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IMPLICATIONS OF MEDICALISATION ON THE HUMAN RIGHTS OF INTERSEX PERSONS IN KENYA

BY

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ACCRONYMS

CAH	Congenital Adrenal Hyperplasia
CRPD	United Nations Committee on the Rights of Persons with Disabilities
DSD	Disturbs of Sexual Development
FGM	Female Genital Mutilation
GID	Gender Identity Disorders
HRC	United Nations Human Rights Council
ICCPR	International Convention on Civil and Political Rights
LGBTI	Lesbian Gay Bisexual Transgender and Intersex
OII	Organisation Intersex International
UNICEF	United Nations Children's Fund
UNAIDS	United Nations Programme on HIV/AIDS
WHO	World Health Organisation
UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UK	United Kingdom
US	United States
UNHCR	United Nations High Commissioner for Human Rights

CITED CASES

Lawrence v Texas 539 U.S

Alfred L. Snapp& Son, Inc. v. P.R. ex rel. Barez, 458 U.S. 592, 607 (1982

Richard Muasya vs. Attorney General, Nairobi High Court Petition No. 705 of 2007

Baby A (minor suing through her mother) v Attorney General [2013] Nairobi High Court Petition No. 266 of 2013

ABSTRACT

Kenya, like all other parts of the world, gets births of intersex children, even though this has been kept away from the public. Medicalisation of such infants is also a secret, despite the danger that it poses to the rights of intersex persons. Recent court cases gave the public a view of intersex persons' challenges in the Kenyan society. However, anecdotal evidence demonstrates that medical surgeries are routinely done on infant intersex children, albeit in secret. Such surgeries violate the human rights of intersex persons and lead to severe physical and psychological consequences for the victims. Today, forced medical surgeries on intersex people have been recognised as a violation of the human rights of intersex persons and the theories that underpinned them discredited. This article examines medicalisation and its implications of the human rights of intersex persons in Kenya.

KEY WORDS: intersex, medicalisation, forced, surgeries, human rights.

INTRODUCTION

Kenya, like all other parts of the world, gets blessed with births of intersex children, even though this occurrence has, until recently, been kept away from the public eye. Behind the glare of the public, forced surgeries are performed on the intersex infant bodies to align them to socially accepted male/female binary. This gender birnarism is termed a recent nineteenth century social construct by poststructuralist scholars and theorists.[1] Medical surgeries pose numerous social, psychological, medical and physical challenges to the victims, a fact that is now recognised medically dangerous and classified as a human rights violation under international law.[2] Although no data exists in Kenya to establish occurrence of forced surgeries, anecdotal evidence, through recent case law the sheer secrecy around intersex persons among doctors and evaluation of global literature on the occurrence of medical intervention on intersex people, establishes high probability that infants born with intersex condition are routinely subjected to medical surgery. It is now an established fact that non-

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[1] See generally Foucault, Michel. *The History of Sexuality, volume I: La Volonté de savoir*, 1976.

[2] See Shadow Report submission to the Human Rights Committee on the situation of intersex people in Australia by Organisation Intersex International Australia Limited ("OII Australia") 28 August 2017 p 6.

consensual surgeries and hormonal therapies violate the fundamental human rights of intersex persons and they are not necessary.[3]

Forced surgeries on intersex persons anywhere, is an area hardly written about by Kenyan scholars and researchers, occasioning a paucity of literature on such an important subject. This article seeks to make a contribution to this most hidden and misunderstood area which concerns the human rights of a section of the Kenyan society. Viewed through poststructuralist lenses, this article argues that sexual identification as a binary phenomenon is responsible for the 'Othering' of intersex persons, thus leading to the perceived need to perform forced surgeries to make them what the dominant majority want them to look like.. Piet De Bruyn argues that the surgical-intervention model for intersex case management is based on intersex conditions constituting a "social emergency"[4] carried out to satisfy those who are threatened by the difference posed by the intersex individuals.

The article commences by giving an understanding of intersex condition and the evolution of surgical intervention model on infant intersex children with a view to 'correcting' the condition to make the victims 'normal'. The article further examines the theoretical perspectives around the intersex condition, particularly focusing on Foulcadian and allied post structuralism in order to understand the social construction of sexuality as a basis for forced surgeries. It explores intersex in history, to give background to the emergence of medicalisation and the general human rights violations that intersex people have faced. It also narrates the human rights violations of intersex persons under international law as well as offering thoughts about movement away from medicalisation to human rights protection.

BACKGROUND

Two recent cases, have brought to light the reality of intersex persons in Kenya and their plight. These are the cases of *Richard Muasya v The Attorney General and 4 others*[5] and *Baby "A" (suing through her mother EA) v The Attorney General and others*,[6] gave the public a view of intersex persons' challenges in the Kenyan society.[7] In the first case, Muasya was born with both female and male genitalia. Due to his ambiguous gender and the stigma and constant humiliation he experienced all through the formative years of school by his fellow students and teachers, he dropped out in standard three. He later attempted to marry but it did not work out nor could his attempted marriage be given legal recognition. He later fell afoul with the law and was imprisoned as a male maximum prison, where he was subjected to gross human rights violations due to his intersex condition.

