1, 2009, 51-65.

<sup>148</sup> Furtado P, Moraes F, Lago R, Barros L, Toralles M, Barroso U, ‘Gender dysphoria associated with disorders of sex development’ 9 *Nature Reviews Urology* 22, 2012, 620–627.

<sup>149</sup> *National Legal Services Authority v Union of India and Others* (2013), The Supreme Court of India.

<sup>150</sup> *Republic v Kenya National Examinations Council and another Ex-Parte Audrey Mbugua Ithibu* (2014) eKLR.

intersex at birth<sup>151</sup> but would be required to self-identify as male or female to enter into a marriage. Thus, a self-identified intersex man could legally marry a woman on the basis of his gender, and vice versa.



---

<sup>151</sup> Section 7(4), *Births and Deaths Registration Act* (1928).

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 Conclusion

This research set out to investigate whether the phrase “opposite sex” as used in the Kenyan Constitution could be interpreted in a manner that includes intersex people in the right to marry. As a matter of equality and human dignity, the exclusion of a group of people from a human right merely as a fact of interpretation rather than substance or material issues would be undue, unwarranted, and wholly unconscionable.<sup>152</sup> The legal regime in Kenya has for a long time applied the rule of *expressio unius est exclusio alterius* to Article 45(2), assuming that the restriction of marriage as between persons of the opposite sex mean that the intention to exclude all other individuals from this institution ought to be inferred. This study was premised on the purposive approach, a rule of constitutional interpretation that emphasises the intent and reasoning of drafters as the main factor to be considered in deciding what the law means to say.

Through this approach, it has been established that the practice of marriage, though universally observed, is not universally defined. Marriage is a dynamic institution that builds relationships and community within a society, whatever the form it may take. Traditional Kenyan marriage had the form of colonial law superimposed over it, restricting it to the ambit of one man and one woman contrary to the culture and norms of the people. Democracy and constitutional reform allowed Kenyans to conceptualise marriage according to their society’s needs to protect their culture. Although the same powers that imposed the “one man, one woman” marriage regime would later champion same-sex marriage reform, the law would stand firm to protect the Kenyan culture of strictly heterosexual marriage.

Thus, to afford intersex people a means of entering a marriage, the phrase “opposite sex” would have to be interpreted in a manner that allows intersex people to be labelled as male or female without detracting from their sex identity. This research has found that the key to this lies in the distinction between sex and gender, a concept rare in Kenyan case law, but occasionally considered by certain tribunals. Court of Appeal Justices Nyamu, Wendo, and Emukule pointed out in 2010 that the word “sex” as used under the previous Constitution should be taken to be referring to gender, since the two words denote different concepts. They described gender as relating to “roles, responsibilities, values, and attitude ascribed to women, men, boys and girls, by a given society at a given place and a given time”, recognising that said roles and responsibilities are socially constructed by each community. On the other hand, they described

---

<sup>152</sup> *Mary Wanjuhi Muigai v Attorney General and another* (2015) eKLR.

sex as “the biological physical characteristics that differentiate and define the females and males”. They stated that sex, unlike gender, is natural, consistent across all cultures and all times, is not taught or learnt, and cannot change.<sup>153</sup>

This analysis of sex and gender, though slightly flawed, was headed in the right direction. Sex is as immutable as was previously thought; intersex individuals have been afforded the right to be identified as what they are, instead of being forced into a strict binary. Even so, there is still need for deeper understanding of what it means to be intersex to inform the laws of the nation. The Intersex Persons Bill proposes that the marriage of intersex persons should be celebrated pursuant to the Marriage Act, with the requirement that the intersex person shall provide documentation to the Registrar of Marriage proving their “sex inclination”.<sup>154</sup> It is not clear what is meant by “sex inclination” within the Bill; the documentation is meant to detail the name and age of the individual, their intersex condition or variation and nothing more. As evidenced in Chapter 3, the intersex condition of an individual may not be directly indicative of their gender or “inclination”.

This study therefore concludes that intersex people should be afforded the opportunity to self-identify their gender as masculine or feminine for the purposes of marriage within the binary phrasing in the Constitution of Kenya. The Intersex Persons Bill already provides that intersex people ought to be able to amend the sex marker on their documents from male or female to intersex, and from intersex to male or female.<sup>155</sup> If the conflation between sex and gender is removed at law, the same rule could be applied for self-identification of gender as an intersex person’s identity is theirs to determine.

