

RIGHT TO GENITAL INTEGRITY: LAW, LIMBO, AND THE STATUS OF INTERSEX CHILDREN IN INDIA

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Abstract

As the movement for recognizing queer rights in India gains momentum, it is critical to evaluate the rights of a particularly neglected group within the LGBTQIA+ community: intersex children. Since 2018, the Indian Supreme Court has decriminalized consensual adult same-sex relationships and has recognized the right to privacy—including decisional and bodily privacy—as a fundamental right guaranteed by the Indian Constitution. However, even after these crucial decisions, intersex children are still subject to medically unnecessary surgeries without their consent. Many suffer long term consequences from such disfigurement. In this Article we examine the rights of children from an ethical and legal perspective in the Indian context. Drawing on classical, feminist, and queer bioethics frameworks, we briefly review the ethical violations inherent in performing genital surgeries on intersex children without their consent. We analyze India's international legal obligations and argue that those obligations fill a significant gap in India's jurisprudence on sexual minorities. We also analyze the domestic legal framework, studying key decisions of various high courts, including the Indian Supreme Court, that have recognized the right to self-determination of gender identity. Finally, we suggest possible alterations to the current legal framework that, if implemented, will help further legal recognition of the rights of intersex children.

INTRODUCTION

Sex is a spectrum,¹ and the term intersex refers to the range of naturally occurring variations in sex characteristics that do not fit within the narrowly defined feminine

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and masculine sex traits.² Children with intersex traits do not possess normative feminine or masculine bodies,³ and this often has tremendous social consequences for the child. Historically, such children have been branded as deviants and their bodies have been subjected to immense public scrutiny and violence.⁴ Children born with intersex traits are seen as having bodies that require “course-correction,” i.e., bodies that must be made to fit within the gender binary.⁵ Cosmetically “normalizing” surgeries are imposed on intersex children regularly in an effort to make them “recognizably human,” in Judith Butler’s sense.⁶ Essentially, such surgeries are often considered a prerequisite for a livable life, and are viewed as a pre-cursor to being recognized as a human being.⁷ It is important to note that such surgeries are significantly different from other invasive but medically necessary forms of treatment that are carried out to prevent immediate medical risks to a child.⁸

¹ Thekla Morgenroth & Michelle K. Ryan, *The Effects of Gender Trouble: An Integrative Theoretical Framework of the Perpetuation and Disruption of the Gender/Sex Binary*, 16 PERSP. ON PSYCH. SCI. 1113, 1115 (2020); Anne Fausto-Sterling, *The Five Sexes: Why Male and Female Are Not Enough*, 1993 SCIENCES, 22, 24; ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* (2000); Janet Shibley Hyde et al., *The Future of Sex and Gender in Psychology: Five Challenges to the Gender Binary*, 72 AM. PSYCH. 171, 180 (2019); Claire Ainsworth, *Sex Redefined*, 518 NATURE 288, 292 (2015).

² EQUINOX INITIATIVE FOR RACIAL JUST., *TOWARDS GENDER JUSTICE 5* (2021), <https://www.equinox-eu.com/wp-content/uploads/2021/05/Towards-Gender-Justice.pdf> [<https://perma.cc/94C3-SG5D>].

³ Morgan Carpenter, *The Human Rights of Intersex People: Addressing Harmful Practices and Rhetoric of Change*, 24 REPROD. HEALTH MATTERS 74, 79 (2016).

⁴ *Id.* at 74.

⁵ J. David Hester, *Intersex(es) and Informed Consent: How Physicians’ Rhetoric Constrains Choice*, 25 THEORETICAL MED. & BIOETHICS 21, 26 (2004); Press Release, German Ethics Council, *Intersex People Should Be Recognized, Supported and Protected from Discrimination* (Feb. 23, 2012), <https://www.ethikrat.org/en/press-releases/press-releases/2012/german-ethics-council-intersex-people-should-be-recognized-supported-and-protected-from-discrimination/> [<https://perma.cc/BRA2-WMSN>].

⁶ JUDITH BUTLER, *UNDOING GENDER* 2 (2004).

⁷ *Id.*

⁸ See Edmund M. Horowicz, *Intersex Children: Who Are We Really Treating?*, 17 MED. L. INT’L 184 (2017).

Cosmetically normalizing surgeries do not fulfill any immediate medical need of an intersex child and they are a by-product of stigma toward the intersex body.⁹

These surgeries are possible partly because parents rarely conceptualize sex as a spectrum and usually believe that clearly masculine or feminine markers are “normal”—a belief commonly confirmed by medical care providers.¹⁰ Having “normal” genitalia is presented as desirable and in the best interests of the child, and surgeries are justified as necessary to “correct” bodies, reduce social stigma, and avoid psychological harm as children grow older in a world that favors normatively masculine and feminine bodies.¹¹ Thus cosmetically “normalizing” procedures are suggested even when intersex traits are not a physical health concern.

However, as this Article argues, “normalizing” cosmetic procedures violate the child’s right to life, liberty, and security of person, to bodily integrity, to health, and to self-determination of sexual orientation and gender identity, amongst other rights. These surgeries, which are a result of patriarchal policing, are premised on assigning sex “correctly” and distributing gender accordingly, notwithstanding the fact that a child may grow up and identify with a gender other than that assigned at birth.¹² Sex here refers to the clear and unambiguous assignment of genitalia, thus implying that when a child is born with both masculine and feminine reproductive genitalia, the same needs instant rectification.¹³

In addition to the real possibility of incorrect assignment of sex at birth, these invasive procedures may leave persons feeling traumatized.¹⁴ Miranda Fricker’s

⁹ Morgan Carpenter, *The “Normalization” of Intersex Bodies and “Othering” of Intersex Identities in Australia*, 15 J. BIOETHICAL INQUIRY 487, 489 (2018).

¹⁰ Horowicz, *supra* note 8.

¹¹ Alice D. Dreger et al., *Changing the Nomenclature/Taxonomy for Intersex: A Scientific and Clinical Rationale*, 18 J. PEDIATRIC ENDOCRINOLOGY & METABOLISM 729, 730–33 (2005).

¹² *FAQ: What’s the History Behind the Intersex Rights Movement?*, INTERSEX SOC’Y N. AM., <https://isna.org/faq/history/> [<https://perma.cc/GY3S-QZXC>]; see Iain Morland, *Management of Intersex*, 358 LANCET 2085 (2001).

¹³ Morland, *supra* note 12.

¹⁴ Iain Morland, *What Can Queer Theory Do for Intersex*, 15 GLQ: J. LESBIAN & GAY STUDIES 285, 287 (2009) (describing the cosmetic normalization done to the author as “glaringly unusual” and yet leading to a feeling of having been “brutally normalized”). See also TIFFANY JONES ET AL., INTERSEX

work on powerlessness and social interpretation is useful both in understanding the lived experiences and realities of persons whose bodies have undergone “corrections” and in explaining the stigma faced by intersex persons.¹⁵ Fricker uses the terms “hermeneutical injustice” to identify this particular kind of disempowerment, where a person’s social experience is significantly distorted due to biases and prejudices existing in a particular society.¹⁶ It has also been argued that some instances of feminizing the body are experienced as abuse.¹⁷ For example, vaginal construction involves dilating the child’s vagina to ensure that it accommodates a penis.¹⁸ Such dilation happens through the repeated insertion of medical equipment and is followed by constant monitoring and medical examination of the child’s body. Additionally, a constructed vagina must be put through sensitivity tests to ensure its adequate functioning.¹⁹ Esther Morris’ words in *The Missing Vagina Monologue* capture this trauma persuasively: “After all that trouble I had gone through, I discovered that a penis would respond to anything. I felt abused in the most intangible way, a victim of other’s [sic] arrogance and assumptions.”²⁰ Morris was born without a vagina and underwent four surgeries in her adolescence to have a neovagina created, even though the end product would not enhance her own sexual pleasure.²¹

STORIES AND STATISTICS FROM AUSTRALIA 16 (2016) (highlighting studies from Germany revealing that nearly eighty percent of the persons who underwent surgeries as children experienced health problems later on, and an Australian survey concluding that children whose bodies were considered abnormal for bearing intersex traits faced shame and stigma).

¹⁵ Miranda Fricker, *Powerlessness and Social Interpretation*, 13 J. SOC. EPISTEMOLOGY 96, 100 (2006).

¹⁶ *Id.*

¹⁷ Esther Morris, *The Missing Vagina Monologue and Beyond*, 10 J. GAY & LESBIAN PSYCHOTHERAPY 77, 90 (2006).

¹⁸ Morgan Carpenter, *Intersex Variations, Human Rights, and the International Classification of Diseases*, 20 HEALTH & HUM. RTS. J. 205, 210 (Dec. 2018).

¹⁹ Peter A. Lee et al., *Advances in Diagnosis and Care of Persons with DSD Over the Last Decade*, 19 INT’L J. PEDIATRIC ENDOCRINOLOGY 1, 5 (2014).

²⁰ Morris, *supra* note 17, at 80.

²¹ *Id.* at 85.

Such procedures highlight not just the insensitivities of the medical community, but also a failure on the part of the state to protect children by fulfilling its extant international obligations. In India, the Supreme Court has upheld the right to bodily integrity,²² as well as the right to self-determination of gender identity.²³ Given these existing legal protections, we attempt to make a case for protecting intersex children in India from medically unnecessary procedures.

In Part I of this Article, we examine the ethical issues that arise from medically unnecessary interventions, analyzing such procedures through a classical bioethical framework. We also attempt to move beyond legal obligations to underscore the ethical imperative to respect the rights of intersex children. We conclude that such medical interventions violate several established principles that govern the medical community, including the principles of non-maleficence, beneficence, autonomy, and justice.²⁴ These principles, although followed with great zeal for other patients, appear to be relaxed when applied to intersex children, as discussed in Part I. In such situations, the parental trauma and potential social ostracism that the child may face are considered to outweigh medical practitioners' ethical obligations toward the child. Consequently, such procedures are justified as being in the "best interests" of the child.²⁵ Beyond classical bioethics, we also scrutinize such procedures through the lens of post-structuralist feminist and queer bioethics, in a post-colonial context, to conclude that medically unnecessary surgeries are morally questionable.

Part II analyzes all the international instruments ratified by India that protect the rights of intersex children. In doing so we examine the Yogyakarta Principles and the Yogyakarta Principles Plus 10, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child. In the Indian context, the executive and judicial branches have

²² Bharat Desai et al., *Quest for Women's Right to Bodily Integrity: Reflections on Recent Judicial Inroads in India*, *ECON. & POL. WEEKLY* (Dec. 31, 2018), <https://www.epw.in/engage/article/quest-womens-right-bodily-integrity-judicial-inroads> [<https://perma.cc/7L7K-6Y3J>].

²³ *Nat'l Legal Serv. Auth. v. Union of India*, (2014) 5 SCC 438.

²⁴ Basil Varkey, *Principles of Clinical Ethics and Their Application to Practice*, 30 *MED. PRINCIPLES & PRAC.* 17 (2021).

²⁵ Alexandra Akre, *Hanging in the Balance: The Intersex Child, the Parent, and the State*, 5 *TENN. J. RACE, GENDER & SOC. JUST.* 37, 45 (2016).

domesticated international legal norms. For instance, in the Hazardous Waste (Management, Handling and Transboundary Movement) Rules, the executive incorporated international obligations under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.²⁶ Further, as early as 1984 the Supreme Court incorporated international obligations into domestic law, in cases such as *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey*,²⁷ *People's Union for Civil Liberties v. Union of India*,²⁸ and *Apparel Export Promotion Council v. A.K. Chopra*.²⁹ As the Supreme Court most prominently held in *Vishakha v. State of Rajasthan*:

Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee. . . . The international conventions and norms are to be read into [fundamental rights] in the absence of enacted domestic law occupying the field when there is no inconsistency between them.³⁰

Given this tradition, it is imperative to thoroughly examine international treaties and instruments with the hope that they may play a significant role in filling the void in India's jurisprudence on intersex rights.

²⁶ Aparna Chandra, *India and International Law: Formal Dualism, Functional Monism*, 57 INDIAN J. INT'L L. 25, 25–45 (2017).

²⁷ *Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey*, AIR 1984 SC 667 (India) at 29; *see also* *Avinash Nagra v. Navodaya Vidyalaya Samiti*, (1997) 2 SCC 534 (India) (“Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. . . . The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament.”).

²⁸ *Peoples Union for Civ. Liberties v. Union of India*, (1997) 3 SCC 433, para. 22 (“The provisions of the covenant [ICCPR], which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights and hence, enforceable as such.”).

²⁹ *Apparel Exp. Promotion Council v. A.K. Chopra*, (1999) 1 SCC 759, 14 (India).

³⁰ *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241, 7 (India).

In Part III, we review India's jurisprudence on the right to self-identification of gender, examining the Supreme Court's decision in *National Legal Services Authority v. Union of India (NALSA)*, and the provisions of the 2019 Transgender Act. We also probe deeper to examine the interpretation of *NALSA* by various high courts and analyze cases concerning intersex litigants in particular. We find that although a separate category of "third gender" has been legally recognized, this umbrella term leaves invisible numerous other genders and has been criticized by intersex communities for this reason.³¹ Finally, we argue that children's consent has not been legally recognized because statutes such as the Indian Contract Act, the Indian Majority Act, and the Indian Penal Code render children incapable of consent. Such a jurisprudential framework exposes intersex children in India to greater risk, which is exacerbated by the reliance on the Bolam test to determine medical negligence.³²

Part IV presents recommendations for recognizing the rights of intersex children, including, amongst others, a recognition of intersex identity as separate from transgender in the Transgender Act, and a principled approach to the interpretation of "best interests" of intersex children. It is important to acknowledge that in this Article, we focus on laws protecting the rights and interests of intersex children in India, specifically regarding medically unnecessary interventions intended to "normalize" their genitalia. Although in some instances genital interventions are medically necessary—and even life-saving—such procedures are beyond the scope of this Article. Further, while intersex children continue to suffer the consequences of such medically unnecessary procedures well into their adult life, facing mental and physical health problems, as well as a range of oppressions and violence based

³¹ Rachana Mudraboyina et al., *A Critique of the Transgender Persons (Protection of Rights) Bill, 2019*, FEMINISM IN INDIA (Aug. 5, 2019), <https://feminisminindia.com/2019/08/05/critique-transgender-persons-protection-of-rights-bill-2019/> [<https://perma.cc/3GXM-88DQ>] ("People with intersex traits are often wrongly identified as transgender, hijras or third gender. But many indigenous gender variants are not okay with the term third gender. The etymological sense of this word derives from Sanskrit word 'tritiya prakriti', which translates to 'beyond dual nature'. This is the term that is used to refer to non-binary genders. But putting them under one umbrella term, when there are many different ways a person could be intersex, is unfair to the community."); see also SRISHTI MADURAL, INFORMATION TOOLKIT: HUMAN RIGHTS OF INTERSEX PERSONS IN INDIA (2019).

