



**Strathmore University**  

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**Law School**

## **THE PLIGHT OF INTERSEX PERSONS**

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

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**DECLARATION**

I, NDICHU GRACE MWENDE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been 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: .....

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

Signed: .....

**MR. JOSEPHAT KILONZO**

## **ABSTRACT**

Every person has a right to identity and a right to human dignity, when these rights are guaranteed to every person, there is no caveat given as to how the person should be, whether black or white, male, female or intersex, all these are persons who deserve these rights. This paper is premised on the hypothesis that there is not enough legal recognition, protection and inclusion of intersex persons the Kenyan law and due to that, intersex persons have suffered in their fight for other basic human rights.

This chapter is based on a theoretical framework by John Rawls who advances that justice can only be considered to be justice if the principles of justice are set out behind the veil of ignorance, these principles support the equality of all. Javier Hervada adds that justice also requires a habit of giving to each what is due to them. Moreover, an analysis of the legal framework in Kenya is taken and a conclusion is drawn to the effect that the shortcoming in the law in the inclusion of intersex persons has crippled the courts while serving justice to intersex persons.

Further a comparative study between Kenya and South Africa and Australia is carried out. This paper compares how the legal frameworks of these countries treat intersex persons and establishes that Kenya needs to create legislation that includes the rights of intersex persons as well as expand the definition of sex to include intersex persons.

Among the recommendations proposed in this paper include the expansion of the interpretation of sex to include intersex as well as the creation of awareness of intersex persons in Kenya.

## **LIST OF CASES**

1. Baby A (minor suing through her mother) v Attorney General [2013] eKLR
2. M W K v another v Attorney General & 3 others [2017] eKLR.
3. R.M v Attorney General [2007] eKLR

## **LIST OF LEGAL INSTRUMENTS**

### **National legal instruments**

1. Births and Deaths Registration Act, Cap 149 Laws of Kenya.
2. Constitution of Kenya (2010).
3. Persons Deprived of Liberty Act Laws of Kenya.

### **South-African legal instruments**

4. Constitution of the Republic of South Africa (1996).
5. The Alteration of Sex Description and Sex Status Act (Act 49 of 2003) (South Africa).
6. Promotion of Equality and Prevention of Unfair Discrimination (Act No 4 of 2000) (South Africa).

### **Australian legal instruments**

7. Sex Discrimination Act (Act No 4 1984) (Australia).
8. Darlington Statement (Australia).

### **International legal instruments**

9. Universal Declaration of Human Rights, 10 December 1948.
10. The Yogyakarta Principles.

## **1.0 CHAPTER ONE; INTRODUCTION**

### **1.1 Background to the study**

The Constitution of Kenya 2010 in Article 27(1) guarantees all citizens equal protection before the law and in sub-article 4 it commits that the state shall not discriminate against anyone on various grounds including sex. Furthermore, not only does the law guarantee that the state shall not discriminate but also in sub-article 5, all persons are barred from discriminating against other persons whether directly or indirectly.<sup>1</sup> In Article 28, the constitution declares that everyone has inherent dignity which should be respected and protected.<sup>2</sup>

The laws of Kenya therefore appraise the idea of equality of all persons and the protection of minority rights in the country. Albeit all the legal evidence of equality and non-discrimination, there is a gap in the law in the protection of intersex persons. Intersex persons have been suffering in silence for long and in the dark without speaking out. The challenges that most intersex people face are not in the light because not many people know about these people let alone the challenges they face. Every person has a right to identity, gender is part of identity and no one should be denied this right. More so, these people also face lack of self-esteem as a challenge because they do not know what sex to identify with and what gender roles to conform to. They have also been hindered from access to justice because the law does not recognise them as a gender. Access to health care has also been a challenge common to these persons because without gender identity, one cannot receive medical attention.

This paper aims to state some of the administrative challenges intersex persons face, postulate that they are a minority and should be treated as such in the Kenyan law and observe other jurisdictions in relation to intersex persons.

### **1.2 Introduction**

What is the role of sexuality when it comes to a person's identity and sense of humanity? John Irving, in his book, states that sexual identity is the central part that forms one's identity.<sup>3</sup> It is

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<sup>1</sup> Article 27(1), (4)(5), *Constitution of Kenya (2010)*.

<sup>2</sup> Article 28, *Constitution of Kenya (2010)*.

<sup>3</sup> John Irving, *One Person*, Simon and Schuster, Washington, 2012, 53.

therefore important that one be accorded the right to have their sexual identity as soon as possible and not only that but the correct sexual identity. It is also of great importance to note that sexual identity is formed as a child grows and adopts to different behaviours and patters as time passes by. Depending on the experiences that a child goes through and the kind of environment they grow up in, a child gets to learn of different gender roles and societal expectations of their gender.<sup>4</sup>

A research by Elizabeth Morgan showed that the sexual orientation of most youths had a key role to play in their individual identity as well as their success and happiness in life. It further went ahead to say that most youth who identify among the sexual minority groups suffer low self-esteem and even are less successful.<sup>5</sup> This shows that sexual identity has a key role to play in an individual`s life and should be safeguarded by all the faculties of the society including the law. For this reason, the identification as well as rights of the intersex persons in the country should be fought for, blood and sweat.

According to Black`s Law dictionary, gender is seen to be the difference and state of being either man or woman based on cultural and socially construed norms.<sup>6</sup> Intersex persons are people who are born with hormonal, physical or genetic features that can neither be identified to be male or female. They can also be defined as individuals who are “born with sexual anatomy, reproductive organs and/or chromosomal patterns that do not fit the typical definition of male or female.<sup>7</sup>This can be due to genetic, anatomic or hormonal imbalances and difference that naturally occur during child birth.<sup>8</sup>

### **1.3 Statement of the problem.**

Many Kenyans have no problem showing their national identity cards to any necessary government offices, opening a bank account, flashing their driver`s license to a traffic officer or even acquiring travel documents because impersonation is not an accusation they face unless in actual cases of impersonation. However, some intersex persons always have to grapple with the question of impersonation whenever they have to show their identification documents in hospital, in schools,

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<sup>4</sup> John Irving, *One Person*, Simon and Schuster, Washington, 2012, 57.

<sup>5</sup> Elizabeth Morgan, *Contemporary Issues in Sexual Orientation and Identity Development in Emerging Adulthood* 1(1), 2012, 59

<sup>6</sup> -<https://thelawdictionary.org/gender/>-/ seen on 13th February 2019.

<sup>7</sup> -< <https://ijrcenter.org/thematic-research-guides/sexual-orientation-gender-identity/>>- on 14th February 2019.

<sup>8</sup> “Kenya: Baby A and the question mark” CRIN, Child Rights International Network.

or in any social places because most have to explain why they do not look like the gender specified on their documents.<sup>9</sup>

The laws of Kenya require that a new born person be registered with the office of the Registrar of Persons in order to acquire a birth certificate.<sup>10</sup> This document is used by the person for a significant period if not his entire life in the acquisition of other necessary documents and papers. In this regard, it is a very important and delicate document. The Births and Deaths Registration Act (herein the Act) provides sample forms of how a birth and a death certificate should look like and the slots to be filled in when registering a new born or a dead person. There is only a slot for male and female persons when registering sex, however, intersex persons face the challenge that they are not sure of which category to classify themselves having signs of both genders. This paper therefore seeks to look into their plight and subsequently propose a solution for these persons.

#### **1.4 Justification of the study**

The Constitution in the preamble commits to nurturing and protecting the well-being of the individual and the family,<sup>11</sup> this is a commitment by the state to be concerned with the welfare of the family of the intersex person as well as the intersex individual himself. Article 56 of the Constitution as well specifies that the state shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life.<sup>12</sup> These are legal proof that the state has the ability to look into the plight of these persons and consequently, find a solution. Intersex persons are part of the family unit that is protected by the state, they can also be classified as minority persons as shall be seen. This study is therefore justified as it embarks on showing how some of these guaranteed rights in the constitution have been infringed by the Act, it is an attempt to recommend the changes that can be made for the sake of intersex persons.