## 5.2 Recommendations

### 5.2.1 Legal definition of the terms “sex” and “gender”

The crux of this paper was the fact that the terms sex and gender are undefined in Kenyan law. There are dangers that arise with improper definition of terms. In 2023, the Supreme Court held that the use of the word “sex” in relation to anti-discrimination law “does not connote the act of sex per se, but refers to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex, or otherwise”.<sup>156</sup> This definition is inaccurate and could cause a myriad of problems if relied upon in other cases. It is therefore recommended that legislators expend the

---

<sup>153</sup> *Jesse Kamau and 25 others v Attorney General* (2010) eKLR.

<sup>154</sup> Section 12, Intersex Persons Bill (2023).

<sup>155</sup> Section 6, Intersex Persons Bill (2023).

<sup>156</sup> *NGOs Co-ordination Board v EG and 4 others; Katiba Institute (Amicus Curiae)* (2023).

appropriate time and effort to discuss the best approach to defining both sex and gender in Kenyan law, specifying which of the two existing law should be taken to refer to. Various institutions have made differing recommendations on the definition of sex: the Taskforce on Intersex Person proposed “a person who is male, female, or intersex”,<sup>157</sup> while the Intersex Rights Bill provides for “the sex status of a person being male, female or intersex”.<sup>158</sup> There have been no propositions for a legal definition of gender, nor a definition of sex that distinguishes it from gender. This study has demonstrated that sex and gender refer to distinct aspects of the human person which are treated differently at law. Thus, the two concepts should be clearly defined to minimise their misinterpretation in various laws. Jurisdictions such as South Africa even go so far as to provide legal definitions of gender characteristics, primary sexual characteristics, and secondary sexual characteristics.<sup>159</sup> The law in Kenya should define sex as “the biological state of a person being male, female, or intersex” while gender should be defined as “the personal and social identity of an individual being male or female”.

### 5.2.2 *Adjustment of marriage procedure*

Legal definition of the terms sex and gender should be followed by corresponding adjustments to marriage procedure to allow intersex people to marry within the terms of the Constitution and the Marriage Act. Provision should be made for a form of additional documentation for intersex people to indicate their gender for the purpose of marriage. The Intersex Persons Bill proposes under Section 12 that an intersex person should provide the Registrar of Marriages with a medical report detailing their name, age, and intersex variation. This proposal should be developed into a legally prescribed identification document composed of two parts: a biometric section detailing the intersex variation and a self-identification section indicating the gender of the individual. Self-identification by the intersex person should be subject to a psychological evaluation and subsequent endorsement by a qualified professional. Marriage procedure should be adjusted to provide for submission of the identification document alongside the birth certificate and national ID or passport of an intersex person intending to marry. Provision of such a document would also ensure that the prospective spouse is made aware of the condition of the intersex person before they give their consent to marry.

---

<sup>157</sup> Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya, *The Report of the Taskforce*, 2018, 191.

<sup>158</sup> Section 30, Intersex Persons Bill (2023).

<sup>159</sup> Section 1, *Alteration of Sex Description and Sex Status Act* (2003).

### 5.2.3 *Education and training of Registrar and marriage officers*

The Registrar of Marriage is an officer appointed by the Cabinet Secretary to register all marriages in Kenya, issue marriage certificates, and appoint marriage officers at national and county levels. The Registrar and marriage officers should be educated and trained on intersex people and the manner in which their marriage shall be handled. Oftentimes, despite the clarity and directness of the law, those executing it may misinterpret or misunderstand it if they are not properly trained. For instance, although the law provides that words and expressions in statutes importing the masculine gender also include females,<sup>160</sup> sole female applicants are sometimes barred from accessing services such as national health insurance as the wording of the law places men as the principal member ‘by default’ while wives and children are viewed as beneficiaries.<sup>161</sup> To prevent a similar misunderstanding, the Registrar and marriage officers should be appropriately educated on intersex people and the procedure for registering their marriages.

### 5.2.4 *Public awareness campaigns*

Intersex rights in Kenya still have a long way to go. From non-consensual hormonal interventions to intersex genital mutilation, intersex people face stigma and exclusion in various aspects of their lives.<sup>162</sup> A significant number of intersex children do not have access to education after being forced to leave their schools due to harassment and bullying from their teachers and peers, adversely impacting their social lives and mental health.<sup>163</sup> Public awareness campaigns will help destigmatise intersex people and dispel myths such as “intersex children are the result of curses” or “all intersex people are homosexuals and transsexuals”.<sup>164</sup> This will ease the way for intersex people to go about their daily lives with dignity and a sense of security in their society.

