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**SPEAKING THE UNSPEAKABLE!  
INTERROGATING THE RIGHTS AND LEGAL RECOGNITION OF INTERSEX  
PERSONS IN KENYA**

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**BY  
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## Abstract

An intersex person is one whose biological sex cannot be classified clearly as either male or female. This ambiguity may be anatomical, hormonal, gonadal or chromosomal. Intersex births are estimated at between 1.7% (Nthumba, 2008) and 3% (Haas, 2006) or between 748,000 and 1,320,000 of Kenya's population which is estimated at around 44 million people. The figures are mind-boggling, yet nothing much is known or written about intersex persons in Kenya. Having served in the Kenyan Judiciary for more than 20 years, the author has risen to the rank of Chief Magistrate and has served in the Childrens' Court. It is here in 2009 that she had her first contact with an intersex child who was brought before her as a child in need of care and protection during the arraignment of the child's mother for child neglect. A victim impact statement revealed that the child was suffering because of the stigma directed at the child's intersex status and the community's traditional attitude against intersex babies, who could be killed at birth. The child was not in school because of the child's parents' fear that the child would be ridiculed by others. A few years later, in the case of *RM v The Attorney General and others* [2010] eKLR, the Constitutional Court made the finding that issues of intersex persons are not the concern of society and do not deserve government regulation or protection. Based on her experiences, the author was of the view that this finding was far removed from the lived realities of intersex persons. Using the Grounded Women's Law Approach, the author sought 'to describe, understand and improve the position of intersex persons in the law and in the society'. She did this by making intersex persons the focus of her study. The study found that, since society is organized and based on the sex/gender binary of female and male, intersex persons are a marginalised sex minority group who face discrimination from the moment of their birth, as some people regard them as abnormal and a curse. Statutory birth registration law does not even recognise their existence. Their right to self-determination is violated through the assignment of a sex/gender at birth, sometimes through corrective surgery and without their consent, yet their bodies may develop into the sex opposite to the one imposed. As a result, they are forced to live secret lives, with no understanding of their condition. The study concludes there is an urgent need for intersex consciousness raising and organizing so that they can speak in their own voices and explain their needs. The Constitution has empowered Kenyan Courts to interpret its values and provisions in such a way as to develop the law to safeguard the rights and freedoms of all its citizens as contained in the Bill of Rights. This constitutional power imposes on the Courts the duty to provide a platform for intersex persons to re-engage meaningfully with Kenyan society in order to seek and earn, at least to start, the fundamental and existential legal recognition they deserve.

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**Declaration**

I Teresia Mumbua Matheka do hereby declare that this dissertation is my original work presented towards the award of Masters Degree in Women’s Law from the University of Zimbabwe. It has not been presented to any other academic institution. Use of other people’s work has duly been acknowledged.

Signed this .....Day of .....2014

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Supervisor: Professor Julie Stewart

Signed this .....Day of .....2014

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## ***Dedication***

*To Billie and Mwanzia, you provoked this search*

*Sidney and Francisca*

*and all the others, for sharing your lives*

*May the stories that are your reality*

*become the reality of our society, soon,*

*Where no person will suffer the indignity*

*Of being defined by the look of their genitals.*

*And to Winnie, for combining your actuarial studies with being Mum to your siblings;*

*Trabolee, Frank and Mwikali in my absence;*

*to Abu for your true friendship*

*to each one of you for your enduring support.*

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## **List of acronyms**

CRADLE	Children’s Rights Advisory Documentation Legal Education Foundation
CRC	Convention on the Rights of the Child
CREAW	Centre for Rights Education and Awareness for Women
DPO	District Probation Officer
GALK	Kenya Gay and Lesbian Trust
I/C	Officer in Charge
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
KCLF	Kenya Christian Lawyers Fellowship
KHRC	Kenya Human Rights Commission
KNBS	Kenya National Bureau of Statistics
KNCHR	Kenya National Commission for Human Rights
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
LRF	Legal Resources Foundation
OCPD	Officer Commanding Station
OII	Organization Intersex International
POR	Probation Officer’s Report
PWDs	Persons with Disabilities
TEA	Transgender Education and Advocacy
UDHR	Universal Declaration on Human Rights
VIS	Victim Impact Statement

## **List of international instruments**

African Charter on the Rights and Welfare of the Child 1990

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities G.A. Res. 47/135, U.N. Doc. A/RES/47/135 (Dec. 18, 1992)

Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

International Covenant on Civil and Political Rights 1966

Universal Declaration of Human Rights 1948

United Nations Convention on the Rights of the Child 1989

International Covenant on Economic Social and Cultural Rights 1966

## **List of statutes of Kenya**

Constitution of the Republic of Kenya, 2010 (whose provisions are referred to as ‘articles’)

Constitution of the Republic of Kenya, 1963 (whose provisions are referred to as ‘sections’)

Children Act, Chapter 141

Births and Deaths Registration Act, Chapter 149

Marriage Act, 2014

National Gender and Equality Commission Act, Chapter 5(C)

Persons with Disability Act, Chapter 133

Sexual Offences Act

Statistics Act, Chapter 112

## **List of Kenyan cases**

*Baby ‘A’ (suing through the mother, E.A.) and another v The Attorney General and others*  
HCC 266/2013 (pending)

*Lemeinguran and three others v The Attorney General and two others* (2008) 3 KLR (EP) 25

*Nyahururu PC P&C 8/09* (unreported) (In the matter of Child PC, or ‘Billie’)  
(This citation means Nyahururu Principal Magistrates Court (PC) Protection and Care (P&C)  
8/09 (Case No 8/2009)

*Kenya Magistrates and Judges Association v Judges and Magistrates Vetting Board and The Attorney General* HCC 64/2014 (unreported)

*RM v The Attorney General and others* [2010] eKLR

(RM stands for Richard Mwanzia Musya and, in the study, this case is referred to variously as RM, Mwanzia and Musya. This case was decided under the Kenyan Constitution of 1963)

## **List of statutes from other jurisdictions**

Australia: Sex Discrimination Amendment 5 (Sexual Orientation, Gender Identity and Intersex Status) Act 2013. Available online at: <http://www.ags.gov.au/publications/express-law/el193.pdf> Accessed on 15/3/2014

South Africa: *Alteration of Sex Description and Status Act 2003* .Available online at: [www.gov.za/documents/download.php?f=68026](http://www.gov.za/documents/download.php?f=68026) Accessed on 9/1/2014

## **List of cases from other jurisdictions**

*Bellinger v Bellinger and HM Attorney General* [2003] UKHL 21

*Christine Goodwin v The United Kingdom* (2002) 35 EHRR18

*Corbett v Corbett* (1970) 2 All ER 33

*Cossey v The United Kingdom* (1990) 30 EHRR 622

*Pant and others v Nepal and others* Writ No 917 of the Year 2064 BS (2007 AD) In NJA Law Journal (2008) pp 261-286

*Rees v The United Kingdom* (1986) EHRR 56

*Sheffield and Horsham v The United Kingdom* (1998) 27 EHRR 163

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## **Executive summary**

Organization Intersex International (OII) says that an intersex person is one whose biological sex cannot be classified clearly as male or female because the person has the biological attributes of both sexes or lacks some of the biological attributes required for classification as male or female. Intersex births are estimated at between 1.7% and 3% of the population of 44 million. This translates into between 748,000 and 1,320,000 Kenyans. Yet, when Richard Mwanzia Musya went to the Constitutional Court in *RM v The Attorney General and others* [2010] eKLR, seeking the legal recognition of intersex persons as a minority group, no statistics were available to support the claim that there were other intersex persons, except him in our society to warrant societal concern or government protection or regulation.

The Court defined ‘intersex’ as ‘a term describing an abnormal condition of varying degrees with regard to the sex constitution of a person’, immediately affirming the general view that an intersex person is abnormal and, therefore, requires to be ‘normalized’, legalizing the stigma that intersex persons face in society.

As a magistrate, I handled the case of an intersex child who had been brought before me as a child in need of care and protection following the arraignment of the child’s mother for neglecting ‘her’. After placing the mother on probation supervision, I found myself getting involved in seeking assistance for ‘her’ surgery. Because of this case, I later interacted with some other intersex persons. I was aware of the existence of other intersex persons and the fact that the claims Mwanzia was making were valid.

This study was conducted using the women’s law approach, the focus of which was on the lived realities of intersex persons, and how that reality could be used to describe, understand and improve the position of intersex persons in the law and society.

The reality was that intersex persons are a sex minority group who are marginalised due to the fact that they do not fit into the sex binary of male or female into which society is organized. This begins from the point of birth when their atypical genitalia create ‘confusion’ as to whether they ought to be classified as male or female. Society’s reaction is to immediately assign them a sex, which is accompanied by the requisite gender, either

through pronouncement, or through ‘normalizing’ surgery. When their bodies develop in contradiction to the imposed sex/gender identity, and they reject it, they are thrown into direct conflict with the society for not conforming to the norm. The ultimate result is a violation of their right to self-determination.

The study found that no statistical data was available on intersex persons because nobody was collecting and maintaining intersex disaggregated data. The Kenya National Bureau of Statistics had never included intersex in their census tools. The stigma around intersex and the imposition of a sex contributed to the lack of statistics and the secret lives of intersex persons. The lack of a legal framework recognizing the intersex condition at birth and status in adulthood was another problem. The result is that intersex persons as a group face specific forms of discrimination that are not expressly proscribed by the law, including, in particular, article 56 of the Constitution which makes special provision for minorities and marginalised groups.

The study also found that there is little literature about intersex persons in Kenya. There is no information available on how to raise an intersex child, no psycho-social support offered to parents or intersex persons, despite the fact that an intersex birth is considered a ‘social emergency’. This vacuum may explain the unpreparedness of the justice delivery system when confronted with cases of intersex persons. It is also a reflection of societal attitudes towards issues remotely connected to sex and sexuality.

It was also the finding of this study that the LGBTI community is not homogenous. Intersex persons, by their definition and realities, stand out as being different. Due to their unique biological make-up, they do not, like the LGBT, fit into the sex binary (i.e., the male or female divide) of society. It is only through their separation from the LGBT community that intersex persons will become visible as a minority group in their own right, the key to legal recognition. There is thus the need for intersex consciousness raising and organizing.

For the very first time in Kenya, the existence of intersex persons, and the need to give them specific legal recognition has been acknowledged in the draft Rights of Persons Deprived of Personal Liberty Bill, 2011. It provides a definition of intersex, the right of an intersex person to choose the sex of the person to body-search them and to enjoy separate accommodation.

This is a clear indicator that under the current Constitutional framework, intersex persons are likely to gain the most protection as a sex minority under article 260. The Courts can no longer turn them away because they are empowered to develop the law to ensure the protection of fundamental rights and freedoms. That requires creating a definition of sex that is inclusive and reading that definition into any part of the country's legal framework that excludes or denies the existence of intersex persons.

This study recommends that the Courts, now equipped with their newly expanded Constitutional jurisdictional powers, have the ideal opportunity in the pending case of an intersex child, Baby A, to speak the unspeakable, take a leaf out of the judgment of *Pant and others v Nepal and others* and boldly declare that intersex persons do, in fact, exist in our society and that their long-overdue return from exile, that is from the margins of Kenyan society, has arrived.

## CHAPTER ONE

### 1. INTRODUCTION AND BACKGROUND TO THE RESEARCH

#### 1.1 CHALLENGING MY LEARNEDNESS - Unlearning to learn

Sitting in the Gender, Law and Sexuality class of the SEARCWL Masters in Women's Law Programme was for me like a journey to a foreign land where the people spoke the same language as I but 'had no shame of mouth' when they 'pronounced' things in *kya athengi*, i.e., in the language my mother always told me was the domain of the inebriated. My lecturer's question: '*What do you call a "vagina" in your mother tongue?*' was met with screams of shock and disbelief. This was in spite of the fact that in the Women's Law class we were always encouraged to speak about things as they are, i.e., to describe the realities of women; to understand their issues in relation to the law, human rights, religion, and custom, and then to determine what needs to be done, based on that reality, to improve their status.

Then there were the articles we read for class discussion, some of which I felt were too sexually expressive, too close to obscenity.<sup>1</sup> Once, I asked my lecturer – timidly, of course – '*Are these legitimate academic articles?*' I was to discover that they were. I also acquired some new knowledge: that sexual health rights included the right to sexual pleasure.<sup>2</sup> This was all new to me, yet, I considered myself 'learned'!

And then there was the personal challenge. I have served in the Kenyan judiciary for close to 21 years, rising through the ranks to that of Chief Magistrate. I have, in addition, served as a Children's Magistrate, a duty that exposed me to the vulnerability that comes with being a child and being considered voiceless. I have tried numerous sexual offences, keenly applying the Children Act, the Penal Code and the Sexual Offences Act. I have attended and facilitated numerous workshops on sexual and gender based violence, and also participated in the Jurisprudence for Equality Project.<sup>3</sup> None of these experiences, however, could have prepared me for what lay in store for me in the Gender, Law and Sexuality class. In this class I was a student, other times the victim, the witness, or sometimes the investigating officer,

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<sup>1</sup> For example, Kopano Ratele's 'Male sexualities and Masculinities' in Tamale (2011: 399-419).[in Tamale, S. (2011: 399-419)]

<sup>2</sup> The Programme of Action of the International Conference on Population and Development (ICPD) 1994, Chapter VII, paragraph 7.2 recognises sexual desire and activity.

<sup>3</sup> Sensitizing judicial officers on the application of CEDAW and other human rights in the protection of women's rights.

having to say it as it was, then I was the critic, the researcher, and then the activist, campaigning for rights I had hitherto not known existed. In other words, in this class, I found myself being all these persons all at once. In my day to day work as a magistrate I cannot be all these persons at once; each one, including myself, has their place.

All these set me on the uncertain but exciting road of unlearning and relearning; critically analysing views and beliefs I initially held as ‘the whole truth and nothing but the truth’. To paraphrase Professor Tamale, I was ‘*sharpening my consciousness to the different assumptions, generalizations and sacred constructs that shape the way I understand reality and create knowledge.*’<sup>4</sup> I was learning that law, whether statutory, customary or religious, is created and operates in the public domain, where the participation of the woman is subjugated, and is not just a tool for maintaining law and order in society, but also for maintaining and protecting the sex/gender system, a system that is produced and maintained through patriarchy, and the ideology of the public/private divide.

Everything has a history. Discussing African sexualities took us back to colonial history. It was as illuminating as it was new: we explored how colonization had influenced the manner in which we look at sex and sexuality in its totality; how sexuality has informed our laws on everything and not just the Sexual Offences Act or the section on unnatural offences in the Penal Code, but also the people we love (the marriage laws), the way we work (sexual harassment), the clothes we wear (rape/indecency), how and what we learn (education systems and curricula) and our religious/customary doctrines on what women can/cannot do, etc.

I had always ‘known’ that gender and sexuality are the natural products of sex, only to find that even this is contested. Judith Butler, in answering the questions: ‘*What is gender? How is it produced and reproduced? What are its possibilities?*’ (Butler, 1999), says gender is performed. Her theory of performativity disputes that gender is a natural consequence of sex:

‘The act that one does, the act that one performs, is, in a sense, an act that has been going on before one arrived on the scene. Hence, gender is an act which has been rehearsed, much as a script survives the particular actors who make use of it, but which requires individual actors in order to be actualized and reproduced as reality once again’ (Butler, 1988).

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<sup>4</sup> Lecture notes.

Then came the discussions on sexual minorities and whether Rubin's sexual hierarchy in *Thinking sex: Notes for a radical theory of the politics of sexuality* (1984) is relevant to Kenyan society. The hierarchy is illustrated in two diagrams, one of which is named 'the charmed circle'. It demonstrates how society ranks different sexual practices and identities according to what is normative and socially acceptable and what is considered abnormal and vile. Society then draws boundaries between what it considers good sexual practices and identities and bad ones. The heterosexual sexual relationship that involves monogamy, marriage, penis and vagina is the norm and exists in the inner circle. Anything else, polygamy, cross-generational sex, homosexuality and the use of sex toys exists in the outer circle. The 'way out', or the worst, category includes gays, lesbians, transvestites, transsexuals. I noted that even in this category, there was not a single mention of intersex persons. And that aroused my curiosity.<sup>5</sup> Was it just an omission or was it a fact that intersex persons simply did not fit inside or outside 'the charmed circle'?

## 1.2 IN THE CONSTITUTIONAL COURT: Getting into the picture

That discovery was intriguing because during these discussions I came across the Constitutional case of *RM v The Attorney General and others* [2010] eKLR,<sup>6</sup> the first case in the Kenyan Courts brought by an intersex person seeking, *inter alia*, the legal recognition of intersex persons and raising a constitutional ruckus about how intersex persons have suffered in silence for so long. I noted that one of the arguments against the recognition of intersex persons was their apparent connection with the Lesbian, Gay, Bisexual, Transgender (LGBT) group:

'...[T]he court cannot by means of these proceedings open *lacunae* for the exploitation by homosexuals who may wish to declassify themselves from one gender to the other to justify their immorality' (Paragraph 86).