³² Tim Bishop, *Bolam & Bolitho Tests – How Clinical Negligence is Assessed*, THE MED. NEGL. SOLIC. (May 30, 2014), <https://www.themedicalnegligencesolicitor.co.uk/bolam-bolitho-tests/> [<https://perma.cc/67AW-XKSA>].

on their intersex identity, this Article is narrowly focused on the violation of the rights of intersex infants and children.³³

I. Tracing Ethical Issues in Cosmetically Normalizing Surgeries

Ellen Feder examines the ethical questions associated with such surgeries while deliberately moving beyond the typical preoccupation with gender and genitalia.³⁴ According to Feder, this is necessary to avoid a single-minded emphasis on sexual difference, which has “dominated the conversation for too long.”³⁵ Continuing in this tradition, this Part draws on classical bioethics as well as post-structural, post-colonial feminist and queer bioethical frameworks to examine the ethical questions raised by intersex surgeries.

A. Classical Bioethics

It has been argued that the rights of intersex children are protected not just legally, but by established ethical principles in the classical bioethical framework, such as the principles of autonomy,³⁶ non-maleficence,³⁷ beneficence,³⁸ and justice.³⁹ The principle of autonomy, or respect for persons, is founded on the intrinsic dignity of all human beings, which necessitates the recognition of individuals’ right to self-

³³ SOLIDARITY FOUND., “WHAT IF IT IS NEITHER?”: A REPORT ON THE HISTORIC SEMINAR ON INTERSEX PERSONS’ ISSUES IN INDIA (2017).

³⁴ ELLEN FEDER, MAKING SENSE OF INTERSEX: CHANGING ETHICAL PERSPECTIVES IN BIOMEDICINE (2014).

³⁵ *Id.* See also Marie Draz, *Ellen Feder, Making Sense of Intersex: Changing Ethical Perspectives in Biomedicine*, 26 KENNEDY INST. ETHICS J. 34 (2016) (reviewing Feder’s book).

³⁶ Sharon E. Sytsma, *The Ethics of Using Dexamethasone to Prevent Virilization of Female Fetuses*, in ETHICS AND INTERSEX (Sharon E. Sytsma ed., 2006).

³⁷ *Id.*

³⁸ BIOETHICS COMMISSION, FEDERAL CHANCELLERY REPUBLIC OF AUSTRIA, INTERSEXUALITY AND TRANSDENTITY: OPINION OF THE BIOETHICS COMMISSION (2017).

³⁹ *Id.*

determination of identity.⁴⁰ As defined by Tom Beauchamp and James Childress, the principle of autonomy imposes both negative and positive obligations on the medical practitioner.⁴¹ In the context of intersex children, medical practitioners have a positive obligation to treat their patients respectfully by disclosing information; to tell the truth; to respect the patient's privacy; to obtain consent for patient interventions; and to protect confidential information.⁴² The principle of non-maleficence prescribes that it is morally worse to actively harm patients than to let harm occur, since this is essential to protecting the patient's trust in the medical practitioner.⁴³ According to the principle of beneficence on the other hand, medical practitioners must "do good." In the context of intersex surgeries, these principles mean promoting the well-being of patients by ensuring a "sustainable quality of life throughout all of later life," and not merely the immediate success of a surgery.⁴⁴ In other words, they implicate not just the "*medical success* of the measures taken . . . but also the *lasting satisfaction* of those affected."⁴⁵ It follows that medical interventions, especially irreversible interventions, must be used "as sparingly as possible and be as little far-reaching as possible, [and] as reversible and as *late in life* as possible."⁴⁶ Finally, the principle of justice protects intersex children from experiencing oppression and disadvantages by virtue of their sex characteristics and affirms that they have the right to redress for those medical interventions which cause grave physical and mental agony.⁴⁷

Although this classical bioethics framework can be applied to protect the rights of intersex children, classical bioethicists have not intervened in the unethical

⁴⁰ FEDER, *supra* note 34.

⁴¹ See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS (1980).

⁴² Eva Prodi, The Principle of Autonomy in Cases of Gender Reassignment for People with Gender Dysphoria (2020) (B.A. thesis, LUISS Guide Carli) (on file with Luiss Library, LUISS Guide Carli).

⁴³ Sytsma, *supra* note 36, at 6.

⁴⁴ BIOETHICS COMMISSION, *supra* note 38, at 19.

⁴⁵ *Id.*

⁴⁶ *Id.* at 20.

⁴⁷ *Id.* at 19.

treatment of children with atypical sex.⁴⁸ According to Erik Parens, the threat posed by the bodies of those with undefined sex embodies “bad medicalization,” where medicalization takes on nonmedical or life/human problems and casts them in medical terms.⁴⁹ Feder explains that bad medicalization represents a subtler, more sinister phenomenon by committing a categorical mistake through “a sleight of hand.”⁵⁰ In other words, bad medicalization signifies the mischaracterization of a social problem for a medical problem. Although “bad medicalization” is not a product of the classical bioethical framework, the framework itself falls short while attempting to ameliorate the unethical treatment towards intersex children. Nonetheless, if this classical bioethical framework is applied in the context of intersex surgeries, these principles could arguably be employed to significantly outweigh other considerations, such as parental agony and societal expectations of gender normativity.⁵¹ This is especially true since there is considerable evidence that adult intersex patients of genital surgeries performed at infancy have reported “genital dysfunction, scarring, loss of sexual feeling, loss of fertility, chronic pain, and the wrong gender assignment—with irreversible excision of genital and gonadal tissues.”⁵² Even with such surgeries, physicians cannot guarantee that permanent gender reassignment surgeries will have a favorable outcome for the child. Such surgeries strip individuals of the right to make decisions regarding their own bodies and prevent them from having autonomy over their own futures. Finally, it has been argued that the very act of “normalizing” or “fixing” intersex individuals to reflect the binary of gender is performative and indicates the feeble nature of the binary itself.⁵³

⁴⁸ FEDER, *supra* note 34, at 109.

⁴⁹ Erik Parens, *On Good and Bad Medicalization*, 27 *BIOETHICS* 28 (2013).

⁵⁰ FEDER, *supra* note 34, at 25.

⁵¹ Emma Tunstall et al., *Intersex in the Age of Queer Bioethics*, 12 *SQS – J. QUEER STUD. FIN.* 1, 14 (2018).

⁵² INTERACT & HUM. RTS. WATCH, “I WANT TO BE LIKE NATURE MADE ME”: MEDICALLY UNNECESSARY SURGERIES ON INTERSEX CHILDREN IN THE US (2017).

⁵³ Judith Butler, *Imitation and Gender Insubordination*, in *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 13 (Diana Fuss ed. 1991); Wendy O’Brian, *Can International Human Rights Law Accommodate Bodily Diversity*, 15 *HUM. RTS. L. REV.* 1, 15 (2015).

B. Moving Toward a Feminist and Queer Bioethical Framework

While the classical principles of bioethics could be applied to safeguard the interests of intersex children, there is still considerable silence on the part of classical bioethics—and of bioethicists—on the rights of intersex children.⁵⁴ Where there has been intervention by bioethicists, it has been with the aim to “fix” intersex individuals.⁵⁵ By contrast, post-structuralist feminist and queer approaches to bioethics offer critical perspectives by exploring alternate standards that reflect feminist and queer ideologies respectively.⁵⁶ Professor Amrita Banerjee has argued a feminist approach to bioethics provides a significantly different framework, with different priorities and focuses.⁵⁷ As opposed to “dry rationalism,” feminist bioethics centralizes care. Feminist bioethics builds affect and affective rationalities—ensuring that an autonomous decision is informed—and in doing so, it factors in the needs and vulnerabilities of individuals.⁵⁸ Further, others have argued that the medical success of these surgeries cannot simply be measured by the ability to have peno-vaginal sexual intercourse, which ultimately reflects heterocentrism.⁵⁹ This is especially so given that, in some instances, heterosexual peno-vaginal intercourse is dissatisfactory—and has been described as “revolting.”⁶⁰

⁵⁴ FEDER, *supra* note 34, at 6; James Lindemann Nelson, *Still Quiet After All These Years: Revisiting “The Silence of the Bioethicists”*, 9 J. BIOETHICAL INQUIRY 249, 249–59 (2012).

⁵⁵ Lance Wahlert & Autumn Fiester, *Questioning Scrutiny: Bioethics, Sexuality, and Gender Identity*, 9 J. BIOETHICAL INQUIRY 243, 244–45 (2012).

⁵⁶ It is imperative to acknowledge that not all kinds of feminisms sit easily with intersex issues, given that several feminists continue to operate within the gender binary framework. Some feminist approaches necessarily use a strict and synthetic definition of the category of “woman” and are explicitly hostile to those who do not adhere to the binary politics.

⁵⁷ The Philosophy Project, *Lecture on Feminism and Bioethics by Professor Amrita Banerjee*, YOUTUBE (July 18, 2021), https://www.youtube.com/watch?v=yJfe4_Dl2FY [<https://perma.cc/N7QQ-9X8B>].

⁵⁸ *Id.*

⁵⁹ Katrina Roen, *Queer Kids: Toward Ethical Clinical Interactions with Intersex People*, in ETHICS OF THE BODY: POSTCONVENTIONAL CHALLENGES 259 (Margrit Shildrick & Roxanne Mykitiuk eds., 2005).

⁶⁰ Morris, *supra* note 17, at 78.

Feminists Suzanne Kessler and Wendy McKenna's groundbreaking work, *Gender: An Ethnomethodological Approach*, demonstrated the social construction of gender, which is crucial to feminist theory.⁶¹ Kessler and McKenna were among the first to question the existence of merely two genders and to argue that maleness and femaleness were socially produced based on the cultural context in which a person is located. Genitals were considered the material markers of differences in sex and were termed "cultural genitals" by them.⁶² Therefore, medically unnecessary surgeries performed on intersex children emanate from the challenge to a "natural dichotomy" as described by Kessler and McKenna, and in performing such surgeries medical professionals embody through their actions the idea that gender is at once founded on nature and determined by social factors.⁶³

Similarly, queer bioethics purportedly offers a "questioning scrutiny" of how LGBTQIA+ persons have been "treated, ignored, dismissed, patronized, judged and most importantly pathologized in the clinical realm."⁶⁴ In this context, it is imperative to examine the regulation of intersex bodies through biopower. According to Lucia Santos:

[W]hen an intersex person is born, political power is inscribed in the *bios* and alters that body. This alteration is no more than the defense of the interests of the population in general disguised as the "defense" of the wellbeing of the intersex person, as the organization of most societies is not prepared to include intersex bodies or *genderqueer* identities. Something that appears to be a positive power for the wellbeing of the intersex person is, in the end, the only solution that the medical authorities have found to compensate for their own inability and that of most institutions to

⁶¹ SUZANNE J. KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* (1978).

⁶² *Id.* at 153–55.

⁶³ See Ellen Feder, *Feminist Theory and Intersex Activism: Thinking Between and Beyond*, 16 PHIL. COMPASS 1, 4 (2021).

⁶⁴ Wahlert & Fiester, *supra* note 55, at 244.

deal with a different sex, as they do not know how to position it in society.⁶⁵

In light of such attempts to regulate intersex bodies, queer bioethics offers an urgent critique of the classical bioethics framework, detecting queer concerns that have fallen under the radar and questioning medical actions normalized as beneficent. Therefore, queer bioethicists perceive medically unnecessary surgeries on intersex babies as just one instance in medicine's long legacy of erasure and exploitation of queer bodies aimed at "correcting" queer persons. This diverges from the principles of the classical bioethical framework, which can at best be used to argue that intersex children must be treated with the same autonomy, respect, justice, and dignity given to other humans. This is of paramount importance as up until now, intersex bodies have been made invisible with the normative assumption that their bodies—as a default measure—require course correction. Queer bioethicists would argue that our response to the AIDS epidemic, restrictions on blood donation by homosexuals, and the treatment of intersex children all ghettoize LGBTQI persons, and "[shunt] them into a corner far from normality."⁶⁶

C. Decolonizing Sex

According to philosopher Beatriz Preciado, the question of identifying as a man or woman itself reflects an anxious Western obsession "with wanting to reduce the truth of sex to a binomial."⁶⁷ As recounted by Michel Foucault, sexual control of human populations began in modern Western societies around the eighteenth century, with the beginning of the project of rationalizing, classifying, and regulating sex.⁶⁸ These moralities were introduced to colonized nations as well, and in the words of one scholar, the language of sexuality played "a central ideological role in the

⁶⁵ Ana Lucia Santos, *Beyond Binarism? Intersex as an Epistemological and Political Challenge*, 6 REVISTA CRITICA DE CIENCIAS SOCIAIS [RCCS] 123, 123 (2014) (Port.).

