

UNIVERSITY OF NAIROBI



ACCESS TO EDUCATION FOR INTERSEX PERSONS IN KENYA

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**SUBMITTED TO THE UNIVERSITY OF NAIROBI IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M)**

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DECLARATION

I, **KABAYA JANET WANJIKU** declare that this is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Where other peoples work or my own work has been used, this has properly been acknowledged and referenced in accordance with the University of Nairobi's requirements.

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Signed:



Date: 19/07/2022

This research project has been submitted for examination with my approval as a University supervisor.

DR. SETH WEKESA

Signed:



Date: 21/07/2022

DEDICATION

To all intersex persons in the country, may your thirst for education be quenched.

ACKNOWLEDGMENT

I appreciate the great support I received from my supervisor, Dr. Seth Wekesa. His honest and timely feedback made the completion of this work a success. Thankyou.

TABLE OF CASES

- i. Baby A (suing through her mother EA) V Attorney General [2013] Eklr (Petition 266 of 2013).
- ii. Richard Muasya V Attorney General [2010] Eklr (Nairobi High Court Petition No. 705 of 2007).
- iii. Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] Eklr.

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- ii. Births and Deaths Registration Act, Cap 149.
- iii. Children Act, 2008.
- iv. Basic Education Act, 2013.
- v. Kenya National Examinations Council Act, 2012.
- vi. Registration of Persons Act, Cap 107.
- vii. The National Education Sector Plan, 2013-2018.
- viii. Ministry of Education, Science and Technology National Curriculum Policy.
- ix. Education for All 2015 National Review.
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- ii. Education Act, Cap 327.
- iii. Gender Identity, Gender Expression and Sex Characteristics Act, Cap 504.
- iv. Civil Code, Cap 16.
- v. Identity Card and Other Identity Documents Act, Cap 258.
- vi. Trans, Gender Variant and Intersex Students in Schools Policy, 2015.
- vii. Addressing Bullying Behaviour in Schools Policy, 2014.

TABLE OF REGIONAL CONVENTIONS

- i. African Charter on the Rights and Welfare of the Child, 1999.
- ii. African Charter on Human and Peoples Rights, 1986.

TABLE OF INTERNATIONAL CONVENTIONS

- i. Universal Declaration of Human Rights, 1948
- ii. Yogyakarta Principles plus 10.
- iii. United Nations Convention on the Rights of the Child, 1990.

ACRONYMS

GIGESC – Gender Identity Gender Expression and Sexual Characteristics

KNBS – Kenya National Bureau of Statistics

KNEC – Kenya National Examinations Council

LGBTI – Lesbian, Gay, Bisexual, Transgender and Intersex

NEMIS – National Education Management Information System

UPI – Unique Personal Identifier

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CHAPTER ONE

INTRODUCTION TO THE STUDY

1.1. Introduction

During birth, the first concern for a parent is whether their child is a boy or a girl. At face value, such a simple question has great implications on the access of fundamental rights and freedoms by intersex persons. What actions or steps should the doctors, nurses or birth attendants take in the event that they cannot determine the sex of the child? Does the law at international, regional and national level protect the said child whose sex cannot be determined at the onset?¹

People are often categorized as either being male or female at birth. However, this is not the case for all births. In some instances, the sex of a child cannot be determined at birth due to certain differences in their sex characteristics and these children are called intersex.²

Intersex in Kenya has been defined as a person certified by a competent medical practitioner to have both male and female reproductive organs.³ The Act makes provision for the rights of intersex persons deprived of liberty in that they are allowed to choose the person who shall perform a body search and that intersex persons who are detained shall be held in different cells or holding facilities from other persons.

The intersex taskforce defined intersex to mean a person who is born with a biological sex characteristic that cannot be clearly identified as being either male or female. This may be as a result of their unique hormonal, genetic, anatomical or gonadal patterns that may manifest during birth, in childhood, puberty or at adulthood.⁴

¹ 'Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya - Kenya Law Reform Commission (KLRC)' <<http://www.klrc.go.ke/index.php/klrc-blog/613-taskforce-on-policy-legal-institutional-and-administrative-reforms-regarding-intersex-persons-in-kenya-blog>> accessed 14 May 2020.

² *ibid.*

³ Persons Deprived of Liberty Act 2014 s. 2.

⁴ 'Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya - Kenya Law Reform Commission (KLRC)' (n 1).

From the above definitions it can be inferred that being intersex is all about a person's genetic makeup and not a social construct. It is important to differentiate between sex, sexual orientation and gender identity as these three aspects are often confused and will offer a bearing on how intersex is a sex issue and not a gender or sexual orientation issue.

Sex refers to the biological characteristics that define humans as female or male. While these sets of biological characteristics are not mutually exclusive, as there are individuals who possess both, they tend to differentiate humans as males and females.⁵

Sexual orientation refers to an individual's attraction to people of the same gender or different gender and the attraction is emotional, sexual and intimate.⁶

Gender identity refers to how an individual identifies themselves which could either be as a man, woman or neither. The gender identity may correspond with the assigned sex at birth or may differ, prompting one to undergo bodily, behavioural or hormonal changes that will ensure the gender identity and the sex match.⁷

Sex and sexual orientation relate to the biological makeup while gender identity is more of a social construct. Sexual orientation is closely associated with members of the lesbian, gay, bisexual, transgender and intersex community (hereinafter LGBTI).

1.2. Background

The right to legal recognition provides that every citizen is entitled to a Kenyan Passport and any document of registration or identification issued by the State to citizens.⁸ In Kenya, the basic identification document is the birth certificate. Once a birth has occurred and the registrar has been notified of the same, the registrar then records the details of the child in the register of birth and the parent (s) or guardian (s) is issued with a birth certificate, which is the child's

⁵ 'WHO | Defining Sexual Health' (*WHO*)

<http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/> accessed 4 June 2020.

⁶ Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.

⁷ *ibid.*

⁸ Constitution of Kenya, 2010 Article 12 (1)(b).

identification until they attain the age of majority.⁹ The details captured in the birth notification and birth certificate include the sex of the child, which can only be male or female. This means that children who are born in between are often not registered at birth because of the difficulty of having to choose to be identified as either being male or female. Essentially, intersex persons experience discrimination right from an early age.

A marginalized group is a group of people who have continually been discriminated against on various grounds due to policies, laws or practices that further offer a basis for the discrimination.¹⁰ Article 27 guarantees equality of all persons before the law and the freedom from discrimination. The State has a duty not to discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.¹¹ The Constitution further places a duty on the State to ensure that the rights of marginalised groups are protected and promoted through affirmative action programmes that will ensure their full participation in governance and other spheres of life and are accorded special opportunities in the education sector and other economic fields.¹²

In the past, protection from discrimination on the grounds of sex was not covered in the repealed Constitution of Kenya, 1963. Section 82(5) offered protection from discrimination on the grounds of race, tribe, place of origin or residence or other local connexion, political opinion, colour or creed). The lack of protection from discrimination on the grounds of sex implied that intersex persons were not given a chance to live freely and enjoy their human rights fully.

The focus of this study is intersex persons in Kenya and their access to quality education and how possessing a birth certificate relates to accessing education. Everyone has the right to education¹³ and children have the right to free and compulsory basic education.¹⁴ For a child to be admitted to an institution of basic education, their age is determined from the date of birth as indicated

⁹ Births and Deaths Registration Act Cap 149 Laws of Kenya 1928.S.10

¹⁰ Constitution of Kenya, 2010 Article 260.

¹¹ Constitution of Kenya, 2010.Art 27 (4)

¹² *ibid.* Art 56

¹³ *ibid* Article 43 (1) (f).

¹⁴ *ibid* Article 53 (1) (b).

on the birth certificate or upon reaching four years but a child shall not be denied admission simply because their age cannot be determined.¹⁵ However, the current practice is that parents or guardians are required to produce a birth certificate before enrolment in a basic education institution or when sitting the national exams.

When enrolling a student in a pre-primary learning institution, the head of a school may rely on the child's immunization card, birth certificate or birth notification to register the child. However, failure to have the aforementioned documents shall not prevent a child from being enrolled in a pre-primary school; the parents or guardians are allowed a period of ninety days to process a birth certificate.¹⁶ In as much as the policy and the law state that a child shall not be denied entry into a school for lack of a birth certificate, there is a three month window within which to submit the said document. A parent or guardian of an intersex child, whose birth was not registered still has the huge task of getting a birth certificate, even if it means choosing the wrong sex just so that their child can access education.

The Ministry of Education introduced the National Examination Management Information System (NEMIS), which keeps track of a learner's academic progress in a bid to ensure that students transition to the following grades.¹⁷ One of the features of the NEMIS is that it captures a learner's details including their name and gender (which is either male or female) and then issues him or her with a Unique Personal Identifier (UPI) that will be used at every stage of the learner's education.¹⁸

In using the NEMIS system, an intersex child is forced to identify as either a male or female and the assigned sex is then captured in all their academic documents. This presents a problem when the intersex child wants to change the sex marker on their documents and the law and subsequent systems do not facilitate this change.

¹⁵ Basic Education Act No. 14 of 2013. S. 33

¹⁶ 'National Pre-Primary Education Policy Standard Guidelines' (Ministry of Education, Kenya, 2018) <<https://www.education.go.ke/index.php/downloads/file/626-pre-primary-policy>>.

¹⁷ 'National Education Management Information System' <<https://www.education.go.ke/index.php/downloads/file/425-nemis-manual>>.

¹⁸ *ibid.*

A birth certificate is evidently a vital document required to access education. For an intersex child whose birth was not registered for one reason or the other, that child cannot enrol in a learning institution. An intersex child whose sex was allocated as either male or female so as to obtain a birth certificate is then able to enrol in school. The problem arises when that child gets to the age of puberty and the biological body changes do not respond with the sex that has been recorded in the birth certificate and other academic official papers. This has a ripple effect on the child's access to higher education and even getting a national identification card.

With regard to access to education, learning amenities and prospects by intersex learners, the taskforce found that there are clear barriers that hinder this group from accessing education. Over half of the respondents ranked their experience in trying to get an education as poor; and this is largely attributable to the lack of information or understanding and the non-recognition of intersex persons and their human rights.¹⁹

Further, the taskforce findings indicated that the school staff, both teachers and support staff play a major role in how intersex learners are treated in the schools. If the staff respect and protect the interests of intersex learners, then the students shall follow suit and protect their fellow students who are intersex and vice versa.²⁰

Other challenges experienced by intersex learners include dropping out of school, open bathrooms and toilets that interfere with their dignity, bullying by other students and administration personnel as well as being accused of promoting homosexuality in school.²¹

In the Baby A case, the petitioner's advocate submitted that the law grants everyone, including baby A, the right to be recognized as a person.²² In the country, lawful recognition begins with the issuance of an acknowledgement of birth slip issued by the health facility or hospital where the birth occurred and later a birth certificate issued by the Registrar of births. The name and sex of the child are some of the prescribed particulars that must be entered into the statutory

¹⁹ 'Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya - Kenya Law Reform Commission (KLRC)' (n 1).

²⁰ *ibid.*

²¹ *ibid.*

²² Universal Declaration of Human Rights Article 6.

documents before a birth is registered. He further stated that the registration form only provides two sex categories that is male or female thus making it difficult for intersex children to be registered. This provision infringes on intersex children such as baby A because it denies them the right to be registered with the correct details contrary to international provisions.²³

Furthermore, the petitioner posited that a birth certificate is a crucial document that acts as a gateway to other spheres of life like admission in a learning institution, obtaining other identification documents like a passport and a national identity card as well as in seeking employment. Without the correct birth certificate, a child will be limited in terms of the rights that they can enjoy and facilities that they can access.

In light of the above, this research study seeks to analyse the challenges faced by intersex persons when pursuing education at whichever level and show the importance of having the legal identification documents with the correct details.

1.3. Problem statement

The problem this research study seeks to address is how the lack of adequate laws fail to recognize intersex persons in the country and how this directly affects their right to education. Legal recognition for the purpose of this study refers to having the proper identification documents, be it a birth certificate, a national identification card or a passport. In Kenya, intersex children face difficulties in obtaining a birth certificate because the current legislative set-up only recognizes two sexes; male or female and therefore intersex children are not registered as such, but have to choose either of the recognized sexes. A birth certificate is a mandatory requirement for admission in pre-primary school and this implies that intersex children who do not have a birth certificate, can therefore not enrol in school. For those children who have birth certificates and progress with their education, the learning environment is not accommodative of their needs such as having ablution blocks specifically for them, facing ridicule once they attain puberty and this contributes to them dropping out of school thus not getting a quality education.

²³ OHCHR | Convention on the Rights of the Child Article 7.

1.4. Statement of objectives

This research seeks to achieve the following objectives:-

- i. To examine the policy, legal and judicial framework on registration of persons and access to education in Kenya.
- ii. To examine the challenges faced by intersex persons in accessing education in Kenya.
- iii. To assess the attainment of quality education for intersex persons in Malta and how those best practices can apply in the Kenyan context.
- iv. To provide recommendations on how intersex persons in Kenya can enjoy their right to quality education.

1.5. Research questions

To achieve its objectives, the study seeks to respond to the following questions

- i. What is the policy, legal and judicial framework on registration of persons and access to education in Kenya?
- ii. What challenges do intersex persons face while accessing education in Kenya?
- iii. What lessons can Kenya draw from Malta with respect to access to education for intersex persons?
- iv. What are the recommendations to ensure intersex persons access quality education in Kenya?

1.6. Hypothesis

In this study, it is posited that:

- I. The policy and legislative framework in Kenya facilitates access to education for intersex persons in Kenya.
- II. The policy and legislative framework in Kenya does not facilitate access to education for intersex persons in Kenya.