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<sup>9</sup> Gloria Aradi, “Man narrates difficulties associated with growing up a girl” Standard media, 12th July 2018. [-https://www.standardmedia.co.ke/article/2001287673/hope-for-intersex-people-as-team-set-to-probe-plight-on](https://www.standardmedia.co.ke/article/2001287673/hope-for-intersex-people-as-team-set-to-probe-plight-on) 10 March 2019.

<sup>10</sup> *Births and Deaths Registration Act*, Cap 149 Laws of Kenya.

<sup>11</sup> The Preamble, *Constitution of Kenya (2010)*.

<sup>12</sup> Article 56(a), *Constitution of Kenya (2010)*.

## **1.5 Research objectives**

The objective of this study is:

- Bring to the light the challenges that intersex persons face in the pursuit of their basic human rights;
- To show that there is a gap in the law in terms of recognition, protection and inclusion of intersex persons in Kenya and
- To show that the dignity of intersex persons is denied to them due to their insufficient representation in the law.

## **1.6 Research questions**

This study attempts to answer the following questions:

- I. Who are intersex persons and what are the challenges they face in Kenya?;
- II. What steps has Kenya taken in the recognition, protection and inclusion of intersex persons in Kenya? And
- III. Can any changes be made in the Act in pursuit of protecting the dignity of intersex persons?

## **1.7 Literature review**

There are many scholars in the Kenyan jurisdiction and outside of Kenya who have written on intersex persons and their right to identity. The rights of intersex persons have been mentioned in Kenyan legislation and therefore an effort seen in the legislators in the recognition of intersex persons. In Africa, there have been several writers and cases as well relating to these persons, the intersex issue is therefore not new in Africa, South Africa has contributed immensely to this issue. Internationally, there are several scholars of the law and outside of the law who have written on these persons and their rights, there are also several cases that have been decided concerning their rights and recognition.

In the Kenyan traditional sphere, the discrimination faced by the intersex person is evidenced in an article titled “Pokot Intersexuality: An East African Example of the Resolution of Sexual Incongruity” where the author explains the plight of the intersex person born to a Pokot community

that is still very intact with its culture. Through their different cultural practices and rituals, the young Pokot gets his identity and place in the society. As for the intersex person, rituals such as circumcision are not performed on them and so they are forced to stay in their parent`s homes forever and be recognized as persons who are important to the community.<sup>13</sup> This paper can be seen as a great effort to getting the plight of intersex persons as it addresses these persons from a specific community. However, it does not give a clear idea as to how many intersex persons there may be in Pokot. It also fails to discuss the interaction of these persons with the administrative offices as the scope is only on the traditional social life.

In an article titled “TALES OF COURAGE: My life as an intersex person” Maggie Nduki shares the story of one Ryan Muiruri who was born as Ruth but is now identified as Ryan. In the story he narrates from how his father fled their family after discovering that his child was an intersex to the brutality he has suffered in the hands of the police, this is a very sad story.<sup>14</sup>

The Kenya National Commission on Human Rights (herein KNHCR) has carried out a number of research as well as data collection on intersex persons in Kenya. In 2017, together with a taskforce organized by the Attorney General, they sort to find the number and distribution of intersex persons across the country.<sup>15</sup>

In the year 2016, nominated Member of Parliament Isaac Mwaura urged the Parliament to make amends in the law to cater for the rights of intersex persons, insisting that they did exist and needed protection in the law. He said, “We are calling on the executive to play its role because the Judiciary has pronounced itself on this matter. It is in the executive where the problem is. They should recognize that there is a third gender called intersex and that is the reality. These are people with ambiguous genitalia. It is therefore imperative to have laws that recognize their existence.”<sup>16</sup> Unfortunately, the bill that he sponsored in parliament failed.

The South African intersex persons have been included in the constitution however this is not the case on the grounded because they do not, in any way feel included. Due to the apartheid history

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<sup>13</sup> Robert B. Edgerton, *Pokot Intersexuality: An East African Example of the Resolution of Sexual Incongruity*, 12 *Nanopsych&ic Institute, University of Carlifonia Los Angeles* 2016, 1289.

<sup>14</sup> -<https://www.nation.co.ke/lifestyle/family/-intersex-person/1954198-4293574-8vublvtz/index.htm>- seen on 17th February 2019.

<sup>15</sup> Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR.

<sup>16</sup> Daily Nation 26th October 2018-<https://www.nation.co.ke/news/Stop-discriminating-against-intersex-persons--urges-MP/1056-3430862-quvcbt/index.html>- seen on 1st October 2018.

of the country, many of the intersex persons who are also black, women and poor are very disadvantaged and to them, their constitutional inclusion is only on paper and not a realised right.<sup>17</sup>

The efforts made by different scholars and law makers on the rights of intersex persons are noticeable and applause worthy. They have mainly highlighted the social challenges faced by intersex persons across in Africa and the discrimination they face from other members of the society. This study shall add to what they have done by highlighting the administrative challenges faced by intersex persons with a key focus on the Kenyan space.

### **1.8 Hypothesis**

This study is carried out with a hunch that the dignity of intersex persons is infringed by the Act, as well as their right to identity. Intersex persons also face a lot of challenges in Kenya especially in pursuit of their basic human rights. There are many jurisdictions that Kenya can learn from in a bid to deal with the plight of intersex persons, some of the jurisdictions include Australia and South Africa.

### **1.9 Research methodology**

The study is mainly a desktop research primarily concerned with Kenya and its legal interaction with intersex persons, however, in the course of research and interrogation of the topic, other jurisdictions are studied for the purpose of persuasion and learning. It also involves a study on government published data as well as scholarly writings from across the world.

### **1.10 Scope of the study**

The scope of this study is to investigate how the Act affects the rights of intersex persons as well as attempt to show how intersex persons are a minority in Kenya and should therefore be treated as such.

### **1.11 Limitations**

The foreseeable significant impediment to the study were the lack of sufficient local material that directly addresses the issues faced by intersex persons.

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<sup>17</sup> Thamar Klein, *Intersex and transgender activism in South Africa*, Liminalis, 2009 issue 3, 17.

## 1.12 Legal definition of Intersex persons in Kenya

In the case of *R.M v Attorney General and 4 others*, the court defined the nature of being intersex in paragraph 109 as “an abnormal condition of varying degrees with regard to the sex constitution of a person.” The court went ahead to say that the term intersex and the hermaphrodite can be used interchangeably.<sup>18</sup> The court in *Baby A v the Attorney General and 6 others*, the court adopted the same definition of the condition of being intersex as given by the court in *R.M. v Attorney General and 6 others*.<sup>19</sup>

The Constitution of Kenya makes no express mention let alone definition of an intersex persons, however, the bill of rights shows a keen interest in the protection of human rights and fight against discrimination based on sex or other avenues.

The Person`s Deprived of Liberty Act of Kenya 2014, defines an intersex as:

"intersex " means a person certified by a competent medical practitioner to have both male and female reproductive organs.<sup>20</sup>

This act was enacted to cater for the needs of persons who have been deprived of their right to liberty.<sup>21</sup>

The taskforce report organized by the Attorney General on intersex persons defines an intersex person as:

“A person who is conceived or 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>22</sup>

In the 2019 Population and Housing Census, the Enumerators` instruction manual describes an intersex person as “a person who is born with indistinct sex organs, which makes it difficult to determine whether the person is male or female.”<sup>23</sup> This definition was included as intersex persons

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<sup>18</sup> *R.M v Attorney general and 4 others [2007]* eKLR.

<sup>19</sup> *R.M v Attorney general and 4 others [2007]* eKLR.

<sup>20</sup> Persons Deprived of Liberty Act Laws of Kenya.

