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Unveiling Identity and Rights: Recognition of Intersex Infants in India

Jasleen Kaur^a

^aAmity University, Noida, India

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The term sex is a categorization that identifies an infant as either a male or female which relates to physiological and biological aspects, circumscribing hormonal, genetic, and the child's external physical characteristics. The movement to endorse the rights of the third gender i.e. transgender and other members of the LGBTQIA+ community has gathered strength in India but the evaluation of the rights of an undervalued group that also falls within the category of LGBTQIA+ community demands approval. Intersex is referred to as an umbrella expression that elucidates bodies that do not fall into the male/female binary. Through Medical insight, intersex infants are identified as having a disorder that is related to sex development. Rather it can be regarded as a divergence in sex development which would be more pertinent to determine them. Even after the decriminalization of same-sex relationships and recognition of bodily privacy which falls under the ambit of a 'fundamental right as right to privacy' ensured by the Indian constitution still intersex infants are susceptible to surgeries that are not necessarily required and without their consent which results in long term consequences that have to be suffered by them. This article aims to provide insight into the rights of intersex infants and their bodily integrity, the legal recognition of intersex children in India, and its ethical perspective.

Keywords: *intersex, bodily integrity, surgeries, sexual development, bodily privacy.*

INTRODUCTION

Intersex, also known as Differences in Sexual Development (DSD), refers to people who are born with sexual characteristics that differ from the traditional binary classification of male or female.¹ It is a spectrum of naturally occurring differences in sex features that do not fall into the rigidly defined categories of feminine and masculine sex attributes. Infants with intersex traits do not exhibit normative feminine or masculine bodies, and as a result, the child has to face immense social consequences. Children born with intersex attributes are perceived to have bodies that require 'course-correction' i.e. bodies that must be altered to conform to the gender binary and such surgeries are imposed on intersex children regularly to make them 'recognizably human'. Essentially, such surgeries are often regarded as a requirement for a livable existence and considered as a forerunner to being recognized as a human being.²

The vast majority of people believe that sex is precisely defined by a binary framework in which one is classified as either male or female. This binary classification neglects the presence of intersex persons who exist on a continuum between these two categories, resulting in the group's continuous marginalization. The terms 'intersex' and 'transgender' are generally used interchangeably. Intersex refers to an individual's sexual traits, whereas transgender relates to gender identity. However, many others including legislators, decline to understand this basic distinction, resulting in the creation and execution of laws that are insufficient at best and may be lethal to the intersex population.³

¹ Raina Delisle, 'Intersex: When a baby isn't quite boy or girl' (*Today's Parent*, 25 June 2019) <<https://www.todayparent.com/baby/baby-health/intersex-when-a-baby-isnt-quite-boy-or-girl/>> accessed 19 August 2023

² Shardha Rajam and Atreyo Banerjee, 'Right to Genital Integrity : Law, Limbo, and the status of Intersex Children in India' (2022) 42(2) *Columbia Journal of Gender and Law* <<https://cjl.library.columbia.edu/>> accessed 19 August 2023

³ Sadhana Swaminathan, 'The Status of Intersex Persons in India- In Light of the Transgender Persons (Protection of Rights) Act 2019' (*YLCube*, 4 June 2022 <<https://ylcube.com/c/blogs/status-intersex-persons-india-light-transgender-persons-protection-rights-act-2019/>> accessed 19 August 2023

CONCEPT AND STATUS OF INTERSEX SURGERIES

Intersex procedures are non-essential surgeries that change intrinsic variations in genital or reproductive anatomy. These procedures include reducing or repositioning the clitoris (which may result in decreased sexual sensation), constructing or altering a vagina, repositioning a functional urethra, and extracting organs responsible for producing sex hormones (such as gonadectomy, which can result in sterilisation). The histories of intersex interventions are heavily steeped in heteronormative and patriarchal notions about sex, gender, and marriage, rather than being driven by medical requirements. Beginning in the mid-twentieth century, medical practitioners began performing surgical treatments on intersex newborns and youngsters to change their genital look to conform to conventional norms. Aside from reinforcing a binary conception of sex and gender, the prevalent mindset within the medical community was centered on the belief that adolescents would experience embarrassment because of their intersex characteristics and would have difficulty establishing traditional marital or sexual relationships unless surgical interventions were undertaken.⁴