I had never questioned 'the fact' that intersex was part and parcel of the Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) community, but perusing the case and analysing

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<sup>5</sup> It formed the basis of my term paper, 'Playing gods, let us recreate female and male in our own image: Locating the intersex person in the Kenyan sexual hierarchy' (September 2013).

<sup>6</sup> Hereinafter referred to as RM, the protagonist in the case being Richard Mwanzia Musya, an intersexed adult who has come out in the open about his status. The Constitutional Court used his initials, but the lower court and the High Court used his full names to refer to him. In this study he will be referred to variously as RM, Mwanzia and Musya.

their place in Rubin's 'charmed circle' in the context of Kenyan society made it clear to me that for intersex persons it was more than sex, gender and sexual orientation. It brought the point painfully home that they were not anywhere within the radar of our legal vision, a point the Constitutional Court made very clear. RM's case also reminded me of the personal struggles I had encountered in a case I had dealt with involving an intersex child, PC, in *Nyahururu* PC P&C 8/09 (unreported). The combined impact of these two cases prompted, no, impelled me to look further into the issue of intersex persons.

In RM the Constitutional Court posed the question: '*Are issues concerning intersex persons, issues concerning the general welfare of the public, or issues in which the public as a whole has a stake?*'

It drew a negative response from the Court which criticised RM for not having identified even a single other intersex person (the petition was made on his behalf and on behalf of other intersex persons). The Constitutional Court said:

'It was for the petitioner and others supporting the petition to establish the existence of a body of persons known as intersex in Kenya' (Paragraph 101).

The Court observed that after RM filed his petition suing the Attorney General, the Commissioners of Prison and Police and the Registrar of Births and Deaths, other parties sought to be joined and were joined in the suit as *amici curiae*<sup>7</sup> and interested parties. *Amici curiae* were notably the Kenya Human Rights Commission (KHRC), the Kenya Gay and Lesbian Trust (GALK), the Kenya National Commission on Human Rights (KNCHR) and the interested parties were the Legal Resources Foundation (LRF), the Children Rights Advisory Documentation Legal Education Foundation (CRADLE), the Kituo Cha Sheria Legal Advice Centre, the Centre for Rights Education and Awareness for Women (CREAW) and the Kenya Christian Lawyers Fellowship (KCLF). This profile apparently gave the Court the impression that the petition raised 'issues of public interest' and this significant presence of 'friends' and 'interest' would provide it with the necessary information to enable it to deal with the issues 'comprehensively'.

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<sup>7</sup> Friends of the court to deal with key issues.

That ‘necessary information’ never materialised, however, and the Court felt cheated. It made a point of expressing its disappointment in the following portions of its judgment (Paragraphs 113-118; all emphasis is mine).

For example, a trustee of GALK deponed in his affidavit that, in the course of his duties, he had ‘encountered intersexuals whose plight was similar to the petitioner’s’. The Court noted, however, that he did not give *‘further facts, nor did he identify any other intersex persons’*.

The KNCHR’s secretary had also deponed that he would bring the Court:

‘...vital and valuable information regarding persons born as intersexuals and the human rights violations they face.’

In spite of this undertaking, however, after being joined to the suit, KNCHR did not provide the Court with:

*‘...any facts regarding the presence of intersex persons in this country or the alleged violation of their rights.’*

The LRF also made general references to intersexuals but *‘did not identify any other intersex person save the petitioner’*.

CRADLE, in seeking to be joined to the suit through its Deputy Director, deponed that:

‘...during the course of his duties he had encountered intersexual minors whose plight is similar to that of the petitioner...[that] his organization had received instructions from guardians or parents of minor intersexuals to highlight the plight of the minor intersexuals.’

However, to the disappointment of the Court no further information was laid before it by this party *‘regarding the incidence or prevalence of intersex births in the country.’*

Adopting the definition of ‘public interest’ as provided in *Black’s Law Dictionary* (8th Edition) as:

‘... the general welfare of the public that warrants protection and something in which the public as a whole has a stake especially an interest that justifies government regulations, ...’ (Paragraph 101),

The Court pronounced on the issue as follows:

‘Thus, there is no empirical data or indeed any other facts before us upon which we can conclude that there is a body of persons known as intersex persons [...] any information upon which this court can conclude that the issues raised with regard to intersex persons is something which the society as a whole has an interest that warrants recognition. It is true that the intersex birth is an unusual occurrence which attracts public curiosity [...] such public curiosity can only graduate to public interest with empirical data confirming that the prevalence of intersex birth in this country is of such magnitude as to call for government regulation or intervention’ (Paragraph 117).

It then decided:

‘Therefore we are not persuaded that there is a definite number of intersex persons in Kenya as to form a class or body of persons [...] nor are we persuaded that the suit before us is a public interest litigation [...] we find that the petitioner’s condition is a rare phenomenon in this country. His case must be treated as an isolated case’ (Paragraph 118).

Near the end of its judgment the Constitutional Court recognised that being intersex carries a social stigma. It spoke with understanding, stating that stigma was not a legal problem. It did not see that the law itself created stigma. It offered a solution:

‘What needs to be done is for parents and those who have such special conditions to be open about their situation and for society to be educated to respect the dignity of such people as human beings’ (Paragraph 145).

The Constitutional Court also appeared to appreciate the inherent difference between the challenges faced by intersex persons and others in the LGBTI community, saying:

‘Few seem to appreciate the fact that the issue of gender definition for an intersex person unlike a transsexual or a homosexual, is a matter of necessity and not choice’ (Paragraph 145).

Problems arose when the Constitutional Court explored the issue of gender reassignment sought by transsexuals and their struggle for legal recognition of their new gender. It looked

at cases from the UK, equating those challenges to the ones faced by intersex persons in Kenya. All the cases it looked at involved male to female transsexuals.

*Rees v The United Kingdom* (1986) EHRR 56 was about the non-recognition for legal purposes of a transsexual's new identity after gender reassignment. In *Cossey v The United Kingdom* (1990) 30 EHRR 622 the applicant was a transsexual whose birth certificate indicated he was born male; in *Sheffield and Horsham v The United Kingdom* (1998) 27 EHRR 163 the applicants were both male transsexuals who had transitioned to female and had undergone gender reassignment and *Christine Goodwin v The United Kingdom* (2002) 35 EHRR 18 was also about a male to female transsexual.

These cases appear to have clouded the Court's understanding expressed earlier, leading it to harden its stance and once again plunge the issues of intersex persons back into the unknown, saying:

'The Kenyan Society is predominantly a traditional African society in terms of social moral and religious values. We have not yet reached the stage where such values involving matters of sexuality can be rationalized or compromised through science. In any case rationalization of such values can only be done through deliberate action on the part of the Legislature taking into account the prevailing circumstances and the need for such legislation' (Paragraph 145).

### **1.3 WHAT I SAW - MY EXPERIENCE WITH BILLIE\* - It's not just a picture, it is a living reality**

The accused in *Nyahururu* PC P&C 8/09 (unreported) was a 20 year old pregnant mother of two, facing a charge of neglect, contrary to section 127(1)(b) of the Children Act, No 8 of 2001. It was alleged that she:

'on diverse dates between 7th October 2004 and 6th July 2009 at Koimogul Village in Mochongoi Division within Rift Valley Province unlawfully abandoned PC aged five years causing him unnecessary suffering by neglecting to take him to hospital for treatment.'

She pleaded guilty to the charge and became liable to the penalty provided of a fine not exceeding Ksh (Kenyan Shillings) 200,000 (about US\$ 2,380) or five years imprisonment or both. However, I ordered a probation officer's report (POR) to assist the court in considering

whether it should impose a non-custodial sentence. That child, whom I shall call Billie\* (not the intersex child's real name), was presented to the Court as a girl<sup>8</sup> and a child in need of care and protection under section 119 of the same Act, for purposes of securing 'his' welfare through a victim impact statement (VIS). In the meantime, there being no government rescue centre in my jurisdiction, we secured a place of safety at the nearby St. Martin Catholic Social Apostolate.<sup>9</sup>

Billie was the first child to be born to the 15 year old single mother, who later, at the age of 16, got married and became a second wife.<sup>10</sup> Her husband accepted the child. When Billie was born the intersex condition was noticed but Billie's mother and grandmother were helpless:

'They indicated their laxity in addressing the child's problem was due to their previous experience with such children in the community where an (*sic.*) hermaphrodite is normally left to fate' (Probation Officer's Report).

In the VIS the mother said the child had two sexual organs and was growing pubic hair which to them appeared abnormal. The parents tried all they could to have the situation corrected but failed. The child was not taken to school for fear of being mocked by her peers.

Even at the rescue centre the child was traumatized 'from [...] the new experience and possibly the shock of being neglected by its [*sic.*] surprised peers.'

In addition, she was aware of her deep male voice which made her reluctant to speak to anyone. The probation officer observed that Billie's deep voice was a weakness inhibiting her self-expression:

'Billie cannot express what she really feels as she talks less and her deep voice seems to hinder her.'

This made the parents think she was mentally retarded. They did not know how to raise an intersexed child. They were also of low economic status. When a community volunteer

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<sup>8</sup> It is noted in the charge sheet that the child is described as 'he' but was presented in court as a girl. It is not clear whether the police officer who charged the mother observed a boy child.

<sup>9</sup> A Catholic charitable organization that works with the community.

<sup>10</sup> This came out during the study interviews.

found an opportunity for Billie to be screened for disability by some foreign volunteer doctors her parents could not raise the fee of Ksh 500 (about US\$5). Everyone, including myself, thought that the solution lay in corrective surgery. We, the Court and the Probation Department, put out a plea in the Daily Nation newspaper seeking assistance for the child.

**Figure 1: Newspaper article (Daily Nation, July 2009) with a plea to help Billie**



This story attracted the attention of a well-wisher who paid all the expenses for Billie, her father and grandmother to be taken by the probation officer to Kenyatta National Referral Hospital in August 2009. The earliest appointment they could get was in 2010. The good Samaritan then also paid for Billie to be examined at MP Shah Hospital, a private facility, where an ultra sound scan revealed that her 'reproductive system was predominantly male' (Transgender Education and Advocacy [TEA] Report).

Secondly, Audrey Mbugua, the Programme Officer for TEA, travelled to Nyahururu to offer assistance. I found myself 'descending into the arena' and accompanied the probation officers on a supervision visit of the child's mother whom I had placed on a probation supervision order for three years.

**Photograph 1: The probation supervision visit with (from left to right) Mr Jason Abukuse (District Probation Officer), Audrey Mbugua (TEA), Grace Kimani (Probation Officer) and Billie's father (extreme right).**



I noticed that Billie's mother stayed away while we were talking about the child. She must have wondered what this 'judge', who had made the order for her *kufungwa*,<sup>11</sup> had come to do at her home, especially since she had not complied with the court order to take her child to school.

The child was not in school because of the parents' fear that she would be ridiculed by the other children. My court order was of no effect as long as the stigma against this child and the family persisted. By keeping their child out of school, the parents thought they were protecting their child as well as themselves. In addition, they had no money for her uniform, books or registration fees.

This called for an immediate intervention. We sat with the child's parents, grandmother, village elder and teacher from the nearby school and discussed the need for community and parental support in order for Billie to attend school. The teacher agreed to help the child and since the child's home was on the teacher's way to school, she offered to pass by and accompany her to school every day. The village elder participation ensured as far as possible that the court order would be complied with. The team raised money for the child's uniform,

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<sup>11</sup> To be jailed.

registration and books. Follow up supervision indicated that Billie was settling well into school.

TEA had scheduled an awareness workshop on gender identity disorders and intersex conditions. Billie attended with her father, and I, the DPO and the journalist who wrote her story were also invited. It was here that I realized Billie was not alone and had to grapple with the secret lives that intersex persons are forced to live.

**Photograph 2: With Billie’s parents, grandmother, village elder and teacher.**



#### **1.4 ENTER MWANZIA! Or his proxy**

It is with the experience of Billie’s case in mind that I read Mwanzia’s Constitutional case.

##### **The facts ... after the fact**

On 20 September 2005 Richard Mwanzia Musya was arrested as a suspect in a robbery in his home village in Munga’ng’a sub-location, Miambani Location in Kitui District, Eastern Province. On 14 October 2005 he was charged jointly with three others with robbery with violence contrary to section 296(2) of the Penal Code in Kitui Principal Magistrate’s Criminal Case No 1446/2005.<sup>12</sup> The offence was not bailable. The Hon. Evans Makori,

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<sup>12</sup> *Republic v Richard Mwanzia Musya and three others* (unreported).

Senior Resident Magistrate (as he then was), tried the case. According to Mwanzia, the police also accused him of raping the complainant. He knew he was not capable of committing the offence. But the worst was yet to come. His intersex condition, known only to a few family members, was going to become public knowledge in a manner he had never anticipated.

After his plea of not guilty, he was remanded in custody at the Kitui Prison pending the hearing of his case. Mwanzia does not talk much about what happened. The following morning, however, the prison warden in charge of welfare reported to the Magistrate that the person he had remanded was neither male nor female and, therefore, they had no place for him/her within the prison facilities. This resurrected the perennial argument between the police and prisons as to whose legal obligation it is to keep remandees.

The prison authorities had already presented him to the district hospital where a doctor had 'confirmed' that he was neither male nor female. Being a capital offender, however, he could not be freed on bail/bond. The Magistrate met with the Officer Commanding Station (OCPD) and the Officer In Charge of the prison and an 'executive' decision was made to remand Mwanzia to the police station pending his trial. There, his safety from sexual molestation could at least be guaranteed. Throughout this entire process no one spoke to him about what was going on. He ended up spending almost two years at the police station.

On 16 March 2007 Mwanzia was convicted and sentenced to death. The Hon. Magistrate in recognition of his status wrote:

'It will be noted that the 1st accused has been held in seclusion (at) the Police Station because of his status - Hermaphrodite. Prison could not find a place for him in the cells either women or men cells. It will be difficult [...] to determine where he will be removed pending appeal and/or further action. Special arrangements have to be made for his safe custody by the prison authorities. It will be a rare case but [...] in future reforms have to be made in our institution(s) to cater for special cases like this one to safeguard the human light (*sic.*) of each individual whatever the disability.'<sup>13</sup>

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<sup>13</sup> Page 10 of the typed judgment.

He was moved to death row at Kamiti Maximum Prison. It is here, he says, that he was reduced to '*kale kamutu kako na matiti*' ('that ka-person with breasts').<sup>14</sup>



**Photograph 3: Richard Mwanzia photographed in the sick bay of Kamiti Prison (Photo courtesy of LRF).**

No English words can really convey the full meaning of these words. You had to hear him say them to begin to understand the distress they caused him. Before his arrest he was living the life of a *kawaida*,<sup>15</sup> man living in the village with a wife and a child.<sup>16</sup> Suddenly, this normalcy was removed from him and he became a freak. The body searches were the most dehumanizing and humiliating experiences for him. Some prison warders and prisoners would ridicule him and laugh at his genitalia. The court order could not protect him against this inexcusable, cruel abuse. Interventions through his lawyer saw him spend the rest of the time in prison (i.e., until his acquittal), between solitary confinement and the sick bay.

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<sup>14</sup> *ka* as is used here before *Mtu*, which is person, deliberately dehumanizes, degrades or reduces the *Mtu* to being less of a person to the extent intended by the speaker.

<sup>15</sup> Ordinary, i.e., as ordinary a lifestyle as possible in the circumstances.

<sup>16</sup> Interview on Radio Maisha FM.

## 1.5 TROUBLING FINDINGS

Dahl (1987: 12) says that usually when one is carrying out a legal analysis one is expected to find out what the makers of the rules/the law intended. However, in the study of women's law the objective is to apply a systemic feminist perspective to the legal analysis. This requires an examination and an understanding of 'how women are considered in law and how the law corresponds to women's reality and needs'. Mwanzia's case, in the light of my experience with Billie and the others that I had met, made me paraphrase the analysis at hand as follows:

*'an examination and understanding of how intersex persons are considered in law and how the law corresponds to their reality and needs.'*

Certain issues stood out in Mwanzia's case. It concerned me that the Constitutional Court's finding that issues of intersex persons were in the realm of public curiosity and had not graduated to matters of general public concern so as to warrant government protection, regulation or legal recognition. In addition, the Constitutional Court's definition of sex, maintaining the binary of male and female, appeared to be inconsistent with the existence of intersex persons. I also noted the occasional mix-up of sex and gender, gender identity and sexual orientation and the impact that that had on the outcome of Mwanzia's case.

It was apparent from my reading of the case that the law, its procedures and implementers were aloof from and indifferent to the reality they were confronted with; to the fact that intersex persons are real people and that society has forced them to live hidden lives. Yet, it could be that as many as between 748,000 (i.e., 1.7%, according to Nthumba, 2008) and 1,320,000 (i.e., 3%, according to Haas, 2006) of the Kenyan population of 44 million are intersex persons.