⁶⁶ Wesley J. Smith, "Queer Bioethics" Another Sign That Bioethics Not Authoritative, FIRST THINGS (2011), <https://www.firstthings.com/blogs/firstthoughts/2011/12/queer-bioethics-another-sign-that-bioethics-not-authoritative> [<https://perma.cc/F47P-3DU8>].

⁶⁷ *Id.*

⁶⁸ MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 24 (Robert Hurley, trans., Pantheon Books 1978) (1976).

making of empire.”⁶⁹ By classifying the intimate desires and bodily pleasures of the colonized as “sex,” colonists could prove that these deviated from bourgeois standards of morality and required enlightenment.⁷⁰ Finally, only those individuals who had been subjected to regulation—and in colonies such regulation was subject to the Victorian moral yardstick—were deemed eligible to lead a “livable” life.⁷¹

Scholars have also argued that although the West condemns female genital mutilation in previously colonized countries, similar genital surgeries and procedures are conducted secretly, and fairly commonly, on intersex children in the West.⁷² Feder has explained in detail the similarities associated with the practices and explores the ties between the two, beginning with the genesis of “normalizing surgeries” in the West. Feder notes that Drs. Gross, Randolph, and Crigler, pioneers of “normalizing surgeries for atypical anatomies,” hinged their claims of normal sexual functions amongst women who had undergone surgery on evidence “anecdotally reported by a single, Western observer.”⁷³ This observer claimed that African women who had undergone genital surgeries as part of their cultural traditions could still have “normal sexual functions.” Using this “evidence,” Drs. Gross, Randolph, and Crigler claimed that excision of a “grotesquely enlarged clitoris” would not affect normal sexual function.⁷⁴ This is especially ironic given that a significant amount of criticism levied against the practice of female genital mutilation in African countries today is based on concerns about safety and sexual unresponsiveness.⁷⁵ Western practices are thus considered to be “rational” and

⁶⁹ George Paul Meiu, *Colonialism and Sexuality*, in *THE INTERNATIONAL ENCYCLOPEDIA OF HUMAN SEXUALITY* 1 (Patricia Whelehan & Anne Bolin eds., 2015), https://scholar.harvard.edu/files/meiu/files/meiu_2015_colonialism_and_sexuality.pdf [<https://perma.cc/U3RM-XN6T>].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² FEDER, *supra* note 34, at 124–32.

⁷³ *Id.* at 128.

⁷⁴ *Id.*

⁷⁵ *Id.*

“sophisticated,” while the cultural practice of genital cutting is considered “primitive.”⁷⁶

II. Intersex Rights in the International Framework

Although India is formally a dualist nation, the notion that international and domestic law function in silos is no longer prevalent.⁷⁷ International law today is viewed within a normative framework, which governs the relationships not only among states, but also between states, their citizens, and non-state entities such as corporations.⁷⁸ Considering these developments, it has been argued that the Indian Supreme Court has shifted from a “dualist position of transformation towards the monist doctrine of incorporation.”⁷⁹ Given this approach, international law fills a significant gap in Indian jurisprudence on a variety of subjects—for example, informing guidelines for the prevention of sexual harassment of women in the workplace.⁸⁰ In the context of the rights of intersex children specifically, international law provides important guidelines, and in some instances has also

⁷⁶ Nikki Sullivan, *The Price to Pay for Our Common Good: Genital Modification and the Somatechnologies of Cultural (In)Difference*, 17 SOC. SEMIOTICS 395, 403 (2007) (“In what sense is intersex surgery (at least when it is not essential to save the life of a child) not a ‘folk custom’ that is particular to our time and culture?”).

⁷⁷ Aparna Chandra, *supra* note 26, at 32.

⁷⁸ A. M. Slaughter & W. Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 HARV. INT’L L.J. 327, 327 (2006).

⁷⁹ Aparna Chandra, *supra* note 26, at 32. (“This approach of the Court was noticeable as early as 1984 in *Gramophone Company of India Ltd. v. Birendra Bahadur Pandey* (1984) 2 SCC 534 (India), where the Court explicitly moved away from the doctrine of transformation to the doctrine of incorporation. In this case, the Court had to interpret a provision of the Indian Copyright Act. In deciding to interpret the provision in a manner consistent with India’s international obligations, the Court held that, ‘Rules of International law may be accommodated in the Municipal Law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. . . . The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament.’”).

⁸⁰ *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241, 4 (India).

helped effect change for intersex children around the world.⁸¹ In the sections that follow we examine how cosmetically “normalizing” surgeries on intersex children violate the right to liberty and security of person, the right to health, the right to gender identity and sexual orientation, the right to privacy, the right against discrimination, and the right against torture and inhuman or degrading treatment.

A. The Right to Life, Liberty, and Security of Person

As a signatory of the Universal Declaration of Human Rights (UDHR), India is obligated to recognize the right to life, liberty, and security of all persons within its territory.⁸² This obligation is enshrined in Article 3 of the UDHR, as discussed in *Maneka Gandhi v. Union of India*, where the Supreme Court noted that the UDHR was adopted in 1948 while the Indian Constituent Assembly Debates were in progress.⁸³ Consequently, the Supreme Court recognized that the framers of the Constitution were influenced by the provisions of the UDHR in framing Part III of the Indian Constitution, concerning fundamental rights.⁸⁴

Article 9 of the International Covenant on Civil and Political Rights (ICCPR) too secures the right to liberty and security of person.⁸⁵ According to the U.N. Human Rights Committee, “security of person” concerns freedom from injury to the body and the mind, or bodily and mental integrity, regardless of whether a person is

⁸¹ Cristian Gonzalez Cabrera, *The Role of International Human Rights Law in Mediating Between the Rights of Parents and Their Children Born with Intersex Traits in the United States*, 24 WM. & MARY J. RACE, GENDER, & SOC. JUST. 459, 497 (2018).

⁸² G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

⁸³ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 (India).

⁸⁴ *Id.* (“Moreover, it may be noted that only a short while before the Constitution was brought into force and whilst the constitutional debate was still going on, the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10th December, 1948 and most of the fundamental rights which we find included in Part III were recognised and adopted by the United Nations as the inalienable rights of man in the Universal Declaration of Human Rights.”).

⁸⁵ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. See also *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

detained or not.⁸⁶ The Committee has also observed that state parties must respond appropriately to patterns of violence against specific groups, including violence against persons for their sexual orientation and gender identity.⁸⁷ This is also secured through the prohibition on the arbitrary interference with individuals' privacy, a principle recognized by Article 12 of the UDHR, and reiterated by Article 17 of the ICCPR. According to the U.N. Human Rights Committee, the notion of privacy refers to the "sphere of a person's life in which he or she can freely express his or her identity."⁸⁸ This is reiterated in Principles 3 and 6 of the Yogyakarta Principles, which protect the right to privacy regarding decisions and choices about one's own body.⁸⁹ As applied to intersex children, the aforementioned provisions protect against unlawful and arbitrary interference in children's privacy, including the right to make decisions about their own bodies.⁹⁰ The Yogyakarta Principles Plus 10 also recognize the right to bodily and mental integrity, especially for sexual minorities. According to Principle 32, which addresses forced medical interventions, everyone has the right to mental and bodily integrity, irrespective of sex characteristics.⁹¹ In the Indian context, the Supreme Court has recognized the mental integrity of survivors of rape, stating:

Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be

⁸⁶ Hum. Rts. Comm., General Comment No. 35, Article 9 (Liberty and Security of Person), U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

⁸⁷ *Id.*

⁸⁸ Hum. Rts. Comm., *Coeriel and Aurik v. The Netherlands*, Communication No. 453/1991, U.N. Doc. CCPR/C/52/D/453/1991 (Dec. 9, 1994) [hereinafter *Communication No. 453/1991*].

⁸⁹ THE YOGYAKARTA PRINCIPLES 11–12, 14 (2007), <https://www.refworld.org/pdfid/48244e602.pdf> [<https://perma.cc/F5XL-6JHW>].

⁹⁰ OFF. OF THE HIGH COMM'R FOR HUM. RTS, BACKGROUND NOTE ON HUMAN RIGHTS VIOLATIONS AGAINST INTERSEX PEOPLE 8 (2019).

⁹¹ THE YOGYAKARTA PRINCIPLES PLUS 10, at 10 (2017), http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf [<https://perma.cc/EUJ6-824E>].

taken to ensure their safety and there should be no arbitrary or unlawful interference with his privacy.⁹²

A similar argument could be made in favor of the mental integrity of intersex children who are subject to medically unnecessary surgeries. In addition, in *Puttuswamy v. Union of India*, the Indian Supreme Court held that the right to privacy includes the right to personal autonomy, including the right to make choices about one's body.⁹³ Finally, Principle 32 specifically protects individuals from medical procedures that modify sex characteristics without free and prior informed consent. As this makes evident, the right to bodily integrity, life, liberty, and security of the person has been recognized through various international instruments. For intersex children, this right has been recognized in institutional and individual responses to testimonies by survivors of "normalization" practices.⁹⁴

B. The Right to Health

According to Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), state parties recognize that everyone has the right to enjoy the highest attainable standard of physical and mental health.⁹⁵ Recognizing that not all state parties have the resources necessary to fulfill these obligations, Article 2 provides that state parties must realize these obligations progressively.⁹⁶ At the same time, there are core minimum obligations that state parties must fulfill, including the right of access to health facilities, access to minimum essential food, and the provision of essential drugs. The U.N. Committee on Economic, Social and

⁹² Lillu @ Rajesh v. State of Haryana, (2013) 2 SCR 774 (India).

⁹³ Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

⁹⁴ Comm. on the Rts. of the Child, Concluding Observations on the Combined Second to Fourth Periodic Reps. of Switzerland, U.N. Doc. CRC/C/CHE/CO/2-4 (2015); Comm. on the Rts. of the Child, Concluding Observations on the Third to Fifth Periodic Reps. of Nepal, U.N. Doc. CRC/C/NPL/CO/3-5 (2016); Comm. on the Rts. of the Child, Concluding Observations on the Combined Fourth to Fifth Periodic Reps. of Chile, U.N. Doc. CRC/C/CHL/CO/4-5 (2015); Comm. on the Rts. of Pers. with Disabilities, Concluding Observations on the Initial Rep. of Germany, U.N. Doc. CRPD/C/DEU/CO/1 (2015).

⁹⁵ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁹⁶ *Id.* art. 2.

Cultural Rights has elaborated on the right to health, stating that it includes the right to control one's sexual and reproductive freedoms, and to be free from interference—including the right to be free from non-consensual medical treatment.⁹⁷

Further, Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) imposes an obligation on state parties to eliminate discrimination against women in the field of healthcare and to ensure accessibility to healthcare, particularly to appropriate services during pregnancy.⁹⁸ The Concluding Observations of the Committee on the Elimination of Discrimination against Women on Costa Rica specifically observe that intersex persons often find access to health care services difficult, and face abuse at the hands of health service providers.⁹⁹ This was reiterated in CEDAW's Concluding Observations on the ninth periodic report of Austria, which directed the state party to develop and implement a rights-based healthcare protocol for intersex persons, ensuring that children are involved in decision-making about medical interventions, and that they are not subjected to surgery without their free, informed, and prior consent.¹⁰⁰

Aside from these treaties, India signed and ratified the Convention on the Rights of Persons with Disabilities (CRPD) in 2007.¹⁰¹ According to Article 25 of the CRPD, persons with disabilities have the right to the highest attainable standard of

⁹⁷ Comm. on Econ., Soc. and Cultural Rights, General Comment No. 14, Article 12 (Right to the Highest Attainable Standard of Health), U.N. Doc. W/C.12/2000/4 (Aug. 11, 2000).

⁹⁸ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 1.

⁹⁹ Comm. on the Elimination of Discrim. Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Costa Rica, U.N. Doc. CEDAW/C/CRI/CO/5-6 (Aug. 2, 2011).

¹⁰⁰ Comm. on the Elimination of Discrim. Against Women, Concluding Observations on the Ninth Periodic Rep. of Austria, U.N. Doc. CEDAW/C/AUT/CO/9 (July 30, 2019).

¹⁰¹ Press Release, Ministry of Soc. Just. & Empowerment, Gov't of India, Secretary, DePWD Participated in 22nd Session of U.N. Committee on CRPD at Geneva (Sept. 9, 2019), <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1584572#:~:text=The%20UN%20Committee%20on%20CRPD,of%20consideration%20of%20the%20report> [<https://perma.cc/UQC7-TFMW>].

health without discrimination.¹⁰² This is also reflected more generally in Article 7 of the ICCPR, which mandates that patients have the right to decide whether they will participate in a medical procedure based on an objective understanding of all the risks and benefits.¹⁰³ Finally, in 2019, in its Concluding Observations on the Initial Report of India, the U.N. Committee on the Rights of Persons with Disabilities expressed concern about “sex normalizing” surgeries on intersex children, and recommended that India adopt measures to prevent such surgeries, ensuring their rights to preserve their bodily and mental integrity.¹⁰⁴ Considering the prevalence of genital surgeries on intersex children, and the way such surgeries are conducted—i.e., without the full knowledge or consent of intersex children—this right is grossly violated.

In the context of children’s right to health, Articles 12, 17, 23, and 24 of the United Nations Convention on the Rights of the Child (UNCRC) become relevant.¹⁰⁵ According to these articles, a child has the right to increasingly form and express their views, access information, actively participate in the community, and enjoy the highest attainable standard of health.¹⁰⁶ The various articles of the UNCRC read together strongly imply a necessary goal of the UNCRC: that surgeries which permanently modify children’s bodies and affect their sexual function and fertility be expressly consented to by children, in line with their best interests.

Finally, Principle 18 of the Yogyakarta Principles specifically protects the right of sexual minorities to be free from medical abuses: “No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity.”¹⁰⁷ Further, states have a positive obligation to ensure that all necessary legislative,

¹⁰² Convention on the Rights of Persons with Disabilities, art. 25, Dec. 13, 2006, 2515 U.N.T.S. 3.

¹⁰³ ICCPR, *supra* note 85, art. 7.

