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Somewhere over the Rainbow

An Analysis of Intersex Gender-normalising Surgery in Kenya, Uganda and India

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Abstract

This research pertains to the rights of intersex children in the Global South. Kenya presents an interesting comparison as there has been litigation concerning intersex children. The 2014 case of *Baby 'A'* presents a wealth of knowledge. The jurisprudence developed in this regard touches on some of the provisions in the United Nations Convention on the Rights of the Child i.e. the four important general principles identified therein. These general principles are crucial in protecting the rights of vulnerable children and issues of gender, gender identity and sex – in particular, intersex children. In Uganda, the situation is quite dire. There are interesting questions regarding the right to health care, bodily autonomy, possible over-reach of medical professionals and legislative over-reach amongst many other issues. A comparison is made with India. In 2019 the state of Tamil Nadu, a court banned such unnecessary gender-normalising surgeries. While not an African country, it provides a comparative nuance in understanding SOGIESC issues in the Global South.

Keywords

Children – children's rights – intersex – sex and gender – gender identity – gender expression – SOGIESC – Kenya – Uganda and India

1 Introduction

Intersex persons make up 1.7 per cent of the world's population.¹ Within that figure, there are 40 different variations of intersex conditions.² Intersexuality is also often also referred to as a Disorder of Sexual Development (DSD).³ DSD describes variations of characteristics which lead to ambiguity regarding one's biological sex.⁴ These characteristics may present themselves at birth; however, they can also occur during puberty or adulthood. The standard practice of healthcare for intersex infants and adolescents is to perform non-essential cosmetic surgery on them to make them appear male or female. This model was created by Dr John Money in the 1960s.⁵ His "gender-rearing optimisation model" has been utilised by physicians without recourse as it is seen as an immutable truth in the medical community – conceived specifically to treat intersex children.⁶ The model subjects intersex infants to medically unnecessary surgery, performed without their informed consent, or that of their parents (in certain instances), in an attempt to 'fix' their sex. This has allowed for several human rights abuses to be perpetrated against the intersex community. Dr Money (one member of a set team of medical professionals at Johns Hopkins) believed that children were psychosexually neutral.⁷ This model is still standard practice in medicine to this day. Irreversible surgical interventions and hormonal therapies have been carried out on infants and very young children without long-term data confirming their necessity, safety and efficacy.⁸ In 2006 a statement (i.e. Consensus Statement on Management of DSD (Chicago Consensus Statement))⁹ was published by 50 international

1 A. Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Basic Books, 2000).

2 Intersex Human Rights Australia: 'Intersex is not a gender identity and the implications for legislation' <<https://ihra.org.au/17680/intersex-characteristics-not-gender-identity/>> (visited on 7 March 2024).

3 I. A. Hughes, C. P.W. Houk, S. F. Ahmed and P. A. Lee Lawson Wilkins Pediatric Endocrine Society (LWPES)/European Society for Paediatric Endocrinology (ESPE) Consensus Group 'Consensus statement on management of intersex disorders' 91:7, *Archives of diseases in childhood*, (2006) pp 554–563.

4 M. Newbould, 'When Parents Choose Gender: Intersex, Children, and the Law' 24:4, *Medical Law Review* (2017) p. 475.

5 R. Green and J. Money (eds) *Transsexualism and sex reassignment* (Johns Hopkins University Press 1969).

6 *Ibid.*

7 S. Creighton, 'Surgery for intersex' 94:5, *Journal of the Royal Society of Medicine* (2001) pp 218–220.

8 J. Scherpe, A. Dutta and T. Helms (eds), *The Legal Status of Intersex Persons* (first edition Intersentia 2018)

9 Hughes *et al*, *supra* note 3.

experts and endorsed by the Lawson Wilkins Paediatric Endocrine Society and the European Society for Paediatric Endocrinology reviewing multidisciplinary management and long-term outcomes of DSD.¹⁰ The participants were comprised of paediatric endocrinologists from 60 medical centres representing 23 European countries. The document was not intended as a clinical guideline, it was rather a professional response to a “troubling” area of medicine.¹¹ The exclusion thereof of the Global South and lower-income areas is rather disappointing.¹² There is thus a glaring disparity in considering the specific cultural context in which the Global South responds to the issues regarding intersex children. To include the voices of those in the Global South, I attempt to encapsulate the number of interventions and developments in this regard.

There are several human rights abuses perpetrated against intersex children by these surgeries. The grounds of human rights are the more fundamental features of reality in virtue of which human rights exist.¹³ It can therefore be said that the existence of human rights is at the most fundamental level independent from contingent social practice(s).¹⁴ Thus the very foundations are being stripped at the core when it comes to human rights violations concerning intersex children. These human rights abuses include, but are not limited to, desecration of the child’s psychological well-being – research suggests that intersex individuals who have undergone non-consensual surgeries as children often experience high rates of psychological distress, including depression, anxiety, and body image issues.¹⁵ The violation of the

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- 10 V. Pastorski, P. Prentice and I. A. Hughes, ‘Consequences of the Chicago consensus on disorders of sex development (DSD): current practices in Europe’ 95:8 *Archives of Disease in Childhood* (2010) pp 618–623.
- 11 L. Liao and K. Roen, ‘Intersex/DSD post-Chicago: new developments and challenges for psychologists’ 5:1 *Psychology & Sexuality* (2014) pp 1–4.
- 12 A. A. Zainuddin, S. R. Grover, K. Shamsuddin and Z. A. Mahdy, ‘Research on Quality of Life in Female Patients with Congenital Adrenal Hyperplasia and Issues in Developing Nations’ *North American Society for Pediatric and Adolescent Gynecology* (2013) pp 296–304.
- 13 J. Schaffer, ‘Grounding, Transitivity, and Contrastivity’ in Fabrice Correia and Benjamin Schnieder (eds), *Metaphysical Grounding: Understanding the Structure of Reality* (CUP 2012) p. 124.
- 14 T. Nagel, *Concealment and Exposure: And Other Essays* (OUP 2002) 33; J. Tasioulas, ‘The Moral Reality of Human Rights’ in Thomas Pogge (ed), *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007) pp76–77; Tasioulas, ‘Towards a Philosophy of Human Rights’ *supra* note 1 pp 26–29
- 15 H. Falhammar, H. Claahsen-van der Grinten, N. Reisch, J. Slowikowska-Hilczler, A. Nordenström, R. Roehle, C. Bouvattier, B. P. C. Kreukels and B. Köhler, ‘Health status in 1040 adults with disorders of sex development (DSD): a European multicenter study’ 7:3 *Endocrine connections* (2018) pp 466–478.

right to bodily autonomy – an important facet thereof is the importance of informed consent. Informed consent in this context is the process in which patients are given important information, including possible risks and benefits, about a medical procedure or treatment.¹⁶ This is to assist the people concerned decide if they want to be treated, tested, or take part in the trial.¹⁷ In the case of intersex children, where surgical interventions are being considered, it is important to prioritise the principles of informed consent and bodily autonomy of the child. Respecting bodily autonomy is a fundamental principle that recognises an individual's right to make decisions about their own body.¹⁸ Intersex individuals have historically experienced non-consensual and unnecessary medical interventions, leading to long-term physical and psychological consequences.¹⁹ This means shifting to a model that prioritises informed consent and allows intersex individuals to make decisions about their bodies once they can do so. Furthermore, every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.²⁰ In April 2022, the Special Rapporteur on the Right to Health presented her final report regarding violence and its impact on the right to health and called upon the ending of gender-normalising surgeries.²¹ The effect is that intersex children are deprived of the right to the highest attainment of health by the continuation of these surgeries.

Finally, one of the core rights that one can also explore is the right of “the best interests of the child being of paramount importance in every matter concerning the child” (as per Article 3 of the United Nations Convention of the Rights of the Child (CRC)). Is it truly in the best interests of the child to undergo unnecessary gender-normalising surgery merely to fit into the binary construction of sex and gender? The best interest of the intersex child must also be forward-thinking in nature in so far as it takes into account the

16 <<https://www.cancer.gov/publications/dictionaries/cancer-terms/def/informed-consent>>, visited on 10 March 2024.