Intersex conditions are medically defined as abnormalities of sexual development (also referred to as DSD or DSDs). The 2006 Consensus Statement on the Management of Intersex Disorders resulted in the decision to stop using the term ‘intersex’ to describe people with intersex problems. Instead, the emphasis moved to distinguishing diverse intersex illnesses by unique labeling. The Consensus Statement determined that a new term was needed since terminology like intersex is ‘controversial’, ‘potentially pejorative’ and ‘confusing’ to both doctors and parents. DSDs are described as ‘congenital conditions in which chromosomal, gonadal or anatomic sex development is atypical’.⁵

Choosing the gender of a child's upbringing does not require medical intervention. Performing genital or gonadal surgeries on intersex infants who are not of the age to explain their gender identification risks incorrectly assigning sex through surgery. Depending on the circumstances,

⁴ Cathren Cohen, ‘Surgeries on Intersex Infants are Bad Medicine’ (*National Health Law Program*, 1 June 2021) <<https://healthlaw.org/surgeries-on-intersex-infants-are-bad-medicine/>> accessed 19 August 2023

⁵ Robert Hupf, ‘Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital “Normalizing” Surgery’ (2015) 22(1) *William & Mary Journal Race, Gender, and Social Justice*

this probability might be as high as 4 percent, implying that a large percentage of infants may later reject the sex that has been surgically established permanently. As a result, in situations when gender identity is unknown, medical experts resort to conducting sex assignment procedures based on supposition. However, the risk of incorrectly designating a sex is not the main concern. Extraction of the gonads can eliminate reproductive options and necessitate a lifelong dependency on hormone therapy. Intersex infants may experience diminished sexual feelings and prolonged pain as a result of genital surgery. These operations are permanent, which means that excised tissues or organs cannot be replaced, cut nerves cannot regenerate, and the existence of scar tissue might limit the possibility of future surgical procedures.⁶

Activists are increasingly concerned that sex assignment is often undertaken with binary notions (putting them into male/female frameworks), ignoring the option of third/neutral sex assignment. Although gender-neutral raising and third-sex rearing are legal, in the Indian framework, parents choose to assign sex to their children to give them a safe socially secure, and comfortable childhood. Even in Western nations where the third gender is socially accepted, the psychological repercussions of such an approach (without choosing a gender) are unclear, and no regulation exists to control their medical therapy.⁷

RECOGNITION OF INTERSEX IN INDIA

Intersex and transgender people have a common desire for sovereignty, but their separate legal requirements and shared obstacles are entangled. Intersex persons commonly endure medically inappropriate treatment during childhood, but transgender individuals are generally refused desired medical treatments during their adolescent years and beyond, despite negotiating comparable difficulties to acquire adequate care. The phrases 'transgender' and 'intersex' are generally misused. A transgender person has a gender identification that differs from the social

⁶ "I want to be like Nature made me" Medically Unnecessary Surgeries on Intersex Children in the US' (*Human Rights Watch*, 25 June 2017) <<https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>> accessed 20 August 2023

⁷ Ramesh Babu, 'Changing the Paradigms in Intersex Management: Legal, Ethical, and Medical Implications' (2022) 27(4) *Journal of Indian Association of Pediatric Surgeons* <<https://www.jiaps.com/showBackIssue.asp?issn=0971-9261;year=2022;volume=27;issue=4;month=July-August>> accessed 20 August 2023

gender associated with their given sex at birth, whereas an intersex person is born with a difference in their sexual or reproductive anatomy that differs from traditional definitions of male or female.⁸

The 2019 Transgender Person (Protection of Rights) Act was the product of the considerable efforts for comprehensive legislation in India. It has been a lengthy process to establish this process. Even though medical and academic groups have acknowledged that 'transgender and 'intersex' are different classes, our leaders and lawmakers combined the two groups, causing intersex persons to be legally and socially undervalued and vulnerable. The inclusion of Intersex persons into the transgender structure has disregarded their distinct necessities and fights.⁹