¹⁰⁴ Comm. on the Rts. of Pers. with Disabilities, Concluding Observations on the Initial Rep. of India, U.N. Doc. CRPD/C/IND/CO/1 (Oct. 29, 2019).

¹⁰⁵ Convention on the Rights of the Child, arts. 12, 17, 23, 24, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter UNCRC].

¹⁰⁶ *Id.*

¹⁰⁷ THE YOGYAKARTA PRINCIPLES, *supra* note 89, at 23.

administrative, and other measures are taken to ensure that a child's body is not irreversibly altered without the full, free, and informed consent of the child.¹⁰⁸

A combined reading of these provisions of various international instruments makes clear that individuals have the right to enjoy the highest attainable standard of health—physical and mental—and states have the obligation to protect the minimum core obligations, while progressively realizing the full extent of this right. In India, the Supreme Court has relied on international instruments in the past to recognize the right to health as a fundamental human right guaranteed by the Indian Constitution.¹⁰⁹ Consequently, intersex persons—and especially children—have the implied right not to be subject to genital “normalizing” surgeries, which are detrimental to their physical and mental health, without their informed consent.

C. The Right to Self-Determination of Sexual Orientation and Gender Identity

The Yogyakarta Principles are considered “the most authoritative statement” of international human rights obligations of states in reference to rights of sexual orientations and gender identities.¹¹⁰ Although the Yogyakarta Principles are not binding, it is widely accepted that they reflect established principles of international law, and they have influenced U.N. Treaty Bodies as well as regional institutions and Indian domestic cases. In the context of the right to self-determination of gender identity, it has been argued that this right is derived from four other rights—the right

¹⁰⁸ *Id.* (“ . . . (B) Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration.”).

¹⁰⁹ *Calcutta Elec. Supply Corp. (CESC) Ltd. v. Subhash Chandra Bose*, AIR 1992 SC 573 (India).

¹¹⁰ Chris Sidoti & Jack Byrne, *Promoting and Protecting Human Rights in Relation to Sexual Orientation, Gender Identity, and Sex Characteristics: A Manual for National Human Rights Institutions*, ASIA PACIFIC F. NAT'L HUM. RTS. INSTS. 134 (2016); see also *id.* at 131 (“The Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles) are the most authoritative statement of what international human rights law obliges States to do and not do in promoting and protecting the rights of persons of diverse sexual orientations and gender identities.”).

to personal autonomy,¹¹¹ the right to informational privacy,¹¹² the right to health,¹¹³ and the right to bodily integrity.¹¹⁴ Each of these rights has been established by numerous international instruments to which India is a state party. According to the Yogyakarta Principles:

Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation, or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.¹¹⁵

In November 2017, the Yogyakarta Principles Plus 10 ("YP+10") were adopted to supplement the Yogyakarta Principles. The YP+10 move the right to sexuality and self-determination of gender identity forward by providing for the rights to state protection, legal recognition, bodily and mental integrity, freedom from criminalization, protection from poverty, sanitation, truth, enjoyment of human

¹¹¹ UDHR, *supra* note 82, art. 22; Rhoda E. Howard & Jack Donnelly, *Human Dignity, Human Rights, and Political Regimes*, 80 AM. POL. SCI. REV. 801, 805 (1986). *See also* Communication No. 453/1991, *supra* note 88 ("[T]he notion of privacy refers to the sphere of a person's life in which he or she can freely express his or her identity[.]"); L.G. Loucaides, *Personality and Privacy Under the European Convention on Human Rights*, 61 BRITISH YEARBOOK INT'L L. 175, 175 (1990) ("For man to be able to function freely, in the full sense of the term, he must have the possibility of self-definition and self-determination: the right to be himself. Thus, the achievement of effective protections of freedom of the person requires legal recognition and safeguarding of . . . his personality.").

¹¹² Hum. Rts. Comm., CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, U.N. DOC HRI.GEN/1/Rev.9 (Vol 1) (1988). *See also* Frank La Rue (Special Rapporteur), *Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN DOC. A/HRC/17/27 (May 12, 2011).

¹¹³ *See supra* Part III.

¹¹⁴ *See supra* Part III.

¹¹⁵ THE YOGYAKARTA PRINCIPLES, *supra* note 89, at 11–12.

rights in relation to information and communication technologies, and cultural diversity.¹¹⁶ In the Indian context this right to self-determination of one's gender identity has been recognized in the Supreme Court's jurisprudence, to be discussed in Part III.

D. The Right Against Discrimination

Perhaps at the heart of all the other rights discussed above, lies the right not to be discriminated against. Article 1 of the UDHR provides for equality and non-discrimination, proclaiming that all humans are born free and equal in dignity and rights.¹¹⁷ It has been observed that this clause applies to everyone irrespective of their gender identity or sexual orientation, with the Office of the U.N. High Commissioner for Human Rights stating:

Protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards. The legal obligations of States to safeguard the human rights of LGBT people are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights treaties.¹¹⁸

This is reiterated by Articles 2, 3, and 26 of the ICCPR, through which all individuals within a state party's jurisdiction are guaranteed the rights enshrined in the ICCPR and have the right to the equal protection of the law: to be treated equally before the law without any discrimination.¹¹⁹ These rights apply to individuals irrespective of their sex or gender identity. Further, the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity has acknowledged that international law is increasingly recognizing

¹¹⁶ THE YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 91, at 10.

¹¹⁷ UDHR, *supra* note 82, art. 1.

¹¹⁸ *Combating Discrimination Based on Sexual Orientation and Gender Identity*, OFF. OF THE U.N. HIGH COMM'R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx> [<https://perma.cc/PJ52-AKFY>].

¹¹⁹ ICCPR, *supra* note 85.

the right of individuals to be free from discrimination based on gender identity.¹²⁰ It has been argued that Article 2 of the ICCPR could be interpreted to protect against discrimination on the basis of gender identity as well.¹²¹

Articles 2 and 3 of the ICESCR also embody this principle since they guarantee the right to be free from discrimination on the basis of sex, amongst other characteristics, and the right to equal enjoyment of economic social and cultural rights.¹²² Further, General Comment Number 22 on Article 12 prepared by the Committee on Economic, Social and Cultural Rights (CESCR) specifically recognizes the right of intersex persons against discrimination, and the prohibition against treatment of LGBTI persons as mental or psychiatric patients that must be “cured.”¹²³ Further, in General Comments Number 18 of 2005 (right to work), Number 15 of 2002 (right to water) and Number 14 of 2000 (right to highest attainable standard of health), CESCR proscribed discrimination based on sex or

¹²⁰ Hum. Rts. Council, Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/35/36, 8 (Apr. 19, 2017) (“As evidenced by the wide range of international human rights treaties that are in force, international human rights bodies and procedures—ranging from the human rights treaty bodies, with their general comments and recommendations, to the universal periodic review, to the special procedures’ coverage of sexual orientation and gender identity-related violations, to resolutions and studies—the international human rights system has been strengthening the promotion and protection of human rights without distinction. The protection of persons based on their sexual orientation and gender identity, and the mandate of the Independent Expert, are based on international law, complemented and supplemented by State practice.”).

¹²¹ Matthew J. Lang, *Examining the Trump Administration’s Transgender Service Ban Through an International Human Rights Law Framework*, 25 DUKE J. GENDER L. & POL. 249, 255 (2018). See also ICCPR, *supra* note 85.

¹²² ICESCR, *supra* note 95.

¹²³ Econ. & Soc. Council, General Comment No. 22 (2016): The Right to Sexual and Reproductive Health, U.N. Doc. E/C.12/GC.22, para. 23 (May 2, 2016) (“Non-discrimination, in the context of the right to sexual and reproductive health, also encompasses the right of all persons, including lesbian, gay, bisexual, transgender and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status. Criminalization of sex between consenting adults of the same gender or the expression of one’s gender identity is a clear violation of human rights. Likewise, regulations requiring that lesbian, gay, bisexual transgender and intersex persons be treated as mental or psychiatric patients, or requiring that they be ‘cured’ by so-called ‘treatment’, are a clear violation of their right to sexual and reproductive health. State parties also have an obligation to combat homophobia and transphobia, which lead to discrimination, including violation of the right to sexual and reproductive health.”).

sexual orientation.¹²⁴ Article 2 of the UNCRC also enshrines this principle while mandating that state parties have the obligation to ensure that all human beings below the age of eighteen enjoy the rights expressed in the UNCRC, without any discrimination based on sex or other status.¹²⁵

Finally, these rights are reflected in Principles 1 and 2 of the Yogyakarta Principles, which delineate the right to the universal enjoyment of human rights, as well as the right to equality and non-discrimination.¹²⁶ In fact, it has also been argued that the right to equality and non-discrimination has “entered the realm of jus cogens.”¹²⁷ Given this context, intersex children arguably have the right to be free from discrimination by way of arbitrary invasions into their right to bodily and mental integrity, the right to privacy, the right to sexual orientation and gender identities, and other rights that have been universally guaranteed.

E. The Prohibition of Torture and Inhuman or Degrading Treatment

According to Article 7 of the ICCPR, individuals have the right to be free from torture or other cruel, inhuman, or degrading treatment, including the right to be free from acts that cause mental suffering.¹²⁸ Further, the right to liberty and security of the person enshrined in Article 9 of the ICCPR is also understood to protect “freedom from injury to the body and the mind, or bodily and mental integrity.”¹²⁹ The Human

¹²⁴ Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 230 (2008) (internal citations omitted).

¹²⁵ UNCRC, *supra* note 105.

¹²⁶ THE YOGYAKARTA PRINCIPLES, *supra* note 89, at 10–11.

¹²⁷ Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 101 (Sept. 17, 2003). *See also* David Brown, *Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles*, 31 MICH. J. INT’L L. 821, 825 (2010).

¹²⁸ Hum. Rts. Comm., General Comment No. 20: Prohibition of Torture, or other Cruel, Inhuman, or Degrading Treatment or Punishment (Article 7), U.N. DOC. A/44/40 (Mar. 10, 1992).

¹²⁹ Hum. Rts. Comm., General Comment No. 35: Liberty and Security of Person (Article 9), para. 3, U.N. Doc. CCPR/C/GC/35 (Dec 16, 2014).

Rights Committee explicitly notes that this right is applicable to everyone, including sexual minorities.¹³⁰

General Comment Number 2 on the freedom from torture, inhuman, and degrading treatment acknowledges that ill treatment may be meted out privately.¹³¹ The U.N. Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“Special Rapporteur”) has recognized that any medical intervention of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment if enforced or administered without the free and informed consent of the person concerned.¹³² In 2013, Special Rapporteur Juan E. Méndez recognized that such medical interventions are especially suspect when they are performed on vulnerable groups such as intersex persons, notwithstanding claims of good intentions or medical necessity.¹³³ The Special Rapporteur noted that “genital modification surgeries could potentially result in permanent, irreversible infertility and severe mental suffering.”¹³⁴ Using the concluding observations mechanism, the Committee Against Torture has criticized Germany, Switzerland, Austria, Hong Kong, Denmark, and France for their inaction related to such medical practices.¹³⁵ The Committee’s other recommendations

¹³⁰ *Id.*

¹³¹ *See generally* Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by State Parties, U.N. Doc. CAT/C/GC/2 (24 Jan. 2008).

¹³² Manfred Nowak (Special Rapporteur), Rep. on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/63/175, para. 47 (Jul. 28, 2008).

¹³³ Juan E. Méndez (Special Rapporteur), Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/HRC.22.53, para. 32 (Feb. 1, 2013).

¹³⁴ *Id.* at para. 77.

¹³⁵ Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention (Germany), U.N. Doc. CAT/C/DEU/CO/5, para. 20 (Dec. 12, 2011); Comm. Against Torture, Concluding Observations on the Seventh Periodic Report of Switzerland, U.N. Doc. CAT/C/CHE/CO/7, para. 20 (Sept. 7, 2015); Comm. Against Torture, Concluding Observations on the Sixth Periodic Report of Austria, U.N. Doc. CAT/C/AUT/CO/6, par. 44 (Jan. 27, 2016); Comm. Against Torture, Concluding Observations on the Fifth Periodic Report of China with Respect to Hong Kong, China, U.N. Doc. CAT/C/CHN-HKG/CO/5, para. 28 (Feb. 23, 2016); Comm. Against Torture, Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Denmark, U.N. Doc. CAT/C/DNK/CO/6-7, par. 42 (Feb. 4, 2016); Comm. Against Torture, Concluding Observations on the Seventh Periodic Report of France, U.N. Doc. CAT/C/FRA/CO/7, para. 34 (June 10, 2016).

regarding laws that impose preconditions to legal gender recognition arguably have wider implications.¹³⁶ This is because “the right to be free from torture is more absolute in nature, provides more protection because there is less room for balancing against public interest, and is more universally recognized and applicable beyond European jurisdictions.”¹³⁷

The Committee Against Torture also recommended that China “[t]ake the necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and personal integrity of . . . transgender and intersex persons,”¹³⁸ specifically with regard to conversion and other abusive treatment.¹³⁹ This was reiterated by the Office of the High Commissioner for Human Rights, which observed that these surgeries might violate the right of individuals to “physical integrity, to be free from torture and ill-treatment, and to live free from harmful practices.”¹⁴⁰ Thus, international instruments can be interpreted to prevent the torture and inhuman or degrading treatment of intersex children through physically invasive medically unnecessary surgeries.

F. The Principle of Best Interests

Intersex children also have the right to have their best interests protected, as established by various articles of the UNCRC.¹⁴¹ In 2015, during its periodic review of Switzerland, the Committee on the Rights of the Child stated that non-consensual intersex surgeries violate the right to physical integrity guaranteed by several

¹³⁶ Comm. Against Torture, Concluding Observations on the Fifth Periodic Report of China, U.N. Doc. CAT/C/SR.1368 and 1371 (2015).