<sup>21</sup> *R.M v Attorney general and 4 others [2007]* eKLR.

<sup>22</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 59.

<sup>23</sup> 24/25<sup>th</sup> August, enumerators instruction manual and census CAPI User guide, government printer, p22.

were among the special groups of persons that were counted in the 2019 Population and Housing Census, this was the first time they were a part of the national census.

From the above definitions of intersex persons and the state of being intersex, it can be established that these persons cannot be classified as the normal male or female but rather are an in between of sorts or indistinct compared to a male or female person. Having a definition of intersex persons from all these avenues is the first step to recognizing these persons as part of the Kenyan community and consequently recognising them.

### **1.13 Chapter Breakdown**

#### **Chapter 1:**

This constitutes the introduction with the sections as delineated. These sections include the background, introduction, statement of the problem, justification of the study, research objectives, research questions, theoretical framework, literature review, the hypothesis, the research methodology, the scope of the study, the limitations and the scope of the study.

#### **Chapter 2:**

This chapter focuses on the theoretical framework which is based on John Rawls` A Theory of Justice and Javier Hervada`s Natural Law and Natural Justice.

#### **Chapter 3:**

This chapter involves carrying out a study on the recognition and protection of intersex persons under Kenyan law. A comprehensive study on the number of intersex persons in the country as well as the challenges they face by virtue of being born intersex.

#### **Chapter 4:**

A study as to how other jurisdictions have included intersex persons in their laws and how Kenya can borrow a leaf from these jurisdictions is carried out. The comparative study is specifically on South Africa and Australia.

## **Chapter 5:**

This constitutes the conclusions and recommendations. They primarily attempt to appraise the measures taken by the state so far.

## **2.0 CHAPTER TWO: THEORETICAL FRAMEWORK**

### **2.1 Introduction**

A theoretical framework is the lens through which a research problem is viewed and consequently the argument is pegged. It can be described as the perfect model that the author is trying to shape the issue at hand through. It is the model through which a research problem is contrasted against and a solution can be inferred from. The theory that an author chooses becomes the foundation upon which the case is built.<sup>24</sup> Through a theoretical framework, an author is able to stand on the shoulders of other great authors or philosophers in making the necessary arguments.

John Rawls` Theory of justice is the lens through which this paper is viewed. The research question, the plight of intersex persons, is viewed through this theory. The hypothesis that intersex persons are discriminated against based on their lack of recognition in the law contrasted against the propositions of this theory and the ideas held dearly by this theory. The conclusion and recommendations that are provided by this paper are intentionally geared to be in order with this theory.

### **2.1 John Rawls: A Theory of Justice**

John Rawls states that “No society can, of course, be a scheme of cooperation which men enter voluntarily in a literal sense; each person finds himself placed at birth in some particular position in some particular society, and the nature of this position materially affects his life prospects.”<sup>25</sup> This is the disposition of every man in today’s world, that we are born and the state that we are born determines the direction that our lives shall take thereafter. A short-sighted person shall have frequent visits to the optician, an albino shall have to battle ultraviolet rays for the most of their life and such other circumstances that we all find ourselves in because of the position that our birth places us in. Our lives tend to pick a tangent depending on where we find ourselves at birth.

In the theory of justice, Rawls proposes that in order to achieve true justice, which he calls justice as fairness, the principles of justice should be chosen behind a veil of ignorance. Behind the veil

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<sup>24</sup> Amanda J. Rockinson-Szapkiw, EdD, *The Importance of the Literature and the Theoretical Framework*, -<[http://www.amandaszapkiw.com/artifacts/research-process-theoretical-framework/Research%20Process\\_%20The\\_Literature\\_Review\\_and\\_Theoretical\\_Framework.pdf](http://www.amandaszapkiw.com/artifacts/research-process-theoretical-framework/Research%20Process_%20The_Literature_Review_and_Theoretical_Framework.pdf)>- seen on the 23<sup>rd</sup> of September 2019.

<sup>25</sup> John Rawls, *A Theory of Justice*, The Belkap Press of Harvard University Press, 1971, 209.

of ignorance, no one knows their social status, class position, fortune in the distribution of natural assets and abilities, intelligence, strength and the like.<sup>26</sup> When no one knows where or who they shall be in the society, they are able to be objective in the principles of justice that they choose decide upon, if they were to decide these principles.

According to this theory by Rawls, true justice for intersex persons would be the principles of justice that can be decided upon behind the veil of ignorance. The theory of justice would require that in preparation of the principles of justice, the law makers are not aware whether they themselves are intersex persons or not and are only aware of the plight of intersex persons and therefore make laws accordingly.

### **2.1.1 Justice as fairness**

This conveys the idea that the principles of justice are agreed to in an initial situation that is fair.<sup>27</sup> This would require that a conception of justice first be construed from which a justice system can be developed surrounding this conception. The importance of the conception is that the justice system has a point to refer from when deciding what is just and unjust. In an ordinary situation, the members of the society cannot voluntarily corporate and enter the world in a position that they choose, rather, it is circumstances of birth that place us in the different positions.

For the concept of justice as fairness, it is important that the principles of justice be decided in fairness, John Rawls is careful to explain that justice and fairness are not terms that can be used interchangeably, but rather that they are terms that work together in this concept<sup>28</sup>. The fairness is achieved behind the veil of ignorance. It is fair when principles of justice are decided upon when the decision makers do not know whether their fate lies as the governors' or the governed or any other situation.

According to Rawls, there are two principles that encompass the idea of justice as fairness. The first principle is that each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.<sup>29</sup> This requires equality in the assignment of basic

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<sup>26</sup> John Rawls, *A Theory of Justice*, The Belkap Press of Harvard University Press, 1971, 208.

<sup>27</sup> John Rawls, *A Theory of Justice*, The Belkap Press of Harvard University Press, 1971, 208.

<sup>28</sup> John Rawls, *A Theory of Justice*, The Belkap Press of Harvard University Press, 1971, 209.

<sup>29</sup> John Rawls, *A Theory of Justice*, The Belkap Press of Harvard University Press, 1971, 213.

rights and duties. These equals basic rights include freedom of movement, expression, assembly, property and even dignity. According to this principle, a just society gives these basic rights equally to all persons despite their status or any other variables. The second principle holds that social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.<sup>30</sup> This principle holds that the inequalities (economic and social) are justified only if: attached to positions, jobs available to all under conditions of equal opportunity impartial (principle of equal opportunities).<sup>31</sup> Here, Rawls talks of the things that make us all different, such as wealth or positions, as “those aspects of the social world that seem arbitrary from a moral point of view,” this is to mean they are mere factors that differentiate us but they do not warrant to decide who is better than the other.

Applying this concept to the plight of intersex persons, it is important that justice as fairness be applied when making the principles that govern persons, intersex persons. Justice as fairness includes considering all persons as equal and ensuring inclusivity of these persons in the law and their recognition. The difference of some people being born intersex is not a premise to ignore such persons and their right but rather should merely be treated as a difference that is accommodated for in the law. The right to dignity, recognition and protection in the law should be guaranteed to all persons in a fair and equitable manner. In the law, the concept of justice as fairness would require that intersex persons be recognized in the registration of Deaths and Births Act,<sup>32</sup> the ruling of the cases *R. M v Attorney General and 4 others*<sup>33</sup> and *Baby A v the Attorney General and 6 others*<sup>34</sup> should have been made in favour of intersex persons and their rights and recognition.

### **2.1.2 The veil of ignorance**

This concept is about the participants in the law making process to be put behind a veil of ignorance, the veil of ignorance is a position where one is denied any specific information about themselves, it forces them to adopt a generalized point of view that bears a strong resemblance to

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<sup>30</sup>John Rawls, *A Theory of Justice*, The Belkap Press of Harvard University Press, 1971, 213.

<sup>31</sup> -< <https://www.the-philosophy.com/rawls-theory-justice-summary>>- seen on 13<sup>th</sup> November 2019.