1.7. Justification of study

This study shall contribute to the body of knowledge regarding the existence of intersex persons and the challenges they face in their daily lives. It shall also expound on the legal and societal barriers that hinder intersex persons from accessing quality education.

The study shall also inform legal and policy reforms that will ensure legal recognition of intersex persons and also inform institutional reforms in the education sector to ensure that quality education is accessed by all, intersex persons included.

In addition, the study shall enrich literature specifically on access to education for intersex persons. Most of the existing literature focuses on their right to health and societal integration.

1.8. Research methodology

This study shall be based on doctrinal research which shall focus on the Constitution of Kenya, 2010 and other laws and policies on registration of persons; access to education and how they hinder intersex persons from attaining quality education.

It shall also entail a review of the court cases that have brought out the predicament of intersex persons in Kenya and how the decisions have caused a shift in policy and law towards recognition of intersex persons in the country.

In addition, the study shall entail a comparative study of the Republic of Malta, which has progressed in ensuring the protection and the promotion of the rights of intersex persons. The comparative analysis will draw out the lessons for Kenya and offer appropriate recommendations.

Lastly, the research will employ a review of various books, journal articles and research reports on intersex persons generally and specifically on their right to access education.

1.9. Theoretical framework

This study is premised on three theories; the sexual hierarchy theory, the natural law theory and the theory of psychosexual development. These theories are important in laying the philosophical grounding on the society's perspective of intersex persons and linking it to the challenges they face in Kenya.

1.9.1. Sexual hierarchy theory

The theory of sexual hierarchy as advanced by Gayle Rubin analyses how sexual inequalities are shaped by society.²⁴ The latter has been socialised to believe that there can only be a man and a woman and therefore heterosexuality is the only acceptable relation and anything outside that should be frowned upon. Rubin states that the society considers sexual interactions according to a tiered system of sexual value. She portrays this by creating a sexual pyramid where heterosexual relations are at the peak, followed by unmarried couples and the bottom most level is occupied by sexual minorities like gays, lesbians, transsexuals and commercial sex workers.

As per Rubin's theory, the heterosexuals at the top of the pyramid are recognized by the society and the state and therefore receive state support and legality. However, the sexual minorities who are at the bottom of the hierarchy are presumed to be having some form of mental illness or are criminals thus the state does not grant them much attention or offer them any support.

Whereas the Rubin's theory does not openly mention intersex persons, their issues are often included in the lesbian, gay, bisexual, transgender and intersex movement because the groups face similar forms of violations.²⁵ The findings made by Rubin's theory, echoes the experiences of intersex persons. The society interprets sex as being either male or female and anything outside those two categories is frowned upon and does not receive societal and state support. As a result, intersex persons are denied their right to legal recognition.

As earlier stated, intersex persons, according to Rubin's theory are at the bottom of the chain and they therefore do not enjoy their basic human rights fully. The lack of legal recognition at birth is the beginning of a wave of challenges that intersex persons face as they progress in life. In Kenya, for a child to be enrolled in pre-primary education, the child's birth certificate is one of the required documents. Now, if the intersex child does not have a birth certificate, it means that their right to access education is merely an aspiration.

²⁴ Richard Guy Parker and Peter Aggleton, 'Culture, Society and Sexuality: A Reader' <<https://trove.nla.gov.au/version/34976075>> accessed 14 May 2020.

²⁵ *ibid.*

1.9.2. Natural law theory

Natural law dictates that law is a system that is validated by another system; that is to say that the legal system we observe is validated by a higher law. In *The Morality of Law*, Professor Fuller draws a distinction between substantive natural law and procedural natural law, which, though not explicitly drawn in his earlier writings, permeates them implicitly.²⁶ The most fundamental aspect of substantive natural law relates to man in his essence. Human beings are inclined to either male or female because nature built them that way. Going outside this binary category is then deemed unnatural and is therefore frowned upon.

Proponents of this theory support laws and policies that seek to maintain the natural order of being male or female and ultimately heterosexual relations. According to them, the state is justified in coming up with laws or policies that are against same sex unions or any other unnatural relations.²⁷

Intersex persons, who are a sexual minority like the gays and lesbians, face similar challenges. Since the law and the society does not recognize any other sex outside male or female, then intersex persons are usually not regarded as 'normal human beings'. This in turn affects how they access various services and enjoyment of human rights.

1.9.3. Theory of psychosexual development

Money, while studying hermaphrodites and how they settle to their assigned sex role, believed that gender was not only a matter of psychosocial construct but also a biological construct.²⁸ With his colleagues, Money developed the concept of critical periods stating that the changes that occur from the embryo stage to early childhood significantly influences gender behaviour.²⁹ From his point of view, such critical periods occurred in the embryo and ended at eighteen months,

²⁶ Lon Luvois Fuller, *The Morality of Law: Notes from the Editors* (Legla Classics Library 2006).

²⁷ *ibid.*

²⁸ 'The Contributions of John Money: A Personal View on JSTOR'

<<https://vpn.uonbi.ac.ke/proxy/2f2438e9/https/www.jstor.org/stable/3813317>> accessed 10 June 2020.

²⁹ *ibid.*

when most sex reassignment surgeries would be conducted.³⁰ The downside to the early sex reassignment surgeries was when the child's hormonal and biological changes at puberty would differ from the reassigned sex and therefore posed difficulties in adulthood in terms of identity.

The Money theory cautions parents of intersex children from conducting early sex reassignment surgeries that would later on present challenges in the child's life. Some of these challenges relate to the issuance of legal documents that bear a sex marker different from the child's physical or biological make up.

1.10. Literature review

This section shall review journal articles, books and thesis with a global and regional view and will be in two themes; intersex persons and the societal stigma and access to education for intersex persons.

Over the years, various groups representing sexual minorities have framed their concerns as human rights claims.³¹ In that way, most of these supporters have fought to have their cause included in the human rights movement and to place a new right to sexuality on the international agenda by stating that sexual rights are human rights which should be protected and respected.³² Clifford opines that having a strong movement that agitates for the rights of its members has contributed significantly in ensuring the recognition and protection of the rights of the LGBT community.³³ He urges intersex persons to be more vigilant in seeking recognition of their rights. His argument focuses mostly on the LGBT community leaving out intersex persons, whose rights, including that of access to education is not addressed. He talks of the right to health, employment, social security for sexual minorities but does not speak about the right to education; which this thesis seeks to bring out.

³⁰ *ibid.*

³¹ Clifford Bob, *The International Struggle for New Human Rights* (University of Pennsylvania Press 2010).

³² *ibid.*

³³ *ibid.*

Megan observes that sex, for the intersexed persons is socially and medically constructed. The society has presumptions about gender and this influences how it constructs sex for the intersex person.³⁴ Cultural differences also determine what sex an intersex child will be assigned; and this means that the intersex child does not have the freedom or the right to choose their sex or to choose to remain intersex. She further views early sex reassignment surgeries as child abuse and the surgeries, if needed, should be delayed until after puberty when the adolescent can give informed consent and choose their own sex.³⁵ Relying on Megan's view, this research shall show how medicalization of intersex or corrective surgeries have long term effects on school going children in terms of interfering with the quality of education, the prolonged recovery periods that result in absence from school.

The question of legal recognition for intersex persons was a concern for Nikoletta who observed that the dual classification of sex and gender sets up a fixed norm that intends to control humans and this is portrayed in the law; the sex/ gender dichotomy is necessary for the person's survival within the law.³⁶ She further posits that legitimate documents such as birth certificates, passports and identification documents are essential for the individual's recognition and integration into the society. However, the entrenchment of the binary systems into law is disadvantageous to those who do not conform to either of the sex categories. On the other hand, the dual structure legitimises those individuals who are comfortable with the sex or gender assigned at birth.³⁷ In her view, in order to achieve justice for all, it is paramount to move away from the binary system so as to accommodate all individuals; to redefine gender as strictly social and sex as strictly biological.³⁸

While conducting an online survey in Australia, Tiffany J found out that out of a survey of 272 people with intersex variations, a majority had undergone at least two medical treatments in an attempt to 'cure' their intersexuality. The two common treatments were hormonal therapy and

³⁴ Megan K DeFranza, *Sex Difference in Christian Theology: Male, Female, and Intersex in the Image of God* (Wm B Eerdmans Publishing 2015).

³⁵ *ibid.*

³⁶ Nikoletta Pikramenou, *Intersex Rights: Living Between Sexes* (Springer Nature 2019).

³⁷ *ibid.*

³⁸ *ibid.*

genital surgery and these were performed when the individuals were below the age of majority.³⁹ The medical treatments had a negative impact on the participants' physical and psychological health. Most of them had considered or attempted suicide particularly at the time when they learnt of their intersex variation. In terms of academic performance, one-fifth of the respondents had not completed their high school education because they had dropped out of school. The learning environment had become toxic due to constant bullying, and the lack of counselling services at school also contributed to their preference to leave school. The participants suggested that the learning institutions should improve in terms of offering comprehensive sex education and creating facilities that can accommodate intersex learners.⁴⁰ The findings of this survey reflect a similar picture that intersex children in Kenya undergo as a result of the effects of the corrective surgeries.

In addition, intersex persons reported having dropped out of school at different stages due to being bullied, missing out of school due to health complications as a result of numerous corrective surgeries. She notes that most if not all schools did not have a curriculum on intersex variations and there was also lack of specialized counsellors who understood the intersex condition. The writer recommends development of a policy guideline on inclusive education for intersex persons; adequate training for school staff and students on how to handle intersex persons.⁴¹

Thomas G, while conducting her research on intersex persons in Tanzania established that in the country, there is no much mention of intersex persons and that they are categorized as either male or female. The discrimination that intersex people face in societies is a consequence of their sex which does not fit in with the conventional meaning of sex by the society which is male or female.⁴² It is believed that the outward physical sex characteristics of having a vagina or a penis automatically means that a person is a female or a male respectively. The issue arises when a

³⁹ Tiffany Jones, *Policy and Gay, Lesbian, Bisexual, Transgender and Intersex Students* (Springer 2014).

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Grace Thomas, 'A Third Sex Identity: Assessing Cultural and Structural Violence against Intersex People in Tanzania' (Masters Thesis, University of Zimbabwe 2017)

<https://ir.uz.ac.zw/bitstream/handle/10646/3313/Thomas_Grace_A_Third_sex_identity.pdf?sequence=1&isAllowed=y>.

mother gives birth to a child who has unique genitalia that does not fit in the traditional definition of sex. How does the community interpret sex and where does the uniqueness of their genitalia fall? The unfair treatment that homosexuals face within the communities is more of sexual orientation. The relationship recognized and accepted by the community is that of the opposite sexes, implying that it has to be between a man and a woman, if people are found conducting themselves differently to the socially accepted relationship then they are discriminated by the society.⁴³This discrimination against intersex persons has resulted in the group not being nationally recognized during the country's population census or through issuance of the national identity card. Once a child is born, the sex is recorded in the birth notification as either male or female, meaning intersex children are not registered as intersex but rather, their parents are forced to choose from the binary category. The sex allocated at birth therefore dictates how that child will develop according to the societal standards.⁴⁴

With respect to access to education, the research found out that the education system does not recognize intersex students in that learning institutions admit students as either male or female; those with boarding facilities, the same cater for male or female students and not intersex persons. Some of the schools have counselling programmes that are meant for parents, teachers and students in the event of disciplinary cases. However, intersex students are not included in the programme and they therefore have to attend the sessions as either male or female.

According to Akinyi M, the most pressing concern is intricate and twofold. First, is the poor understanding among many Kenyans (including LGBTI communities) on sexuality and sexual orientation compounded by inherited colonial criminal law, dogmatic religious belief, and the rigidity of social and sexual hierarchies? Second, is the current low quality of life in general affecting many LGBTI communities and the wider society?⁴⁵ She posits that many arguments and conclusions relating to sexuality and sexual orientation are based on ignorance, religious beliefs and sexual hierarchies perpetrated by the society. She goes further to rely on Rubin's theory of

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ Akinyi Margareta Ocholla, 'Thoughts on LGBTI Activism, Race, and Gender in a Kenyan Context' (2010) 4 *Race/Ethnicity: Multidisciplinary Global Contexts* 123.

sexual hierarchy which resembles a class system where sexual practices, expressions, identities, and communities are ranked, from the most normative and socially approved to the most stigmatized and despised. The mainstream relationships of male-female are recognized and receive support from the State and from the society as well. On the other hand, LGBTI people are frowned upon to the extent that having sex outside the order of nature (read LGBT) is criminalized in the Penal Code of Kenya attracting a jail term of fourteen years. The writer goes on to note that intersexuality and transsexuality were not featured in the repealed Constitution of Kenya 1963 and therefore people did not have a basis for claiming their rights.⁴⁶

As mentioned above, most arguments regarding sexual orientation and sexuality are based on ignorance, religious beliefs and hierarchies and standards set by the society. There is need to reconcile all these factors in order to strike a balance and allow every individual to express themselves sexually or otherwise. Kenya has tried to achieve this by prohibiting discrimination on the grounds of sex and the State has allowed the registration of various Non-Governmental Organizations that seek to protect and promote the rights of LGBTI persons.

