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THE NEED FOR SPECIFIC LEGAL PROTECTION OF INTERSEX INDIVIDUALS IN INDIA: A GENDER THAT HAS WALKED THE EARTH AS LONG AS MAN BUT HAS REMAINED LARGELY INVISIBLE TO SOCIETY

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I. Introduction

Intersex is a term that many people are not familiar with as they do not come across it everyday lives. Even those who are familiar with the term seldom understand the true nature and intricacies that form a part of the lives of individuals who identify as intersex. While conducting the research for this paper, the researcher was shocked to find the dismal lack of information, especially from the Indian perspective, about intersex individuals. Internationally as well, it has only been in the last couple of decades that individuals identifying as 'intersex' have been more vocal about their plight and have tried to spearhead movements to fight for the recognition and protection of their rights. This lack of awareness of a largely invisible population is clearly visible in the reflection of the handful of countries that actually have laws protecting the rights of intersex individuals. It is saddening to note that India has no comprehensive legislative framework to adequately deal with the specific issues faced by intersex individuals. From the legislative standpoint, the Transgender Persons (Protection of Rights) Act, 2019 merely defines 'person(s) with intersex variations' once in its

definition³⁸⁷ section but makes no efforts to distinguish it from the term 'transgender', as a result of which the two are treated as one and the same. From a judicial standpoint as well, there have only been a few judgements that dabble around the topic of 'intersex.' The progressive and widely celebrated judgement in National Legal Services Authority v. Union of India³⁸⁸, has no doubt made great progress for the transgender community, but on careful scrutiny, it can be seen that there has been no acknowledgement or action taken to allay the specific concerns of the intersex community. The lacunae in the aforementioned judgement were corrected with the recent case of Arunkumar v. Inspector General of Registration³⁸⁹ wherein the judiciary took an active step in ordering the Tamil Nadu Government to prohibit medical interventions on intersex infants.

³⁸⁷ The Transgender Persons (Protection of Rights) Act 2019, s 2(i), No.40, Acts of Parliament, 2019 (India)

³⁸⁸ National Legal Services Authority v. Union of India, (2014) 5 SCC 438 (hereinafter referred to as the NALSA judgement)

³⁸⁹ Arunkumar v. Inspector General of Registration, 2019 SCC OnLine Mad 8779 (hereinafter referred to as the Arunkumar judgement)

II. Understanding Intersex Individuals

The UN defines intersex³⁹⁰ individuals as those people that 'are born with physical sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit typical definitions for male or female bodies.' To understand this in its true sense and differentiate it from other non-binary categories, especially those that fall under the transgender umbrella, attention needs to be paid to the term 'physical sex characteristics.' Contrastingly, transgender individuals are defined³⁹¹ as 'someone whose gender identity differs from their sex recorded at birth.' Gender identity³⁹² can be understood as something that a person deeply feels on the inside as a 'sense of being male or female or something in between.' This feeling is subjective, self-defined and may or may not correspond with their sex. Sex characteristics³⁹³ on the other hand, refer to 'genitalia and other sexual and reproductive parts.'

Simply put, sex characteristics are objective or definitive, but their identification or detection is rather complex and not always obvious, and so it is seen as convenient to group them under the same subjective umbrella of 'transgender.' As an illustration, consider a woman gives birth to a newborn that externally looks exactly like a typical male child. However, the doctors, during the ultrasound, find it difficult, until the actual birth of the child, to conclusively determine its sex due to the detection of XX chromosomes that correspond typically to a female's DNA pattern. This child may have the external

genitalia of a male but due to the detection of ovaries (rather than testes) on the inside of the individual, the physician might advise and insist that the parents consider putting this infant through a gonadectomy to remove the ovaries present in the child as prima facie, it is considered 'abnormal' for a male to have ovaries. What sadly, is not taken into consideration is the freedom of choice and consent of the child. This infant is stripped of one of its most important rights of self-determination and reproductive/sexual health the moment it is born into the world.

The stigma behind the belief that there exist only two genders- male and female is the root of this problem. It is the reason an entire segment of human beings that make up 1.7%³⁹⁴ of the world's population remain invisible and unheard of. It must be understood at the outset that transgender individuals are not the same as intersex individuals. The former are born as typical males or typical females, with their DNA and sex characteristics reflecting the same. It is only after birth that they recognise and develop their gender identities by deeply and better understanding their feminine/masculine sense of being on the inside. Intersex individuals are from birth itself physiologically different from the typical male/female. They are born into the world with these differential sex traits and characteristics. This does not mean that they are any less 'natural' or 'normal' compared to any other binary man or woman. Why then, are they forced to undergo medical interventions at such an early stage in their lives? These interventions are often not even medically necessary and rather run the risk of being life-threatening. The answer has been created by society itself due to their beliefs from time immemorial. Religious, economic, cultural and societal factors all have the shared basis that an individual is born as either a man or a woman. The sex you are born as, which is ultimately reflected on your birth certificate must be either male or female. Therefore,

³⁹⁰ The United Nations Human Rights Office of the High Commissioner, *Intersex people: OHCHR and the human rights of LGBTI people*, OHCHR BLOG (1st December 2022, 5:29 PM), <https://www.ohchr.org/en/sexual-orientation-and-gender-identity/intersex-people>

³⁹¹ Fleur Mulligan, *Gender identity: Developing a statistical standard*, UN Department of Economic and Social Affairs, Statistics Division (3rd December 2022, 6:00PM), <https://mdgs.un.org/unsd/classifications/expertgroup/egm2017/ac340-22a.PDF>

³⁹² *Ibid* at 5

³⁹³ Victorian Equal Opportunity & Human Rights Commission, *Sex characteristics*, Human Rights Vic. Gov. Australia (10th December 2022, 7:23 PM), <https://www.humanrights.vic.gov.au/for-individuals/sex-characteristics/>

³⁹⁴ *Supra* at 4

parents to intersex individuals as well as medical physicians see these infants as problems or abominations that need to be 'corrected' or 'fixed' as they depart, in some sense, from the traditional characteristics of a typical male or female. These intersex individuals are perfectly capable of leading long, healthy lives without these corrective surgeries. This proves that the surgeries are not medically necessary and are rather, cosmetic in nature³⁹⁵.

