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# The Place of Legal Recognition at Birth in Enhancing the Realisation of the Rights of Intersex Persons: A Comparative Analysis of Kenya and Malta

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Master's Programme in Human Rights  
and Democratisation in Africa

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THE PLACE OF LEGAL RECOGNITION AT BIRTH  
IN ENHANCING THE REALISATION OF THE RIGHTS  
OF INTERSEX PERSONS: A COMPARATIVE ANALYSIS  
OF KENYA AND MALTA



DEDICATION

*I dedicate this research to my parents for believing in me and showing unconditional love. They laid out the foundation for my education which has made this research possible. I will always try my best to make you proud.*

ACKNOWLEDGEMENTS

*I would like to extend my sincere gratitude to the Centre for Human Rights which was home to me for the past year. Thank you Professor Frans Viljoen and Norman Taku for mentoring me and giving direction to my life. This programme has completely changed my life and shall forever be indebted to the Centre for Human Rights. Dr Nicholas Orago, thank you for the guidance and supervision to this research. You made our stay in Nairobi comfortable.*

*I would also like to thank my brother Joseph for inspiring me and supporting me to undertake my studies. You made this journey possible for me. To Munyaradzi thank you for the support on all levels. It started with my undergraduate dissertation and now it is my Master's thesis. Thank you for the motivation, I will continue to break the glass ceiling.*

ABSTRACT

*Intersex persons are people born with indeterminate sex. The laws regulating birth registry in Kenya operates under the assumption that there are only two sexes 'male' and 'female' which are fixed and unambiguous, despite medical evidence proving the contrary. The assumption that all people fit neatly into the two binaries severely impacts on the human rights of intersex individuals since there is no provision for a third sexual category.*

*Without a birth certificate intersex children face the risk of exclusion, discrimination, denial of certain rights, benefits, and services. This means that an intersex child will not be able to have access to national identity documents unless they identify themselves as either male or female. These documents enable one to access many services, benefits and rights which include the right to education, access to health, freedom of movement and inheritance amongst other rights and freedoms. In some cases children are forced to go through genital corrective surgery in order to exercise their right to legal recognition. Informed consent is given through their parents since the infants are incapable of consenting. However this consent is defective and does not take into consideration the views of the child, violating a number of human rights which include the right to physical and bodily integrity.*

*This research seeks to establish that by denying intersex persons registration at birth in Kenya, devastating consequences arise which severely impact on the rights and life of intersex persons. It looks at the place of the legal recognition of intersex persons in international human rights law, the Constitution of Kenya and statutory law. The research takes a comparative approach analysing the steps taken by Malta in protecting the rights of intersex persons and show how Kenya can learn from the best practices. This research attempts to develop a model legislation that can be enacted by Kenya and other African countries to ensure registration of intersex children at birth and to enhance the protection of their fundamental rights and freedoms.*

ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons Living with Disabilities
ESCR Committee	Committee on Economic, Social and Cultural Rights
FGM	Female Genital Mutilation
GIGESC Act	Gender Identity, Gender Expression and Sex Characteristics Act
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
KNCHR	Kenya National Commission for Human Rights
KNEC	Kenya National Examination Council
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NHIF	National Hospital Insurance Fund
OHCHR	Office of the High Commissioner for Human Rights
OII Australia	Organisation International Australia
PEPUD	Promotion of Equality and Prevention of Unfair Discrimination Act
PPDL Act	Protection of Persons Deprived of Liberty Act
SOGI	Sexual Orientation and Gender Identity
UDBHR	Universal Declaration on Bioethics and Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCAT	United Nations Committee against Torture
UNICEF	United Nations Children's Fund



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## INTRODUCTION

### 1. BACKGROUND TO THE STUDY

Intersex persons are defined as ‘individuals who possess genital, chromosomal, or hormonal characteristics which do not correspond to the given standard for male or female categories as for sexual or reproductive anatomy.’<sup>1</sup> The laws regulating birth registry operates under the assumption that there are only two sexes ‘male’ and ‘female’, which are fixed and unambiguous, despite medical evidence proving the contrary.<sup>2</sup> The assumption that all people fit neatly into the two binaries, severely impacts on the human rights of intersex individuals since there is no provision for a third sexual category.<sup>3</sup>

The majority of African countries including Kenya deny the existence of sexual minorities including intersex persons despite compelling evidence that this community exists.<sup>4</sup> When an intersex child is born, this is considered abnormal which from the very onset attracts all sorts of cultural fundamentalism, prejudices based on heteronormativity.<sup>5</sup> The existence of such socially constructed ideas prejudices intersex persons.

The current practice in the world including Kenya when a child is born, is for the parents to choose the sex of the child.<sup>6</sup> Parents in Kenya

<sup>1</sup> Amnesty International Report ‘Making Love a Crime: Criminalisation of same-sex conduct in Sub-Saharan Africa’ (2013) 97.

<sup>2</sup> J Greenberg ‘Defining Male and Female: Intersexuality and the Collision between Law and Biology’ (1999) *Arizona Law Review* 267.

<sup>3</sup> J Greenberg (as above) 275.

<sup>4</sup> E Heinze *Sexual Orientation: A Human Right* (1995) 15.

<sup>5</sup> (As above) 231.

<sup>6</sup> S Benson ‘Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed’ (2005) 265 *Cardozo Journal of Law and Gender* 31.

are unable to register their child as intersex since there is no provision for a third sexual category, which denies intersex persons the right to legal recognition.<sup>7</sup> There are no definite statistics on the number of intersex persons in Kenya, however Gama Africa Foundation has documented 132 cases of intersex children between July and October 2016.<sup>8</sup>

The Kenyan Courts have dealt with two cases involving intersex persons. The first case is of *Baby A (suing through her mother, EA) & another v Attorney General and Others (Baby A case)*, in which the applicant argued that the respondent had put a question mark on the field of sex on a birth notification form, thus it was going to be difficult for the applicant to get the birth registered.<sup>9</sup> In the application the petitioner sought a declaration for legal recognition at birth of intersex persons, a declaration that all surgery which is not medically necessary should be approved by a court, an order for the government to develop guidelines on performing surgery on intersex persons, and an order for the government to gather data on intersex children in Kenya.<sup>10</sup>

The court did not find that the petitioner had been denied the right to legal recognition to register as intersex because the petitioner had not made an attempt to register, therefore, could not claim a right that had not been violated.<sup>11</sup> It is evident that if the petitioner had approached the registrar of births wanting to register as intersex, they would be denied to do so, because the law only recognises registration as either male or female.<sup>12</sup> The court went on further to direct the Attorney General to submit information to the court in 90 days in relation to the establishment of an institution that is responsible for the collection of statistics of intersex persons.<sup>13</sup> The court also directed the Attorney-General to make a submission before the court within 90 days, giving information relating to the development, adoption and enactment of a

<sup>7</sup> Interview with John Chigiti on 19 October 2016. He is an advocate of the High Court of Kenya and member of the Gender Minority Advocates Trust. He litigated the *RM and Baby A case*.

<sup>8</sup> Gathoni Muchomba, founder director of Gama Africa Foundation speaking at the launch of the 'let me be me' intersex campaign held at Kenya National Commission for Human Rights on 19 October 2016.

<sup>9</sup> *Baby A (suing through her mother, EA) & another v Attorney General and Others* Petition 266 of 2013 para 1.

<sup>10</sup> As above.

<sup>11</sup> (As above) para 71.

<sup>12</sup> Interview with John Chigiti (n 7 above).

<sup>13</sup> As above.

statute regulating intersex as a sexual category.<sup>14</sup> The order was ignored by the government and no action has been taken by the government up to this date.<sup>15</sup>

The second case was of *RM v Attorney General & others* in which an intersex convict on death row alleged a number of human rights violations whilst in detention as well as suffering lack of legal recognition because there was no provision for a third sexual category<sup>16</sup> RM alleged that he was being made to share accommodation with male inmates which was uncomfortable for him due to the ridicule and insults directed at him by other inmates.<sup>17</sup> Although there had been a court order to detain him separately there were no experienced personnel to handle his condition.<sup>18</sup> He had been subjected to strip searches and blood sample examination without his consent.<sup>19</sup> On suffering lack of legal recognition the court held that it was not within its mandate to interpret the wording 'sex' to include intersex persons, such could only be done by the legislature.<sup>20</sup>

Whilst the Court reached an undesirable conclusion in dismissing the allegations of violations it ruled that the invasive strip searches violated the petitioner's protection against inhuman and degrading treatment.<sup>21</sup> The court held that where searches are carried out they must be done with respect for human dignity which can be done by using technology.<sup>22</sup> It is evident from the two cases above that the courts have refused to interpret 'sex' to include intersex persons. It is therefore prudent for the legislature to do so through an Act of Parliament.

The immediate tragic decision parents make in order to conform to the requirements of birth registration is to make their child undergo medical corrective procedures which are often 'cosmetic and not medically necessary.'<sup>23</sup> Such medical procedures often have devastating impacts on the reproductive capacity of the intersex individual later in

<sup>14</sup> As above.

<sup>15</sup> Isaac Mwaura MP, presenting petition to the Parliamentary Departmental Committee on Administration and National Security on 6 October 2016.

<sup>16</sup> *RM v Attorney General & others Petition* 705 of 2007.

<sup>17</sup> As above para 23.

<sup>18</sup> As above.

<sup>19</sup> As above.

<sup>20</sup> As above para 131.

<sup>21</sup> As above para 168.

<sup>22</sup> As above.

<sup>23</sup> Amnesty International Report 'the state decides who I am; lack of recognition for transgender people' (2014) 29.

life as well as their mental and physical well-being.<sup>24</sup> Parents make this decision with little or no information for them to make an informed decision.<sup>25</sup> ‘The medical professionals counsel them to act quickly in order to establish and correct the sex.’<sup>26</sup> As one German parent recounts;

The pressure exerted by the registry office to slot one’s child into one of the two genders builds up an unreasonable pressure that is only surpassed when the attending physicians demand your consent to carry out allegedly pressing operations at the same time. The option to leave the sex/gender entry vacant for years would have let me know from the legal side that it is absolutely appropriate to wait in this situation.<sup>27</sup>

This lack of appropriate legal recognition at birth does not only lead to intrusive medical corrective procedures but also affects and limits access to other human rights.<sup>28</sup> Malta, which will be a basis for this comparative study, has developed laws and policies on how to legally recognise intersex persons without having to go through intrusive processes like surgery in order to obtain a birth certificate.<sup>29</sup> It is the first country in the world to ban non-consensual genital corrective procedures.<sup>30</sup>

Since 26 August 2016, there has been growing interest in Kenya on intersex rights, sparked by the presentation of a petition on the protection of intersex rights to parliament by the Special Interest Groups Member of Parliament Isaac Mwaura.<sup>31</sup> On 6 October 2016 there was a further hearing of the petition by the Parliamentary Departmental Committee on Administration and National Security (Parliamentary Committee),

<sup>24</sup> Open Society Foundations ‘license to be yourself: forced sterilisation’ A legal gender recognition Issue Brief 5. Available at <https://www.opensocietyfoundations.org/sites/default/files/lgr-forced-sterilization-20151120.pdf> (accessed 28 October 2016).

<sup>25</sup> N Ben-Asha ‘The necessity of sex change’ (2006) 51 *Harvard Journal of Law and Gender* 65.

<sup>26</sup> (As above) 65.

<sup>27</sup> Issue paper published by the Council of Europe Commissioner for Human Rights ‘Human Rights and Intersex people’ 37. Available at <http://insanhaklarimerkezi.bilgi.edu.tr/media/uploads/2015/07/31/Intersex.pdf> (accessed 28 October 2016).

<sup>28</sup> Amnesty Report (n 23 above) 29.

<sup>29</sup> ‘Fact Sheet on Intersex person’ United Nations Office of the Higher Commissioner for Human Rights. Available at [https://unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf) (Accessed 20 September 2016).

<sup>30</sup> ‘We are real; the growing movement advancing the rights of intersex’ Astrea Lesbian Foundation for Justice Report 29. Available at <http://astraeafoundation.org/wearereal/wp-content/uploads/2016/07/AstraeaWeAreRealReport.pdf> (28 October 2016).

<sup>31</sup> ‘Kenyan MP pushes for law to recognise intersex people’ Website of BBC available at <http://www.bbc.com/news/world-africa-37256913> (accessed 27 October 2016).

which reached a decision that there was urgent need to enact legislation protecting intersex persons. The petition will be discussed in detail in chapter four. On 19 October 2016, the Kenya National Commission on Human Rights (KNCHR) together with Gama Africa Foundation launched a media campaign on intersex persons called 'let me be me.'<sup>32</sup> On 26 October 2016, Kenya joined the world for the first time in celebrating World Intersex Day by conducting a march and other side events.<sup>33</sup>

Based on these awareness campaigns and an indication by the Parliamentary Committee that there is need to enact legislation protecting intersex persons, Kenya may borrow from the best practices set out by Malta. It is, therefore, imperative to first analyse the consequences of not legally recognising intersex persons at birth in Kenya, and examine the approaches adopted by Malta in dealing with the issue, which can be adopted by Kenya and other African countries in enhancing the recognition at birth of intersex children.

## 2. RESEARCH PROBLEM

Intersex children are entitled to the right to legal recognition at birth like any other child as provided for under international law.<sup>34</sup> Despite this protection under international law, the domestic legislation and policies in Kenya excludes intersex children from birth registration.<sup>35</sup>

This research seeks to establish that by denying intersex persons registration at birth, devastating consequences arise which severely impact on the rights and life of intersex persons. One of the immediate impact that may result from not legally recognising intersex children at birth is the pressure that parents have which result in parents subjecting their infant child to non-consensual medical corrective procedures which violate the doctrine of informed consent as well as several other human rights as discussed in chapter two below; and does not take the best interests of the child into consideration.<sup>36</sup>

<sup>32</sup> The researcher attended this media launch held at KNCHR on 19 October 2016.

<sup>33</sup> 'Kenya marks day for people born with two sex organs' <https://citizentv.co.ke/news/kenya-marks-day-for-people-born-with-two-sex-organs-146654/> (accessed 27 October 2016).

<sup>34</sup> Article 7 of the CRC, Article 6 of the ACRWC.

<sup>35</sup> J Chigiti (n 7 above).

<sup>36</sup> A Puluka 'Protecting Intersex Children' (2015) 2095 *Michigan State Law Review* 2099.

