

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 4 | Issue 6**

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**2021**

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# Assessing the Medico-Legal Predicaments of Intersex People in India and the indifference of The Transgender Act, 2019

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## ABSTRACT

*The paper seeks to assess the basic policy challenges that needs to be tackled in India with regard to intersex people and point out how the existing legal framework, which is The Transgender persons (protection of rights) Act, 2019 problematizes as well as invisibilizes intersex community by positioning them under the ambit of a "Trans person". Despite sharing some common concerns, the issues both the communities face are distinct. This policy gap should be addressed.*

*I discuss the landmark Tamil Nadu High Court judgement which has banned sex-reassignment surgeries in the state and explore how the key stakeholders such as medical force as well as parents make decisions about the gender assignment of an intersex kid and situate those decisions within the broader socio-cultural context of India. I argue that there is an imminent need to acknowledge intersex persons legally as well as create overall awareness in the society about the gender spectrum. The paper strongly argues against gender reassignment surgery which is done without the consent of intersex people, and emphasise the necessity for evolving treatment protocols. This practice is particularly problematic as it essentially re-negotiates and re-draws our fundamental right of privacy. At this particular juncture, where the LGBTQI+ movement is gaining a lot of traction and various different countries like Malta, Australia, Sweden and others have been framing laws to accommodate intersex persons, it is high time that the Indian state intervene and make the world a more humane place for intersex people. In the end, I propose some suggestions for making effective policy change for meaningful legal recognition of intersex persons.*

**Keywords:** *Intersex, sex-reassignment surgery, LGBTQI+ rights, India.*

## I. INTRODUCTION

Intersex people are those people who are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit the binary notions of male or female bodies.

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Up to 1.7% children are born intersex with reproductive organs, genitals, hormones or chromosomes that do not fit the gender binary.<sup>2</sup> This article seeks to analyse the medico-legal concerns of intersex people and the practice of sex re-assignment surgeries on them in India and paths that the policy routes that the country could take to make itself a more humane space for intersex people.

## **II. PATHOLOGIZATION OF THE INTERSEX**

There is an increasing tendency on the part of medical fraternity, and social workers to pathologize persons born with intersex variations by labeling them as born with some disorder or an “abnormality” that need to be fixed urgently. A congenial or non-congenial sex variation is always seen more as a social problem than a medical urgency. Much of this problem stems from the common knowledge of gender understood as a binary of male/female, shared by members of the medical fraternity and the society.<sup>3</sup>

It has become common practice for intersex children and infants to undergo sex re-assignment surgeries which are often undertaken, to alter their bodies, particularly the sexual organs, to make them conform to gendered physical norms, including through repeated surgeries, hormonal interventions and other measures. As a result, such children may go through medically unnecessary, often irreversible, interventions that may have lifelong consequences for their physical and mental health, including irreversible termination of all or some of their reproductive and sexual capacity.<sup>4</sup>

These surgeries are done to make the infant conform to either side of the gender binary. The law also recognises this binary, for instance under the The Births and Deaths Registration Act, 1969 when an infant is born, a Birth Report is required to be submitted to the Registrar of Births within 30 days of birth which includes among other things the gender where either ‘M’ or ‘F’ has to be ticked on the prescribed form. Intersex conditions in most cases do not represent a threat to the life or health of the infant and instead are ‘socio-cultural emergencies’ where the body of the intersex infant must be made to conform to culturally defined notions of a male and female body.<sup>5</sup>

Further, within the existing medico-legal scholarship, there is significant concern that parents

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<sup>2</sup> Hegarty, P. et al. (2021) ‘Drawing the Line Between Essential and Nonessential Interventions on Intersex Characteristics With European Health Care Professionals’, *Review of General Psychology*, 25(1), pp. 101–114. doi: 10.1177/1089268020963622.

<sup>3</sup> Sourav Mandal, ‘Corrective surgeries on persons born with intersex-variations in India’, *Journal of Dharma* [2018]

<sup>4</sup> *Sexual Health, Human Rights and the Law* (WHO, 2015) 26

<sup>5</sup> Suresh, M., 2015. Pendulous Penises and Couture Clitorises: What Medical Men do to Intersex Infants. In: A. Narrain and V. Chandran, ed., *Nothing to Fix: Medicalisation of Sexual Orientation and Gender Identity*, 1st ed.

and guardians continue to authorise genital-normalising interventions in circumstances where: (1) they do not fully understand intersex; (2) they are not encouraged or assisted to reflect upon the necessity of surgical alterations; and (3) they are not aware of, nor are they required to consider, the long term effects of forcibly altering their child's body.<sup>6</sup> Such an act actively deprives the child to participate in the most important aspect of their life; parents should have no ground to consent for the child if it's not a medical necessity. Doing so violates the child's rights to self-determination and bodily integrity.