¹³⁷ Geoffrey Yeung, *Using the Convention Against Torture to Advance Transgender and Intersex Rights*, OXFORD HUM. RTS HUB (May 26, 2016), <http://ohrh.law.ox.ac.uk/using-the-conventionagainst-torture-to-advance-transgender-and-intersex-rights/> [<https://perma.cc/UV3E-W4YC>].

¹³⁸ Nowak, *supra* note 132.

¹³⁹ *Id.*

¹⁴⁰ *Fact Sheet: Intersex*, OFF. OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, http://ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE_FactSheet_Intersex_EN.pdf [<http://perma.cc/BSN6-TGJ7>].

¹⁴¹ *See* UNCRC, *supra* note 105.

international instruments.¹⁴² According to Articles 3, 9, 18, and 21, the best interests of the child shall be a primary consideration for state parties in all actions concerning children, and state parties must ensure that institutions and services necessary for child protection conform to standards established by the relevant competent authorities.¹⁴³ According to these Articles, the best interest of the child shall be the primary concern of parents, and state parties must use their best efforts to ensure recognition of this principle.¹⁴⁴ While the UNCRC may not explicitly recognize the right of children to self-determine their gender, it arguably gives them the right to participate in such decisions. Further, as argued by Kirsten Sandberg, given that decisions about one's gender identity are private, they are also protected under Article 16 of the UNCRC, which clearly states that children have a right to privacy.¹⁴⁵

Further, a child's best interest is intrinsic to a particular child and there is no universal principle of what constitutes "best interest."¹⁴⁶ Accordingly, the best interests of a child will be different for different children, determinable only on a case-by-case basis.¹⁴⁷ This becomes salient once one understands that the concerns and pathologization intersex children face are unique. Additionally, the right of child participation is also important and must be placed beside the praxis of seeing "best interests" through an individual lens. These complementary rights are vital, and General Comment Number 14 appears to recognize this when it notes that consulting with a child—notwithstanding their vulnerabilities, youth, or any form of disability—is of paramount importance.¹⁴⁸ However, these rights become more

¹⁴² OFF. OF THE HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 90.

¹⁴³ UNCRC, *supra* note 105, arts. 3, 8, 18, 21.

¹⁴⁴ *Id.*

¹⁴⁵ Kirsten Sandberg, *The Rights of LGBTI Children Under the Convention of the Rights of the Child*, 33 NORDIC J. HUM. RTS. 337, 343 (2015).

¹⁴⁶ Comm. on the Rts. of the Child, *General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1)*, U.N. Doc CRC/C/GC/14 (May 29, 2013).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

valuable only once a child has attained certain faculties by coming of age.¹⁴⁹ Therefore, the best interests for intersex children facing unnecessary pathologization at infancy would continue to be medical procedures that seek to assign a determinable gender to the child at birth.¹⁵⁰

The principle of best interests cannot be manipulated to justify the practices that conflict with intersex children's bodily integrity. This has been categorically stated in Principle 32 of the Yogyakarta Plus 10 principles.¹⁵¹ Intersex children are thus entitled to have their best interests protected by the state as well as their parents/legal guardians, and to be protected against manipulated interpretations of the best interests principle.

III. Intersex in India

In India, intersex people's identities and their experiences of violence have gone largely unacknowledged, and any legislative attempts to protect their entitlements have been misdirected. Admittedly, the concerns enumerated in this Article are not only present in India. However, in India, they are exacerbated. Given the prevalence of female infanticide, and the preference for a male child, the already precarious situation for intersex children in India is worsened.¹⁵² Existing literature on the

¹⁴⁹ *Id.*

¹⁵⁰ Bernard M. Dickens, *Management of Intersex Newborns: Legal and Ethical Developments*, 143 INT'L J. GYNAECOLOGY & OBSTETRICS 255, 259 (2018).

¹⁵¹ THE YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 91, at 10 ("States shall ensure that the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity.").

¹⁵² Shailvee Sharda, *90% Want Doctor to Turn Baby with Deformed Parts into Boy*, TIMES OF INDIA (Mar. 3, 2017, 10:54 IST), <https://timesofindia.indiatimes.com/city/lucknow/90-want-doc-to-turn-baby-with-deformed-parts-into-boy/articleshow/57443180.cms> [<https://perma.cc/MV7H-S33L>]; *see also*, Arpita Das, 'Aching to Be a Boy': A Preliminary Analysis of Gender Assignment of Intersex Persons in India in a Culture of Son Preference, 34 BIOETHICS 585, 587 (2020); Stanley Pinto, *Against Doc's Advice, Parents Pick Male Gender for Child with Sex Disorder*, TIMES OF INDIA (Feb. 28, 2019), <https://timesofindia.indiatimes.com/city/mangaluru/against-docs-advice-parents-pick-male-gender-for-child-with-sex-disorder/articleshow/68190968.cms> [<https://perma.cc/DBY2-4F7X>]; R. Rajendran & S. Hariharan, *Profile of Intersex Children in South India*, 32 INDIAN PEDIATRICS 666, 670 (1995).

subject recognizes that differences of sexual development¹⁵³ (DSDs) are difficult to treat due to their complexity coupled with the stigma associated with them.¹⁵⁴ Accordingly, the management of DSDs is done through “normalizing” surgeries and hormone therapy, ultimately leading to the “correct” gender assignment in line with the normative masculine or feminine body.¹⁵⁵ Endocrinological studies¹⁵⁶ on the subject have found that Indian parents prefer “complete” babies with such completion being premised on fertility and sexual adequacy.¹⁵⁷ Further, there is no uniform medical process for dealing with intersex children¹⁵⁸ because of the myriad complexities that arise while dealing with intersex individuals. Yet, even on the limited question of whether to perform a “normalizing” surgery where there are no risks to the child there is no agreement. The dominant view continues to be that “normalizing” surgeries are best, despite a child not physiologically requiring such intervention.¹⁵⁹ Medical pedagogy in India too is silent on issues of DSDs and the psychological repercussions of performing “normalizing” surgeries.¹⁶⁰ As a matter of fact, medical texts in India have routinely been found to foster phobia toward the intersex community with an emphasis on pathologization of intersex traits.¹⁶¹

¹⁵³ This is commonly referred to as “disorders of sexual development.” However, the terms “divergence of sexual development” and “difference of sexual development” have been adopted variously by intersex advocates. In this Article we choose the term “difference of sexual development.”

¹⁵⁴ Vaman V. Khadilkar & Supriya Phanse Gupta, *Issues in the Diagnosis and Management of Disorders of Sexual Development*, 81 INDIAN J. PEDIATRICS 66, 75 (2014); see also MABEL YAU ET AL., DISORDERS OF SEXUAL DEVELOPMENT IN NEWBORNS (2019).

¹⁵⁵ *Id.*

¹⁵⁶ S. Julka et al., *Quality of Life and Gender Role Behavior in Disorders of Sexual Differentiation in India*, 19 J. PEDIATRIC ENDOCRINOLOGY & METABOLISM 879, 880 (2006).

¹⁵⁷ *Id.* at 885.

¹⁵⁸ V. Raveenthiran, *Neonatal Sex Assignment in Disorders of Sex Development: A Philosophical Introspection*, 6 J. NEONATAL SURGERY 58, 62 (2017).

¹⁵⁹ *Id.*; Sanjay Karla et al., *We Care for Intersex: For Pinky, for Santhi, and for Anamika*, 16 INDIAN J. ENDOCRINOLOGY & METABOLISM 873, 873–75 (2012).

¹⁶⁰ *Id.*

¹⁶¹ *Queerhythm v. Nat’l Med. Comm’n*, WP(C) No. 18210 of 2021, decided on Sept. 7, 2021 (Ker. HC); *Medical Courses in India Reaffirm ‘Queerphobia’, Says Madras HC, Advises Change in Curriculum*,

Given this background, Sections III.A and III.B will address the misdirection of laws and the misunderstood responses of the Indian State. The promise of reform guaranteed by the Supreme Court of India in *NALSA v. Union of India* fell woefully short, and the case struggled for coherence while addressing intersex rights.¹⁶² The Court conflated intersex identity with the “umbrella” identity of being transgender without acknowledging and understanding the unique experiences of oppression faced by intersex persons. The Transgender Persons (Protection of Rights) Act of 2019 (“Transgender Act”) also fails to explicitly ensure that intersex persons may meaningfully participate in society. That silence is not neutral but rather furthers the vulnerabilities of intersex persons. When coupled with the medicalization of intersex bodies, this entrenches such bodies as unruly and in need of correction. Finally, Sections III.C and III.D will examine intersex persons’ status as litigants before Indian courts and explore how intersex persons have been omitted from policies formulated by various Indian states under the Transgender Act.

We argue that the ineffectiveness and limitations within the Transgender Act have led to a complete misidentification of the intersex identity, and that the current standard used by Indian courts when assessing whether adequate consent was obtained for medical procedures vitiates the rights of intersex children.

A. *NALSA* and the Selective Rights of Self-Determination

NALSA was a watershed moment in India for transgender rights.¹⁶³ Through Articles 14, 15, 16, 19, and 21 of the Indian Constitution, the Supreme Court found that transgender persons have the right to self-determination of gender identity and must be treated as “socially and educationally backward classes” to get entitlements under affirmative state action.¹⁶⁴ Among other observations, the Supreme Court found that gender identity was intrinsic to one’s self-identity and observed that it

SCROLL (Sept. 1, 2021, 7:39 PM), <https://scroll.in/latest/1004345/medical-courses-in-india-reaffirm-queerphobia-says-madras-hc-advises-change-in-curriculum> [<https://perma.cc/PU5T-S5KY>].

¹⁶² Nat’l Legal Serv. Auth. v. Union of India (2014) 5 SCC 438.

¹⁶³ Smita Shah, *The Legal Status of Intersex Persons in India*, in *THE LEGAL STATUS OF INTERSEX PERSONS* 281 (J. Scherpe et al. eds., 2018); see also *Briefing Paper: Implementation of NALSA Decision*, INT’L COMM’N OF JURISTS (2016), <https://www.icj.org/wp-content/uploads/2016/04/India-QA-NALSA-Advocacy-Analysis-brief-2016-ENG.pdf> [<https://perma.cc/MN35-AG6M>].

¹⁶⁴ Nat’l Legal Serv. Auth., 5 SCC at para. 129.

could not be restricted or hindered by the state. In doing so, the Court rightly observed that the right to life guaranteed by the Constitution includes within it the right to privacy, autonomy, and dignity.¹⁶⁵

At this point, it may be of value to consider the historiography and etymology of the word *hijra*, as this term served as the fulcrum upon which the Indian Supreme Court was to bestow the newly found right to gender identity.

Historically the word *hijra* has depicted multiple facets of society: moral panic, prejudice, and a different people.¹⁶⁶ It is also often used as a term to revile another for being weak, effeminate, or impotent.¹⁶⁷ At the turn of the nineteenth century, the term evoked prurient curiosity and was largely misunderstood to refer to people who are neither male nor female or an unholy combination of both.¹⁶⁸ In the Indian sub-continent, *hijras* are both revered and ridiculed in equal measure: their presence is considered auspicious when a child has just been born, yet the community is condemned to begging for alms as a way of life.¹⁶⁹

In *NALSA*, the Supreme Court of India was moved by the immiseration of the *hijra* community, and recognized the rights of *hijras*, bringing them within the framework of the Indian Constitution.¹⁷⁰ This did two things: Firstly, it brought *hijras* within the protective framework of the Indian Constitution which meant that *hijras* would now be eligible for benefits and entitlements stemming from positive discrimination in the form of reservations for jobs and education.¹⁷¹ Secondly, and

¹⁶⁵ *Id.*

¹⁶⁶ *The Hijra Panic*, https://www.cambridge.org/core/services/aop-cambridge-core/content/view/1E3C6C60CC72BEDBBF1FD1559F83C505/9781108492553c1_27-43.pdf/hijra_panic.pdf [<https://perma.cc/8W54-SX7F>].

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Shriya Dasgupta, *Begging at Signals a Way of Life for Transgenders*, TIMES OF INDIA (Aug. 28, 2016, 14:47 IST), <https://timesofindia.indiatimes.com/city/kolkata/begging-at-signals-a-way-of-life-for-transgenders/articleshow/53893879.cms> [<https://perma.cc/8LPR-Y2PD>].

¹⁷⁰ Nat'l Legal Serv. Auth., 5 SCC at 164.

¹⁷¹ *Id.*

perhaps more importantly, the right to gender identity and self-identification was recognized within Indian jurisprudence.¹⁷² *NALSA* was rhapsodized for being “pathbreaking” as it sought to remedy centuries of oppression for a people who were hitherto outside of the ambit of the law’s protection.¹⁷³

The Court’s imprimatur to guarantee the right to self-identification was meant to usher in an era of reforms for those persons who do not fit into the masculine and feminine binary. However, *NALSA* was without any delineation; it did not in explicit terms lay down the specific groups that were to benefit from the court’s newly announced declaration of a right to gender identity. This is not to suggest that legal recognition is not important. It helps a great deal in confrontations with the everyday state—accessing identification documents, housing entitlements, education, insurance, and more. However, *NALSA* premised the bestowal of rights upon a person identifying as *hijra* and “transgender.” The judgment, with its concomitant legislation and policies, ignored the plight of intersex persons who occupy a liminal space, facing oppression for not fitting into a gender binary and requiring a different bouquet of rights and entitlements.

Despite its many progressive aspects, *NALSA* conflated intersex identity with being transgender, and the remit of specific rights for intersex people vis-à-vis *NALSA* remains unclear.¹⁷⁴ Consider the following excerpt of the judgment where the Court attempts to establish “transgender related identities”:

Eunuch: Eunuch refers to an emasculated male[,] and intersexed to a person whose genitals are ambiguously male-like at birth, but [if] this is discovered[,] the child previously assigned to the male sex[] would be recategorized as intersexed [sic] – as a Hijra.¹⁷⁵

Thus, the Court evidently confuses intersex identity and mistakenly characterizes the intersex persons as *hijras* which, although *hijras* are tremendously marginalized, is a distinct and disparate group of persons indigenous to parts of India,

¹⁷² *Id.*

¹⁷³ Shah, *supra* note 163.