I found that the feminist concept that 'the personal is political' applied to the experiences of Billie, Mwanzia and the other intersex persons and their families. The court cases were in the public domain. My experience of these unique but misunderstood people, their issues and their cases was saying to me that intersex persons and their concerns could not remain a 'private' matter; they needed to be placed properly and responsibly in the public domain

where the law is created, so that they, too, could be accommodated within society. For this to happen, they needed to voice their realities themselves.

## **1.6 THE RESEARCH DESIGN**

### ***1.6.1 The research problem***

Intersex persons are born into a social and legal environment that is hostile to their existence because it is set in the sex and gender binary of female and male. The Constitutional Court in *RM v The AG and others* [2010] eKLR refused an application for their legal recognition as a class of people who suffer specific discrimination, and, particularly, the right to self-determination.

### ***1.6.2 Main objective and significance of the research***

- To find out whether intersex persons are a sex minority group deserving legal recognition and to find out the implications of such recognition if at all, particularly in the light of articles 56 and 260 of the 2010 Constitution.
- Since no similar study has been done in Kenya, hence, to contribute to the conversation on the legal recognition of intersex persons both locally and in the region.

### ***1.6.3 The research assumptions***

1. There is sufficient statistical and medical evidence on intersex persons to warrant their recognition as a sex minority group.
  - 1.1 Intersex persons have specific rights which are not provided for under article 56 of the Constitution.
2. There is no legal recognition of intersex persons in Kenya.
  - 2.1 The lack of legal recognition of intersex persons has resulted in their marginalization and discrimination in all aspects of their lives.
  - 2.2 The lack of legal recognition of intersex persons has resulted in the denial of their human rights.
3. Parents impose a sex on newborns due to cultural beliefs.

- 3.1 Parents impose a sex on newborns through corrective surgery due to the influence of medical doctors.
- 3.2 The imposition of a sex on intersex children results in their suffering identity crises.
- 4. Intersex persons are denied the right to self-determination.
  - 4.1 Intersex persons have to choose to be either female or male due to the requirements of the law.
- 5. Judicial officers and others in the justice delivery system are not aware of intersex issues.

#### **1.6.4 *The research questions***

- 1. Is there sufficient statistical and medical evidence on intersex persons to warrant their recognition as a sex minority group?
  - 1.1 Do intersex persons have specific rights which are not provided for under article 56 of the Constitution?
- 2. Is there legal recognition of intersex persons in Kenya?
  - 2.1 Has the lack of legal recognition of intersex persons resulted in their marginalization and discrimination in all aspects of their lives?
  - 2.2 Has the lack of legal recognition of intersex persons resulted in the denial of their human rights?
- 3. Do parents impose a sex on newborns due to cultural beliefs?
  - 3.1 Do parents impose a sex on newborns through corrective surgery due to the influence of medical doctors?
  - 3.2 Does the imposition of a sex on intersex children result in their suffering identity crises?
- 4. Are intersex persons denied the right to self-determination?
  - 4.1 Do intersex persons have to choose to be either female or male due to the requirements of the law?
- 5. Are judicial officers and others in the justice delivery system aware of intersex issues?

### ***1.6.5 The limitations of the study***

The study is limited to the issues arising out of the two cases *Nyahururu PC P&C 8/09* (unreported) (In the matter of Child PC, or ‘Billie’) and *RM v The AG and others* [2010] eKLR regarding the legal recognition and rights of intersex persons under Kenya’s new 2010 Constitution.

The number of intersex persons interviewed is limited. Those willing to share their stories or their parents were scattered all over the country. I had to travel to Mochongoi, Bunyore, Kinangop, and Gilgil to reach them (see Table 3). Winning their trust in order to share their stories required several interventions and interviews. I could not reach all those who were willing to share their stories because of the lack of adequate time and resources.

## CHAPTER TWO

### 2. THE CONCEPTIONAL FRAMEWORK

RM's case presented the Constitutional Court with the conundrum of the concepts of sex, gender, gender identity, sexuality and sexual orientation. Although it ought to have done so, the Court failed to define these terms in order for it to lay the conceptual boundaries within which it was defining intersex persons in the Kenyan society. Its omission explains its use of such references as Mwanzia's 'ambiguous gender', 'people who were not of the same gender as himself', 'no trained personnel of the same sexual orientation as the petitioner', 'prisoners of male and female gender' and 'the intersex gender'. These and other similar expressions permeate the examination and understanding of how intersex persons are considered in law and how the law corresponds to their reality and needs.

#### 2.1 Sex, gender, gender identity and sexuality

There are debates as to what these terms mean and their relationship to one another. Jordan-Young (2011: 12) says that the language of sex, gender and sexuality is more than vexing - it is confused, confusing and contentious. According to Bochenek (2012: 14), discussions of sex, gender, gender identity and sexual orientation require clarification of often contested terms.

‘The meanings of [sex and gender] are widely contested in the hard and soft sciences, in humanities, in legal theory, in women’s and gender studies, and increasingly in popular discourse. Ultimately the only thing we know about what sex means, or what gender means, is what state actors, backed by the force of law, say those words mean.’<sup>17</sup>

This is what happened in RM. There was no definition in the Constitution. In refusing to interpret the term to include intersex the Court asked itself the question: ‘*What did the Legislature mean by the term sex?*’ There was nothing in the judgment to show that the Court sought guidance from the debates surrounding the insertion of the word sex in the Constitution. The court relied on two definitions:

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<sup>17</sup> Currah and Mulqueen in ‘Scrutinizing gender: identity, biometrics and transgender bodies at the airport’, 78 Soc Research (2011: 557, 577).

‘... either of the two main categories (male or female) into which humans and most other living things are divided on the basis of their reproductive functions, the fact of belonging to one of these categories, the group of all members of either sex’ (*Concise Oxford English Dictionary*, 11th Edition)

and:

‘1. The sum of the peculiarities of structure and function that distinguish a male from a female organism. 2. Sexual intercourse. 3. Sexual relations’ (*Black’s Law Dictionary*, 8th Edition).

It summed up the two definitions and came up with the Legislature’s intention that:

‘...the term sex simply refers to the categorization of persons into the male and female on the basis of their biological differences as evidenced by their reproductive organs.’

In the context of the case before it, the next question was: *What biological differences? What reproductive organs?*

Gender was also central to the case and occasionally was used interchangeably with sex. Is there a difference between the two? The common usage is that sex is about biology while gender is about socially accepted behaviour. Gender as a description of people as either feminine or masculine was popularized by John Money, an American sexologist famous for the John/Joan case.<sup>18</sup> Suffice it to say, as Jordan-Young (2011: 13) states:

‘...empirical research has revealed the relationship between sex and gender to be even more complex than originally thought.’

Feminists have, however, taken that distinction further. Rubin (1975: 159) quoted in Jordan-Young (2011: 13) identified a ‘sex/gender’ system described as ‘a set of arrangements by which a society transforms biological sexuality into products of human activity’ so that gender becomes the aspects of human personality, relationships, behaviours, privileges and prohibitions to the domain of either ‘masculine’ or ‘feminine’. Gender is thus seen as the social effect, rather than the result of human biology. ‘Sex is conceived as the remainder - the material body - and those bodily interactions that are necessary to reproduce it.’

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<sup>18</sup> This involved a boy whose penis was cut off during circumcision, and Money advised the parents that the boy be raised as a girl.

Ideas about gender and sexuality are used by medical doctors and psychologists to determine the male or female status of bodily structures and to reshape those structures so that they can be seen to be fitting with ‘normal’ male versus female bodies (Kessler, 1998). For example, the doctor in RM determined he was ‘male’ and, hence, could be held in a male prison.

Since there is evidence of the feminization of intersex (as it appears to be the easy option), sexual organs may not be sufficient proof of either femaleness or maleness. An analysis done on a sample of 1981 individuals for the period 1995-2005 revealed that more than 50% of intersex individuals were assigned the female sex (Jorge, 2007: 24). The emphasis is on creating a ‘normal’ vagina, normality here being a penetrable vagina regardless of whether there is any capacity for sexual ‘feeling’ (Karkazis, 2008).

The argument, then, is:

‘...that gender causes us to perceive the natural world (the body) in a particular way, and thereby to impose on it the dichotomous category “sex”. Sex, then is no longer the raw material from which culture produces gender. Instead, it is in some important sense an effect of gender’ (Jordan-Young, 2011: 17).

Jorge (2007: 19) argues that sex is only a statistical classification and describes it as one of the simplest and most pervasive forms of binary classification. Its social legal expression is guaranteed through classification at birth into the two mutually exclusive categories of anatomical phenotype of male and female and the entries in birth certificates. As a result, the thousands of babies born with ambiguous genitalia are forced into this sexual classification. He demonstrates how statistics influence the practice of medicine and, in particular, diagnosis, in the way society deals with the apparent medical and social emergency of the birth of an intersex child. Birth parents and doctors worry about how to classify the child:

‘Ultimately they are constrained by a social mandate: every child must have an assigned sex category as determined by a medical expert. The law enforces the mandate in that birth certificates must be issued to register the legal identity of all newborns. Limited by our current binary system scientists and physicians are required to discover the “true sex” of an intersex phenotype’ [Lee (2004) as quoted in Jorge (2007: 20)].

Jordan-Young (2011: 18) takes the agnostic stand on these definitions and I am happy to join her there. She refuses to accept that these things are settled. It is not taken for granted that gender is the result of social relations; studies have shown that the contrary is the case. Neither does she presume that bodily sex is simply given by nature; it could also be a result of socially inflicted classifications and commitments, nor that sexuality flows from the need to reproduce or because one is feminine or masculine.

## 2.2 What is intersex?

Getting consensus on an appropriate definition of intersex has been almost as difficult as agreeing about how to deal with the condition. ‘The standard definitions of intersex in major dictionaries which come to something like “one having characteristics of both sexes” have been found to be vague and inadequate’ (Bishop, 2007: 536).<sup>19</sup>

This is so similar to the common usage in Kiswahili of *ana vitu mbili* which translates loosely to ‘has two things’, leaving it to the hearer to decide on what it means. I recall a certain young man, who was very ‘girlish’ and would come to sit with my aunts and I while we shelled maize in the shade of the granary. He would sit just like us with his legs stretched out in front of him and demand a *lesso*<sup>20</sup> to wrap around his waist typical of women doing such work. Occasionally, they would tease him and tell him to go and join the men. I heard them say *e malinda*.<sup>21</sup> Among the Pokot, they are known as *serer* (Edgerton, 1964), among the Banyore, *nasatsa*,<sup>22</sup> in Islamic jurisprudence, *khuntha* (for which there are two categories, *mushkil* and *geihr mushkil*<sup>23</sup>), among the Kikuyu, *ciugu*, and among the Kisii, *eriasi*.

Another term used is ‘ambiguous genitalia’. However, that term immediately raises issues as it problematizes the structure of genitals in terms of what is female and what is male. It presupposes a standard. Bishop notes that Alice D. Dreger in ‘*Ambiguous sex*’ - *or Ambivalent medicine? Ethical issues in the treatment of intersexuality* (1998: 24, 26) questions the use of the term and notes that the phrase ‘ambiguous genitalia’ begs the question: ‘*What should count as “ambiguous”?*’

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<sup>19</sup> Citing Robert M. Blizzard in ‘Intersex issues: A series of continuous conundrums’ (2002: 616).

<sup>20</sup> A piece of cloth also known as *khanga* wrapped round the waist to cover the waist down to the legs.

<sup>21</sup> My village-savvy cousins had used it to refer to a goat with two sex organs.

<sup>22</sup> Interview with Mr. E.A. at Ebusiratsi.

<sup>23</sup> Interview with Deputy Chief Kadhi, email correspondence with Kadhi Hassan.

Jordan-Young (2011: 17) states that the term intersex typically describes a person who is born with ‘mixed’ male and female bodily characteristics, for instance, the female XX chromosome pattern but a penis and no vagina or the male XY chromosome pattern but a vulva (including labia and clitoris) and vagina. The most common intersex conditions involve steroid hormone atypicalities, where a person who is genetically male has ‘female structures because he produces but cannot respond to testosterone’, or one who is genetically female but ‘produces unusually high levels of androgens (and) results in her having masculine genitalia’.

In RM the court adopted the definition by Haas (2004: 43-44) summing it up thus:

‘Intersex is a term describing an *abnormal* condition of varying degrees with regard to the *sex constitution* of a person’ [emphasis mine].

In section 2 of the draft Bill on the Rights of Persons Deprived of Personal Liberty, ‘intersex’ is defined:

‘...as a person with both male and female sexual characteristics and organs as confirmed by a medical officer of health.’

These definitions beg questions such as: ‘*What is normal?*’; ‘*What is sex constitution?*’ and ‘*What are the standards to be applied by the medical officer?*’

It is, therefore, necessary to examine the different debates that informed the Constitutional Court in arriving at the only current legal definition of intersex.

### **2.2.1 *LGBTI is not a homogenous group: Sexual orientation and gender identity or sex, sexual orientation and gender identity?***<sup>24</sup>

The distinction between intersex persons and LGBT begins from the point of birth. Bird (2008) states that:

‘[n]ext to prenatal death, genital ambiguity is likely to be the most devastating condition to face any parent of a newborn.’<sup>25</sup>

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<sup>24</sup> Terms used by OII Australia.

<sup>25</sup> Quoted from: Y. Low, J. Hutson *et al.*, ‘Rules for clinical diagnosis in babies with ambiguous genitalia’, 39 J. Pediatrics & Children's Health 406 (2003).

Nthumba (2008) says that the birth of a child with ambiguous genitalia is a social emergency which requires emergency actions in diagnosis and treatment plans to minimize medical, psychological and social complications. Lee (2006: 491) adds that initial gender uncertainty is unsettling and stressful for families. For more than half a century intersex conditions have been understood as ‘disorders like no others’ (Feder and Karkazis, 2008). For the intersex person, the assignment of sex or the ‘unwanted normalizing surgery’ is carried out on them without their consent by parents following the advice of medical personnel. This assignment of sex and corrective surgeries may result in permanent physical and psychological damage. The intersex person is forced to live in the assigned sex and gender despite apparent incongruence after puberty. This elicits issues of violation of bodily integrity, autonomy and denial of self-determination.

One of the challenges in RM was the subtle interplay between the Court’s attitude toward intersex people and its apparent prejudice against the LGBTI community as a whole. The conflation of issues of sexual orientation and gender identity with those of intersex persons was evident in some of the submissions made by counsel and statements made by the Court. A great deal of case law relied upon was related to transsexuals and the issue of the recognition of their gender re-assigned identities. There was a presumption that they relate to intersex issues.

Ben-Asher (2005) lays down an intrinsic difference:

‘Transsex individuals often desire the future body they should have, while intersex individuals often mourn the body they had before an unwanted normalizing surgery interfered with it.’

Corboz (2006), reviewing literature on sexual citizenship of sexual minorities (GLBTQ), says:

‘The most widely cited denial of civil rights is in relation to same-sex marriage; in most nations legal marriage is restricted to heterosexual people only.’

In other words, quoting Richardson (2000a):

‘[...] gay and lesbian people are denied multiple social rights *via the legal denial of same-sex relationships* and, thus, irregular access to welfare benefits, inheritance and tax benefits’ [emphasis added].

The fact that Kenya has specific legal provisions outlawing same sex relationships which attract a penalty of up to 14 years imprisonment,<sup>26</sup> and specifically prohibiting homosexuals from adopting children,<sup>27</sup> explain their campaign for decriminalization.

The Yogyakarta Principles (2007) provide a clear distinction between sexual orientation, which is the emotional and sexual attraction to an individual of the gender of the person’s choice, and gender identity which is a person’s ‘deeply felt internal experience of gender’.

### **2.2.2 Identity or disorder?**

The issue as to whether intersex is a medical condition or an issue of identity arose in RM where the Constitutional Court adopted a medical definition and declared the identity issue a fallacy.

This has been an on-going debate between the medical establishment and intersex activists.

A conference of Paediatric Endocrinologists from the USA and Europe in 2006 found the terms intersex, hermaphroditism to be ‘potentially pejorative’, i.e., derogatory or judgmental and adopted the term ‘disorders of sexual development’ (DSD) to cover ‘congenital conditions in which the development of chromosomal, gonadal, or anatomic sex is atypical’, i.e., intersex (Lee, 2006: e488).

The term provoked reactions from some intersex persons and activists who felt that it was more stigmatizing than the term intersex because of its pathological tenor. David Cameron, an intersex person, declared, ‘I am a person, not a disorder.’

Supporters of DSD, Feder and Karkazis (2008) argued that it placed intersex where it would get the appropriate medical treatment it requires, pointing out that the controversy arose because both the medics and activists viewed intersex as an issue of identity from different perspectives. Nthumba (2008) says the intersex condition creates an uncertainty about the

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<sup>26</sup> Penal Code sections 162(a) and (c), 163 and 165 on unnatural sexual offences.