The discrimination against sexual minorities does affect the quality of life that they lead. Some may be able to hide their identity in order to fit in the societal categories of either male or female, but this eventually takes a toll on their mental health. Sexual minorities face the challenges of not being able to engage in gainful economic activities thus contributing to their poverty; lack of proper identification hinders their access to services key to their survival; low literacy levels due to lack of education also contribute to their daily struggles. Narrowing down to access to education, a majority of intersex persons are not able to have a peaceful experience at school due to the lack of facilities specifically catering for their needs. The writer recommends that the State should review the current curriculum and the entire education system such that matters of sex, sexual orientation and gender are taught in school at an early stage and institutions should have facilities that cater to the needs of intersex persons- students, teachers and non-teaching staff.⁴⁷

⁴⁶ *ibid.*

⁴⁷ *ibid.*

Professional counselling in learning institutions plays a major role in determining how sexual minorities conduct themselves in the said institutions.⁴⁸ Counsellors are tasked with the duty to detect and eradicate obstacles that forbid pupils from gaining high quality education. For lesbian, gay, bisexual, transgender, queer, intersex youth, hurdles exist within schooling settings, hindering positive educational experiences and contributing to intimidating school atmosphere. One obstacle to equal access to education for youth who are sexual minorities is heteronormative beliefs that saturate educational policies, practices, and environments such as educational heteronormativity. Educational heteronormativity refers to the organizational structures in schools that support heterosexuality as normal and anything else as deviant.⁴⁹

While conducting the study, Strear M found out that deliberations of difference take place in learning institutions, such as modules on racial, political, or religious injustice; however, sexual and gender identity are seldom incorporated in these discussions. Interested parties in the education sector report hesitation to converse about sexual and gender identity due to fear, individual philosophies, lack of awareness, and custom. Therefore, educational heteronormativity continues within learning environments as demonstrated by omission of sexual and gender identity in syllabi, instructional practices, official papers, resources, images and language. There is a gap in terms of education about intersex and how the hormonal and physical changes affect a learner's ability to receive quality education.

Educational heteronormativity has negative effects on sexual minority youths in learning institutions. According to a National Climate Survey, sexual minorities, including intersex face unfair treatment and victimization because of their sexual preference and gender identities. Sexual minority students stated they felt insecure and also that they stopped attending school due to a hostile environment that interfered with their access to a quality education. Further, evidence suggests sexual minority youth show undesirable educational outcomes such as absenteeism, disinterest from school, and low achievement. To this end, the guiding and

⁴⁸ Strear Molly, 'FORECASTING AN INCLUSIVE FUTURE: School Counseling Strategies to Deconstruct Educational Heteronormativity on JSTOR' <<https://vpn.uonbi.ac.ke/proxy/393c4948/https/www.jstor.org/stable/90014855>> accessed 14 May 2020.

⁴⁹ *ibid.*

counselling departments in school have a duty to institute institutional reforms within the school and to break down heteronormative structures.⁵⁰

Some of the strategies put forward to assist sexual minorities adjust in the learning institutions are providing safe spaces for LGBTIQ students; having inclusive facilities like changing rooms, washrooms, and gender-based events that match gender identity. In order to embrace a social justice paradigm, counselors and teachers need to commence a critical and informed dialogue to disrupt dominant narratives and unfair regulatory practices. To look at learning atmospheres through a lens of critical inquiry is a way school counselors can recognize and apply oneself to the obstacles that hinder equal access to high quality public education.

In terms of protection of the rights of sexual minorities in Africa, South Africa stands out as a leading country in the region that upholds the rights of the lesbian, gay, bisexual, transgender and intersex community. Statistics show that same-sex relations continue to be criminalized in more than two-thirds of African countries. Africans have been portrayed as the least accepting of homosexuality in the world.⁵¹ The existence of lesbian, gay, bisexual, transgender and intersex people or their homosexual relations continue to be criminalized in several African countries including Nigeria and Uganda. Homosexuality is also viewed as a psychological or medical issue. South Africa is distinct in terms of efforts towards protection of the rights of sexual minorities.⁵²

In South Africa, homosexuality is protected by the law. Any form of discrimination based on sexual orientation, sex or gender was outlawed during the end of the apartheid regime making it the first nation in the world to declare as unconstitutional any form of homophobic acts. This was further reinforced by various policies and laws.

Regardless of the above, South Africans who do not conform to the traditional roles of identity and sexuality of either male or female are often left out in various government policies and development plans. An example is in the health sector where there are gaps in the protection of intersex persons or those born with congenital variations in their sex characteristics. This implies

⁵⁰ *ibid.*

⁵¹ Tiffany Jones, 'South African Contributions to LGBTI Education Issues' (2019) 19 *Sex Education* 455.

⁵² *ibid.*

that intersex persons are not protected against non-consensual cosmetic medical interventions.⁵³ On the other hand, the study documented that in the education sector, the government of South Africa in conjunction with various Non-Governmental Organizations has made strides in ensuring a safe space for intersex persons while in institutions of learning. Several anti-bullying campaigns have been rolled out in schools across the State with the key emphasis that everyone is born equal and free regardless of their sex or sexual orientation. Training courses have taught education officials, administrators and educators that ‘young people who are or are perceived to be homosexual’ face high victimization risks and therefore require more protection and accommodation.⁵⁴

While conducting a comparison between Kenya and Malta, Tapiwa M noted that a greater number of African countries including Kenya refute the presence of sexual minorities including intersex persons despite convincing data that this group of people exists.⁵⁵ When an intersex child is born, this is treated as unusual and thus, from the very beginning invites all manner of traditional fundamentalism, biases based on heteronormativity. The presence of such generally made ideas disadvantages intersex persons. The modern practice in the world, Kenya included, is that the parents or guardians of a child choose the sex of the child immediately they are born. Parents or guardians in Kenya are not able to register their child as intersex because there is no provision for another sex category, which denies intersex persons the right to be legally recognized.⁵⁶

The instantaneous appalling choice parents or guardians make in order to fit into the requirements of birth registration is to make their child go through medical remedial procedures which are often ornamental and not medically required. Such medical procedures frequently have negative effects on the reproductive capability of the intersex person later in life. It also affects their psychological and physical well-being. Parents or guardians make this choice with

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ Tapiwa Mamhare, ‘The Place of Legal Recognition at Birth in Enhancing the Realisation of the Rights of Intersex Persons : A Comparative Analysis of Kenya and Malta’ (Thesis, University of Pretoria 2017) <<http://repository.gchumanrights.org/handle/20.500.11825/256>> accessed 14 May 2020.

⁵⁶ *ibid.*

little or no information for them to make an informed decision. The failure to provide for intersex persons within the domestic laws not only leads to the invasive corrective procedures in an attempt to fit in the societal boxes of being man or woman but also interferes with the enjoyment of other human rights.

The purpose of birth registration is two-fold; that is legal and statistical. From a legal perspective, it allows an individual to have proof of identity and belonging thus empowers that person to claim their rights. Statistically, it assists the government to have a near precise record of the population and this in turn informs the planning and implementation of development policies.

Whereas there has been a vast amount of study indicating the significance of having intersex matters in academic settings, most of this work focuses on tertiary students; there are countless conversations on sexual minorities and sex education for high school students. However, the conversations lack an aspect of cultural and religious diversity of Australian and New Zealand secondary students. The writer contends that it is key to introduce dialogs that could be connected to intersex issues already in secondary school instead of leaving those discussions to chance, choice, or to medical practitioners. She further suggests that introducing and discussing intersex issues in the high school curriculum is of importance to all students. This is because learners at this stage are usually concerned with sex and their physical look thus it would be prudent to have a comprehensive sex education that addresses the uniqueness of the human body.⁵⁷A change in the school curriculum will have far reaching results in ensuring that intersex persons are given a safe space and are able to identify as such from an early stage in life.

In conclusion, the current literature shows that there is a gap when it comes to intersex persons and access to education. Most writers focus on legal recognition, corrective surgeries and its implications on the individual's life. There is a dearth of information regarding intersex persons and access to education.

⁵⁷ Annette Brömdal and others, 'Intersex Bodies in Sexuality Education: On the Edge of Cultural Difference' (2017).

1.11. Scope and limitation

This study shall focus on intersex persons and their access to quality education in Kenya. It is limited by the fact that society lumps intersex persons together with the LGBT community, a group that is quite vocal in advocating for their rights and they subsequently overshadow the intersex movement.

Another limitation is the societal stigma, discrimination and legal gaps that continue to perpetuate injustices towards intersex persons in their daily lives including that of accessing education.

1.12. Chapter breakdown

This study shall be divided into the following chapters:-

Chapter one is an introduction to the study and shall focus on the background and the current situation regarding the protection of intersex persons in Kenya. It also looks at the justification of the study, problem statement, the research questions and objectives as well as the literature on intersex persons and education.

Chapter two will examine the policy, legal and judicial framework on registration of persons and access to education in Kenya. The chapter will also focus on the judicial pronouncements and their impact in seeking to establish the recognition of intersex persons in Kenya and how this translated to their enumeration in the 2019 Kenya Population and Housing Census.

Chapter three shall cover the challenges faced by intersex persons in accessing quality education in Kenya. It will bring to light the challenges of enrolment into school as an intersex person, the impact of early corrective surgeries on a learner's education journey as well as the lack of facilities that accommodate intersex persons, especially those in boarding schools.

Chapter four is a comparative analysis between Kenya and Malta, which has progressive laws and policies that protect the rights of intersex persons.

Chapter five shall focus on the conclusion and recommendations to the various State agencies that will inform change in policies and laws in Kenya to ensure that intersex persons access quality education at whatever level.

CHAPTER TWO

LEGAL AND POLICY FRAMEWORK ON REGISTRATION OF PERSONS AND ACCESS TO EDUCATION IN KENYA

2.1. Introduction

This chapter will examine the policy and legal framework on registration of persons and access to education in Kenya. The chapter will also focus on the judicial pronouncements and their impact in seeking to enhance the recognition of intersex persons in Kenya; how this translated to their enumeration in the 2019 Kenya Population and Housing Census; and how the legal recognition ties in with accessing education.

2.2. Historical background of education in Kenya

Historically, the Kenya Education Commission report, 1964, sought to reform the education system inherited from the colonial government and to make it more responsive to the needs of independent Kenya.⁵⁸ The report noted that there exists disparities of access to educational opportunities in the country between provinces, districts and divisions in the same provinces and between the sexes.⁵⁹ The disparity between the sexes has resulted in men being more educated than women and this also reflects the higher socio-economic power among the men. The primary reasons have been the traditions, beliefs and prejudices held by the society that women are essentially homemakers while the men are the providers.⁶⁰ The Commission only looked at the disparity in education between males and females, leaving out intersex persons and their right to get an education.

⁵⁸ 'Report of The National Committee on Educational Objectives and Policies' (1964) <<http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-National-Committee-on-Educational-Objectives-1975-to-1976.pdf>>.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

The Mackay Report, 1981, led to the expansion of other postsecondary training institutions. In addition to the establishment of second University, it also recommended the establishment of the 8:4:4 system which removed the advanced (A) level of secondary education.⁶¹

In addition to the above, The Kamunge Report, 1988 concentrated on bettering education funding, quality and significance. The report had a major departure on funding of education and training in Kenya as it proposed a policy of sharing costs among the state, parents or guardians and the society⁶². In terms of quality of education, the report did not look at the kind of environment that learners, especially intersex students, are exposed to while pursuing an education.

Building on the Kamunge report, the Koech report 1999 set out to pinpoint ways of supporting the education system to enable nation-wide unity, reciprocal social responsibility, enhanced industrialised and technological development, long lasting learning, and adjustment in response to varying environments.⁶³ Just like the previous reports, the Koech report does not make reference to intersex persons and how their recognition and inclusion in the education sector would facilitate national unity and social responsibility.

2.3. Legal and policy framework on education in Kenya

2.3.1 Constitution of Kenya

Article 43 (1) (f) guarantees every person the right to education. It further narrows it down in Article 53 (1) (b) by providing that every child has the right to free and compulsory basic education. Further, Article 53 (2) provides that a child's best interests are of paramount importance in every matter concerning the child.

⁶¹ 'Report of the Presidential Working Party on the Second University in Kenya, 1981'.

⁶² 'Report of the Presidential Working Party on Education and Manpower Training for the Next Decade and Beyond, 1988' <<http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Presidential-Working-Party-on-Education-and-Manpower-Training-for-the-Next-Decade-and-Beyond-March-1988.pdf>>.

⁶³ 'Report of the Commission of Inquiry into the Education System of Kenya, 2000' (1999) <<https://www.davykoech.com/wp-content/uploads/2019/04/Koech-TIQET-Report-1999.pdf>>.

Protection from discrimination on any grounds including birth or sex is guaranteed to every person and this means that intersex children should not be treated differently from the male and female students while pursuing an education.

Relying on the principle of the best interest of the child, in this case being the right to get an education, implies that every child, including an intersex child, has the right to access education.

2.3.2 Basic Education Act

The Basic Education Act operationalizes Article 53 of the Constitution by providing a legal framework on basic education in the country. It also establishes various bodies that ensure the quality and standards of education are maintained across the different regions in the country.

The Act provides that a learning institution or an admission officer shall not single out any child looking for admittance on any basis, including sex or gender. However, this is not applicable where a school has been registered and offers education to a particular gender group. In as much as the Act provides for non-discrimination, the provisions that follow have a gap which could be relied on to discriminate intersex students whose bodily characteristics do not respond with the sex that they identify with.⁶⁴

Composition of the county education board has representation from the teachers' service commission, the church, parents, persons with disabilities, child rights organizations but none from the intersex community.⁶⁵ The import of this is that the unique needs of the intersex learners and perhaps staff are not well represented.

2.3.3 Children Act

The Act is the legal framework that protects the rights of the child in line with constitutional provisions as well as regional and international conventions. It also regulates children institutions that may house children as they await adoption or those that are in conflict with the law.⁶⁶

⁶⁴ Basic Education Act No. 14 of 2013 s 34 (2).

⁶⁵ *ibid* 20.

⁶⁶ Children Act No. 8 of 2001 Laws of Kenya s 1.

A child is defined as any human being that is below the age of eighteen years.⁶⁷ The simple interpretation of this definition is that even intersex children are considered as children provided they have not yet attained the age of majority. However, the Act introduces a special category of children, that is, a disabled child to mean a child suffering from a physical or mental handicap which necessitates special care for the child. The Act should also define who an intersex child is since they are also in need of special care, especially at the early stages of the intersex manifestation.