The few instances where medical intervention is acceptable in case of intersex infants is when the internal organs of the infant are found on the outside of the body or in case of urinary tract obstructions³⁹⁶ (surgeries to ensure that there is place for urine to leave the body or where the internal organs protrude from the abdominal wall/impair excretion). Other instances are when the infant is unable to retain salt in the body and surgeries performed for early removal of streak gonads in children with gonadal dysgenesis³⁹⁷. Barring these, all other medical interventions on intersex infants and individuals are completely cosmetic in nature and there exists no medical necessity for the same.

A. The Plight and Struggles faced by the Intersex Community

Intersex infants are made to undergo numerous cosmetic surgeries that are consented to by their parents in order to 'fix' something that is not a problem or broken to begin with. The impact of these surgeries is long-lasting and sometimes irreversible in nature, condemning the individual to a life filled with hardships and complications which are created by man, treating their bodies as experiments in which

the infant himself/herself had no say. From the parent's point of view however, most of them are well-meaning and genuinely believe that these surgeries are in the best interest of the child's future, to save them from being bullied in school for appearing/being 'different.' There have been instances where doctors themselves have advised parents to consent to such surgeries under the false belief that refusing surgery would significantly increase the intersex individual's risk of contracting cancer³⁹⁸ in the future. These decisions are made hastily under false pretences due to the dearth of available and reliable information regarding the physiology and anatomy of intersex individuals. Intersex children are often made to believe that they are a rare species of sorts, one of the few of their kind and that they will not find anyone in the same situation as them. They are also told to keep their sex a secret. This instils a deep sense of shame which leads to depression, discrimination, and an inherent sense of inferiority due to fear of social stigma, were people to find out the truth about them.

Some of the more common cosmetic surgeries³⁹⁹ intersex infants are subjected to are vaginoplasties, labioplasties, clitoral recession surgeries, penile augmentation surgeries, urogenital surgeries, phalloplasty, hypospadias surgeries, etc. In some instances, if intersex traits are detected during the early stages of pregnancy, many intersex fetuses are aborted and this is associated with a whole other range of human rights violations closely associated with the rights of an unborn child, however the discussion about the same is beyond the scope of this paper.

Yet another risk of performing such surgeries is that there is no guarantee of its success. Intersex individuals that have been forced and

³⁹⁵ InterACT Advocates for Intersex Youth, *I want to Be Like Nature Made Me: Medically Unnecessary Surgeries on Intersex Children in the US*, HRW ORG (October 1st, 2022, 7:30 PM), <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>

³⁹⁶ Ibid

³⁹⁷ Zillén K., Garland J., Slokenberga S. *The Rights of Children in Biomedicine: Challenges Posed by Scientific Advances and Uncertainties*, Committee on Bioethics of the Council of Europe (November 29th, 2022, 8:00 PM)

³⁹⁸ Méndez J. Tamar-Mattis. A. p. 94, *Medical treatment of people with intersex conditions as torture and cruel, inhuman, or degrading treatment or punishment*, Center for Human Rights & Humanitarian Law, Washington College of Law, editors. Torture in healthcare settings: Reflections on the Special Rapporteur on torture's 2013 thematic report. (Washington, DC, 2013)

³⁹⁹ Carpenter M, *Intersex Variations, Human Rights, and the International Classification of Diseases* 20 Health and Human Rights 205 (2018)

subjected such unnecessary cosmetic medical interventions in their childhood have had to suffer the impacts of the same through adulthood and do not always have access to the facilities to help cope with these hardships⁴⁰⁰. Financial support is often continuously required in cases where the initial forced treatment/surgery does not produce the desired result and additional treatments/surgeries are required to correct the aberrations created them in the first place. Some of the after-effects of these surgeries include irreversible nerve damage, infertility, incontinence, loss of sexual sensation and function as well as the need to be on life-long hormone replacement therapy. Examples of procedures used to combat these after-effects include further reparative treatments and associated types of health care, practices that include dilation, repeated genital examinations, post-surgery sensitivity testing and medical photography, to name a few.

Sometimes, due to the lack of financial resources and accessibility to the required, adequate medical care and support required to understand and live as in intersex individual, parents' consent to such cosmetic surgeries being performed by underqualified doctors who adopt unsafe procedures and methods to 'cure' these individuals. In some cases, the repeated insertion of devices into a newly opened vaginal cavity in order to perform surgeries such as gonadectomies lead to the need for multiple corrective surgeries to be performed during the tender years of the child's development- both mental and physical. When these surgeries are performed by people who falsely claim to be doctors or even by some unscrupulous doctors themselves, they are associated with feelings of deep shame and trauma on the victim and have sometimes even been described as a form of sexual abuse⁴⁰¹.

The lifelong pain endured by intersex individuals is felt internally as well. These early corrective surgeries have no guarantee that the sex the doctor assigns to the child will eventually coincide⁴⁰² with the child's actual gender identity. A child develops his/her gender identity during the course of his/her life. By assigning a sex to the child at birth which he/she is made to believe has been done for his/her own good, the child's own freedom and right to self-determination to discover his/her identity himself/herself is curtailed. Similarly, this puts their sexual interests and desires for a particular type of bodily appearance also in jeopardy. They are forced to live a life in a body that has been modified according to someone else's definition of 'normal.' From a legal perspective, it must be understood that nothing can replace the child's consent⁴⁰³ and any belief's regarding the child's best interests by his/her parents, even if looked upon in light of medical necessity, must not outweigh their right to free and informed consent.