<sup>27</sup> Children Act, section 158(3)(c).

newborn's immediate identity, an emergency requiring quick diagnosis so to ensure that the gender is assigned as early as possible and at least before the child's second birthday.

Treating intersex as a DSD, gender assignment depends on:

‘...diagnosis, genital appearance, surgical options, need for lifelong replacement therapy, potential for fertility, views of the family and sometimes, cultural practices.’

Further, the clinical management protocols state that:

‘...all individuals should receive gender assignment although it is to be approached with caution - gender assignment must be avoided before expert evaluation of newborns.’

According to Jorge (2007: 25) this argument has no basis since science has not yet shed light on the mechanisms of gender formation or even the time frame within which gender develops. He finds it ironic that we can put up a standard for the measurement of gender, yet we have no understanding, or certainty, of how gender is formed. This amounts to forcing gender on an intersex newborn, on the assumption that gender cannot exist without clearly defined genitals.

Another argument is that the term intersex is meant to describe the individuals whose phenotype falls between the male and female sexes. Jorge (2007) says that the medical establishment has expanded the definition to label cases where chromosomal, gonadal and hormonal sex does not coincide with the anatomy of the genitalia. This also gives them the ‘authority and presumed objectivity’ they need when making decisions for intersex persons, as demonstrated by the table below.

**Table 1: The Algorithm of Sex Classification (Jorge, 2007: 24)**

<b>THE ALGORITHM OF SEX CLASSIFICATION</b>				
<b>KARYOTYPE DNA</b>	<b>GONAD BIOPSY</b>	<b>HORMONE BLOOD</b>	<b>SEXUAL PHENOTYPE</b>	<b>SEX CLASSIFICATION</b>
<b>XY</b>	Testis	Androgens	Penis 2.5cm-4.8cm	<b>MALE</b>
<b>XX</b>	Ovary	Androgens Progestins	Clitoris 0-0.9cm	<b>FEMALE</b>

The tests are described in great detail in Lee (2006: e490-491) who says:

‘The results of these investigations are generally available within 48 hours and will be sufficient for making a working diagnosis.’

These protocols or guidelines were adopted by medical doctors in Kenya. Indeed, one doctor<sup>28</sup> did, in fact, bring to my attention the adoption of the term DSD instead of intersex. These tests may not always be available in Kenya and, when they are, the cost is beyond the ordinary Kenyan’s pocket<sup>29</sup> and definitely would not be available within 48 hours. According to the same doctor, only about 20% take place in hospitals and health centres. That means then the main test and available evidence of intersexuality is the ‘phenotype’ (i.e., what the external genitalia look like).

Another term, ‘Variations of Sexual Development’ (VSD), was proposed as being neither stigmatizing nor judgmental. It did not reduce intersex to an ailment that required medical attention *per se*. Making this proposal, Diamond (2006) pointed out that the term ‘disorder’ was too narrow and too pathological to be accurate and that it revealed an ‘unwelcome arrogance in the light of medicine’s limited vantage’. Clearly accusing the medical establishment of ‘highhorseness’ he asked them to:

<sup>28</sup> Interview with Dr. A, a pediatric surgeon.

<sup>29</sup> As in the case of Billie (see above, paragraph 1.3) and MW (Mike, not the intersex person’s real name) an intersex minor serving a three year prison term in Nyeri are examples. The LRF identified the latter case, in which the prison authorities could not afford the karyotype tests. Tests alone can cost up to Ksh30,000 (US\$300) (Interview with Dr. Nthumba).

‘...take a more humble and compassionate approach recognizing that the institution of medicine does not act as a sphere of perfect knowledge nor hold a monopoly in classifying individuals.’

They had acted as though they were unaware of the controversies surrounding medical interventions and corrective surgeries. He told them that intersex people experience ‘variations of human sex development’ and medicine ‘does not know the biological purpose of such variations.’

### 2.2.3 *The third sex/gender?*

The Constitutional Court in RM stated:

‘...to interpret the term sex to include intersex would be akin to introducing intersex as a third category of gender in addition to male and female [...] would be a fallacy’ (Paragraph 130).

The most I can say here is that the Court failed to draw the distinction between sex and gender.

South Africa, the only African country to legally recognise intersex, has not defined intersex as a third gender but added them as a category of persons who are entitled to be protected from discrimination. Similarly, in Australia, intersex is recognised in anti-discrimination law. There is a clear definition of intersex status, but no mention of a ‘third gender’ and Germany provides for an ‘indeterminate gender’ giving parents time to make the decision.

Intersex persons are treated differently in Nepal where the Supreme Court in the case of *Pant v Nepal* Writ No. 917 of the Year 2064 BS (2007 AD)<sup>30</sup> legally established a third ‘gender’ and defined it to include intersex persons born naturally with both male and female genetic sex organs. The court ordered the government to implement its orders. Consequently, third genders were specifically registered as voters in 2010 and introduced as a third gender category in the federal census in 2011. In India the Hijras and Kothis are recognised within their culture and have definite roles to play within society (Bochenek, 2012).

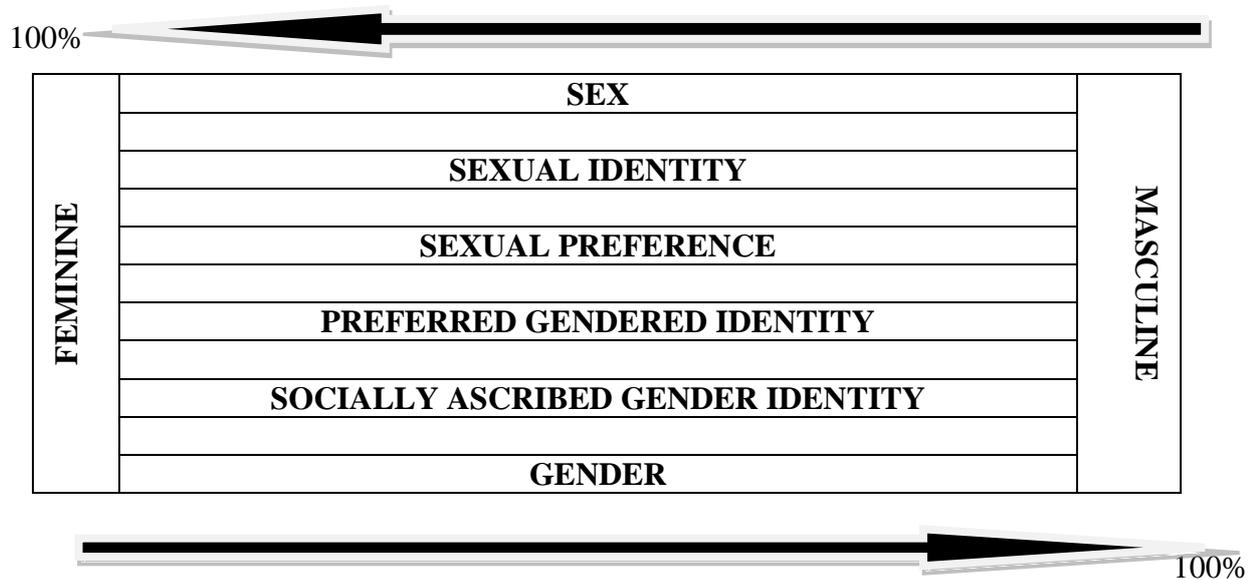
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<sup>30</sup> Translated in Nat’l Jud Acad. LJ, (2008: 262).

#### **2.2.4 Conclusion**

It is Simone de Beauvoir who wrote, 'one is not born, but rather becomes, a woman' clearly distinguishing that "being" female and "being" a woman are two very different sorts of being' (Butler, 1986). For the intersex person, being intersex and being a woman or a man are different sorts of being. That is their reality. It is the reality of those who consider themselves 'normal' men and women that sex and gender are a continuum and one can locate them anywhere in between.

**Table 2: Stewart's Sex and Gender Locator (Stewart, 2011: 41)**



## **CHAPTER THREE**

### **3. RESEARCH METHODOLOGY AND METHODS**

#### **3.0 INTRODUCTION**

In chapter 1 I lay the background that this study is based on the issues arising out of my experiences in the case of Billie in *Nyahururu PC P&C 8/09* (unreported) (In the matter of Child PC) and *RM v The Attorney General and Others* [2010] eKLR.

#### **3.1 RESEARCH METHODS**

This was a qualitative study. It began with a critical analysis of the RM case.

Through desk and internet research I realised that though there is a host of materials on intersex persons from other parts of the world, there is hardly anything available about them in Kenya.

I conducted face to face interviews and three group discussions. In all of them I began with a brief summary of RM's case and the court's findings. This established the fact that the study was about the rights of a specific group of people. For the intersex persons and their families, I emphasised the fact that one of the reasons for the rejection of the prayer for recognition was that there was no evidence of their existence. I observed that that elicited a reaction of disbelief.

**Table 3: Sources of information: Number of intersex persons (respondents) and their significant others**

Respondent	Where we met	Approximate distance (in km) from Nairobi	Number of interviews	Parents	Relatives	Neighbours and friends
Billie	Mochongoi	270km	2	2	2	4
	Karandi	250				
Mwanzia	Mathare A		3	-	2	2
	CBD					
	Mathare A					
Beck	CBD		3	-	-	3
	Likoni Road					
	Sarit Centre					
Franc	Mukuru		1	-	-	3
AB's Cousin	Bunyore	418	1	-	1	-
Ken	Embu	230	1	1	1	2
Rosa	Kinangop/Gilgil	168	1	1	2	1
Total no.				4	8	15

Some intersex persons required more than one interview to gain their confidence and trust. It is noteworthy that Mwanzia had never met any other intersex person. Meeting with Beck was a big psychological boost for both of them. Mwanzia complained of too many interviews, Beck feared that revealing his identity would expose him to physical attacks, and for Billie the family had been traumatised by the court case.

For the others, some were known to me in my course of work; others took me seriously, and gave me appointments without any problem after introducing myself as a judicial officer studying a master's programme in Women's Law. Making the decision to be attached to the Judiciary Training Institute during the research period gave me many opportunities to meet with other judicial officers and others in the justice delivery system in workshops and seminars.

It was in these workshops that I realised that the visibility of Audrey Mbugua, the transgender activist, created confusion in the minds of some people as they thought intersex was the same as transgender or transsexual. There was also evidence of people failing to draw a distinction

between sexual orientation and gender identity coupled with prejudices towards homosexuality.

Attending court during the mentions of Baby A's case gave me an insight as to how these cases are litigated. The lawyers file their clients' petitions, responses and submissions. Then they appear in court to highlight or summarise their submissions orally. There is no hearing as such and, hence, the court may never really 'hear' the full story. That is exactly what happened in RM's Constitutional Petition. The court never saw or heard Mwanzia because he was 'amply represented.'

I perused court records in order to understand and triangulate Mwanzia's and the magistrate's and judges' accounts of the case as it progressed through the court system. That also saved me from having to track down the prosecutor, the OCPD and the Officer in Charge (I/C) of the Prison in Kitui because the record spoke for itself.

I did some activist research. With some of my respondents I shared my experiences of meeting with intersex persons and my findings on the position of intersex persons in Islamic jurisprudence. This motivated them to seek and meet an intersex person themselves and helped them to broaden their perspectives towards intersex issues. Having found that many people had never heard of Mwanzia's case, that he had never been paid the damages the Court had awarded him and that there had been no follow up on the issues raised by the Court impelled me to turn to the media to see how a public conversation on intersex issues could be provoked.

**Table 4: Other sources of information**

Source		Number of Individuals	Other information
TEA		1	Letters, Emails, court records, reports
Jinsiangu		1	Emails, Publication
KNCHR		1	UPR meeting and Report
LRF		1	Case Reports on intersex prisoners
NGEC		1	Publications
Religious	Islamic	2	Emails
	Catholic	4	Canon Laws
Doctors		3	Publication
Lawyers		3	Court records, email and social media communications
Government Departments	Prison's Department	2	Draft Bill on Rights of Persons Deprived of their Liberty, workshops
	Probation Services	4	POR, Progressive reports, Email, Workshops
	Department of Children Services	2	Workshops
	Kenya National Bureau of Statistics	3	
	Kenya Law Reform Commission	1	
	Ministry of Education	3	Workshop
Judiciary		5	Court Records, Conversations in workshops, experiential data, Attending court in Baby A's Case

### 3.2 RESEARCH METHODOLOGY...The journey

Drawing assumptions from the cases and my own experiences as a magistrate is termed experiential data according to Giddens (1984). Bentzon *et al.* (1998: 157) state that:

‘...they encourage the researcher to make active use of her professional and personal experiences as sources for the problem formulation and research assumptions.’

Evidently my research problem and assumptions were also influenced by what they refer to as ‘memory work’, described as:

‘...a method of evoking “hidden” experiential data as it helps the individual [...] bring experiences to the surface for conscious consideration’ (Haug, 1990).

Memory work, however, requires corroboration and a guard against personal biases.

For example, in Billie’s case, after safeguarding Billie’s welfare as a child in need of care and protection through the mother’s probation supervision order, I never thought of how she would fit into the world as an adult until I read Mwanzia’s case. This case provoked thoughts of how intersex people manage their lives within such a hostile legal environment. For the required corroboration, I sought out the other key players who were involved with the case then, i.e., the probation officer, the community volunteer and members of the extended family.

The grounded women’s law approach is a framework located in grounded theory. This approach takes the woman as the starting point. It enables one to explore the women’s lived realities. Using their realities it allows one to interrogate and investigate the law and the way in which it affects women. In a nutshell, it enables one to describe, understand and improve the position of women in the law and the society (Dahl, 1987).

I paraphrased this process and made it relevant to intersex persons as follows:

‘This approach takes the intersex person as the starting point and enables one to explore the intersex person’s lived realities. Using their realities it allows one to interrogate and investigate the law and the way in which it affects intersex persons. In a nutshell, it enables one to describe, understand and improve the position of intersex persons in the law and in the society.’

Taking the intersex person as the starting point, I began by seeking out and interviewing intersex persons themselves. I listened to them talking about their lived realities from the moment they became conscious of being different and how that affected their lives. I went through the same process with their parents and how having an intersex child impacted on their lives. I also interviewed relatives, close neighbours and friends who were aware of their intersex status. Through this I began to understand and unravel how being intersex interacts with statutory, customary, and religious laws.

In the search for intersex respondents I also applied the ‘dung-beetle’ technique which also helped me to follow up on the issues that arose. For example, reading the RM case sent me looking for his lawyer who helped me find his mother. After contacting her on my mobile phone she gave me her son’s number. Looking for and meeting RM made it necessary for me to look for and read the criminal case file from Kitui, which I followed through to the Machakos High Court Registry after interviewing the Magistrate who tried him.

The grounded women’s law approach is also an interactive process, where:

‘Data and theory, lived reality, and perceptions about norms are constantly engaged with each other to help the researcher decide on what data to collect and how to interpret it’ (Bentzon *et al.*, 1998).

For example, my assumption on the availability of data to warrant the recognition of intersex persons as a sex minority group was challenged when it emerged that no disaggregated data on intersex persons was being collected or maintained by the hospitals or the state. I did not abandon the assumption. Instead, I assumed that their lived reality of living secret lives contributed to their invisibility and the unavailability of statistics. I interpreted this to mean that intersex consciousness raising and intersex organizing was a central issue. I was, therefore, put in a position where I could seek data on this aspect, including how intersex could be de-stigmatized and discussed openly, sensitively, and without shame on a platform of recognition and rights. As a result, three intersex persons were interviewed for the print media,<sup>31</sup> and two of those gave live interviews on radio.<sup>32</sup>

These two actions set off a public conversation, even on social media.<sup>33</sup> Unfortunately, I was not able to analyse the dialogue for purposes of this research.

This methodology requires one to maintain an open mind and not to be shackled by one’s initial assumptions. My assumption that ‘parents of intersex children impose a sex on newborns due to cultural beliefs’ was challenged. Interviews, literature and the law revealed that it was more about the pressure of fitting the child into the social-legal dichotomy of male

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<sup>31</sup> *The Sunday Standard*, 8 December 2013.

<sup>32</sup> Radio Maisha aired on 9 December 2013.