Every child has the right to education, which shall be the responsibility of the State; every child is entitled to free and compulsory basic education.⁶⁸ The Act expressly states that no child shall be discriminated against on any grounds including sex or birth.⁶⁹ This infers that intersex children, despite not being mentioned in the Act, should not be discriminated against based on their status of being born intersex.

2.3.4 Kenya National Examinations Council Act

This statute offers a framework for the administration of national examinations by the Kenya National Examinations Council. The Act provides that the nomination bodies submit two nominees, a man and a woman who may be appointed by the Cabinet Secretary.⁷⁰ The impact of this provision is the lack of representation of intersex persons in the Examinations Appeal Tribunal.

2.3.5 The National Education Sector Plan, 2013-2018

The Plan is a state initiative with the objective of delivering quality basic education thus ensuring sustainable development in the country. One of the key deliverables under the plan is increasing access to education for children who ordinarily are unable to get an education. This is achieved

⁶⁷ *ibid* 2.

⁶⁸ *ibid* 7.

⁶⁹ *ibid* 5.

⁷⁰ Kenya National Examinations Council Act, No. 29 of 2012 s 40 (B) (3).

through policy and management changes that have a positive result of increase in enrolment and transition rates.⁷¹

The Plan addresses the aspect of gender in education where gender is defined as the societal and behavioural characteristics that fit either men, women, boys or girls. Since masculine or feminine roles are a social construct, they can be altered to attain fairness and equality for all in the society. The department of education should provide education on an equal basis.⁷²

Based on the above, all references to gender are taken to mean either boy/girl or male/female; with no mention to intersex children. The Plan therefore does not address the unique needs of intersex children in the education sector.

2.3.6 Ministry of Education, Science and Technology National Curriculum Policy

The policy, which was rolled out in 2014 changed the previous curriculum and introduced a new one that is focused on the learner's interests and capabilities that would increase innovation. The policy however does not factor the unique needs of intersex learners such as ablution blocks and other facilities that form an integral part in the learning process.

2.3.7 Education for All 2015 National Review

The Kenya 'Education for All 2015' National Review Report was prepared by the relevant national authorities for the World Education Forum (Incheon, Republic of Korea, 2015) and submitted in response to UNESCO's invitation to its member states to assess progress made since 2000 towards achieving Education For All (EFA). Both the National Curriculum Policy and the Education For All 2015 Review do not contain any mention of children/ students within the system who are born intersex and how that status impacts on their ability to stay in school, acquire an education or progress themselves in the context of education.⁷³

⁷¹ 'Ministry of Education, Science and Technology, National Education Sector Plan 2013-2018' <<https://www.education.go.ke/index.php/downloads/file/83-national-education-sector-plan-volume-one-basic-education-programme-rationale-and-approach>>.

⁷² *ibid.*

⁷³ 'Education For All, The 2015 National Review' (Ministry of Education, Science and Technology) <<https://unesdoc.unesco.org/ark:/48223/pf0000231637>>.

2.3.8 National Pre-Primary Education Policy

The policy provides that when enrolling a student in a pre-primary learning institution, the head of a school may rely on the child's immunization card, birth certificate or birth notification to register the child. However, failure to have the aforementioned documents shall not prevent a child from being enrolled in a pre-primary school; the parents or guardians are allowed a period of three months to process a birth certificate.⁷⁴ In as much as the policy and the law state that a child shall not be denied admission for lack of a birth certificate, there is a three month window within which to submit the said document. A parent or guardian of an intersex child, whose birth was not registered still has the huge task of getting a birth certificate, even if it means choosing the wrong sex just so that their child can access education.

2.3.9 National Education Management Information System

The National Education Management Information System (NEMIS) keeps track of a learner's academic progress in a bid to ensure that students transition to the following grades.⁷⁵ One of the aspects of this system is that it captures a learner's details including their name and gender (which is either male or female) and then issues him or her with a Unique Personal Identifier (UPI) that will be used at every stage of the learner's education.⁷⁶

In using the NEMIS system, an intersex child is forced to remain as either a male or female and the assigned sex is then captured in all their academic documents. This presents a problem when the intersex child wants to change the sex marker on their documents and the law and subsequent systems do not facilitate this change.

2.3.10 Basic Education Regulations, 2015

The regulations place an obligation to any person managing a learning institution to ensure that there is adequate provision of hygienic facilities which are suitable for different ages and

⁷⁴ 'National Pre-Primary Education Policy Standard Guidelines' (n 16).

⁷⁵ 'National Education Management Information System' (n 17).

⁷⁶ *ibid.*

genders.⁷⁷ The regulations should specifically provide for intersex persons because access to sanitary facilities is a huge challenge for learners and staff who are intersex.

2.3.11 National Curriculum Policy

The policy document by the Ministry of Education seeks to guide implementation of the curriculum reform process that is geared towards offering quality education for all learners at whichever level of education.⁷⁸ One of the goals of the policy is to promote inclusive education and ensure equity in education and training to address the needs of learners with disabilities and vulnerable groups in nomadic and arid and semi-arid counties and those living in extreme poverty and informal settlements.⁷⁹

Special focus has been given to children with disabilities, those living in extreme poverty and those in the arid and semi-arid regions. The rationale being that these special category of learners experience difficulties in the course of their learning and therefore require extra assistance in order to access a good education. Intersex children also face unique challenges due to their sex and should also be considered as one of the learners who need specialized attention. Building a safe learning environment for intersex learner will ensure that they realize their full potential while in school.

2.4. Legal framework on registration of persons in Kenya

2.4.1 Constitution of Kenya

Every citizen is entitled to a Kenyan passport and any document of registration or identification issued by the State to citizens.⁸⁰ The most basic form of identification is the birth certificate, which is issued once a birth has occurred in Kenya. The details contained in the birth certificate include the sex of the child, which as per the birth notification is either male or female.

⁷⁷ The Basic Education Regulations, 2015 s 50 (1) (c).

⁷⁸ 'National Curriculum Policy : Kenya Institute of Curriculum Development' <<https://kicd.ac.ke/curriculum-reform/national-curriculum-policy/>> accessed 24 October 2020.

⁷⁹ *ibid* 22.

⁸⁰ Constitution of Kenya, 2010. Article 12 (2).

Having the binary option of either male or female automatically leaves out children who are born intersex meaning that they cannot obtain a certificate bearing the correct details of being intersex.

Inclusiveness, non-discrimination and protection of the marginalized are some of the national values and principles of governance.⁸¹ As earlier discussed, intersex persons are a marginalized group that should be protected in order to promote their inclusion and participation in all spheres of life.

2.4.2 Births and Deaths Registration Act

The Act places an obligation on any person who is aware of the birth of a child to have the same registered within three months.⁸² In the event that a birth is being registered six months after the occurrence of birth, the registrar is required to have written authorization to register the said birth.

Further, the parents, guardians or any other person present during the birth must inform the registrar of the occurrence of birth and provide the prescribed particulars of the child to the best of their capability.⁸³

Birth is the process of bringing forth a child, whether dead or alive after a period of twenty eight weeks of pregnancy.⁸⁴ Prescribed particulars refers to all the details that may assist a person identify a child and these include the sex, name as well as the date and place of birth.⁸⁵ The register of birth form only provides for either male or female and this essentially means that an intersex child cannot be registered.

All the information filled in the register of births must be complete and accurate. However, the principal registrar has the mandate to correct any errors that may have occurred while filling the

⁸¹ *ibid.* Article 10 (2) (b).

⁸² Births and Deaths Registration Rules, 1966 s 6.

⁸³ Births and Deaths Registration Act Cap 149 Laws of Kenya s 10.

⁸⁴ *ibid.* 2.

⁸⁵ *ibid.*

register of births.⁸⁶ Once the registrar completes registering the birth, the registrar-general then issues a birth certificate with all the correct information.⁸⁷ In light of the aforementioned provisions, the only way an intersex child can be issued with a birth certificate is if they choose to be either male or female; a fact that misrepresents their true identity.

In the event that a parent of an intersex child fails to obtain the child's birth certificate, it means that they cannot be enrolled in school. In most cases, the parents or guardians are forced to choose either male or female as the sex of the intersex child and this presents a challenge for the child when the intersex traits start to manifest during puberty.

2.4.3 Registration of Persons Act

The act lays out the procedure of issuance of a national identity card once an individual attains the age of majority. Upon attaining eighteen years old, a person is required to register with the registrar general within ninety days and thereafter be issued with a national identity card.⁸⁸ One of the details captured in the registration forms is the sex of the applicant, which is either male or female.⁸⁹

Registration of persons is clearly based on the binary model of male or female. This means that intersex persons are locked out from obtaining an identity card unless they choose to be identified as either male or female. Intersex persons are therefore forced to conceal their true identity, which was a natural occurrence.

The identity card is an essential document that is tied with access to various services offered by the state including licences, permits, education and a person may be required to produce it upon demand by any authority.⁹⁰ In the event that an adult fails to register or gives false information while applying for an identity card, the person may be fined or serve a jail sentence upon conviction.⁹¹ Further, intersex persons who have obtained identity cards may have those cards

⁸⁶ *ibid* 28.

⁸⁷ *ibid* 26 (3).

⁸⁸ Registration of Persons Act Cap 107 Laws of Kenya s 6 (1).

⁸⁹ Registration of Persons Rules, 1948 (Kenya). Second schedule.

⁹⁰ Registration of Persons Act Cap 107 Laws of Kenya s 10.

⁹¹ *ibid* 14.

revoked in the event that it is determined that they misrepresented facts, in this case being intersex.⁹²

Intersex adults who may wish to pursue tertiary education are still forced to choose between male or female in order to obtain a national identification card, which is a mandatory document upon enrolment in the learning institution.

2.5. Judicial pronouncements

2.5.1 Richard Muasya v Hon. Attorney General High Court of Kenya⁹³

The petitioner, Richard Muasya, was born with both male and female genitalia but was raised as a male child and given a masculine name by his parents. Owing to his ambiguous genitalia, his parents were unable to secure a birth certificate but managed to enrol him in school even though he dropped out while at standard three. When he became an adult, he entered into a marriage which did not last because his wife discovered his intersex status. As a result of his poor education background and low economic status, he was charged with the offence of robbery with violence at the Kitui Chief Magistrate Court where he underwent trial.

As Richard Muasya was held in a remand prison pending the conclusion of his case, he underwent the normal legal body search at the prison where it was discovered that he had both the male and female genitalia. The prison wardens were in a predicament as to whether to detain the Muasya in a female cell or a male cell; and they therefore transferred the matter to the Kitui Magistrate's Court for further guidance on the matter. The magistrate directed that the petitioner should undergo a medical exam to verify his gender and this was done at the Kitui District Hospital. Upon performing various medical tests, the doctor established that indeed Richard Muasya had unclear genitalia. The stated that the petitioner was a vulnerable person that needed protection and therefore ordered that he be held at the Kitui Police Station until his matter was finalized.

⁹² *ibid* 18A.

⁹³ *RM v Attorney General & 4 Others Petition No 705 of 2007* (High Court of Kenya).

Upon conclusion of his trial, the petitioner was found guilty of robbery with violence, a capital offence punishable by death. He was sent to Kamiti Maximum Prison where the prison medical officers examined him and confirmed that he was a hermaphrodite. While at the prison, Richard Muasya shared holding cells, sanitation facilities and even beddings with the male inmates. As a result, he faced constant physical and mental abuse to the extent of being molested by curious male inmates. The petitioner claimed that his dignity as a human being and his fundamental rights against inhuman treatment, discrimination on grounds of sex, and rights to freedom of association, freedom of movement, right to fair hearing and protection under the law were violated.

In defending the case the advocate stated that the petitioner was an intersex person because he was born with reproductive organs that could not be clearly determined whether they were for a male or a female. He also noted the law at the time did not define who an intersex person is and therefore relied on the definition of intersex as the congenital physical sexual differentiation which is atypical to whatever degree.⁹⁴ Another definition relied upon was that an intersex person is a person who has physical, hormonal or genetic features that are not fully female or fully male; or a combination of male or female; or not female or male.⁹⁵

Another argument that was relied on was that the failure of the law to recognize Muasya as an intersex person affected his other rights and freedoms including the right to life, freedom of association and movement as well as the right to security of the person.

For example, the petitioner's freedom of association, and freedom of movement, under Sections 80 and 81 of the Constitution⁹⁶ respectively have been encroached on because he can neither interact nor move around at will without proper identification documents. In addition, the petitioner was deprived of his right of freedom of movement because the same was enabled by documents such as an identity card and passport which could only be acquired after getting a

⁹⁴ 'Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 | South African Government' <<https://www.gov.za/documents/promotion-equality-and-prevention-unfair-discrimination-act>> accessed 3 September 2020.

⁹⁵ 'Legislation Act 2001 | PDF' <<https://www.legislation.act.gov.au/View/a/2001-14/current/PDF/2001-14.PDF>> accessed 3 September 2020.

⁹⁶ The Constitution of Kenya, Revised edition 2008 (2001).

birth certificate. In the instant case, Muasya could not obtain the basic travel documents unless he misrepresented his sex that he was either male or female.

On the other hand, opposing counsel challenged the petition stating that RM did not have identification documents simply because he did not apply for the same and not because the laws do not provide for intersex persons. It was the respondent's case that the law as is, sufficiently caters to either the males or females, and since RM identified as male, he should have applied for a birth certificate since his prescribed particulars, that is being male, was known to him.

In addition to the above, the respondents contended that it was not the court's duty to introduce a new sex category of intersex persons; this is the responsibility of the legislature in terms of enacting or amending laws in the country.