¹⁷⁴ *Id.*

¹⁷⁵ Nat’l Legal Serv. Auth. v. Union of India, (2014) 5 SCC 438.

Pakistan, and Nepal.¹⁷⁶ Proceeding from this mischaracterization, the Court stated that any case involving a discrepancy between sex and/or gender assigned at birth and an identity that is not within the masculine and feminine binary—intersex or otherwise—is a “transgender related identity.”¹⁷⁷ In fact, *NALSA* did not engage the question of intersex persons on a standalone basis at all, and ignored the particular experiences of oppression faced by intersex persons. Intersex identity is primarily concerned with how certain physical traits are perceived by others and understood to be “at odds” with the normative physical body,¹⁷⁸ while transgender identity is premised on how one perceives one’s own gender.¹⁷⁹ This is not to suggest that intersex concerns do not also involve internal experiences, but rather to center the particular oppression and violence that intersex individuals face. Although related, intersex issues are not a “species” of the genus of transgender issues. *NALSA* wholly omitted the primary concern of the intersex community which is the unnecessary pathologization of their bodies in childhood.

Subsequent cases such as *Jackuline Mary* have interpreted *NALSA* restrictively to include only transgender persons and not intersex individuals.¹⁸⁰ In *Jackuline Mary*, a person with intersex traits was raised as a woman.¹⁸¹ In adulthood, while undergoing certain tests for a government job, the petitioner’s chromosomal pattern was found to be “46, XY with undervirilization.”¹⁸² The petitioner was diagnosed

¹⁷⁶ Shah, *supra* note 163.

¹⁷⁷ Nat’l Legal Serv. Auth., 5 SCC at 164.

¹⁷⁸ Jens Scherpe, *Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons*, in *THE LEGAL STATUS OF INTERSEX PERSONS* 201 (J. Scherpe et al. eds., 2018).

¹⁷⁹ *Id.*

¹⁸⁰ *Jackuline Mary v. Superintendent of Police*, 2014 SCC Online Mad 987, 28 (India).

¹⁸¹ *Id.* at 3.

¹⁸² *Medical Encyclopedia: Intersex*, MEDLINE PLUS, <https://medlineplus.gov/ency/article/001669.htm> [<https://perma.cc/QR27-JUJ5>] (previously understood as male pseudohermaphroditism, this condition is commonly understood to be associated with intersex persons); *Jackuline Mary*, 2014 SCC Online Mad at 6.

with “partial androgen insensitivity syndrome.”¹⁸³ The medical report characterized the petitioner as “transgender by birth” and dismissed her from the job as the opportunity was for women only.¹⁸⁴ The court relied on *NALSA* in its judgment, holding that the petitioner was entitled to be regarded as a woman because that was her self-identified gender.¹⁸⁵ In doing so, it interpreted the *NALSA* ruling’s recognition of a “third gender” to be limited to transgender women.¹⁸⁶ Accordingly, the court concluded that individuals of all other gender identities had to be categorized within the binary male-female classification under Indian law, or risk losing the entitlements provided to them under the Constitution.¹⁸⁷ Given that the litigant here had lived as a woman and was assigned female at birth, the court held that legally she “should be treated as a female for all purposes,” notwithstanding other possible medical classifications.¹⁸⁸

Several issues arise in view of *Jackuline Mary*. First, the court proceeded on the notion that *NALSA* applied only to transgender women, categorizing them as the “third gender.”¹⁸⁹ Second, the petitioner in *Jackuline Mary* was diagnosed with a condition that is medically understood to be an intersex trait.¹⁹⁰ Not only did the *state* mischaracterize her as transgender, but the *court* did not acknowledge this

¹⁸³ See Bruce Gottlieb & Mark Trifiro, *Androgen Insensitivity Syndrome*, GENEREVIEWS (May 11, 2017), <https://www.ncbi.nlm.nih.gov/books/NBK1429/> [<https://perma.cc/QR27-JUJ5>].

¹⁸⁴ *Jackuline Mary*, 2014 SCC Online Mad, at 9–10 (India) (including a medical report in which an intersex condition was mislabeled as a transgender condition).

¹⁸⁵ *Id.* at para. 36.

¹⁸⁶ *Id.* at para. 33. This Article uses the widely accepted terms “transgender women” and “transgender men” for the sake of clarity and respect, notwithstanding the *Jackuline Mary* court’s approach to defining these identities. See *Trans Woman*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/trans%20woman> [<https://perma.cc/FDK7-RW3U>]; *Trans Man*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/trans%20man> [<https://perma.cc/4J5C-6FEC>].

¹⁸⁷ *Id.* at para. 32.

¹⁸⁸ *Id.* at para. 37.

¹⁸⁹ *Id.* at para. 37.

¹⁹⁰ MEDLINE PLUS, *supra* note 182.

misnomer.¹⁹¹ This highlights how intersex traits are commonly conflated with being transgender. Third, since the petitioner herself identified as female, the court did not have to adjudicate upon her intersex status. Yet, this raises the question of what would have happened had the petitioner identified as intersex in non-binary terms and not as a woman. Tracing the rationale of the court, such an identity would seemingly not be recognized by the judiciary or the state.

While the remit of the *NALSA* Court was limited to the regional community of transgender persons,¹⁹² it expressed its understanding of the term “transgender” as one that also encompassed gay, lesbian, and bisexual individuals.¹⁹³ This confusion is likely the result of what J.A. Redding labels as “innocent judicial fumbling.”¹⁹⁴ Here, the court was placed in a situation where it adjudicated upon the rights of a class of persons with whom the court was presumably unfamiliar. This judicial fumbling has led to a misunderstanding of intersex identity and struggles, as well as a severe conflation with otherwise disparate vulnerable communities.¹⁹⁵

As will be shown through cases following *NALSA*, its interpretation has led to the right of self-determination being selectively wielded. It could be argued that the crux of *NALSA* was to create space for new legislation that would eliminate prejudicial practices toward sexual minorities. The exact rights, remedies, and entitlements could have been provided legislatively—precisely what the Transgender Act had the potential to do. Instead, it has fallen woefully short.

¹⁹¹ *Id.* (including a medical report in which an intersex condition was mislabeled as a transgender condition).

¹⁹² *Id.*

¹⁹³ Nat’l Legal Serv. Auth. v. Union of India, (2014) 5 SCC 438, para. 107 (“At the outset, it may be clarified that the term ‘transgender’ is used in a wider sense, in the present age. Even Gay, Lesbian, bisexual are included by the descriptor ‘transgender.’”).

¹⁹⁴ J.A. Redding, *From “She-Males” to “Unix”*: Transgender Rights and the Productive Paradoxes of Pakistani Policing, in REGIMES OF LEGALITY: ETHNOGRAPHY OF CRIMINAL CASES IN SOUTH ASIA (D. Berti & D. Bordia eds. 2015).

¹⁹⁵ *Id.*

B. Exclusion and Misdirection Through the Transgender Act, 2019

The Transgender Act and the bill that preceded it¹⁹⁶ have been subjected to scathing criticism.¹⁹⁷ However, the criticism has not been directed toward the omission of any rights or entitlements for intersex persons. The Transgender Persons (Protection of Rights) Bill, 2016 (“2016 Bill”) did not envisage an intersex person and instead only provided for “intersex variations” under the umbrella of the term “transgender.”¹⁹⁸ was referred to a parliamentary standing committee,¹⁹⁹ which recommended that it be renamed the Transgender and Intersex Persons (Protection of Rights) Bill.²⁰⁰ This would have been a welcome addition as the 2016 Bill in its then form was exclusionary. The Committee also noted that the bill confused intersex persons and transgender persons.²⁰¹ In response, it suggested that “persons with intersex variations” be added to the text of the 2016 Bill. Most of the Committee’s suggestions were overlooked when Parliament passed the Transgender Act in 2019, but the this requested term was added as a separate definition.

The Transgender Act defines the term “person with intersex variations” as: “a person who at birth shows variation in his or her primary sexual characteristics,

¹⁹⁶ The Transgender Persons (Protection of Rights) Bill, 2019, Bill No. 169 of 2019 (July 15, 2019).

¹⁹⁷ Justin Jos, *Limiting Gender Variance Critical Reflections on the Transgender Persons Bill*, ECON. & POL. WEEKLY (Jan. 28, 2017), <https://www.epw.in/journal/2017/4/commentary/limiting-gender-variance.html> [<https://perma.cc/WLY4-NMBT>]; Revathi Krishnan, *Unscientific and Regressive—Why Transgenders Bill Tabled in Rajya Sabha Is Contentious*, THEPRINT (Nov. 21, 2019), <https://theprint.in/theprint-essential/unscientific-regressive-why-transgenders-bill-tabled-in-rajya-sabha-is-contentious/323859/> [<https://perma.cc/2QJJ-E3N7>].

¹⁹⁸ The Transgender Persons (Protection of Rights) Bill, 2016, Bill No. 210 of 2016, §2(i) (August 1, 2016) (India).

¹⁹⁹ Press Release, Ministry of Soc. Just. & Empowerment, Special Funds for Transgenders (2019), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=187295> [<https://perma.cc/FDF9-4MJK>].

²⁰⁰ STANDING COMM. ON SOC. JUST. & EMPOWERMENT, MINISTRY OF SOC. JUST. & EMPOWERMENT, THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2016: 43RD REPORT 18 (2017).

²⁰¹ *Id.*

external genitalia, chromosomes or hormones from the normative standard of male or female body.”²⁰²

The definition itself is prejudicial to persons with intersex traits. The glaring lacuna is the lack of a definition of what constitutes a normative male or female body. Further, the definition assumes that an intersex person has a “variation,” thereby implying that an intersex body cannot be considered normal. This perfunctory recognition of intersex variations is more akin to legal misrecognition, as it portrays intersex traits as deviations from the normative body. In failing to distinguish between the terms “intersex” and “transgender,” the Transgender Act has swallowed the identity of intersex persons within a larger transgender identity. Provisions related to the legal issues faced by intersex people and the unwarranted pathologization they encounter are absent from both legal discourse and the Transgender Act. Although rights are provided to transgender persons including persons with intersex characteristics,²⁰³ such rights are concerned primarily with a formal legal identification of the “third gender.”²⁰⁴ The oppression faced by persons with intersex traits through medicalization and “course correction” of their infant bodies goes unaddressed.²⁰⁵ The Transgender Act does nothing to curtail these “normalizing” surgeries.

Further, the Transgender Act has increased the mandate of surgical procedures, albeit in the form of sex-reassignment surgeries.²⁰⁶ The final entitlement toward which the Transgender Act is geared is a state-sanctioned “normalizing” process for persons wishing to transition. Perusing the Transgender Act in its entirety reveals that the purpose of the Act is to facilitate better and easier transitions.²⁰⁷ This is important for persons who at birth are born with a normative male or female body, but who do not identify with the concomitant gender. However, this does not

²⁰² The Transgender Persons (Protection of Rights) Act, 2019 §2(i).

²⁰³ *Id.* at §§ 3, 4, 7, 9, 11, 12, 15.

²⁰⁴ Edmund Horowicz, *supra* note 8, at 183–218.

²⁰⁵ See Peter Dunne, *Acknowledging or Erasing Intersex Experiences? Gender ‘Diversity’ in German Law*, 70 N. IR. LEGAL Q. 163 (2019).

²⁰⁶ The Transgender Persons (Protection of Rights) Act, 2019, §15(b).

²⁰⁷ *Id.* at §§ 7, 8, 15.

envisage the concerns of intersex persons. Adding to this, Indian courts have often used derogatory terms while describing intersex persons, without understanding the stigma and trauma associated with such terms.²⁰⁸

C. Exclusion by Indian States

In this section, policies of various state governments in India are explored. These policies have been established to supplement the Transgender Act's framework of rights and entitlements for transgender individuals, as defined by the Act. Recall that persons with intersex variations are statutorily subsumed under the umbrella of transgender identity. Accordingly, it could be argued that *NALSA* recognized that sexual minorities such as intersex persons ought to be provided with rights and entitlements, and that the Transgender Act formally recognized such rights and established the coordinates within which such rights were to be provided, leaving the actual realization of rights to the states. Yet, as will be argued, various state policies regarding those who are transgender wholly neglect the problems faced by intersex persons and are of no succor when it comes to recognizing rights for the intersex community.

Kerala's policy on transgender persons was the first state policy which analyzed the issues faced by the transgender community along with possible mitigation strategies.²⁰⁹ Yet, this policy reflects the biases of the Transgender Act, and discussions around intersex persons are absent. For instance, a survey of four thousand transgender persons was conducted prior to formulating this policy.²¹⁰ Ninety-nine percent of the survey participants identified as transgender women.²¹¹ Issues faced by transgender individuals are not the same as those face by intersex individuals, yet the policy fails to provide for intersex participation.²¹²

²⁰⁸ Soutik Biswas, *The Degradation of Pinki Pramanik*, BBC NEWS (July 4, 2012), <https://www.bbc.com/news/world-asia-india-18704298> [<https://perma.cc/E4UM-WB8M>].

²⁰⁹ G.O.(Ms) No. 61/2015/SJD, State Policy for Transgenders in Kerala, 2015, Department of Social Justice, <https://translaw.clpr.org.in/wp-content/uploads/2019/01/State-Policy-for-Transgenders-in-Kerala-2015.pdf> [<https://perma.cc/SG39-NUXL>].

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

Tamil Nadu formed a board in 2008 to provide protection for the *aravani* community in the state.²¹³ This community comprises persons who feel trapped in masculine bodies and choose to identify as women.²¹⁴ Once again, the board catered solely to the needs of transgender women, with no rights or entitlements provided for intersex persons.