A child born intersex is similar to a person without a state because the documents conferring citizenship require an affirmative ‘male’ and ‘female designation.’<sup>37</sup> This means that an intersex child will not be able to have access to national identity documents unless they identify themselves as either male or female. These documents enable one to access many services, benefits and rights which include the right to education, access to health, freedom of movement and inheritance amongst other rights.<sup>38</sup> The research is inspired by these human rights violations experienced by intersex persons due to a lack of recognition of their sexuality because of the current binary recognition of children as either male or female, and is thus aimed at proposing a legal framework that can be adopted by Kenya and other African countries to ensure that intersex children are recognised and registered at birth to affirm their identity and enable them to access important human rights and fundamental freedoms.

### 3. RESEARCH QUESTIONS

#### *Main Research Question*

- What are the human rights violations and consequences that arise from lack of appropriate legal recognition at birth of intersex persons in Kenya and can a specific legal framework enhance the protection of these rights?

#### *Sub-research questions*

- What is the place of the right to legal recognition of intersex persons in international human rights law and the Constitution of Kenya?
- What are the trends in other countries on legally recognising intersex persons?
- How can the inadequacy of Kenyan legislation and policies in protecting the rights of intersex be addressed?

<sup>37</sup> A Akre ‘Hanging in the balance; the intersex child, the parent, the state’ (2016) 37 *Tennessee Journal of Race, Gender and Social Justice* 38.

<sup>38</sup> Petitioners Submission (n 9 above) para 3.

## 4. HYPOTHESIS AND THEORETICAL FRAMEWORK

The study is based on the hypothesis that the legal recognition of intersex persons at birth ensures the protection of their fundamental rights and freedoms and also enhances their access to socio-economic services in infancy, childhood and adulthood. There is no legislation or government policy that governs the right to legal recognition of intersex persons in Kenya including protection of their fundamental rights and freedoms. The study is also based on the hypothesis that with a more liberal interpretation of the Constitution of Kenya 2010, intersex persons can be recognised as a third sex category on birth registration and their rights and freedoms can be guaranteed and upheld by the courts.

This study is premised on Gayle Rubin's theory of sexual hierarchy which is very useful in analysing how sexual inequalities are produced in society.<sup>39</sup> Society has already been socially constructed to believe that what is acceptable is between being a man and being a woman, and what is acceptable is heterosexuality.<sup>40</sup> Any other sexuality that falls outside that realm is abhorred and marginalised. Rubin posits that 'societies appraise sex acts according to a hierarchical system of sexual value.'<sup>41</sup> She constructs an erotic pyramid with heterosexuals on top, unmarried couples below, with sexual minorities like gays, lesbians, transsexuals and sex workers at the bottom.<sup>42</sup>

According to Rubin, individuals at the top of the hierarchy are rewarded with benefits from the state which includes legality, institutionality and social support.<sup>43</sup> Those at the bottom are presumed to be mentally ill and criminals. They have restricted social and physical support and lack institutional support.<sup>44</sup> 'As is the case with all situations of hierarchy, actual or implicit use of force, sanctions and violence may be needed to maintain unequal power relations.'<sup>45</sup> In Africa, scholars

<sup>39</sup> G Rubin 'Thinking sex, Notes for a radical theory of the politics of sexuality' in R Parker & P Aggleton (eds) *A Reader, Culture, Society and Sexuality* (2007) 158.

<sup>40</sup> S Tamale 'Researching and theorising sexualities in Africa' *Sexuality and Politics: Regional Dialogues from the Global South* 16.

<sup>41</sup> G Rubin (n 40 above) 158.

<sup>42</sup> As above.

<sup>43</sup> (As above) 159.

<sup>44</sup> (As above).

<sup>45</sup> P Collins 'It's All in the Family: Intersections of Gender, Race, and Nation' (1998) 62 *Hypatia, Border Crossings: Multicultural and Postcolonial Feminist* 64.



like Sylvia Tamale have relied on Gayle Rubin's theory in theorising sexualities in the African context.<sup>46</sup> She argues that the sexual hierarchy, if contextualised, resonates with the experiences of African societies.<sup>47</sup>

Whilst the Rubin's theory does not explicitly refer to intersex persons, intersex issues are encompassed in the lesbian, gay, bisexual, transgender and intersex (LGBTI) movement because the violations experienced by intersex persons are similar to the violations experienced by the other sexual minorities. The discoveries made by Rubin's theory, therefore resonates with the experiences of intersex persons. The expectation of the society is that gender or sex is either male or female. Whatever falls outside those categories is discriminated against and does not benefit from the state. This has thus led to the denial of the right to legal recognition at the birth of intersex persons, a right that is enshrined in various international human rights conventions.

## 5. LITERATURE REVIEW AND SIGNIFICANCE OF THE STUDY

The discourse on intersex issues particularly in Africa is limited, thus much of the material on intersex issues is from outside Africa. In 2013, Amnesty International compiled a report which analysed the legal environment and the human rights violations of sexual minorities, including intersex persons in Sub-Saharan Africa.<sup>48</sup> Whilst the report purports to encompass all sexual minorities, there is under-reporting on the issue of intersex persons and the right to legal recognition.

Alexander Akre has written on the binary and the intersex issue extensively, weighing the benefits of allowing surgery on an intersex child against the potential violation of children's rights.<sup>49</sup> Akre proposes constitutional protection of intersex rights as the only possible solution against unnecessary surgery, suggesting that, 'a constitutional floor, bolstered by the State's interest in protecting minors, must be established and recognized in order to adequately protect the fundamental rights of intersex children against the constitutional rights of their parents.'<sup>50</sup> Whilst

<sup>46</sup> S Tamale (n 41 above) 26.

<sup>47</sup> As above.

<sup>48</sup> Amnesty International Report (n 1 above) 28.

<sup>49</sup> A Akre (n 38 above) 38.

<sup>50</sup> A Akre (n 38 above) 68.

the argument of Akre is very important, it does not establish the causal nexus between lack of appropriate legal recognition at birth and its potential impact on causing unnecessary surgery without the consent of the child.

Anne Tamer-Mattis proposes increased court involvement so as to improve the decision making process before surgery can be carried out on a child, using models that have successfully been adopted on similar ethically challenging medical decisions.<sup>51</sup> Instead of increased court involvement as suggested by Tamer-Mattis, this research suggests an intersex review body for Kenya, made up of experts as courts usually do not have the expertise to determine on medical issues. Harper Jean Tobin argues that ‘individuals find themselves coerced into major surgical operations they otherwise would not have in order to exercise their right to gender recognition.’<sup>52</sup>

The European Union Agency for Fundamental Rights released a comprehensive document titled, ‘the fundamental rights situation of intersex people.’<sup>53</sup> The research suggested that the requirements for one to receive a birth certificate entrench the social expectations and binaries of male and female.<sup>54</sup> These requirements force parents to seek medical interventions in order to conform to the legal requirements. ‘The interplay of legal, social, and medical expectations creates a context in which the child’s rights to physical and mental integrity, and to express views freely can be easily overridden.’<sup>55</sup>

In April 2016, three South African based civil society organisations prepared a Shadow Report submitted to the African Commission on Human and Peoples Rights’ (African Commission) on the situation of civil, political, social and economic rights of transgender and intersex persons in South Africa.<sup>56</sup> Whilst the report extensively dealt with violations perpetrated against intersex persons, it did not highlight anything on the right to legal recognition at birth.

<sup>51</sup> A Tammer- Mattis ‘Exceptions to the rule; curing the law’s failure to cure intersex children’ (2013) 59 *Berkley Journal of Gender, Law and Justice* 62.

<sup>52</sup> H Jean Tobin ‘Against the surgical requirement for a chance of legal sex’ (2007) 393 *Case Western Reserve Journal of International Law* 427.

<sup>53</sup> FRA 4/2015. Available at <http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf> (accessed 28 October 2016).

<sup>54</sup> As above.

<sup>55</sup> As above.

<sup>56</sup> Shadow report to the African Commission on Human and Peoples’ Rights on the civil, political, socio-economic rights of transgender and intersex persons prepared by Legal Resources Centre, Gender Dynamix and Iranti-Org (2016).

In 2014, Amnesty International released a report entitled ‘the state decides who I am; lack of recognition for transgender people.’<sup>57</sup> This research covered the legal recognition of transgender persons in European countries. The report has a small section dedicated to the protection from discrimination of intersex persons in European countries. The report does not mention anything on Africa.

There is little to no research that has been carried out in Africa with regards to intersex issues, particularly on the lack of appropriate legal recognition at birth of intersex children. Where research has been done around unnecessary medical procedures, lack of appropriate legal recognition at birth has not been established as one of the causes. This research, therefore, is important as it examines the impact resulting from the denial of registration at birth and suggests recommendations to Kenya on how it can protect the right to legal recognition of intersex persons by learning from Malta. It analyses the best practices in the world by referencing to Malta and suggesting a model law as well as suggesting recommendations to fill the gaps in the Kenyan legal framework on the registration of intersex persons.

## 6. RESEARCH METHODOLOGY

This is a mixed research relying on both primary and secondary sources. The study relies on desktop research. It is a multidisciplinary research that looks at the intersection between law and medical ethics. In comparative perspective, the study will look at the legal framework that has been adopted in Malta, the opportunities it offers for the recognition and registration of intersex children and whether Kenya, and other African countries, can learn from the best practices in Malta. The research is also based on testimonies from intersex persons, and the legal team involved in the *Baby A case*<sup>58</sup> and other cases that have been litigated on the violation of the rights of intersex persons in Kenya.

## 7. LIMITATIONS OF THE STUDY

<sup>57</sup> Amnesty International Report (n 23 above).

<sup>58</sup> *Baby A case* (n 9 above).

The limitation to this research is that it relates to the limited research that has been done around issues of legal recognition of intersex persons in Africa. Where studies have purported to report on sexual minorities, there has been underreporting on the issue of intersexuality. Much of what has been written is on the need to protect intersex persons from corrective genital surgery with little written on legal recognition. Therefore access to relevant materials is one of the great challenges.

## 8. STRUCTURE

Chapter one of this paper is made up of the research proposal which gives a brief background to the research, the research methodology, literature review, hypothesis, significance and limitations of the study. Chapter two deals with the human rights violations that result from lack of legal recognition. It sets out the legal framework protecting the right to legal recognition under international law. It looks at the domestic legislation in Kenya protecting the rights of intersex persons, which includes the Constitution and statutory legislation. This chapter examines the rights of intersex persons that are violated, which include physical integrity and bodily autonomy through the medicalization of intersex people, freedom from non-discrimination, the right to the highest attainable standard of health and freedom from cruel inhuman and degrading treatment. The Chapter also examines the lack of access to other rights resulting from the lack of legal recognition.

Chapter 3 is a comparative analysis of Kenya and Malta, analysing how Malta has effectively protected the right to legal recognition of intersex persons. Chapter 4 develops a model law protecting the right to legal recognition and other rights of intersex persons that can be adopted by Kenya and other African countries. Chapter 5 concludes and suggests recommendations.

## 2.

CONSEQUENCES OF LACK OF APPROPRIATE LEGAL  
RECOGNITION AT BIRTH ON INTERSEX PERSONS

## 2.1 CHAPTER INTRODUCTION

Legal recognition, through birth registration, is an internationally recognised human right which enables an individual to have legal identity.<sup>59</sup> According to United Nations Children’s Fund (UNICEF), birth registration is defined as;

The official recording of the birth of a child by some administrative level of the state and coordinated by a particular branch of government. It is a permanent and official record of a child’s existence. Ideally, birth registration is part of an effective civil registration system that acknowledges the existence of the person before the law, establishes the child’s family ties and tracks the major events of an individual’s life, from live birth to marriage and death.<sup>60</sup>

Birth Registration serves two major purposes which are legal and statistical.<sup>61</sup> Legal in the sense that it allows one to have proof of identity which enables one to claim entitlements to rights, freedoms, benefits and services from the State.<sup>62</sup> It serves a statistical purpose in that it enables the state to have accurate demographic data which can be used in the planning and implementation of development policies.<sup>63</sup> However

<sup>59</sup> K Horne ‘Navigating Nationality: The Rights to Birth Registration and Nationality in Refugee Magnet States’ (2014) 115 *Columbia Journal of Transnational Law* 118. A discussion on the provisions on birth registration under international law will be done in the next subsection.

<sup>60</sup> ‘Right from the start’ (2002) UNICEF Innocenti Digesti. Available at <https://www.unicef-irc.org/publications/pdf/digest9e.pdf> (accessed 18 September 2016).

<sup>61</sup> ‘The Rights Start to life’ Statistical Analysis of birth registration (2005) *UNICEF Report* 1.

<sup>62</sup> As above.

<sup>63</sup> As above.

it is not all children who have the privilege to register immediately after birth in Kenya.<sup>64</sup> As discussed in the first chapter, children who are born intersex cannot register at birth as intersex. In order to register they have to fall into the two existing socially constructed binaries of male and female since there is no provision for a third gender.<sup>65</sup>

As discussed in chapter one, without birth certificates such children, also later in adulthood, face the risk of exclusion, discrimination, denial of certain rights, benefits, services and may fall victim to human rights violations.<sup>66</sup> These undesirable consequences take place despite protection of the right to legal recognition in international law and constitutional provisions which, if liberally interpreted, guarantee the right of intersex persons to legal recognition.<sup>67</sup> This chapter will analyse the protection of the right to legal recognition in international law, the Constitution of Kenya and subsidiary legislation. This chapter will also discuss the negative impact resulting from lack of appropriate legal recognition at birth.

## 2.2 LEGAL FRAMEWORK PROTECTING THE RIGHT TO LEGAL RECOGNITION AT BIRTH FOR INTERSEX PERSONS

### 2.2.1 *International Law*

The right to legal recognition is an internationally recognised right which individuals have regardless of their sex or gender.<sup>68</sup> The right was first recognised in the Universal Declaration of Human Rights (UDHR) which provides that every person has the right to be recognised as a person before the law.<sup>69</sup> The International Covenant on Civil and Political Rights (ICCPR) is more specific, it obligates every child to

<sup>64</sup> In an interview with John Chigiti on the 19 October 2016, he stated that the provisions of Section 2(a) of the Registration and Deaths Act (Cap 149 Laws of Kenya) do not accommodate any other gender other than male or female, thus intersex persons. John Chigiti is the advocate who has handled the intersex cases of *RM case* and the *Baby A case*.