The argument was that the term sex in Section 70 and 82 of the Constitution⁹⁷ should have a broad interpretation, to include intersex persons. This would ensure equality for all before the law. However, the court was cautious about this argument. Firstly, the term sex as used in Sections 70 and 82 of the Constitution encompasses the two categories of male and female gender only. To construe the term sex as including intersex would be similar to introducing intersex as a third gender category in addition to the primary male and female. The court was of the opinion that an intersex person can be grouped as either a male or a female and that the current law therefore recognizes them. It viewed that there was no need of introducing intersex as a third sex category.

Secondly, the court was of the view that if there was need for the legislature to have intersex as a third sex group, then it would have provided for the same in the Constitution or other statute. In its view, the word sex in Sections 70 and 82 of the repealed Constitution should only be interpreted using the ordinary and natural meaning which encompasses all persons including intersex persons within the broad categories of male and female. Based on the above findings, the court held that the petitioner is well covered by Kenyan laws and the Constitution and has therefore not been discriminated or failed to be legally recognized by law.

⁹⁷ *ibid.*

Having read the facts and arguments presented by the parties, it is prudent to state that indeed RM was accorded inhumane treatment while in custody. Instead of holding him in a male facility, the officer in charge should have directed that RM be held in a special facility, away from the other inmates as a measure of protecting his physical and mental wellbeing. On the other hand, in as much as it is not in the judiciary's purview to amend laws, the trial court should have advised Parliament on the need to amend the Prisons Act and other pieces of legislation in order to provide for intersex persons and their unique needs.

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

On or about 3rd May 2009, E.A. went to Kenyatta National Hospital where she gave birth to a child, Baby A, who was born with both male and female organs. Seven days later, Kenyatta National Hospital issued the mother with various documents used in the process of carrying out genitogram tests, x-rays and scans on that baby and a question mark '(?)' was indicated for the column indicating the child's sex; and this implied that neither the mother nor Kenyatta National Hospital was aware of Baby A's sex. Due to the question mark that was inserted on the child's medical, treatment and the birth notification, baby A had not been issued with a birth certificate as at the time the petition was brought before the high court.

In court, the Petitioner claimed that having a question mark in the child's hospital documents offends their right to be legally recognized in law and takes away their dignity. It also subjected baby A to inhuman and degrading treatment, a constitutionally guaranteed right.

One of the issues raised in the petition was lack of legal recognition of baby A. In Kenya, lawful recognition begins with the issuance of an acknowledgement of birth slip issued by the health facility or hospital where the birth occurred and later a birth certificate issued by the Registrar of births. The name and sex of the child are some of the prescribed particulars that must be entered into the statutory documents before a birth is registered under section 7 of the Act.⁹⁸ By entering

⁹⁸ Births and Deaths Registration Act Cap 149 Laws of Kenya s 2.

the question mark on the baby's documents essentially denied it the right to be issued with the most basic form of identification, a birth certificate, issued by the State.

It was the petitioner's case that a birth certificate is vital in all spheres of life and development of a child because it is a gateway to enrolment in a learning institution, issuance of travel documents, a national identity card as well as employment. Without the birth certificate, a child is limited in terms of accessing these rights and services provided by the state and other private institutions.

Further, the petitioner's advocate argued that since there was no documented data and information on intersex children or adults, it would then be impossible for those individuals to be legally recognized by the State. This therefore means that children born with both male and female organs are marginalized and vulnerable and also exposed to unfair treatment because of their sex. Based on the aforementioned, the petitioner urged that intersex children remain as targets of discrimination because there is no law or policy that protects them and even the country's national census does not recognize them.

On the other hand, the respondents argued that Baby 'A' was not being discriminated against since the law provides for the sex category of male or female and therefore baby 'A', through the mother, can choose which sex category to be identified with based on the dominant sexual or hormonal characteristics.

Regarding lawful recognition of intersex persons, the attorney general submitted that the court cannot direct the office of the attorney general to come up with guidelines that recognize intersex persons in the country; the duty to make laws and regulations is upon the Parliament of Kenya pursuant to Part 4 of the Constitution.

In determining whether Baby A was denied the right to legal recognition, the court looked at the law which provides that every registrar shall keep a register of all births and deaths and their

respective prescribed particulars, when he receives notification of the same.⁹⁹ In this case, prescribed particulars include the sex of the child.¹⁰⁰

From the above provisions of the law, it is clear that for a birth to be completely registered, the particulars of birth are required. The particulars of birth include the sex of the child; though sex has not been defined by the parent Act on birth registration or in the Interpretation and General Provisions Act. However, the register of births indicates that the sex of a child can either be male or female; there is no other category that caters for a child born with both female and male genitalia. In addition, the court reiterated the constitutional provisions that no person shall be discriminated against on any ground including that of sex; though the Constitution does not also define the term sex.

In order to get the meaning of the term sex, the court relied on the meaning that sex refers to either being male or female depending on one's reproductive functions.¹⁰¹ Another definition relied upon is that sex refers to the characteristics of structure and purpose, that distinguish a male from a female organism.¹⁰²

The court relied on the definition that sex refers to the categorization of persons into either male or female organisms based on their reproductive functions and their peculiarities of structure and function as organisms.

Regarding the specific question of legal recognition, the court observed that while Baby A was assigned the male sex at birth, as is shown from the birth records adduced in court, the fact that the laboratory report form from Kenyatta National Hospital had the question mark recorded as the baby A's sex might have created uncertainty as to whether the child was male or female. This however should not infer that baby A was not entitled to all the rights and freedoms guaranteed in the Constitution.

⁹⁹ *ibid* 7 (1).

¹⁰⁰ *ibid* 2 (a).

¹⁰¹ 'Concise Oxford English Dictionary'.

¹⁰² 'Black's Law Dictionary'.

The trial court held that a child born as an intersex is no different from any other child. The law provides that every child has the right to a name and nationality from birth which grants the child legal recognition and identity acquired through issuance of a birth certificate, a right to access health services and a right not to suffer discrimination of any form arising from their intersex status; to this end, the court directed that Baby A, upon application, be issued with a birth certificate. The Attorney General was directed to come up with information related to the organ, agency or Institution responsible for collecting and keeping data related to intersex children and persons, generally and the status of a statute regulating the place of intersex persons as a sexual category and guidelines and regulations for corrective surgery for intersex people.

In agreement with the court's findings, a child born as an intersex is no different from that born as a male or female. All children are entitled to legal recognition, which in this case is a birth certificate having the correct information including intersex as the sex of that child.

2.5.3. Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu¹⁰³

Audrey Ithibu Mbugua who was initially called Andrew Ithibu Mbugua was born and raised as a male child. She attended Kiambu High School, a male only high school where she sat for her Kenya Certificate of Secondary Education Examination in 2001. She performed quite well and was awarded the Kenya Certificate of Secondary Education that indicated her mean grade of A-. In addition to the grade, the certificate also had her previous name Andrew Ithibu Mbugua and the mark 'M' indicating that she is a male student.

Since October 2008, Audrey has been receiving medical treatment at Mathare Hospital for gender identity disorder and depression where she identifies as a female and not male. Audrey then requested the Kenya National Examination Council to change the details on her certificate to indicate her current name Audrey Mbugua Ithibu from what was appearing i.e Andrew Mbugua Ithibu and to change the sex marker from male to female.

¹⁰³ *Republic v Kenya National Examinations Council & another Ex Parte Audrey Mbugua Ithibu JR Case No 147 of 2013* (High Court of Kenya).

The national examination council declined to change the details as requested, citing that it did not have the mandate to do so. For individuals who are or have undergone sex changes, and they have certified medical records stating the same, then the council can change the particulars. The court agreed with the Council's position and therefore the details of her examination certificate were not changed.

Dissatisfied with the decision, Audrey filed a judicial review case seeking compelling orders against the Kenya National Examination Council to change the particulars of the name to reflect her new name and also remove the gender marker on the certificate. In effecting these changes, the Kenya National Examination Council would be acting within its mandate.

Audrey highlighted that as per the law, the details to be captured in a certificate are the name of the candidate, the candidate's index number, the name of the school, the subjects that have been examined with the respective codes and the grades obtained.¹⁰⁴ The rules do not mention the candidate's sex or gender as one of the particulars to be captured in the certificate upon completion of the secondary school examinations.

She further highlighted that the Kenya National Examinations Council has the power to recall a certificate for purposes of effecting an amendment to the particulars or for any other reason where it considers it necessary.¹⁰⁵ This therefore means that the Council has the legal grounding to comply with Audrey's request. To this end, the court issued an order to the Kenya National Examinations Council directing it to remove the gender marker on Audrey's certificate.

The trial court issued a progressive judgment that has paved way for sexual minorities who need to change their academic and identification documents to match their preferred sex or gender. However, the process should not be abused but rather stringent measures like production of medical records that show the new health developments. This case is a positive precedent that intersex persons can rely upon to have the sex marker appearing on their examination certificates removed such that it protects them from further discrimination.

¹⁰⁴ Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules 2009 s 9.

¹⁰⁵ *ibid* 9 (3).

2.6. Enumeration of intersex persons in Kenya

Following the court's decision in the Baby 'A' case that affirmed that intersex persons have rights that should be protected and respected, the Honorable Attorney General appointed the Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya, hereinafter referred to as the taskforce.¹⁰⁶ The taskforce was tasked with compiling data on the number, geographical distribution and the challenges experienced by intersex persons in the country. It was also responsible for reviewing the various legal and policy frameworks that touch on intersex persons and provide tangible recommendations for their protection and recognition.

In carrying out its functions, the taskforce engaged the Kenya National Bureau of Statistics (KNBS), an agency tasked with the collection, compilation, analysis, publication and dissemination of statistical information, and the co-ordination of the national statistical system¹⁰⁷ with the aim of having intersex persons enumerated in the 2019 Kenya Population and Housing Census.

Through a consultative process spearheaded by the bureau's technical working committee comprising of various stakeholders and having representation of the taskforce, a third sex marker for intersex was introduced in the census questionnaires. The bureau went further to define the term sex to mean the biological condition or characteristics of being male, female or intersex.¹⁰⁸ This was the first time in Kenya that intersex persons were counted during a national census, an indication that the State is slowly recognizing their existence and thus working towards their recognition.

The actual enumeration took place from the night of 24th/25th August 2019 and ended on 31st August 2019. A total of 47,564,296 persons were enumerated during the census, comprising

¹⁰⁶ Kenya Law | Kenya Gazette.

¹⁰⁷ Statistics Act No 4 of 2006 Laws of Kenya s 4 (1).

¹⁰⁸ '2019 Kenya Population and Housing Census Volume III: Distribution of Population by Age, Sex and Administrative Units' (Kenya National Bureau of Statistics) <<https://www.knbs.or.ke/?wpdmpro=2019-kenya-population-and-housing-census-volume-iii-distribution-of-population-by-age-sex-and-administrative-units>> accessed 3 September 2020.

23,548,056 males, 24,014,716 females and 1,524 intersex; translating to 3.2% of intersex persons against the total population in the country.¹⁰⁹

The data gathered by the bureau of statistics is a positive move towards recognition of intersex persons in the country; it is proof that they are real people who are in need of protection. The numbers recorded will assist the national and county governments when developing annual plans and budgets to include the needs of intersex persons be it in terms of budgetary allocation towards their health, education and other sectors of development. The figures create a solid base for change in policy and advocacy.

2.7. Conclusion

The policy and legal framework regarding education and registration of persons in Kenya has always taken the binary approach of either male or female in terms of the sex of a person. This has continuously put intersex persons at a disadvantage since they are forced to identify with either one of the two sex categories just so that they may get the basic identification documents that may enable them to fully enjoy their rights, including accessing education. However, the judiciary has made attempts to bring out the plight of intersex persons by making favourable judgments that are geared towards protecting their rights.

The next chapter brings out the challenges and human rights violations that intersex persons are faced with as they attempt to seek an education in Kenya.

¹⁰⁹ *ibid.*

CHAPTER THREE

CHALLENGES EXPERIENCED BY INTERSEX PERSONS WHEN ACCESSING EDUCATION IN KENYA

3.1. Introduction

Many of the challenges faced by the intersex community are borne out of a lack of understanding and awareness of what it means to be intersex, and the problematic ways in which it has been defined and addressed within the medical field.¹¹⁰

This chapter will look into the challenges experienced by intersex persons from a human rights violations perspective. Infringement of their fundamental rights and freedoms directly affects the quality and level of education they attain.

3.2. Challenges

3.2.1. Admission into a learning institution

Everyone has the right to education; children have the right to free and compulsory basic education provided for by the government.

A child is eligible to be admitted in a pre-primary learning institution when they have attained the age of four years; which age may be determined by relying on the birth certificate or any other document.¹¹¹ However, the current practice is that parents or guardians are required to produce a birth certificate before enrolment in a basic education institution or when sitting the national examinations.

In determining the age of a child, a head teacher shall use a child's immunization card or birth certificate/notification for enrolment at Pre-primary. However, no child shall be denied admission for lack of submitting the above documents; but the parents shall be given three months to acquire a birth certificate.¹¹²

¹¹⁰ Gina Wilson, 'Equal Rights for Intersex People' (2013) 10 The Equal Rights Review 134.

¹¹¹ Basic Education Act No. 14 of 2013. S. 33

¹¹² 'National Pre-Primary Education Policy Standard Guidelines' (n 16).

In as much as the policy and the law state that a child shall not be denied admission for lack of a birth certificate, there is a three month window within which to submit the said document. A parent or guardian of an intersex child, whose birth was not registered still has the huge task of getting a birth certificate, even if it means choosing the wrong sex just so that their child can access education.