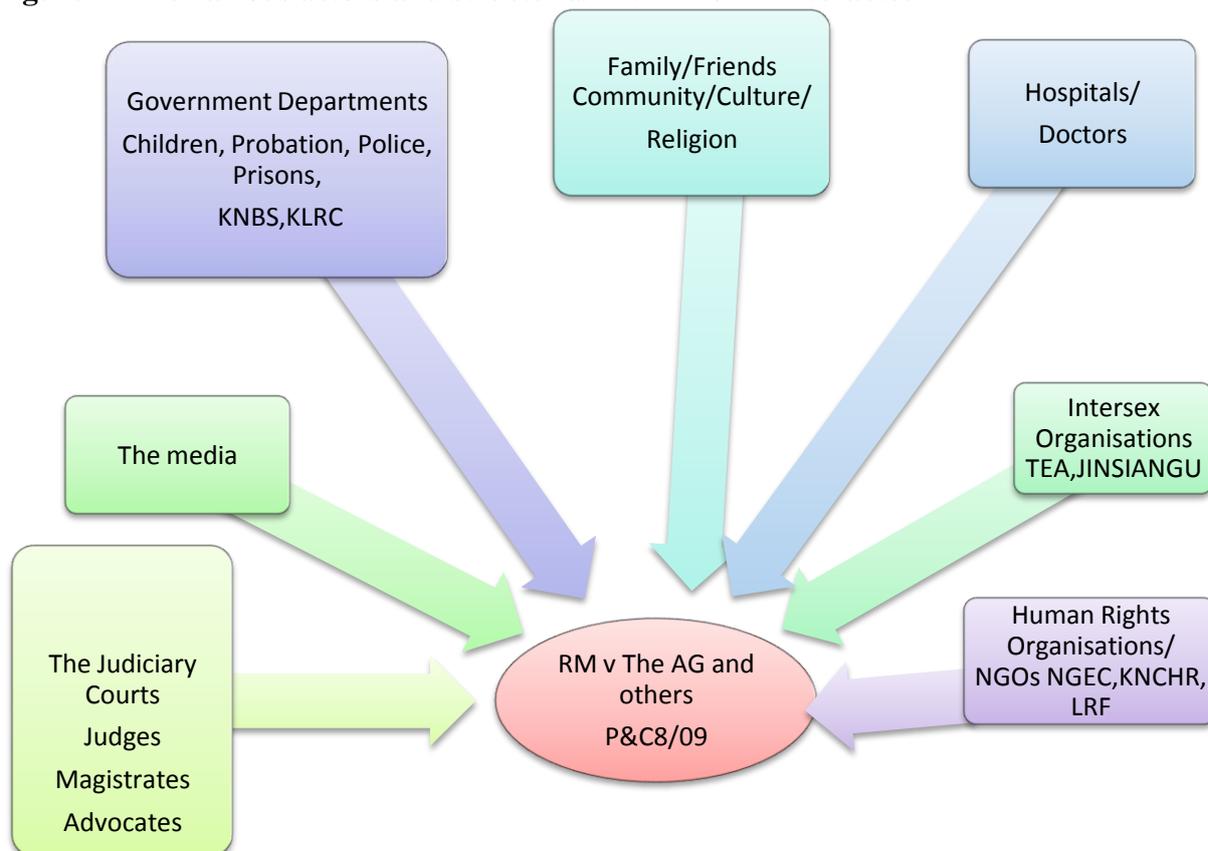
<sup>33</sup> Facebook and Twitter.

and female rather than any cultural dictates. Using the ‘next question technique’ I sought data on how culture deals with the intersex person.

Using the grounded women’s law approach put me in direct contact with intersex persons’ realities and, in particular, the reason why they are ‘invisible’ in society and to the law. This gave me both the opening to interrogate the constitutional and legal frameworks under which this could change and the opportunity to make recommendations for legal reform.

I engaged the actors and structures approach together with legal pluralism. This approach enables us to start out with the intersex persons’ experiences as they go through life and how the normative structures impinge on their lives (Bentzon *et al.*, 1998). The issue here was to examine how these legal, social and cultural norms, values and institutions affect their lives and determine the choices they or their parents or families have to make in resolving the conflict that naturally arrives with their birth.

**Figure 2: The various actors and structures with whom I interacted**



This approach enabled me to interrogate the roles of the actors and structures in perpetuating the stigma and discrimination against intersex persons. I looked at how each could contribute to the legal reform required to achieve the life goals of intersex persons and where the input of intersex persons was required in order to bring about positive change to the manner in which they view and approach their issues.

Finally, I used the Human Rights approach which:

‘...identifies rights holders and their entitlements and corresponding duty bearers and their obligations, and works towards strengthening the capacities of rights holders to make their claims and of duty bearers to meet their obligations’ (UNOCHR, 2006).

The basic principles of human rights are that they are universal, inalienable, indivisible and interdependent. The focal point is the principles of equality and non-discrimination. Kenya is a signatory to the International Bill of Rights. Article 2(5) of its Constitution provides that

‘the general rules of international law shall form part of the law of Kenya’ and article 2(6) provides that ‘any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution’. Hence, Kenya has just as much obligation to respect, fulfil and protect the human rights of its intersex citizens as it has towards its ordinary citizens in respect of their human rights.

Using this approach I was able to identify intersex persons as rights holders who are not so much aware of their entitlements as human rights *per se*, as they are of ‘***Haki ya kutodhulumiwa***’ (‘a right not to be discriminated against’). It also helped me identify a real gap in the international human rights framework in as far as the special rights of intersex persons as a group is concerned, as they are included among the LGBTs but very often get passed over. It helped me to see that even though the UDHR, ICCPR and ICESCR are in place, intersex persons were never anticipated.

## CHAPTER FOUR

### 4. THE FINDINGS

#### 4.0 INTRODUCTION

In this chapter, I present my findings which demonstrate the urgent need for Kenyan society to embrace intersex persons, as a sex minority, and a specific category for non-discrimination within the Constitution. The Constitution demands it.

My findings will be presented under six headings.

#### 4.1 EVIDENCE: Asking the wrong people the wrong questions

The question was whether there is sufficient data to warrant the legal recognition of intersex persons as a sex minority group. *What is a minority group? How do we identify a minority group in international law and in the Kenyan Constitution? What is the statistical and medical evidence with regard to intersex persons in Kenya?*

In RM, the Court distinguished the case of intersex persons from that of the Il Chamus Community because the Il Chamus were ‘a unique, cohesive and minority group numbering about thirty thousand people’. This is in line with article 56<sup>34</sup> of the Constitution which provides for minorities and marginalised groups, setting out the state obligations on affirmative action. These provisions mirror those of the UN Declaration on the Rights of Indigenous Peoples (2007) which was preceded by the UN Declaration on the Rights of Persons Belonging to National, or Ethnic, Religious and Linguistic Minorities (1992) which emphasizes the non-discrimination of racial, religious, ethnic and linguistic groups.

International law does not provide a definition for the term ‘minority’. In his article, ‘Redefining minority rights: Successes and shortcomings of the UN Declaration on the Rights

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<sup>34</sup> Article 56. The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

- (a) participate and are represented in governance and other spheres of life;
- (b) are provided special opportunities in educational and economic fields;
- (c) are provided special opportunities for access to employment;
- (d) develop their cultural values, languages and practices; and
- (e) have reasonable access to water, health services and infrastructure.

of Indigenous Peoples’, Jabareen (2011: 124-125) makes a distinction between indigenous peoples and minority groups. Article 56 of the Constitution does not distinguish between indigenous and minority groups. Jabareen says that there is an overlap between what is defined as indigenous and what is defined as minority but they are distinct. This is what article 260 does by drawing a distinction between ‘marginalised community’ and ‘marginalised group’.

He states that key elements to the establishment of a minority group would be:

‘... self definition and a desire to preserve unique group based characteristics [...] fragile identity and interests requiring appropriate protection, including the application of special temporary or permanent measures.’

It becomes necessary to seek recognition so that certain specific collective rights can be guaranteed and conferred on the group.

Intersex persons have a unique identity. They fall outside what is considered the natural human binary of sex (female or male) and even their gender cannot always be fixed as feminine or masculine. They require special measures to protect their identity and their interests because there is a definite pressure on them to fit into something they are not and that makes them targets for discrimination.

#### ***4.1.1 The search for statistical and medical data***

According to the Constitutional Court in RM, the burden was on Mwanzia to provide the statistics for intersex persons to qualify as a minority group. I found, however, that no official statistics were available. Part of the problem was the social and legal stigma that forces intersex persons to live secret lives. At birth they are assigned a sex, a discriminatory act which conceals their intersex status. There is no provision in the law for recognition of any changes that may occur later in their lives, e.g., during and after puberty. Neither the medical establishment nor the central government collects or maintains intersex disaggregated data.

The Kenya National Bureau of Statistics (KNBS) is the statutory body established under the Statistics Act, Chapter 112, which is mandated under section 4(1) to collect, analyze and disseminate statistical data and is the custodian of official statistical information. In its first

schedule, the Act lists 42 areas in which statistical information may be collected, compiled, analyzed, abstracted and published. 'Population' is first on the list. When it comes to 'sex', statistics are collected on the basis of male or female only.

While showing me previous census reports and surveys that KNBS had conducted, its statistical officer, Javan Washiali, said:

'When we carry out the census or surveys there is no provision for intersex. The parameters we use to conduct a survey include age/sex - but sex is either male or female.'

The Acting Director, Macro Economic Statistics, Collins Omondi, confirmed this:

'When we conduct the census, on the issues of sex it is either male or female... and, although we have had the debate informally as to the possibility of some people being both, we have never taken it seriously. This is an issue that ought to be considered...we have no statistics on intersex...we never ask that question.'

The Directorate of Population and Social Statistics conducts household census and surveys. Its Acting Director, Macdonald Obudho, was categorical:

'Our tools for data collection are about male and female...At the bureau we have never thought of incorporating intersex in our tools.'

But even if they had the 'tools', the challenge would be how the enumerators would ask questions of a society that does not feel free to talk about sexual issues. Even in a normal census it is not common to ask the sex of people and in certain situations it would be listed as 'non- stated' because it had not been determined.

'It would be a rare case for a family to report that the sex of one member is unknown ... some people would take offence to be (*sic.*) asked whether they are male or female' (Macdonald Obudho).

Drawing a parallel with the relatively small number of people who suffer from the unique double disability of being both hearing and visually impaired, it is clear that numbers do not matter but rather the special needs of those who are identified. The challenge would be how to start asking the right questions of and about intersex people and their issues:

‘Intersex is a peculiar state...Intersex appear not to have a voice to speak for themselves...there is need to have a discussion with stakeholders and perhaps an organization could write to us pointing out the shortcoming and that could lead to our commitment to cover it’ (Macdonald Obudho).

This poses a challenge. Intersex persons do not have an ‘intersex’ organization that could champion their issues. The organisations they belong to are associated with the gay and lesbian movement which is considered to be illegal, and whose registration the government has rejected.<sup>35</sup>

In terms of section 4(2) of the Statistics Act, it is the mandate of the Bureau to authorize, supervise, and set standards for the collection and dissemination of data. Without standards and regulations on the collection of this data, not even hospitals or health centres can keep intersex disaggregated data. The Births and Deaths Registration Act requires that the birth of a child be registered as either male or female. Dr Nthumba, who has published a report on some of the surgeries conducted at Kijabe Mission Hospital, said, ‘it is impossible’ to establish the specific numbers of patients who show up with intersex conditions because of the diversity of intersex conditions. Dr. A from the University of Nairobi said that such statistics could be found in the medical records of patients.

A TEA Programme officer said she had had contact with at least 40 intersex persons but had not kept a register. Jinsiangu did not provide any numbers.

The National Gender and Equality Commission and the Kenya National Commission on Human Rights both acknowledge that intersex persons could be recognised as a minority group in terms of article 260 of the Constitution but neither has put in place any measures to collect data on them.

After RM’s case, the Legal Resources Foundation (LRF) had made some efforts and found 17 intersex persons suffering in silence in prison. Lenson Njogu, LRF’s Senior Programmes Officer, said they had also found that:

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<sup>35</sup> Constitutional Petition No 440 of 2013 seeking registration of a National Gay and Lesbian body; two of my respondents actually appeared before the NGO co-ordination body supporting the non-registration saying that they were not consulted and do not wish to be represented by that body .

‘The prevalence of intersex cases was high in Nyanza...Births are in the homes and are assisted mainly by Traditional Birth Attendants...most births are not registered.’

He did not give figures but stated that LRF had put in place strategies to capture the statistics by using the local administration.

‘We have recognised the need for the chiefs to raise these issues in their *barazas* (public meetings) and in particular to come up with practice rules so that chiefs can make a return on specific cases of intersex’ (Lenson Njogu, LRF’s Senior Programmes Officer).

Faith-based organisations could have been another source of statistics. The ‘religious’ view which was ‘Christian’ expounded in RM would not be conducive to the identification of intersex persons because the intersex person must conform to the assigned sex.

Islamic jurisprudence presents a different perspective in that intersex is identified as such, and, even though sex is assigned, it is acknowledged that the person is intersex, and there is provision for the recognition of any changes that may occur after puberty.

Jorge (2007) argues that the problem of statistics is directly related to the manner in which intersex is classified - ‘on statistical principles of binary classification’.

‘The practice of encoding intersex by etiology and not phenotype...perpetuates the binary system...and the idea of rare events.’

This is because sex differentiation is a continuum. He suggests that instead of intersex being classified as a rare phenomenon, it would be more realistic to classify it as a random phenomenon. That would make it easier to capture its occurrence.

Locating intersex persons in an official survey/census will raise their chances for social justice and the preservation of their dignity. It will ensure that they, too, get the opportunity to realize their full potential as human beings.

## 4.2 IMPOSITION OF A SEX AND ITS IMPLICATIONS FOR INTERSEX PERSONS: The right to self-determination

The imposition of a sex is either by pronouncement, ‘it’s a girl or a boy’, from the general appearance of the external genitalia and ‘dominant physiological features’<sup>36</sup> or through corrective surgery, where the genitals are crafted through multiple surgeries to appear normal.

The court’s position in RM is what has been described as the ‘natural attitude toward gender’ where everyone must be classified as either male or female. Kessler and McKenna (1978: 114-115) quoted in Jordan-Young (2011: 257-258) state that the natural attitude towards gender is that the male/female dichotomy is natural, there are only two genders, male and female, and genitals are the essential sign of that gender, therefore, everyone must be classified by gender. This natural attitude towards gender has been central to the manner in which the medical profession manages intersex infants.

‘In the “unnatural” event of an ambiguously sexed child a decisive - and naturalizing - gender assignment derives from the pediatrician’s apparent “discovery” of the child’s “true, natural sex” [Kessler (1998) quoted in Turner (1999: 467)].

Obviously, where the birth is not in a hospital, then, according to RM, the mother or the midwife would be able to determine the true sex of the infant and ‘assign’ a sex.

Medical and legal opinion is still divided on this.<sup>37</sup> On the one hand,<sup>38</sup> the argument is that a child cannot be allowed to grow without a specific sex/gender because they will not fit into society. Sex must be assigned at the earliest possible stage in the person’s life, even permanently through surgery. On the other hand, it is argued that surgery should wait until the intersex person is able to consent to it.<sup>39</sup>

Consequently, determining an intersex person’s sex has been described as an ‘intermediate morphology’.<sup>40</sup> Gendered behaviour is taken as a natural consequence of sex in that sex is

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<sup>36</sup> RM, Paragraphs 128 and 129.

<sup>37</sup> This was brought out in RM and is the contentious issue in Baby A’s case.

<sup>38</sup> Interviews with Dr. Nthumba and Dr. Ondieki.

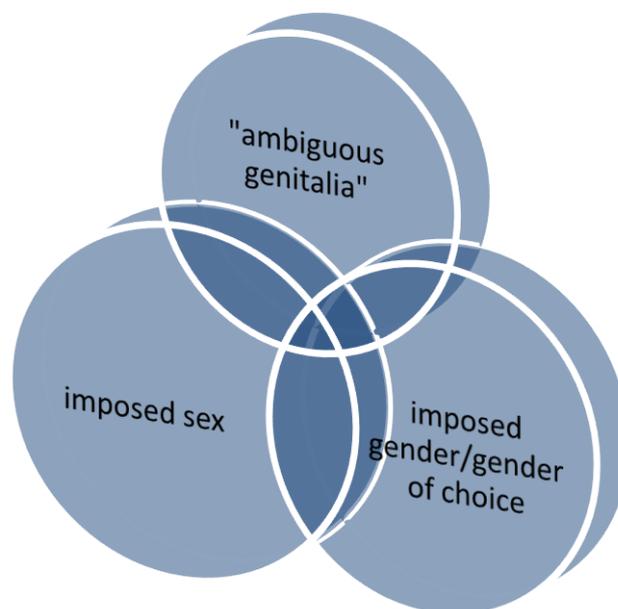
<sup>39</sup> Interview with Dr. Osawa.

<sup>40</sup> Genitals develop from a common precursor and therefore intermediate morphology is common, but the popular idea of ‘two sets’ of genitals (male and female) is not possible. Intersex genitals may look nearly female with a large clitoris, with some degree of posterior labia fusion. They may look nearly male, with

seen as the social criteria for gender. That explains why, in a gendered society like ours, it becomes necessary to assign sex.

I found that this imposition denied the choice to self-determination and self-identity of the intersex person, which affected all other aspects of their lives, including health, education, security and sexuality. It also affected the families who rejected them when they rejected the imposed sex, exposing the intersex person to interlocking oppressions. It ultimately results in the violation of the human rights of intersex persons.