<sup>65</sup> Interview with J Chigiti (n 7 above).

<sup>66</sup> Y Mackenzie 'The campaign for universal birth registration in Latin America: ensuring all Latin American children's inherent right to life and survival by first guaranteeing their right to a legal identity' (2009)519 *Georgia Journal of International and Comparative Law* 521.

<sup>67</sup> Provisions of international law and the Constitution guaranteeing the right to legal recognition are comprehensively discussed in sub-section 2.2 below.

<sup>68</sup> In terms of Principle 3 of the Yogyakarta Principles, all persons have the right to legal recognition as a person before the law regardless of their sexual orientation or gender identity.

<sup>69</sup> Article 6 of the UDHR.

be registered immediately after birth.<sup>70</sup> The Human Rights Committee (HRC) has issued General Comment 17 on the Rights of the Child which deals with the whole of Article 24 of the ICCPR.<sup>71</sup> Paragraph 7 of the General Comment, which is the only provision specifically addressing registration at birth as provided for in Article 24(2) of the ICCPR, states that Article 24(2) must be interpreted to be ‘closely linked to the right to special measures of protection.’<sup>72</sup>

Since the provision is linked to the right to special measures of protection and the need for States to take necessary steps and other measures to implement obligations under the ICCPR as provided for under Article 2(2) of the ICCPR, Kenya has to take necessary legislative and administrative steps to ensure that the law provides for intersex persons to register as a third sexual category. The General Comment States that the main objective of this provision is to protect children against the danger they face of being abducted, trafficked and other types of abuse that are contrary to the provisions of the Covenant.<sup>73</sup>

The Convention on the Rights of the Child (CRC) also comprehensively protects the right to legal recognition.<sup>74</sup> It obligates states in their national law to take measures to ensure that ‘children are registered immediately after birth and that they have a right to a name, nationality and as far as possible, the right to know and be cared for by their parents.’<sup>75</sup> In its General Comment number 7, the Committee on the Rights of the Child (CRC Committee) stated that the registration of children was still a major challenge in the majority of states in the world.<sup>76</sup> The CRC Committee postulated that by not enabling all children to immediately register soon after birth, this negatively impacted on the identity of the child and impeded them from accessing basic entitlements such as social services, health care and education.<sup>77</sup>

<sup>70</sup> Article 24(2)

<sup>71</sup> General Comment Available at the website of OHCHR on [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FGEC%2F6623&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FGEC%2F6623&Lang=en) (accessed on 24 October 2016).

<sup>72</sup> As above.

<sup>73</sup> As above.

<sup>74</sup> P Gerber, A Gargett & M Castan ‘Does the Right to Birth Registration Include a Right to a Birth Certificate?’ (2011) 434 *Netherlands Quarterly of Human Rights* 435.

<sup>75</sup> Article 7.

<sup>76</sup> Paragraph 25 of General Comment 7 of the CRC. Available at the website of OHCHR on <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf> (Accessed 9 September 2016).

<sup>77</sup> Paragraph 7 (As above).

The CRC Committee recommended states to ensure that all children are registered through a universal system that is accessible to everyone and free of charge.<sup>78</sup> It also recommended for States to give provision for late registration where a child has been unable to register at birth; ensuring that children without birth certificates also have equal access to education, health services and social services.<sup>79</sup> It is the danger of excluding children without birth certificates, such as intersex children, that this provision of the General Comment seeks to protect. Without a birth certificate intersex children remain extremely vulnerable and excluded from basic rights and services.<sup>80</sup>

What has been discussed above are the provisions protecting the right to legal recognition in general. It is important to note that there is no international law that specifically provides for the right to legal recognition or any other human rights of intersex persons.<sup>81</sup> It is the recognition of this gap that motivated human rights experts to formulate the Yogyakarta Principles (Principles) on the application of international human rights law on the issues of sexual orientation and gender identity (SOGI).<sup>82</sup> Whilst the Principles lack the status of law, most governments and agencies have made reference to them.<sup>83</sup> The Principles elaborate on a number of human rights of sexual minorities. However, Principle 3 is the most relevant for the purposes of this research as it states that every person has the right to be recognised as a person before the law.<sup>84</sup> The Principles further state that it shall not be a requirement for one to undergo genital corrective surgery in order for them to be legally recognised.<sup>85</sup>

The United Nations (UN) has not issued any resolution specifically protecting the rights of intersex persons. However in 2015 the Office of the High Commissioner for Human Rights (OHCHR) issued a report pursuant to resolution 27/32 updating a report on the status

<sup>78</sup> As above.

<sup>79</sup> The petition presented to Parliament of Kenya on 26 August 2016 indicated in paragraph 6 that intersex children were ineligible for the National Hospital Insurance Fund (NHIF) thus excluded in health care.

<sup>80</sup> A Akre (n above) 38.

<sup>81</sup> S Agius & C Tobler 'Trans and intersex people; Discrimination on the grounds of sex, gender identity and gender expression' (2013) *Thematic Report of the European Commission* 24.

<sup>82</sup> As above.

<sup>83</sup> As above.

<sup>84</sup> Principle 3.

<sup>85</sup> As above.



of violence and discrimination based on SOGI.<sup>86</sup> The report focused on violence and other forms of discrimination based on SOGI. On intersex persons, the report indicated that gender expectations often require persons to undergo genital corrective surgery as a requirement for legal recognition.<sup>87</sup> The report also condemns genital corrective procedures which it states are irreversible and often cause both long term psychological and physical suffering, a key focus of this research<sup>88</sup>

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also compiled a report on some form of abuses in health care settings which may constitute torture or cruel, inhuman or degrading treatment or punishment.<sup>89</sup> One of these abuses in health care settings, which relates to intersex persons specifically, includes genital corrective surgery on intersex without their consent in order to make them fall within the two binaries of male and female.<sup>90</sup>

On a regional level in Africa, The African Charter on Human and People's Rights (African Charter) provides that 'all persons are equal before the law.'<sup>91</sup> The right to legal recognition at birth is also recognised under the African Charter on the Rights and Welfare of the Child (ACRWC) which provides that every child must be registered at birth.<sup>92</sup> In its General Comment number 7 of Article 6 of the ACRWC, the African Committee of Experts on the Rights and Welfare of the Child (Committee of Experts) stated that the right is universal, universality implying that it must be accessible to every child without discrimination.<sup>93</sup>

The Committee of Experts in the communication of *Institute for Human Rights and Development in Africa and Open Society initiative*

<sup>86</sup> Report available at [http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A\\_HRC\\_29\\_23\\_en.doc](http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_23_en.doc) (accessed 25 October 2016).

<sup>87</sup> (As above) para 70.

<sup>88</sup> Report of OHCHR (n 87 above) para 53.

<sup>89</sup> Summary of the Report of the Special Rapporteur on Torture. Available at website of the OHCHR on [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf?utm\\_source=AIC+mailing+list&utm\\_campaign=0940e5a7fc-&utm\\_medium=email](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf?utm_source=AIC+mailing+list&utm_campaign=0940e5a7fc-&utm_medium=email) (accessed on 24 October 2016).

<sup>90</sup> (As above) para 77.

<sup>91</sup> Article 3(1).

<sup>92</sup> Article 6(2).

<sup>93</sup> Paragraph 50. Available at [http://srs.g.violenceagainstchildren.org/sites/default/files/political\\_declarations/2014/african\\_union/GC-No2-on-Article-6-of-the-African-Charter-on-the-Rights-and-Welfare-of-the-Child.pdf](http://srs.g.violenceagainstchildren.org/sites/default/files/political_declarations/2014/african_union/GC-No2-on-Article-6-of-the-African-Charter-on-the-Rights-and-Welfare-of-the-Child.pdf) (Accessed 9 September 2016).

*on behalf of the children descent in Kenya v the government of Kenya (Nubian case)* found Kenya in violation of Article 6(2) of the ACRWC, which provides for the immediate registration of children at birth.<sup>94</sup> The Committee of Experts held that by denying children of Nubian descent to be registered at birth, they were rendered stateless and faced an uncertain life in which they fail to access rights and protections given to them by the state.<sup>95</sup> Further such children faced difficulties such as travelling freely, accessing juvenile justice, and accessing socio-economic rights.<sup>96</sup> There is similarity between the difficulties that were considered Nubian children had to face in the above case due to lack of registration at birth and the difficulties that face intersex children due to their lack of registration at birth, and there is thus need to establish the necessary legal framework to register intersex children as was recommended by the Committee of Experts in relation to the Nubian children.

The above discussion on the place of legal recognition and the human rights of intersex persons in international law has shown that the right to legal recognition is protected under international law. However there is inadequate targeted protection of the rights of intersex persons in the binding normative instruments of international law as detailed above. This gap has been addressed by the Yogyakarta Principles that elaborate on the application of international human rights law to SOGI issues. Considering that Kenya has a progressive Constitution that allows general principles of international law and treaties ratified by Kenya to become part of domestic law, Kenya should fulfil its obligations under international law to ensure that intersex persons can register at birth and be protected from other forms of human rights violations.<sup>97</sup> The following sub-section will analyse the domestic legislation of Kenya and examine the extent to which it protects the right to legal recognition of intersex persons.

<sup>94</sup> *Institute for Human Rights and development in Africa and Open Society initiative on behalf of the children descent in Kenya v The government of Kenya*, Communication /002/2009, African Committee of Experts on the Rights and Welfare of the Child, 22 March 2011.

<sup>95</sup> (As above) para 46.

<sup>96</sup> As above.

<sup>97</sup> Article 2(5) & (6).

### 2.2.2 Kenyan Legislation

#### *Constitution*

The Constitution of Kenya (Constitution) entrenches a comprehensive Bill of Rights in Chapter four with the entire corpus of human rights and fundamental freedoms. The Constitution provides that the purpose of protecting the rights and freedoms as enshrined in the Constitution is to ensure that the dignity of persons is respected and also to ‘promote social justice and realise the full potential of all human beings.’<sup>98</sup> It is important to note that the need to legally recognise intersex persons is to protect their human dignity and to ensure that they are treated equally without discrimination.

The Constitution provides that ‘all persons are protected by the Bill of Rights to the greatest extent consistent with the nature of the right or freedom.’<sup>99</sup> Further to the constitutional imperative that persons enjoy their right to the greatest extent possible; the Constitution also injuncts the courts to interpret the Bill of Rights in such a way that favours the enforcement of the right of freedom.<sup>100</sup> The above provisions of the Constitution if progressively interpreted allow intersex persons to be legally registered at birth since the Constitution provides for legal recognition of everyone.

The Constitution of Kenya provides that every citizen is entitled to the rights, privileges and benefits that emanate by virtue of being a Kenyan citizen.<sup>101</sup> These include an entitlement to a passport and any other registration document that the State gives to individuals.<sup>102</sup> The above provisions imply that everyone must be entitled to birth registration as long as they are a Kenyan citizen. The Constitution also provides for the right to equality and freedom from discrimination.<sup>103</sup> ‘Every person is equal before the law and has the right to equal benefit and protection of the law.’<sup>104</sup> This equality entails that differences should not affect a person’s individual abilities and should not be used as a

<sup>98</sup> Article 19(2).

<sup>99</sup> Article 20(2).

<sup>100</sup> Article 20(3).

<sup>101</sup> Article 12(1)(a).

<sup>102</sup> Article 123(1)(b).

<sup>103</sup> Article 27(1).

<sup>104</sup> As above.

basis for treating other people differently.<sup>105</sup> Equality means that people should be treated with respect and deserve the same opportunities as everyone else.<sup>106</sup> By excluding intersex persons from registering at birth they are been treated differently thus affecting their right to equality.

The State and other persons are also prohibited from discriminating any person, on ‘any ground which includes ‘sex.’<sup>107</sup> Intersex persons, being people with an ambiguous sex should be progressively interpreted to be covered by this provision. The Constitution also requires the State to take legislative and other measures to address any disadvantages suffered by individuals and groups because of past discriminations.<sup>108</sup> Intersex persons are definitely a disadvantaged small minority group with no political power to influence legislation or policies that protect their rights. They can thus only be protected from this discrimination if the state takes legislative measures by enacting legislation that protects the rights of intersex persons and allows the recognition and registration of intersex children at birth.<sup>109</sup>

The Constitution of Kenya, if progressively interpreted, protects the right to legal recognition and other fundamental rights of intersex persons. The need for this progressive interpretation of Constitutional provisions to offer the necessary protection to intersex persons is further strengthened by Kenya’s obligations under international conventions which form part of the domestic law of Kenya.<sup>110</sup> The international obligations and general rules discussed in section 2.2.1 above have a direct binding effect on Kenya through the provisions of Article 2(5) and (6) of the Constitution which provide as follows:

- (5) The general rules of international law shall form part of the law of Kenya.
- (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

These provisions in the 2010 Constitution significantly changed the application of international human rights law in Kenya. International

<sup>105</sup> H Evelyn ‘Equality and Equity: Key Constitutional values’ in Y Pal Ghai & J Cottrell Ghai (eds) *National Values and Principles of the Constitution* (2015) 55.

<sup>106</sup> As above.

<sup>107</sup> Article 27(4) & (5).

<sup>108</sup> Article 27(6).

<sup>109</sup> One of the recommendations made by the Parliamentary Committee after hearing the petition presented by Issac Mwaura on behalf of intersex persons.

<sup>110</sup> Article 2(5) & (6).

law can therefore, now be directly incorporated into domestic law, a departure from the doctrine of transformation under which international law can only be domesticated through an Act of Parliament.<sup>111</sup>

The Kenyan Courts have applied this direct application of international human rights law, in the case of *Re The Matter of Zipporah Wambui Mathara* in which Justice Koome held that:

Section 2(6) of the Constitution of Kenya 2010, International Treaties, and Conventions that Kenya has ratified, are imported as part of the sources of the Kenyan Law. Thus the provision of Article 11 of the International Covenant on Civil and Political Rights which Kenya ratified on 1st May 1972 is part of the Kenyan law.<sup>112</sup>

The application of international human rights law in Kenya has also been confirmed in the case of *Beatrice Wanjiku & Another v The Attorney-General & Another*, in which the Court held that:

Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular articles 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law.<sup>113</sup>

The above mentioned cases are evidence that Kenyan Courts are embracing the binding nature of international law. The position taken by the courts is supported by Human rights treaty bodies such as the Committee on Economic, Social and Cultural Rights (ESCR Committee).<sup>114</sup> The ESCR Committee in its General Comment number 9 on the domestic application of the Covenant stated that to ensure that individuals can enforce their rights under the Covenant in domestic courts, human right treaties must be enforced immediately in domestic legislation.<sup>115</sup>

<sup>111</sup> N Orago 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 415 *African Human Rights Law Journal* 419.