3.2.2. Freedom and security of the person

Every person the right to freedom and security of the person which entails the right not be subjected to any form of violence from either public or private sources; subjected to torture in any manner whether physical or psychological; or treated in a cruel, inhuman or degrading manner.¹¹³

Despite the law protecting learners from any form of physical or mental harassment, many intersex students are bullied by their peers in school.¹¹⁴

Intersex persons are often the target of bullying and ridicule from their peers and teachers while in school. The school staff, both teachers and support staff play a major role in how intersex learners are treated in the schools. If the staff respect and protect the interests of intersex learners, then the students shall follow suit and protect their fellow students who are intersex and vice versa.¹¹⁵

As a result of the constant ridicule and bullying from teachers and fellow students, coupled with the lack of proper administrative channels to address their issues, the learning environment becomes quite toxic for the intersex learners. This often results in learners dropping out of school and seeking alternative ways of living as opposed to seeking an education.¹¹⁶

¹¹³ Constitution of Kenya, 2010 Article 29.

¹¹⁴ Basic Education Act No. 14 of 2013 s 36.

¹¹⁵ 'Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya - Kenya Law Reform Commission (KLRC)' (n 1).

¹¹⁶ *ibid.*

As narrated by one of the intersex persons who was a constant target of taunting and ridicule from the fellow students who wanted to see what was in between his legs and this caused him to become withdrawn from school and the society.¹¹⁷

3.2.3. Dropping out

In a bid to fit into the binary sex category of either being male or female, intersex persons undergo a number of corrective surgeries. This involves frequent medical appointments, prolonged hospitalization and recovery periods either at home or in the hospital. As a result, the intersex child misses out on the school session and may face difficulties in trying to catch up with his fellow students. Some are able to continue with the learning but others opt to drop out of school due to the frustrations they encounter in trying to catch up.

As per the taskforce report, intersex persons often find the education environment unbearable. This affects their general self-esteem which in turn reflects on the learner's poor academic performance even though a student might be academically smart. In the end, most intersex learners opt to drop out of school as a way of getting away from the constant ridicule in school. In the big picture, low transition rates are recorded by intersex persons and this affects the quality and level of their socio-economic might.¹¹⁸

Another cause of intersex students dropping out of school is the constant ridicule that they face from their peers. Most of the learners are unable to cope with this and often resort to staying at home where it is somewhat safe.

3.2.4. Freedom from discrimination

Every person is equal before the law and has the right to equal protection and equal benefit of the law. Further, women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.¹¹⁹

¹¹⁷ marymwendwa, 'Challenges of Intersex Community in Kenya' (*Talk Africa*, 28 February 2017) <<https://www.talkafrica.co.ke/challenges-intersex-community-kenya/>> accessed 21 October 2020.

¹¹⁸ 'Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya - Kenya Law Reform Commission (KLRC)' (n 1).

¹¹⁹ Constitution of Kenya, 2010. Article 27

In as much as the law guarantees equal protection and equal access to opportunities, the same is limited only to men and women; intersex persons have not been catered for. This means that in order for them to access such facilities they have to choose to be either male or female. What then happens to those intersex persons who do not identify as either and choose to remain intersex?

One of the guiding principles regarding provision of basic education is that of safeguarding every child from unfair treatment either inside the school or by an education division or institution on any ground whatsoever.¹²⁰ No child shall be the subject of discrimination on any ground including sex or birth.¹²¹

In addition, the Constitution protects every person from being discriminated against on any grounds including sex. For intersex students however, this is not the case. A majority of them face unfair treatment when it comes to pursuing education in that the male or female students are given priority over them.

Intersex persons are frequently exposed to discrimination and cruelty if their intersex status is known, or if they are viewed not to comply with sex and gender norms. Anti-discrimination laws or policies do not essentially prohibit discrimination against intersex persons, leaving them at risk of discriminatory practices in a variety of settings, including access to education, public services and employment.¹²²

¹²⁰ Basic Education Act No. 14 of 2013 s 4 (e).

¹²¹ *ibid* 5.

¹²² 'Background Note on Human Rights Violations against Intersex People' (Office of the High Commissioner for Human Rights)
<<https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf>>.

3.2.5. Academic certificates

Once a candidate has completed their primary school education, they are issued with a certificate indicating their name, the learning institution and the subjects and grades attained.¹²³ The same applies to students who have sat their secondary school examinations.¹²⁴

The academic certificates issued indicate the name of the student but the rules do not provide a mechanism for change of the particulars in the event that an intersex person wishes to change the name that appears on the certificate to match with the sex they have chosen.

3.2.6. Right to health

The Constitution guarantees every person the right to the highest attainable standard of health including reproductive health.¹²⁵ Health refers to the state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.¹²⁶

Mental health is a factor that determines a person's economic and social wellbeing. It affects how an individual or society relate and their general lifestyle. A healthy mind results in higher education which may yield a higher economic status and better relationships with other members in the society.¹²⁷

Intersex persons are often pre-disposed to suffering from various mental illnesses. This is due to the lack of the general understanding of who an intersex person is and their needs, discrimination, myths and physical abuse.¹²⁸ An unstable environment risks exposing children to mental disorders.

¹²³ Kenya National Examinations Council(Kenya Certificate of Primary Education)Rules, 1997 s 14(1).

¹²⁴ Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination)Rules, 2009 s 9.

¹²⁵ Constitution of Kenya, 2010. Article 43(1) (a).

¹²⁶ Health Act No. 21 of 2017 Laws of Kenya s 2.

¹²⁷ 'Kenya Mental Health Policy, 2015-2030' <<http://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf>>.

¹²⁸ 'Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya - Kenya Law Reform Commission (KLRC)' (n 1) 122.

Since intersex is not a common phenomenon that people openly talk about, intersex students may shy away from talking to counsellors as a way to ease their pressures and this may lead to mental health problems.

3.2.7. Right to reasonable standards of sanitation

In addition to the right to health, every person has the right to accessible and adequate housing and to reasonable standards of sanitation.¹²⁹

The law requires that public buildings, which include schools and colleges to provide for sanitation facilities (bathrooms and toilets) where applicable that are accessible by members of the public.¹³⁰ The rules go further to provide categorically for sanitation facilities for males and females.¹³¹

By having it prescribed that sanitation facilities are to be provided for either male or female students clearly leaves out the needs of intersex learners who are forced to either choose which facilities, between the two, they will use in order to relieve themselves.

One of the intersex persons narrated in an interview that he used to wake up at 3:00 am just so that he could take a shower peacefully before the other female students. This was because the school did not provide bathrooms for intersex learners.¹³²

3.2.8. Expulsion and suspension from school

No child who has been admitted in school shall be expelled except in the event of delinquent behaviour by the student.¹³³ However, intersex learners are often suspended from school due to their nature of being intersex and not because of disciplinary issues.

Intersex persons and other sexual minorities are sometimes expelled or suspended from school once their identity is discovered by the school administration. In a survey conducted by the Kenya Human Rights Commission, 23% of the respondents interviewed testified having been either

¹²⁹ Constitution of Kenya, 2010. Article 43(1) (b).

¹³⁰ Public Health Act Cap 242 Laws of Kenya s 126.

¹³¹ Public Health (Drainage and Latrine) Rules s 86.

¹³² Deutsche Welle (www.dw.com), 'A Third Gender for Kenya? | DW | 17.04.2019' (DW.COM) <<https://www.dw.com/en/a-third-gender-for-kenya/a-48375912>> accessed 26 October 2020.

¹³³ Basic Education Act No. 14 of 2013 s 35.

expelled or suspended from school on grounds of actual or suspected sexual orientation or gender identity.¹³⁴

3.2.9. Comprehensive sexuality education

Comprehensive sexuality education is a rights based approach that seeks to equip children and young people with the knowledge, skills, attitudes and values that will enable them to develop a positive view of their sexuality, in the context of their emotional and social development.¹³⁵

The education focuses on the changes that occur in the male or female body but leaves out the changes in the intersex body. Students who are intersex are not given an opportunity to understand the changes occurring in their bodies in order to appreciate themselves. This results in confusion and low self-esteem for the intersex students and it also hinders other students from understanding the intersex spectrum and how best to accommodate their fellow learners.

3.3. Conclusion

Education is a key pillar towards the realization of independence and development. It offers one an opportunity to explore life from a global and regional perspective. Intersex students should not be denied this opportunity; there should be reasonable accommodation in our learning institutions. Despite the challenges they face, intersex learners are determined to complete their education.

The next chapter is on comparison between Kenya and Malta while exploring the lessons that Kenya can borrow in order to better protect the rights of intersex persons in the education sector.

¹³⁴ Kenya Human Rights Commission, 'The Outlawed Amongst Us: A Study of the LGBTI Community's Search for Equality and Non-Discrimination in Kenya' (Kenya Human Rights Commission 2011).

¹³⁵ <https://plus.google.com/+UNESCO>, 'Why Comprehensive Sexuality Education Is Important' (*UNESCO*, 15 February 2018) <<https://en.unesco.org/news/why-comprehensive-sexuality-education-important>> accessed 26 October 2020.

CHAPTER FOUR

BEST PRACTICE IN MALTA ON ACCESS TO EDUCATION FOR INTERSEX PERSONS

4.1. Introduction

This chapter examines how Malta, a relatively progressed country due to its legal and policy framework that recognizes intersex persons and enables them access education, has protected the rights of intersex persons. The chapter shall also draw an analysis of the protection of intersex persons in Kenya and Malta and draw lessons for implementation in Kenya.

4.2. Policy and legal framework on education in Malta

4.2.1. The Constitution of Malta

The Constitution of Malta provides for compulsory and free primary education for all¹³⁶ and the bright but needy students are entitled to financial aid for them and their families, in order to assist them attain the highest level of primary education.¹³⁷

Every person is protected from discrimination; no law shall be discriminatory in its form or in its effect.¹³⁸ The Constitution prohibits any form of preferential treatment based on race, place of origin, sex, sexual orientation or gender identity.¹³⁹

This Constitutional protection guarantees all children, intersex children included, of basic education at primary level which shall be paid for by the State.

4.2.2. Education Act

Under the Act, the compulsory school age begins at five years up to fifteen years, which is the age in secondary school.¹⁴⁰ Every citizen has the right to receive education and instruction without any discrimination on the grounds of age, sex, disability, belief or economic means.¹⁴¹ This implies that intersex children have the right to access education, provided they are of school going age, and shall not be treated differently by virtue of their status.

¹³⁶ Constitution of Malta Art. 10.

¹³⁷ *ibid* Art. 11.

¹³⁸ *ibid* Art. 45 (1).

¹³⁹ *ibid* Art. 45(3).

¹⁴⁰ Education Act Cap 327 Laws of Malta s 2.

¹⁴¹ *ibid* 3.

The State has a duty to offer education and instruction in all schools. It also has the duty to ensure that there exists a system of schools and institutions accessible to all citizens and promotes their full development.¹⁴²

4.2.3. Trans, Gender Variant and Intersex Students in Schools Policy

The government of Malta developed the education policy in order to fully implement the provisions of the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC). The overall objective of the policy is to make sure there is a secure and supportive learning environment where institutions appreciate and accommodate the various potentials and needs of trans, gender variant and intersex students.¹⁴³

As per the policy, all students including trans, gender variant and intersex students have the right to converse and express their gender identity with whomever they choose. The school is required to provide a conducive environment for the students to discuss their issues.

Once a student discusses their gender identity, the policy dictates that the staff member shall direct the student to the relevant support staff who shall offer them counselling services and discuss on how best the school can assist them in transitioning to their preferred identity. This will involve coming up with a school management plan that supports and ensures the school responds to the students' needs.¹⁴⁴

The school support management plan shall take into account the psychological needs of the student and if necessary their family members, gender specific facilities like changing rooms and toilets, how to deal with other students who may be affected by the gender identity revelations as well as the need for the support staff to be adequately trained on matters gender expression and identity.

¹⁴² *ibid* 4.

¹⁴³ 'Trans, Gender Variant and Intersex Students in Schools Policy, 2015' (2015) 3 <<https://tgeu.org/wp-content/uploads/2015/06/Malta-Education-Procedures.pdf>>.

¹⁴⁴ *ibid* 4.

In the event that a student wishes to transition to their preferred gender identity, the school has to come up with a student transition management plan. The policy recommends transitioning during the school holidays in order to uphold the student's privacy and confidentiality.

The student transition management plan should provide for continuous psychological support to the student seeking to transition, their parent(s) or guardian(s) as well as the fellow students who may be affected by the transition. According to the plan, the transition process should commence once such application is filed in court and should not wait for the court's final judgement.¹⁴⁵

4.2.3.1. Key Features of The student Transition Management Plan

Name and pronoun

A learner should be addressed with their self-identified name and pronoun corresponding to their gender identity once the transition application has been filed in court.

Access to gender specific activities and areas

Students shall have the right to use amenities such as lavatories and changing rooms that match their gender identity. The school may retain separate amenities for males and females but leave accessibility based on one's gender identity.

However, the school should not have specific facilities for trans, gender variant and intersex students as this will expose them to the rest of the school population and result in negativity and the concerned students may be targets of bullying. The facilities should be integrated.

Privacy and confidentiality

Keeping the student's need for a transition as a private affair is very important. It should not be assumed that the school community is aware of the transition process and therefore this information should not be disclosed randomly. In the event the student remains in the same school after the transition, psychosocial support should be given to the fellow students, teaching staff and the community around the school in order to help them cope with the transition.

School documentation

The school's official documentation such as school register, school identity card shall be changed once the court has authorised the said change under the GIGESC Act. The school shall ensure that

¹⁴⁵ ibid 6.

the student's documents reflect the newly acquired legal name or gender identity. Further, the student may apply for change of particulars in any certificate that had been issued earlier before the transition took place.

Bullying, discrimination and harassment

No student shall be discriminated or bullied by virtue of their trans, gender variant or intersex status. Any person caught discriminating against such students shall be punished accordingly.