<sup>32</sup> *Births and Deaths Registration Act*, Cap 149 Laws of Kenya.

<sup>33</sup> *R.M v Attorney general and 4 others* [2007] eKLR.

<sup>34</sup> *Baby 'A' (Suing through the Mother E A) & another v Attorney General & 6 others* [2014] eKLR.

the moral point of view. One does not know whether they shall be rich or poor, handicapped or not, law makers or law enforcers or any other status in the society. The status is hidden from the person. The importance of this is to rid the participants from any biases while making the laws. The premise of this is that our experiences cause the biases that we hold. The laws should be made without favouring any groups of persons or anticipating that one would be at any particular position.<sup>35</sup>

It is true that most laws are made by people who know or who can anticipate their status in the society and therefore an inclination to make laws that favour their status. The veil of ignorance takes away this disadvantage. If a parliamentarian was not aware whether they may be born intersex, mentally challenged or any other state, they would objectively make laws that would be inclusive of all groups and status of persons. This can be shown further by the fact that the nominated member of parliament, Isaac Mwaura, is the one who proposed the Intersex persons bill in the Kenyan Parliament.<sup>36</sup> However, the proposition according to John Rawls would be that laws concerning inclusion and fairness be made behind the veil of ignorance where one does not know where they shall end up finally.

In the plight of intersex persons, the veil of ignorance would rid the participants of law making their biases against intersex persons. The conversation around intersex persons is that they are cursed people who deserve to be shunned and in some instances killed.<sup>37</sup> Though laws may be proposed in parliament to cater for their needs, there is fear that the laws are un-African.<sup>38</sup> Laws concerning minorities should be made behind the veil of ignorance so as to create inclusion and protection for intersex persons.

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<sup>35</sup> John Rawls, *A Theory of Justice*, The Belknap Press of Harvard University Press, 1971, 213.

<sup>36</sup>Rawlings Otieno," Bill seeks to allow intersex persons to change gender" Standard Newspaper, 16 August 2019, <<https://www.standardmedia.co.ke/article/2001338399/bill-seeks-to-allow-intersex-persons-to-change-gender>>- seen on 13<sup>th</sup> November 2019.

<sup>37</sup> Wallace. M. Nderu, *[An Opinion] Of Intersex Persons, Identity, Recognition and the Law; Born this Way [The Need to Recognize Intersex Persons, Respect, Safeguard and Uphold their Rights]* International Commission of Jurists Kenya, 2018, 6.

<sup>38</sup> Wallace. M. Nderu, *[An Opinion] Of Intersex Persons, Identity, Recognition and the Law; Born this Way [The Need to Recognize Intersex Persons, Respect, Safeguard and Uphold their Rights]*, 6.

## 2.2 Javier Hervada; Natural Law and Natural Justice

Hervada goes to lengths to speak about justice being the fact of giving to each his own. He discusses this using various examples, the duty that a lessee has to a lessor, which is to pay back for the land leased. Using this example, Hervada explains that justice is to give to one what is due to them and that an omission would amount to an injustice.<sup>39</sup>

He discusses that giving to each his own means that one must want to give it. Moreover, it pertains knowing what should be given and to whom. Hervada uses the example of the early Romans to illustrate who should be given, what they should be given, when they should be given, where it should be given to them, how they should be given and who is the giver.<sup>40</sup> Although the justice system has evolved and judges sometimes find themselves solving matters such as the interpretation of the law, at the heart of every dispute is the question, what is due and to whom is it due?<sup>41</sup> Hervada explains that for there to be justice, there has to be a giver and a given, and that at its very core it is about giving to one what is due to them. He further discusses what he calls the virtue of justice. The hallmark of the virtue of justice, once again, is knowing and wanting. Knowing what is due and wanting to give it. When the two are practiced hand in hand, it leads to the virtue of justice, which is the permanent willingness to perform acts aimed at giving to each what belongs to him.<sup>42</sup> This goes hand in hand with Thomas Aquinas definition of justice which is, the habit by which one, with constant and perpetual will, gives to each his right.<sup>43</sup>

From the definition of justice given by Hervada, there are rights that are inherent to all human beings, they are inalienable.<sup>44</sup> The right to be protected from discrimination, to be recognized as a person in the law, to be accorded human dignity are all rights enshrined in the Universal Declaration of Human Rights.<sup>45</sup> According to Hervada's definition of justice, these rights are due to all person, intersex persons included. Following this, a justice system that does not give all persons their rights cannot be said to have or to practice the virtue of justice.

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<sup>39</sup>Javier H, "Critical introduction to Natural Law" 2.

<sup>40</sup> Javier H," Critical introduction to Natural Law" 6.

<sup>41</sup> Javier H, "Critical introduction to Natural Law" 6.

<sup>42</sup> Javier H," Critical introduction to Natural Law" 7. Here, the author discusses nature of the willingness to give to one what is due to them and that forming a habit of continuously doing this s what forms the virtue of justice. It is a virtue because it is a continuous exercise of a good act.

<sup>43</sup> Thomas Aquinas, *Summa Theologicae*, II-II, question 58, answer 1.

<sup>44</sup>Preamble, *Universal Declaration of Human Rights*, 10 December 1948.

<sup>45</sup>Article 1, 2, 6 and 7, *Universal Declaration of Human Rights*, 10 December 1948.

In application, intersex persons are people under the law, they deserve the right to dignity as postulated under Article 28 of the Constitution of Kenya.<sup>46</sup> The government of Kenya has the duty to grant this right to intersex persons. Dignity is what is due to intersex persons and the government of Kenya should accord this right. Justice would therefore be a guarantee of dignity to intersex persons and a continuous practice of this would lead to the virtue of justice.

### **2.3 Conclusion**

The two theories used can be used to support the hypothesis which is that the dignity of intersex persons is infringed by the Act.<sup>47</sup> The theory of justice would point out that the act has not been made from a point of veil of ignorance and that there is no justice as fairness because it discriminates against intersex persons who are not represented in the categories to be filled while indicating the sex of a child.<sup>48</sup> Using these two theories, this paper shall therefore look at the plight of intersex persons in Kenya and propose any possible solutions if any.

Javier Hervada definition of justice would fault the act by noting that it does not give intersex persons the right to identity which is a right that is due to them by virtue of being human beings, more so by the fact that it is a right provided for in the Constitution of Kenya.<sup>49</sup>

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<sup>46</sup> Article 28, *Constitution of Kenya (2010)*.

<sup>47</sup> *Births and Deaths Registration Act*, Cap 149 Laws of Kenya.

<sup>48</sup> *Births and Deaths Registration Act*, Cap 149 Laws of Kenya.

<sup>49</sup> Article 28, *Constitution of Kenya (2010)*.

### **3.0 CHAPTER THREE: THE RECOGNITION AND PROTECTION OF INTERSEX PERSONS UNDER KENYAN LAW**

#### **3.1 Introduction**

Intersex in the Kenyan sphere is not a new narrative, this is a matter that has been addressed up to the level of the High Courts of Kenya. This matter was heard in the Kenyan courts in the case of *R. M v Attorney General and 4 others*, petition number 705 of 2007.<sup>50</sup> This was even before the advent of the New Constitution of Kenya 2010, the conversation around intersex persons in the Kenyan legal sphere is not new. This chapter therefore seeks to examine the intersex person in the Kenyan legal space. This is done by looking at the definition of intersex persons in the Constitution and other subsidiary laws in Kenya. There is also an interrogation of the Constitution and other subsidiary laws of Kenya to examine the extent and parameters of the rights, if any, of intersex persons.