---

<sup>160</sup> Section 3(2), *Interpretation and General Provisions Act* (1956).

<sup>161</sup> Financial Sector Deepening Kenya, *Gendered Review of Financial Sector Laws in Kenya*, 2021, 14.

<sup>162</sup> Jones M, ‘Intersex Genital Mutilation – A Western version of FGM’ 25 *International Journal of Children’s Rights* 1, 2017, 396.

<sup>163</sup> Kabiru D, ‘Press Statement by Intersex Person’s Implementation Coordination Committee (IPICC)’ Kenya National Human Rights Commission, 2019, 2-3.

<sup>164</sup> Kenya National Commission on Human Rights, *Equal in Dignity and Rights*, 2018, 15.

## BIBLIOGRAPHY

### Books

1. Aristotle, *Politics* (translated by Benjamin Jowett), Oxford University Press, Oxford, 1885.
2. Barak A, *Human Dignity: The Constitutional Value and the Constitutional Right*, Cambridge University Press, Cambridge, 2015.
3. Barak A, *Purposive Interpretation in Law*, Princeton University Press, Princeton, 2005.
4. Benedict R, *Patterns of Culture*, Houghton Mifflin Company, Boston, 1934.
5. Berger P, *The Sacred Canopy: Elements of a Sociological Theory of Religion*, Doubleday and Company, New York, 1967.
6. Bobbit P, *Constitutional Interpretation*, Blackwell Publishing, Cambridge 1991.
7. Brownlee K, *Being Sure of Each Other: An Essay on Social Rights and Freedoms*, Oxford University Press, Oxford, 2020,
8. Carlson N, *Psychology: The Science of Behavior*, 4 ed, Pearson, London, 2010.
9. Dobres M, *Gender in the Earliest Human Societies: A Companion to Global Gender History*, John Wiley and Sons, Ltd, New Jersey 2020.
10. Eekelaar J, *Family Law and Personal Life*, Oxford University Press, Oxford, 2006.
11. Fox R, *Kinship and Marriage*, Cambridge University Press, Cambridge 1996.
12. Frankena W, *Ethics*, Prentice-Hall, New Jersey, 1973.
13. Gerstman E, *Same-sex marriage and the Constitution*, Cambridge University Press, Cambridge, 2004.
14. Graham S, *Challenging Gender Norms: Five Genders Among Bugis in Indonesia. Case Studies in Cultural Anthropology*, Thomson Wadsworth, California, 2006.
15. Haviland W, Prins H, McBride B, and Walrath D, *Cultural Anthropology: The Human Challenge*, 13 ed, Cengage Learning, Boston, 2011.
16. Herodotus, de Selincourt A, and Marincola J, *The Histories*, Penguin Books, 2003.
17. Jones T, Hart B, Carpenter M, Ansara G, Leonard W, Lucke J, *Intersex: Stories and Statistics from Australia*, Open Book Publishers, Cambridge, 2016.
18. Kiage P, *Family Law in Kenya: Marriage, Divorce, and Children*, LawAfrica Publishing, 2016.
19. Kottak C, *Anthropology: The Exploration of Human Diversity*, McGraw Hill, New York, 2004.

20. Lumumba P and Franceschi L, *The Constitution of Kenya, 2010: An Introductory Commentary*, Strathmore University Press, Nairobi, 2014.
21. Nolan P and Lenski G, *Human Societies: An Introduction to Macrosociology*, 11 ed, Paradigm Publishers, London, 2009.
22. Plato, *Phaedrus* (translated by Benjamin Jowett), C. Scribner's Sons, New York, 1871.
23. Stoller R, *Sex and Gender: The Development of Masculinity and Femininity*, Karnac Books, London, 1984.
24. Tonkinson R, *The Mardu Aborigines: Living the Dream in Australia's Desert*, Holt, Rinehart and Winston, New York, 1991.
25. Westermarck E, *History of Human Marriage Vol. 1 (1922)*, Kessinger Publishing, Montana, 2003.
26. Westermarck E, *The Future of Marriage in Western Civilisation*, Books for Libraries Press, 2013.