Therefore, there is a crucial need for mental health experts to play a key role in implementing a law protecting intersex infants against sex reassignment surgeries. This is mainly because the surgery is enabled by uninformed medical professionals and done to prevent the psycho-social or socio-cultural harm that may arise as the child doesn't conform to the gender binary. Mental health experts are better positioned to address such concerns, and they should also actively take part in educating the parents of intersex persons.

Some research and empirical studies have tried to make sense of sex reassignment surgeries in India despite the fact that intersex concerns are badly documented in India unlike the west.

One particular research after studying 561 sex reassignment surgeries across India indicated that there was even an androcentric parental pressure over the medical decision making process. There seems like a recurrent parental desire to see a male child post-surgery,<sup>7</sup> which essentially meant that if they were unsure of a baby's gender they would do a surgery to make it male.

Another interesting study was done by conducting 22 qualitative semi-structured, in-depth interviews with medical and health professionals from different specializations across public and private healthcare systems from eight cities in India and several intersex individuals and family members, analysing different factors—medical and socio-cultural—that help them in deciding the intersex person's gender. The researcher concluded that there seemed to be an inclination towards a male child, which could be seen as an extension of the patriarchal system that surrounds us. She also concluded that there were many complex social constructs like heteronormativity and the binary framework of gender that impacted the decision making process. The researcher found that even medical professionals' are heavily influenced by their own ideas of society and the hetero-patriarchal framework in which they operate.<sup>8</sup> Intersex

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<sup>6</sup> Peter Dunne, 'Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons', *The Legal Status of Intersex Persons* (2018)

<sup>7</sup> *Supra* note 3

<sup>8</sup> Arpita Das, 'Aching to be a boy': A preliminary analysis of gender assignment of intersex persons in India in a culture of son preference' *Bioethics* [2020]

conditions in most cases do not represent a threat to the life or health of the infant and instead are socio-cultural emergencies where the body of the intersex infant must be made to conform to culturally defined notions of a male and female body.<sup>9</sup> By doing such sex-reassignment surgeries, the society is essentially imposing the gender binary on these intersex infants.

Therefore, consequences of surgical and medical interventions can be severe and irreversible: unnecessary surgery at a young age often leads to lifelong physical and mental health issues due to the irreversible character.<sup>10</sup> A study describes that that parents of intersex children reported that they had been bullied by family members and that their children had been described in pejorative terms<sup>11</sup>

Another study argues that early sex reassignment is recommended to avoid prolonged uncertainty of gender, which causes insecurity among parents as well as well-wishers, especially given our cultural framework.<sup>12</sup> This goes against the right to physical and mental integrity of an individual.

### **III. INTERSEX HUMAN RIGHTS IN INDIA**

In the past few years, various national, regional and international actors have increasingly taken measures to protect the rights of transsexual and intersex communities. Further, several United Nations Treaty Bodies have criticised the sex-reassignment surgery done on intersex children. The first notable judicial mention of the term ‘intersex’ in Indian jurisprudence can be seen in the *NALSA v Union of India* in 2014. It turned out to be a landmark judgement for the LGBTQI+ community as the court recognised the trans community as the ‘third gender’. Further, they asserted that all fundamental rights under the Constitution of India will be equally applicable to transgender people and also affirmed their right to self-identification of male, female or third-gender.

In this case, the Supreme Court exhibited an expansive, progressive and inclusive knowledge of different gender identities, but no separate discussion or deliberation around the specific vulnerabilities and rights of ‘intersex’ persons was explored.<sup>13</sup> This judgement led to the

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<sup>9</sup> Mayur Suresh (n4) 180

<sup>10</sup> Falhammar H, Claahsen-van der Grinten HL, Reisch N, Slowikowska-Hilczer J, Nordenstrom A, Roehle R, et al. Health status in 1040 adults with disorders of sex development (DSD): a European multicenter study. *Endocrine Connections*. 2018. (<https://doi.org/10.1530/ec-18-0031>).

<sup>11</sup> Joseph AA, Kulshreshtha B, Shabir I, Marumudi E, George TS, Sagar R, et al. Gender Issues and Related Social Stigma Affecting Patients with a Disorder of Sex Development in India. *Archives of Sexual Behavior*. 2018;24(2):361-367.