B. Distinctiveness of Intersex Individuals

In order to truly understand how intersex individuals are distinct and unique from other non-binary individuals, it necessary to define the various other communities intersex individuals commonly get confused with. Transgenders have already been defined earlier in this paper. Hijras are commonly referred to as the 'third gender.'⁴⁰⁴ This community derives its name from a cultural standpoint rather than a scientific and physiological one. Hijras are most commonly born as males however they dress in feminine ways. They may choose to undergo a castration ceremony, the emphasis being on their choice to remove their male genitalia as an offering to the Bahuchara Mata, a Hindu goddess. There however, may be a small minority of hijras that might actually be born as

⁴⁰⁰ Jordan-Young RM, Sonksen PH and Karkazis K, 'Sex, Health, and Athletes' 348 BMJ g2926 at 3 (2014)

⁴⁰¹ Dreger AD, *Jarring Bodies: Thoughts on the Display of Unusual Anatomies* 43 Perspectives in Biology and Medicine 161 (2002)

⁴⁰² Supra at 11

⁴⁰³ Supra at 3

⁴⁰⁴ Harvard Divinity School, *The third gender and Hijras*, RPL.HDS.HARVARD.EDU, (15th October 2022, 6:19 PM), <https://rpl.hds.harvard.edu/religion-context/case-studies/gender/third-gender-and-hijras>

intersex individuals. The defining characteristic that differentiates the hijra community from the intersex one is the aspect of choice. The hijra concept originated with these individuals choosing to leave home and become a part of the hijra community which typically removes themselves from wider society and teaches its lessons in secret. Traditionally, they have a set of duties to perform which include rituals, dances, and other forms of blessings at auspicious Hindu occasions such as births and weddings. It is believed that due to the sacrifice of their procreative ability, they have received the blessing of the Goddess to hold incredible religious powers⁴⁰⁵. Today however, the community has largely lost its original status in society. Individuals belonging to the hijra community are often excluded from employment and education and forced to resort to prostitution and begging to combat the poverty faced by them⁴⁰⁶.

Eunuchs, are commonly referred to as Male to Female (MTF)⁴⁰⁷. These individuals are genetic males who are either born without testicles (similar to some intersex individuals), or who, for various reasons, have them surgically removed. Historically, eunuchs were believed to be men who had their testicles removed for the purpose of making them better soldiers. The purpose of castration was so that they were not distracted from their duty or swayed by lust or sexual matters. In the Middle East and China, they were employed mainly as guards or servants in the women's quarters or harems, and as chamberlains⁴⁰⁸ to the kings. Eunuchs were, those individuals who were for most of the time, forced into castration rather than born without testicles.

The terms that can, however, be associated with intersex individuals are to describe them as persons who are born with intersex variations or

traits or even a variety of sex characteristics. They are also known as individuals with DSD⁴⁰⁹– Differences in sex development. However, DSD and the term 'hermaphrodite' must not be used in common parlance to describe these individuals as they have developed a negative and derogatory connotation over time. Hermaphrodite especially, is a term that is frowned upon when referenced to the intersex community as it represents a sort of inferiority, being also used to describe flowers, animals, or any organism that can produce both male and female reproductive organs.

III. International Legislative Framework that Protects Intersex Individuals

Over the years, several countries have enacted laws that protect the rights of intersex individuals, more particularly, laws that explicitly protect these individuals from coercive and forced corrective surgeries that are not medically necessary. India unfortunately, continues to lack a distinct law that specifically addresses the unique issues faced by intersex individuals. The problem in India is that the intersex community is placed under the umbrella legislation that protects transgenders– The Transgender Persons (Protection of Rights) Act, 2019. However, on scrutiny of the Act, it is seen that apart from merely defining 'persons with intersex variations' under Section 2(i), the Act makes no further provisions that correct the wrongs faced by the intersex community.

The judiciary too, until the Arunkumar judgement, merged the categories of intersex and transgender. Although there do exist certain similarities between the two, they remain fundamentally distinct from each other, each of them facing a unique set of problems. The NALSA judgement was a leap forward for the transgender community but did very little to put an end to the corrective surgeries which

⁴⁰⁵ Ibid

⁴⁰⁶ Ibid at 18

⁴⁰⁷ Hermann, M., & Thorstenson, A. 'A Rare Case of Male-to-Eunuch Gender Dysphoria' *Sexual Medicine*, 3(4), 331-333 (2015)

⁴⁰⁸ Andrews E. 'THE ORIENTAL EUNUCHS' *JAMA*. XXX(4):173-177 (1898)

⁴⁰⁹ Hughes, I. A., Houk, C., Ahmed, S. F., Lee, P. A., & Group, C. 'Consensus statement on management of intersex disorders' (*Archives of Disease in Childhood*), 91(7), 554-563 (2006)

amount to a violation of the human rights of intersex individuals. Due to this lacuna in the Indian law, it is necessary to look into the laws of other countries around the world that specifically work towards ensuring that the human rights of intersex individuals are not violated. Some of the countries that have provisions in their legislations that protect intersex individuals are Malta, Chile, Portugal, Germany, Iceland, Belgium, Scotland, Denmark, France and Uganda.