**Figure 3: Diagram depicting the complexities of imposed sex**



At the centre of the above diagram is the real person who has to grapple with the consequences of society's demands to conform. Beck's life illustrates the effect of this imposition. He was born intersex and raised as a girl in a village in Butere in Western Province. By demanding that he remains a girl, his parents, the community and the law are denying who he really is. The fact that he feels like a man and is sexually attracted to women is what society cannot tolerate, because we live in a society ruled by hegemonic

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a small penis or with hypospadias (urinary opening located on the underside of the penis). They may be truly 'right in the middle' with a phallus that can be considered as either a large clitoris or a small penis with a structure that might be a split empty scrotum or outer labia, and with a small vagina that opens into the urethra rather than into the perineum (ISNA 'Frequently Asked Questions') Turner (1999: 465).

heterosexuality and we cannot imagine 'her' with a woman, because, in our judgment, that makes him a lesbian and that is not acceptable:

'I was born intersex on 2 August 1990. I was raised as a girl. When I began to go to school, my mother made me wear two pairs of underwear and forbade me from using the toilet, or bathe together with other girls. When I was about 12 I began to question why I was different from the other children. I no longer wanted to wear a tunic to school and wore shorts under my uniform. My parents were very harsh when I rejected being a girl and began to dress like a boy and to hang out with boys. My father, in a bid to reinforce the girl he wanted me to be, arranged for me to obtain a national identity card using the girl name and female gender marker before I turned 18. I earned the name *chali-dem* (boy-girl). Some boys in the village became so curious they attacked and forcefully circumcised me. My father, who had threatened to kill me, wished I had died in the attack. I was rescued by good samaritans and came to Nairobi' (Beck, 24).

The identity card did not change the fact Beck identifies himself as a man. Running away from home did not help. His friend from Jinsiangu confirms the following event:

'My family rejected me. The only person I was close to was my grandfather. When he died, I asked a friend to accompany me home to attend the funeral. I was treated like a complete stranger, I was not even acknowledged as a member of the family, nor was even offered food. It was really traumatizing.'

The trauma of the attack in the village has never left him. His greatest fear to date is about his personal security:

'I have been assaulted severally even in Nairobi but cannot face the police to report. They ask too many questions. Very few people know about my intersex status. Recently I gave an interview with a newspaper and they used the name I identify with. Some neighbours suspected it was me but, though I denied it, they came demanding that I move out of the house.'

When Mwanzia was born the grandmother announced, '*tii ithwi, na ti mo*' meaning, 'It is neither us, meaning women, nor them, meaning men'. He was assigned the male sex/gender, despite the fact that neither his penis nor his vagina had (or have even now) developed. He is now 40 years old. As a result, he is expected to live like a man:

'My stepfather did not know about my status. He could not understand why as a young male adult I was not interested in girls. I had grown breasts and I was not comfortable with them...My mother told him why. He told me that it was

important that I have a *boma*<sup>41</sup> of my own. He found a girl who was a divorcee with one and was living with her mother who was a widow. He arranged with her mother and she came and became my wife. I was embarrassed about my breasts and would not let her touch me. I do not have sexual feelings. I cannot have sex...I cannot have children. So she is free to get children for me with whoever she pleases. While I was in prison she gave birth thrice, now I have four children.’

Mwanzia’s marriage, if challenged, would not satisfy the test of a statutory marriage because he is incapable of the standard coital consummation. He draws a parallel with the woman to woman marriage or *iweto* in Kamba customary law where a barren woman or one who only has daughters may ‘marry’ another woman to bear children for her.<sup>42</sup> However, in the usual patriarchal way, *iweto* was meant for women.

Billie is about 10 years old. Her father says:

‘When she was born the male part was small. Her voice broke at one year and she began to grow pubic hair. Her male part began to grow. The doctor who examined her said she was a bit old and operating on her to be a boy would take too long to heal. We have taken her as a girl.’

The child has to struggle to fit into this girl identity, yet it is evident she is growing into a boy.

For Franc, her sexual orientation was bothering her because Kenyan society does not accept sexual relations between persons of the same sex:

‘I thought I was a lesbian until I learnt that my parents had me operated on as a child creating what appear to be female genitals. Except for my female name there is nothing female about me. I have no breasts, but also no beards yet I am 26 now. I live with a woman whom I consider my wife and I would prefer to be called Franc instead of my female name. My uncles who are aware of what was done to me have not raised any objection to my relationship as they can also see there is nothing female about me. In fact I get embarrassed sometimes at security checks which are now common due to Al Shabab attacks because I often get sent to the male queue. I am a qualified football referee.’

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<sup>41</sup> Family and home.

<sup>42</sup> Interview on Radio Maisha.

And then there was AB.<sup>43</sup> He was born and raised as a girl, CD, and attended school and college as such but was dating girls to the consternation of her mother. As a young nurse, one of her doctor colleagues diagnosed the intersex condition and she was taken to the UK where she underwent surgery and came back as a married man. According to his cousin, he was able to lead a very successful life as a man. However, there was a social emergency when he died. What rites should be followed? According to his cousin, he saved them the agony and willed to be cremated.

Rosa, a high school teenager, alleges that she was raised a boy but when she was a toddler her parents had her operated on and turned her into a girl. When she was sent away from a girls' only school because of frequent fainting spells, she told a social worker from St. Martin Catholic Social Apostolate about her condition. Her mother denied it and even said that Rosa was her step-daughter. She said:

‘I don’t know what demon has got into that child’s head. She is not like that.’

It is worth noting here that, although her mother gave us the go ahead to interview the girl and told where to find her, the girl told us:

‘My mother rang me and told me not to talk about those things.’

Barely a week later I received several phone calls from a person calling herself Rosa’s sister. She said:

‘My mother is lying. My sister is that way. We don’t want her in our home. She is a curse to the family.’

The Court in RM stamped its authority on this imposition. Persuaded by the findings of Ormrod J in the transsexual’s case of *Corbett v Corbett* (which was followed in *Bellinger v Bellinger*, another transsexual’s case), it made the finding:

‘that from both the religious and scientific points of view, an individual’s biological sexual constitution is already fixed as either male or female at birth and cannot be changed either by natural development of the organs of the opposite sex or by medical or surgical means.’

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<sup>43</sup> Interview with Mr T.O.A., cousin of AB, as AB had died two weeks before the interview.

Having looked at the precedent setting Colombian Cases<sup>44</sup> on intersex corrective surgeries, the Court was aware of the fact that the sex of a person with ambiguous genitalia may not be clear at birth and subsequent biological factors may turn out to be incongruent with the physiological factors. Relying on Mwanzia's mother's 'imposition', the Court determined that he was male, despite finding that the medical report was inconclusive and clearly stated he had no testes.

It is also noteworthy that of the six intersex persons interviewed, five were assigned the female sex and gender at birth and each one of them is uncomfortable with this status and is in the process of changing it or has adopted the lifestyle of the opposite gender.

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<sup>44</sup> Sentensia No 54-337/99 (the Ramos case) and Sentensia T551/99 (the Cruz case).

**Table 5: Assigned sex/gender v sex/gender of choice of selected intersex persons**

Intersex Person	Age (years)	Sex assigned at birth	Surgery	Current gender expression
Billie	10	Female	No	Male suppressed in female rearing
Rosa	17	Female	Yes	Questioning /male
Beck	24	Female	No	Male
Franc	28	Female	Yes	Male
Mwanzia	40	Male	No	Male
AB	Deceased @ over 60	Female	Yes	Male

### 4.3 RIGHTS: THE CONSTITUTIONAL FRAMEWORK: No passing the buck now!

In RM the Constitutional Court found that the issue of recognition of intersex persons, as a class or body of persons, was a matter for Parliament. Its view was that RM had to lobby Parliament to get recognition as the Court could not legislate. It cited the cases of South Africa<sup>45</sup> and Australia<sup>46</sup> where it is addressed in legislation. The Nepalese case of *Pant* demonstrates that the Courts can make the declaration for legal recognition through the interpretation of the Constitution.

The Kenyan Constitution of 2010 has broadened the issue of *locus standi* and the jurisdiction of the Court in Constitutional matters. Article 20(3)<sup>47</sup> amplifies this further by giving the Court no choice but to interpret the Constitution as widely as possible to ensure or to give effect to a fundamental right or freedom. The Court is further required to promote the values that ‘underlie an open and democratic society based on human dignity, equality, equity and freedom’.<sup>48</sup>

Recently, the Constitutional Court in *Kenya Magistrates and Judges Association v Judges and Magistrates Vetting Board and The Attorney General*<sup>49</sup> demonstrated that the Court, using the tools of ‘severance’ and ‘reading into’, can declare contested parts of legislation unconstitutional in order to bring that legislation in line with the values of the Constitution.

Article 2(4) provides for the supremacy of the Constitution above any law or custom that is inconsistent with its provisions. This would readily apply to all legislation, customs and traditions that allow for the discrimination of intersex persons. In line with this is article 10 which binds any state organs, officers and all persons, whenever they apply or interpret the Constitution, enact, apply or interpret any law, make or implement public policy, to apply the national values and principles of governance set out therein. These national values include:

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<sup>45</sup> Alteration of Sex Description and Sex Status Act, No 49 of 2003.

<sup>46</sup> Legislation Act, 2001 [later amended by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex) Act, 2013].

<sup>47</sup> Article 20(3): In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

<sup>48</sup> Article 20(4)(a).

<sup>49</sup> HCC 64/2014 (unreported at the time of writing).

‘Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized’ [Article 10(2)(b)].

This provision covers every aspect of the issues raised by intersex persons in RM and, hence, today the Court would have no excuse to pass the buck to Parliament or civil society.

The issue of religious discrimination is covered under article 8 which provides that there shall be no state religion. We cannot, therefore, have situations like in RM where the court will utter words as ‘from a religious point of view...’ The question will be whose religion? Hence, arguments based on Christian teachings as were brought by KCLF in RM may be misplaced.

Intersex persons are exposed to abuse of the right to human dignity provided for under article 28, which may be read with the protection against psychological and physical torture and the right to freedom and security under article 29. The body searches that Mwanzia was forced to endure in prison and Beck’s attack and circumcision by village boys are clear examples of breaches of these human rights. They suffered this specifically because of the intersex condition. An interpretation of sex in article 27(4) to include intersex would bring to life for intersex persons article 27(6), which sets out the state’s obligation:

‘[to] take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.’

It would ensure that the reference to equality of women and men in article 27(3) does not work to exclude intersex persons. It is also under this provision that the state would be obligated to put in place a process for determining the number of intersex persons in the country.

The right to information as provided for under article 35 is a basic right to intersex persons. Section 2 of the Access to Information Bill, 2013, defines ‘information’ to:

‘...include all records held by a public entity, regardless of the form in which the information is held, its source or date of publication.’

‘Personal information’ includes:

‘...race, gender, pregnancy, marital status, national, ethnic, or social origin, colour, age, physical, psychological or mental health, well being, disability, religion, conscience, belief, culture, language, and birth.’

The omission of sex is critical for intersex persons because that is where their identity as persons begins. The assumption here, that gender is all inclusive, could result in the exclusion of intersex persons.

Intersex persons live without information as to what is happening in and with their bodies. The state has an obligation to avail all information to explain the meaning of intersex and its status because the rights and fundamental freedoms of intersex persons depend on it. This would include statistics of, e.g., how many intersex persons are in the country, what types of intersex are prevalent and how they should be handled. The state has an obligation to seek information:

‘...held by another person and required for the exercise or protection of any right or fundamental freedom.’

The state’s enforcement of this provision should dissuade a parent/guardian/next of kin or doctor from hiding a child from the authorities or from hiding information from the child or the authorities that a child is intersex. It should also help to lift the stigma of being intersex.

Intersex persons could also use the right to ‘the correction or deletion of untrue or misleading information that affects the person’<sup>50</sup> which goes hand in hand with the right to fair administrative action.<sup>51</sup> These can be used to correct or delete the birth information which may have been entered in birth records, school records, identity documents, etc., especially about the assigned sex where that may have changed. The Births and Deaths Registration Act schedules could be amended to provide for the re-issue of birth documents to reflect the real identity of a person.

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<sup>50</sup> Article 35(2).

<sup>51</sup> Article 47.

Article 45 provides for marriage and family. The constitutional provision is that every adult has the right to marry a person of the opposite sex, based on the consent of the parties. The Marriage Act, 2014 defines ‘marriage’ as:

‘The voluntary union of a man and a woman in a monogamous or polygamous union and registered in accordance with this act’ [Section 3(1)].

Section 12 defines ‘voidable marriage’ to include one where:

‘... at the date of the marriage either party was and has ever since remained incapable of consummating it.’

The definition of marriage is based on the binary of sex ‘man and woman’. Section 12 explains why: the fact of coital consummation. Marriages between or by intersex persons who are incapable of coital consummation are voidable. The section may require the addition of a proviso to exempt intersex persons for as long as there is disclosure.

The draft Bill on the Rights of Persons Deprived of Personal Liberty created under article 51 of the Constitution has included intersex persons, providing hope that the process of reform has started. Titus Karani, Deputy Commissioner of Prisons, Legal Officer and a member of the Taskforce, said:

‘Following the RM case there was a debate on intersex. Intersex is not recognised. One has to be either male or female. It requires more research as it is can only be determined after a medical examination. It raises the issue of rights ... there is no literature on intersex persons in Kenya or on how to differentiate the intersex from others. The law is silent and thus they have to be treated as medical cases.’

With respect, I do not agree that treating intersex persons ‘as medical cases’ is the right place to start.

‘The Draft Bill is a good thing. If it went to Parliament, there would be debate on the issue of intersex persons and Parliament would get information from experts and doctors. The Attorney General would then deal with the issue’ (A Judge of the High Court sitting at Kakamega).

The current constitutional framework and climate offers a new opening for intersex persons to seek and find the recognition they deserve, so that they may benefit fully from the promise of article 19(2) of the Constitution which provides that:

‘The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.’

The Constitutional Court is empowered to and should give effect to these provisions.

#### **4.4 LEGAL RECOGNITION: How many of us will you need to arrest before you accept that we exist?**

The right to recognition as a person before the law is a very vital fundamental right, the right that places a person within the protective and obligatory legal framework of the international and national human rights instruments.

Article 6 of the UDHR and article 16 of the ICCPR provide that:

‘Everyone has the right to recognition everywhere as a person before the law.’

Together with the ICESCR, they form the International Bill of Rights. The Kenyan Constitution recognises the implications of Kenya being a signatory to these and other instruments by providing that they form part and parcel of Kenyan law.

These instruments have been interpreted in many ways leading to conventions, declarations and principles for the protection of various classes of people including children, persons with disabilities, indigenous peoples, women, minorities, immigrants, refugees and sexual minorities. All these address issues related to men and women, boys and girls, as they fit within the female/male and feminine/masculine sex and gender binary. There is not a single international instrument that recognises that intersex persons do not fit within those confines and that, by just being who they are, they challenge that ‘sacred’ construct.

In just the same way as gender mainstreaming is grounded in the reality that men and women are different, though they are all human beings, so intersex persons require that we re-look at our human rights framework and redefine sex.

The Kenyan Constitution is no different. It speaks the language of the UDHR by providing rights for everyone. However, certain of its articles clearly demonstrate that intersex persons were not contemplated by its drafters.

It all starts at birth.

#### **4.4.1 Registration at Birth**

A birth certificate is the ‘membership card’ to society, evidence of legal existence, identity and age. According to article 7 of the United Nations Convention on the Rights of the Child (CRC)(1989):

‘The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality.’

Registration is a fundamental human right, giving a child legal recognition and forms the basis for nationality. It carries the right to protection of individual rights and the assurance of remedies in case of any violation:

‘Unregistered children who do not show up in the data are often overlooked in social development planning. They are completely invisible when important policy and budget decisions are made’ (Marta Santos Pais. Director, UNICEF Innocenti Research Centre).

Without registration a country cannot be certain about its own birth and death rates and cannot fully protect its citizens. For a child that can mean the loss of protection against child labour, the risk of being detained and prosecuted as an adult<sup>52</sup> and, generally, the loss of the key to the enjoyment of rights to healthcare, education, participation and protection.

The African Charter on the Rights and Welfare of the Child (ACRWC) states specifically in article 6(2) that ‘Every child shall be registered immediately after birth.’

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<sup>52</sup> E.g., the case of Mike (not the intersex person’s real name), an intersex minor, who was sentenced to serve three years imprisonment in a male prison, though living as female in society, and whose age could not be adequately determined for lack of a birth certificate. LRF case report, PR.NO.NYR/357/010/LS.

The Kenyan Constitution does not carry a similar requirement but, in article 53(1)(a), it speaks of the entitlement of every child to a name and nationality. There is, however, an entitlement to each Kenyan citizen to a Kenyan passport and any document of registration or identification.

Nevertheless, Kenya is a signatory to both the CRC and the ACRWC and, hence, according to article 2(6) of the Constitution, is bound by those two articles to ensure registration at birth and the issuance of a birth certificate.

The Births and Deaths Registration Act, Chapter 149 of the Laws of Kenya:

‘...provide(s) for the notification and registration of births and deaths and other matters incidental thereto.’