17 *Ibid.*

18 K. G. Townsend, ‘Defending an inclusive right to genital and bodily integrity for children’ 35 *International Journal of Impotence Research* (2022) 27–30.

19 A. Abouafia, ‘Just what the doctor ordered?: An analysis of unnecessary surgeries on intersex children from human rights perspective’ 30:3 *University of Florida Journal of Law and Public Policy* (2020) pp 321–338.

20 E/C.12/2000/4 <<https://documents.un.org/doc/undoc/gen/g00/439/34/pdf/g0043934.pdf?token=SVRRainVNiuvy7147y&fe=true>> visited on 12 March 2024 1.

21 A/HRC/50/28: Violence and its impact on the right to health – Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health < <https://documents.un.org/doc/undoc/gen/g22/310/91/pdf/g2231091.pdf?token=h5holABRJNGUFDiSxf&fe=true>> visited on 12 March 2024.

psychological and physiological implications and what that will mean for the future of the child as they progress into adulthood.²² It is thus crucial to engage in ongoing dialogue, involving medical professionals, intersex advocacy groups, legal professionals, and affected individuals, to develop approaches that uphold human rights and protect the well-being of intersex children.²³

I, therefore, make the argument for a moratorium on gender-normalising surgeries until such time that the affected communities can dictate the standard of care for intersex children in line with international humanitarian law.²⁴ The purpose of such a moratorium would generally be to thoroughly examine the ethics, medical necessity, and long-term impacts of performing intersex surgeries on infants. The goal is to strike a balance between the rights of the child, the parent's desires, and the medical community's understanding of the benefits and potential harm of these procedures.²⁵ During the moratorium, experts would likely engage in dialogue, gather scientific evidence, consult with affected communities, and explore alternative approaches to ensure that any future interventions are informed by the best interests of intersex individuals.²⁶ It may be a worthwhile compromise for detractors such as Hermer who hold the view that an outright ban (as some activist organisations have urged governments worldwide to ban elective genital surgeries without the intersex individual's informed consent)²⁷ is not beneficial due to several issues, including a possible misconstruing of data used in small sample sizes, *vis-à-vis* gender-normalising surgeries to support those who argue for a ban.²⁸ Even researchers who are on oppose gender-normalising surgeries,

22 E. Reis, 'Culture and cutting' 42:6 *The Hastings Center report*, (2012) p. 3.

23 G. Davis, E. Feder, L. Liao, A. Baratz, K. Karkazis and J. Frader, *Normalizing Intersex. VOICES: Personal Stories from the Pages of NIB (Narrative Inquiry in Bioethics)* (Johns Hopkins University Press, 2016).

24 M. Diamond was one of the first to suggest a moratorium on surgical treatment for intersex in young children. K. Kipnis and M. Diamond, 'Pediatric Ethics and the Surgical Assignment of Sex' 9 *The Journal of clinical ethics* (1998) p. 398, p. 410.

25 Medical Ethics Advisor – Noted researcher calls for surgery moratorium 1 December 1998 <<https://www.reliamedia.com/articles/39682-noted-researcher-calls-for-surgery-moratorium>>, visited on 4 February 2024.

26 M. M. Ernst, L. Liao, A. B. Baratz, and D. E. Sandberg, 'Disorders of Sex Development/ Intersex: Gaps in Psychosocial Care for Children' 142:2 *Pediatrics* (2018) pp 1–4.

27 J. A. Greenberg, 'Legal, ethical, and human rights considerations for physicians treating children with atypical or ambiguous genitalia' 41:4 *Seminars in Perinatology* (2017) pp 252–255. Also, see M. Gardner and D. E. Sandberg, 'Navigating Surgical Decision Making in Disorders of Sex Development (DSD)' 6:339 *Frontiers in Pediatrics* (2018) pp 1–9.

28 L. Hermer, 'A Moratorium on Intersex Surgeries?: Law, Science, Identity, and Bioethics at the Crossroads' 13:2 *Cardozo Journal of Law & Gender* (2007) pp 255–272.

such as Creighton and Minto do not publicly support a ban but rather counsel substantial caution and greater disclosure regarding risks and uncertainties.²⁹

1.1 *International Obligations*

There are several provisions in the CRC which are relevant to this discussion. These rights include, but are not limited to, Article 2 (the right of non-discrimination on the grounds of, *inter alia*, sex); Article 3 (the best interests of the child shall be a primary consideration in all matters affecting them); Article 8 (respect for the right of the child to preserve their identity as recognised by law without unlawful interference); Article 12 which provides that:

States Parties shall assure the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight by the age and maturity of the child.

Article 24, which states, *inter alia*:

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services

The culmination of the abovementioned rights is the creation of a human rights framework that is child-centric and takes into account the principle tenets of child law as a foundational component of the greater scheme of human rights. Furthermore, it is important to employ a child-centric theory of rights. Children's rights cannot be studied in isolation. The theory of children's rights is a complex blend of philosophical, moral, legal and social considerations.³⁰ The rights set out in the CRC are merely claims based on the ideals of how children should be treated.³¹ It is simple to declare that children

29 C. Minto, L. Liao, C. R.J. Woodhouse *et al*, 'The Effect of Clitoral Surgery on Sexual Outcome in Individuals Who Have Intersex Conditions with Ambiguous Genitalia: A Cross-Sectional Study' 361 *The Lancet* (2003) p. 1252; S. Creighton and C. Minto, 'Managing Intersex' 323 *BMJ* (2001) pp1264–1265; S. Creighton, C. Minto and S. J Steele, 'Objective Cosmetic and Anatomical Outcomes at Adolescence of Feminising Surgery for Ambiguous Genitalia Done in Childhood' 358 *The Lancet* (2001)124–125.

30 S. Human, 'The Theory of Children's Rights' in *Child Law in South Africa*, second edition, T. Bozaaart (ed), (Juta 2021), pp 305–324.

31 O. O. 'Neill, 'Children's rights and children's lives' in *Children's Rights and the Law* P. Alston, S. Parker, J. Seymour (eds) (Clarendon Press; Oxford University Press, Oxford, New York 1992).

have rights and create legislation or implement the ratification of treaties as a framework for the implementation of children's rights; however, without a set of justificatory principles, assertions and legislation will not succeed in being persuasive.³² The theories of children's rights also entail a discussion of the rights of children against their parents. Children must also be seen as autonomous beings able to make decisions free from those of their parents. They are not to be simply viewed as an extension of their parents until they reach majority age. Every child has their dignity. They cannot be treated as a mere extension of their parents, umbilically destined to sink or swim with them.³³ This essentially creates a tension between the rights of adults and children. This tension will, *inter alia*, entail a tension between the rights of parents to act on or assist their children by the vulnerability but, also awareness that there are certain situations in which the child can act autonomously.³⁴ It is thus also imperative that in engaging on issues of gender-normalising surgery, we look at the role that parents play in consenting to the child by proxy. An infant cannot advocate for themselves. The issue of bodily autonomy and the ancillary rights of intersex children juxtaposed with the rights of parents and medical professionals to make decisions about their sex through unnecessary surgery is a complex and sensitive matter. The intersection of parental rights, the rights of intersex children, and the child's right to bodily autonomy raises complex ethical and legal considerations. Balancing these interests requires careful thought and consideration of the best interests of the child using a rights-based approach. Parents typically have the authority to make decisions in the child's best interest.³⁵ What one constitutes as 'best interests' is malleable and will depend on the circumstances of each case.

The normative human rights framework for intersex children in terms of international law is primarily based on principles outlined in various international human rights treaties and documents. Some of these documents include, but are not limited to:

- A. The Universal Declaration of Human Rights. In terms of Article 1 thereof, all human beings are born free and equal in dignity and other rights.³⁶ This principle lays a foundation for the recognition of and protection of

32 Human *supra* note 30.

33 *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC).

34 B. Mezmur, 'The United Nations Convention of the Rights of the Child' in *Child Law in South Africa*, second edition, T. Bozaart (ed), (Juta 2021), pp 403–425.

35 B. Sanders Purves, 'Parental consent and the surgical management of intersexed newborns' 19:1 *Monash Bioethics Review* (2000) pp 23–42.