In incarceration, Muasya was consistently subjected to body searches by prison warders who ridiculed and embarrassed him. Consequently, he moved to court where he sought declarations that his status should be recognised under the Births and Deaths Registration

[3] See generally Ana Lúcia Santos, Beyond Binarism?Intersex as an Epistemological and Political Challenge. RCCS Annual Review, 6.
[4] Ibid p 2097.
[5] Richard Muasya vs. Republic, Nairobi High Court Petition No. 705 of 2007
[6] Baby A (minor suing through her mother) v Attorney General [2013] Nairobi High Court Petition No. 266 of 2013
[7] Ibid

Act[8] that he suffered discrimination in fact and that his conviction was as a result of his status. The Court held that:

> [T]o include the intersex in the category of "other status" would be contrary to the specific intention of the legislature in Kenya. It would result in the recognition of a third category of gender which our society may not be ready for at this time…Kenyan Society is predominantly a traditional society in terms of social, moral and religious values. We have not reached a stage where such values involving matters of sexuality can be rationalised or compromised through science. In any case, rationalisation 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.[9]

The judges refused to grant the Petitioner's prayer for legal recognition although they pointed out that intersex falls within the broader definition of sex under the Constitution. They found that the petitioner's rights were violated only to the extent of being placed in the same cell as males as it was eventually found that the petitioner had both male and female genitalia.[10] In respect of legal recognition, the judges stated that the petitioner was not denied legal recognition as the law in Kenya recognised everyone including intersex persons, and further pointed out that there is a need to create awareness around the issues of intersex people noting that the phenomenon is rare.[11]

In the Baby "A" case, the court was of the opinion that there was no record of the minor child being denied registration but noted that there is silence of intersex human rights issues in Kenya. It further pronounced that issues that are faced by intersex persons are fundamental and that tradition should not be used to silence their right to be equally protected as a marginalised group. The court also emphasised the need for enactment of law that will specifically deal with intersex human rights issues.[12]The decision in Baby "A" case reflects the aspirations of international law that seeks to promote the rights of those whose gender and legal recognition are side-lined. The relevance of these two cases is that they demonstrate the general ignorance and insensitivity among some courts around the intersex condition.

As well articulated by Keikantse Phele, intersex identity is not a medical condition or a disorder or a disability or pathology or a condition of any sort. Intersex is differences in the same way height, weight, hair, colour and so on are differences.[13] Being intersex is solely a question of biology, not of sexual orientation or gender identity: intersex people can have any gender identity (male, female, intersex, non-binary, neutral, undetermined), and any sexual orientation, as these are distinct from sex characteristics.[14]Heterosexism, the cultural system that says biological sex, gender, and sexuality is seen by postmodern and poststructural theorists as the foundation for medicalisation of intersex persons.

[8]Keikantse Elizabeth Phele, Law and the Silence of intersex Status: A threat to human rights in Botswana. LLM Thesis, Center for Human Rights, University of Pretoria,2016, p 16.
[9] Richard Muasya note 1 above.
[10]Keikantse Elizabeth Phele, note 2 above p 44.
[11] Ibid
[12]Ibid
[13] The fundamental rights situation of intersex people, FRA Focus 04/2015
[14] Ibid

By its nature, heterosexismlines up in a predictable and heterosexual way to be acceptable, while denying and stigmatising anyone who fall outside of this mould. In this view, the body is seen as the foundation of gender and if biological sex is not binary, this throws a wrench in this deeply embedded cultural system.[15]According to Butler, oppression is a system that seeks to separate the oppressed individual from their bodies and sense of embodied pride. The embodied person threatens oppressive norms.[16]Michel Foucault argues that from a historical perspective, intersex is a 'type of monstrosity' which upsets legal regularities, not only in the sphere of marriage but also as regarded baptism and rules of succession. Intersex people destabilise the so-called "natural" principle, the moral principle and the laws and they cast doubt on the medical system, the legal system and the organisation of institutions.[17]It is therefore interfered with to stem the threat.

UNDERSTANDING INTERSEX CONDITION

Commonly, the terms intersex and intersexuality refer to a great variety of conditions in which a person can be born with a genetic and/or gonadic atypical set, or hormonal variations, and/or with a sexual anatomy that does not fit the usual characteristics and definitions of female and male.[18] Contrary to popular belief, intersex people do not have the "complete external genitalia" of a man and a woman; they are more likely to have what are often referred to as "ambiguous genitalia."

> While identification of a child as intersex can often be made by physical examination alone, in some cases normal-appearing external genitalia can hide an internal ambiguity or an anomalous chromosomal sex. As a result, families and physicians face a dilemma concerning how to treat such infants. Prior to the advent of modern surgery, such individuals were left as they were born. . . . [I]n 16th century England, Lord Coke declared with respect to the law of inheritance that "a hermaphrodite may be either male or female, and it shall succeed according to the kind of sex that doth prevail."29

There is a current debate about the terminology: most of the medical professions, many intersex parents, some intersex activists and associations have agreed to replace the terms intersex/uality with the new one 'Disturbs of Sexual Development' (DSD) to avoid conflating matters of anatomic/gonadic/chromosomal sex with sexual preference or gender identity, and to refer to the most recent specific medical classification of the intersex conditions.[19] On the other hand, some other intersex activists and associations, some scholars, academics and also medical professionals prefer to keep using the terms intersex/uality, because they believe DSD incorrectly suggests that intersex is always and only a pathological condition since the terminology Disturbs of Sexual Development implies illness, abnormality and deviance and it represents and ratifies a pathologisation of intersex persons.[20] According to the new "Brief

[15]Sedgwick, Eve Kosofsky. Epistemology of the Closet. Berkeley, CA: U of California, 1990. Print.

[16]Ibid

[17]Ana Lúcia Santos, Beyond Binarism?Intersex as an Epistemological and Political Challenge. RCCS Annual Review, 6, p 129

[18] Ibid

[19]Viola Amato, note 31 above, p 16.