#### **3.2 An analysis of the Constitution of Kenya 2010 in light of Intersex persons**

A deep dissection of the bill of rights and the Constitution in general brings out several recourses that intersex persons can hold on to in a bid to fight for their rights. Article 19(2) entails the protection of dignity of individuals as the purpose of recognising and protecting human rights, intersex persons are also individuals under the law, whose dignity should be respected and protected. Article 19(2) together with Article 28 stress on human dignity which is inherent to a person. Stressing on human dignity, the courts of Kenya in the case of *M W K v another v Attorney General & 3 others* stated the importance of Article 28 as:

“The Constitution entrenches respect for human dignity, the achievement of equality and the advancement of human rights and freedoms, being the foundational values of the Constitution and forming the bedrock upon which the Constitution is based. Article 28 provides no definition of dignity, however its role and importance as a foundational constitutional value has been emphasized in a number of cases”<sup>51</sup>

Article 27(4) bars a state from discriminating a person directly or indirectly based on different aspects inclusive of which is sex. The bill of rights continues highlighting different rights but there is a consistency of referring the rights as belonging to a person or an individual, this is clear that

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<sup>50</sup> *R.M v Attorney general and 4 others* [2007] eKLR.

<sup>51</sup> *M W K v another v Attorney General & 3 others* [2017] eKLR.

the rights are not limited to only male or female persons but a person in general. Article 12(1) guarantees every citizen the right to citizenship, a passport and any other documentation that pertains to identification. Article 53(1)(a) states that every child has a right to name and identification.<sup>52</sup> The language that the constitution seems to adopt in all these provisions is of a general and inclusive nature, the use of words such as every, persons or even individuals seems to be an intentional approach by the law maker to create a “blanket” under which any applicable party may fall. Furthermore, in Article 259(1)(b)(c), the Constitution states that it should be interpreted in a manner that promotes the bill of rights and development of the law.<sup>53</sup> Through this analysis of the Constitution, it is clear that the though beautifully crafted and the factor of inclusivity can be seen across, intersex persons are underrepresented despite their existence and a matter such as *R.M v The Attorney general and 4 others* having been decided before the era of this Constitution.

However, there are some Articles in the constitution that are careful to state men and women, such as Article 27(3)) which guarantees the right to protection in the political, economic, cultural and social spheres specifically to men and women, how about intersex persons?

### **3.3 Kenyan courts and intersex case law developments**

#### **3.3.1 An analysis of *R.M v the Attorney general and 4 others*<sup>54</sup>**

The petitioner in this matter was born with both male and female genitalia, he was given a male name and grew up as a male, he dropped out of school while in class three. He did not have any documentations such as a birth certificate, identity card or travel documents. He attempted to marry a woman, but the marriage failed neither was it recognised legally. He was later charged with robbery with violence. Before he was remanded, it was realised that he had both genital, the Magistrate in this matter ordered that he be remanded at the police station while the matter was being heard. He was tried and convicted to life imprisonment and sentenced at the Kamiti Maximum prison where he shared the facility with other male inmates some of whom molested and ridiculed him constantly. Feeling that his dignity had been violated, he filed this petition.<sup>55</sup>

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<sup>52</sup> Article 53(1) *Constitution of Kenya (2010)*.

<sup>53</sup> Article 259(1)(b)(c) *Constitution of Kenya (2010)*.

<sup>54</sup> *R.M v Attorney general and 4 others [2007] eKLR*.

<sup>55</sup> *R.M v Attorney general and 4 others [2007] eKLR*.

The Attorney General and Prisons Commissioner insisted that the Kamiti Maximum Prison facility was not equipped to cater for intersex persons and they therefore had to put the petitioner with the other prisoners. They also stated that the Prisons Act was silent on the provision of separate facilities for hermaphrodites.

The court first defined the term intersex in paragraph 109 as;

“a term describing an abnormal condition of varying degrees with regard to the sex constitution of a person. The term intersex and the term hermaphrodite may therefore be used interchangeably. It appears however, that the current preference is for the term intersex rather than the term hermaphrodite”<sup>56</sup>

The court did indeed find the petitioner to be an intersex person based on the report from the Prison’s doctor. However, the court, in paragraph 112, did not find sufficient evidence to show that the existence of a category of persons known as intersex in Kenya and therefore the petitioner did not have grounds to bring a public interest litigation. Further, the court stated that although the petitioner had ambiguous genitalia, it was not enough to negate his biological sexual constitution which had already been fixed at birth, male.<sup>57</sup>

This case has a number of shortcomings in light of the plight of intersex persons in Kenya. The first shortcoming that can be seen is the seemingly evasion by the court to recognize that there are a group of persons in Kenya who identify as intersex and whose rights are violated due to the lacuna in the law. The court also takes a trajectory of assuming that the sex marker on a child’s birth certificate is sufficient to indicate the sex and gender therefore of a person.

Considering Javier Hervada’s theory of justice, the petitioner was not granted what was due to him by the court, the Petitioner was in pursuit of his right to legal recognition and a possible recourse for the harms he suffered while in prison. In categorizing him as male despite his ambiguous genitalia, the court refuses to acknowledge that the sex marker on a birth certificate can be inconclusive.

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<sup>56</sup>*R.M v Attorney general and 4 others [2007] eKLR.*

<sup>57</sup>*R.M v Attorney general and 4 others [2007] eKLR.*

### **3.2.2 An analysis of Baby ‘A’ (suing through the mother, EA) and the CRADLE-the Children Foundation v. The Attorney General and 6 others<sup>58</sup>**

This matter was heard before the Constitutional division of the High Court of Kenya before Justice Lenaola J. The petitioner, Baby A, was born with both male and female genitalia and therefore the sex could not be determined at birth. The doctors at Kenyatta National Hospital, in all the medical documentations, put a question mark (“”) on the indication of the gender of the child. The child was thus unable to acquire a birth certificate, appropriate medical attention due to the ambiguity. The petitioner also insisted that due to the ambiguity in the sex of the child, it led to an infringement of the child’s dignity and right to identity as guaranteed by the Constitution and the Children’s Act. The petitioner claimed that Section 2(a) of the Act<sup>59</sup>, forms number 1 to 7 only provided for the options of male and female sex markers under the sample forms for a birth certificate. Gender binary became a challenge to the petitioner because the Petitioner’s sex could not be determined at birth.

For the purposes of this paper, there were two key issues of interest that the court determined. The issue as to whether baby “A” was an intersex and whether this meant that he suffered lack of legal recognition. This can be put simplified to be a question of whether section 2(a) and 7 of the 2<sup>nd</sup> Schedule of the Act are in violation of Article 27 of the Constitution. The court did find that baby “A” was an intersex person based on the fact that the results by Kenyatta National Hospital indicated the sex of the child as (“”) instead of the normal male or female, the court states that this was a clear indication that the usual categorization would not apply to the child. The court dismissed the claims that the notification of births form indicate that the child was male and stated that this was most likely done to try and fit the child to the societal expectations of being either male or female.

Having established that the child was intersex, the court did not find that the child suffered discrimination contrary to Article 27 of the Constitution. It stated that to recognise intersex as a third gender would be to overstep its mandate as a court and that to recognize intersex persons as “other status” category would be to give them a right to plead discrimination. The court therefore distanced itself clearly from recognizing intersex persons as a third gender by stating that this was

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<sup>58</sup> *Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR.*

<sup>59</sup> *Births and Deaths Registration Act, Cap 149 Laws of Kenya.*

the work of the legislative and not the judiciary, just as South Africa approached the situation.<sup>60</sup> As to the question of whether intersex persons suffer discrimination, the court found that there was not enough evidence produced by the petitioner to prove discrimination suffered by baby “A and therefore intersex persons.

The second issue, crucial to this paper, that the court had to grapple with was whether there was need to collect data on intersex persons. The court found that the issue needed no extrapolation and urged the Attorney General to collect data on intersex persons in Kenya. This call led to the taskforce report of 2018.