36 <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> visited on 5 March 2024.

intersex children. Interestingly this article is not gendered. Giving scope that it indeed applies to any sex.

- B. Yogyakarta Principles+10:³⁷ The Yogyakarta Principles provide a set of guidelines regarding the application of international human rights law concerning sexual orientation, gender identity, and gender expression. Expressed therein are certain rights of intersex persons, including protection from harmful medical interventions without their informed consent. Although not binding, the principles are undoubtedly important to this discussion.
- C. Specific resolutions. Various international and regional bodies, such as the United Nations, the European Parliament, the African Committee of Experts on the Rights and Welfare of the Child have issued resolutions, Concluding Observations, General Comments and statements by various experts who represent the various treaties bodies calling for an end to harmful medical practices on intersex children.

Thus the normative human rights framework for intersex children is based on a combination of international treaties, principles, and other international law apparatus that emphasise as per, *inter alia*, the four general principles in the CRC. Efforts are currently ongoing to ensure the protection of these rights in practice and to eliminate harmful medical interventions without informed consent.

1.2 *Regional Considerations*

In March 2023, the African Commission on Human and Peoples' Rights (the Commission) adopted a Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa – ACHPR/Res.552 (LXXIV) 2023 (Resolution 552) after meeting at its 74th Ordinary Session, held virtually from 21 February to 7 March 2023. This was in line with its mandate to promote and protect human and people's rights in Africa under Article 45 of the African Charter on Human and Peoples' Rights (the African Charter). Resolution 552 represents a huge leap forward in the protection of intersex persons, but more specifically, in this case, intersex children. The Commission made specific mention of Article 21 of the African Charter on the Rights and Welfare of the Child (ACRWC) which prohibits harmful social and cultural practices. This indeed confirms the recognition that the treatment of intersex children (with a particular focus on unnecessary surgeries performed on intersex infants).

While this constitutes a giant leap forward in terms of the rights of intersex children; it cannot go without scrutiny. Many facets of Resolution 552 miss the mark and also perpetuate harmful stereotyping in the form of language and

37 <<https://yogyakartaprinciples.org/principles-en/yp10/>> visited on 5 March 2024.

a mischaracterisation of intersex persons in general. Such harmful language can be seen in the statement calling that intersex ‘conditions’ present, *inter alia*, “chromosomal abnormality”, but in the same sentence also stating that the Commission recognises that intersex persons, who are born “naturally”. This presents an obvious dichotomy. The pathologising of intersex bodies is the very problem in which the Commission recognising must end, while simultaneously contributing to the harmful stereotyping they wish to stop.

However, the impact of Resolution 552 cannot be denied. One also cannot speak about the impact of Kenya’s contribution (perhaps pioneering) to the protection of intersex children without an in-depth discussion of the famous “Baby A” case. Indeed this case constitutes an important part of the jurisprudence on the matter of intersex children.

In Uganda, the situation is quite dire. There are interesting questions regarding the right to health care, bodily autonomy, possible over-reach of medical professionals and legislative over-reach amongst many other issues. There is also something to be said about the fact that the State recognises that intersex children exist, however, there is still a vast array of human rights abuses. While Uganda’s primary focus seems to be sexual orientation, under the LGBTQI+ umbrella, it is difficult to imagine that this will also malign intersex persons. The Anti-Homosexuality Bill, 2023 has caused uproar in the international community as it will see the criminalisation of LGBTQI+ persons – including minors. It will be interesting to see how intersex children will be viewed in light of the proposed legislation. There are already detailed accounts of intersex children suffering using surgeries (oftentimes done without consent) going wrong leading to the impairment of the child and contributing to the violation of rights such as the right to healthcare and education (as some intersex children drop out of school due to harassment, bullying and stigmatisation). Intersex children are also thought to be a bad omen with some being victims of violence, abandonment and infanticide.³⁸ There is also the question of how non-governmental organisations (NGOs) will deal with the scrutiny of the Anti-Homosexuality Bill, 2023 in light of helping marginalised groups given the history of the country trying to “out” those persons they believe to be part of the LGBTQI+ community.

In India the landmark judgment in the Tamil Nadu High Court, the court delves into the impact of non-essential surgeries performed on intersex infants.³⁹ It provides a backdrop on how to effectively protect the rights of

38 K. G. Behrens, ‘A principled ethical approach to intersex paediatric surgeries’ (2020) 21 108 *BMC Medical Ethics*,

39 V. Gauthaman, ‘Assessing the Medico-Legal Predicaments of Intersex People in India and the Indifference of the Transgender Act, 2019’ 4:6, *International Journal of Law Management & Humanities* (2021) p. 590-[lvii].

intersex children and provides a framework upon which one can build to exert pressure upon the government to provide said protections.⁴⁰

Intersex persons, according to the Office of the UN High Commissioner for Human Rights, constitute those persons born with any of several sex characteristics including that do not fit “typical” binary notions of male or female bodies.⁴¹ As previously stated intersex persons constitute 1.7 per cent of the world’s population.⁴² This figure is, however, an estimate and without comprehensive data. This may be a reason why most countries have not made the necessary policy, legislative, institutional or administrative steps specifically aimed at safeguarding the rights of intersex children. It may seem to be a minute issue in the grander scheme of government policy in some countries. However, the conversation has taken great strides over the past few years by the international community.

1.3 *The African Convention on the Rights and Welfare of the Child*

The African Charter is the principal treaty. However, several specific instruments complement the African Charter.⁴³ The focus will be on the ACRWC as this article pertains to intersex children.

According to Article 6(2) of the ACRWC, “every child has the right to be registered after birth”. General Comment No. 2 to Article 6 of the ACRWC provides that states ensure “no child’s birth should go unregistered”. This imposes a positive duty on States to ensure that legislative steps are put in place to provide for registration. It is important to note that the child is not subject to a particular sex, thus this should in theory and practice include intersex children. Unfortunately as will be demonstrated below, many intersex infants encounter legal battles regarding the registration of birth. This includes long waiting times; a refusal to issue a birth certificate or a name; the insertion of the incorrect sex and non-essential surgery to provide the “right” sex of the child.

2 Aim and Methodology

This research aims to identify, define and make recommendations regarding the rights of children regarding non-essential surgeries performed on intersex

⁴⁰ *Ibid.*

⁴¹ ‘A step forward for intersex visibility and human rights’ 2015 <<https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>> visited on 5 September 2023.

⁴² Fausto-Sterling, *supra* note 1.

⁴³ *Ibid.*

infants in the context of countries leading the charge in the Global South. The reason behind this approach is that much of the focus has seemed to be that of the Global North. One can look at Malta as an example of this position as Malta has formal guidelines in place that prevent physicians from performing these procedures.⁴⁴ Western societies are often heralded for being forward-thinkers in regards to gender identity and queerness, while Africa (and indeed in the Global South in general) is renowned for being sites of violence and intolerance for queer Black Africans especially.⁴⁵ There is a severe lacuna in the law which allows these abhorrent practices to thrive. The focus of this research is specifically through the lenses of these East African countries (and the Indian subcontinent) as there is a need to decolonise the notion that LGBTQI+ (or the current terminology sexual orientation, gender identity gender expression and sex characteristics i.e. SOGIESC) identities are “un-African” – a patently false narrative.⁴⁶ The linkage of this particular comparative exercise is that the countries of focus have seen some upheaval in this specific area of the law in recent times. There is historical proof that SOGIESC identities existed on the continent (and indeed in the Indian subcontinent) pre-colonialism.⁴⁷ It was indeed the colonisers who brought with them the notion that homosexuality goes against the norms of society and must thus be weeded out.⁴⁸ This new way of thinking brought with it the stigmatisation of homosexual persons and others in the SOGIESC community in Africa. As stated above, the aim thereof was to enforce heterosexuality and discernable binary gender norms as the default.

This brings us to the methodology employed herein. While the topic is predominately legal, there is a need to not only look at the topic through the lens of legal scholarship, but through a broader social sciences perspective. A topic as multi-faceted as this requires a high level of realism. As this appears to be an interdisciplinary exercise; one must tailor it in such a way that it does justice to each discipline.