A. The Malta Act

The Gender Identity, Gender Expression and Sex Characteristics Act, 2015 of Malta, by specifically mentioning three different terminologies in its title, indicates that there exists a difference between these terms. The Act goes on to define each of them. Gender identity and sex characteristics have been discussed earlier in this paper. Gender expression⁴¹⁰ refers to 'each person's manifestation of their gender identity, and/or the one that is perceived by others.' It must be understood that although this paper emphasises on the link between sex characteristics and intersex individuals, it does not mean that the terms gender expression and gender identity cannot be associated with intersex individuals as well. To put it plainly, an intersex infant can be born with XX chromosomes but with the gonads of a man and later will recognise and identify as a man (based on the strong internal masculine feeling felt by him, this being his gender identity) and will thus dress in a man's clothing and maybe style his hair like a man, this being his gender expression.

The Act ensures protection of an intersex individual's right to gender identity as well as the right to change his/her gender⁴¹¹ or first name in order to reflect the person's self-determined gender identity which he/she might develop later in life. The Act also provides

pecuniary punishments for offences⁴¹² in contravention of the provisions of the Act (typically a fine of 1000-5000 euros). There also exist anti-discriminatory provisions⁴¹³ that promote equality and elimination of harassment. This allows equality of opportunity irrespective of the sex characteristics of the individual. The most notable right that is protected under this Act is the right to bodily integrity and physical autonomy⁴¹⁴. The Act makes it unlawful for medical practitioners or other professions to conduct medical surgeries and treatments such as sex assignment treatment or surgical intervention on sex characteristics of a minor when such treatment can be deferred until the person is old enough to give his/her own informed consent. Additionally, in order to provide support⁴¹⁵ to intersex individuals throughout their lives in case of issues that might arise as they advance in age (both physical and mental), the Act states that health services such as counselling, support and individually tailored interventions relating to intersex status must be given to them by experts in the field who are sensitive to the unique plight faced by them. These services must be supported by psychologists, medical practitioners or peer counsellors.

B. Yogyakarta Principles Plus 10

On the international front, the Yogyakarta principles plus 10⁴¹⁶ are the most comprehensive set of guidelines that have been formulated for the protection of intersex individuals by a consensus reached between a group of distinguished human rights experts and academicians including former UN members. There have been Indian signatories to these principles as well, and they serve as universal, international legally-binding standards to which all States are required to comply. These

⁴¹² Ibid note s 11

⁴¹³ Ibid note s 13

⁴¹⁴ Ibid note s 14

⁴¹⁵ Ibid note s 15

⁴¹⁶ International Commission of Jurists (ICJ), *The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (November 2017)

⁴¹⁰ The Gender Identity, Gender Expression and Sex Characteristics Act 2015, s 2

⁴¹¹ Ibid note s 4

principles are however, considered to be soft-law⁴¹⁷. The initial Yogyakarta principles of 2007⁴¹⁸ covered human rights in the areas of sexual orientation and gender identity however the Yogyakarta +10 added ten additional principles that specifically recognised the unique needs of intersex people based on the fundamental understanding of sex characteristics. These principles address an intersex individual's right to bodily privacy⁴¹⁹ and their right to make autonomous choices⁴²⁰. One of the recommendations put forward in these principles is to end the registration⁴²¹ of the sex at birth in identity documents and as part of their legal personality while simultaneously providing interim arrangements that include a multiplicity of gender markers. Thus, gender is seen as a spectrum where variances in sex characteristics are celebrated rather than seen in black or white. The State is endowed with an obligation to promote and protect the rights of intersex individuals by ensuring their full equality and actively addressing the problem of discrimination.

The Preamble of the principles⁴²², makes a specific differentiation between gender expression and sex characteristics. The differentiating factor here is the fact that sex characteristics act as a ground that warrants protection in case of human right violations. It emphasises and recognises that human right violations as well as the characteristics and populations of individuals on the gender spectrum vary from one another and are distinct and unique in their own sense. The principles thus serve as rights to be given to these individuals irrespective of their sex characteristics or intersex status. Under the ambit of bodily and mental integrity, Principle 32 sees the forced and coercive medical practices

as being violative of human rights principles as well as bodily integrity and calls upon governments to fight the associated stigma and stereotypes that plague society. Some of the principles/duties imposed on the States are covered under Principles 30–38 as follows:

- The right to state protection
- Right to legal recognition
- Right to bodily and mental integrity
- Right to freedom from criminalisation and sanction on the basis on sexual orientation, gender identity, gender expression or sex characteristics
- Right to protection from poverty
- Right to sanitation
- Right to enjoyment of human rights in relation to information and communication technologies
- Right to truth
- Right to practise, protect, preserve and revive cultural diversity

C. United Nations Guidelines

The departments under the United Nations have also taken efforts and steps to spread awareness on intersex individuals and their rights. In 2015, the United Nations Free and Equal Campaign released a fact-sheet on the rights of intersex people⁴²³. This was followed by the first UN Expert Meeting on measures that can be taken to end human rights violations against intersex persons. The following year, as a follow-up to the previous efforts, the UN published a call to Governments⁴²⁴ all over the world to prohibit non-consensual coercive and forced surgeries including other medically unnecessary treatments on intersex children. An education campaign on the rights of intersex people was also launched during the UN

⁴¹⁷ Thoreson, R.R. 'Yogyakarta Principles', The Wiley Blackwell Encyclopedia of Gender and Sexuality Studies (eds A. Wong, M. Wickramasinghe, r. hoogland and N.A. Naples 2016)

⁴¹⁸ Yogyakarta Principles, *Principles on the application of international human rights law in relation to sexual orientation and gender identity*, (2007)

⁴¹⁹ Ibid note Principle 6

⁴²⁰ Supra at 30 note Principle 32

⁴²¹ Supra at 30 note Principle 31

⁴²² Supra at 30

⁴²³ United Nations for LGBT Equality, *Fact Sheet Intersex, Free & Equal*, UNFE.ORG (29th November, 2022, 8:12 PM), <https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>

⁴²⁴ United Nations Human Rights Office of the High Commissioner, *Human Rights Violations Against Intersex People: A Background Note*, OHCHR.ORG (30th November, 2022, 7:16 PM), <https://www.ohchr.org/en/documents/tools-and-resources/background-note-human-rights-violations-against-intersex-people>

Intersex Awareness Week and a website⁴²⁵ was dedicated solely to spread awareness about the plight of intersex individuals which published videos and other educative material. The Office of the UN High Commissioner of Human Rights also made a comment⁴²⁶ which implied that the fear faced by parents/doctors of the discrimination likely to be faced by their intersex child/patient, can never justify human right abuses.