[20] Ibid

Guideline for Intersex Allies", written by Organisation Intersex International (OII), states intersex people need health care just as everyone else does and there are few instances when a child's intersex variation poses health risks that require immediate medical attention.[21]

The United Nations (UN) has attempted to offer a definition of intersex. According to the UN Office of the High Commissioner for Human Rights:

> Intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty.[22]

Gina Wilson states that the term intersex describes human beings who have naturally occurring differences of sex anatomy and whose biological sex cannot be classified as clearly male or female.[23] An intersex person may also have the biological attributes considered necessary to be defined as one or the other sex. Intersex is a congenital condition and the term is not applicable to situations where individuals deliberately alter their own anatomical characteristics.[24]

In the sphere of biology, the term "intersexuality" was first used by the geneticist Richard Goldschmidt in his article "Intersexuality and the Endocrine Aspect of Sex," published in the journal Endocrinology in 1917, in which he refers to a series of sexual ambiguities, including hermaphroditism.[25] However, the term had already been used by other authors to refer to homo- and bisexuality, and even Goldschmidt considered homosexuality to be a form of intersexuality. The word "intersexuality" gained popularity following his article as a replacement for the term hermaphroditism, and has prevailed in medical literature since the middle of the 20th century. [26]

Today, it is used in biomedicine to refer to sexual variations in relation to the external genitalia or other features. In short, intersex is the circumstance in which the harmony between the sexual chromosomes, sexual hormones, genitalia, gonads (testicles and ovaries) and secondary sexual characteristics evades the criteria stipulated for the categorisation of a person as male or female, which makes it impossible to determine their "overall sex."[27] 'Intersex' is used in this paper as an umbrella term to denote a number of different variations in a person's bodily characteristics that do not match strict medical definitions of male or female.

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[21] Ibid

[22] Shadow Report submission to the Human Rights Committee on the situation of intersex people in Australia by Organisation Intersex International Australia Limited ("OII Australia") 28 August 2017 p 6

[23] Gina Wilson, 'Equal Rights for Intersex People' in The Equal Rights Review, Vol 10 (2013) 134. In Ibeere Emily Kangai: From Exclusion to Dignity: The Rights of Intersex Persons Under Kenya's Constitutional Framework. Thesis submitted in partial fulfilment of LLM degree School of Law, University of Nairobi.

[24] Ibid

[25] Dreger, Alice (2003), Hermaphrodites and the Medical Invention of Sex. Cambridge: Harvard University Press. P 31.

[26] P 127

[27] Ana Lúcia Santos, Beyond Binarism?Intersex as an Epistemological and Political Challenge. RCCS Annual Review, 6, (October 201)4: 123-140

Despite the wide variety of situations concerned, the majority of intersex people are physically healthy. Only a few suffer from medical conditions that put their health at risk.[28] Yet the situation of intersex people has for a long time been treated as an essentially medical issue. Until recently, the prevailing medical view has been that intersex children's bodies can and should be made to conform to either a male or a female paradigm, often through surgical and/or hormonal intervention; that this should be done as early as possible; and that the children should then be raised in the gender corresponding to the sex assigned to their body.[29]

The whole impetus to control intersexual "deviance" stems from cultural tendencies toward gender binarism, homophobia, and fear of difference.[30] Due this binarism, human beings are meticulously measured and regulated inside and out, so that no one remains outside the recognised categories of "man" and "woman."[31]While being born with ambiguous sexual organs indeed problematizes binary understandings of sex and gender, the majority of intersexed children do not require medical intervention for their physiological health.[32] Nevertheless, the majority of these infants are medically assigned a definitive sex, undergoing surgery and hormone treatments to "correct" their variation from the anatomies expected by the designations of female and male. According to Janet Dolgin, the strength of the binary-gender presumption underlies many of the differences in society, medicine, and the law's modes of discriminating against intersex.[33] Butler argues that such differences in treatment are shaped by the lens through which medicine and society understand and respond to intersex individuals.[34]

Current medical interventions on intersexed bodies rest on the fundamental assumption that without the medical alteration of genitals to aid in unambiguous sex/gender assignment, intersexuals will live a life of alienation and despair.[35] There is limited empirical evidence to demonstrate this and some recent research and activism that contradict this mode of thinking.[36] As is the case with most medical conditions, there are no mandatory or legislative standards of care for intersex conditions, only the work of individual scholars and researchers to guide physicians on medical protocol.[37]

This approach often involves enormous breaches of physical integrity, including major surgical interventions such as castration and vaginoplasty, in many cases on very young children or infants who are unable to give consent and whose gender identity is unknown. This is done despite the fact that there is no immediate danger to their health and no genuine

[28] Ibid
[29] Ibid
[30] Butler, Judith (1990), Gender Trouble: Feminism and the |ubversive Identity. New York: Routledge. Butler Judith (1993), Bodies that Matter: On the Discursive Limits of "Sex". New York: Routledge. In Sharon E. Preves, Sexing the Intersexed: An Analysis of Socio-cultural Responses to Intersexuality. University of Chicago Press (2007), Vol. 27, No. 2 p. 523-556
[31] Butler, Judith, (1993), Bodies that Matter: On the Discursive Limits of "Sex". New York: Routledge p 2.
[32] Ibid p 2
[33] Janet Dolgin, DISCRIMINATING GENDER: LEGAL, MEDICAL, AND SOCIAL PRESUMPTIONS ABOUT TRANSGENDER AND INTERSEX PEOPLE SOUTHWESTERN LAW REVIEW [Vol. 47 p 62
[34] Ibid
[35]Preves, Sharon E. Sexing the Intersexed: An Analysis of Socio-cultural Responses to Intersexuality. University of Chicago Press (2007), Vol. 27, No. 2 p. 523-556 p 524p 524
[36] Ibid
[37] Ibid

therapeutic purpose for the treatment, which is intended to avoid or minimise social problems (which are outside the competence of medical professionals) rather than medical ones.[38]