Secondly, the law does not exist in a vacuum nor is it stagnant. The topic is not merely theoretical. Accordingly, the response cannot be offered with

44 ‘Malta Declaration Statement of the Third International Intersex Forum 2 of 1 December 2013’ <<https://www.oiiurope.org/malta-declaration/>> visited on 4 February 2023.

45 S. Collins, ‘The Splendor of Gender Non-Conformity In Africa’ *Medium*, 10 October 2017 <https://medium.com/@janelane_62637/the-splendor-of-gender-non-conformity-in-africa-f894ff5706e1>, visited on 5 September 2024.

46 A. M. Ibrahim, ‘LGBT rights in Africa and the discursive role of international human rights law’, 15:2 *African Human Rights Law Journal* (2015) pp 264–281.

47 *Ibid.*

48 S. O. Murray and W. Roscoe, (eds) *Boy wives and female husbands: Studies in African homosexualities* (State University of New York Press 2021).

the exclusive use of legal and doctrinal research methods. Non-doctrinal legal research is concerned with a complementary problem, policy and a law reform-based approach. This approach allows one to, other than contemplating the normative content of the body of law, be in a position to raise problems that are currently affecting the law.⁴⁹ Qualitative research, such as this, is 'naturalistic' and participatory research conducted in its natural context to capture experiences and observations, and subsequently to understand them and assign a subjective meaning to them.⁵⁰ In addition, qualitative methods rely heavily on inductive reasoning based on data and reality, which are then categorised into general themes and patterns. The reason this research will also be qualitative is that it lacks the validity of a proper sample and objective quantitative proof. The issue is that there is no official data on how many instances of non-essential cosmetic surgeries performed on intersex infants there are. This unknown presents a problem. However, if the lacunae in the law can be addressed through legislative means at the very least, one can hope that the implementation of penalties and offences will bring the number of non-essential cosmetic surgeries performed on intersex infants out of the woodwork using reporting and stopping such practices.

Finally, I shine a spotlight on certain countries in the Global South given the developments made regarding intersex children. The approach is critical in that there is a lack of accounting for the lack of resources in lower-income areas and the Global South in terms of healthcare. The structural inequalities between the Global North and Global South will mean there will be different standards of care (as there already are due to factors such as poverty and priorities in governmental investment into healthcare). It means that many of these conversations are still being centred on privilege. Cultural differences are also not accounted for – the standard of treatment for intersex persons is indeed viewed as purely scientific and usually seen as culture-free.⁵¹ A glaring example of this would be the aforementioned Consensus Statement and the stakeholders therein.⁵²

49 I. Dobinson and F. Johns, 'Legal Research as Qualitative Research' in M. McConville and W. H. Chui (eds) *Research Methods for Law* (Edinburgh University Press 2017) p 16.

50 L. Webley, (ed) *Legal Writing* (Routledge 2016).

51 N. Ehrenreich and M., 'Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices"' 40 *Harvard Civil Rights-Civil Liberties Law Review* (2005), p. 78.

52 Hughes *et al supra* note 3.

3 Kenya

3.1 Background

One cannot start a conversation about the plight of intersex children without first discussing *R.M v Attorney General* [2010], eKLR (RM case). RM was born intersex. At some point during adulthood, RM was convicted and sentenced to imprisonment in a male prison. While in prison RM was victim to the strip searches conducted by the prison wardens as cruel, inhuman and degrading treatment and a violation of RM's right to human dignity, amongst other human rights violations. RM was born intersex and could not obtain a birth certificate at birth as the law did not have a category for RM's sex. RM could consequentially not receive an identity card and eventually dropped out of school at the lower primary level and struggled to find employment due to having dropped out at such a young age. This case is a testament to the stigmatisation, violation of rights and ostracising that intersex persons face. The discrimination is not only societal but systemic. Without the ability to secure a birth certificate, one is left with very few options. It not only affects their physical and mental well-being but the attainment of socio-economic rights, freedom of movement, healthcare and education. This is all in contravention of certain treaties to which Kenya is a party – including the CRC. The CRC provides, *inter alia*, Article 7(1) which states that every child be immediately registered after birth. The UN Committee on the Rights of the Child noted its concern that vulnerable groups of children in Kenya, including intersex children, faced difficulty in obtaining birth registration and called on the State to, *inter alia*, “expedite the adoption of a law that provides for universal and free birth registration at all stages of the registration process”. This was provided for in paragraph 30 of Concluding Observations on the combined third to fifth periodic reports of Kenya as adopted by the Committee at its seventy-first session (11–29 January 2016).

Being born intersex may also mean a matter of life and death. Some communities in Kenya consider intersex children a curse.⁵³ They are disowned or at times killed.⁵⁴ Patriarchal sentiments have meant that those who are intersex are seen as “cursed, deviant or devil worshippers”.⁵⁵ As discussed above, there is a notion that being a part of the SOGIESC community is

53 K. G. Nelson, ‘Intersex is Counted in Kenya’s Census: but is this a Victory?’ *Global Post* 10 September 2019 <<https://theworld.org/stories/2019-09-10/intersex-counted-kenyas-census-victory>> visited on 10 December 2023.

54 *Ibid.*

55 M. W. Kuria and S. G. Maranya, ‘The Legal Impunity for Gender Based Violence against Intersex, Transgender, and Gender Diverse Persons in Kenya: A Legal Recognition Issue for the African Human Rights System’ 33:1 *Stellenbosch Law Review* (2022) pp 100 – 122.

“un-African”. This, Kuria and Maranya argue, has made it difficult for the law to coincide with the cultural norms in Kenya. These cultural norms have seeped into the core of society to the point that human rights are disregarded by the community. A 2018 research study conducted in Kenya found that 27.4 per cent of religious leaders agreed that violence against those in the SOGIESC community is justified to preserve cultural values.⁵⁶

In 2015, an East African Baseline Survey aimed at highlighting the plight of intersex persons was conducted in Kenya, Uganda and Rwanda. The survey highlighted the need to stop the stigmatisation, discrimination and violence perpetuated against intersex persons. It further called for the inclusion of the intersex status in health and social development education, service access and employment policies. Despite this call to action, the reality on the ground is profoundly different.

3.2 “Baby A” Case

Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others [2014], eKLR is a watershed moment in the battle for the recognition and protection of intersex rights. In terms of Article 27(4) of the Kenyan Constitution, the High Court upheld the rights of intersex persons to non-discrimination and affirmed their right to protection from torture, and cruel, inhuman and degrading treatment.

According to the facts of the case, Baby ‘A’ was born intersex. A question mark was inserted in the column that indicated the child’s sex. It was alleged by the applicants that the insertion of a question mark to indicate the child’s sex constituted a violation of the rights as guaranteed in Section 4 of the Children Act, 2001 [Kenya], No. 8 of 2001 Articles 27, 28 and 29 of the Constitution of Kenya, 2010. Namely, it amounted to a violation of the rights of the child to legal recognition, dignity and freedom from inhuman and degrading treatment. Additionally, the Births and Deaths Registration Act Chapter 149 (BDRA), indicates in the schedules, the forms in which the registration must take place; there is only provision made for ‘male’ or ‘female’. According to the BDRA, a birth must be registered within three months of the birth occurring. Baby ‘A’ had not been issued a birth certificate by the time the matter had gone to court – which exceeded the three-month requirement. The applicants sought a declaration that intersex children are entitled to the same rights as all other persons under the Constitution, the Children Act and various international instruments to which Kenya is a signatory e.g. the CRC, ACRWC, the Universal Declaration of Human Rights, the International Covenant on Civil and Political

⁵⁶ *Ibid.*

Rights and the African Charter. The applicants also sought a declaration that non-essential surgeries on intersex children were cosmetic and thus a human rights violation.

While the court ruled in favour of the respondents in that they did not violate the rights of Baby 'A' due to a lack of evidence, the court did state that the matter was to be addressed by the legislature to create a third category of sex. The court relied on the principle of separation of powers. While the Baby 'A' case constitutes an important step forward in the dialogue regarding intersex children, it is unfortunately left wanting in many circumstances.⁵⁷ Unfortunately, much of what is said regarding the human rights abuses and the need for a change in legislation to stop the unnecessary surgeries on children is *obiter*.⁵⁸ This would have certainly been the best opportunity for the court in Kenya to lead the charge insofar as being the country in Africa leading the charge regarding this issue as ruled by the courts. Articles 259(1)(b) and (c) of the Kenyan Constitution state the following:

This Constitution shall be interpreted in a manner that:

- b). advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights;
- c). permits the development of the law

Article 20(4)(a) and (b) of the Constitution further state:

In interpreting the Bill of Rights, a court, tribunal or other authority shall promote:

- a). the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
- b). the spirit, purport and objects of the Bill of Rights.