Though the above measures refer to specific steps taken by the UN organisations towards the providing a solution to the unique problem faced by intersex individuals, other human rights documents of the UN also contain provisions that can be interpreted in light of protecting their rights. For example, human rights as per the Universal Declaration of Human Rights⁴²⁷ under include the freedom to develop as a dignified human being and calls upon States to rectify human rights violations. The UDHR and the International Covenant on Civil and Political Rights⁴²⁸ both guarantee the protection against discrimination along with the right to privacy and the right to live a life with dignity to all human beings. Article 3 of the UDHR, Article 9 of the ICCPR and Article 17 of the Convention on the Rights of Persons with Disabilities⁴²⁹ all emphasise on the right to security of a person which includes the freedom from injury to the body and mind or bodily and mental integrity. This view can be expanded to accommodate the fact that forced and coercive medical interventions on intersex children violate these very rights. Another argument that favours the same is covered under Article 24(3) of the United Nations

Convention on the Rights of Child⁴³⁰. This provision places a duty on the State to abolish harmful practices that are prejudicial to the health of children.

The 26th of October is celebrated globally every year as Intersex Awareness Day to commemorate the protest of several members of the Intersex Society of North America in 1996 at an American Academy of Pediatrics (AAP) meeting that was being held in Boston. This was the first time intersex individuals were speaking publicly about the trauma faced by them as a result of non-consensual genital surgery and the stigma and isolation that followed them around like a shadow ever since. This protest inspired people in the years that followed to voice their human rights concern and spread awareness in order to put an end to human right violations of intersex individuals.

D. Other Legislations

In Germany and Portugal, although intersex conditions are not specifically mentioned, the law states that no surgeries and treatments apart from life-threatening ones are allowed to be performed (Portugal) and in Germany⁴³¹, only those procedures that are considered necessary to cure or eliminate a functional disorder... without posing any real threat to the individual's health at the moment are allowed. The Organisation of Intersex International (OII) in Europe however, does not deem these laws as protective enough and they are therefore working to develop a minimum criteria to help determine whether the laws enacted by countries constitute a formal prohibition on carrying out non-consensual surgeries on intersex children. These standards are expected to be unveiled early this year⁴³².

⁴²⁵ Free & Equal, United Nations, 'United Nations for Intersex Awareness', UNFE.ORG (1st December, 2022 5:00 PM), <https://unfe.org/intersex-awareness>

⁴²⁶ Committee on the Rights of the Child, 'General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration' (Art. 3, Para. 1, 2013)

⁴²⁷ United Nations General Assembly. The Universal Declaration of Human Rights (hereinafter referred to as the UDHR). New York: United Nations General Assembly (1948)

⁴²⁸ UN General Assembly, *International Covenant on Civil and Political Rights*, United Nations, Treaty Series, vol. 999, p. 171 (16 December 1966) (hereinafter referred to as the ICCPR)

⁴²⁹ UN General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106*

⁴³⁰ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

⁴³¹ Lilas Pepy, *Malta's pioneering law on intersex children*, Le Monde, (5th November 2022, 6:00 PM), https://www.lemonde.fr/en/science/article/2022/06/12/malta-s-pioneering-law-on-intersex-children_5986507_10.html#:~:text=In%202015%2C%20Malta%20was%20the,for%20justifying%20any%20medical%20procedure.

⁴³² Ibid

The Civil Status Law of 2007⁴³³ in Germany normally requires that the gender of all children be documented in the birth register but also allows persons to be identified as neither female nor male in case, at birth, it is unclear as to which sex can be assigned to the child. This provides room for the right of self-determination of the child to conform to a gender identity he/she identifies with later in life. Similarly, in Spain, the Basque Country Act of 2012⁴³⁴ has a provision that deals with non-discrimination based on gender identity. Although this provision was added in recognition of the rights of transgender people, the same can be extended via interpretation to intersex individuals as well. Scotland too⁴³⁵, has included intersex issues under its wide umbrella definition of gender identity to extend to those individuals who are 'not standard males or females.' This too however, can prove to be problematic as there exists an underlying hint of intersex individuals not being 'standard' which teeters dangerously close to the edge of seeing them in a different light, as something abnormal.

In South Africa a combined and consolidated reading of two legislations- The Alteration of Sex Description and Sex Status Act of 2003 and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 define intersex persons and insert this definition within the general categories of 'sex' thereby prohibiting discrimination of intersex individuals as among the typical binary categories of men and women.

IV. Indian Legislative Framework

As mentioned earlier in the paper, the only mention of the term 'intersex' in any Indian legislation has been in the Transgender Act and that too, has failed to have any real positive

impact on the intersex community. Their rights still remain in jeopardy with an exception in the State of Tamil Nadu, which after the judgement of the Arunkumar case, put forward an official government order prohibiting the performance of sex reassignment surgeries on intersex infants and children. The Act also does not explicitly recognise the poignant issue faced by the intersex community of discrimination on the basis of sex characteristics. One positive outcome of the Act has been the fact that intersex individuals have been officially recognised and defined much like in the legislation of Scotland.