<sup>112</sup> *Re The Matter of Zipporah Wambui Mathara*, Bankruptcy Cause 19 of 2010 para 9.

<sup>113</sup> *Beatrice Wanjiku & Another v The Attorney-General & Another* Petition 190 of 2011 para 17.

<sup>114</sup> N Orago (n 96 above) 421.

<sup>115</sup> CESCR General Comment 9: The domestic application of the Covenant, 3 December 1998, E/C 12/1998/24 para 4, <http://www.unhcr.org/refworld/docid/47a7079d6.html>

From what has been discussed above, the Constitution lays a necessary framework for protecting the rights of intersex persons. The Constitution allows for the direct application of international human rights treaties which Kenya has ratified. If the legislature takes heed of the human rights standards set out above and progressively applies the Bill of Rights there is need to provide for the recognition of intersex persons as a third sexual category to enable intersex persons to fully enjoy the rights and benefits given by the State. The following subsection will discuss the extent to which Parliamentary legislation provides for the right to legal recognition.

### *Parliamentary Legislation*

In Kenya, births are registered in terms of the Birth and Death Registration Act (Cap 149) ('the Act'). In the terms of section 7 of the Act, it is the duty of every registrar to record the particulars of birth given to him. In terms of the Act, these prescribed particulars include 'name, sex, date and place of birth, and the names, residence, occupations and nationality of the parents.'<sup>116</sup> The term 'sex' is not defined in the Act or in the Interpretation and General Provisions Act (Cap 2). However Form 1 contained in the Schedule to the Act excludes intersex persons, indicating that sex is either male or female.<sup>117</sup> This infers that a child cannot be registered at birth as an intersex. In the *Baby A case* it was held that the Courts have no power to interpret the wording 'sex' to include a third gender which is intersex, it was stated that it is the duty of the legislature to create a third sexual category.<sup>118</sup>

In terms of the Children's Act (Cap 141), 'every child shall have a right to a name and nationality and where a child is deprived of his identity, the Government shall provide appropriate assistance and protection with a view to establishing their identity,'<sup>119</sup> Despite the guarantees in the Children's Act, individuals at the present moment cannot register as intersex. In an interview with one intersex individual on the side-lines of the Parliamentary Committee hearing, he stated that because of his intersex condition he had been unable to be registered because it was unclear under which sexual category he would fall.<sup>120</sup>

(accessed 25 October 2016).

<sup>116</sup> Section 2.

<sup>117</sup> Section 24.

<sup>118</sup> *Baby A case* (n 9 above) para 62.

<sup>119</sup> Section 11.

<sup>120</sup> Interview conducted on 6 October at Continental. The interview requested to remain

The practice in Kenya has to been to exclude intersex children from registering at birth as a third sexual category.<sup>121</sup> There is no policy framework in Kenya providing for the registration of intersex persons at birth. There is no policy that protects intersex persons from any of the abuses and human rights violations that they face on a day to day basis.<sup>122</sup> There is a gap in the domestic legislation as it does not provide for a third sexual category. The Courts have already reiterated that it is the duty of the legislature to provide for a third sexual category.<sup>123</sup> It is, therefore, the duty of the legislature to enact legislation providing for the legal recognition of intersex persons at birth. The following sub-section will in detail analyse the consequences resulting from non-registration of intersex persons.

### 2.3 THE IMPACT OF LACK OF APPROPRIATE LEGAL RECOGNITION AT BIRTH ON INTERSEX PERSONS (NON-CONSENSUAL MEDICAL CORRECTIVE PROCEDURES ON INTERSEX PERSONS)

One of the consequences resulting from denying persons the right to register as intersex at birth is that it puts pressure on the parents to subject their child to unnecessary medical corrective procedures which often occur without the consent of the child, since the child is incapable of consenting.<sup>124</sup> In the *Baby A case*, for example, the parent of the intersex child alleged that she was unable to properly register the birth of her child because a question mark had been put on the birth notification form, as there was no provision to register intersex persons as a third sexual category.<sup>125</sup>

Parents, on the ill-advice of medical doctors, are always advised to surgically correct the genitalia of their child in order to match socially

anonymous.

<sup>121</sup> James Karanja and other intersex individuals present at the Parliament Hearing testified that they had been unable to get birth certificates.

<sup>122</sup> Commissioner Jedidah Wakonyo Waruhiu of the KNCHR speaking at the launch of the 'let me be me' intersex campaign held at KNHRC on 19 October 2016.

<sup>123</sup> *Baby A case* (n 9 above) para 62.

<sup>124</sup> S Aliabadi 'Gender Assignment Surgery for Intersexed Infants: How the Substantive Due Process Right to Privacy Both Supports and Opposes a Moratorium' (2004) 170 *Virginia Journal of Social Policy & the Law* 171.

<sup>125</sup> *Baby A case* (n 9 above) para 1.

constructed binaries.<sup>126</sup> Some scholars have equated sex-correction surgery on intersex children to Female Genital Mutilation (FGM) citing them as far more complicated than FGM because of the serious physical and psychological consequences that result later in life.<sup>127</sup> According to these scholars, ‘the parents of these children are often poorly informed about the need for and effects of the surgery and are sometimes pressured by doctors to consent to it.’<sup>128</sup>

One of the parents who testified during the Parliamentary Committee hearing attended by this researcher, and discussed more broadly in chapter four below, testified that when she gave birth, she was very confused because of the condition of the child and she only started to understand the condition with the passage of time. From what has been highlighted above, parents of an intersex child are left with no choice but to align their child to the ‘acceptable sexes’ in order to register their child, so as to benefit from the rights that accrue from possessing national identity documents. It will be imperative to analyse the bioethics involved in intersex surgery and the human rights violations that arise when intersex children are subjected to non-consensual medical corrective procedures.

### *2.3.1 Bioethics involved in intersex surgery: The informed consent doctrine*

The current human rights standards and medical ethics require that ‘all persons must give free, prior and informed consent before any medical treatment.’<sup>129</sup> Informed consent is defined as ‘the free, voluntary and conscious agreement of a patient, stated in the full use of their faculties after being suitably informed, so that an action may be undertaken that affects their health.’<sup>130</sup> However in surgery involving intersex children, this consent is given by the parent because the child is too young to consent, yet the complications resulting from the surgery affect the child’s life.

<sup>126</sup> A Puluka (n 37 above) 2097.

<sup>127</sup> N Ehrenreich & M Barr ‘Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of Cultural Practices’ (2005) 71 *Harvard Civil Rights-Civil Liberties Law Review* 74.

<sup>128</sup> As above.

<sup>129</sup> Amnesty International note to the European Parliament. Available at <https://www.amnesty.org/en/documents/ior61/014/2011/en/> (accessed 28 October 2016).

<sup>130</sup> M Cainzos & S Gonzalez-Vinagre ‘Informed Consent in Surgery’ (2014) 1596 *World Journal of Surgery* 1597.



The Universal Declaration on Bioethics and Human Rights (UDBHR) in Article 6(1) provides that any medical treatment has to be performed with the full consent of the person involved and that where appropriate such consent must be expressed. Article 7(a) of the UDBHR further provides that where a person is incapable of giving consent, medical practice or authorisation must be obtained with due regard to the best interests of the person and domestic law; and that the person concerned must to a great extent be involved in the decision making. In terms of principle 3 of the Yogyakarta Principles, ‘no person may be forced to undergo any genital corrective medical procedure.’ As will be evidenced by the human rights violations to be discussed in the next subsection, the corrective surgery is performed without considering the best interests of the child and not including the child in the decision making.

In its concluding observations on Germany, the United Nations Committee against Torture (UNCAT) recommended Germany to ensure ‘the best practices of granting informed consent to surgical treatment of intersex persons including full information in writing, orally on suggested treatment, its justification and alternatives.’<sup>131</sup>

As mentioned earlier, where corrective procedures are performed, they are done without the full and express consent of the child involved. There is universal rejection and condemnation of intersex infant surgery by people who have fallen victims.<sup>132</sup> This only exposes the weaknesses of the informed consent that parents give on behalf of their minor children. According to Tamar-Mattis, there is no demonstrated harm to an intersex child if surgery is postponed until later in life.<sup>133</sup> This enables the concerned child to fully take part in the decision making of their chosen gender when they are capable of consenting.<sup>134</sup>

### *2.3.2 Deficiencies in parental consent on behalf of intersex children*

Parents of intersex children often consent to medical corrective surgery on behalf of their minor children. Young children are excluded

<sup>131</sup> Concluding observation on Germany. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fDEU%2fCO%2f5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fDEU%2fCO%2f5&Lang=en) (Accessed 16 September 2016).

<sup>132</sup> A Tamar Mattis (n 52 above) 68.

<sup>133</sup> As above.

<sup>134</sup> As above.

from the decision-making process despite the surgery affecting a fundamental component of their life. According to Beh and Diamond the informed consent given by parents on behalf of their children is deficient.<sup>135</sup> Parents are not in a position to give valid consent on behalf of their children as the medical professionals fail to give them adequate information.<sup>136</sup> Medical professionals often give the impression that surgery is urgent when it is not.<sup>137</sup>

Beh and Diamond also enunciated that medical professionals often fail to disclose to the parents the possibility that the child may reject the sex that have been assigned to them, later in life <sup>138</sup> ‘There is always a question as to whether the parents make the decision after the doctors have explained the options to them or the doctors are the real decision-makers.’<sup>139</sup> Parents should not make decisions concerning surgery on their children unless it is an emergency. This is because parents have a conflict of interest as they are more interested in having a ‘normal’ looking child without paying due regard to the best interests of the child.<sup>140</sup>

### *2.3.3 Human Rights violations arising from medical corrective without the consent of the child.*

Medical corrective procedures on intersex children without their consent violate a number of fundamental human rights of the concerned individuals. According to OHCHR, intersex children are subjected to irreversible medical procedures that can cause life-long psychological suffering, depression, permanent infertility, pain, incontinence and loss of sexual pleasure; without the young person concerned appreciating the decision-making which violates their right to physical integrity.<sup>141</sup> These procedures may sometimes be recommended on the alleged health benefits. However, they are proposed without fully examining the

<sup>135</sup> G Beh & M Diamond ‘An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia’ (2000) 1 *Michigan Journal of Gender and Law* 38.

<sup>136</sup> As above.

<sup>137</sup> (As above) 43.

<sup>138</sup> (As above) 56.

<sup>139</sup> A Tamar Mattis (n 52 above) 85.

<sup>140</sup> As Above.

<sup>141</sup> OHCHR Fact sheet on Intersex, United Nations for LGBT. Available at [https://unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf) (accessed on 18 September 2016).

child and giving alternative solutions that protect the right to physical integrity and bodily integrity.<sup>142</sup>

Bodily integrity stems out of one's entitlement to privacy which is deemed to protect them from intrusion into their health care decisions.<sup>143</sup> Many individuals are forced into surgical procedures they would have otherwise not accepted in order for them to exercise their right to gender recognition and registration aligned to the binary of male and female.<sup>144</sup> Corrective surgery has also been found to constitute torture.<sup>145</sup> The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment condemned the surgery as a form of torture stating that there is overwhelming evidence from people who were subjected to corrective surgery confirming the negative impacts.<sup>146</sup>

Some authors argue that there should be a moratorium on intersex surgery unless it is necessary to perform it.<sup>147</sup> The KNCHR in its submissions during the Parliamentary hearing submitted that intersex children in Kenya were being subjected to non-consensual genital corrective surgery which violated the rights already explained above.<sup>148</sup>

From what has been analysed above, intersex children are at risk of being subjected to corrective surgery in order to be aligned to the socially acceptable binaries of male and female. Without providing for a third sexual category in Kenya or providing for other alternatives on birth registration intersex children are at risk of having the above mentioned rights violated.

<sup>142</sup> As above.

<sup>143</sup> S Benson 'Hacking the gender binary myth; recognising the fundamental rights of the intersexed' (2005) 31 *Cardozo Journal of Law and Gender* 43.

<sup>144</sup> As above.

<sup>145</sup> Report of the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the twenty-second session of the HRC on 1 February 2013. 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.' Available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf) (10 September 2016).

<sup>146</sup> (As above) para 76-79.

<sup>147</sup> S Benson (n 145 above) 35.

<sup>148</sup> Submissions of the KNCHR in support of the petition to the Parliament Committee discussed in chapter four below.

2.4 IMPACT OF NON-REGISTRATION ON NATIONALITY  
AND ACCESS TO CITIZENSHIP RIGHTS

The registration of a birth is the first action of a community in legally recognising a child.<sup>149</sup> It is the State's first acknowledgment that a child exists, which represents a child's significance and importance before the law, and a ticket to nationality and citizenship that opens the way to full enjoyment of rights, benefits and services that are provided by the state.<sup>150</sup> OHCHR presented a report to the HRC in which it stated that birth registration is a fundamental tool in preventing stateless children, however birth registration does not always lead to citizenship.<sup>151</sup> Instead birth registration enables every child to acquire nationality since it is a form of proof of a relationship between the individual and the state.<sup>152</sup>

One scholar writing on intersex persons enunciated that, 'a child who is born without a definite sex is analogous to an individual without a state, because the very documents conferring citizenship require an affirmative 'male' and 'female designation.'<sup>153</sup> 'A birth certificate allows a child to obtain a national identity document, a driver's licence, opening a bank account, inheriting property and securing formal employment.'<sup>154</sup> Without a birth certificate, children who insist on registering as intersex are then denied access to these rights, benefits and services. Being registered is one of the first steps towards a person's democratic right to vote and even standing for election.<sup>155</sup> A birth certificate is also a prerequisite for one to obtain a passport which enables one to cross borders.<sup>156</sup> Without a passport, intersex persons are denied their right to movement across borders. Intersex persons cannot register as a third sexual category, therefore such exclusion has the negative impact explained above.

<sup>149</sup> U Dow 'Birth registration: The first right' (1998) *Civil Rights Commentary* 9. Available at <http://www.unicef.org/pon98/06-13.pdf> (accessed 18 September 2016).

<sup>150</sup> As above.