What is notable is that in observing the genitalia of the new-born child, obstetricians stipulate the sex in accordance with the average dimensions and visual schema that they have in their minds. Thus, the sex does not depend upon its nature or on the way it appears, but the way in which it is perceived.[39] This basically involves a violation of the body[40] using technologies to "normalise" it aesthetically so that it can be included in a category that is recognisably human.[41] Santos argues that the "treatment" for intersexuality[42] rests on ideologically consolidated grounds: machismo and sexism allied to heterosexuality.[43]Heterosexism is the main criterion used to assess the success of a treatment: sexual relations with the opposite sex.[44]

In one study, physicians reported that genital surgery in infancy was necessary to put parents at ease with their child, encourage bonding between parent and child, and allow parents to avoid the discomfort of explaining their child's condition to family and friends.[45] However, surgical assignment in infancy can result in a host of medical and psychological problems.[46] Accounts that have emerged since the late 1990s of intersex persons affected by early surgical and hormonal sex-assignment treatment show the devastating harm that these have caused in many people's lives. Physical harm typically includes various combinations of repeated surgery, irreversible scarring, incontinence, chronic urinary infections, the effects of castration, hormone imbalances, osteoporosis, loss of sensation, unwanted masculinisation or feminisation, vaginal narrowing and/or stenosis, dilation procedures. Psychological harm includes distress, depression, feelings of having been raped (in particular amongst persons having gone through vaginal dilation procedures), increased self-harming and suicidal behaviour.[47]

THEORETICAL PERSPECTIVES AROUND INTERSEX CONDITION

Poststructuralists and queer theorists fault heterosexist perception of the binary gender, which is the basis for all the woes that intersex persons face. Michel Foucault in The History of Sexuality Volume 1 proposes that the majority of sexual morals and norms do not reflect an objectively innate system of right and wrong. Instead, western sexual culture is based on

[38] Doc. 14404 Report p 19
[39] P 125
[40] According to Butler, (Butler, 2004: 213-214), intersex bodies are violated with the most sophisticated techniques. But, recalling Butler, all bodies are in fact violated. This philosopher claims that sexual categories operate as violations as they are not chosen but imposed, penalizing anyone who dares to refuse the norms established for each category (consequences may involve loss of employment, loss of parental rights, and even loss of life, among others)
[41]Preves, Sharon E.
[42] (i.e. a medical solution designed to "correct"/ "normalise" and transform the intersex into one of the two recognised sexual categories)
[43] Santos note 1 above
[44]Fausto-Sterling, Anne (2000b), "Five Sexes, Revisited," The Sciences, July/August, 17-23. Electronic version consulted on 13.02.2013). Ibid
[45] See SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 1-4 (1990).
[46]Puluka, Anne PARENT VERSUS STATE: PROTECTING INTERSEX CHILDREN FROM COSMETIC GENITAL SURGERY. Michigan State Law Review 2015:2095 p 2096
[47] Intersex children are often advised never to discuss their realities outside closed circles, and it can be extremely hard for intersex people to find a community.

biased and intentional constructions designed and perpetuated by "the regime of power-knowledge-pleasure that sustains the discourse on human sexuality in our part of the world."[48]For intersex people, who physically defy sexual binarism, hormonal and/or surgical treatment is imposed as a necessity, without alternatives.[49] This basically involves a violation of the bodyusing technologies to "normalise" it aesthetically so that it can be included in a category that is recognisably human, in Butler's sense.[50]

According to Butler,[51] coercive measures to ensure normative anatomy actively construct the binary anatomical mandate for all subjects, not only those with inter or transsex traits. In this sense, the surgical, chemical or psychological interventions act not only on the corporeality of the individual with intersex variations. The idea that 'male' and 'female' are discrete and oppositional can only be maintained by disavowing inter sex anatomies.[52]

According to Foucault, it was in the 18th century that the process of rationalising, classifying and regulating sex got under way.[53] It was also in that period that interest burgeoned in the sexuality of children, "mad" people, criminals and homosexuals (i.e. "deviant" sexualities).[54] Discourses on this issue multiplied during the 19th and 20th centuries and with them the "perversions." Norms of sexual development were stipulated in accordance with age, and perversions were condemned in court; anyone that practised sexual irregularities was considered mentally ill, and controlled pedagogically or through medical treatment.[55] Behaviour became the object of analysis and interpretation on the part of institutions such as medicine, psychiatry, and criminal justice, and sexual behaviours in particular were examined with the aim of constituting a "sexuality that is economically useful and politically conservative".[56]

Sexuality was controlled by institutions of knowledge and power, and discourses on sex became sites of power which could be unsettled by ambiguous sexes. For example, hermaphrodites were considered to be criminals or "crime's offspring" due to their anatomy, which "confounded the law that distinguished the sexes and prescribed their union".[57] With the rationalisation of the discourses around sex, and subsequently the increase in access to medical care (including gynaecological care), there was a multiplication of discourses and narratives, particularly medical publications, which produced a sudden apparent increase in cases of atypical sex in the 19th century. The proliferation of assumed homosexuals and feminists also contributed to this, as they were considered "behavioural hermaphrodites" who

[48] Anne E. Stewart Grow, The Meaning of Sexuality: A Critique of Michel Foucault's History of Sexuality Volume 1. A thesis submitted to the faculty of Brigham Young University in partial fulfillment of the requirements for the degree of Master of Arts, 2018 p 1.
[49]Fausto-Sterling, note 31 above
[50]Dreger, Alice (2003), Hermaphrodites and the Medical Invention of Sex. Cambridge: Harvard University Press.
[51]Butler, Judith .*Gender Trouble*.New York :Routledge, c1999. 178-79
[52] Wendy O'Brien, Can International Human Rights Law Accommodate Bodily Diversity? International Human Rights Law and Bodily Diversity. Human Rights Law Review, 2015, 0, 1–20 p 15
[53]Foucault, Michel. *The History of Sexuality, volume I: La Volonté de savoir*, 1976. p 129
[54] Ibid
[55] Ibid p 36
[56] Ibid
[57]Ibid p 38.

defied the limits of sexuality.[58] The consequences of this diversity were reflected in an overly rigorous delimitation of masculinity and femininity on the part of the medical and scientific communities, which categorised as unusual, unnatural and immoral anything that did not fit into the pattern. It became inconceivable not to try to normalise the situation of a hermaphrodite after birth.