Although defining the issue is indeed the first step, further steps need to be taken to solve and implement the problem of violation of the rights of privacy, bodily integrity and self-determination of intersex individuals which continue to remain under threat at the hands of medical physicians and parents who are still swayed by the societal stigma towards intersex individuals. In 2020, the United Nations Committee on Rights of Persons with Disabilities recommended directly to the Government of India that the latter should adopt measures to prevent sex assignment or 'sex normalising' surgeries as well as bullying and stigmatisation of intersex children in order to ensure the rights to preserve their physical and mental integrity. However, unfortunately, to this day, the Central Government has failed to take steps to implement any of these recommendations. There was however, one positive outcome. The Delhi Commission for Protection of Child Rights, in 2021, recommended that the Delhi Government ban the practice of performing medically unnecessary sex-selective surgeries on intersex infants following suit of the precedent set in the Arunkumar judgement.

The intersex community still however remains invisible in all practicality, the most obvious example of the same being that their population is not clearly reflected in the 2011 census of India nor the population projections

⁴³³ Civil Status Act (PStG) (BGBl. I S. 122) s 21(1)

⁴³⁴ Rivera, O. & Sancho, F. & Sánchez, M. & McCormick, A. & Berlo, A. & Barrios, Á & Benito, J. & Yanguas, José & Sebastián, I. AAL summit 2012: The Basque country declaration. Gerontechnology (2013)

⁴³⁵ LGBTI and gender recognition, Scottish Government, Riaghaltas na h-Alba

for India and States for the years 2011-2036. These records continue to show the expected projections wholly with respect to male and females. The 2011 census is the census that is followed today in India as census operations are conducted once every ten years. The 2021 census was postponed due to the COVID-19 pandemic and even today, as of January 2023, the census has still not been updated. There is hope that after the passage of the Act in 2019, the Census Division will take into consideration individuals that fall under the non-binary category, such as intersex individuals, in the computation of the Nation's population. In a notification published by the Ministry of Social Justice and Empowerment regarding the Welfare of Transgenders, the Registrar General of India, during enumeration of the Census of 2011 provided three codes for enumeration—Male-1, Female-2 and Other-3. However, this notification expressly stated that the Census of India does not collect any data specifically on 'transgenders' and as such 'Other' was used to include any person who desires to record their sex under a category that is not 'male' or 'female'.

V. Issues that continue to be faced by the Indian Intersex Community

This lack of choice given to the intersex community, treated within the transgender community, the latter estimated to be a total of 4.88 lakh as per the 2011 census, denies distinct visibility and recognition of an entire community of individuals. This further provides detrimental hardships to intersex individuals who, due to their lack of visibility in official data struggle in accessing various social benefits. This issue came to the forefront especially for the transgender community during the COVID-19 pandemic wherein the promised money transfers via banks and ration supplies from the government were never materialised as these individuals have no official documentation to begin with.

The National Statistical Office is tasked with the responsibility of conducting nationwide sample surveys. However, they have still not conducted any surveys on intersex persons and the issues faced by them. The official recognition of transgender individuals themselves is in its nascent stage and so the recognition of intersex individuals as a distinct and separate category rather than grouped under the transgender umbrella might not take place in a hurry. It is only after these individuals are recognised as distinct and different from transgenders can there be any hope for specific nation-wide laws to be made to protect their rights from the specific human right violations faced by them.

Another issue that arises due to the non-official recognition of intersex individuals in India is that there exists an inaccurate account of the statistics of crimes that have been committed to them. These corrective surgeries should be criminalised from taking place altogether as they are often performed on infants with parental consent and due to this they cannot be reported unless the child is old enough to understand the gravity of what he/she had to endure as an infant and gain the courage to report such instances himself/herself. This could take years and such delayed reporting would not be effective in curtailing the same surgeries from happening to countless infants in the interim period.

VI. Judicial Precedents

Prior to the celebrated Arunkumar judgement, there have been a handful of cases handled by the Indian judiciary that have made references to intersex individuals. However, most of these references have been misplaced due to a faulty understanding of what being intersex truly means. Some articles⁴³⁶ regarding the lack of judicial intervention towards protection of the

⁴³⁶ Atreyo Banerjee, Shardha Rajam, *Indian Courts Must Understand What Being Intersex Really Means*, Smashboard, (1st January, 2023, 9:00 PM), <https://smashboard.org/indian-courts-must-understand-what-being-intersex-really-means/>

rights of intersex individuals have even termed this misconstruction as 'judicial fumbling.'

A. Pinki Pramanik v. State of W.B

The case of Pinki Pramanik v. State of W.B⁴³⁷, dealt with whether an intersex person could be convicted on the charge of sexual assault and rape. Upon arresting the plaintiff, she was made to undergo multiple medical examinations in order to 'determine' her gender, the results of which indicated that she was a male pseudo-hermaphrodite who suffered from disorder of sexual development. The judgement of the Calcutta High Court implied that since the provisions in the Indian Penal Code, 1860 were not gender-neutral in nature, or in other words, complaints of sexual offences can only be made by women against men, medical examinations were necessary to determine whether such charges could be brought against the plaintiff in the first place. The Court concluded that although her medical reports showed that she was intersex, she was not capable of 'penetrative intercourse' and as a result could not be guilty of the crime of rape. This judgement was problematic in nature as here too, intersex individuals are seen as different from normal human beings and stand beyond the reach of the existing law. This lack of inclusion of intersex persons in the eyes of the law can lead to great injustice in cases where these individuals actually commit non-consensual sexual intercourse with other persons. They can escape from the criminal liability under the misguided belief that they lack the capability to have sexual intercourse due to their non-binary sex characteristics.