### Chapters in Books

1. Boas F, 'The Principles of Ethnological Classification', in Stocking G (ed) *A Franz Boas Reader: The Shaping of American Anthropology, 1883-1911*, University of Chicago Press, Chicago, 1974.
2. Cook J, 'Cultural Relativism as an Ethnocentric Notion' in Beehler R and Drengson (eds) *In The Philosophy of Society*, Methuen, London, 1978.
3. Dousset L, 'Understanding Human Relations (Kinship Systems)' in Thieberger N (ed) *The Oxford Handbook of Linguistic Fieldwork*, Oxford University Press, 2011.
4. Folger R, Cropanzano R, Goldman B, 'What is the relationship between justice and morality?' in Grenberg J and Colquitt J (ed) *Handbook of Organisational Justice*, 1 ed Lawrence Erlbaum Associates Publishers, 2005.
5. Muigai G, 'The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication' in Kichana P (ed) and Muthoni A and Wendoh P (compilers) *Constitutional Law Case Digest, Volume II, Kenyan Section of the International Commission of Jurists*, Nairobi, 2005.
6. Murunga G, 'Elite Compromises and the Content of the 2010 Constitution' in Murunga G, Okello D, and Sjögren A (eds) *Kenya: the Struggle for a New Constitutional Order*, Zed Books, London, 2014.
7. Read D, 'Kinship Terminology' in Wright J (ed) *International Encyclopaedia of the Social and Behavioural Sciences*, 2 ed, Elsevier, Oxford, 2015.

## Journal Articles

1. Bell D, 'Defining marriage and legitimacy' 38 *Current Anthropology* 2, 1997.
2. Bhargava A, Arnold A, Bangasser D, Denton K, Gupta A, Krause L, Mayer E, McCarthy M, Miller W, Raznahan A, and Verma R 'Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement' 42 *Endocrine Reviews* 3, 2021.
3. Blaustein A, 'Constitution Drafting: The Good, the Bad, and the Beautiful' 2 *The Scribes Journal of Legal Writing* 1, 1991.
4. Burton J, 'Ghost Marriage and the Cattle Trade among the Atuot of the Southern Sudan' 48 *Africa* 4, 1978.
5. Cadigan R, 'Woman-to-woman marriage: practices and benefits in Sub-Saharan Africa' 29 *Journal of Comparative Family Studies* 1, 1998.
6. Carpenter M, 'Intersex Variations, Human Rights, and the International Classification of Diseases' 20 *Health and Human Rights* 2, 2018.
7. Cotran E, 'Marriage, divorce and succession laws in Kenya: Is integration or unification possible?' 40 *Journal of African Law* 2, 1996.
8. Doby J, 'Man the Species and the Individual: A Sociological Perspective' 49 *Social Forces* 970.
9. Fitzgerald J, 'The Road to Equality? The Right to Equality in Kenya's New Constitution' 5 *The Equal Rights Review* 1, 2010.
10. Furtado P, Moraes F, Lago R, Barros L, Toralles M, Barroso U, 'Gender dysphoria associated with disorders of sex development' 9 *Nature Reviews Urology* 22, 2012.
11. Garland F and Travis M, 'Legislating intersex equality: building the resilience of intersex people through law' 38 *Legal Studies* 4.
12. Georgas J 'Family: Variations and Changes Across Cultures' 6 *Online Readings in Psychology and Culture* 3, 2003.
13. Gough K, 'The Nayars and the Definition of Marriage' 89 *Royal Anthropological Institute of Great Britain and Ireland* 1, 1959.
14. Haig D, 'The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001' 33 *Archives of Sexual Behavior* 2, 2004.
15. Hewitt J, Warne G, 'Management of disorders of sex development' 3 *Pediatric Health* 1, 2009.
16. Heyer V, 'In Reply to Elgin Williams' 50 *American Anthropologist* 1, 1948.