The court did not find any discrimination on the petitioner on grounds that there was not sufficient proof of discrimination against the petitioner or the community of intersex persons.<sup>61</sup>

### **3.4 Report of The Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya**

This report was born from General vide Gazette Notice No. 4904 on 26th May 2017.<sup>62</sup> The report was delivered on the 10<sup>th</sup> of December 2018 to the Attorney General. The taskforce was mandated to collect data on the number of intersex persons and the challenges they face. According to the report, the estimated number of intersex persons in Kenya is 779,414 with a large population of these persons in Nairobi county (75874).<sup>63</sup> This number is very different from the 2019 Census results that quoted the number of intersex persons in Kenya at 1,524.<sup>64</sup>

#### **3.4.1 Challenges faced by intersex persons in Kenya**

The taskforce cited some of the challenges faced by intersex persons. One of the challenges faced by institutions which deal with these persons, such as hospitals, is that there is limited data on the number and distribution of these persons. This leads to a limitation on the quality of services that can be provided for these persons as well as planning.<sup>65</sup> The government of Kenya tried to remedy

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<sup>60</sup> *Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR* para 60.

<sup>61</sup> *Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR*.

<sup>62</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 4.

<sup>63</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 147.

<sup>64</sup> Graham Kajilwa, 2019 Census reveals Kenya has 1524 intersex people -

<<https://www.sde.co.ke/article/2001348112/2019-census-reveals-kenya-has-1-524-intersex-people>>- April 10.

<sup>65</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 186.

this during the 2019 National Housing and Population Census by collecting data on intersex persons.<sup>66</sup>

The report also cites challenges such as low literacy levels among intersex persons due to high rates of dropping out of school this being caused by lack of educational institutions for intersex persons. This is also caused by bullying from other students as well as frequent visits to the hospital.<sup>67</sup> The research indicated that 16.3% had no or had not completed any formal education while only 4.1% had attained university (undergraduate) education.<sup>68</sup> During elections, some of these persons do not get a chance to exercise their democratic right to vote because while there are queues for men and women, there are none for intersex persons. Moreover, their identification cards and their physical appearances always seem to differ more often than not.<sup>69</sup>

Yet another challenge faced by these persons includes registration and documentation difficulties. As stated earlier, this paper seeks to challenge the Act, most intersex persons do not have birth certificates due to their inability to comprehensively identify as either male or female. Therefore, most of these persons lack birth certificates, those who have the birth certificates later find it hard to get identification cards because their physical appearances do not match the gender that has been indicated on the birth certificates.<sup>70</sup> The report describes this challenge of documentation as a dominoes effect because lack of or improper documentation leads to a curtail of other basic rights such as identity, nationality, property ownership, civic rights and even free travel.<sup>71</sup> Other challenges such as employment are also elaborated.

### **3.4.2 Recommendations proposed by the Taskforce report**

The report proposed recognition of these persons. An amendment of the several subsidiary laws of Kenya was proposed to include the definition of intersex as:

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<sup>66</sup> 24/25<sup>th</sup> August Enumerators Instruction Manual and Census CAPI User guide, Government Printer, p22.

<sup>67</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 187.

<sup>68</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 176.

<sup>69</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 189.

<sup>70</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 178.

<sup>71</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 177.

“a person who is 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>72</sup>

This proposed definition is to apply to several acts such as the Interpretation and General Provisions Act, Persons Deprived of Liberty Act and Children Act. The definition of the word sex should also be reviewed to; “Sex” means a person who is male, female or intersex.<sup>73</sup> This should be applied to acts such as Interpretation and General Provisions Act, the Act, Registration of Persons Act and Kenya Citizenship and Immigration Act.

A further proposal to have three categories of sex when categorizing sex in some acts, rules and procedures, the categories proposed are male, female and intersex.<sup>74</sup> The acts to include this change include the Act and Kenya Citizenship and Immigration Rules. The Taskforce proposed various other changes such as the liberty of an intersex person to choose who the gender of the person who can conduct a search on them,<sup>75</sup> when in prison or remand, they should be kept separately as a different sex altogether<sup>76</sup> and while holding a passport or any other documentation, an intersex person should be free and the law should facilitate for a change of sex if necessary.<sup>77</sup> There are other recommendations provided that deal with the health sector, educational sector as well as statistics.

### 3.5 Conclusion

The Kenyan legal sphere has made progress in the inclusion of intersex persons. The courts can be seen to have evolved in the decisions made from the case of R.M to that of Baby A. the recent inclusion of intersex persons in the National Housing and Population Census is yet another

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<sup>72</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 191.

<sup>73</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 191.

<sup>74</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 193.

<sup>75</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 193.

<sup>76</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 193.

<sup>77</sup> General vide Gazette Notice No. 4904 on 26th May 2017, *Report of The Taskforce On Policy, Legal, Institutional and Administrative Reforms Regarding the Intersex Persons in Kenya*, 10<sup>th</sup> December 2018, 194.

indication of the increased efforts to include intersex persons in the sharing of the national cake. The taskforce on intersex persons has also played a major role in the data collection of intersex persons as well as creating awareness.

The journey is still long, until intersex persons are fully recognised as equal to any male or female person in the society. The law still needs to evolve.

## **4.0 CHAPTER FOUR; COMPARATIVE STUDY BETWEEN KENYA, AUSTRALIA AND SOUTH AFRICA**

### **Introduction**

Chapter three of this paper proved that indeed there is a gap in the laws of Kenya in the recognition of intersex persons. From the cases reviewed and the legislations analysed, it is clear that there are still milestones to be covered. This chapter seeks to delve deeper into the plight of intersex persons by opening it up to other jurisdictions. The jurisdictions chosen are those that have already made a significant step in the recognition of intersex persons and which Kenya can learn from.

This chapter aims at analysing other jurisdictions and picking out what Kenya can borrow in the legal protection and inclusion of intersex persons. This is done first by analysing the constitution of the Republic of South Africa and other key legislations that advocate for the rights of intersex persons. An analysis of Australia follows with a keen eye on their legal developments that have not been noted in the Republic of South Africa. The last limb of this chapter is on the lessons that Kenya can learn from these two jurisdictions.

### **4.1 Introduction on the Republic of South Africa**

In Africa, South Africa is a model state for its legal accolades and developments. The constitutional court of South Africa has seen precedents set that have been used across the continent. Its “transformative constitution” has been trailblazer for many constitutions across Africa Kenya included. In terms of equality and inclusion, the legal space of South Africa has made significant development hence its inclusion in this paper. It should be noted that the choice of South Africa is not so to imply that it has attained the threshold of intersex persons’ recognition and inclusion but rather that the steps it has taken are notable.

## **4.2 The constitution of the Republic of South Africa**

Essentially; a constitution of a state is a good determinant of the legal and democratic growth of a nation and its people. It is a show of what the people in the country can tolerate and what they cannot. Although the question of its implementation is a completely different conversation, a constitution is a starting point to legal growth.

The constitution of the Republic of South Africa is fortified with many articles that advocate for equality of all persons and the fight against discrimination. One of the founding values of this constitution is the promotion of human dignity, achievement of equality and the advancement of human rights and freedom.<sup>78</sup>

The constitution enshrines several rights in Chapter two, the Bill of rights, that can be seen to be an extension to the protection of intersex persons. Article 9 discusses and equality and some of the grounds prescribes against which discrimination should not occur are gender and sex.<sup>79</sup> Article 10 enshrines the right to dignity,<sup>80</sup> this is further supported by Article 37(5) which states that this right is an entirely non-derogable right.<sup>81</sup> Article 12(2) guarantees all persons the right to make decisions over their bodied and to decide on the medical or scientific experiments that can be done on their bodies.<sup>82</sup> This right is a remedy to the overarching probe faced by most intersex persons in south Africa, intersex genital mutilation.<sup>83</sup> All these are rights that intersex persons can use to further their interests in a court of law.

## **4.3 Subsidiary legislation on intersex persons in South Africa.**

South Africa was the pioneer country in the world in 2005 to insert the definition of intersex under sex as a ground for non-discrimination, this was in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000.<sup>84</sup> The conflation of the rights enshrined in the South African

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<sup>78</sup> Article 1(a), *Constitution of the Republic of South Africa* (1996).