B. Ganga Kumari v. State of Rajasthan

In the case of Ganga Kumari v. State of Rajasthan⁴³⁸, the Court deliberated upon whether the petitioner, who identified as sex neutral could claim that her rights were

Constitutionally protected. Although the Court clubbed hermaphrodites, transgenders, and eunuchs in the same category, which is clearly erroneous, they declared that the Constitution was meant for all persons/living beings of the human race in our country. Therefore, whether an individual identifies as transgender or hermaphrodite is irrelevant to the fact that they are still citizens of this country by virtue of being born within the territory of India. Fundamental rights are granted to all citizens and the petitioner, being a transgender citizen is also granted protection of her rights. The Court also briefly stated the difference between sex and gender but made no explicit mention of the term 'intersex.'

C. Nangai v. The Superintendent of Police

In the case of Nangai v. The Superintendent of Police⁴³⁹, the Court recognised that the compulsion of an individual to undergo medical examinations in order to determine his/her gender in the absence of a legislation that mandated the same amounted to a violation of the person's fundamental rights under Article 21 of the Indian Constitution. Forcing an individual, (in this case, the petitioner), to accept her identity based on a medical declaration rather than what she herself identifies as by virtue of her own free will, amounts to a violation of her right to equality under Article 14, right to non-discrimination under Article 15, right to freedom of speech and expression under Article 19(1)(a) as well as the right to life and personal liberty under Article 21 guaranteed by Constitution of India.

D. The NALSA Judgment

In the NALSA judgement, Justice GR Swaminathan made a significant observation with respect to intersex individuals. He stated that, "When a child is born it is usually endowed with male genitalia or female genitalia. But there are children who are born with a genitalia

⁴³⁷ Pinki Pramanik v. State of W.B., 2014 SCC OnLine Cal 18832

⁴³⁸ Ganga Kumari v. State of Rajasthan & Ors. D.B Civil Writ Petition No. 10672/2021

⁴³⁹ Nangai v. Superintendent of Police, 2014 SCC OnLine Mad 988

that belongs to neither category. They are known as intersex children. They must be given their time and space to find their true gender identity... consent of the parent cannot be considered as the consent of the child.' However, this is the only effort made in the judgement to highlight the plight faced by intersex individuals. In fact, as the judgement progresses, there is a grave error made wherein the Court synonymises the terms 'intersex' and 'eunuch' when the two are entirely different. This lapse of understanding has ramifications in the form of the lack of legal interventions that address the specific needs of the intersex community. It also omits the fundamental concern of the intersex community which revolves around the pathologisation of their bodies during their infancy and childhood. After the judgement, these corrective medical interventions and treatments continued to take place in order to make the intersex infant conform to a binary body. Another misconceived move by the Court was made when it clubbed hijras, transgenders, eunuchs and intersex people under the bracket of 'third gender' under law. Although this might help with making society recognise and acknowledge the existence of non-binary individuals, it does not provide any legal remedy for the human right violations faced specifically by intersex community.

The current law in India, after the NALSA judgement allows individuals to change the sex assigned to them at birth in their official documents. However, the birth registration laws in India only allow this to happen on the condition that the entry of such sex was a typographical error. Further, according to Section 15 of the Registration of Births and Deaths Act of 1969, the original entry made in the birth certificate can be appropriately corrected or cancelled in accordance with the rules made by the State Government only if the Registrar is satisfied as to the necessity of the same. In effect, this once again leaves the decision of determining the sex of the individual

in question in the hands of a public official rather than the individual himself/herself thus depriving the latter of their right to self-determination.

By interpretation however, we can extend some of the observations made by the Court in the NALSA judgement with respect to transgender individuals to be specifically attributed to the protection of the fundamental rights of intersex individuals as well. For example, the mention of 'person' in Articles 14 and 21 is gender neutral in nature. Similarly, the mention of 'sex' in Articles 15 and 16 covers hijras and transgenders as well as those individuals who consider themselves as neither a binary male or female, thereby expanding the field to possibly include those who identify as intersex. Further, the right to freedom of speech and expression under Article 19(1)(a) can be extended to include a citizen's right to expression of his/her self-identified gender.

Articles 253 and 51 allow international law to be made applicable in those scenarios where Indian law is absent or lacking to adequately deal with the situation. Thus, the international principles and laws that have been discussed earlier in the paper can be applied and integrated into Indian legislation as well. This would be an effective step to tackle the issue of legal protection of intersex individuals in India.

Articles 14, 19 and 21, 32 and 226 of the Constitution enable the process of judicial activism. According to this process, Constitutional courts in India must not remain silent as a mute spectator when they see instances of blatant violations of human rights of individuals (in this case, intersex individuals) especially when such rights have achieved universal recognition and acceptance. Judicial activism calls for purposive interpretation of provisions of law in light of the doctrine of rule of law which frowns upon arbitrariness and discrimination that is not based on intelligible differentia. The doctrine of rule of law demands protection of the rights of individual human

beings and states that such rights must be guaranteed to each and every one of them. The percentage of the population that is composed of these marginalised communities is irrelevant in the deciding the question as to whether/not they are holders of human rights.

In the NALSA case, Justice Radhakrishnan stated that intersex individuals along with those individuals (hijras, emasculated and non-emasculated men) who lacked reproductive capabilities of either a man or a woman and rather, consider themselves to be a 'third gender'.

Justice Sikri, in his opinion also recognised the existence of these marginalised individuals, however small in number, in contrast to the typical man/woman population, who are may be born with bodies that incorporate both/certain aspects of both male or female physiology. He went on to emphasise on the universal recognition of human rights as being rights that 'belong' to every person. This does not depend on the specifics of the individual nor on the relationship between the right-holder and right-grantor. They are pre-existing rights that exist regardless of whether they have actually been granted or recognised by the socio-legal systems and institutions prevailing in the society. He also specifically emphasises that the discussions made in the judgement regarding conferring of a distinct identity are restrictive in nature and are applicable only in light of the transgender community (hijras). This line in the judgement is supposed to bring clarity but in reality, it does just the opposite by causing even more confusion. This is because, in the prior paragraphs, intersex individuals have also been described as hijras and thus the distinctiveness of the intersex community continued to remain invisible.