Although the Act does not define the term ‘sex’, it is quite clear from a reading of the rules and schedules made in terms of section 29 that ‘sex’ stands for female and male. This is the law that provides for the legal recognition of the existence of every person born in Kenya.

The Act does not provide for the registration of children born intersex as ‘intersex’. A child born with an intersex condition is made invisible either by being denied registration because they do not fit into the traditional female/male binary, or by being registered as *either* female *or* male. This is clearly demonstrated by the following official forms.

**Table 6: Part of the table in the official form to be filled in by the informant of the birth of a child**

Full Name	Baptismal or given name(s)	Middle or Tribal name Son or Daughter of	Surname or Tribal Name of Father
Date of Birth	Date of Month	Month	Year
			Sex of Child Male or Female

The Registrar of Births and Deaths is expected to file returns. These reflect what is in the form in Table 6 (see also the third column of Table 5 and Table 7). Indicating ‘sex’ as either ‘male or female’ is a requirement for both births and deaths.

**Table 7: Official form to be filled in by medical practitioners and hospitals to inform the Registrar of the death of a person**

Full name of deceased	Baptismal or given name(s)	Middle or tribal name	Son or Daughter of	Surname or tribal Name of Father
Date of Death	Date of Month	Month	Year	Sex of Deceased Male or Female

*There is also no provision for the recognition of the changes that may occur in intersex persons like Billie, Beck and Franc (see Table 5).*

#### **4.4.2 The Children Act**

The Children Act consolidates the CRC and the ACRWC together with other human rights instruments to give us a Bill of Rights for Children. However, the drafters did not factor in article 6 of the ACRWC and article 7 of the CRC. The closest the Act comes to these provisions is section 11 which provides that a child has a right to a name and nationality; but there is no mention of a right to be registered at birth. Throughout the Act, the term ‘sex’ refers to male and female. In adoption and fostering it matters whether the child is male or female. Children’s institutions are also designed for boys and girls, etc; there is no specific provision for intersex children. Hence, an intersex child, though protected by the omnibus clauses of non-discrimination both in the Act and the Constitution, is not guaranteed the protection of individual rights that attach to intersex status.

#### **4.4.3 The National Gender and Equality Commission Act, 2011**

This Commission is established pursuant to article 59(4) of the Constitution. Its main purpose is to promote gender equality. Gender is defined in terms of section 2 of the Act to mean:

‘...the social definition of women and men among different communities and cultures, classes, ages.’

The position of the Commission’s Chairperson was that intersex is a condition which doctors are better placed to deal with and that an intersex person cannot be without a gender. Provided an intersex person identifies herself or himself as a woman or a man, s(he) is

covered by the Act. The question must arise, however: What happens to those who choose not to identify with either? The Act must recognise and cater for that possibility. Would an intersex person, like Beck, fit into the above definition? His community, culture, class and contemporaries reject his gender of choice. The social construction of gender will not work for him because his gender is self-identified. What about Franc? His gender is socially constructed as feminine, but his gender of choice is masculine. In other words, this definition, when applied to intersex persons, becomes problematic in the absence of necessary provisos.

#### ***4.4.4 The Draft Persons Deprived of Personal Liberty Bill, 2011***

This draft Bill is the most progressive of all since the passing of the current Constitution. It defines ‘intersex’, and recognises the rights of intersex persons who come into conflict with the law to dignified searches and separate accommodation from other inmates. This is borne of the experiential data from Mwanzia’s cases and of some of the members of the Task Force tasked to draft it. But the Bill also raises a concern: How many intersex persons need to be arrested before we are prepared to grant them complete, once-and-for-all rather than piecemeal legal recognition?

One likely positive spin-off of Parliament rejecting the Bill is that it will spark a long overdue debate in the public domain.

### **4.5 MARGINALIZATION, DISCRIMINATION AND THE DENIAL OF HUMAN RIGHTS: Intersex rights are human rights!<sup>53</sup>**

Throughout this study it is evident that our society generally views intersex negatively. It has been referred to as an abnormal occurrence, a public curiosity, a medical and social emergency, a disorder, a curse, a rare occurrence, unnatural, a peculiar thing, a disability. What all these labels have done is to dehumanize intersex – deface the human face so that what is seen is the label. We see not someone, but something which has to be normalized, peeped at, diagnosed and treated quickly to save us from the shock and psychological trauma, something unacceptable, something to be purged and cast out.

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<sup>53</sup> Wilson (2012).

The Constitutional Court in RM climbed on to this bandwagon as well. After finding that, except for Mwanzia, there was no data to prove the existence of other intersex persons, it stated:

‘Nor, is there any information upon which this court can conclude that *the issues raised with regard to intersex persons, is something in which the society as a whole has an interest that warrants recognition*’ (Paragraph 117; emphasis mine).

All these negative labels and attitudes demonstrate just how marginalised intersex persons are. This persistent public hostility sets them up for discrimination and the violation of their human rights from the moment they are born.

Answering the question as to whether his community recognises intersex persons, one judge responded:

‘Among my people the Pokomo it is only recently that we have began (*sic.*) to see persons with disability of any kind with hospital births. Previously the old women who assisted with the births would determine which child would live, if born with any deformity - thus intersex babies too would not be allowed to live. Any deformity was attributed to evil spirits.’

June Yegon, a community volunteer in Mochongoi, explained that, though times had changed, her community, the Tugen had and still considered intersex persons a curse:

‘In the Tugen Community, a child with such a disability did not have a right to live. It is considered a curse and the person not worthy of life. A baby would be taken into the cowshed to be killed by the cows. The child could also be poisoned. That is still the notion today and even exposing Billie’s condition is risky.’

Billie’s parents had also expressed similar fears to the probation officer. They confided that they could not raise the issue within the community because of its negative attitude towards intersex children.

The father of Cheporr in Edgerton (1964: 1292) is quoted saying:

‘I saw that my child was this *serer* so I thought I would kill it. What use could such a one be? I would have to feed it for its whole life as it could never

marry and what would I get in return? It could never bring me bride wealth. So I thought it would be better to kill this sererr. But the mother said ‘no, no - do not kill it.’

Mr T.O.A., speaking about his experiences while growing up in Bunyore, said that among his people, when a child was born, the traditional midwife would announce the birth of a boy by coming out with a spear, and of a girl by coming out with an *ingara*, a round object that is used to balance loads carried on one’s head:

‘For a death or abnormality she came out empty handed...for an intersex person or *nasatsa*, what rites would apply to them? That is one reason why they were never allowed to live, and were killed at birth.’

Beck said his father threatened him with death, and wished him dead when he began to reject the sex he had been assigned:

‘I am considered a curse. Even when they have family functions they do not invite or involve me because my presence is considered a bad omen.’

This was the same expression used by Rosa’s sister when she said, ‘That girl is a curse. We don’t want her around.’

One respondent told me that the Kikuyu refer to them as *ciugu*. Another explained further that they are referred to as persons who missed *itheruka rimwe*, a phrase used to describe beans that are half cooked.

The case of Mike\*<sup>54</sup> PR.NO.NYR/357/010/LS (details of which the LRF shared with me) who is serving a sentence in Nyeri (male) Prison demonstrates the overall effect of this marginalization.

According to the report by the paralegal, 17 year old MW was born intersex to a single mother who died when she was seven and she was raised by her grandmother. She was raised as a girl, was never taken to school and at the time of the arrest was working as a house help. She was charged with malicious damage to her aunt’s property, who forced her to wear male clothes when the police came to arrest her.

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<sup>54</sup> Not the intersex person’s real name.

In Nyeri prison, she was 'lucky' because they did not carry out the strip searches that Mwanzia had gone through at Kamiti so her intersex status was not found out. However, an uncle who happened to be on death row in the same prison informed the officer in charge, who ordered that 's/he' be held in isolation. The case was then brought to the attention of LRF paralegals, who reported that:

“'He' has been experiencing menses since he was 10 years old. According to him, the menses come regularly after every 28 days and take duration of 3 days.’

The prison could not supply 'him' with sanitary towels.

The LRF reported further as follows. The prison authorities tried to help by taking 'him' to hospital. 'Physical assessment at the Provincial General Hospital identified both female and male features', 'an X-ray revealed a prostate'. Neither MW nor the prison could afford the 'karyotyping' tests.

When Mwanzia was arrested and charged with a capital offence, there was no 'normal' holding place for him:

‘I was first kept in isolation, later I was placed in the sickbay though I was not sick until the day my appeal went through.’

When he was found to have peculiar genitals, he acquired another identity, that of a diminished man. The prison warders and other inmates would call him *kale kamutu kako na matiti*. Beck was *chali-dem* - one who is neither male nor female. When MW's status as an intersex person was revealed, the taunting began:

‘The inmates in Nyeri Prison refer to Mike as Semenya (the intersex athlete from South Africa). This name calling has a negative impact on his self esteem. Further the inmates gather in small groups to discuss him whenever he passes by. This causes MW to be reserved and cannot visit the paralegal office whenever he has an issue to be addressed.’ (LRF casenotes)

The Court in RM was very quick to say that Mwanzia's dropping out of school had nothing to do with his condition. The reality, however, was that people's reaction to his condition made dropping out his only option. As he says:

'I would leave home like I was going to school but stay in the bushes and *shambas*<sup>55</sup> until time for going home then I would join the other children going home.'

Responding to the question, 'So you urinate while squatting like a woman?' Mwanzia describes the difficulties he has in urinating like a boy, as he told Radio Maisha:

'You see, urine is supposed to come out from in front, but mine comes from under there. So, I just try but I have to lift my *ka-thing*<sup>56</sup> very much because God forgot to join mine to allow urine to come out the front.'

It is the arrest of Billie's mother that opened the way for her to go to school. Beck could not proceed beyond Class Eight because the family rejected him for rejecting his assigned sex/gender. Like Billie, he has to rely on well wishers for his training and casual work. Rosa is in Form Three but she had to repeat a class because of the issues she was having in school. Franc finished Form Four and that is the farthest he got. Having had the operation, the challenge he had was that he never got his periods when the other girls did.

Ken\*<sup>57</sup> has a very rare condition that is associated with intersex. According to Ken's mother, there is something the doctors ought to have done when he was an infant but they never did. His urine just flows out uncontrollably. He has spent all his life in diapers but only when his mother can afford them. He attended school irregularly and performed very poorly in his Class Eight examinations.

The forgoing stories manifest the fundamental violations of the human rights to human dignity, life, education, health and protection from unfair prosecution that result from marginalization.

The Constitution defines a 'marginalised group' as those who, because of:

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<sup>55</sup> Farms.

<sup>56</sup> Describes his penis as very tiny.

<sup>57</sup> Not the intersex person's real name.

‘[L]aws or practices before, on, or after the effective date were or are disadvantaged by discrimination on one or more of the grounds in article 27(4).’

These grounds include, and are not limited to, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, birth, race, sex, pregnancy.

Intersex persons, as a group, have been disadvantaged by discrimination on the grounds of sex, birth, disability, religion, belief, culture and conscience, among others, both before and since the coming into operation of the Constitution.

Comparing intersex persons with persons with disability illustrates how their marginalization may be dealt with. What intersex persons are going through now is what persons with disability went through for a long time until the state made a serious attempt to address their issues. They were seen as bad omens or curses and killed at birth or locked up and hidden in their homes.

Change came with the enactment of the Persons with Disability Act, Chapter 133. Josephine Sinyo, Senior Deputy Chief State Counsel at the Kenya Law Reform Commission, herself a visually impaired person, said:

‘Visibility is the key. It requires that the intersex persons speak for themselves. That is the only way it will be known they exist, and for their special needs to be appreciated.’

The Act provides *inter alia*:

‘for the rights and rehabilitation of persons with disabilities, to achieve equalization of opportunities for persons with disabilities, to establish the National Council for persons with disabilities.’

‘Disability’ is clearly defined in section 2 of the Act to cover all forms of disability, including:

‘[p]hysical, sensory, mental, or other impairment including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.’

Article 260 of the Constitution has expanded that definition to include:

‘any physical, sensory, mental, psychological or other impairment, condition, or illness that has, or is perceived by significant sectors of the community, to have a substantial or long term effect on an individual’s ability to carry out ordinary day to day activities.’

Of great significance is the definition of ‘discriminate’ in the context of disability in terms of section 2 of the Persons with Disability Act:

‘Discriminate means to accord different treatment to different persons solely or mainly as a result of their disabilities and includes using words, gestures, or caricatures that demean, scandalize or embarrass a person with disability.’

This provision would aptly apply to intersex persons where words like *chali-dem*, or *kamutu kako na matiti*, or *ako na vitu mbili* would be deemed to be discriminatory.

Being formally recognized paved the way for the inclusion of persons with disability in the census through the National Council, established in terms of section 7(1) of the Act, and whose functions include to:

‘co-operate with the Government during the national census to ensure accurate figures of persons with disabilities are obtained in the country for purposes of training.’

The passage of the Act was followed by a National Disability Policy and, in 2007, the first Kenyan National Survey for Persons with Disabilities (KNSPWD) was conducted:

‘The survey aimed to estimate the number of PWDs, their distribution in the country, and their demographic, socio-economic and socio-cultural characteristics. The survey also sought to determine the types and causes of the disabilities; the problems faced and coping mechanisms, and the nature of services and rehabilitation programmes available. The following impairments defined the disability: physical, mental, visual, speech, self-care and hearing’ [Wycliffe A. Oparanya, MP, Minister of State for Planning, National Development and Vision 2030 (Foreword KNSPWD 2008)].

As part of its attempts to secure protection for persons with disabilities, the state has made it an offence punishable by a fine not exceeding Ksh.20,000 (approximately US\$200) for any parent, guardian or next of kin who conceals a person with disability.<sup>58</sup> A similar provision could also be used to protect intersex persons.

This Act clearly demonstrates the difference legal recognition is likely to make to the protection of the rights and fundamental freedoms of a marginalised group, like intersex persons.

#### **4.6 IT IS A JUNGLE OUT HERE: But paths are made by walking<sup>59</sup>**

The justice delivery system includes all the courts and all the other actors and structures I mentioned earlier as being the court users, including all the *wananchi*.<sup>60</sup> These were in one way or another represented in RM and exhibited various degrees of not having sufficient information about intersex persons. Perhaps only two of the advocates in that case had ever met and spoken with an intersex person.

The case of an intersex person presents a serious challenge to the justice delivery system, including my own experience with Billie. Intersex persons have been treated as freaks:

‘Nobody warned me that I was having a case of an intersex person. There were no similar cases to which I could turn to for guidance on how to deal with Muasya - although there have been other similar cases but due to lack of information, they have been treated as freaks...I now realize that at the point of plea I ought to have referred the case to the Constitutional Court at the point where the police and prisons did not know what to do with him’ (Magistrate, Honourably E. Makori).

Even the Judges in the Constitutional Court did not have any local cases to turn to for guidance:

‘It’s a rare and peculiar condition ... Mwanzia’s was my first time for me to see such a case. There was no local law, no local case. We had to refer to the Constitution and our African tradition. Our laws are very specific. They provide for male and female, for school, identity cards, passports’ (High Court Judge).

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<sup>58</sup> Section 45.

<sup>59</sup> See title Hellum (2007). ‘Human rights, plural legalities and gendered realities: Paths are made by walking’.

<sup>60</sup> Citizens.

In RM the Judges did not see or hear him:

‘The application was made for Mwanzia to appear in court while his constitutional petition was going on but we rejected that application because he had his lawyers. The petition was about his circumstances. He was already a convict at Kamiti. We felt that his appearance in court would cause an unnecessary attention and only serve to sensationalize the matter’ (High Court Judge).

Would things have been different if the petitioner had not been on death row?

The court procedures perpetuate the stigma attached to intersex. Firstly, Mwanzia was RM and now we have Baby A, whose mother is described as E.A. The effect of the use of initials or letters to represent petitioners, though intended to ‘protect’ their identity, may also be counterproductive because it removes the human face of the intersex person from the case, denying them the visibility they need, giving it to the lawyers and their organisations. I could not access Baby A’s court file because it remains under lock and key in the Judge’s Chambers. At some point in the case, the respondents even expressed their doubts that Baby A or her mother existed. The Judge would not even allow me to peruse the file in his absence, despite my position as a judicial officer.

Secondly, no hearing is actually conducted. The matter is dealt with by way of submissions by the advocates so the possibility of the Judge actually getting to listen to the intersex person is minimal. There must be intersex persons out there who are ready to tell their story and lift this veil of stigma from intersex persons, otherwise the courts, the seats of justice and court users will continue to be willing participants in the marginalization of intersex persons.

Thirdly, although the Prisons Department (both the structure and its actors) was clearly not set up to deal with intersex persons in terms of accommodation and rehabilitation, the powers that be were not prepared to admit this in RM. Instead, they opted for *ad hoc* administrative measures in dealing with intersex prisoners. They said RM was a security risk. He had to be guarded at all times:

‘His rehabilitation was a nightmare. Putting him in rehabilitation programs became (a) problem’ (M. Khaemba, Director Rehabilitation).