<sup>79</sup> Article 9, *Constitution of the Republic of South Africa* (1996).

<sup>80</sup> Article 10, *Constitution of the Republic of South Africa* (1996).

<sup>81</sup> Article 37(5), *Constitution of the Republic of South Africa* (1996).

<sup>82</sup> Article 12, *Constitution of the Republic of South Africa* (1996).

<sup>83</sup> National Intersex Meeting Report 2018, *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People*, South Africa, 15. Most intersex persons are subjected to a series of surgeries that am at “correcting” their intersex status. Most of these surgeries are driven by social, cultural and religious reasons where the caregivers of these intersex children avoid facing the stigma that comes with having an intersex child hence opting for the “corrective” surgery which may have devastating side effects.

<sup>84</sup> National Intersex Meeting Report 2018, *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People*, South Africa, 6.

constitution and the highly held values of equality led to a number of subsidiary legislations that have championed for the rights of intersex persons.

#### **4.3.1 The Alteration of Sex Description and Sex Status Act**

This act was enacted in a bid to fill a lacuna left by the repeal of section 28 of the Births, Marriages and Deaths Registration Act of 1963.<sup>85</sup> Section 2 of this act states:

“Any person whose sexual characteristics have been altered by surgical or medical treatment or by evolvment through natural development resulting in gender reassignment, or any person who is intersexed may apply to the Director-General of the National Department of Home Affairs for the alteration of the sex description on his or her birth register.”<sup>86</sup>

The act defines the term intersex as with reference to a person, means a person whose congenital sexual differentiation is atypical, to whatever degree.<sup>87</sup> This act works hand in hand with the Act 1997, the Director-General of births and deaths is then required by law to change the sex marked on the birth certificate of the applicant to the preferred sex after having gone through legal sex alteration.<sup>88</sup>

This act has been a relief to intersex and transgender persons in South Africa because it gives them a chance to have their documentation match concur with their physical appearance and identity.<sup>89</sup> The cited shortcoming of this act is the fact that an applicant for sex alteration can only alter their sex to either male or female, this means that an intersex person cannot identify as intersex as this is not an option provided.<sup>90</sup> However, this does not water down the progress made by South Africa in terms of inclusion and progressive thinking.

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<sup>85</sup>Section 28, *Births, Marriages and Deaths Registration Act* (Act 81 of 1963) (South Africa).

<sup>86</sup> Section 2(1), *The Alteration of Sex Description and Sex Status Act* (Act 49 of 2003) (South Africa).

<sup>87</sup> Section 1, *The Alteration of Sex Description and Sex Status Act* (Act 49 of 2003) (South Africa).

<sup>88</sup> Section 4, *The Alteration of Sex Description and Sex Status Act* (Act 49 of 2003) (South Africa).

<sup>89</sup> National Intersex Meeting Report 2018, *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People*, South Africa 28.

<sup>90</sup> National Intersex Meeting Report 2018, *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People*, South Africa, 28.

### 4.3.2 The Promotion of Equality and the Prevention of Unfair Discrimination Act

This act was enacted to remedy the deeply rooted systemic injustices that were woven in the day to day lives of South Africans due to apartheid, patriarchy and colonisation. It is an attempt to criminalize and deter all forms of discrimination in South Africa.<sup>91</sup> This act includes the definition of intersex persons in its definition of sex.<sup>92</sup> This act places the duty to both the state and individuals not to discriminate against anyone on any grounds.<sup>93</sup> Some of the grounds against which discrimination has been prohibited include race,<sup>94</sup> gender,<sup>95</sup> disability,<sup>96</sup> prohibition of hate speech<sup>97</sup> and prohibition of harassment<sup>98</sup> and prohibition on the dissemination of information that unfairly discriminates.<sup>99</sup>

Furthermore, the act sets out a test of determining fair and unfair discrimination. First of, the burden of proof if proving or disproving unfair discrimination is placed on the respondent once the complainant has established a *prima face* case.<sup>100</sup> The test set out in section 14 of the act puts into account certain factors such as the context of the discrimination, whether there were other remedies that would have been sought to avoid the discrimination and the purpose of the discrimination.<sup>101</sup> On close analysis of the test, discriminating on intersex persons on the grounds of gender would have slim if not nil chances of being classified as fair discrimination because it is merely granting a person their basic right to identity. The act further establishes equality courts whose jurisdiction is determine whether unfair discrimination, harassment or hate speech has taken place as alleged.<sup>102</sup>

### 4.4 Australia

Australian law is progressive in the inclusion of intersex person, in 2015, the UN office of the High Commissioner declared it alongside Malta as the countries that have made great progress in

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<sup>91</sup> Preamble, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>92</sup> Section 1, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>93</sup> Section 6, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>94</sup> Section 7, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>95</sup> Section 8, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>96</sup> Section 9, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>97</sup> Section 10, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>98</sup> Section 11, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>99</sup> Section 12, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>100</sup> Section 13, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>101</sup> Section 14, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

<sup>102</sup> Section 21, *Promotion of Equality and Prevention of Unfair Discrimination* (Act No 4 of 2000) (South Africa).

the recognition of rights of intersex persons.<sup>103</sup> Australia has made great attempts at breaking gender binary such that they have added a third box in the sex marker of their birth certificates.<sup>104</sup> In 2013, the government put in place sex and gender guidelines that fundamentally recognise that people can identify with a gender different from the sex assigned during birth or infancy and therefore their official documents should reflect these changes.<sup>105</sup> The report furthers that no person in Australia shall be discriminated against on basis of their sex or gender identity.

The developments made and the significant support from the government makes Australia a good jurisdiction to sample in this paper.

#### **4.4.1 Sex Discrimination Act 1984**

This act defines intersex as:

“the status of having physical, hormonal or genetic features that are:

- (a) neither wholly female nor wholly male; or
- (b) a combination of female and male; or
- (c) neither female nor male”<sup>106</sup>

The act states the instances under which discrimination can occur and it includes discrimination on the basis of the status of being intersex.<sup>107</sup> It describes an act of discrimination to have occurred if the discriminator disadvantages an intersex person on the basis of being intersex, having characteristics that generally appertain to intersex persons or characteristics that are generally imputed on intersex persons.<sup>108</sup> It states that the burden of proof to show that the alleged act of discrimination did not take place lies on the accused person.<sup>109</sup> The act further sets a reasonableness test for checking whether there is indirect discrimination. The discriminating act is checked to

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<sup>103</sup> Morgan Carpeter, The Normalization of Intersex bodies and othering of intersex identities in Australia, *Bioethical Inquiry* 2018 Volume 15, 487.

<sup>104</sup> Morgan Carpeter, The Normalization of Intersex bodies and othering of intersex identities in Australia, *Bioethical Inquiry* 2018 Volume 15, 493.

<sup>105</sup> Australian Government Guidelines on the Recognition of Sex and Gender, July 2013 - <<https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>>- seen on 6 December 2019.

<sup>106</sup> Section 4, *Sex Discrimination Act* (Act No 4 1984) (Australia).

<sup>107</sup> Section 5C, *Sex Discrimination Act* (Act No 4 1984) (Australia).

<sup>108</sup> Section 5C, *Sex Discrimination Act* (Act No 4 1984) (Australia).

<sup>109</sup> Section 7C, *Sex Discrimination Act* (Act No 4 1984) (Australia).

confirm whether it was a reasonable act, whether there was feasibility of overcoming or mitigating the disadvantage and whether the disadvantage is proportionate to the discrimination suffered.<sup>110</sup>

This can be used by the intersex persons in Australia to champion for their right against discrimination and equal opportunities.