E. Jackuline Mary v. Superintendent of Police

In the case of Jackuline Mary v. Superintendent of Police⁴⁴⁰, the issue revolved around whether the termination of service of a woman, who applied to the post of Woman Police Constable was sustainable based on the fact that her medical check-up results showed that she was transgender. She failed to disclose this fact during the application to the post in question. The Court did observe that the NALSA judgement failed to provide a clear definition of the term 'transgender', but nonetheless affirmed the same insofar as to drive the point home that all persons have a fundamental right to self-identity with regards to their gender under Article 19(1)(a) of the Constitution. The Court however, stated that so long as the petitioner declared her gender as female, she would be treated as the same until the State enacted a law that recognised FTM (female to male) individuals, such as herself, as 'transgender'. In lieu of the same, the Court directed the State authorities to ensure that steps were taken to provide separate facilities for FTM individuals. What was distinct in this judgement as compared to the previous ones was that the Court correctly stated that intersex individuals belong under the umbrella of 'transsexuals' rather than 'transgenders', which is closer to the truth than clubbing intersex individuals under the ambit of transgender.

F. The Arunkumar Judgment

The Arunkumar judgement was the first to specifically highlight the unique plight faced by intersex individuals as being distinct from those faced by other non-binary communities such as transgenders. This judgement also materialised into actual efforts taken by the Government of Tamil Nadu to curb the menace of human rights violations caused to intersex infants and children as a result of non-consensual corrective and coercive medical interventions. The facts of the case involved a

⁴⁴⁰ Jackuline Mary v. Superintendent of Police (2014) SCC OnLine Mad 987

marriage between a male and a transwoman wherein the registering authority refused to register the marriage. The justification given by the authority for its actions was that on the wedding day, the bride can only be a woman and a transwoman cannot be considered as a woman. The Court highlighted that sex and gender are not the same and that according to Article 14 of the Constitution, States shall not deny 'any person' equality before the law and equal protection of the laws within the territory of India. Such protection would apply to transgenders as well as other non-binary individuals, thus including within its scope, intersex individuals.

In light of the Constitution being an enabling document, the Court stated that the expression of 'bride' under S.5 of the Hindu Marriage Act, 1955 will include intersex as well as transgender persons who identify as a woman. This separate mention of both 'intersex' as well as 'transgender' indicate the recognition of the two as distinct identities and not clubbed under the same umbrella of 'other gender'.

A pivotal part of this judgement was in the reference made by the Court to a complaint written to the National Human Rights Commission by Gopi Shankar, an intersex rights activist regarding the necessity to give time and space to those children who are born with genitalia that completely belong neither to the female or male category, in order for such children to find their true gender identity. In order to facilitate this, Shankar prayed that the parents of such children, on the advice of medical physicians, do not forcefully make the infant undergo sex reassignment surgery (SRS). In effect, Shankar prayed that the NHRC ban forced selective surgeries and other forms of medical abuses from taking place on intersex babies in India, in recognition of their fundamental rights. The response from the Health Ministry however was disheartening and merely served as a justification behind the performance of such surgeries stating that it

was perfectly legal in nature as the written consent of the parent/guardian of the infant is taken before conducting the surgery. It was in response to this that the Supreme Court reiterated what was stated previously by the World Health Organisation, that the consent of the child is pivotal in nature and cannot be replaced by that of the parent/guardian. The WHO in its report also called for deferring intersex genital mutilation (IGM) until the individual is old enough to make these decisions for themselves.

The Court, in order to make more effective the mandate put forward in the NALSA case about forced medical procedures not being a valid requirement for legal recognition of a person's gender identity, found it necessary to direct the Government of Tamil Nadu to issue a Government Order reiterating the same. It also fixed a responsibility on the Government to launch a sustained awareness campaign in order to help the parents of intersex children understand that the status of their child is not a matter of embarrassment or shame.

VII. Conclusion

It is pertinent that society understands and acknowledges that intersex rights and human rights are intertwined and cannot be considered in isolation of each other. Human rights belong to every individual regardless of their specifics. Such rights cannot be granted to people or taken away by them as they are moral, pre-legal rights. By officially recognising intersex individuals as a distinct and unique category in themselves rather than grouping them under the umbrella of 'transgender' individuals, their human rights can be effectively protected. On recognition, they can finally be included in the census calculation of countries across the world which will allow them to be able to contribute better to society. They must also be included from the formal consultation processes conducted by the various authorities while making various legal and policy decisions so that their struggles are

voiced and heard. The ripple effect of the same will also improve their visibility and therefore their access to health services, education, public services and employment in the exercise of the fundamental rights in the Constitution that guarantee them the same. Globally, intersex rights activists such as Mx. Anunnaki Ray Marquez, Dr. Tiger Devore, Pidgeon Pagonis and Gopi Shankar of Madurai continue to fight for the rights of intersex individuals all around the world. Organisations such as InterACT (in the USA), OII (Europe) and Amnesty International specifically issue guidelines and seek to advise the law-making authorities of their respective regions on measures and principles that can be adopted to protect the rights of intersex individuals.

VIII. Scope and Limitations

The scarcity of accurate statistics along with the lack of awareness of intersex as a community itself have proven to be hindrances in conducting research, especially from an Indian perspective to assess the efficacy of the prevailing laws and specific instances of human rights violations of intersex individuals across the country. The scope for further research can include the issue of abortion of intersex fetuses in light of the rights of an unborn child as well as an in-depth analysis on how effective existing international legislations and policies have been in protecting the rights of intersex individuals.

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