Eva Kosofsky Sedgwick, in her pioneering book Epistemology and the Closet,talks of sexual variations that cannot be put into the discrete locations created by the binary set between heterosexuality and homosexuality.[59]In her seminal work ‘*’Sexing the Body’*Fousto Sterling argues that if nature really offers us more than two sexes, then it follows that our current notions of masculinity and femininity are cultural conceits and, above all, the medical and surgical practices performed on intersex new-borns and children appear to be based on the desire to maintain the dominant two sex/gender system.[60] She indicates that our acknowledgement of sexual diversity in history will illuminate the objectionable treatment in the present of individuals with atypical sex characteristics.[61] She argues that, ‘medical accomplishments [in “biochemistry, embryology, endocrinology, psychology and surgery”] can be read not as progress but as a mode of discipline’ echoing Michel Foucault’s ‘docile bodies,” they are expected to be productive and submissive.[62]

In Foucault’s Discipline and Punish, the ambiguous bodies of intersex individuals are the inmates who are looked at, regulated and prevented from escape.[63]Rubin Gayle argues that certain sexual expressions are made more valuable than others, and by doing that, it allows those who are outside of these parameters to be oppressed.[64]One intersex individual refers to ‘the many horrible, tense visits to the paediatric endocrinologists to have my genitals gawked, fondled and stared at by hordes of what I perceived to be nasty, despicable men’.[65] Another intersex, Hale Hawbecke, recounting his experience agrees:

> Doctors seemed to be perversely fascinated with my genitals. They would make me sit in frog-legged position, and invite teams of earnest interns to come in and look at me while I was naked on the cold metal examination table, the shame on my face unnoticed by them as they talked about me in the third person and looked at me close, peering at me as if I were a bug under a microscope.[66]

Butler, in her book *Gender Trouble* argues that gender, like sexuality, is not an essential truth obtained from one’s body but something that is acted out and portrayed as “reality”.[67]She

[58]Dreger Alice, note 47 above, p 26
[59]Sedgwick, Eve Kosofsky. Epistemology of the Closet. Berkeley, CA: U of California, 1990. Print. .*In* Wendy O’Brien, Can International Human Rights Law Accommodate Bodily Diversity?International Human Rights Law and Bodily Diversity.Human Rights Law Review, 2015, 0, 1–20 p 15.
[60]Fausto-Sterling, Anne note 31 above, p 15.
[61] Ibid
[62] Ibid
[63] Ibid
[64]Rubin Gayle, Thnking Sex***.In Wendy O’Brien, Can International Human Rights Law Accommodate Bodily Diversity?International Human Rights Law and Bodily Diversity. Human Rights Law Review, 2015, 0, 1–20 p 15
[65]Anger 1997, cited in Holmes 2002, pp. 169–170.
[66]Hawbecker, H 1999, ‘Who did this to you?’ in Intersex in the age of ethics, ed. AD Dreger, University Publishing Group, Hagerstown, MD., p. 112)
[67]Judith Butler, *Gender Trouble*. New York :Routledge, c1999. 178-79

argues that the strict belief that the there is a "truth" of sex makes heterosexuality as the only proper outcome because of the coherent binary created of "feminine" and "masculine" and thus creating the only logical outcome of either being a "male" or "female."[68] According to Butler, the identity claims 'male' and 'female', when made by people with non-intersexed anatomies, are morally indefensible because they constitute a commitment to the descriptivism that disenfranchises intersexed individuals.[69]

Sexual difference and apparent anatomic fact serve only to legitimise political and perpetuate power relations.[70] When a body has an ambiguous appearance, everything will be done, technologically and otherwise, to fit it into the normal pattern of sexual difference, thereby preventing that body from destabilising the organisation of society.[71] Sexually ambiguous bodies are controlled by medicine and subjected to "normalisation" procedures so that sex, body, behaviour, sexuality and secondary characteristics will function in harmony with each other and conform to the ideology of a heterosexist society.

HISTORY OF MEDICALISATION OF INTERSEX CONDITION

Medicalisation of intersex people intensified during the twentieth century, and it began routinely with assigning babies identified as intersex to one gender or the other and then subjecting infants to surgery to re-shape their genitals so that they would resemble genitals associated with the assigned gender as much as possible.[72]In the 1950s, John Money and colleagues at Johns Hopkins began to develop a set of 'case management' guidelines for individuals with atypical sex anatomies, or intersex variations, which had truly global impact. These guidelines suggested that, although chromosomal, gonadal, genital and hormonal markers of sex were important in the diagnosis of sex, the gender of rearing was considered the best way of predicting adult 'gender role'.[73]

Money proposed that there was a "critical period" for gender acquisition in a child's life, and during that period the child could be successfully assigned to either gender.[74] The critical period would last for the first eighteen months of the child's life; during that time, the child was more susceptible to environmental stimuli, and gender identity could be permanently