Article 20(4) thus imposes a duty on the courts to construe any law, practice and action in contravention of the values of the Bill of Rights as unconstitutional. Would it thus have been judicial overreach to conclude that the respondents had violated this position and subjected the applicant to a violation of the children's dignity, and equality (in particular Article 27(4) which specifically

⁵⁷ S. Kayombo, 'Case review: Baby 'A' and Another v A' and Another v Attorney General and Others [2014] eKLR' 4:1 *SAIPAR Case Review* (2021) pp 16–20.

⁵⁸ *Ibid.*

prohibits the State from directly or indirectly discriminating against an individual based on, *inter alia*, sex), freedom and security of the person and healthcare, amongst other rights? I think that the court wasted an opportunity to make such an argument. The court was indeed hesitant to make such a ruling. A finding that the State ought to create guidelines for intersex surgeries would not have amounted to the court overstepping its mandate, but simply the court upholding the provisions of the Constitution and ensuring that the State abided by these provisions.⁵⁹

In any event, the new Children Act, 2022 has taken effect in Kenya – repealing the Children Act 2001. Article 21 specifically provides for the rights of intersex children. However, one must first analyse the definition of an intersex child as per the definition therein. The Children Act, 2022 defines an “intersex child” as:

a child with a congenital condition in which the biological sex characteristics cannot be exclusively categorised in the common binary of female or male due to inherent and mixed anatomical, hormonal, gonadal or chromosomal patterns, which could be apparent before, at birth, in childhood, puberty or adulthood

I think that the problem with this definition is the pathologising of an intersex person. To call it a “congenital condition” is to further perpetuate the notion that there is still something inherently wrong with intersex bodies and not recognise that it is a naturally occurring phenomenon.

In assessing other provisions set in the Children Act, 2022, it is evident that the legislature has made great strides in ensuring that the rights of the intersex child are protected. One can point to Article 7(3) which places a positive duty on the Principal Registrar to ensure correct documentation and registration of intersex children at birth. Furthermore, in terms of Article 144 (1), a child in need of care and protection includes a child who has been or is likely to be subjected to gender-normalising surgery. The wording here is important. It does not simply refer to the non-essential surgery as just that, but rather as a form of mutilation. This indeed echoes the wording used by some NGOs.⁶⁰ This may be seen as a call to treat non-essential surgery as a harmful practice in stronger language to reinforce the seriousness of these surgeries. Article 144 (z) also provides that intersex children require care and protection in situations where they may face discriminatory treatment abuse.

59 *Ibid.*

60 <<https://stopigm.org/>>. visited on 10 March 2024.

The Children Act, 2022 is not without criticism. Article 23(1)(f) (which deals with, *inter alia*, harmful cultural practices) for example states that “No person shall subject a child to, except with the advice of a medical geneticist, organ change or removal in case of an intersex child”. This is followed by Article 23(2) which makes it a criminal offence to contravene the provisions of section 23(1) and such a person commits an offence and if convicted will be liable to imprisonment for a term of “not less than three years or to a fine of not less than five hundred thousand shillings, or both”.

While it is progressive to make a harmful practice a criminal offence (which is also revolutionary in the context of intersex children on the African continent); it seems odd that the only person who has a say regarding the approval of the surgery is a medical geneticist. This disregards the bodily autonomy and participation of the child and infringes on the rights and responsibilities of the parent. Thus the intersex child is still at the mercy of medical professionals. There are no set guidelines regarding the perpetuation of these harmful medical practices as they pertain to medical professionals who may indeed think that Dr Money’s “gender-rearing optimisation model” should still be adhered to.⁶¹

Furthermore, Article 144 of the Children Act, 2022 places intersex children (in general) as those children in need of care and protection. This could also be construed as “othering”. “Othering” means treating people from another group as essentially different from and generally inferior to the group you belong to.⁶² This can bring along with it certain dangers. While there is certainly a battle to be had regarding the equality of intersex children, a more new nuanced approach would be to provide an equitable space for intersex children where they are essentially viewed simply as another category of sex.

4 Uganda

4.1 *Historical Context*

As per Ranger⁶³

The invented traditions imported from Europe not only provided whites with models of command but also offered many Africans models of

61 Creighton, *supra* note 7.

62 A. Kobayashi(ed), International Encyclopedia of Human Geography (Second Edition) (Elsevier Ltd 2019), pp 25–31.

63 E. Hobsbawm and T. Ranger (eds), The invention of tradition (Cambridge University Press 2014).

‘modern’ behaviour. The invented traditions of African societies – whether invented by Europeans or by Africans themselves in response – distorted the past but became in themselves realities through which a good deal of colonial encounter was expressed.

Christianity came to Uganda rather late compared to many other parts of Africa – with missionaries arriving around 1877.⁶⁴ Now a staggering number of the population is Christian. According to a 2014 census, 82 per cent of the population identify as Christians. The reasons behind the establishment of these facts are two-fold. Firstly, Christianity (and indeed the Abrahamic religions as a whole – as one can generalise) has been used as an integral lynchpin in establishing the morality of a society. Secondly, the colonisation and evangelisation of Uganda have invariably left an indubitable mark on what constitutes morality in the case of SOGIESC identities. While much of the focus in Uganda is on sexual orientation – much of this may spill into the LGBTQI+ community as a whole. According to Leviticus 18:22 of the New King James Version⁶⁵ of the Christian faith “Thou shalt not lie with mankind, as with womankind; it is abomination”. It is important to note that the passage itself has been translated from original Hebrew and many scholars have thought that there might be a mistranslation. The Hebrew Bible does not refer to and hence does not condemn, homosexuality as a sexual orientation.⁶⁶ However, this research will not delve deeply into that discussion. The purpose is to establish the backdrop upon which the policies regarding the anti-LGBTQI+ legislation are premised. It is also important to understand that colonisation was also a tool used to replace African tradition with that of the colonising powers.⁶⁷ Thus much of the “history” has been lost and/or distorted to fit a certain narrative.⁶⁸

4.2 *Modern-day Woes*

Julius Kaggwa (who is intersex) is the executive director of the Support Initiative for People with Atypical Sex Development (SIPD Uganda).⁶⁹ SIPD

64 N. B. Musisi, ‘Morality as Identity: the Missionary Moral Agenda in Buganda, 1877–1945’ 23:1 *The Journal of Religious History* (2000) pp 51–74.

65 The Simplified King James Version: The New International Version (2022).

66 J. Stiebert and J. T. Walsh, ‘Does the Hebrew Bible Have Anything to Say About Homosexuality?’ 14:1 *Old Testament Essays* (2001) pp 120–152.

67 K. Ward, ‘A History of Christianity in Uganda’ *The Dictionary of African Christian Biography* <<https://dacb.org/histories/uganda-history-christianity/>> visited on 10 December 2023.

68 Ward, *supra* note 68.

69 ‘Support Initiative for People with Congenital Disorders’ <https://sipdug.org/> visited on 10 December 2023.

is an NGO in Uganda which, through community outreach and engagement, provides reliable and objective information on issues surrounding the intersex community.⁷⁰ As noted above, the main issue of contestation in Uganda in recent times has been homosexuality, as evidenced by The Anti-Homosexuality Bill, of 2023. The Bill, as passed by the Ugandan Parliament, creates legislation that further criminalises the identities and behaviour of LGBTQI+ people in Uganda.⁷¹ This includes, but is not limited to, a life sentence for consensual same-sex conduct among adults. However, I note that, as substantiated by Kaggwa, intersex people are viewed as being under the umbrella of the LGBTQI+ community and are thus affected by the legislation. Perhaps not directly, but certainly indirectly by being politically labelled as LGBTQI+ and part of the gay rights advocacy discourse also has its contribution to pushing intersex people in Uganda further to the margins, keeping them only visible through a homosexual lens.⁷² This viewpoint may be dangerous in the sense that intersex issues are thus further misunderstood and the recognition of intersex bodies is further diminished.