<sup>151</sup> 'Birth registration and the right of everyone to recognition everywhere as a person before the law' *Report of the OHCHR* presented to the HRC on the 27<sup>th</sup> session of the HRC on 17 June 2014.

<sup>152</sup> As above.

<sup>153</sup> A Akre (n 38 above) 38.

<sup>154</sup> M Miller 'Birth Registration; statelessness and other repercussions for unregistered children' (2004) Paper presented to the third European Conference on Nationality 12. Available at [http://www.coe.int/t/dghl/standardsetting/nationality/3\\_WEB%20E%20Rep.%2012.pdf](http://www.coe.int/t/dghl/standardsetting/nationality/3_WEB%20E%20Rep.%2012.pdf) (accessed 18 September 2016).

<sup>155</sup> As above.

<sup>156</sup> As above.

## 2.5 IMPACT OF NON-REGISTRATION ON SOCIO-ECONOMIC RIGHTS (RIGHT TO EDUCATION AND HEALTH)

### 2.5.1 *Right to education*

In terms of Kenya's Education Act of 2013, 'no child shall be denied admission in a school or basic education institution for lack of proof of age.'<sup>157</sup> However, in a study carried out in Kenya by Plan International, researchers found out that the government of Kenya introduced a measure that makes it mandatory for one to present their birth certificate before they can register for national examinations.<sup>158</sup> In some schools, you may not have access to education without a birth certificate.<sup>159</sup>

James Karanja at the media launch of the 'let me be me' campaign at KNCHR, attended by the researcher on the 19 October 2016 in the context of this research, spoke of his failure to gain admittance to study at the University of Nairobi because he did not have a national identity document. The situation was further exacerbated by the fact that he could not even gain access into the premises of the university even to inquire, because it is a mandatory security requirement that one must produce a national identity card before entering the university premises.

The petition submitted to the Parliamentary Committee, which will be discussed in detail in Chapter 4 below, stated that one challenge intersex persons were facing is that education certificates with the incorrect sex were being issued to intersex persons.<sup>160</sup> This could not be easily amended by the Kenya National Examination Council (KNEC) as there is no existing policy on name changing.<sup>161</sup> This absence of a name-change policy subsists despite the Courts having been confronted with the *Republic v KNEC (Audrey Mbugua case)* involving a transgendered woman who wanted to change the names on her education certificates to reflect her new names and gender.<sup>162</sup> The court on this matter issued an order directing the KNEC to recall her certificate and effect the

<sup>157</sup> Article 33.

<sup>158</sup> 'Birth registration and children's rights; A complex story' Report by Plan International available at <https://www.planusa.org/docs/birth-registration-rights-2014.pdf> (Accessed 18 September 2016).

<sup>159</sup> As above.

<sup>160</sup> Para 3 of the petition.

<sup>161</sup> Confirmed at the Parliamentary hearing by the KNCHR.

<sup>162</sup> *Republic v KNEC & Another Petition 147 of 2013*.

changes.<sup>163</sup> Despite this, there is still no policy at KNEC with regards to name changing. The court held that it was not a requirement to put a gender marker on a certificate, therefore, certificates could be issued without gender markers.<sup>164</sup> From what has been explained above, without a birth certificate, intersex children are denied a basic fundamental right to education and other education-related opportunities which makes them vulnerable to exploitation in the future due to lack of education<sup>165</sup>

### 2.5.2 *Right to Health*

According to Plan International;

Millions of children die of preventable diseases before reaching the age of five. Ineffective systems of birth registration play a role in this crisis since unregistered children may be unable to gain access to health care services or may have to pay more than the registered child. In some countries, a child without proof of citizenship will also be denied access to free or subsidized vaccination programs.<sup>166</sup>

The findings of Plan International potentially affect intersex persons in Kenya since one has to present their identity documents before they can have access to healthcare. The OHCHR has also established that there is a correlation between children who are registered and being taken to a health professional when they are sick.<sup>167</sup> OHCHR enunciated the implications of proof of identity on children who are affected by HIV/AIDS. The HRC stated that birth registration reduces the impact of HIV/AIDS on affected children and protects orphaned children from abuse and exploitation.<sup>168</sup>

Intersex persons in Kenya who are not registered at birth are at risk

<sup>163</sup> *Audrey Mbugua case* (as above) 12.

<sup>164</sup> As above.

<sup>165</sup> J Todres 'Birth Registration; An essential step towards ensuring the rights of all children' Electronic copy available at: <http://ssrn.com/abstract=1118759> (accessed 18 September 2016).

<sup>166</sup> N Sharp 'Universal Birth Registration – A Universal Responsibility' (2005) *Plan International Report* 16.

<sup>167</sup> Report of the OHCHR on the right of the child to the enjoyment of the highest attainable standard of health, twenty-second session of the HRC 4 December 2012 para 81. Available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-31\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-31_en.pdf) (accessed 18 September 2016).

<sup>168</sup> 'Birth registration and the right of everyone to recognition everywhere as a person before the law' Report of OHCHR to the twenty-seventh session of the HRC, 17 June 2014.

of being victims of the potential negative impacts of not having a birth certificate. Proof of identity is imperative in accessing healthcare facilities or healthcare benefits offered by the State. The petition submitted to the Parliamentary Committee cites that intersex persons cannot access the National Hospital Insurance Fund (NHIF).<sup>169</sup> Without proof that you are a Kenyan national, you are at risk of being excluded from such benefits.

## 2.6 CONCLUSION

This chapter has analysed the human rights violations intersex persons in Kenya are at risk of facing on the basis that they are excluded from registering at birth. Despite Kenya being party to international conventions and entrenching constitutional guarantees that protect the right to legal recognition of intersex persons, one can only register as either male or female. The negative impacts have been explained above. The subsequent chapters will elaborate on how to address the exclusion by learning from experiences from Malta and proposing a model law for Kenya and other African countries.

<sup>169</sup> Para 6.

3.

LESSONS LEARNT FROM OTHER JURISDICTIONS:  
A CRITICAL ANALYSIS OF MALTA IN PROTECTING  
THE RIGHT TO LEGAL RECOGNITION AND OTHER  
FUNDAMENTAL HUMAN RIGHTS OF INTERSEX PERSONS

3.1 INTRODUCTION

This Chapter analyses the international best practices in protecting the right to legal recognition and other fundamental rights of intersex persons, by learning from Malta. Chapter two has shown that the lack of legal recognition negatively impacts on other human rights. This chapter will therefore, analyse how Malta has protected these other rights by analysing Malta's legislation and government policies, which Kenya can gain inspiration from.

In 2015, Malta adopted the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC Act), which provides for the recognition and protection of the right to gender identity and the 'sex characteristics' of a person by allowing name changes on birth certificates and delaying birth registration on people with indeterminate sex.<sup>170</sup> According to OHCHR, Malta is the first country in the world to have legislation banning non-consensual corrective procedures on minors without their consent.<sup>171</sup> The GIGESC Act comprehensively protects the right to legal recognition which it refers to as the right to gender identity, the right to bodily integrity and physical autonomy which protects minors from undergoing genital corrective surgery without their consent.<sup>172</sup>

<sup>170</sup> Preamble of the GIGESC Act. Available at the government of Malta website at <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1> (19 October 2016).

<sup>171</sup> Fact sheet prepared by OHCHR (unpaged). Available at [https://unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf) (accessed 19 October 2016).

<sup>172</sup> Section 3 & 14. The right to gender identity, right to bodily integrity and the right physical are new rights which are not provided for under the Constitution of Malta.



The favourability of Malta as a good comparator of this study is motivated by the fact that it is the first country in the world to ban non-consensual corrective surgery as well as providing for such issues like legal recognition and name changing all under one piece of legislation specifically catering for intersex and trans-gendered persons. In Africa, South Africa's through the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUD Act) protects intersex persons from various forms of discrimination<sup>173</sup> The only limitation is that the PEPUD Act is only limited to protection from discrimination and does not protect other fundamental rights and issues raised in the previous chapters.

This chapter will examine the public consultative process leading to the adoption of the GIGESC Act in Malta and suggest how Kenya can draw inspiration from the process. Steps towards drafting a Bill on intersex persons are still in their infant stages as will be discussed in Chapter four below, therefore a lot can be borrowed from Malta. In Kenya, besides the Protection of Persons Deprived of Liberty Act (PPDL Act), there is no other legislation that specifically protects the rights of intersex persons.<sup>174</sup> In terms of the PPDL Act, intersex persons have the right to choose the gender of the person who can search them.<sup>175</sup> Further, intersex persons must be detained separately.<sup>176</sup>

A synopsis of the GIGESC Act will be written highlighting the important features of the law by looking at the right to legal recognition and protection of minors from non-consensual corrective surgery. Further analysis will be undertaken of the two policies that have been developed by Malta to implement the GIGESC Act on the protection of intersex persons in schools and places of detention.<sup>177</sup> Considering that Kenyan courts have been seized with an intersex issue in the *RM case*<sup>178</sup>, an analysis of Malta's Inmates policy with regards to intersex persons will be carried out. This chapter will further look at Malta's education policy considering that Kenyan Courts have also been seized with a matter concerning name changing on education certificates, in

<sup>173</sup> Section 1.

<sup>174</sup> Interview with John Chigiti (n 7 above).

<sup>175</sup> Section 2 & 12(e).

<sup>176</sup> Section 2 & 12(e) respectively.

<sup>177</sup> Malta Trans, Gender Variant and Intersex Inmates Policy and the Malta Education Policy (Trans, Gender Variant and Intersex students in Schools Procedures).

<sup>178</sup> *RM case* (n 16 above).

the *Audrey Mbugua case*,<sup>179</sup> although it dealt with a transgendered person.<sup>180</sup>

### 3.2 THE PUBLIC CONSULTATIVE PROCESS IN THE DRAFTING OF THE GIGESC ACT IN MALTA

In order to have more public input in the formulation of the GIGESC Act, the government of Malta - through its Ministry for Social Dialogue, Consumer Affairs and Civil Liberties - initiated an online public consultative process from 29 October to 30 November 2014.<sup>181</sup> This was done despite the fact that there is no Constitutional provision on public participation in the Constitution of Malta.<sup>182</sup> This online consultative process received 26 submissions from various stakeholders.<sup>183</sup> The importance of undertaking public participation in the law-making process is highlighted in the South African case of *Doctors for Life International v The Speaker of the National Assembly and others* in which the Court stated the following;

It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice.<sup>184</sup>

The inclusion of the public by Malta in the law-making process of the GIGESC Act is a commendable procedure that showed that Malta is a constitutional democracy which upholds its international obligations on public participation.<sup>185</sup> It is prudent for Kenya to involve the public and

<sup>179</sup> *Audrey Mbugua case* (n 164 above).

<sup>180</sup> *Audrey Mbugua case* (n 164 above). James Karanja stated that he was facing challenges of changing his certificates to reflect his new name and sex during his testimony at KNCHR.

<sup>181</sup> Submissions report on the GIGESC Act (page 4). Available at GOM Website on [http://socialdialogue.gov.mt/en/Public\\_Consultations/MSDC/Documents/2014%20-%20GIGESC/GIGESC%20-%20Outcome%20Report.pdf](http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/2014%20-%20GIGESC/GIGESC%20-%20Outcome%20Report.pdf) (accessed 19 October 2016).

<sup>182</sup> The Constitution of Kenya enables the public to be involved in making of legislation as provided by Article 118(b).

<sup>183</sup> Submissions Report (n 183 above) 6.

<sup>184</sup> *Doctors for Life International v The Speaker of the National Assembly and others* 2006 6 SA 416 (CC) at para 115.

<sup>185</sup> The right to public participation is provided for under Article of the 25 of the ICCPR,

various stakeholders in the law-making process of a Bill that protects the rights of intersex persons. Public Participation is already provided for in the Constitution of Kenya.<sup>186</sup> This is imperative considering the sensitive issues at stake which are rather considered alien in Kenyan conservative society.

After the close of the consultative process, the government of Malta prepared a submissions report detailing its findings from the process.<sup>187</sup> In its final decision after assessing the submissions, the government of Malta noted that the issues of gender identity affecting transsexuals and intersex persons might be perceived to be sensitive in nature, however these were matters affecting the core of the individuals and families affected and required government attention.<sup>188</sup> This culminated in the adoption of the GIGESC Act which will be analysed in the next subsection.

It is important to note that from the submissions made during the consultative process, there was no opposition to the Bill in respect to intersex persons, however there was opposition in respect to transgender persons.<sup>189</sup> An organisation called the Church in Malta criticised the oversimplification of acquiring a new gender which is against nature.<sup>190</sup> The process can also not go without criticism, as it did not take into account some of the most important proposals concerning intersex persons. One of the recommendations came from the Organisation Intersex International Australia (OII Australia) concerning the definition of ‘sex characteristics.’<sup>191</sup> OII Australia recommended that the word ‘intersex’ should be expressly included in the definition of sex characteristics as this would enable more clarity on how sex characteristics are diverse in nature.<sup>192</sup> However the suggestion made by

and Articles 9, 13 & 25 of the African Charter.

<sup>186</sup> Article 118(1)(b).

<sup>187</sup> Submissions Report (n 183 above).

<sup>188</sup> (As above) 10.

<sup>189</sup> Submissions available at [http://socialdialogue.gov.mt/en/Public\\_Consultations/MSDC/Pages/Consultations/GIGESC.aspx](http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Pages/Consultations/GIGESC.aspx) (accessed 26 October 2016).

<sup>190</sup> Submission of the Church in Malta available at [http://socialdialogue.gov.mt/en/Public\\_Consultations/MSDC/Documents/2014%20-%20GIGESC/The%20Church%20in%20Malta.pdf](http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/2014%20-%20GIGESC/The%20Church%20in%20Malta.pdf) (accessed 26 October 2016).

<sup>191</sup> Submissions of OII Australia (unpagd). Available at GOM Website at [http://socialdialogue.gov.mt/en/Public\\_Consultations/MSDC/Documents/2014%20-%20GIGESC/Organisation%20Intersex%20International%20Australia%20\(OII%20Australia\).pdf](http://socialdialogue.gov.mt/en/Public_Consultations/MSDC/Documents/2014%20-%20GIGESC/Organisation%20Intersex%20International%20Australia%20(OII%20Australia).pdf) (accessed 19 October 2016).

<sup>192</sup> As above.