Section 2(k) of the said act merely includes Intersex Persons by defining 'Transgender Persons' as: 'transgender person' means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), a person with intersex variations, genderqueer and person having such socio-cultural identities as more kin, hijra, aravani and jogta.¹⁰

ROLE OF THE JUDICIARY FOR THE PROTECTION OF INTERSEX IN INDIA

In the Landmark Judgement of **NALSA v Union of India**¹¹ in 2014, the identity of the intersex community was recognized under the umbrella of transgender by the Hon'ble Supreme Court. In the NALSA Judgement, the rights of the transgender community have been recognized and brought within the framework of the Constitution of India. Despite the mention of the term 'Intersex', the judgment combined many identities such as 'there, Kothis, Aravanis, Shiv Shaktis, third gender and intersex under the umbrella term transgender'. Intersex persons, who require a distinct set of rights and privileges than those who identify as Hijra or transgender, have been

⁸ 'Understanding Intersex and Transgender Communities' (*InterAct Advocates for Intersex Youth*) <<https://interactadvocates.org/wp-content/uploads/2016/05/LavLaw-Trans-and-Intersex-Fact-Sheet.pdf>> accessed 21 August 2023

⁹ Swaminathan (n 3)

¹⁰ Transgender Persons (Protection of Rights) Act 2019, s 2(k)

¹¹ *National Legal Services Authority v Union of India and Ors* AIR 2014 SC 1863

left behind the judgment and its intersex identity by addressing the right to gender identification in usual terms and its enforcement has been left in the hands of the state. This lack of understanding of the distinction between transgender and intersex forms the crux of judicial fumbling. The NALSA judgment neglects the primary concern of the intersex community, which is the pathologization of their bodies in childhood. Apart from referring to legal protections offered to intersex persons in other countries, it makes no mention of the intersex issue. Despite being seen as progressive, the NALSA judgment made the common and legal understanding of intersex identity even more ambiguous and uncertain than it already was.¹²

After the uncertain recognition of intersex in the NALSA judgment, in the other landmark judgment of **Arun Kumar v Inspector General of Registration**¹³, The High Court of Madras decision was well-received across the board and was applauded by the community of intersex, as the first time in the history of India that the issue of sex ‘normalizing’ surgeries was prohibited. This was the first case in which the right to consent and integrity of intersex newborns and children was recognized. The Court recognized that intersex children have the right to privacy, which includes the right to determine their gender identity. The judgment prohibited sex-selective surgeries on intersex children in the state of Tamil Nadu.¹⁴

The court addresses the issue of Sex Reassignment Surgery (SRS) and points out that the parent’s approval cannot be treated as the consent approved by the child and medical surgeries should not be considered as a pre-requisite to be legally recognized as gender and one should not be compelled to go through surgeries. The Tamil Nadu government was directed by the court to circulate orders to restrict such surgeries on intersex infants.¹⁵

¹² Atreyo Banerjee and Shardha Rajam, ‘Indian Courts Must Understand What Being Intersex Really Means’ (*Smashboard*, 15 March 2022) <<https://smashboard.org/indian-courts-must-understand-what-being-intersex-really-means/>> accessed 21 August 2023

¹³ *Arunkumar and Ors v The Inspector General of Registration and Ors* WP 4125/2019

¹⁴ ‘Intersex Justice in India: An Unfinished Agenda’ (*Intersex Asia*, 22 April 2022) <<https://intersexasia.org/intersex-justice-in-india-an-unfinished-agenda/>> accessed 21 August 2023

¹⁵ ‘ARUNKUMAR & OTHER VS. THE INSPECTOR GENERAL OF REGISTRATION & OTHERS’ (*Centre For Law And Policy Research*) <<https://translaw.clpr.org.in/case-law/arunkumar-vs-the-inspector-general-of-registration/>> accessed 21 August 2023