17. Hyde J, Bigler R, Joel D, Tate C, van Anders S, 'The future of sex and gender in psychology: Five challenges to the gender binary' 74 *American Psychologist* 2, 2019.
18. Itao K and Kaneko K, 'Evolution of kinship structures driven by marriage tie and competition' 117 *Proceedings of the National Academy of Sciences of the United States of America* 5, 2020.
19. Jones M, 'Intersex Genital Mutilation – A Western version of FGM' 25 *International Journal of Children's Rights* 1, 2017.
20. Kanakis G and Nieschlag E, 'Klinefelter syndrome: more than hypogonadism' 86 *Metabolism* 1, 2018.
21. Kuria M and Maranya S, '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' 33 *Stellenbosch Law Review* 1, 2022.
22. Leach E, 'Polyandry, Inheritance, and the Definition of Marriage' 55 *Man* 12, 1955.
23. Macagno F, 'Definitions in Law' 2 *Bulletin Suisse de Linguistique Appliquée* 1, 2010.
24. Mendonca B, Gomes N, Costa E, Inacio M, Martin R, Nishi M, Carvalho F, Tibor F, and Domenice S, '46,XY disorder of sex development (DSD) due to 17 $\beta$ -hydroxysteroid dehydrogenase type 3 deficiency' 165 *The Journal of Steroid Biochemistry and Molecular Biology* 1, 2017, 79-85.
25. Ojwang J, 'Constitutional trends in Africa: The Kenya case,' 10 *Transnational Law and Contemporary Problems* 1, 2000.
26. Redhead D and Power E, 'Social hierarchies and social networks in humans' 377 *Philosophical Transactions of the Royal Society B: Biological Sciences* 1845, 2022.
27. Renu D, Rao B, and Ranganath K, 'Persistent mullerian duct syndrome' 20 *The Indian Journal of Radiology and Imaging* 1, 2010.
28. Ribeiro G, 'What is constitutional interpretation?' 20 *International Journal of Constitutional Law* 3, 2022.
29. Sybert V and McCauley E, 'Turner's syndrome' 351 *The New England Journal of Medicine* 12, 2004.
30. Travis, M 'Accommodating intersexuality in European Union anti-discrimination law' 21 *European Law Journal* 2, 2014.
31. Twomey A, 'The dilemmas of drafting a Constitution for a new state' 28 *Australasian Parliamentary Review* 2, 2013.
32. Udry R, 'The Nature of Gender' 31 *Demography* 4, 1994.

33. Vorona E, Zitzmann M, Gromoll J, Schüring A, and Nieschlag E, 'Clinical, Endocrinological, and Epigenetic Features of the 46,XX Male Syndrome, Compared with 47,XXY Klinefelter Patients' 92 *The Journal of Clinical Endocrinology and Metabolism* 9, 2007, 3458–3465.
34. Yongo C, 'Constitutional interpretation of rights and court powers in Kenya: Towards a more nuanced understanding' 27 *African Journal of International and Comparative Law* 2, 2019.

### **Self-Published Articles**

1. Chitere P, Chweya L, Masya J, Tostensen A, and Waiganjo K, 'Kenya Constitutional Documents: A Comparative Analysis' Chr. Michelsen Institute, 2006.
2. Ember C, Gonzalez B and McCloskey D, 'Marriage and Family' Human Relations Area Files, 2021.
3. Kabiru D, 'Press Statement by Intersex Person's Implementation Coordination Committee (IPICC)' Kenya National Human Rights Commission, 2019.
4. Pruden H and Edmo S, 'Two-Spirit People: Sex, Gender, and Sexuality in Historic and Contemporary Native America' National Congress of American Indians Policy Research Center, 2016.
5. Wewa N and Mwangi V, 'Referendums in Kenya: KNCHR's Journey Towards Ensuring Political Accountability and Respect for Human Rights in Kenya's Constitutional Process Making' Kenya National Human Rights Commission, 2021.

### **Reports**

1. Commission on the Law of Marriage and Divorce, *Report of the Commission on the Law of Marriage and Divorce*, 1968.
2. Constitution of Kenya Review Commission, *Report of the Constitution of Kenya Review Commission Volume 2: The Draft Bill to Amend the Constitution*, 2002.
3. Constitution of Kenya Review Commission, *The Final Report of Technical Working Group "B" on Citizenship and the Bill of Rights*, 2005.
4. Constitution of Kenya Review Commission, *The Report of the Rapporteur General to the National Constitutional Conference*, 2003.

5. Ghoshal N and Knight K, 'Rights in transition: Making legal recognition for transgender people a global priority' Human Rights Watch: World Report 2016, 2016.
6. Kenya National Bureau of Statistics, *2019 Kenya Population and Housing Census Volume III: Distribution of Population by Age, Sex and Administrative Units*, 2019.
7. Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya, *The Report of the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya*, 2018.
8. **UNGA**, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, UN A/73/152, 12 July 2018.
9. United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Kenya*, 8<sup>th</sup> Universal Periodic Review, A/HRC/15/8, 17 June 2010.