4.2.4. Addressing Bullying Behaviour in Schools Policy

The anti-bullying policy was developed to address violence, bullying and harassment in schools that was targeted at students of diverse sexual orientation and gender identity and those that belonged to the minority and vulnerable groups. The overall objective is to develop a child friendly environment by ensuring that violence is curtailed against and amongst children.¹⁴⁶

Bullying has been defined as behaviours which are repeated over time by an individual or a group and which are intentionally hurtful in a direct or indirect manner against a person who has difficulty defending himself or herself.¹⁴⁷ Transphobic or homophobic bullying is one type of bullying where members of diverse sexual orientation and intersex status are targeted either physically or psychologically simply for being different.

Schools are required to provide a conducive environment where the physical and mental wellbeing of the students is taken care of. In the event of transphobic, homophobic or any other type of bullying occurs, the persons involved should face the consequences of their actions and make amends with their victims.¹⁴⁸

¹⁴⁶ 'Addressing Bullying Behaviour in Schools Policy, 2014' 5
<<https://education.gov.mt/en/Documents/Addressing%20Bullying%20Behaviour%20in%20Schools.pdf>>.

¹⁴⁷ ibid 11.

¹⁴⁸ ibid 16.

4.3. Policy and legal framework on registration of persons in Malta

4.3.1. Civil Code

The Civil Code provides for inter alia, registration of births, marriages, deaths and the rights that accrue with each category of registration. With regard to the registration of births, the Act requires the parents, guardians or any other person involved in the birth of the child to inform the officer charged of recording birth of such occurrence.¹⁴⁹

In terms of the particulars of birth, the certificate shall have the details of the child which include the name of the child, the date and time of birth, and the sex of the child. In the event that the gender identity of the child is not determined at first instance, the law allows for it to be recorded as “undeclared” until such a time as when the same is determined.¹⁵⁰ This implies that children born intersex have the opportunity to receive a birth certificate even though their sex or gender is not definite.

Further, if a conflict arises as a result of the birth being recorded as “undeclared” the parents may, within thirty days of being issued with the birth notification, make an application to the Civil Court (Voluntary Jurisdiction Section) requesting it to order the correct sex to be indicated.¹⁵¹ However, if the thirty days lapse, the status quo remains.

Another aspect of protection under the Act, is the form in which the birth is recorded. The Act does not provide a male or female check box in the birth certificate. This allows for intersex persons to be registered as “undeclared” until they are certain of their intersex status.¹⁵²

4.3.2. Identity Card and Other Identity Documents Act

The Identity Card and Other Identity Documents Act makes provision for issuance of identification documents. Under the Act, every Maltese person who has attained the age of fourteen years has the right to possess a valid identity card.¹⁵³ As the Act refers to every person, this includes intersex persons as well.

¹⁴⁹ Civil Code Cap 16 Laws of Malta s 272.

¹⁵⁰ *ibid* 278 (1) (c).

¹⁵¹ *ibid* 278 (2).

¹⁵² *ibid* Form C Part II First Schedule.

¹⁵³ Identity Card and Other Identity Documents Act Cap 258 Laws of Malta s 4.

Among the particulars to be captured in the identity card is the sex of the person. Having the broad definition of sex as the biological characters that make one as either male, female or intersex, this by implication infers that the sex to be included may also be that of intersex.

4.3.3. Gender Identity, Gender Expression, Sex Characteristics Act

Passed into law in 2015, the Gender Identity, Gender Expression, Sex Characteristics Act (GIGESC Act) provides for the recognition and registration of the gender of a person and regulates the effects of such a change, as well as the recognition and protection of the sex characteristics of a person.¹⁵⁴

The Act specifically defines the terms ‘gender expression’, ‘gender identity’, ‘gender marker’, and ‘sex characteristics’. Gender expression refers to each person’s manifestation of their gender identity, and/or the one that is perceived by others while gender identity refers to each person’s internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance and/ or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms.¹⁵⁵

Gender marker refers to the identifier which classifies persons within a particular sex category. Sex characteristics refers to the chromosomal, gonadal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia and/or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure.¹⁵⁶

Having these terms defined in the Act shows that Malta is at the fore front in recognizing and protecting the rights of sexual minorities regardless of which spectrum they fall under.

¹⁵⁴ Gender Identity, Gender Expression and Sex Characteristics Act Cap 540 Laws of Malta.

¹⁵⁵ *ibid* 2.

¹⁵⁶ *ibid*.

Every Maltese has the right to gender identity, to be treated according to that identity and to have identification documents corresponding with the chosen gender identity.¹⁵⁷ This means that intersex persons who have changed their identity, name and sex marker have the legal grounding to change the particulars of their education and identity documents to reflect the new details.

The process of changing one's gender identity is fairly simple. One does not require any proof of having undergone any surgical procedure for total or partial genital reassignment, hormonal treatment or any psychological or medical treatment.¹⁵⁸

In order to change one's gender identity, the person shall make an application, by way of a declaratory public deed, to the Director of Public Registry stating that they wish to change the recorded gender and the first name.¹⁵⁹ Once the change has been effected, the applicant has a right to have the new particulars reflected in their birth certificate within a period of fifteen days.¹⁶⁰

In addition to making changes in the birth certificate, a person who has changed their gender identity under the GIGESC Act has the right to request the Director of Public Registry, to change the particulars in other civil documents and these include the national identity card, education certificates and any other documents.¹⁶¹

Another protection under the Act is that minors shall not undergo any sex assignment treatment and or surgical intervention on the sex characteristics of a minor if the same can be deferred until the minor attains the age of majority or understands the impact of consent.¹⁶²

Intersex children often undergo corrective surgeries in an attempt to assigning them the parents' preferred identity. One of the effects of these surgeries is the prolonged recovery periods that require the students to be out of school thus affecting their smooth learning.

¹⁵⁷ *ibid* 3.

¹⁵⁸ *ibid* 3 (4).

¹⁵⁹ *ibid* 4.

¹⁶⁰ *ibid* 4 (6).

¹⁶¹ *ibid* 10.

¹⁶² *ibid* 14 (1).

4.4. Analysis of access to education for intersex persons between Kenya and Malta

The previous chapters have discussed how intersex persons have or have not been protected by the various laws and policies in Kenya and Malta. This section shall draw an analysis of the two countries in the following sub-headings.

4.4.1. Registration at birth

As mentioned earlier, the birth certificate is the most basic or fundamental piece of identification and it influences access to education and other services. In Kenya currently, an intersex child can only be registered as born either male or female; there is no provision for intersex. On the other hand, Malta allows for registration as either male, female or undeclared thus giving children born intersex to obtain a birth certificate which they may change the sex marker, once they have determined their intersex status.

4.4.2. Access to basic education

In Kenya, in order for a child to be enrolled in any institution that offers basic education, the child's birth certificate is one of the key documents required before enrolment. Therefore, if an intersex child does not have their birth certificate, then they automatically miss out on school, unless their sex is recorded as either male or female. In the case of Malta, the law does not stipulate the documents required for enrolment; the only requirement is that the child has attained the compulsory school going age of five years.

4.4.3. Academic certificates

Once a student in Kenya has completed their primary or secondary education, they are issued with an academic certificate by the Kenya National Examination Council. The certificate bears the name and sex of the student, which is either male or female. In the event that an intersex student wants to change the said particulars to match their intersex status, then they have to go through a rigorous court process to effect the changes.

In contrast, Malta, under the GIGESC Act allows for students to apply to the court to have their academic and other identification documents to be changed to match their preferred gender identity or intersex status.

4.4.4. Legal and policy framework for protection of intersex persons

The legal and policy framework in Malta is quite progressive and specific to the protection of intersex persons in the country. The country's constitution prohibits discrimination on any grounds and this includes on sex, sexual orientation or gender identity. Having protection of intersex persons mentioned in the supreme law of the land further affirms the commitment to protect and promote their fundamental rights and freedoms. Further, various policies have been put in place to ensure proper protection of intersex persons. These include anti-bullying policies as well as the school transition management plan.

Kenya on the other hand has blanket provisions in the Constitution that prohibit discrimination on various grounds including sex. There is no specific mention of sexual orientation or gender identity as a ground for discrimination. There are no policies that have been developed to protect and promote the rights of intersex persons.

4.4.5. Change of name and sex marker

An intersex person in Malta has the right to change the particulars on their identification documents to match their self-determined sex or gender. This is done by making an application to the Director of Public Registry through a public deed that contains the previous birth certificate, the preferred new name and gender and a declaration by the applicant stating that the preferred gender and name does not match the one given at birth. Once the change of particulars is effected, the applicant will have the name and gender that correspond to the self-determined gender or sex.

In Kenya, the process of change of name is effected through a Deed poll signed by the applicant stating the reasons for wanting to change the name.¹⁶³ The Deed poll only facilitates the change of name and not the sex of the applicant. This means that an intersex person can only change their name but the sex or gender in the document does not correspond to the self-determined sex.

¹⁶³ Registration of Documents (Change of Name) Regulations 1967 (Malta) s 3.

4.5. Key lessons for Kenya

In its recently concluded national population census, Kenya recognized intersex persons as a third sex category in the country. However, there are certain key lessons or best practices that it may draw from Malta.

First, Kenya should amend its birth registration policy from the binary male or female and include a third category of intersex. This will ensure children who are born as intersex are registered as such and may change their sex marker once they attain self-determination.

Second, access to basic education in Kenya should not be complex. The only requirement that the State should consider is that the child has attained four years in order to be enrolled. The requirement of a birth certificate should be removed as a requisite for admission. The birth certificate may be filed at a later stage when the parent or guardian of an intersex child has been able to secure it.

With regard to changing the details on one's academic certificates and other identification documents, Kenya should simplify the process to effect the changes where an intersex student wishes to change the said particulars to match their intersex status.

In terms of the legal and policy framework for protection of intersex persons, Kenya should enact an equality and anti-discrimination law as envisaged in the Constitution.¹⁶⁴ The legislation should move away from the blanket provision of non-discrimination and be specific that no person shall be discriminated on gender identity or sexual orientation as well.

Lastly, the process of change of name via deed poll in Kenya should also allow for the change of sex of the applicant. This will ensure that the name and sex marker of the applicant are corresponding.

4.6. Conclusion

Malta has made deliberate efforts to protect and promote the wellbeing of intersex students while in their quest to get an education. This has been achieved not only through legislation but by also developing policies that implement the laws. Kenya should borrow these best practices

¹⁶⁴ Constitution of Kenya, 2010 Article 27 (6).

and step up protection of intersex persons, which should go beyond having the intersex marker 'I', appearing on the national population census.

The next chapter gives a summary of the findings as well as the recommendations for the State and its agencies on how best to protect the interests of intersex persons in their pursuit for education.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

This chapter gives a summary of the findings of the research as well as provide recommendations towards better protection and promotion of the rights of intersex children in the country within the education system. The recommendations are both legal reforms and policy reforms.

5.2. Summary of findings

In the first chapter, it was evident that the lack of legal recognition of intersex children directly affects the quality of education they access when they are eventually enrolled in school and how this subsequently affects other documents issued in terms of the particulars, that is, the name and sex marker.

The second chapter brought out the gaps in the extant laws and policies in so far as recognition of intersex as a third sex category. The current laws and policies only provide for the traditional male or female sex category. However, the jurisprudence set in the 'Baby A case' and the subsequent recognition of intersex persons in the 2019 Kenya Population and Housing Census is a clear indicator that the intersex voice is slowly being heard.

Chapter three brings to light the challenges that intersex persons experience while studying. These range from outright discrimination, physical and mental abuse and eventual dropping out of a learning institution before even completing primary education. These challenges greatly contribute to the low literacy levels among intersex persons.

In chapter four, the analysis of protection of intersex persons between Kenya and Malta indicate that the latter provides for change of sex marker and name of an intersex person upon self-actualization as opposed to the Kenyan laws that only allow for change of name.

5.3. Legal reforms

Parliament, being the law making body should amend various existing laws in order to offer better legal recognition to intersex persons. These are:-

5.3.1. Interpretation and General Provisions Act

Section 2 of the Interpretation and General Provisions Act should be amended to include the definition of intersex to mean 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.

In addition, the term “Sex” to be amended to mean a person who is male, female or intersex.

5.3.2. Children Act

The Children Act should be amended in section 2 to provide for the definition of “intersex child” to mean 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.

5.3.3. Births and Deaths Registration Act

Section 2 of the Act should be amended to introduce the term “sex” to mean a person who is male, female or intersex.

Another proposed amendment is in section 14 where the Act should be amended to enable change of sex marker from either male or female to intersex or from intersex to either male or female. This will ensure that the change of name as envisioned in section 14 corresponds with the correct sex marker as proposed.

5.3.4. Births and Deaths Registration Rules

The register of birth as captured in Form No. 1 in the Rules provides for a male and female checkbox. The Form should be amended to provide for male, female and intersex checkboxes.

Form No.6 on the register of death provides for a male and female checkbox. It should be amended to provide for male, female and intersex checkboxes.

In addition, Form No. 7 on the register of death (for use by next of kin where no medical certificate of cause of death issued) provides for the sex of the deceased as either male or female. The form should be amended to show the sex of the deceased as either male, female or intersex.

5.3.5. Registration of Persons Act

Section 3 of the Act should be amended to introduce the term “sex” to mean a person who is male, female or intersex.

The second schedule on application for an identity card should be amended from male or female to male, female or intersex.

Further, the fifth schedule on application for change of particulars in identity card should be amended to provide for change of the sex of the applicant as they so wish. Currently, the schedule only provides for change of name, which may not correspond with the chosen sex of an intersex person.

5.3.6. Basic Education Act

The basic education Act requires that a child who has attained the age of four years must be enrolled in an institution of early learning. One of the admission requirements is the birth certificate, which is proof of the child’s age.