But the legal officer, T Karani, expressed the frustrating dilemma the prison found itself in:

‘The doctor had found that he was male hermaphrodite. He was brought to a male prison. He has male names and presents himself as male. Surely, what wrong did the Prison do?’

He nevertheless acknowledged the paucity of information on intersex in Kenya:

‘There is no literature in Kenya on how to differentiate the intersex from other people. The law is silent and thus they have to be treated as medical cases.’

The court in RM also adopted the medical form of intersex. One of the Judges confirmed this:

‘We defined it as a medical condition.’

This is based on the assumption that there are sufficient facilities and trained personnel and guidelines for medically determining who an intersex person is. This was an issue in RM where there was lack of expert evidence and the prison doctor’s report was found to be inadequate. It is the same in Baby A’s case:

‘The medics we have approached do not want to give individual opinions on this issue...about three have now said they would rather the relevant bodies representing the relevant specialists and specialties would meet and agree on the way forward. As for statistics, we have nada (*sic.*) - hoping the petitioner and the court will provide a way forward on that’ (Lawyer appearing in *Baby A’s* case).<sup>61</sup>

There is also the lack of sufficient information within the system on matters on sex, sexuality, sexual orientation, gender and gender identity because some of them are considered taboo.

One Judge expressed the view that:

‘The difference between transgender and intersex is minimal. Doctors say the main difference is hormonal, that hormones determine the major reason for why people try to change their sex/gender.’

While another Judge confirmed that they drew some distinctions:

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<sup>61</sup> Personal correspondence on 18/3/2014.

‘We had the opinion that for the transgender and gay persons it was a matter of personal choice, while for the intersex persons it was not a matter of choice but the way the person was born.’

This ‘lack of sufficient information’ was exhibited in RM in the cross references of terms that do not mean the same thing, for example, the use of the terms gender and sexual orientation, and even on corrective surgery with the use of ‘gender reconstruction surgery’, ‘genital reconstructive surgery’, sex change’. It is this apparent confusion that led to a complaint:

‘Audrey<sup>62</sup> wrote to us after the judgment complaining that we had mixed up the issues of gay and lesbians with those of transgender and intersex persons’ (High Court Judge).

Interacting with government and nongovernmental juvenile justice agencies exposed the same lack of information and confusion of these issues. For instance, the mention of intersex drew reactions revealing that it was being confused with transgender (due to Audrey Mbugua’s visibility as a transwoman fighting for the rights of transpeople) and issues of homosexuality. This insensitivity is revealed every so often with reports in the media of students expelled for being ‘homosexuals’ or ‘lesbians’ by teachers whose determination is made from hearsay and confessions. I confronted this in some of the workshops I attended. Educational and statutory children institutions managers will quickly say they do not have intersex children in their schools. How would they know? Labels like *chali-dame* dismiss them as freaks, others like Franc simply pass through the system wondering why they are not like their peers. Intersex children in Beck’s circumstances, who may not even understand what is happening to them, become easy victims:

‘In school some girl told the teacher that I played ‘boy games’ and the teacher said he would pray for me to grow beards...I once told our neighbour’s daughter I would marry her. That angered my father.’

Ugandan intersex activist Julius Kagwa in Tamale (2011: 232) describes this very well:

‘The climax of my struggle happened during puberty when, in an all girls boarding school I failed to fulfil age old female sexuality milestones, such as menstruation and sexual attraction to the ‘opposite’ sex...the most alarming of

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<sup>62</sup> Audrey Mbugua is the Programme Officer of TEA.

all was the progressive development of male genitalia and consequent attraction to some of the girls I associated with.’

His story and Beck’s are similar about the rigorous training their mothers gave them on how to keep their secret to themselves.

In RM the Constitutional Court made reference to religion and traditional African society in determining the status of the intersex person. One of the Judges confirmed that because of the lack of local precedent they also relied on ‘our’ African traditions. The attitude of culture towards intersex differs. In some cultures, any newborn with any disability would not be allowed to live, while in some there was a mixed reception, yet in others there was total acceptance. In its present form, statutory law has turned out to be one of the cultures that ‘kills’ the intersex child at birth (See Tables 5 and 6).

Even religion differs. While the general Christian view expressed in RM is articulated by Charles Kanjama, a lawyer and a member of the KCLF, in the story on intersex persons,<sup>63</sup> was quoted as saying:

‘There is no debate among Christians – there are only two genders. Period. What we have are cases of gender ambiguity disorder which is purely biological and which can be detected immediately at birth and corrected accordingly through medical intervention soon after birth.’

Islamic jurisprudence, on the other hand, recognizes there is more to intersex than what we see at birth, and we do not need medical intervention:

‘There are two categories of *khuntha*, *mushkil* (neither male nor female traits are dominant) and *geihr mushkil* (female or male traits apparent or dominant). The test is which genital organ urinates first at birth. If both urinate, then the organ that is frequently used will be considered. If both perform this function well, then puberty will be the determinant whether the person will have either male or female dominant traits. If neither develops to that extent then the determinant will be the person’s dominant sexual attraction.’<sup>64</sup>

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<sup>63</sup> <http://www.standardmedia.co.ke/lifestyle/article/2000099636/suffering-in-silence-the-difficult-life-of-intersex-individuals>

<sup>64</sup> Interviews with Hon. Deputy Chief Kadhi, and Hon. Kadhi Lamu.

## **4.7 CONCLUSION**

In this chapter I set out to present my findings along the research questions. It is clearly evident is that there is no legal recognition of intersex persons in Kenya, and this is as a result of the social and legal frameworks in place which are fixated on the sex and gender binary dichotomy. These feeds into all aspects of the life of an intersex person, demonstrating the need for necessary urgent interventions.

## CHAPTER FIVE

### 5. EMERGING ISSUES

My take off point for this study was the Constitutional Case of RM and issues related to the rights and legal recognition of intersex persons. I, however, came across issues I had not anticipated, which I could not deal with and which I could not just ignore.

I entered a field where there is lack of scholarship on the intersex phenomenon in Kenya. There are studies and articles<sup>65</sup> on the LGBTI or LGBT communities and one study on Pokot intersexuality conducted in the early 1960s. On the medical side, I came across one publication on the internet by doctors from Kijabe Mission Hospital. There is a gap here that requires to be filled.

It follows, therefore, that there is no readily available information on the types and prevalence of intersex in the country. Dr. Nthumba confirmed this when I suggested a format for collecting and maintaining data on intersex. He said that it was a necessity for purposes of research on the geographical distribution of intersex.

I found no intersex organization. KHRC (2011) states that LGBTI organizing began in Kenya around 1997 and later the Gay and Lesbian Coalition of Kenya (GALCK) was formed as an umbrella organization for LGBTI groups. Some intersex persons are not comfortable with this arrangement and would prefer to have a purely intersex organization that is not tied to the gay movement. That is in line with the international trend with Organization Intersex International (OII), OII Australia, OII Germany, OII UK, OII US, OII Chinese and OII Belgium.

In Uganda there is SIPD (Support Initiative for People with atypical sex Development)<sup>66</sup> founded by an intersex person.<sup>67</sup> It describes itself as a grassroots non-profit organization whose mission is ‘promoting human rights and social support for intersex children and people in Uganda’ and working through:

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<sup>65</sup> E.g., KHRC (2011), Nyarang’o (2011).

<sup>66</sup> <http://sipd.webs.com/> -6/4/2014.

<sup>67</sup> Tamale (2011: 231).

‘community outreach and engagement provides reliable and objective information on the plight of persons with intersex conditions.’

Intersex South Africa<sup>68</sup> was also founded by an intersex person who saw to it that intersex was legally recognised.<sup>69</sup>

Another emerging issue was the ignorance of people about intersex people and intersex conditions. Most people, in the first instance, said that they did not exist in their communities. Issues of intersex persons are conflated with those of transgender persons, and the LGB community. This was accompanied by the apparent omission/failure by the medical establishment to give all the available information to parents of intersex children and intersex adults about the condition. For example, although Billie was not born in hospital, she was taken to post natal clinics but no one there explained anything about the child’s condition to Billie’s mother. Similarly, Mwanzia was presented to a health centre for circumcision together with his contemporaries, but he was turned away without any explanation.

The extreme example of this is the case of 16 year old, GS, a boy who appeared at Kijabe Mission Hospital with complaints of abdominal pains for four years without a proper diagnosis. One of the doctors suspected he was intersex. Upon further examination he was found to have a uterus and what looked like a scrotum was fused labia, and the pains were ‘period pains.’ Two weeks after this diagnosis, doctors carried out a hysterectomy and removed his uterus. According to the doctor, had he been diagnosed earlier he would have been raised as a girl but, by the time the condition was detected, it was too late to allow that to occur. The question of guidelines looms large here.

There is the need to assess the impact of an intersex birth on the child’s mother and the family in general.

Public litigation concerning intersex persons could be perpetuating the very stigma they are trying to fight. So far, two cases have been launched: Mwanzia’s case (RM) and now Baby A’s. Other known intersex persons are not parties to or even aware of these cases. Lawyers

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<sup>68</sup> <http://www.intersex.org.za/index.php/en/-/6/42014>.

<sup>69</sup> Tamale (2011: 235-237).

representing intersex persons appear before the judges and present their legal arguments in the absence of their clients. The anonymity of intersex parties in court proceedings not only contributes to sanitising the issues, but, more seriously, to turning the parties from living human beings into disembodied voices whose issues may be easily brushed aside by a less than sympathetic society. Proper visibility to bring about serious focus on their genuine, pressing issues, which is the key to recognition, ends up elsewhere.

## **CHAPTER SIX**

### **6. CONCLUSION AND RECOMMENDATIONS**

#### **6.0 INTRODUCTION**

This study set out to interrogate the rights and legal recognition of intersex persons under the Kenyan Constitution. The study was inspired by the position taken by the Constitutional Court in the first ever case of an intersex person to seek legal recognition (*RM v The Attorney General and Others* [2010] eKLR) and my own experience as a Magistrate when I handled the case of an intersex child.

In order to do so I explored the following key areas: Whether there is sufficient data, statistical and medical, to warrant the recognition of intersex persons as a minority group in terms of article 56 of the Constitution; the significance of imposing a sex on intersex persons to fit within the definition of sex which only provides two options, male or female, and the sex and gender binary within which society is organized; and the effects of non-recognition of intersex persons at the international, regional and Kenyan human rights level. This led to the examination of the resultant marginalization, discrimination and denial of human rights of intersex persons. Taking into consideration the genesis of the study, I looked at the general levels of awareness of intersex persons and issues held by various members of the justice delivery system.

It is noteworthy that there is a lack of literature on the issues related to intersex persons in Kenya.

#### **6.1 THE MAIN FINDINGS**

The findings were set out in chapter four under six headings.

I found that the Constitutional Court's position, that it was the duty of the Petitioner in RM to provide the evidence of statistical or medical data of the prevalence or magnitude of the 'intersex condition', was untenable. The organisations that appeared before the Court in support of RM's case did not have any. Neither the Kenya National Bureau of Statistics nor the medical establishment maintains any intersex disaggregated statistics. Hence, to expect

that legal recognition should be dependent on numbers being provided by the Petitioner was totally unreasonable. This is the nightmare that will face the Court in Baby A's case in the event the Court follows that approach.

The imposition of a sex on intersex children at birth either by surgery or 'pronouncement' has an impact not only on the statistics but on the overall lives of intersex persons. It contributes to their invisibility both in society and to the law. As a result, intersex persons are denied the right to self-determination. They also suffer identity crises, rejection by their families and society when they reject the assigned identity. This creates the vicious cycle of secrecy, stigma, abuse, discrimination and denial and violation of their human rights.

However, the Constitution provides hope for legal recognition of intersex persons on the basis of a minority group as defined by article 260 of the Constitution. The jurisdiction granted to the High Court in the interpretation of the Constitution is such that the court can no longer pass the buck to Parliament. It has the power to make the declaration giving legal recognition to intersex persons as a way of ensuring the fulfilment and protection of their fundamental rights and freedoms as guaranteed by the Constitution.

The only obstacle is the lack of awareness of intersex persons within the justice delivery system. This has been partly created by societal attitudes towards the LGBTI community. Intersex persons are lumped together with this group which has obfuscated their real issues. The removal of intersex persons from this group will enable a clear understanding of their unique issues by the justice system.

## **6.2 THEORETICAL IMPLICATIONS**

The very existence of intersex persons calls for new theories on sex and gender. This is what Diamond (2006) emphasized when responding to the Consensus Statement on the Management of Disorders of Sex Development (Lee, 2006). Intersex persons are not just 'lab rats' on which to test our ability to create sexual organs according to our design, it is possible that they come with their own design. (In other words, whatever sexual organs intersex persons are born with, that is their own design and we have no business designing other organs for them. So let us retain the original.) If we stop and begin to learn from them as beseeched by the Colombian Constitutional Court, we will realize theirs is more than and not

just a medical, sexual orientation or gender identity issue. It is no longer just about ‘female or male’, it is now about ‘female or male or intersex’. Processing this grounded realisation will impact on the whole range of international human rights instruments and the Kenyan legal framework.

### **6.3 POLICY IMPLICATIONS**

This study found that intersex persons had never been thought about or planned for. Using persons with disabilities as a comparison, it has emerged that as far as intersex persons are concerned, there are no policies on their assessment at birth, on their health, on corrective surgeries performed on them, on information or education for or about them, on data capture about them in hospitals and villages, on statistical data collection, analysis and dissemination, including awareness creation.

### **6.4 RECOMMENDATIONS**

#### ***6.4.1 Framework for data collection***

A framework for the collection of data on intersex persons throughout the country is crucial. The absence of such data was the main reason why the Court denied intersex persons recognition in the first place. This could be obtained by conducting a survey, similar to the one conducted on persons with disabilities in 2007. It could be achieved through an order of Court, especially in the current case of *Baby A v The Attorney General and Others* HCC Petition No 266/2013.

There is precedent for this, though not binding on the Kenyan courts, from the Supreme Court of Nepal, in *Pant and others v Nepal* (2007) where the Supreme Court, at page 267 of the translated decision, justifies the court’s powers to review laws that are inconsistent with the Constitution and declare them invalid. The court said:

‘There may be not sufficient time to summon and convene the session of the Legislature to repeal and amend such laws that are found enacted against the Constitutional provisions. The rights of the people protected by the Constitution shall be at stake when it takes such a long time to repeal or amend these unconstitutional enactments.’

The Kenyan High Court has similar powers emanating from the jurisdiction granted to it under article 23(1) and grounded in the supremacy of the Constitution in article 2(4) to grant:

‘a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights’ [Article 23(3)].

#### **6.4.2 Framework for legal recognition**

Flowing from the above is the framework for the legal recognition of intersex persons. The statistics are not necessarily the starting point. The Court has the power under articles 27(4) and (6), 56, and 260 of the Constitution to recognise intersex persons as a minority group.

The Draft Bill on Rights of Persons Deprived of their Liberty is one of the starting points.

A declaration of recognition would only require the amendment of the forms in the Births and Deaths Registration Act which does not require Parliamentary debate, but simply administrative action. That would immediately open a significant channel for the collection of data on intersex births.

#### **6.4.3 The multi-sectoral approach**

This was recognised in the Nepalese case (above) where the court ordered the formation of a committee made up of:

- A specialist medical doctor designated by the Ministry of Health;
- A representative of the National Human Rights Commission;
- A representative of the Ministry of Law, Justice and Parliamentary Affairs;
- One Sociologist designated by the government;
- A representative from the Ministry of Population and Environment;
- A representative of the Nepal Police (a specialist in the area);
- An advocate representing the Petitioners.

In Germany the Federal Government gave the assignment to the German Ethics Council which is made up of 26 members from different professions.

#### **6.4.4 Intersex consciousness raising**

In this context, this means intersex activism by intersex persons. Some of my respondents (such as Mwanzia, Beck and Franc) were very enthusiastic about this. This is because they

would, for the very first time, have an opportunity to specifically talk about their issues, not LGBTI issues. This may require initial participation on my part. It will begin with a workshop scheduled on 2 May 2014 at the Kenya Judiciary Training Institute involving judicial officers, intersex persons, and officers from various government offices.

#### ***6.4.5 Intersex Awareness Day/Week***

This is an activity that can be organized by SEARCWL Alumni (including the 2013/2014 class) with the assistance of the Kenya National Commission on Human Rights and the Legal Resources Foundation which demonstrated a capacity to follow up the RM case and other bodies that had an interest in RM's case, Transgender Education and Advocacy, Jinsiangu and Media Houses.

### **6.5 CONCLUSION**

Intersexed people question our capacity for tolerance and constitute a challenge to the acceptance of difference. Public authorities, the medical fraternity and the citizenry at large have the duty to create a welcoming space for these people who have, until now, been monumentally violated and silenced. We all have to listen to them and not only how to live with them, but how to learn from them.

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