Subsequently, Karnataka,²¹⁵ Odisha,²¹⁶ and Assam²¹⁷ developed policies addressing the needs of the transgender community. It is telling that none of these policies made any attempts to address issues faced by intersex persons. In fact, the only context within which the word “intersex” was mentioned in any of these policies, was to define “transgenders” as an umbrella term within which fall “persons with intersex variations.”²¹⁸

D. The Intersex Litigant

In the case of *Ganga Kumari*, the court aimed to define the term “hermaphrodite” and concluded that it refers to persons with sexual organs of both the feminine and

²¹³ Venkatesan Chakrapani, *The Case of Tamil Nadu Transgender Welfare Board: Insights for Developing Practical Models of Social Protection Programmes for Transgender People in India*, UNITED NATIONS DEV. PROGRAMME (2012), <https://translaw.clpr.org.in/wp-content/uploads/2018/10/the-case-of-tamil-nadu-transgender-welfare-board-insights-for-d.pdf> [<https://perma.cc/AY6K-SSG8>].

²¹⁴ Aarefa Johari, *Hijra, Kothi, Aravani: A Quick Guide to Transgender Terminology*, SCROLL (Apr. 17, 2014), <https://scroll.in/article/662023/hijra-kothi-aravani-a-quick-guide-to-transgender-terminology> [<https://perma.cc/N4UW-ALYU>].

²¹⁵ *Karnataka Introduces a State Policy for Transgender Persons*, CTR. FOR L. & POL’Y RSCH (Nov. 16, 2017), <https://clpr.org.in/blog/karnataka-introduces-a-state-policy-for-transgender-persons/> [<https://perma.cc/65XG-LET8>].

²¹⁶ SOC. SEC. & EMPOWERMENT OF PERS. WITH DISABILITIES DEPT., GOV’T OF ODISHA, SWEKRUTI (A SCHEME FOR PROMOTION OF TRANSGENDER EQUALITY & JUSTICE) (2017), <https://cdn.s3waas.gov.in/s335051070e572e47d2c26c241ab88307f/uploads/2018/04/2018042881.pdf> [<https://perma.cc/7TM5-4ER9>].

²¹⁷ SOC. WELFARE DEPT., GOV’T OF ASSAM, RULES ON ASSAM POLICY FOR TRANSGENDER 2 (2019), <https://translaw.clpr.org.in/wp-content/uploads/2020/07/Rules-under-Assam-Transgender-Policy-30.6.2020.pdf> [<https://perma.cc/YR6C-VBJT>].

²¹⁸ *Id.*

masculine sexes.²¹⁹ Pertinently, the court stated that “hermaphrodites” are commonly referred to as transgender.²²⁰ “Hermaphroditism” is another (obsolete) way to describe intersex traits, and thus is not as such related to being transgender.²²¹ While an intersex individual may choose to identify with a gender that is disparate from the gender (or the lack of it) assigned at birth, a person is not “transgender” merely because they possess sexual organs that are not in tandem with the hegemonic understanding of gender. In fact, the Indian judiciary has seemingly misunderstood the term “transgender” such that any person with varying physical traits not fitting in the masculine-feminine binary is considered “transgender.” However, while there may be overlap—an intersex person choosing not to identify with the gender assigned at birth—being intersex and identifying as transgender are not inherently the same.

In *Thanusu*, the petitioner, though raised as a woman, did not have a uterus and ovaries.²²² The court found that the absence of such organs does not make a person transgender.²²³ In *Pinki Pramanik*, a national level athlete was charged with allegations of sexual assault.²²⁴ During incarceration, she was subjected to numerous medical procedures to decipher her gender identity.²²⁵ Finally, it was determined that she had “male pseudohermaphroditism.”²²⁶ In a baffling judgment full of incongruities, the court found the accused to be “incapable” of performing sexual

²¹⁹ *Ganga Kumari v. State of Rajasthan*, W.P. No. 14006 of 2016, decided on Nov. 13, 2017 (Raj.) (India).

²²⁰ *Id.* at para. 6.

²²¹ *Hermaphroditism*, ENCYC. BRITANNICA, <https://www.britannica.com/science/hermaphroditism> [<https://perma.cc/4CUL-H8RD>]; *Slurs, GENDER CONSTRUCTION KIT*, <https://genderkit.org.uk/slurs/#:~:text=Hermaphrodite> [<https://perma.cc/2ELR-P4HB>].

²²² *T. Thanusu v. Sec’y to Gov’t of Tamil Nadu*, W.P. No. 16539 of 2014, decided on July 3, 2014 (Mad.) (India).

²²³ *Id.* at 4.

²²⁴ *Pinki Pramanik v. State of W. Bengal*, CRR 2848 of 2013, decided on Sept. 12, 2014 (Cal.) (India).

²²⁵ *Id.* at paras. iv, v.

²²⁶ *Id.* at para. v.

intercourse “like an ordinary male.”²²⁷ This was premised on a belief about intersex individuals’ incapability to perform “ordinary” sexual intercourse.²²⁸ Further, throughout the incarceration she was subjected to invasive procedures, kept in a male cell despite identifying as a woman, and subjected to harassment.²²⁹ *Pinki Pramanik* demonstrates how the law mirrors medical narratives of intersex bodies as incomplete and abnormal.²³⁰ Although the court found her to be incapable of performing sexual activities in the context of the allegation of sexual assault, such a finding furthers the prejudices that intersex bodies are sexually inadequate.²³¹

In another case, *Faizan Siddiqui*, the petitioner presented herself as female and the court did not explore Faizan’s status and rights as an intersex person.²³² Rather, the emphasis remained on the adequacy of Faizan’s femininity, with the court observing that she had undergone vaginoplasty and consumed female hormones since childhood, and that the medication did not interfere with her fitness to serve as a female constable.²³³

Although it could be argued that after *NALSA*, the courts in *Jackuline Mary* and *Faizan* were bound by precedent to recognize the litigants’ self-identified gender, it is relevant to point out here that this leaves ambiguous situations where persons may

²²⁷ *Id.* at 44.

²²⁸ *Id.*

²²⁹ *Id.* at 44; HT Correspondent, *I Was Harassed in Jail, Says Pinki Pramanik*, HINDUSTAN TIMES (July 11, 2012, 5:35 PM IST), <https://www.hindustantimes.com/kolkata/i-was-harrassed-in-jail-says-pinki-pramanik/story-QRuk4g5Pd0SSA4efJc0THM.html> [<https://perma.cc/N5FN-AWTS>].

²³⁰ *Id.* (“This Court notices that the medical opinion states that the petitioner suffers from an intersex variation where she possesses both the primary and secondary characteristics of the two sexes. The medical opinion does not call the petitioner a female in the ordinary sense of the term but also stops short of calling the petitioner a man. This Court cannot be also oblivious to the fact that the petitioner, according to the medical opinion is incapable of performing sexual intercourse.”).

²³¹ Arpita Das, ‘Aching to Be a Boy’: A Preliminary Analysis of Gender Assignment of Intersex Persons in India in a Culture of Son Preference, 34 *BIOETHICS* 585, 590 (2020).

²³² *Faizan Siddiqui v. Sashastra Seema Bal*, W.P.(C) No. 7208 of 2008, decided on May 3, 2011 (Del.) (India).

²³³ *Id.* Other cases, such as *Nangai v. The Superintendent of Police*, 2014 (3) CTC 497 (India), have similar facts where the intersex status of the person was not explored.

not identify as female. In other words, if the petitioners in either case were to identify as an intersex individual instead of a female, the outcome could have been different. The courts could have observed that the post was for women only, and therefore the petitioners could not be employed in it. Therefore, the petitioners and the court have had to restrict the arguments to this narrow question, given that there is little discussion of the particular kinds of oppressions intersex individuals experience, the specific disentanglements of their rights, and the legal recognition of their status as intersex. It is evident that intersex litigants must present themselves regularly as belonging within the binary framework not just to the social world, but also at the altars of justice,²³⁴ even if the binary framework is in fact a farce. An understanding regarding who an intersex person is and how they might be different from transgender persons is therefore absent from legal discourse. In such absence, a biomedical narrative of intersex traits which pathologizes intersex bodies has become dominant.²³⁵

E. Medical Consent, Health Care, and Children

India does not have a specific statutory framework through which consent is obtained for medical procedures. Consequently, consent for medical procedures is stitched together through multiple statutes existing in disparate domains and has the same requirements as “free consent,” as defined in the Indian Contract Act of 1872.²³⁶ Before a person can provide free consent they must be competent to contract, i.e., be of age.²³⁷ Per the Indian Majority Act of 1875 the age of majority is eighteen.²³⁸ Therefore, a child cannot provide consent in India, as they are not competent to contract due to not having attained the age of majority.

²³⁴ Fae Garland & Mitchell Travis, *Legislating Intersex Equality: Building the Resilience of Intersex People through Law*, 38 *LEGAL STUD.* 587, 589 (2018).

²³⁵ See GEORGIANN DAVIS, *CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS* (2015).

²³⁶ Indian Contract Act, 1872, §14; see also D.S. Ramchandra, *Informed Consent: A Myth of Ethical Spirit and Legal Paradigm in Medical Profession*, 14 *MEDICO-LEGAL UPDATE* 86 (2014).

²³⁷ Indian Contract Act, 1872, §11.

²³⁸ Indian Majority Act, 1875, §3.

The Indian Penal Code (“IPC”) provides that a child below the age of twelve cannot provide consent,²³⁹ and that a person above the age of eighteen may provide valid consent.²⁴⁰ Thus, reading Sections 89 and 90 of the IPC suggests that a child above the age of twelve may provide consent for medical treatment, while a child under the age of twelve may not. Indeed, Section 90 states that consent given by a person below the age of twelve is not consent as understood under the IPC. However, Section 89 does provide that consent for an act done in good faith for a child below the age of twelve (which would include medical procedures), is not an offense if the guardian of the child provides consent.

Therefore, in India, children younger than twelve years old cannot consent to medical procedures. Given, then, that cosmetically “normalizing” surgeries take place right after childbirth or during the early years, how is consent vis-à-vis proper and reasonable medical treatment determined in this situation? One possible method is to use the guidelines on conduct and etiquette issued by the Indian Medical Council (“IMC”), which mandate that a medical practitioner must obtain written consent from the parent or guardian before operating on a minor.²⁴¹ Therefore, medical consent in India is “obtained” formally from a parent or guardian of a child because the child is not competent to contract. Extant laws have no mechanism which focuses on the process of obtaining consent. There are no legally binding requirements on a medical practitioner to explain the psychological and social impact which a child subjected to genital mutilation may face while entering adolescence and adulthood—an impact which may be severely detrimental. There is no obligation which requires that the medical team and the parent/guardian agree on a course of action which would be in the best interests of a child, and which would not involve unnecessary surgeries to “course correct” a body.

Cases which have come before courts have been restricted to discussions around medical negligence and malpractice. Nonetheless, they are useful to understand how consent is to be obtained for medical procedures. The landmark case of *Samira*

²³⁹ Indian Penal Code, 1860, §89.

²⁴⁰ *Id.* §87.

²⁴¹ Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, § 7.16.

*Kohli*²⁴² states that the Bolam test²⁴³ is to be followed in India.²⁴⁴ The main principles set forth in *Samira Kohli* are that (i) a doctor should obtain “real” consent which is given voluntarily by a patient competent to contract on the basis of adequate information regarding the nature of treatment; (ii) the doctor should explain the substantial risks of the procedure, but there is no need to explain remote or theoretical risks; and (iii) the nature of information furnished by a doctor should be that which is accepted as normal and proper by a body of medical persons/experts skilled and experienced in the particular field.²⁴⁵

The Supreme Court has also observed that the existence of a body of opinion which may deem the course adopted by a medical practitioner incorrect is not sufficient to question the course of action, or the consent obtained for the medical procedure.²⁴⁶ To establish the legitimacy of a medical procedure, the Bolam test requires only that the practice be recognized by a body of medical opinion. This implies that in the event there are differing opinions regarding a medical practice, the practice would be acceptable as long as there is a critical mass of opinion which favors the practice. This is an inadequate standard through which consent may be obtained for intersex surgeries, however, because cosmetically “normalizing” surgeries are not universally criticized.²⁴⁷

Indian laws governing the process of obtaining consent are flawed and inadequate given the particular vulnerability of intersex children. In any other situation, agreement between the parent/guardian and the medical practitioner may be assumed to be in the best interests of the child. However, in light of the specific

²⁴² *Samira Kohli v. Dr. Prabha Manchanda*, (2008) 2 SCC 1, 8 (India).

²⁴³ *Bolam v. Friern Hosp. Mgmt. Comm.*, 1957 1 WLR 582, 23 (India).

²⁴⁴ Other cases have also applied the Bolam test. See *Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1 (India); *Dr. Harish Kumar Khurana v. Joginder Singh*, (2021) SCC Online SC 673 (India); *Martin F. Dsouza v. Mohd. Ishfaq*, (2009) 3 SCC 1 (India). However, in *Samira Kohli*, the Supreme Court laid down the manner in which the Bolam test must be interpreted in India. *Samira Kohli*, (2008) 2 SCC, at 8.

²⁴⁵ *Samira Kohli*, (2008) 2 SCC, at 8.

²⁴⁶ *Martin F. Dsouza*, (2009) 3 SCC, at 20.

²⁴⁷ M. Newbould, *When Parents Choose Gender: Intersex, Children and the Law*, 24 MED. L. REV. 474, 480 (2017).

prejudices against intersex persons, such agreement may not be in the best interests of the child, ensuring instead that the body of the child adheres to societal standards.²⁴⁸ This is aggravated due to India's poor standard of information disclosure, as it does not require medical practitioners to disclose theoretical and remote harms.²⁴⁹ Since the harm faced by a child would manifest much later in life, it is often not a consideration while subjecting intersex children to medically unnecessary surgeries.