OII Australia was ignored in the final Act despite the importance of the concerns. It is prudent for Kenya or any African country that wishes to draft a bill protecting the rights of intersex persons to explicitly include the wording ‘intersex’ in order to avoid any ambiguity.

### 3.3 LEGAL RECOGNITION OF INTERSEX PERSONS IN MALTA UNDER THE GIGESC ACT

The core of this research, as discussed in the previous chapters, is to analyse the impact of not legally recognising intersex persons particularly through birth registration. With continued exclusion of intersex persons from registration in Kenya, there is continued danger that this small minority group will continue to have their fundamental rights violated. Malta has rectified this problem by legally recognising intersex persons.

As a first step towards legally recognising intersex persons, the GIGESC Act accords the right to gender identity for every Maltese citizen.<sup>193</sup> The GIGESC Act uses the wording ‘gender identity’ to refer to both sex and gender. Any identity documents have to reflect the person’s preferred gender identity.<sup>194</sup> This provision of the GIGESC Act is in line with the Yogyakarta principles which state that all persons must have legal capacity regardless of their gender identity.<sup>195</sup> The GIGESC Act does not expressly create a third sexual category which is an imperfection that should be rectified if Kenya is to enact any legislation.

It is not a requirement for one to produce proof that they have undergone a genital corrective surgery in order to exercise their right to gender identity.<sup>196</sup> This reflects what is provided for under Principle 3 of the Yogyakarta Principles explained in the previous chapter. The GIGESC Act sets out a procedure one has to follow if they want to change to their self-determined gender, such change extending to change of name.<sup>197</sup> This procedure is initiated at the Director of the Public Registry who should enter the new gender within 15 days.<sup>198</sup>

<sup>193</sup> Section 3(1)(a).

<sup>194</sup> Section 3(1)(c).

<sup>195</sup> Principle 3.

<sup>196</sup> Section 3(4).

<sup>197</sup> Section 4.

<sup>198</sup> Section 4(4).

One has to produce a public deed, which contains the old birth certificate, preferred new name and gender, and a declaration by the applicant that the preferred gender does not correspond with the one given at birth.<sup>199</sup> This will, especially, be relevant to Kenya as all the intersex persons present at the Parliamentary Committee hearing, discussed more broadly in chapter four below, had changed their names to suit their new gender, but these changed names were not legally recognised in Kenya. In order to enable intersex persons to be legally recognised by their new names in Kenya, inspiration can thus be drawn from the above mentioned provision in the GIGESC Act.

Another important provision in the GIGESC Act relating to legal recognition is the name and gender change when the concerned person is a minor.<sup>200</sup> Such may be done on behalf of the minor by their parent or guardian by application to a court.<sup>201</sup> In considering the application, the Court is obligated to take into account the best interests of the child as enshrined in the CRC, with the views of the minor being sought and given sufficient weight depending on the age and maturity of the concerned child.<sup>202</sup> This provision seeks to protect intersex children from being assigned a particular gender only on the basis of their parents decision, which is often influenced by external factors as discussed in chapter two. The parents' decision is often conflicted as explained in chapter two above; thus this provision of the Act seeks to rectify this problem.

The GIGESC Act also gives an option for one not to be immediately registered at birth, if their gender cannot be easily determined.<sup>203</sup> If the minor has not reached the age of 18 years, the parents or guardians of the minor may file an application before a court to declare the gender of the child.<sup>204</sup> This again takes into account the best interests of the child. The full birth certificate can only be attained when the minor reaches the age of 18 years.<sup>205</sup> The importance of this provision is that it guards against hurriedly imposing a gender or sex marker that does not correspond with what the concerned minor will turn out to be in

<sup>199</sup> Section 4A(5).

<sup>200</sup> Section 7.

<sup>201</sup> As above.

<sup>202</sup> Section 7(2).

<sup>203</sup> Section 7(4).

<sup>204</sup> As above.

<sup>205</sup> Section 8.

the future. A gender marker on a birth certificate which is neither male nor female, or the absence of gender marker which is recognised by a foreign court also has effect in Malta.<sup>206</sup> This provision guards against discriminating intersex persons from other jurisdictions who are legally recognised in a particular form.

If one has changed their gender on their identity documents they may also upon the payment of a fee cause their education certificates or any other documents to reflect their new gender.<sup>207</sup> This is reflected in the Maltese education policy to be discussed below. This provision rectifies the problem in the *Audrey Mbugua case* discussed in chapter two.<sup>208</sup>

The GIGESC Act also criminalises any conduct that is contrary to what is provided for in the GIGESC Act.<sup>209</sup> Fines are imposed on any offenders. It protects intersex persons against discrimination and protects their equality.<sup>210</sup> The public service is obligated to ensure that it is accommodative and create opportunities for everyone regardless of their gender thus intersex persons are essentially protected within the public service.<sup>211</sup> This provision also extends to the private sector.<sup>212</sup>

From what has been discussed above, it can be noted that the objective of the GIGESC Act is not only to legally recognise intersex persons and end there. It goes further to ensure that intersex persons are not prejudiced by losing other rights acquired on their mistaken sex or gender, such as property rights acquired before change of name.<sup>213</sup> It ensures that intersex persons can use their newly acquired documents with their preferred sex or gender without facing any discrimination since the GIGESC Act criminalises any conduct which is contrary to the provisions therein. Similarly, Kenya must draw inspiration from Malta when drafting its intended Bill to protect intersex persons. Additional provisions that ensure that the right to legal recognition is fully put into effect must be contained in such a Bill.

<sup>206</sup> Section 9(2).

<sup>207</sup> Section 10(3).

<sup>208</sup> *RM case* (n 16 above).

<sup>209</sup> Section 11.

<sup>210</sup> Section 13.

<sup>211</sup> As above.

<sup>212</sup> Section 13(2).

<sup>213</sup> Section 3(2).

### 3.3.1 *Protection of intersex individuals from non-consensual genital corrective surgery*

This research established that one of the consequences of not legally recognising intersex persons as they are, is that parents often take their children for genital corrective surgery so that they fit within the binaries of male and female and thereby enable them to register. However, as already discussed earlier in chapter two, such surgery is problematic since the consent of the child is questionable due to the incapability of the minor child to consent to surgery. In order to rectify this problem, the GIGESC Act introduces the right to bodily integrity and physical autonomy which protects minor children from undergoing non-consensual genital corrective surgery.<sup>214</sup>

The GIGESC Act makes it unlawful to surgically operate a minor intersex person when such surgery can be deferred until the minor is capable of consenting.<sup>215</sup> Consent may be given through a person exercising parental authority of the minor, however in some circumstances the consent given by the parent can only have effect if there is agreement between the parent and an interdisciplinary team.<sup>216</sup> One of the most important features of the GIGESC Act which Kenya can draw inspiration from is the interdisciplinary team which is mandated to review the necessity of an intersex child to undergo genital corrective surgery in exceptional circumstances<sup>217</sup>

The interdisciplinary team is the primary body that approves surgery in exceptional circumstances, and thus there is no need for court application to perform surgery.<sup>218</sup> In circumstances where the interdisciplinary team approves such surgery to go ahead, it should not be influenced by social factors.<sup>219</sup> The interdisciplinary team must give consideration to the best interests of the child as enshrined under the CRC, and the views of the child after assessing their age and maturity.<sup>220</sup>

The interdisciplinary team established by the GIGESC Act effectively protects minors from non-consensual genital corrective surgery, which

<sup>214</sup> Section 14.

<sup>215</sup> As above.

<sup>216</sup> Section 14(2).

<sup>217</sup> As above.

<sup>218</sup> As above.

<sup>219</sup> (n 73 above).

<sup>220</sup> Section 14(5).

is one of the devastating impacts of not legally recognising intersex children. By establishing an interdisciplinary team, decisions by medical professionals and the informed consent given by parents can be scrutinised to ensure that the surgery is necessary and not cosmetic. This safeguards against the concerns raised in the chapter two, that the consent given by the parent is usually defective.

Another important feature of the GIGESC Act is the establishment of a treatment protocol that is composed of a working group appointed by the Minister.<sup>221</sup> The working group is composed of nine persons who are drawn from human rights experts, psychologists and medical professionals.<sup>222</sup> The mandate of the working group is to review Maltese medical treatment protocols and ensure that they are in line with the current best practices.<sup>223</sup> The working group was to be introduced within 3 months of the gazetting of the GIGESC Act and was mandated to report back with recommendations on how to improve the existing guidelines in Malta.<sup>224</sup> The accomplishments of the working group with regards to fulfilling its mandate could not be established by this research.

Kenya can borrow on this front from Malta, as the issue of medical treatment protocols has already been raised by the Kenyan court in the *Baby A case*, when the court directed the government to develop guidelines on the surgical procedures on intersex persons.<sup>225</sup> The government has, however, ignored this directive as per the testimonies in the Parliamentary hearing on intersex persons that is discussed more elaborately in chapter four below. The government can work on this by establishing a similar working group of experts to develop guidelines for surgical procedures in Kenya.

#### 3.4 MALTA EDUCATION POLICY (TRANS, GENDER VARIANT AND INTERSEX STUDENTS IN SCHOOLS PROCEDURES)

In order to ensure that the provisions of the GIGESC Act have effect, the government of Malta developed policies to ensure full

<sup>221</sup> Section 16.

<sup>222</sup> Section 16(4).

<sup>223</sup> Section 16(6).

<sup>224</sup> Section 16(5).

<sup>225</sup> *Baby A case* (n 9 above) para 71.



implementation of the GIGESC Act. One such policy is the education policy,<sup>226</sup> which Kenya can draw inspiration from considering that the Kenyan Courts have been confronted with the issue of name changing on certificates when one has transitioned.<sup>227</sup> In the Kenyan *Audrey Mbugua case*, the reason for litigation was the refusal by the KNEC to allow a name change in the academic certificates of a transgendered person, Audry Mbugua Ithibu, who had changed her name from Andrew Mbugua Ithibu.<sup>228</sup> It is important to note that this case dealt with a transgender person and not an intersex person. However intersex persons also face the same dilemma of changing the gender/sex on their documents as testified during the Parliamentary hearing. Whilst the Court issued an order for the KNEC to give the applicant a certificate without a gender marker and reflecting the new names; submissions from the KNEC during the case showed that there was no policy for name changing.<sup>229</sup>

The Maltese education policy procedures rectify this problem right from the period of attending school, thus avoiding such challenges later in life.<sup>230</sup> Where a student has changed their sex in terms of the GIGESC Act, the school should change all records to reflect the new particulars.<sup>231</sup> The policy also allows a person who has changed his or her legal gender or sex to order a reissue of their education certificates by the school bearing their preferred new particulars.<sup>232</sup> Such a policy guards against refusal by schools and education bodies to amend education certificates as was in the *Audrey Mbugua case*.<sup>233</sup>

Where an intersex child approaches any school authority, the school must offer support by creating an inclusive school management plan involving parents, the concerned victim and other professionals to ensure that the school appropriately responds to the student's needs.<sup>234</sup> To ensure that there is inclusivity in the school set-up, the policy provides that students can access toilets or any gender specific facilities which

<sup>226</sup> Education procedures available at <http://tgeu.org/wp-content/uploads/2015/06/Malta-Education-Procedures.pdf> (accessed 19 October 2016).

<sup>227</sup> *Audrey Mbugua case* (n 84 above).

<sup>228</sup> (As above) 4.

<sup>229</sup> As above.

<sup>230</sup> Education Procedures (n 228 above) 8.

<sup>231</sup> As above.

<sup>232</sup> As above.

<sup>233</sup> *Audrey Mbugua case* (n 84 above).

<sup>234</sup> Education Procedures (n 228 above) 4.

suit their self-determined gender.<sup>235</sup> If the student is uncomfortable using a shared facility, an alternative must be provided. However, the policy prohibits the creation of specific toilets for intersex and gender non-conforming individuals as it can potentially undermine the right to privacy of the concerned individual, by publicly identifying them.<sup>236</sup> As a recommendation, the policy encourages toilets which can be used by one person at a time and are accessible to all genders.<sup>237</sup>

Much can be learnt from the education policy of Malta. Enacting a law which protects the rights of intersex persons is just one step towards full recognition of intersex persons. It must be coupled with policies that ensure full implementation of the proposed Act. Such an education policy in Kenya should ensure that the school environment is fully accommodative of intersex persons and caters for their recognition in school records including education certificates. It must instruct schools to formulate a plan when a person identifies themselves as intersex in order to offer psychological services and guard against discrimination such as bullying.

### 3.5 MALTA TRANS, GENDER VARIANT AND INTERSEX INMATES POLICY

The Kenyan Courts decided on *the RM case* discussed in chapter one, which dealt with an intersex prison inmate.<sup>238</sup> The concerns raised in the petition can be rectified by learning from Malta. The Malta Trans, Gender Variant and Intersex Inmates Policy (Inmates policy) effectively sets out guidelines for correctional service officials to follow when they are confronted with a situation involving an intersex person.<sup>239</sup> The Inmates Policy encourages correctional services to ensure that their prison and remand facilities respect human rights, equality, inclusion and recognition of all persons.<sup>240</sup>

The policy provides that upon entry into a prison facility, inmates

<sup>235</sup> (As above) 7.

<sup>236</sup> As above.

<sup>237</sup> As above.

<sup>238</sup> *RM case* (n 16 above).

<sup>239</sup> Inmates' policy. Available at Government of Malta website at <https://socialdialogue.gov.mt/en/Documents/TRANS%20GENDER%20VARIANT%20and%20INTERSEX%20INMATES%20POLICY/Trans%20Gender%20Variant%20and%20Intersex%20Inmates%20Policy.pdf> (accessed 19 October 2016).

<sup>240</sup> (As above) 3.

are registered as per their documents.<sup>241</sup> Where an inmate identifies differently from what is reflected on the identity documents, further clarity is made with the inmate in privacy.<sup>242</sup> Intersex persons are placed into facilities as to the sex on their identity documents.<sup>243</sup> Where it is necessary, separate facilities may be offered. However, it is discouraged to restrict association with other inmates.<sup>244</sup> If an inmate permanently identifies themselves in a new sex, then they should be housed in a facility that suits their gender, thus in the *RM case*, the applicant would be placed in female cells.<sup>245</sup>

Prison searches, which was one of the complaints in the *RM case*, are carried out as per the identity documents and not based on how one physically looks.<sup>246</sup> Regarding the sharing of ablution facilities and changing facilities, due consideration must be given to the sensitivity and privacy of some individuals; thus access is encouraged to be given at different times.<sup>247</sup>

Intersex inmates may also initiate ‘gender identity recognition’ whilst in prison, which correctional facility officers are required to approach with due diligence.<sup>248</sup> The Inmate Policy also provides for access to health services which includes assessment and medical treatment relating to the condition of the inmate.<sup>249</sup> If an inmate was already on hormone therapy prior to entering the prison facility, then they should continue accessing the treatment in the same manner they were receiving it.<sup>250</sup>

### 3.6 CONCLUSION

From what has been discussed in this chapter, the Maltese GIGESC Act comprehensively protects the right to legal recognition of intersex persons as well as other fundamental human rights of intersex persons. This has been complemented by policies developed to ensure effective

<sup>241</sup> (As above) 6.