RIGHT TO BODILY PRIVACY

The '**Right to Privacy**' is a fundamental right that refers to an individual's right to keep their personal life private and free from intrusion by others, including the government and other organizations ensured by the Indian Constitution. Personal autonomy, informational privacy, and bodily integrity are all facets of it. It is considered a crucial integral of a person's liberty and dignity. In the Beginning, the 'Right to privacy' was recognized as an essential right that falls under the ambit of the right to life and personal liberty guaranteed under Article 21¹⁶ of the constitution. In the landmark judgment of **K S Puttaswamy v Union of India**,¹⁷ it was held by the Hon'ble Supreme Court that the right to privacy is one of the significant fundamental rights enshrined in the constitution, which encompasses various phases of privacy such as informational privacy, bodily integrity, and decisional autonomy.¹⁸

Given the particular vulnerability of intersex children, Indian rules governing the process of obtaining consent are flawed and insufficient. In all other conditions, an agreement between the parent/guardian and the medical practitioner is possibly considered to be in favor of the child's welfare. However, in light of the specific prejudices against intersex persons, such an agreement may not be in the best interests of the child, ensuring instead that the body of the child adheres to societal standards.¹⁹

In the recent Judgment of the Kerala High Court, the parents whose child was born with indeterminate genitalia (Congenital Adrenal Hyperplasia) filed a writ petition requesting the court to grant permission to perform 'Genital Reconstructive Surgery' on the child. The writ petition was disposed of by the court. It was held by the court that if permission is given to perform the surgery, it would violate the fundamental rights of the child under Article 14²⁰

¹⁶ Constitution of India 1950, art 21

¹⁷ *Justice K S Puttaswamy (Retd) v Union of India* WP (C) 494/2012

¹⁸ Anshika Jaswal, 'Right to Privacy under Indian Constitution' (*Social Laws Today*, 28 March 2023)

<[https://sociallawstoday.com/right-to-privacy-under-the-indian-constitution/#:~:text=Puttaswamy%20\(Retd.\)-v.,Personal%20Liberty%20under%20Article%2021.](https://sociallawstoday.com/right-to-privacy-under-the-indian-constitution/#:~:text=Puttaswamy%20(Retd.)-v.,Personal%20Liberty%20under%20Article%2021.>)> accessed 21 August 2023

¹⁹ Shardha Rajam and Atreyo Banerjee, 'Right to Genital Integrity : Law, Limbo, and the status of Intersex Children in India' (2022) 42(2) *Columbia Journal of Gender and Law* <<https://cjgl.library.columbia.edu/>> accessed 21 August 2023

²⁰ Constitution of India 1950, art 14

(Equality before law), Article 19²¹ (Freedom of Speech), and Article 21²² (Protection of Life and Liberty) enshrined in the Indian Constitution and further the court stated that if the surgery is performed without the consent of the child, it would infringe the dignity and privacy of the child. The government was directed by the court to set up a state-level committee to ensure whether the child was witnessing any life-threatening danger due to genitalia issues. The Permission to perform surgery could only be given if the child is facing any serious threat.²³

CONCLUSION

Despite the progressive judgment of NALSA and the other judgment of Arunkumar, still, no certain and clear ambit recognizes the rights and identity of intersex in India. The Indian Legal Framework provides inadequate protection to intersex children even though the LGBTQIA+ community is recognized as a third sex and is entitled to equal protection enshrined in the constitution of India. Due to the absence of rigid laws and protection, the intersex community is evaluated as an undervalued group. To meet societal standards, intersex children have to undergo surgeries without their consent and such non-consensual surgeries disregard their bodily privacy and integrity. There is a certain need for a comprehensive legal framework to acknowledge the rights of Intersex Individuals in India. Although the Indian Judiciary has made attempts to promote the interests and concerns of the Intersex Community a significant role has to be played by both legislature and executive equally to safeguard better protection of rights.

²¹ Constitution of India 1950, art 19

²² Constitution of India 1950, art 21

²³ 'Issue Regulations on Sex Selective Surgeries on Intersex Infants, Kerala HC asks govt' (*The Hindu*, 9 August 2023) <<https://www.thehindu.com/news/cities/Kochi/issue-regulations-on-sex-selective-surgeries-on-intersex-infants-kerala-hc-asks-govt/article67171789.ece>> accessed 21 August 2023