IV. The Way Forward

The lack of legal space to maneuver for intersex rights, especially within the national framework where intersex litigants are pigeon-holed within the binary, emerges clearly from the above discussion, and is a cause for urgent concern. Until now, the identity of intersex persons has been conflated with a larger transgender identity in India.²⁵⁰ Discussions of the legal issues faced by intersex people and of the unwarranted pathologization they encounter have rarely been a part of the legal discourse in India. The sections that follow offer certain recommendations which, if adopted, might result in an embargo on the medicalization of intersex bodies and would provide a framework for adjudication of the rights of intersex persons.

A. Proscribe Unnecessary Cosmetically “Normalizing” Surgeries

Extant laws must recognize that the legal issues concerning persons with intersex traits are different from those of transgender individuals.²⁵¹ Although there may be overlap,²⁵² the medicalization of intersex bodies must be treated as a distinct form of violence. In this regard, it also must be acknowledged that the judgment in *NALSA* with its expansive definition was meant to guide the legislature and was not a complete code within itself. Accordingly, the Transgender Act ought to have

²⁴⁸ *Id.*

²⁴⁹ *Samira Kohli*, (2008) 2 SCC at para. 32.

²⁵⁰ Jayna Kothari et al., *Beyond the Binary: Advocating Legal Recognition for Intersex Persons in India*, CLPR & SOLIDARITY FOUND., BANGALORE (2020), https://clpr.org.in/wp-content/uploads/2020/07/CLPR_PolicyBrief_2.pdf [<https://perma.cc/D8N2-VEFK>].

²⁵¹ *Id.*

²⁵² *Id.*

provided for distinct definitions as opposed to providing an all-encompassing definition, tacitly denying recognition to intersex persons.²⁵³

The intersex identity must be withdrawn from the umbrella transgender identity as currently provided in the Transgender Act. It must be noted that intersex variations are varied and complex,²⁵⁴ and a general definition of “persons with intersex variation” runs the risk of obfuscating their specific condition and allows free reign for “normalizing” surgeries as all intersex variations are understood to require treatment. Thus, any definition should provide an indicative and exhaustive list of intersex variations, and the same should be subject to constant revisions. This will provide the space for recognition that a person may be born outside of the majoritarian markers of sex and gender identities, and still lead a life without prejudice and stigma.²⁵⁵ Further, the Transgender Act must clearly protect intersex persons from medically unnecessary procedures. That the physical integrity of intersex persons is routinely and publicly violated due to societal biases remains unaddressed in the Transgender Act.

Therefore, the Act must be amended to recognize and protect the rights of intersex children, as a starting point to question the conflation of transgender and intersex identities. Some measures have been taken by state child protection commissions.²⁵⁶ However, such measures must be reflected in the central legislation as well as individual state policies on transgender persons.

²⁵³ Shah, *supra* note 163, at 40.

²⁵⁴ *Intersex Conditions*, INTERSEX SOC’Y OF N. AM., <https://isna.org/faq/conditions/> [<https://perma.cc/5Q44-MHFG>].

²⁵⁵ MADURAI, *supra* note 31, at 46–47.

²⁵⁶ The Commission has issued a notice to various governmental bodies such as the Department of Social Welfare, Department of Health and Family Welfare and to the President of the Delhi Medical Council seeking their inputs and comments on banning normalizing surgeries for intersex children. *See* DELHI COMM’N FOR PROT. OF CHILD RTS., GOV’T OF NCT OF DELHI, QUARTERLY PERFORMANCE REPORT (2020), <https://drive.google.com/file/d/1IHMQCwPwYQdS5Wgno5e728zxE98olsPA/view> [<https://perma.cc/MA8S-9UVD>].

B. Making Space for Cultural Contexts in Intersex Rights

At this juncture it is imperative to acknowledge that a complete prohibition on such surgeries also raises difficult ethical questions: What if in some communities, intersex children are so feared that they “experienc[e] terrible ostracization, rejection, violent assault and even murder”?²⁵⁷ Kevin G. Behrenshas proposed five principles to determine when such surgeries should be performed:

1. Interventions as drastic as these surgeries should only be performed when there is strong evidence that they are, all things considered, beneficial and not harmful.
2. Surgeries should normally only be performed on intersex infants in cases of true medical necessity.
3. Surgeries should normally be delayed until such time as the intersex person is mature enough to assent to treatment or decide against it.
4. Conventional ethical requirements regarding veracity/truth-telling apply equally to intersex children as to anyone else.
5. Where physicians and/or parents think that surgery truly is in the best interests of the child, in terms of safety or psycho-social well-being, the burden of proof lies with them.²⁵⁸

Although Behrens consistently argues against medical interventions without consent, this framework recognizes that in different socio-cultural contexts, intersex children might be more at risk of grave violence and oppression than in others. This set of principles is founded on the idea that the default decision must be non-intervention, and medical procedures must always be the exception, placing the burden of proof on parents or guardians.²⁵⁹ This also calls into question the pro-surgery approach of medical professionals, who often pressure parents to consent to

²⁵⁷ Kevin G. Behrens, *A Principled Ethical Approach to Intersex Paediatric Surgeries*, BMC MED. ETHICS, Oct. 29, 2020, at 2.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

such surgeries, even when no real health risks exist.²⁶⁰ However, there could be line-drawing concerns in such frameworks too—for instance, what is the degree of threatened violence and ostracism required to justify medical interventions? Will the carving out of such exceptions lead to more violence as expressions of social anxiety, to control ways of beings? Such questions remain to be answered.

C. Best Interest and Consent

Given the age at which children are subjected to cosmetically “normalizing” surgeries, they are usually not in a position to consent. The consent for such surgeries is then provided by parents and guardians, who may give it for extraneous reasons like ensuring that the child fits into a normative masculine or feminine body in order to escape societal prejudice and violence. However, this is not in the best interests of the child given the long-term consequences of such procedures. Further, such procedures vitiate the person’s right to make deeply personal decisions about one’s own body.

Recourse and remedy are not available in the future given the prevalence of the Bolam test. This test implies that when the medical profession cannot agree on the best course of action, courts are to provide a seal of approval on a medical procedure as long as there is a body of medical opinion supporting such a procedure.²⁶¹ Given that consent is based on an understanding between the parent and medical practitioner, the Bolam standard vitiates the autonomy of a child who is “incapable” of expressing consent at that point. Intersex children would have no recourse under the Bolam framework as courts would not find it fit to award compensation to a person subjected to cosmetically “normalizing” surgery due to the prevalence of different medical opinions on the issue. In this light, the Bolam test operates as a *quasi*-ethical framework. To remedy this, we propose that the best interests of the child should be analyzed from the perspectives of a post-structuralist feminist paradigm and queer bioethics, focusing on the child on whom such a surgery is to be performed. This would require a shift from premising consent purely on whether a body of medical opinion supports such cosmetically “normalizing” surgeries.

²⁶⁰ Claudia Wiesemann et al., *Ethical Principles and Recommendations for the Medical Management of Differences of Sex Development (DSD)/Intersex in Children and Adolescents*, 169 EUR. J. PEDIATRICS 671, 673 (2010).

²⁶¹ *Kusum Sharma v. Batra Hosp. & Med. Rsch. Ctr.*, AIR 2010 SC 1050, para. 71.

To uphold the best interests of the child, the decision regarding medical interventions should be made over a period of time. In this regard, reference may be made to cases in Colombia.²⁶² Colombian courts adjudicating cases regarding medically unnecessary surgeries for intersex children have held that such procedures amount to a violation of bodily integrity.²⁶³ Most importantly, courts have recognized that decisions regarding these surgeries are not always premised on the best interests of the child, but instead are made to normalize children and compartmentalize them into the normative masculine or feminine bodies.²⁶⁴ To remedy this, the courts have focused on the process of obtaining consent, which would require that parents and guardians be given full information on the procedure as well as its repercussions.²⁶⁵ This process should also entail exploring possible alternatives to surgery, and parents should mandatorily consult mental health practitioners to understand the harms which may befall an adult who was subjected to “normalizing” surgeries during childhood.

In addition to this, a child must experience gender on their own before gender is medically assigned to any child—intersex or otherwise.²⁶⁶ This emanates from the right of children to participate in experiencing gender, in the way they deem fit.²⁶⁷ It has been argued that gender must be provisionally assigned to children, who can then take a self-determined gender on reaching the age of majority.²⁶⁸ Naturally, this would then imply a prohibition on any medical procedure until a child is old enough to consent to it. This would be a significant departure from the present standard of

²⁶² Julie A. Greenberg & Cheryl Chase, *Background of Colombia Decisions*, INTERSEX SOC’Y OF N. AM. (1999), <https://isna.org/node/21/> [<https://perma.cc/T2LR-BHEX>].

²⁶³ *Id.*

²⁶⁴ Ryan L. White, *Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson*, 37 FORDHAM INT’L L.J. 777, 793–802 (2014).

²⁶⁵ *Id.*

²⁶⁶ Sandberg, *supra* note 145, at 345.

²⁶⁷ UNCRC, *supra* note 105, art. 12.

²⁶⁸ Carrie Paechter, *The Rights and Interests of Trans and Intersex Children: Considerations, Conflicts and Implications in Relation to the UNCRC*, 30 J. GENDER STUD. 844, 850 (2021).

obtaining consent in India, where medical practitioners are not expected to disclose “theoretical risks.”²⁶⁹

D. Shifting Toward Substantive Equality

Although the Transgender Act recognizes intersex variations, such recognition is perfunctory and is not supported by specific protections for intersex persons.²⁷⁰ While transgender persons can avail themselves of hormone-therapy counseling²⁷¹ and sex reassignment surgeries,²⁷² these rights presume that a transgender person wishes to transition. Hence, they do not protect the specific vulnerabilities of the intersex community. In this regard, Martha Fineman’s work on vulnerability may be used in India.²⁷³ Her theory pre-supposes the vulnerability of every individual, and thereby seeks to diminish it by building resilience.²⁷⁴ Such an approach mandates that the state not only recognize “intersex” as a separate legal identity, but also put in place specific redistributive provisions.²⁷⁵ Pertinently, it recognizes autonomy as exercised by individuals as a fallacy.²⁷⁶

In this context, *Arunkumar v. the Inspector General of Registration* is of tremendous significance because it considers the primary oppression of persons with intersex traits: the medicalization and corresponding correction through surgery of intersex bodies at childhood.²⁷⁷ Based on *Arunkumar*, the State of Tamil Nadu has

²⁶⁹ Samira Kohli v. Dr. Prabha Manchanda, (2008) 2 SCC 1, para. 32(ii).

²⁷⁰ Garland & Travis, *supra* note 234, at 2.

²⁷¹ The Transgender Persons (Protection of Rights) Act, 2019, §15.

²⁷² *Id.*

²⁷³ See generally Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008).

²⁷⁴ *Id.*

²⁷⁵ NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 45 (2003).

²⁷⁶ Fineman, *supra* note 273, at 19–23.

²⁷⁷ *Arunkumar v. Inspector Gen. of Registration*, W.P. (MD) No. 4125 of 2019.

banned surgeries on intersex children,²⁷⁸ and plaintiffs have relied on *Arunkumar* in petitioning other Indian courts to ban such surgeries.²⁷⁹ When it comes to banning medically unnecessary surgeries, *Arunkumar* does more than both *NALSA* and the Transgender Act.

However, it is also important to acknowledge the need to decenter the law, and question whether banning surgeries through courts or legislative measures would puncture the systemic biases which operate against intersex persons. For example, even if “normalizing” surgeries are banned or restricted until a certain age, such a ban would offer little protection against prejudice. Redistribution here would make efforts to address the underlying biases that are cast against intersex persons. Such redistribution could take the form of providing for education and health needs of intersex persons. For example, the texts that are taught to medical students at the university level in India have faced criticism by Indian courts for entrenching phobia toward the LGBTQIA+ community.²⁸⁰ Such texts ought to be overhauled and replaced. Similar to the provision of sex-reassignment surgeries, provisions for counseling and therapy specially catered toward intersex persons ought to be provided.²⁸¹

CONCLUSION

The harms faced by intersex persons have been documented across jurisdictions and recognized in international law. In this Article we have argued that the extant Indian legal landscape fails to adequately address a specific kind of violence intersex children face. This is despite India’s obligations under international law to protect intersex children from invasive medical procedures.

In this context, although India has passed the Transgender Act, it has focused on providing a “legal identity” for transgender persons and attempted to fit intersex

²⁷⁸ Kyle Knight, *Indian State Bans Unnecessary Surgery on Intersex Children*, HUM. RTS. WATCH (Aug. 29, 2019), <https://www.hrw.org/news/2019/08/29/indian-state-bans-unnecessary-surgery-intersex-children> [<https://perma.cc/9DZD-FGAX>].

²⁷⁹ Redding, *supra* note 194.

²⁸⁰ *Queerhythm v. Nat’l Med. Comm’n*, W.P.(C) No. 18310 of 2021, decided on Sept. 7, 2021 (Ker. HC), para. 7.

²⁸¹ Rachana Mudraboyina et al., *supra* note 31, at 5.

individuals within transgender identity. Being a purely status-based reform, which confuses the status of intersex persons with transgender persons, the law perpetuates a bio-medical narrative of intersex bodies being far removed from normative bodies, and thereafter does little to address the oppressions that arise from such differences. By perpetuating the invisibility of intersex persons, policies formulated by Indian states further entrench their vulnerability.

When the definition of intersex is pathologized, it is important to question the prejudices that have led to this result. In this regard, we have argued for viewing intersex concerns through a different lens of feminist and queer bioethics, keeping the intersex child's autonomy at the forefront. Studying how courts have viewed the intersex body and the parameters employed to determine meaningful consent, it appears that intersex children are left in a precarious position at the mercy of parents/guardians. Parents, often unaware of the gender spectrum and in a state of shock given the common understanding of the gender binary, usually opt for "normalizing" surgeries.

Consequently, a multipronged approach must involve changes to extant laws, especially the Transgender Act, and the application of a queer bioethical lens to intersex concerns. It must also ensure that the judicial approach proceeds in tandem with India's existing international obligations.