4.2.1 Cognitive Dissonance – Work of NGOs

There seems to be a cognitive dissonance when it comes to intersex matters in Uganda. While the work of organisations such as SIPD has in educating communities regarding intersex issues, the organisation itself may create a further lack of understanding of intersex issues. For example, the very name of the organisation is problematic. By drawing focus on the “atypical sex development” it appears that the NGO perpetuates the cycle of pathologisation that has long plagued the intersex community. The focus is on intersex being a “disorder” and not a naturally occurring phenomenon. In doing so, regardless of the good intentions of the organisation, there seems to be an undertone the issues facing intersex persons must still exist within a binary system. To this effect, one can analyse the following statement by Kaggwa:

Many people in Uganda – including intersex people themselves – speak of intersex people having “two private parts”. But humanly speaking, this cannot occur like a human being. A human being cannot have two sets of genital organs ... which fully function at the same time.⁷³

⁷⁰ *Ibid.*

⁷¹ S. Nyanzi, ‘Dismantling reified African culture through localised homosexualities in Uganda’¹⁵:8 *Culture, Health & Sexuality* (2013) pp 952–967.

⁷² J. Kaggwa, ‘Understanding intersex stigma in Uganda’, (2016), <<https://intersexday.org/en/understanding-stigma-uganda/>>, visited on 11 December 2023.

⁷³ *Ibid.*

This opinion does not take into account the multiple variations in which being intersex may manifest. Furthermore, focusing solely on genitalia adds to the morbid curiosity of “what’s in your pants” – which adds to the layer of mysticism of the human body and reduces intersex persons solely on their genitalia. This form of “othering” is harmful rather than helpful.

4.3 *Lived Reality in Uganda for Intersex Persons*

There is a substantial culture of silence surrounding the issues of intersex persons in Uganda. This is coupled with extreme poverty.⁷⁴ The culture of silence manifests in several traditional rituals, which often means killing the intersex infants in question.⁷⁵ Those who survive are often raised in secrecy and isolation. And as teenagers, some are forced to leave school or end up on the streets.⁷⁶ There have also been reports of infanticide and the abandonment of infants in pits.⁷⁷ In many cases, the mothers of intersex children will be blamed for the birth of an intersex child. Their families will also consult witch doctors, mediums and traditional healers for a solution. In many instances, the mother will work with either a traditional medicine practitioner or some other ally to kill the child.⁷⁸ Furthermore, the process of naming a baby is an extremely sacred tradition. The baby-naming holds deep practical and symbolic meaning. However, when it comes to intersex children, many families refuse to give the child a name. It defines the child as not being worthy of personhood.⁷⁹ One such incident is that of Josephat Kawaddwa. He says when a clan won’t name a child, it is rejecting the “specific names belong to specific clans,” he goes on to state that “clans give a sense of belonging. That is how we, the Baganda, identify each other. So when a child is presented before me to give a name and I refuse, it’s an indication that I believe the child isn’t my family and can’t belong to my clan, because clanship is lineage”.⁸⁰

The refusal to provide a child with a name not only isolates a child from the family but also presents practical and legal implications. The Registration of Persons Act, 2015 provides in section 30(1) that:

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ N. Segawa, ‘Intersex Children in Uganda Face Rejection, Violence’ 23 August 2020. <<https://globalpressjournal.com/africa/uganda/intersex-children-uganda-face-rejection-violence/>>, visited on 11 December 2023.

⁷⁷ *Ibid.*

⁷⁸ Kaggwa, *supra* note 72.

⁷⁹ Segawa, *supra* note 76.

⁸⁰ *Ibid.*

A parent, guardian or the person having charge of a child, shall immediately after the date of birth or finding of a child notify the registration officer for registration of the birth of that child.

Although it is unclear what is meant by “immediately” in this context as a set number of days is not provided; it is clear that the registration of such a birth is necessary for, amongst others, the purposes of the population register. Furthermore, section 32 (2)(a) of the Act states that:

The registration officer shall before entering any information in the register in respect of birth; the name, sex, date, disability if any weight at birth, place and district of birth.

This also affects the attainment of a birth certificate as provided for in section 39(2) (a) of the Act.

An example of the practical effect this has on a child is provided in the following story:⁸¹

The child of Roselyn Bilabwa and her husband, Henry, went four months with no name. They took their 2-week-old intersex baby to Henry’s father, but he declined to name the newborn. Bilabwa recalls, “He called our child a *kikulekule*, a Luganda word for a nonhuman being, an “it”, “a form of creation that no person in his clan could ever give birth to.” “By refusing to name our baby, it was evident that my father had discriminated against one of his blood,” says Henry, who asked to be identified by only his first name for fear of stigmatization. “My child was denied a place, a lineage in my family.” Henry says they tried a female name but dropped it after their community asked, “Is she a girl?” Finally, a doctor in a hospital named the baby.

This means that the baby was either issued a birth certificate with the incorrect sex or the baby was not issued a birth certificate at all. The latter would thus, in contravention of the provisions of the CRC (Article 7) and the ACRWC (Article 6) which deal with the registration of birth as it would also deny the child with a nationality. This would effectively mean that the child is rendered stateless. A stateless child is at risk of not being able to access basic human rights such as socio-economic rights, healthcare and education.

81 *Ibid.*

Section 38 of the Registration of Persons Act, 2015 does alternatively allow for the issuing of a birth certificate if the child is born a “hermaphrodite”.

Section 38 states that

If a child born a hermaphrodite, after being registered, through an operation, changes from a female to a male or from a male to a female and the change is certified by a medical doctor, the registration officer shall, with the approval of the Executive Director of the Authority upon application of the parents or guardian of that child update the particulars of the child, which appear on the register.

This presents some problems. Firstly, it condones the use of surgical intervention to make an intersex child either male or female. There is no category allocated for the sex of child as “intersex”. Secondly, the child has no agency in this surgical intervention. There are instances in which surgical intervention is necessary – for instance if the child is unable to urinate – however, it is clear from the wording herein that the main objective is to make the child fit into the binary. Furthermore, there is no recognition that the term “hermaphrodite” is a slur. As per the Intersex Society of North America (ISNA), the word “hermaphrodite” is a stigmatising and misleading word. ISNA states that while some intersex people do reclaim the word “hermaphrodite” with pride to reference themselves, it is to be avoided except under specific circumstances.⁸² Finally, the ultimate power is given to the medical professional to determine the sex of the child.

Due to the shame, stigmatisation and administrative processing of an intersex child, infants are subjected to gender “normalising” surgery. Some parents will go as far as contacting local radio stations in Uganda with appeals seeking donors to help fund gender “normalising” surgery abroad due to the lack of adequate facilities in Uganda.⁸³

The complexities in which intersex persons find themselves may stem from the lack of education surrounding their particular set of issues. The community has largely been ignored or often lumped in with issues concerning sexual orientation. This of course has lent itself to the same discrimination faced by sexual and gender minorities in the form of hate crimes, discrimination, sexual assault and even murder.⁸⁴ This lack of understanding of intersex persons

82 Abouafia, *supra* note 19.

83 Y. Kakande, ‘In Uganda, parents seek controversial genital surgery for ‘intersex’ babies’ 18 December 2016 *Reuters* < <https://www.reuters.com/article/idUSL5N1Eo5NQ/> > visited on 11 September 2023.

84 J. Oloka-Onyango, ‘Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya’ 15:1 *African Human Rights Law Journal* (2015) pp 28–57.

and their intersecting issues was displayed in the debate in the Ugandan Parliament over the Registration of Persons Bill, 2014. The chairperson was at pains to explain that there are intersex persons present in Uganda (although she used the term ‘hermaphrodite’). Her declarations were met by laughter in the House. It is also clear that she is uneducated on the issue of intersex bodies. The chairperson stated, *inter alia*:

There are people who are hermaphrodites; who are born with two sexual organs and at some stage you must decide whether you are going to be a man or a woman

One Ms Alaso had this to say: “I would like to take cognisance of the fact that there are Ugandans that are born hermaphrodites and there will be need for corrective surgery” ...