This requirement should be amended so that a birth certificate is not a mandatory document during admission. This will open an avenue for intersex children who may wish to be enrolled in school but are barred due to lack of a birth certificate.

5.3.7. Kenya National Examinations Act

This statute provides for the establishment, constitution, control and administration of the Kenya National Examinations Council. The Act provides that the nomination bodies submit two nominees, a man and a woman who may be appointed by the Cabinet Secretary.¹⁶⁵ The impact of this provision is the effective denial of an opportunity for an intersex person to be nominated in the Examinations Appeal Tribunal.

¹⁶⁵ Kenya National Examinations Council Act, No. 29 of 2012 s 40 (B) (3).

The section should be amended to provide for a representative from the intersex community to be nominated in the Examinations Appeal Tribunal.

5.3.8. Public Health Act

The law requires that public buildings, which include schools and colleges provide for sanitation facilities (bathrooms and toilets) where applicable that are accessible by members of the public.¹⁶⁶ The rules go further to provide categorically for sanitation facilities for males and females.¹⁶⁷

The Public Health (Drainage and Latrine) Rules should be amended to provide sanitation facilities for males, females and intersex persons. Access to bathroom and toilets is one of the biggest challenges intersex learners face while in school.

5.4. Policy and Administrative reforms

5.4.1. National Education Management Information System

The National Education Management Information System should be amended to provide for intersex as a third sex category. This will ensure that intersex students are properly registered in the system.

Besides the above, the system should be flexible to allow a student change their particulars i.e name and sex once they have self-determined the sex they identify as upon going through the puberty stage.

5.4.2. National Curriculum Policy

As earlier mentioned, the National Curriculum Policy provides for equity and inclusiveness in the education system and mainly focuses on learners with disabilities and vulnerable groups in nomadic and arid and semi-arid lands.

The policy should be amended to provide for intersex learners as they are also a vulnerable group that requires extra protection and facilitation to ensure they access education.

¹⁶⁶ Public Health Act Cap 242 Laws of Kenya s 126.

¹⁶⁷ Public Health (Drainage and Latrine) Rules s 86.

5.4.3. Comprehensive sexual education

The Ministry of Education and the Kenya Institute of Curriculum Development should develop a robust sexual education programme that focuses on the special needs of intersex persons. This may include the physical changes that may manifest, the psycho-social support of intersex learners as well as the different sex categories.

5.4.4. Continuous public awareness

State and non-state actors should engage in robust public awareness on the existence of intersex persons and the need to ensure that their rights and fundamental freedoms are protected.

BIBLIOGRAPHY

Books and Chapters in Books

Pikramenou N, *Intersex Rights: Living Between Sexes* (Springer Nature 2019).

Parker RG and Aggleton P, 'Culture, Society and Sexuality: A Reader' <https://trove.nla.gov.au/version/34976075> accessed 14 May 2020.

Holmes M, *Intersex: A Perilous Difference* (Associated University Press 2008).

Balen AH and others, *Paediatric and Adolescent Gynaecology: A Multidisciplinary Approach* (Cambridge University Press 2004).

Jones T, *Policy and Gay, Lesbian, Bisexual, Transgender and Intersex Students* (Springer 2014).

DeFranza MK, *Sex Difference in Christian Theology: Male, Female, and Intersex in the Image of God* (Wm B Eerdmans Publishing 2015).

Corrêa S, de la Dehesa R and Parker R, *Sexuality and Politics: Regional Dialogues from the Global South, Volume 1* (2015).

Bob C, *The International Struggle for New Human Rights* (University of Pennsylvania Press 2010)

Fuller LL, *The Morality of Law: Notes from the Editors* (Legla Classics Library 2006).

Mutisya L, *Human Rights Law and the LGBTI Community in Kenya* (G-Kenya Trust) https://queeramnesty.ch/docs/HR_LGBT_Kenya.pdf .

Brömdal A and others, 'Intersex Bodies in Sexuality Education: On the Edge of Cultural Difference (2017).

Dreger AD *Hermaphrodites and the Medical Interventions of Sex*. (Harvard University Press 1998).

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

Ghattas DC, *Human Rights between the Sexes: A Preliminary Study in the Life of Inter individuals* (Henrich Boll Stiftung Publication Series on Democracy, Vol.34 2013).

Karkazis K, *Fixing sex; Intersex, Medical Authority and lived experience*, (Duke University Press 2008).

Reis E., *Bodies in doubt; An American History of Intersex* (John Hopkins University Press 2009).

Journal Articles

Molly S, Forecasting an Inclusive Future: School Counselling Strategies to Deconstruct Educational Heteronormativity on JSTOR <https://vpn.uonbi.ac.ke/proxy/393c4948/https://www.jstor.org/stable/90014855> accessed 14 May 2020

Intersex Narratives: Shifts in the Representation of Intersex Lives in North American Literature and Popular Culture on JSTOR https://vpn.uonbi.ac.ke/proxy/393c4948/https://www.jstor.org/stable/j.ctv1xxrsz?Search=yes&resultItemClick=true&searchText=Intersex&searchText=Narratives&searchText=Shifts&searchText=in&searchText=the&searchText=Representation&searchText=of&searchText=Intersex&searchText=Lives&searchText=in&searchText=North&searchText=American&searchText=Literature&searchText=and&searchText=Popular&searchText=Culture&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DIntersex%2BNarratives%2BShifts%2Bin%2Bthe%2BRepresentation%2Bof%2BIntersex%2BLives%2Bin%2BNorth%2BAmerican%2BLiterature%2Band%2BPopular%2BCulture&ab_segments=0%2Fbasic_SYC-5152%2F control accessed 14 May 2020

Lon Fuller's Multidimensional Natural Law Theory on JSTOR' <https://vpn.uonbi.ac.ke/proxy/5fa17745/https://www.jstor.org/stable/1227343> accessed 15 May 2020

South African Contributions to LGBTI Education Issues' (2019) 19 Sex Education 455

The Contributions of John Money: A Personal View on JSTOR' <https://vpn.uonbi.ac.ke/proxy/2f2438e9/https://www.jstor.org/stable/3813317> accessed 10 June 2020

Ocholla AM, 'Thoughts on LGBTI Activism, Race, and Gender in a Kenyan Context' (2010) 4 Race/Ethnicity: Multidisciplinary Global Contexts 123

Gina Wilson, 'Equal Rights for Intersex People' (2013) 10 The Equal Rights Review 134

Sidze EM and others, 'From Paper to Practice: Sexuality Education Policies and Their Implementation in Kenya' 76

Theses

Wekesa Seth, 'A Constitutional Approach to the Decriminalization of Homosexuality in Africa: A Comparison of Kenya, South Africa and Uganda' (Doctoral Thesis, University of Pretoria 2016)

Thomas G, 'A Third Sex Identity: Assessing Cultural and Structural Violence against Intersex People in Tanzania' (Master's Thesis, University of Zimbabwe 2017) https://ir.uz.ac.zw/bitstream/handle/10646/3313/Thomas_Grace_A_Third_sex_identity.pdf?sequence=1&isAllowed=y

Phele KE, 'Law and Silence of Intersex Status: A Threat to Human Rights in Botswana' (Mini Dissertation, University of Pretoria 2017) <https://repository.up.ac.za/handle/2263/62552> accessed 15 May 2020

Mamhare T, 'The Place of Legal Recognition at Birth in Enhancing the Realisation of the Rights of Intersex Persons : A Comparative Analysis of Kenya and Malta' (Thesis, University of Pretoria 2017) <http://repository.gchumanrights.org/handle/20.500.11825/256> accessed 14 May 2020

Reports

Kara A, 'Birth Registration and Children's Rights: A Complex Story' (Plan International) <https://plan-international.org/publications/birth-registration-and-childrens-rights> accessed 5 June 2020

Taskforce on Policy, Legal, Institutional and Administrative Reforms Regarding Intersex Persons in Kenya - Kenya Law Reform Commission (KLRC)' <http://www.klrc.go.ke/index.php/klrc-blog/613-taskforce-on-policy-legal-institutional-and-administrative-reforms-regarding-intersex-persons-in-kenya-blog> accessed 14 May 2020

2019 Kenya Population and Housing Census Volume III: Distribution of Population by Age, Sex and Administrative Units' (Kenya National Bureau of Statistics) <https://www.knbs.or.ke/?wpdmpro=2019-kenya-population-and-housing-census-volume-iii-distribution-of-population-by-age-sex-and-administrative-units> accessed 3 September 2020

Education For All, The 2015 National Review (Ministry of Education, Science and Technology) <https://unesdoc.unesco.org/ark:/48223/pf0000231637>

Report of the Commission of Inquiry into the Education System of Kenya, 2000 (1999) <https://www.davykoech.com/wp-content/uploads/2019/04/Koech-TIQET-Report-1999.pdf>

Report of The National Committee on Educational Objectives and Policies' (1964) <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-National-Committee-on-Educational-Objectives-1975-to-1976.pdf>

Report of the Presidential Working Party on Education and Manpower Training for the Next Decade and beyond, 1988 <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Presidential-Working-Party-on-Education-and-Manpower-Training-for-the-Next-Decade-and-Beyond-March-1988.pdf>

Report of the Presidential Working Party on the Second University in Kenya, 1981

The Kenya Education Commission Report: An African View of Educational Planning' <https://vpn.uonbi.ac.ke/proxy/53e200cf/https/www.jstor.org/stable/1186037> accessed 17 August 2020

Background Note on Human Rights Violations against Intersex People’ (Office of the High Commissioner for Human Rights)
<https://www.ohchr.org/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsagainstIntersexPeople.pdf>

Kenya Human Rights Commission, ‘The Outlawed Amongst Us: A Study of the LGBTI Community’s Search for Equality and Non-Discrimination in Kenya’ (Kenya Human Rights Commission 2011)

Cases

Republic v Kenya National Examinations Council & another Ex Parte Audrey Mbugua Ithibu JR Case No 147 of 2013 (High Court of Kenya)

RM v Attorney General & 4 Others Petition No 705 of 2007 (High Court of Kenya)

Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others (High Court, Constitutional and Human Rights Division)

Statutes

Basic Education Act No. 14 of 2013

Births and Deaths Registration Act Cap 149 Laws of Kenya 1928

Births and Deaths Registration Rules, 1966

Children Act No. 8 of 2001 Laws of Kenya

Civil Code Cap 16 Laws of Malta

Constitution of Kenya, 2010

Constitution of Malta

Education Act Cap 327 Laws of Malta

Gender Identity, Gender Expression and Sex Characteristics Act Cap 540 Laws of Malta

Health Act No. 21 of 2017 Laws of Kenya

Identity Card and Other Identity Documents Act Cap 258 Laws of Malta

Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules 2009

Kenya National Examinations Council Act, No. 29 of 2012

Kenya National Examinations Council (Kenya Certificate of Secondary Education Examination) Rules, 2009

Kenya National Examinations Council (Kenya Certificate of Primary Education) Rules, 1997

Public Health Act Cap 242 Laws of Kenya

Public Health (Drainage and Latrine) Rules

Registration of Persons Act Cap 107 Laws of Kenya

Registration of Persons Rules, 1948 (Kenya)

Statistics Act No 4 of 2006 Laws of Kenya

The Basic Education Regulations, 2015

The Constitution of Kenya, Revised edition 2008 (2001)

Policy Documents

National Pre-Primary Education Policy Standard Guidelines' (Ministry of Education, Kenya, 2018)
<https://www.education.go.ke/index.php/downloads/file/626-pre-primary-policy>

Ministry of Education and Ministry Of Higher Education, Science Technology Sessional Paper No. 14 of 2012 on Reforming Education and Training Sectors in Kenya

Ministry of Education, Science and Technology, National Education Sector Plan 2013-2018
<https://www.education.go.ke/index.php/downloads/file/83-national-education-sector-plan-volume-one-basic-education-programme-rationale-and-approach>

Kenya Mental Health Policy, 2015-2030
<http://publications.universalhealth2030.org/uploads/Kenya-Mental-Health-Policy.pdf>

Addressing Bullying Behaviour in Schools Policy, 2014
<https://education.gov.mt/en/Documents/Addressing%20Bullying%20Behaviour%20in%20Schools.pdf>

Trans, Gender Variant and Intersex Students in Schools Policy, 2015 <https://tgeu.org/wp-content/uploads/2015/06/Malta-Education-Procedures.pdf>

Websites and Blogs

National Education Management Information System
<https://www.education.go.ke/index.php/downloads/file/425-nemis-manual>

WHO | Defining Sexual Health' (WHO)
http://www.who.int/reproductivehealth/topics/sexual_health/sh_definitions/en/ accessed 4 June 2020

Welle (www.dw.com) D, A Third Gender for Kenya? | DW | 17.04.2019 (DW.COM)
<https://www.dw.com/en/a-third-gender-for-kenya/a-48375912> accessed 26 October 2020

National Curriculum Policy: Kenya Institute of Curriculum Development
<https://kicd.ac.ke/curriculum-reform/national-curriculum-policy/> accessed 24 October 2020

<https://plus.google.com/+UNESCO>, Why Comprehensive Sexuality Education Is Important (UNESCO, 15 February 2018) <https://en.unesco.org/news/why-comprehensive-sexuality-education-important> accessed 26 October 2020

Mary Mwendwa, 'Challenges of Intersex Community in Kenya' (Talk Africa, 28 February 2017)
<https://www.talkafrica.co.ke/challenges-intersex-community-kenya/> accessed 21 October 2020

Regional and International instruments

African Charter on the Rights and Welfare of the Child, 1999

African Charter on Human and Peoples Rights, 1986

United Nations Convention on the Rights of the Child, 1990

Universal Declaration of Human Rights, 1948

Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles)

Dictionary entries

Black's Law Dictionary

Concise Oxford English Dictionary