<sup>12</sup> Raveenthiran V. Neonatal sex assignment in disorders of sex development: A philosophical introspection. *Journal of Neonatal Surgery*. 2017;6(2). <https://doi.org/10.21699/jns.v6i3.604>.)

<sup>13</sup> Jayna Kothari, Krithika Balu and Rohit Sarma, *Beyond the Binary: Advocating Legal Recognition for Intersex Persons in India* (CLPR and Solidarity Foundation, Bangalore, 2020).

drafting of the transgender person's bill in the parliament.

Eventually, the transgender persons (protection of rights) Act, 2019 was passed by our parliament and received presidential assent on 5 December, 2019. It seeks to protect the rights of transgender people, their welfare and other related matters. It was met with fierce opposition by the *LGBTQI+ community in India*. Among other grounds under which the bill discriminates against the community, the bill has only two mentions to the term "intersex".

*The bill first defined "person with intersex variations" as a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body* <sup>14</sup> and then later conflated this definition while defining "transgender person" as a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman, '**person with intersex variations**', genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.<sup>15</sup>

This is extremely problematic and misrepresentative as an intersex person may or may not identify as transsexual. Being an intersex person simply means that you were born with a body that does not fit into the gender binary, while identifying as a trans person essentially means that you identify to a gender identity that is other than the gender assigned to you at birth. The human rights issues that both of these communities face are very distinct although they do share some common concerns. Therefore our transgender bill clearly invisibilizes the intersex community and their concerns by casually conflating it with the transgender community. But the intersex human rights issues remain neglected by the authorities.

After the NALSA case, the Navtej Singh Johar judgement was another landmark judgement for the LGBTQI+ community in 2018 where the court decriminalised all forms of sex among consensual adults.

#### IV. JUDICIAL CASES ON INTERSEX HUMAN RIGHTS

In 2018, in the case of Arunkumar and Ors. V. The Inspector General of Registration<sup>16</sup>, the High Court taking note of the widespread, unchecked practice of performing sex reassignment surgeries on intersex infants and children, asked the state to pass a government order to prohibit intersex infant sex- reassignment surgeries in Tamil Nadu.

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<sup>14</sup> The transgender Persons (Protection Of Rights) Act, 2019 Sec 2(i)

<sup>15</sup> The transgender Persons (Protection Of Rights) Act, 2019 Sec 2(k)

<sup>16</sup> Arunkumar vs The Inspector General Of registration (2019)

The Tamil Nadu High Court took note of the infamous NALSA judgement<sup>17</sup> and observed that what's happening in practice breached what the Supreme Court held.

The High Court further held that such practices are a direct violation of our Constitution's Article 39(f)<sup>18</sup>.

“The State shall, in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.”

The judgment has also acknowledged a World Health Organization (WHO) report titled ‘Sexual Health, Human Rights and the Law’<sup>19</sup>, calling for prohibition of sex reassignment surgeries. The report calls for the deferment of sex reassignment surgeries until the intersex persons are old enough to make their own decisions, or in case of a medical necessity<sup>20</sup>.

This judgement, just like the other landmark judgements for the LGBTQI+ community, relied on a lot of international jurisprudence. This is the first time in Asia that a judicial body has passed an order asking the state to prohibit such surgeries across their territory. The first country to draft such legislation was Malta, back in 2015. However, it is said that the policy only exists on paper and such practices are still widespread in Malta.<sup>21</sup> It could be because of the lack of implementing medical protocols in supplement to these prohibitory orders. This is the first time a judicial body has asked a state to pass a government order in this regard in Asia. But however, this practice is only banned in the state of Tamil Nadu; it is well documented<sup>22</sup> such procedures are actively practiced in other states; therefore there is a policy gap that needs to be filled, and we must employ inclusive actions to deal with such issues. One such important document, which has often been referred to by the Supreme Court as well is the Yogyakarta Principles.

In the NALSA judgement, the Supreme Court observed that the Yogyakarta Principles, are consistent with the fundamental rights guaranteed under the Indian Constitution and must be recognised and followed, and has sufficient legal and historical justification in our country. They also remarked that UN bodies, Regional Human Rights Bodies, National Courts,

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<sup>17</sup> NALSA, Writ Petition (Civil) No.400 of 2012

<sup>18</sup> The constitution of India, Article 39(f)

<sup>19</sup> Sexual Health, Human Rights and the Law (World Health Organisation 2015)

<sup>20</sup> *ibid*

<sup>21</sup> Massimo Costa, ' Intersex surgery on infants still carried out in Malta, despite ban' ( Malta Today 2020)

<sup>22</sup> Breaking the Intersex Silence in South Asia' ( ApCom 2020) < <https://www.apcom.org/breaking-the-intersex-silence-in-south-asia-an-interview-with-gopi-shankar/>>

Government Commissions and the Commissions for Human Rights, Council of Europe and such organisations have endorsed these principles and have considered them as an important tool for identifying the obligations of States to respect, protect and fulfil the human rights of all persons, regardless of their gender identity.