#### **4.4.2 The Darlington Statement**

This is a 2017 declaration prepared by the advocates for intersex rights from Australia and New Zealand in a bid to fight for the rights and recognition of intersex persons.<sup>111</sup> Although the document is yet to be approved, it is a good indication of the progressive fight for intersex persons in Australia.<sup>112</sup> A close analysis of this document reveals a variance between Kenya and even South Africa *vis a vis* Australia in terms of the development of the fight for intersex persons. The demands brought out in this document are more practical from a tried system and therefore they are advocating for the shortcomings of a system that already recognises intersex persons. In the report, Article 7 calls for immediate criminalization of any medical surgeries that seek to correct the sexual orientation of an intersex person, especially children, without consent.<sup>113</sup> It further states that gender binary and sex classifications are a form of structural violence that does more harm than good to the intersex person. It condemns the overemphasis on the classification of intersex persons and advocates for a system in which sex classification is treated as a provisional requirement rather than as a definite requirement.<sup>114</sup>

The report further recommends effective legislative protection of intersex persons from any form of discrimination,<sup>115</sup> acknowledgment and apology from the government on any form of ill treatment done on intersex persons,<sup>116</sup> an end to genetic discrimination,<sup>117</sup> their right to marry and form a family,<sup>118</sup> their right to travel freely without any form of discrimination<sup>119</sup> and meaningful participation and consultation of intersex persons on matters affecting intersex persons.<sup>120</sup>

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<sup>110</sup> Section 7B, *Sex Discrimination Act* (Act No 4 1984) (Australia).

<sup>111</sup> Preamble *Darlington Statement* (Australia).

<sup>112</sup> -< <https://ihra.org.au/darlington-statement/>> The Darlington Statement. Seen on 15 November 2019.

<sup>113</sup> Article 7, *Darlington Statement* (Australia).

<sup>114</sup> Article 8, *Darlington Statement* (Australia).

<sup>115</sup> Article 9, *Darlington Statement* (Australia).

<sup>116</sup> Article 10, *Darlington Statement* (Australia).

<sup>117</sup> Article 11, *Darlington Statement* (Australia).

<sup>118</sup> Article 12, *Darlington Statement* (Australia).

<sup>119</sup> Article 13, *Darlington Statement* (Australia).

<sup>120</sup> Article 14, *Darlington Statement* (Australia).

#### **4.5 Lessons Kenya can learn from South Africa and Australia in the protection of the rights of intersex persons**

Protection of intersex person and the promotion of their fundamental rights begins with the acknowledgement of their existence. This has been seen in the South African and Australian jurisdictions where their legislations include the definition of intersex persons in their laws. In Kenya, there are several legislations that can expand the definition of sex to include intersex persons, the Act can include intersex in its definition of sex.<sup>121</sup> This would be a good starting point. The constitution can also expand the definition of sex to include intersex.<sup>122</sup> This can only be done through a referendum; this is because it is an amendment of the bill of rights.<sup>123</sup> This would then lead to people voting for the expansion of the term sex to include intersex in the bill of rights. Consequently, the interpretation of the word sex would also include intersex.

There is also need for subsidiary legislations to be created for to ease access to justice for intersex persons. Nominated Senator Isaac Mwaura has been on the forefront proposing for a bill that caters for the needs and legal inclusion of intersex persons, time is now ripe for Parliament to enact this bill into law.<sup>124</sup> This would be similar to South Africa's "The Promotion of Equality and the Prevention of Unfair Discrimination Act" and Australia's "Sex Discrimination Act."

From Australia's progress, it is clear as day that legislation is not enough, there is need for people to be sensitized about intersex persons and for the conversation around this topic to be normalized. It is time for the medics to contribute to the conversation, the religious leaders, the legislators and every player in the society. Public awareness should be created.

#### **4.6 Conclusion**

This chapter sought to have a comparative analysis of Kenya and two other jurisdictions that have already taken the steps of recognizing the plight of intersex persons. Through the analysis of South Africa, Kenya can see the example of an African country that has begun recognizing intersex persons. From the example of Australia, it is clear that not only should there be legal recognition

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<sup>121</sup> Section 1, *Births and Deaths Registration Act*, Cap 149 Laws of Kenya.

<sup>122</sup> Chapter 4, *Constitution of Kenya* (2010).

<sup>123</sup> Article 255(1)(e) *Constitution of Kenya* (2010).

<sup>124</sup> Standard Media, Bill seeks to allow intersex persons to change gender, -<  
<https://www.standardmedia.co.ke/article/2001338399/bill-seeks-to-allow-intersex-persons-to-change-gender>>- seen on 1 December 2019.

but the society as a whole has a role to play. From the foregoing, it is clear that the course is doable and will bear much fruit.

## **5.0 CHAPTER FIVE; CONCLUSION AND RECOMMENDATIONS**

### **5.1 Introduction**

Having carried out a comprehensive study on the plight of intersex persons in Kenya, using the theoretical framework from John Rawls and Javier Hervada, this chapter gives a conclusion and sets out a few recommendations for the sake of a better legislation towards the legal inclusion of intersex persons.

### **5.2 Conclusion**

This paper set out in chapter with the hypothesis that there is not enough legal recognition and inclusion of intersex persons in Kenya and that there is need for improvement. The second hypothesis was that some human rights such as right to dignity and right to identification are not easily accessible by intersex persons and therefore the need for a change in the law.

Chapter two of this paper laid a theoretical framework by John Rawls, A theory of Justice. Using the concepts elaborated by Rawls, it was crystal clear that all persons are equal, and that justice applies to all fairly. Intersex persons have a place in the law, and they should be included. A law was also seen to be just only if it is about giving to each what is due to them. This was shown by Javier Hervada. The concept of the veil of ignorance by Rawls, also proved that should all persons be rid of the knowledge of their status in society, laws would be made that champion for the inclusion of all persons, intersex included.

Chapter three of the paper was concerned with the intersex person in the Kenyan space and whether indeed there is insufficient legal recognition and protection of intersex persons. This paper went ahead to analyse the constitution of Kenya and found that there are some articles that advocate against discrimination. However, there was not any that explicitly addressed intersex persons. There was a case review of intersex persons in the Kenyan courts and it was clear as day that the judges in these cases, even though they wished to serve justice, lack of legal recognition of intersex persons was a challenge they faced. The taskforce report of 2018 on intersex persons was also analysed. It highlighted some of the challenges faced by intersex persons as well proposed what can be done, one of the proposals being proper legislation. The report also proved the hypothesis

that intersex persons lack proper recognition in the law and that their basic human rights are constantly infringed.

Finally, an analysis of South Africa and Australia proved what this paper advocates for, legal inclusion and protection of intersex is possible in a democracy. The two countries lay the footsteps upon which Kenya can step in this journey of the plight of intersex persons.

The hypothesis set out in chapter one of this paper has been asserted and that there is need to give legal recognition and protection to intersex persons in Kenya.

### **5.3 Recommendations**

#### **5.3.1 Definition of intersex persons in statute laws.**

The first step that Kenya should take is to enact legislation that has the definition of sex to include intersex. The Yogyakarta principle number 2(a) reads that states shall:

“Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles”<sup>125</sup>

This is a requirement for the member states of the United Nations to include all forms of sexual minorities in the law. This is the first step that Kenya should take towards the plight of intersex persons. It is not sufficient to have data collected and stored on intersex persons through the taskforce of 2018 and the National Population and Housing censuses, the state should take active steps towards the data collected.

#### **5.3.2 Creation of awareness**

There is need for creation of awareness concerning intersex persons among the masses. People should be aware of the fact that intersex persons are normal and everyday people, and anyone can be born intersex. The stigma around intersex persons and their families should be broken through mass education. There is also need to realise that cultural and societal views on sexual minorities is a great cause of the stigma around intersex persons.

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<sup>125</sup> Principle 2(a), *The Yogyakarta Principles*.

### 5.3.3 Reliance on data to promote and protect the welfare of intersex persons

The data collected by the government during the 2019 Housing and Population Census should not merely remain as data but rather should be used in proper planning for intersex persons.

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