#### **Institutional authors**

1. Asia Pacific Forum of National Human Rights Institutions, *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics*, 2016.
2. Department of Justice and Constitutional Development, *Drafting the Constitution – Topics, Detail, Language*, 1995.
3. Human Rights Watch, *The Issue is Violence: Attacks on LGBT People on Kenya's Coast*, 2015.
4. Financial Sector Deepening Kenya, *Gendered Review of Financial Sector Laws in Kenya*, 2021, 14.
5. Kenya National Commission on Human Rights, *Equal in Dignity and Rights: Promoting the Rights of Intersex Persons in Kenya*, 2018.
6. National Council for Population and Development, *Youth: Curbing Early Marriages Improves their Prospects*, 2013.
7. Royal Anthropological Institute, *Notes and Queries on Anthropology*, 1951.
8. Support Initiative for People with Congenital Disorders, *Baseline Survey on Intersex Realities in East Africa – Specific Focus on Uganda Kenya and Rwanda*, 2016.

9. United Nations Human Rights Committee, *Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Third Periodic Report of States Parties, Kenya*, CCPR/C/KEN/3, 2011.
10. United Nations Human Rights Committee, *Replies from the Government of Kenya to the List of Issues to be taken up in connection with the consideration of its Third Periodic Report*, CCPR/C/KEN/Q/3/Add.1, 2012.

### **Dissertations and theses**

1. Cheruiyot B, 'The Legal Status of Intersex Persons with Special Reference to Kenya' Unpublished LLB Dissertation, Moi University, Kenya, 2019.
2. Koe G, 'An Analysis of the Legal Rights of Intersex People in Kenya' Unpublished LLB Dissertation, Strathmore University Law School, Kenya, 2018.
3. Matheka Teresia, 'Speaking the Unspeakable! Interrogating the Rights and Legal Recognition of Intersex Persons in Kenya' Published LLM Thesis, University of Zimbabwe, Zimbabwe, 2014.
4. Ngari P, 'The Trends on Awareness of the Rights of the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) People in Kenya' Unpublished MA in International Relations Dissertation, 2022.
5. Vestile A, 'A Qualitative Study of Lived Experiences of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Community in Nairobi With Regards to Finding and Maintaining Jobs' Unpublished MSc in International Development Studies, Norwegian University of Life Sciences, Norway, 2021.

### **Hansard Reports**

1. National Assembly Hansard Report, 11 March 2021, 24.
2. National Assembly Hansard Report, 20 March 2014, 34.

### **Internet resources**

1. Bhalla N, 'Kenyan census results a 'big win' for intersex people' Reuters, 4 November 2019 <https://www.reuters.com/article/us-kenya-lgbt-intersex-trfn-idUSKBN1XE1U9> on 9 January 2023.
2. <https://publications.parliament.uk/pa/cm201213/cmpublic/marriage/memo/m07.htm> on 12 January 2023.

3. <https://www.bbc.com/news/world-africa-53935125> on 24 January 2024.
4. Intersex Human Rights Australia, *Intersex is not a gender identity, and the implications for legislation*, 2019 <https://ihra.org.au/17680/intersex-characteristics-not-gender-identity/> on 21 January 2024.
5. Momodu I, Lee B, and Singh G, 'Congenital Adrenal Hyperplasia' National Centre for Biotechnology Information, 2023 <https://www.ncbi.nlm.nih.gov/books/NBK448098/> on 21 January 2024.
6. Ringa M, 'Kenya: Law Review Experts Rule Out Rights for Homosexuals' Daily Nation, 18 October 2009 <https://allafrica.com/stories/200910190050.html> on 14 January 2024.
7. United Nations Office at Geneva, *Human Rights Committee Examines the Report of Kenya*, 2012 <https://www.ungeneva.org/en/news-media/meeting-summary/2012/07/human-rights-committee-examines-report-kenya> on 22 January 2023.
8. Union of International Associations, 'Cultural Relativism', *The Encyclopaedia of World Problems and Human Potential*, 4<sup>th</sup> October 2020 <http://encyclopedia.uia.org/en/problem/140048> on 20<sup>th</sup> December 2023.
9. Wilson G, 'Intersex people and marriage; An analysis by Gina Wilson' Intersex Human Rights Australia, 2018 <https://ihra.org.au/21183/intersex-people-and-marriage-analysis/> on 12 January 2023.