<sup>242</sup> As above.

<sup>243</sup> As above.

<sup>244</sup> As above.

<sup>245</sup> (As above) 7.

<sup>246</sup> (As above) 8.

<sup>247</sup> (As above) 9.

<sup>248</sup> (As above) 11.

<sup>249</sup> (As above) 13.

<sup>250</sup> As above.

implementation of the GIGESC Act. Kenya is still in its initial stages towards the drafting of a Bill protecting the rights of intersex persons. The tone has been set through the Parliamentary Committee hearing, which is discussed in section four below, with the Committee expressing its commitment to ensure that this Bill passes through. As Kenya begins this process, lessons and best practices, as documented in this chapter, can be learnt from the Maltese process which started with the consultative process that culminated in the adoption of the GIGESC Act.

## 4.

SUGGESTED MODEL LAW ON INTERSEX PERSONS  
FOR ADOPTION BY KENYA

## 4.1 INTRODUCTION

This Chapter aims to develop a model law that can be used to guide the Kenyan process of enacting legislation for the recognition of intersex children at birth as well as the protection of their human rights and fundamental freedoms. The discussion in Chapter two concluded that Kenya has the necessary constitutional framework for the protection of the right to legal recognition and other fundamental rights of intersex persons, particularly because of the direct application of international law. Under international human rights law, states are obligated to take measures that respect, protect, and fulfil all fundamental human rights obligations.<sup>251</sup> ‘There is growing consensus that international human rights law carries positive obligations for states to take affirmative actions which allow for the domestic implementation of international human rights law.’<sup>252</sup>

That being the case, Kenya should fulfil its obligations under international human rights law by taking necessary legislative measures of enacting legislation that protects the rights of intersex persons. Intersex persons may only be protected by a law that provides for their recognition as a third sexual category, protect them from non-consensual genital corrective surgery and any other fundamental human rights discussed in chapter two. Kenya has embarked on the process of creating the necessary legislative framework for the recognition and

<sup>251</sup> I Kysel ‘Domesticating Human Rights Norms in the United States; considering the role and obligations of the Federal government as litigant’ (2015) 1009 *Georgetown Journal of International Law* 1021.

<sup>252</sup> I Kyle (as above) 1020.

registration of intersex persons as well as the protection of their rights as will be discussed in detail in the following sub-section.

It is to that regard that this research develops a draft model law that can be used as the preliminary draft in the legislative process. Even though the model legislation is developed with the objective of contributing to the Kenyan process, it can form an important starting point for many African countries which can use it to initiate the processes of legislative enactment to enhance the recognition of intersex persons and to guarantee the protection of their human rights and fundamental freedoms. However before dealing with the draft model law, the following sub-section will explain in detail the initial phases of the proposal to draft a Bill on intersex persons in Kenya.

#### 4.2 SYNOPSIS OF THE KENYAN PROCESS TOWARDS ADOPTING A BILL PROTECTING FOR THE RIGHTS OF INTERSEX PERSONS

The drafting of a Bill protecting the rights of intersex persons in Kenya is still in its infant stages. On 6 October 2016 the Parliamentary Committee heard a petition presented by Honourable Isaac Mwaura (MP) regarding the legal recognition of persons with gender disorder conditions.<sup>253</sup> It is important to note that the petition was restricted to the gender disorder conditions of intersex persons. The Parliamentary Committee's hearing follows an initial submission of the petition to the Parliament of Kenya by Isaac Mwaura (MP).<sup>254</sup>

The petition dated 24 August 2016 and signed by 20 intersex individuals, raised a number of concerns and recommendations were presented.<sup>255</sup> The petition took note of Article 27 (4) and (5) of the Constitution of Kenya, which recognises the individual's rights to equality and freedom from discrimination.<sup>256</sup> The petition noted that the Ministry of Interior and Coordination of National Government had through the Directorate of National Registration of Persons failed

<sup>253</sup> The petition is on file with the researcher. The meeting was held at Continental House in Kenya and attended by the researcher in the context of this research.

<sup>254</sup> 'Kenyan MP pushes for law to recognise intersex people' Website of the British Broadcasting Corporation (BBC). Available at <http://www.bbc.com/news/world-africa-37256913> (accessed 14 October 2016).

<sup>255</sup> Petition is on file with the researcher.

<sup>256</sup> Petition (para 1).

to recognise intersex persons as Kenyan citizens.<sup>257</sup> The concerns in this petition are in tandem with this research topic, which is the legal recognition of intersex persons at birth.

The petition noted that the Ministry of Education, and Technology's curriculum, despite containing intersex education, still issued wrong certifications to persons living with gender disorders.<sup>258</sup> Further, that due to the lack of appropriate registration at birth, intersex persons in Kenya were denied access to public places, right to vote and other citizenship rights.<sup>259</sup> The petition noted that due to lack of awareness, intersex persons continued to face discrimination from the public which led to low self-esteem and stigma which often resulted in intersex persons committing suicide.<sup>260</sup> This resonates with one of the testimonies made by one of the intersex persons before the Parliamentary Committee that he has tried to commit suicide at least four times.<sup>261</sup> The petition further noted that the Ministry of Health had neglected intersex persons which led them to receive inadequate medical check-ups and that they had been ineligible for the National Hospital Insurance Cover (NHIF) cover.<sup>262</sup> The futility in trying to engage the government agencies concerned made the petitioners recommend the Parliament to direct the Ministry of Interior and Coordination of National Government to establish a mechanism that enables persons with gender disorders to register as intersex persons.<sup>263</sup> The petition further recommended the government to conduct public awareness on intersex issues, allocate funds to intersex persons in the next budget especially for covering surgery and adopt legislation that protects the rights of intersex persons.<sup>264</sup>

In support of the petition, the KNCHR presented a report to the Parliamentary Committee in which it urged the Parliament to adopt a number of recommendations.<sup>265</sup> In supporting the petition, the KNCHR was performing its functions as listed under section 8 of the KNCHR Act.<sup>266</sup> In the submissions made by the KNCHR, it was stated

<sup>257</sup> (As above) para 2.

<sup>258</sup> (As above) para 3.

<sup>259</sup> (As above) para 4.

<sup>260</sup> (As above) para 5.

<sup>261</sup> Name withheld for privacy concerns.

<sup>262</sup> (As above) para 6.

<sup>263</sup> (As above) para 7.

<sup>264</sup> (As above) para 8.

<sup>265</sup> The document is on file with the researcher.

<sup>266</sup> In terms of section 8(e) the KNCHR has the mandate to investigate and research on

that birth certificates are of great importance for anyone to access any other rights.<sup>267</sup> Without a birth certificate the life of the child is affected as it enables one to go to school, to have access to documents such as such as passports, identity documents and access to the NHIF.<sup>268</sup> This denies the child rights, protection and guarantees that are made under part two of the Children’s Act.<sup>269</sup> The concerns of the KNCHR reiterate what has already been discussed in chapter two above.

The KNCHR was also concerned that most intersex children were undergoing normalising surgery which arise not justified and violates the rights of intersex persons.<sup>270</sup> This caused long- lasting psychological and physical pain, sterility and genital insensitivity amongst other things.<sup>271</sup> Corrective surgery was condemned by the KNCHR as it violates people’s autonomy and bodily integrity.<sup>272</sup> It also violated the right to health, as clinical approaches in handling intersex persons were more concerned with genitalia as opposed to other health needs of intersex persons.<sup>273</sup> KNCHR insisted that there was no need to perform corrective surgery unless there was urgent need to do so, with the consent to undergo corrective surgery to be given by the child when they reach such an age that they can give informed consent.<sup>274</sup>

KNCHR further noted the absence of guidelines to regulate the process when it is necessary to perform corrective procedures. The KNCHR stated that it was difficult to ascertain the number of intersex persons in Kenya because the census in Kenya was structured on the traditional binaries of male and female which does not give room for other genders.<sup>275</sup> This made intersex persons victims of inequality as they are ignored in state policies or any other government programmes.<sup>276</sup> They further noted that most intersex persons had faced extreme social rejection, violence and some had been abandoned by their parents.<sup>277</sup> Most had been abandoned due to cultural taboos which erroneously

matters in respect of human rights and to make recommendations to state.

<sup>267</sup> Submission of the KNCHR to the Parliamentary Committee para 8.

<sup>268</sup> As above.

<sup>269</sup> As above.

<sup>270</sup> (As above) para 9.

<sup>271</sup> As above.

<sup>272</sup> (As above) para 10.

<sup>273</sup> As above.

<sup>274</sup> (As above) para 11.

<sup>275</sup> (As above) para 14.

<sup>276</sup> As above.

<sup>277</sup> (As above) para 17.



assert that intersex children are a curse and may lead to ostracism of the parents.<sup>278</sup>

The concerns raised in the petition and the submissions by the KNCHR were also supported by the testimonies given by intersex persons who were present during the petition.<sup>279</sup> James Karanja testified that he was abandoned by his father upon realising his condition. Due to societal pressure and ostracism his mother has been locked up in a mental facility as a result of psychological conditions caused by his intersex condition. 'Ruth' Wangui testified that he had been raised as a girl and had been registered at birth, and acquired identity documents on the same gender. However upon reaching puberty, as with other intersex persons who were present, he did not go through normal puberty stages that girls go through. Instead, he developed male features which significantly altered his physical appearance. He was ridiculed in school and had been stripped several times in public by people who wanted to ascertain his gender. Due to the ridicule he faced in school, he dropped out and has not completed any formal education.

Identity documents presented to the Parliamentary Committee and all those in attendance at the Committee hearing showed that he had physically changed to the extent that you could barely recognise him as a 'female.' Due to this physical change, it is now almost impossible for him to use the same documents. The police have been called on him several times on the mistaken belief that he wanted to impersonate someone by using stolen identity documents. This issue has been difficult to rectify as Kenyan legislation does not provide for people who have changed their gender identity to acquire new identity documents. This is one of the serious gaps in Kenyan legislation that this research seeks to rectify.

After hearing the presentation of the petition, the Parliamentary Committee described the petition as one of the most emotional and important petitions they have ever heard. The Parliamentary Committee stated that there was need for a radical recommendation for the Parliament of Kenya to enact legislation that protects the rights of intersex persons. The Parliamentary Committee noted that intersex persons were a very small minority with little to no political power to influence their agendas, thus without the protection of the legislature

<sup>278</sup> As above.

<sup>279</sup> Three intersex persons were present at the hearing, however the petition had been signed by 20 intersex persons.

they would continue to face discrimination and violation of their human rights.

The Parliamentary Committee urged intersex persons to come out and present themselves so that the government would have statistics for budgetary allocations. The Parliamentary Committee inquired if there was need to amend any other Acts, create special hospitals and special schools for intersex. There is no harm in creating special hospitals for intersex persons or amending any legislation that discriminates intersex persons. However it can be problematic to create special schools for intersex persons as it goes against the current trend towards inclusive education.

Inclusive education is a 'process of addressing and responding to the diversity of needs of all learners through increasing participation in learning, cultures and communities, and reducing exclusion within and from education.'<sup>280</sup> It is an internationally protected right provided for in the Convention on the Rights of Persons Living with Disabilities (CRPD).<sup>281</sup> The CRPD 'forbids the exclusion of children with disabilities from the general education system on the basis of disability.'<sup>282</sup> Organisation Intersex Europe (OII Europe) has acknowledged the CRPD as one of the international conventions that protects the rights of intersex persons.<sup>283</sup>

If children with disabilities or any other condition like intersex persons are excluded from mainstream education it can have devastating impacts which deny them opportunities exposed to other children.<sup>284</sup> Children who have disabilities or any other condition can only achieve their highest potential if they are provided with the same opportunities as other children.<sup>285</sup> Lessons can also be learned from Malta's education policy which it adopted to protect the fundamental rights of transgendered and intersex children.

<sup>280</sup> UNESCO 'Guidelines for inclusion: ensuring access to Education for All' (2005). Available at <http://unesdoc.unesco.org/images/0014/001402/140224e.pdf> (accessed 19 October 2016).

<sup>281</sup> Article 24.

<sup>282</sup> As above.

<sup>283</sup> 'Statement of OII Europe on Intersex, Disability and the UN Convention on the Rights of People with Disabilities' 2. Available at [http://oiiurope.org/wpcontent/uploads/2015/05/CRPD\\_2015\\_Statement\\_OII\\_Europe.pdf](http://oiiurope.org/wpcontent/uploads/2015/05/CRPD_2015_Statement_OII_Europe.pdf) (accessed 16 October 2016).

<sup>284</sup> O Mafa 'Challenges of implementing inclusion in Zimbabwe's Education System' (2012) 14 *Online Journal of Education Research* 16.

<sup>285</sup> As above.

It was imperative to give a full analysis of what transpired at the Parliamentary Committee hearing in order to have a full appreciation of the foundation that has been set towards the drafting and adoption of a Bill that protects intersex persons in Kenya. Whilst the hearing does not improve the protection of intersex persons, it is a significant step towards legally recognising intersex persons and protecting some of their rights. The Parliamentary Committee can do no more than draft and recommend the Bill to Parliament for adoption. It is up to Parliament to pass the drafted Bill into law, hence the need to sensitise MPs on intersex issues in order to avoid misconceptions on the nature of the Bill.

An analysis of the Maltese consultative process in the drafting of the GIGESC Act as well as the steps that were taken in the development of the Bill and its enactment into law has been undertaken in chapter three above. Chapter three has similarly undertaken a substantive analysis of the content and the practical implementation of the GIGESC Act, teasing out the best practices that Kenya can adopt in drafting, enacting and implementing legislation for the registration at birth of intersex persons and for the protection of their human rights and fundamental freedoms.