[68]Ibid
[69]Iain Morland, Why Five Sexes Are Not Enough.The Ashgate Research Companion to Queer Theory, p 45.
[70] Ibid
[71]Ibid
[72]MichelaBalocchi, in PREVES, SHARON E. INTERSEX AND IDENTITY: THE CONTESTED SELF 96 (2003). When Money published his findings on this case, he referred to it as the "John/Joan" case, signifying that the child born male, or "John," had been successfully transformed into a female, or "Joan." Beh& Diamond, supra note 49, at 6-7.
[73]Money J, Hampson JG, Hampson JL. (1955. a) An examination of some basic sexual concepts: The evidence of human hermaphroditism. Bulletin of the Johns Hopkins Hospital 97(4): 301–319; Money J, Hampson JG, Hampson JL. (1955. b) Hermaphroditism: Recommendations concerning assignment of sex, change of sex, and psychologic management. Bulletin of the Johns Hopkins Hospital97(4): 284–300; Money J, Hampson JG, Hampson JL. (1956) Sexual incongruities and psychopathology: The evidence of human hermaphroditism. Bulletin of the Johns Hopkins Hospital 98(1): 43–57.
[74] Ibid

shaped by exposure to masculine or feminine stimuli. Money believed that the appearance of external genitalia was the most significant factor to consider when assigning gender.[75]

Money was granted the opportunity to test his hypothesis when he was approached by the parents of Bruce Reimer, an infant who had his penis burnt off during a circumcision. Thus, the surgery and concealment-based model for intersex case management was based on a case study of an individual who was not actually born with an intersex condition.[76] The case provided a particularly compelling opportunity for Money to test his hypothesis because Bruce had an identical twin brother, Brian, who had not suffered from a botched circumcision.[77] Thus, Money advised the parents to have Bruce surgically assigned to the female sex and to raise him as a girl.[78] Money saw the accident as an opportunity to compare gender development of the two twins in tandem and ultimately hoped to show that gender identity is based entirely on childrearing, as opposed to biology.[79] In what became the famous John–Joan case study, Money met with both children regularly in early childhood to observe how Bruce, renamed "Brenda," adjusted to his female role in comparison to his twin brother.[80]

However, Money's experiment failed to produce the results that he had expected. Even though Money had instructed the parents never to tell "Brenda" about his sex at birth, Brenda rejected the female gender role from early on in his life. From an early age, Brenda had avoided playing with "girl" toys, like dolls; had refused to wear dresses; and was teased at school for standing up to urinate. By age fourteen, Brenda informed his father that he had always felt that he was a boy.[81] Eventually, Brenda changed his name to "David" and underwent surgery and hormone replacement to reassign his body as male.[82] Even though Money knew that his experiment had failed, he misrepresented his findings and widely reported the sex reassignment as a success.[83] The idea that gender was purely determined by socialization was embraced by sociologists, psychologists, and feminists. Finally, in 1997, it was revealed that David had always rejected his gender assignment and that Money had misrepresented the success of the experiment for decades.[84]

Thus, Money was wrong. Many children altered never felt at home in their assigned sex.[85] Some never knew their medical history, as doctors advised parents and relatives to keep the matter secret. When they found out, some changed genders as adults. Others struggled to accommodate life with surgically altered sexual organs that had been severely compromised

[75]Ibid P 2102
[76] Ibid
[77] Ibid
[78] Ibid
[79] Ibid
[80] PREVES, SHARON E. INTERSEX AND IDENTITY: THE CONTESTED SELF 96 (2003). When Money published his findings on this case, he referred to it as the "John/Joan" case, signifying that the child born male, or "John," had been successfully transformed into a female, or "Joan." Beh& Diamond, supra note 49, at 6-7.
[81]Butler, J (1988). "Performative acts and gender constitution: An essay in phenomenology and feminist theory". *Theatre journal*. **40** (4): 519–531 P 523
[82] Ibid
[83] Ibid
[84] Ibid
[85] Ibid

as well as with a deep sense of shame induced by enforced secrecy.[86]This article argues that the clandestine medical surgeries performed by doctors on intersex infants in Kenya continue to be based on this disgraced theory of Dr. Money.

INTERSEX AND INTERNATIONAL LAW

Although currently there is no specific UN convention that addresses the human rights of sexual minorities, these violations can be gleaned from the UDHR and the subsequent conventions. Adopted by the UN General Assembly (UNGA) in 1945, the UDHR is not a human rights treaty, but has nonetheless laid ground for the conclusion of numerous human rights instruments at both the international and regional front. Furthermore, its provisions have also found expression in Bills of Rights of national constitutions.

Given that the principles enunciated therein have enjoyed The UDHR does not distinguish between adults and children and proclaims that all human beings are born free and equal in dignity and rights and accordingly endowed with reason and conscience.[87] The UDHR does not make any specific reference to the word intersex but a liberal and purposive interpretation of the provision would lead to the conclusion that the use of the phrases, 'all human beings' and 'equal in dignity' covers even the rights and freedoms of the intersex. In fact the Declaration goes ahead to provide that everyone is entitled to all the rights and freedoms set forth in the Declaration without regard to race, sex, religion, colour, creed, language, opinion, birth and status.[88]

Articles 2(1) and Article 26 of the ICCPR set out the non-discrimination standards for the protection and observance of human rights to all. Under Article 2(1), each State party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights recognised therein without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 recognises that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law."[89] Discrimination in the law "on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" is prohibited.[90]

Complementing the dignity of the person including that of the intersex persons is the freedom from torture and cruel, inhuman or degrading treatment or punishment. Torture against the intersex is a fact that was captured by a report of the United Nations Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[91]According to the report, intersex persons worldwide are disproportionately

[86] Ibid
[87] Emily Kangangilbeere, FROM EXCLUSION TO DIGNITY: THE RIGHTS OF INTERSEX PERSONS UNDER KENYA'S CONSTITUTIONAL FRAMEWORK. THESIS SUBMITTED IN PARTIAL FULFILMENT OF LLM DEGREE, School of Law, University of Nairobi, 2013,
[88] UDHR Art 2.Ibid
[89] Emily Kangangilbeere, FROM EXCLUSION TO DIGNITY: THE RIGHTS OF INTERSEX PERSONS UNDER KENYA'S CONSTITUTIONAL FRAMEWORK. THESIS SUBMITTED IN PARTIAL FULFILMENT OF LLM DEGREE, School of Law, University of Nairobi, 2013, p 13.
[90] Ibid
[91] Ibid p 22

subjected to harassment, humiliation and other violations that affect their basic human dignity.