She then proceeds to speak about the adoption of children of same-sex couples and the alleged abuse perpetrated by the same-sex couple who are adoptive parents. In doing so, she completely side-steps the issue of intersex children altogether.⁸⁵ She further likens intersex people as having a disability or an anomaly which needs urgent surgical intervention. This contributes to the narrative that all intersex persons do not desire their bodies, have agency over their bodies and should be ashamed thereof.

It thus seems that the response to intersex births is to surgically ‘correct’ the child’s sex to either male or female on the basis that it is an anomaly and can thus not be tolerated. As stated above, intersex children are not only exposed to these non-essential surgeries – they are also at risk of infanticide, abandonment, discrimination based on superstitions and the inability to have agency over their own lives. This may lead many intersex persons into poverty as the process of birth registration also has the potential to leave one stateless and unable to obtain employment; vote; have access to socio-economic rights and the inevitable loss of their equality and human dignity. The Anti-Homosexuality Bill, of 2023 will undoubtedly bring with it a form of violence and human rights abuses not only upon same-sex couples but also those who in infancy, cannot express their sex to an already stigmatising and silent society.

85 *Ibid.*

5 India

5.1 *Background*

On 22 April 2019, the Madras High Court in the state of Tamil Nadu, banned unnecessary gender-normalising surgeries after the court upheld the right to informed consent insofar as it relates to the bodily autonomy of intersex children. *Arunkumar v. Inspector General of Registration and Others* (2019)⁸⁶ (*Arunkumar* case) was concerned with whether a marriage solemnised between a male and a transgender woman, both professing Hindu religion, was a valid marriage. The court answered the question in the affirmative. The court referred to, *inter alia*, the decision reported in *National Legal Services Authority v. Union of India* (2014) 5 SCC 438 (NLSA case) where the Supreme Court upheld the transgender person's right to decide their self-identified gender. In the aforementioned case, the Supreme Court held that the existence of a third category outside the male-female binary has been recognised in the indigenous Hindu tradition. A person of the third gender is referred to as a *Hijra*.

However, as one will see, this term in and of itself is not without its complexities (particularly when viewed through a Western eye). The term seems to conflate sex and gender as well as fails to make a distinction between transgender persons and intersex persons. One can see such an example in the *Arunkumar* case where in paragraph 13, the court seems to use the terms as synonyms:

For too long, transgender persons/intersex people have been languishing in the margins. The Constitution of India is an enabling document. It is inviting them to join the mainstream.

While the tenets behind this statement are well-intentioned; it does unfortunately conflate intersex persons and transgender persons.

I think that NLSA unfortunately erred in their interpretation of "sex". In terms of Articles 15 and 16 of the Constitution of India, 2022 there is a prohibition on discrimination on grounds of religion, race, caste, sex or place of birth – by the State and by individuals. No mention is made of 'gender'. Complexity is added when one considers that the court NLSA held that held that "sex" here does not only refer to biological attributes but also includes "gender" (based on one's self-perception). Thus, the Court held that discrimination on the grounds of "sex" included discrimination based on gender identity. It is unclear whether

86 *W.P. (MD)* No. 4125 of 2019.

this is what the legislature intended. If so, again there is a conflation of gender and sex. Intersex issues are not the same as transgender issues. There needs to be a clear distinction as the human rights violations of intersex persons begin at birth – which is not the case for a transgender person. This means a concerted effort to educate medical professionals, families, and parents at birth and at some point the child (at an age when it is the child can make informed decisions concerning their body) regarding the implications and complications attributed to these types of surgeries.

5.2 *Hijras – History Thereof*

The concept of *Hijra* is one of historical significance in India, Bangladesh and Pakistan. The vast variety of terms used to translate the Hindi word ‘Hijra’ creates confusion for an outsider.⁸⁷ This is due in part to the world associating the word with a “third gender”.⁸⁸ However, the term, which can translate into many forms in the Indian subcontinent, is so complex that it can also include intersex persons and eunuchs.⁸⁹ The concept of *tritiya prakriti* (third nature/sexuality/gender) and myths from the Ramayana and the Mahabharata (two of India’s greatest epics that have influenced the Hindu way of thinking and belief system) are used as evidence for the ‘*hijras*’ historical presence in South Asia, while the two ethnographies on *hijras* by Nanda (1991) and Reddy (2005) are cited to refer to the religious and political significance of *hijras* in everyday Hindu lives.⁹⁰ The *Hijra* community in the Indian sub-continent has a broad historical background. This community has a history of more than 4,000 years.⁹¹ They are mentioned in various ancient texts including *The Kama Sutra*, written by Vatsyayana.⁹² During the period of Mughal Rule in India (an Islamic empire that controlled much of South Asia between the 16th and 19th centuries),⁹³ the *Hijras* held various important administrative positions. They also had a significant role in some religious matters.⁹⁴ However, colonialism

87 M. Sibsankar, ‘The hijras of India: A marginal community with paradox sexual identity’ 34(1) *Indian Journal of Social Psychiatry; Mumbai*, (2018) pp 79–85.

88 *Ibid.*

89 *Ibid.*

90 V. Saria, ‘Begging for change: Hijras, law and nationalism’ 53(1) *Contributions to Indian Sociology*, (2019) pp 133–157.

91 S. Yadav and R.K. Patni, ‘Indian Transgender: Glimpse on Indian History and Mythology’ 6(6) *Journal of Emerging Technologies and Innovative Research*, (2019) pp 423–426.

92 P. Roy, India’s third gender: A journey of Hijra community from mythology to harsh reality <<https://myvoice.opindia.com/2020/06/indias-third-gender-a-journey-of-hijra-community-from-mythology-to-harsh-reality/>> visited on 18 December 2023.

93 J. F. Richards (ed), *The Mughal Empire* (Cambridge University Press 1995).

94 Roy, *supra* note92.

changed this tradition as the British harboured homophobic and transphobic beliefs. Unfortunately, after independence, the contemptuous attitude of the society towards the *Hijras* did not change.⁹⁵ This problem seems to plague many a colonised nation as they struggle to preserve their history and culture amid a Western construction of what is appropriate.

5.3 *Present Day Issues*

While the rest of the *Arunkumar* judgment concerns itself with the specific set of facts which the court presented paragraphs 16 – 20 of the judgment deal specifically with issues of intersex children. The court details how intersex activist Gopi Shankar⁹⁶ had requested the National Human Rights Commission of India (NHRC) to ban forced surgeries on intersex babies in India and to recognise intersex people's fundamental rights in India. It was partially through his work that the court itself came to discuss the issue of unnecessary surgeries on intersex infants and children. As it currently stands in terms of the Registration of Births and Deaths Act, 1969, the Register of Births, a statutory register, classifies all births under either 'male' or 'female'. This registration of birth must be done within 30 days of birth. As stated above, there is no need to perform these surgeries unless there is a good reason therefore, such as to urinate etc. However, instead, these types of surgeries are so-called 'socio-cultural emergencies'.⁹⁷ In India, there is a further layer. There appears to be a greater inclination amongst doctors, parents, family and other stakeholders to 'make' the intersex child male.⁹⁸ The reasons are as complicated as the highly patriarchal society in which India exists.⁹⁹ One must consider that in many parts of India the preference for sons is motivated by economic, religious, social and emotional desires and norms that favour males and make females less desirable.¹⁰⁰ Women are often seen as a financial burden in terms of the expectations of dowries for example when one is to get married. Sons also carry on the family name, while daughters are then married into another household, carrying on the name and duties of another household.

95 *Ibid.*

96 G. Shankar, 'How India Can Lead The Intersex Rights Movement' *Swarajya* 24 April 2020 <<https://swarajyamag.com/ideas/how-india-can-lead-the-intersex-rights-movement>> visited on 18 December 2023.

97 Gauthaman, *supra* note 39.

98 *Ibid.*

99 *Ibid.*

100 R. Pande and A. Malhotra 'Son preference and daughter neglect' <https://www.unfpa.org/sites/default/files/resource-pdf/UNFPA_Publication-39764.pdf> visited on 14 December 2023.