Both the NALSA judgement and the Navtej Singh Johar judgement which were landmark judgements for the LGBTQI+ community relied a lot on the Yogyakarta principles which was developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds, including judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, NGOs and others. The Yogyakarta Principles address the broad range of human rights standards and their application to issues of sexual orientation and gender identity.<sup>23</sup>

The Yogyakarta Principles apply international human rights law to gender expression and sex characteristics apart from sexual orientation and gender identity. It serves as a road map to nation states to enact laws and implement policies, which protect rights of those who are discriminated against on the basis of their sexual orientation and gender identity.<sup>24</sup> Similarly, Malta has enacted the ‘Gender Identity, Gender Expression and Sex Characteristics Act, 2015’ recognizing the right to bodily integrity and physical autonomy.

We must look towards such progressive laws as it helps us to formulate a normative framework to think about intersex concerns and their rights.

## **V. CONCLUSION AND SUGGESTIONS**

On January 12th, 2021 the Delhi Commission for Protections of Child Rights (DCPCR recommended that the Delhi government should declare a ban on medically unnecessary, sex selective surgeries on intersex infants and children except in the case of life-threatening situations.

They stated that they passed this order after understanding that there are several cases of such surgeries happening in their territory. The plea added that most of the times these surgeries are conducted without prior, free and fully informed autonomous consent. The order read: “After careful deliberations, the commission is of the considered opinion that the Government of Delhi should declare a ban on medically unnecessary, sex-selective surgeries on intersex infants and children except in cases of life-threatening situations and advises the government accordingly.”

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<sup>23</sup> 'The Yogyakarta principles' < <https://yogyakartaprinciples.org/> > accessed 23 August 2020

<sup>24</sup> Ibid

However, no action has been taken in pursuance of this recommendation.

The existing legal framework is deeply problematic as it completely invisibilizes the intersex community by positioning them under the ambit of a "trans person". The issues both the communities face are distinct even though they do share some common concerns. So therefore there is a policy gap in our legal framework that should be addressed. The sex reassignment surgeries on intersex infants in the global south are not well documented, but it is definite that most intersex infants are subjected to these irreversible treatments without there being a medical necessity to do so.<sup>25</sup> Such a practice can be construed as violation of the child's right to identity, physical integrity, privacy and the right to be heard. It can be attributed to the poor knowledge on the side of the medical fraternity or other socio-cultural factors that force the parents to go for such measures.

At this particular juncture where the LGBTQI+ movement is gaining a lot of momentum, there is an imminent need for policy intervention in this regard. It is of utmost need to ban such harmful and invasive sex-reassignment surgeries and make provisions for the legal recognition of the intersex community. India should delegitimise such surgeries as they are not constitutionally valid.

Medical professionals should be sensitised regarding the existence of diverse sexual orientations and gender identities. The Supreme Court had emphasised in the Navtej Singh Johar judgement that State bears the responsibility of sensitising and spreading awareness about the struggles of the LGBTQIA+ people amongst the society as a whole to remove the stigma associated with the community<sup>26</sup>

The State should make individuals aware of their rights under the law, and this process and its outcomes should be regularly monitored and evaluated to ensure accountability.

#### **(A) Suggestions**

1. Surgeries – There should be a blanket ban on sex reassignment surgeries throughout the country, in accordance with the Tamil Nadu High Court judgement. Such surgeries being conducted at birth without the consent of the kid infringe upon the kid's privacy as well as their physical well-being and are plainly unconstitutional. Surgery should be done only if it is medically necessary for the kid.

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<sup>25</sup> Supra note 22

<sup>26</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC

2. Sex-registration – Sex registration at birth should be revamped to include and accommodate the whole gender spectrum instead of compulsorily making a newborn to conform to either gender binaries.
3. Sensitisation and support – The general public must be sensitised towards intersex people and the whole gender spectrum and at the same time intersex people should be given therapy and support free of cost. As we saw earlier, empirical research suggests that a major chunk of our medical force fails to understand the intersex problem and therefore suggests sex re-assignment surgeries; therefore doctors and parents also must be sensitised to ensure intersex-specific concerns.

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