Article 9 of the ICCPR protects the rights of individuals to be secure in their persons and to be free from arbitrary detention. This in essence means that the security of the person prohibits unnecessary and unlawful body-searches that have been made against the intersex persons with the object of casting them as spectacles for public ridicule.

The UNCRC acknowledges the vulnerability of children and discusses their rights in relation to the four P's: protection, provision, prevention and participation. The Convention places children's rights in the context of human rights and sets basic standards and minimum entitlements and freedoms that should be respected by governments. It is founded on the respect for the dignity and worth of each child regardless of race, colour, gender, language, opinion, origin, wealth, birth, status or ability. Article 3 states that the best interest of the child should be the primary consideration in all actions concerning children. In this light, it is paramount that the rights of intersex children as regards especially recognition, non-discrimination and protection be safeguarded to ensure that they reach their full potential. Furthermore, it is imperative that their best interests are taken into consideration when making determinations concerning for instance, 'corrective surgery' where such is deemed necessary.

Yogyakarta Principles 2006, an aspirational document with 29 principles that draw from existing human rights frameworks. It interprets the existing international treaties and rephrases the language, making them clear and precise to sexual minorities. Each principle has a statement of international human rights law; its application is given the interpretation to find the state's duty and obligation for sexual minorities. For instance, Principle 3-The right to recognition before the law provides that:

> Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

Although intersex persons comprise such sexual minorities, these principles generally refer to the human rights of the LGBT people and only mentions the intersex persons once. However it is a step in the right direction as has been observed by a number of treaty monitoring bodies which have held that the rights of sexual minorities are evolving rights that can be linked to other treaty provisions. In a related recent development, the United Nations Human Rights Council (HRC) on 17 June 2011 adopted a resolution on human rights, sexual orientation and

gender identity.[92] The Resolution is the first of its kind and expresses grave concern about acts of violence and discrimination against individuals because of their sexual orientation and gender identity. It calls on the UN High Commissioner for Human Rights to commission a global study to document discrimination and violence on the grounds of sexual orientation and gender identity.[93]

Various human rights bodies have recognised that the medical treatment of people with intersex conditions rises to the level of human rights violations. The World Health Organisation (WHO) has called for the elimination of involuntary sterilisation, noting that sterilization without informed consent has been described as a violation of fundamental human rights.[94] WHO recognises that "[i]ntersex persons, in particular, have been subjected to cosmetic and other non-medically necessary surgery in infancy, leading to sterility, without informed consent of either the person in question or their parents or guardians." [95]The United Nations Committee on the Rights of Persons with Disabilities (CRPD) has called for data collection on the frequency of genital mutilation and forced sterilisation of intersex children, and a plan to end these practices, in Germany.[96]

The United Nations Special Rapporteur on Torture (SRT) has also called for an end to the abuses against intersex people, noting that atypical sex characteristics are often subject to irreversible sex assignment, involuntary sterilisation, involuntary genital normalising surgery, performed without their informed consent, or that of their parents, 'in an attempt to fix their sex', leaving them with permanent, irreversible infertility and causing severe mental suffering.[97] Further, the Special Rapporteur calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilisation, unethical experimentation, [or] medical display, which are enforced or administered without the free and informed consent of the person concerned. He also calls upon them to outlaw forced or coerced sterilisation in all circumstances and provide special protection to individuals belonging to marginalized groups" [98]

In 2014, several UN bodies, which included the World Health Organisation (WHO), the Office of the High Commissioner for Human Rights (OHCHR), UN Women, the Joint United Nations Programme on HIV/AIDS (UNAIDS), the UN Development Programme (UNDP), the UN Population Fund (UNFPA) and the UN's Children's Fund (UNICEF),[99]released an interagency statement noting that intersex persons, in particular, have been subjected to cosmetic and other non-medically necessary surgery in infancy, leading to sterility, without informed consent of either the person in question or their parents or guardians. Such practices

[92] Ibid
[93] Ibid
[94] Ibid
[95] Ibid
[96] (CRPD 2014)
[97] Ibid
[98] SRT 2013
[99] Emily Kangangilbeere note 86 above, P 6

have also been recognised as human rights violations by international human rights bodies and national Courts.[100]

The UN Special Rapporteur on Health has also come to the defence of intersex children against surgeries, citing the Yogyakarta Principles, which provide for special consideration to ensure that the informed consent of sexual minorities is safeguarded in health and medical settings.[101]The Special Rapporteur on Torture has also found that when children are forced to undergo surgery without their consent or without the consent of their parents. He noted that these children are often left with 'permanent, irreversible infertility and...severe mental suffering'[102]

Specific violations under international human rights law

Specific violations in international human rights law include right to privacy and health. Because gender is a fundamental aspect of one's identity and sense of self, surgery without the child's informed consent raises strong concerns about the child's privacy rights.[103]Surgery and medical treatments without the consent of the patient are recognised by international human rights law as a form of cruel, inhuman and degrading treatment. Genital surgery performed on intersex people was equated to female genital mutilation (FGM) by the Conference.[104] According to Anne Puluka, genital surgery in infancy implicates the child's substantive right to privacy by depriving the child of the opportunity to define his or her gender, an aspect of identity that will shape the child's growth and have a continuing impact throughout the child's life.[105]

Right to privacy has been upheld as a fundamental right in several case involving sexual relationships, family relationships, the doctor–patient relationship, and medical decision-making.[106] These include the pioneering American Supreme Court case of *Griswold v. Connecticut,*[107]*Lawrence v. Texas*, in which the Court stated that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[108]