Based on the process that has been initiated for the development of legislation on intersex persons in Kenya, and the best practices that have been denoted in Malta, this study attempts to develop a model legislation that can be enacted by Kenya and other African countries to ensure registration of intersex children at birth and to enhance the protection of their fundamental rights and freedoms. The following subsection focuses on the suggested model law for Kenya.

#### 4.3 PROPOSED BILL PROTECTING INTERSEX PERSONS IN KENYA

*Title of the Bill: The Registration and Protection of the Rights of Intersex Persons Bill 2016*

*Preamble*

A Bill for the enactment of AN ACT of Parliament to establish a framework for the recognition and registration of intersex children at birth; for the protection, promotion and fulfilment of the human rights and fundamental freedoms of intersex persons without discrimination

as per Article 27 of the Constitution; and for connected purposes.  
Enacted by the Parliament of Kenya as follows.

PART I – PRELIMINARY

1. Short title: This Act may be cited as the Registration and Protection of the Right of Intersex Persons Bill, 2016.

2. Interpretations: In this Act, unless the context otherwise requires –  
“Intersex person” means “individuals who possess genital, chromosomal, or hormonal characteristics which do not correspond to the given standard for male or female categories as for sexual or reproductive anatomy, which may take different forms and cover a wide range of conditions.”<sup>286</sup>

“Corrective surgery” means “any medical procedure performed for the purpose of altering the sexual or reproductive anatomy of a person”.

“Identity documents” means “any official documents issued by the state or any institution bearing the person’s name and sex for the purposes of identification”.

“Minor” means “a person below the age of 18 years”.

“Intersex Review Board” means “a board established under section 10 of this Act”.

3. *Objects and purpose of the Bill*

The object and purpose of this Bill is to create a conducive national legal framework for the recognition and registration at birth of intersex children; and further to create the necessary legal framework for the respect, protection, promotion, observance and fulfilment of the rights of intersex persons as per Articles 21 and 27 of the Constitution.

4. *Guiding Principles*

All persons under this Act, shall in the performance of their functions under this Act be guided by the National Values and Principles set out in Article 10 of the Constitution as well as the values that underpin

<sup>286</sup> Amnesty International Report (n 1 above) 97.

the Bill of Rights in Chapter four of the Constitution. For further clarity, the guiding values would be – human dignity, equality and non-discrimination, inclusivity and the protection of the vulnerable and marginalised populations.

PART II – RECOGNITION, REGISTRATION AND PROTECTION  
OF THE RIGHTS OF INTERSEX PERSONS

*Right to legal recognition*

5. (1) All intersex persons shall have the right to legal recognition, this includes the right to have access to a birth certificate, a passport and any other identity document accorded to Kenyan citizens.

The wording ‘sex’ in any law shall be interpreted to include intersex persons.

(2) It shall not be a requirement for any intersex person to undergo genital medical corrective procedures, sterilisation, hormonal therapy or any other medical treatment as a requirement to have access to a birth certificate, passport or any other identity document issued under the laws of Kenya.

(3) It shall not be a requirement for one to be unmarried in order to exercise their right to legal recognition.

(4) A designation of a sex marker ‘non-assigned’ (NA), shall be entered on a birth certificate of a child with undeterminable sex, until such a time the sex can be determined.

(a) Determinable sex is qualified where the concerned intersex person has reached the age of 18 years old, or earlier in exceptional circumstances, with due consideration to age and maturity of the minor. Where the concerned person is a minor, consent may be given on behalf of the minor by a parent or any other person with parental authority over the minor subject to the approval by the Intersex Review Body.

(b) Determinable sex in sub-article 4(a) above may be self-determined or medically determined.

(c) Any intersex person may elect to continue having their identity documents bearing the ‘non-assigned’ (NA) sex marker. It shall not be a mandatory requirement to amend identity documents to show ‘male’ or ‘female’ as a sex marker.

(d) No intersex person shall be discriminated, prejudiced or denied access to

any rights, claims or benefits accorded by the state or any private person on the basis of a 'non assigned' (NA) sex marker.

(5) Any intersex person shall have full legal capacity in civil and criminal matters and the right to enter into and execute any contract, benefit from inheritance, to acquire and dispose of property.

#### *6. Change of name and sex on identity documents*

(1) Any intersex person who has acquired any identity document before the promulgation of this law, and their name or sex has been wrongly entered on their identity documents as medically determined or self-determined by them to reflect their person, has the right to change the name and sex on identity documents. Parents or persons with parental authority on behalf of a minor may initiate name and sex change procedures provided the decision has been approved by the Intersex Review Body.

(2) Change of name and sex set out in sub-article 6(1) above shall not prejudice any person of any rights or obligations they had, prior to the change of name and sex.

(3) It shall not be a requirement for one to be unmarried in order to effect a name or sex change.

(4) Three months after the gazetting of this law, the Ministry of Interior and Coordination of National Government must issue a Statutory Instrument setting out procedures on how to change names and sex through the Directorate of Immigration and Registration of Persons. Such a Statutory Instrument may always be amended in order to align it with the emerging best practices and human rights standards which are consistent with the laws of Kenya.

#### *7. Change of name and sex on certificates from institutions of education and examination bodies*

(1) Intersex persons who have received education certificates bearing a wrongly entered name or sex shall have the right to change the name and sex to reflect their person, as medically determined or self-determined by them.

(2) The Ministry responsible for education shall develop policies and procedures which enable students to change their name and sex on their academic certificates.

(3) Name and sex change can only be effected provided that, the procedures in Article 5(4)(a) above are met.

*8. Right to bodily integrity and physical autonomy (Protection of minors from non-consensual medical genital corrective procedure)*

(1) It shall be unlawful to carry out any genital corrective procedures or any treatment without the express informed consent of the minor, or express informed consent of the parent or person with parental authority.

(2) All genital corrective procedures or treatment regardless of the express informed consent of the minor, parent or person with parental authority shall be reviewed and approved by the Intersex Review Board. It shall be an offence for any medical professional to conduct genital corrective procedures or treatment without a review of the decision by the Intersex Review Board.

(3) In exceptional circumstances genital corrective surgery or treatment may be performed on a minor without the approval of the Intersex Review Body, provided it is justified as an emergency situation and there is immediate risk to the life of the minor if the surgery or treatment is not performed immediately.

(4) Genital corrective procedures may be performed on intersex persons above the age of 18 years old without the approval of the Intersex Review Body provided there is express informed consent. In exceptional circumstances, this requirement may be reduced to the age of 16 years.

(5) In considering the necessity of performing genital corrective surgery, test or any other treatment, medical professionals or the Intersex Review Body reviewing a decision of a medical professional shall take into account:

(a) The medical necessity of performing surgery and not cosmetic or social factors.

(b) That the minor or adult intersex person, parent or person with parental authority consenting on behalf of an intersex minor is fully aware of all the information concerning the genital corrective surgery and that the positive and negative consequences of performing the surgery have been fully explained to them to enable them to have an informed consent.

(c) The best interests of the child as provided for under the Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

(d) Age and maturity, where the concerned person is a minor.

### *9 Freedom from discrimination and promotion of equality*

(1) All intersex persons shall enjoy the right to equal protection, equal benefit of the law and freedom from discrimination as provided for under Article 27 of the Constitution of Kenya.

(2) No law or policy shall be interpreted in such a way that it discriminates against intersex persons.

(3) Government shall develop policies that ensure that intersex persons have the freedom from discrimination in political, cultural and social spheres. The public service and private sector shall ensure that policies are developed which protect intersex persons from discrimination in the workplace.

(4) Any person alleging violation of any provision of this Act, has the right to petition the courts as provided for under Article 22 of the Constitution of Kenya.

### *10 Establishment of the Intersex Review Body*

(1) The President shall appoint an Intersex Review Body for a period of 5 years renewable terms.

(2) The Intersex Review Body shall be composed of 9 renowned experts. The experts must equally come from the fields of human rights, medicine and psychology.

(3) The functions of the Intersex Review Body shall include;

(a) Reviewing and approving or disapproving all decisions relating to legal recognition and genital corrective surgery where the concerned person is a minor.

(b) Creating and updating guidelines on intersex medical procedures in line with the prevailing best practices and human rights standards.

(c) Collating statistics and developing budgetary allocations on intersex for submission to responsible ministries.

(d) Identifying and recommending medical centres or medical professionals who can perform genital corrective surgery where necessary.

### *11. Health Services*

(1) The government shall ensure that all intersex persons requiring medical interventions receive it free of charge in public hospitals. This includes surgery, hormonal therapy, or any treatment or medical tests to determine sex.



(2) The Ministry of Health in Consultation with the Intersex Review Body shall develop a budget to accommodate the health requirements of intersex persons.

(3) The government shall free of charge offer intersex persons; counselling and psychosocial support

#### 4.4 CONCLUSION

This chapter has suggested a model law which can offer a starting point towards the adoption of a Bill protecting the rights of intersex persons in Kenya. The Bill ideally has provided for the protection of the right to legal recognition and the right to bodily integrity and physical autonomy. It is not possible to protect each and every right of intersex persons under one piece of legislation. What this model law does is to protect issues of serious concern, which include exclusion from registering at birth, freedom from discrimination and non-consensual genital corrective procedures. Once intersex persons are legally recognised they will be able to access other rights which they have been discriminated against.

Where Intersex persons face human rights violations such as discrimination or any differential treatment, they are equally protected under the Constitution of Kenya as with any other person. Already the suggested model law makes it an offence to discriminate any intersex person on the basis of their identity documents which display a 'non-assigned' sex marker.

5.

CONCLUSION AND RECOMMENDATIONS

5.1 SYNOPSIS OF FINDINGS

Chapter one of this research was the introduction of the research setting out a general overview and purpose of this research. Chapter two analysed the place of the legal recognition of intersex persons in international law and the Constitution of Kenya. Kenya has obligations under international law to equally recognise all human beings without discrimination. The constitutional framework, if progressively interpreted, already provides for the necessary framework to protect intersex persons particularly the direct application of international law in domestic legislation provided for under the Constitution. Chapter two also analysed the devastating impacts of not allowing intersex children to be able to register at birth, which include non-consensual genital corrective surgery, and not being able to access health-care, education and other rights and benefits.

Chapter three was a comparative study which focused on Malta, analysing how it has been able to protect the rights of intersex persons particularly on legal recognition and protection of minors from genital corrective surgery. The standards set out in Malta through the enactment of the GIGESC Act and the Inmates and Education policy on Intersex Persons are best practices which Kenya can borrow from, in the drafting of the a local Bill protecting the rights of intersex persons. Chapter four analysed the initial phases of discussions and deliberations for the drafting of a Bill protecting intersex persons which is currently taking place in Kenya. The chapter then developed a draft model law for Kenya, which could be used as a starting point in the law-making process in Kenya. Chapter five is the conclusion and suggests recommendations below.

## 5.2 CONCLUSION

The research has established that there is urgent need for the protection of the rights of intersex persons in Kenya, particularly on legal recognition which was the core of this research. Without a birth certificate, intersex persons are excluded from many rights and services. The legal framework created by the Constitution of Kenya 2010 can be progressively interpreted to recognise the right to legal recognition, equality before the law and non-discrimination, important components of the law that can be critical in protecting the rights of intersex persons. At this moment in the socio-political context in Kenya, there is growing interest in the recognition of intersex people as a third gender and the protection of their human rights and fundamental freedoms, with civil society organisations and the KNCHR successfully petitioning the Parliamentary Committee to urgently draft a Bill protecting the rights of intersex persons.

The Parliamentary Committee agreed that a Bill must be urgently drafted. However it is up to the whole Parliament to pass the Bill into law, a process that may take time due to the conservative nature of Kenyan society and the competing interests, with the country headed for an election in August of 2017. To kick-start the drafting process, Kenya may use the draft model law in chapter four as a starting point. Best practices may also be adopted from Malta through its GIGESC Act. In order to adequately protect the right to legal recognition and other fundamental rights of intersex persons, this research makes the following recommendations.

## 5.3 RECOMMENDATIONS

### 5.3.1 *Government*

- The Ministry of Interior and Coordination of National Government, through the Directorate of Immigration and Registration and Persons, must take immediate administrative action in ensuring that intersex persons are legally recognised as a sexual category. A separate gender/sex marker must be created to ensure that intersex persons are accommodated.
- The legislature must make it illegal to perform any genital corrective

procedures on minors without their informed consent, and without approval of such a decision by a review body. Surgery without the approval of the review body may be limited to emergency situations. The total ban on surgery may seem far-fetched. However, that is the best way of guarding young children incapable of consenting from the decisions of their parents which are often defective because of societal pressure or of doctors who often usually do not fully explain to parents the positive and negative outcomes of performing corrective surgery on minors.

- Parliament should require the treasury to make budgetary allocations that caters for intersex persons to ensure that intersex persons freely access health services which include government sponsored genital corrective surgery, where it is necessary, chromosome tests in order to establish the sex of the child and any other medical procedures that are related to the intersex condition.
- In order to fulfil the above mentioned recommendation, Government must issue a directive to the Registrar of Persons and the Ministry of Health ordering them to collate the statistics of intersex persons. These figures will enable the government or any other institution with a mandate for the protection of the fundamental rights of intersex persons, to allocate resources or incorporate intersex persons in any other programmes with the exact figures in place.
- The National Hospital Insurance Fund must cover intersex persons.
- The Ministry of Health must develop proper medical protocols and guidelines for medical professionals to follow when they are confronted by an intersex child requiring surgery.
- Government must develop comprehensive policies that cover intersex inmates who are in detention to ensure that they are treated with dignity and not subjected to inhumane and degrading treatment, whilst in detention. The government must also develop a comprehensive education policy that ensures that intersex children are integrated into the school system and protected from discrimination whilst in a school environment. Government must also take an administrative action to enable students who have received certificates with a wrong name and sex to smoothly amend their certificates with KNEC.

### *5.3.2 Civil society organisations*

- The initiative by Gama Africa Foundation on 26 October 2016 to launch the ‘let me be me’ intersex awareness campaign is commendable. However civil society organisations with different expertise like legal or medical experts should join hands with Gama Africa to ensure that they successfully sensitize society as well as lobbying Parliament to enact legislation protecting the rights of intersex persons.

### *5.3.3 Intersex persons*

- Intersex persons and their families should come out so that they can be visible to society and statistics are collated for the purposes of budgetary allocations or any other use for the promotion and protection of the fundamental rights of intersex persons.

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