The court in the *Arunkumar* case called for the practice of non-essential intersex surgeries to be brought to a halt by the government in Tamil Nadu. This would in effect mean that the surgeries could not be carried out in Tamil Nadu, but continue to thrive in other states in India. In January 2021 the Delhi Commission for Protection of Child Rights recommended that the Delhi government should declare a ban on medically unnecessary surgeries on intersex infants except in the case of life-threatening situations,¹⁰¹ however, this recommendation has yielded no actual results or a call to action.

India is effectively trying to make changes *vis-à-vis* the rights of the SOGIESC. However, many of those changes have been directed towards marriage equality and the transgender community. There is also the ever-present conflation of sex and gender that seems to be plaguing the judiciary and may be more harmful than useful. However, one must also take into account the historical context in which Indian society exists – especially wherein the term ‘hijra’ lies. In *NLSA* the court states, *inter alia*, that:

Hijras are biological males who reject their ‘masculine’ identity in due course of time to identify either as women, “not men”, “in-between man and woman”, or “neither man nor woman”.

This provides a degree of confusion as it does not include intersex persons as per the older definitions used throughout the Indian subcontinent’s history. This may of course also be due to the Western construction of what the SOGIESC community should be. The term LGBTQI+ itself may also be harmful as it does seemingly ignore the historical context. It may perhaps also be my construction of what the umbrella term *ought* to be which may constitute a misunderstanding of the space in which the constructs of Indian sex and gender norms which may in and of itself create a problem. In the *Arunkumar* the judgment clearly states, *inter alia*, in paragraph 18 that “informed consent should be ensured in medical interventions for people with intersex conditions”. Furthermore, the judgment states that “parents often consent to medical intervention for their children in circumstances where full information is lacking and without any discussion”. Even in the *NLSA*, the court stated that no one should be forced to undergo medical intervention to fit the narrative of the gender binary. From the analysis of the jurisprudence alone, one would be hard-pressed not to believe that changes are being made.¹⁰² However, the process has been slow

¹⁰¹ Gauthaman, *supra* note 39.

¹⁰² P. K. Agarwal, ‘Rights of Third Gender in India and Recent Developments: Special Reference to *NLSA* Judgment’ 7:1 *Indian Journal of Law and Justice*, (2016) pp 1–12.

and has only been recognised in one state in India thus far. It speaks to a larger issue of how serious the government is to eradicate this harmful practice. *Hijras* and other sexual and gender minorities have been left on the fringes of society. They have been left to squalor in the wastes of, amongst others, sex work, poverty, abandonment and inability to access employment (despite the Constitution prohibiting discrimination in employment practices).¹⁰³ Furthermore, infanticide of intersex babies and children continues to be an ignored issue in India (while not limited to India alone).¹⁰⁴

Perhaps the way forward would be to disentangle the conflation of transgender persons and intersex persons first. A better understanding of the differences thereof would go a long way in providing much-needed education on the different needs of the two groupings as they pertain to parents, medical professionals, families, the child and the community.

6 Conclusion

There is also something to be said about the fact that there seems to be a veneer of progressiveness in Kenya (especially) and India. Both nations recognise that intersex children exist; however, there is still a vast array of human rights abuses. Uganda seems to want to shy away from the existence of intersex persons entirely. Uganda certainly seems, not only from a legislative perspective, but also executive point of view, to support non-essential surgery on intersex infants and children. There are vivid descriptions of intersex children being categorised as ‘anomalies’. Language wields unwavering power. If the parliamentarians in Uganda cannot even begin to determine the definition of an intersex person; what hope is there on the ground level to assist intersex children? The work of NGOs has been most important. As stated earlier, there is power in words. There is certainly an argument to make regarding using the terminology of NGOs namely – “intersex genital mutilation” and the more politically correct term – “unnecessary non-essential cosmetic surgery”. The latter, being more palatable seems to be the approach of the international community (one need only look at the General Comments and Concluding Observations as issued by bodies such as the UN Committee on the Rights of the Child). While the former term evokes strong, violent, gruesome and

¹⁰³ A. Banerji, ‘Job snubs to forced surgery: India’s ‘invisible’ intersex people’ *Reuters*, 16 August 2019. <[¹⁰⁴ *Ibid.*](https://www.reuters.com/article/idUSKCN1V6oZL/#:~:text=BANGALORE%20(Thomson%20Reuters%20FoFoundati)%20%2D,been%20mistreated%20all%20his%20life>”, visited on 10 December 2023.</p>
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powerful imagery. One may argue that by using the former, the issue may be on par with the brutality of female genital mutilation and call on the same response and stance that the various international human rights bodies and various States have taken in this regard. I used the terms interchangeably at certain junctures to take a more palatable approach.

This research has hopefully shed light on the issue of gender-normalising surgery in Kenya, Uganda, and India – not picked at random, but rather because of the development of this area of jurisprudence in these respective countries has been significant. Further conceptualising the concept from the perspective of the Global South as much of the focus has been in the Global North. The issue is further complicated in light of the cultural rites and practices which have been practised in the aforementioned countries for centuries. The stark difference between Africa and India is that India did not allow British administrators to create Indian traditions for them. Britain made greater use of the idea of the “Imperial Monarchy” in Africa as compared to many of their other colonies.¹⁰⁵ The result is a complete erasure of Africa’s actual cultural identity – perhaps even that of intersex persons on the African continent. Whereas in India there has been a centuries-long, oral and written history acknowledging the existence of intersex persons in society – even if not fully realised in modern society. The decolonisation of these practices, ever so deeply entrenched in these countries, presents an issue as it may further exacerbate the sentiment that the Global North finding itself as being seen to be ‘interfering’ in the affairs of the Global South as has been the viewpoint since the advent of colonisation. The history of *Hijras* in India for example is complex and has found itself equating intersex issues with those of transgender issues. In Uganda, intersex persons are seen to be entangled in the issues of homosexuality and not as a separate issue entirely with an ever-present and deeply entrenched Evangelical Christian focus. The signing of the Anti-Homosexuality Act will certainly affect intersex persons whether it is directly or indirectly by registration of birth. It is only in Kenya that a beacon of hope appears. However, there are still lingering issues at play. The “Baby A” case certainly guides one in terms of providing that hope. The Kenyan government now has an opportunity to leap miles ahead of any African state by enacting legislation protecting the rights of intersex infants and children.

Various experts have concluded that these forced and coercive medical interventions violate rights to the security of a person, the right to bodily and mental integrity, freedom from torture and ill-treatment, and freedom from violence. There is a need to also disentangle the medical community from the

¹⁰⁵ Ward, *supra* note 68.

harmful practices which physicians have practised since the 1960s when Dr John Money created the “gender-rearing optimisation model”.

Furthermore, the social and cultural factors contributing to the persistence of gender-normalising surgery cannot be overlooked. Deep-rooted societal beliefs, lack of awareness, and the stigmatisation of intersex individuals play a crucial role in perpetuating these harmful practices such as abandonment and infanticide. Therefore, addressing gender-normalising surgery requires a multi-faceted approach that encompasses legal, societal and educational.

Efforts must be made to enact comprehensive legislation that explicitly prohibits non-consensual surgeries on intersex individuals; ensuring that their bodily autonomy and right to self-determination are protected. Additionally, healthcare professionals and practitioners should receive proper training on intersex issues, including educating the community at large and parents on the concept of informed consent; to promote ethical practices and alternative non-surgical interventions.

Furthermore, public awareness campaigns and community engagement programs should be implemented to challenge the prevailing stereotypes and misconceptions surrounding intersexuality. Open dialogues, advocacy, and support groups can contribute to de-stigmatising intersex conditions and fostering a more inclusive society.

Ultimately, addressing gender-normalising surgery in Kenya, Uganda, and India requires collaboration between governments, civil society organisations, medical professionals, and intersex individuals themselves. This in turn will begin the process of recognising the rights and dignity of intersex people, advocating for legal reforms, and fostering societal acceptance. Through the concerted effort of the abovementioned stakeholders, one can ensure that intersex individuals are no longer subjected to unnecessary and harmful surgical interventions and that their rights to bodily integrity and self-determination are fully respected.