Health

Evidence that surgery provides these benefits is lacking. In fact, genital normalising surgery carries known risks of harm. Vaginoplasty may cause scarring and abnormal tissue growth,

[100] Ibid
[101] Ibid
[102]Me´ndez, Special Rapporteur, Report on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, 1 February 2013, at para 77. See also World Health Organization, Eliminating forced, coercive and otherwise involuntary sterilisation: An interagency statement OHCHR, UN Women, UNAIDs, UNDP, UNFPA, and WHO (2014) at 2.
[103]Puluka, Anne PARENT VERSUS STATE: PROTECTING INTERSEX CHILDREN FROM COSMETIC GENITAL SURGERY. Michigan State Law Review 2015:2095 p 2098
[104] This was stated by the Conference of State (Länder) Ministers for Equality of Germany. See further Germany (2014), 24. Konferenz der Gleichstellungs- und Frauenministerinnen und - minister, -senatorinnen und - enatoren der Länder am 1./2. Oktober 2014 in Wiesbaden, TOP 8.1 Paragraph 3.
[105]Puluka, Anne PARENT VERSUS STATE: PROTECTING INTERSEX CHILDREN FROM COSMETIC GENITAL SURGERY. Michigan State Law Review 2015:2095 p 2098 p 2128
[106]Ibid p 2108.
[107]Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).
[108]539 U.S. at 562.

requiring repeated intervention. Vaginal stenosis, incontinence, and urinary tract fistulas may also develop. Clitoral reduction carries a significant risk of loss of sexual function and sensation. While clitoral reduction fits the definition of female genital mutilation.[109] Genital normalising surgery risks psychological as well as physical harm, including depression, poor body image, dissociation, social anxiety, suicidal ideation, shame, and self-loathing, difficulty with trust and intimacy, and post-traumatic stress disorder.[110]

Intersex individuals also show elevated rates of gender dysphoria. Many children with intersex conditions suffer irreversible surgery that creates a gendered appearance ultimately inconsistent with their gender identity. Egregiously, doctors who perform genital-normalising surgery are well aware that many of their patients will reject their assigned sex.[111] In some cases, sex-assignment surgery also removes viable gonads or other reproductive organs, terminating or permanently reducing reproductive capacity. The impact of involuntary sterilisation on health and well-being has been widely recognised.[112]

While children with intersex conditions suffer from an excess of medical attention, adults with intersex conditions often have difficulty finding providers who are educated about their needs. Some have even reported discrimination and denial of care based on their atypical anatomy. For example, AIC is aware of an adult intersex man who died of vaginal cancer in the US after several centres refused to treat a man who had a vagina.[113]

FROM VIOLATION TO PROTECTION

One of the ways to protect children from the harm of forced surgeries is the use of the doctrine of *parenspatriae*. In defining this doctrine, Courts have held that the state will always have a "quasi-sovereign interest in the health and well-being-both physical and economic - of its residents in general."[114]This means that it is incumbent upon States to step in and protect the human rights of infant intersex persons. Currently, some States commonly invoke the doctrine of *parenspatriae* to protect the safety and well-being of children in cases concerning child abuse, such as allowing a state worker to remove the child from the parents' home as a precautionary measure to protect against further abuse.[115] Thus, when the well-

[109] Anne Tamar-Matti, Report to the UN Committee Against Torture: Medical Treatment of People with Intersex Conditions. P 2

[110] Ibid

[111] Ibid

[112]European Commission, Directorate-General for Justice, Trans and intersex people, Discrimination on the grounds of sex, gender identity, and gender expression, 2012.

[113] Anne Tamar-Matt, note 135 above p 4.

[114]Alfred L. Snapp& Son, Inc. v. P.R. ex rel. Barez, 458 U.S. 592, 607 (1982). This was the first of two categories of quasi-sovereign interests the Court identified. Id. The second quasi-sovereign interest of the state was in "not being discriminatorily denied its rightful status within the federal system.".

[115] Thomason v. SCAN Volunteer Servs., Inc., 85 F.3d 1365, 1373 (8th Cir. 1996) ("Where a treating physician has clearly expressed his or her reasonable suspicion that life-threatening abuse is occurring in the home, the interest of the child (as shared by the state as *parenspatriae*) in being removed from that home setting to a safe and neutral environment outweighs the parents' private interest in familial integrity as a matter of law." (emphasis added)). Government officials can also use their power under *parenspatriae* to simply remove a child from her home for questioning when the officials believe that the child would have trouble discussing abuse in front of the parents. J.B. v. Wash. Cty., 127 F.3d 919, 925 (10th Cir. 1997) ("[C]onsiderable deference should be given to the judgment of responsible government officials in acting to protect children from perceived imminent danger or abuse." (quoting J.B. v. Wash. Cty., 905 F. Supp. 979, 986 (D. Utah 1995))).

being of the child is at stake, the state retains an interest that can trump that of the parents; even given the heavy weight the Court has traditionally afforded family privacy and integrity.[116] The state can also act as *parenspatriae* to pass broader legislation protecting the health and well-being of a child, in addition to using the power to intervene in the family through the courts or administrative agencies.[117]

CONCLUSION

It is time that Kenya opened up about medicalisation of intersex persons with a view to promoting and protecting their human rights. This can be done through elaborate legislation which not only recognises them as ordered in the Baby 'A' case, but also undertake studies and surveys to determine the extent to which forced surgeries take place, then apart from criminalising them, force the state to take its place as *parenspatriae* for such infants.

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[116] See Thomason, 85 F.3d at 1373.

[117] See, e.g., Prince v. Massachusetts, 321 U.S. 158, 160-61 (1944); see also CAL. BUS.&PROF. CODE § 865 (West 2013).

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