

UNIVERSITY OF UTRECHT

European Master's Degree in Human Rights and Democratisation  
A.Y. 2014/2015

# Making Room for the Rights of Intersex Children

Legal perspectives on intersex genital surgeries

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## **Abstract**

The rights of intersex persons are a new topic on the human rights agenda. It has only been in the last ten years that international and national human rights institutions have started to address the issue of subjecting intersex children to “cosmetic” genital surgeries in order to make their genitalia look typically female or male. This thesis explores different legal approaches for regulating these medically unnecessary intersex genital surgeries performed on non-consenting children. At first, this study examines how international and national human rights bodies have so far responded to intersex rights activists’ claims that the surgical alteration of children’s intersexed genitalia are human rights violations. The primary focus of this thesis is to analyse the extent to which different national approaches of protecting the rights of intersex persons have truly been in the best interests of intersex children. General Comment No. 14 of the CRC Committee provides the analytical framework for evaluating whether or not a legal measure ensures the child’s best interests. The study aims to shed some light on the debate on which legal measures need to be implemented in the future if states want to ensure that intersex children’s human rights are not being violated as a consequence of genital surgeries.

## **Acknowledgments**

*I warmly thank my thesis supervisor dr. Marjolein van den Brink for her guidance and support, her many inspiring inputs and perspectives and for trusting in me to develop my own thoughts.*

*I further thank my mother for having supported and advised me throughout this Master programme and my entire life.*

*I thank my sister for encouraging and believing in me and for always being there for me when I most need her.*

*My thanks also goes to Valerio who beard with me during my research and made me laugh and eat and whose inputs I always appreciate.*

*I further thank Clarissa for her corrections and patience.*

*Finally, I also thank all civil society organizations that provided me with input and different perspectives.*

## **Table of Acronyms**

CAH	Congenital Adrenal Hyperplasia
CAT	Convention against Torture and Other, Cruel, Inhuman or Degrading Treatment
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CRIA	Child's rights impact assessment
CRPD	Convention on the Rights of Persons with Disabilities
DSD	Disorder of Sex Development or Difference of Sex Development
ECHR	European Convention on Human Right
ECtHR	European Court for Human Rights
FGC	Female Genital Circumcision
GIGESC Act	Gender Identity, Gender Expression and Sex Characteristics Act 2015
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ISNA	Intersex Society of North America
LGBT	Lesbian, Gay Bisexual and Transgender
NNID	Dutch Network for Intersex/DSD
NSW	New South Wales
OII	Organization Intersex International
UDHR	Universal Declaration for Human Rights
UN	United Nations

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## Introduction

Intersexuality and its legal implications are mainly invisible, at least in most legal systems in Europe, North America and Australia. In the last century, if intersexuality was recognized and discussed at all, it was mainly perceived as a social or medical problem but rarely as a legal issue. Whereas around the end of the 19<sup>th</sup> century when lawmakers and courts still played a significant role in the determination of the sex of intersex persons, the improvement of medical techniques since the beginning of the 20<sup>th</sup> century made physicians the primary arbiter in the process of establishing the sex of these persons.<sup>1</sup> The medical advancement enabled doctors to surgically alter someone's intersexed genitalia in order to erase any doubt about that person's sex. This led to the establishment of intersex genital surgeries as a common medical practice. The surgical interventions were first performed on consenting adults, but in the 1950s the focus shifted to the medical treatment of the intersexuality of children. Between the 1950s and the end of the last millennium, the usual response to the birth of a child with both female and male sex characteristics in North America and Europe was to operate shortly after the child's birth in order to adjust the appearance of the genitalia to one of the two sexes of the binary sex model.<sup>2</sup> Besides the enhanced surgical techniques, it was the increasing importance of the so-called *Optimal Gender Policy* that made the widespread application of intersex genital surgeries possible. The *Optimal Gender Policy*, as established in the late 1950's by the psychologist John Money and his colleagues from the John Hopkins University in Baltimore, claimed that a child's gender identity is completely malleable and only depends on the environment's reaction to the gender role that is assigned to the child in infancy. According to this policy, the gender identity of an intersexed child will develop in accordance with the assigned gender role as long as any doubt about the child's sex is erased. This consequently demanded the surgical alteration of children's intersexed genitals in order to make them look typically female or male.<sup>3</sup>

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<sup>1</sup> Mak, 2012, pp. 165-172.

<sup>2</sup> Fausto-Sterling, 2000(a), pp. 44-46, Mak, 2012, pp. 171-178; Voss, 2012, p 15.

<sup>3</sup> Fausto-Sterling, 2000(a), pp. 44-46.

The belief that intersex genital surgeries are necessary for the child to form a stable gender identity and to avoid harassment and stigmatization due to “atypical” genitalia was not challenged until the 1990s when the intersex rights movement started to form itself in North America. The activists’ goal was to draw the attention of political decision makers and doctors to the psychological and physical harms caused by intersex genital surgeries on children. By claiming that these surgical interventions were violations of the right to bodily integrity or self-determination of the children concerned, they framed intersex genital surgeries for the first time as human rights concerns.<sup>4</sup>

Despite the increased visibility of intersex people and their claim to end non-consensual intersex genital surgeries, international human rights mechanisms as well as lawmakers and courts continued to overlook the legal aspects of intersex genital surgeries until the late 2000s. Finally, in the last ten years NGOs, international organizations, and slowly even national legislative bodies, have started to consider intersexuality in their strategies, policies and laws.<sup>5</sup>

However, the legal responses to intersex genital surgeries still remain fragmented and inconsistent. Only about a hand full of states have acknowledged the need to protect children’s intersexed bodies from irreversible surgical treatment.<sup>6</sup> In addition, since 2008, some international human rights institutions have independently from another concluded that these surgical interventions can cause human rights violations. They, however, have not yet agreed on one common coherent approach on how to deal with intersex genital surgeries.<sup>7</sup>

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<sup>4</sup> Preves, 2004, p. 271.

<sup>5</sup> E.g.: CEDAW Committee, CO, 2009, para 62; Malta’s Gender Identity, Gender Expression, Sex Characteristics Act 2015 (GIGESC Act), para 14(1); Special Rapporteur on Torture, 2013, para 88. The International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) started to work on *intersex* in 2008 (see: ILGA, 2013).

<sup>6</sup> E.g.: Bundesärztekammer, 2015; Constitutional Court of Colombia, *Sentencia SU-337/99*; Constitutional Court of Colombia, *Sentencia T-551/99*; High Court of Kenya, *Baby ‘A’ (Suing through the Mother E A) & another v Attorney General & 6 others [2014] eKLR*, Petition No. 266 of 2013, paras 62-67; Kekeritz, 2014; Malta’s GIGESC Act, para 14(1).

<sup>7</sup> Different legal measures have been proposed for regulating intersex genital surgeries. For example, the Special Rapporteur on Torture called on states to repeal all laws which allow for sex “normalizing” surgeries, the CAT Committee and the CRPD Committee focused on informed consent guarantees and the access of legal redress and the Special Rapporteur on Health supported the informed consent model as the Constitutional Court of Columbia proposed it. See: CAT Committee, CO, 2011, para 20; CRPD Committee,



Since the issue of intersex genital surgeries performed on children has only been discussed within the human rights discourse over the last ten years, there is still a lack of research on this topic. Some recent studies do examine the psychological and physical consequences of intersex genital surgeries, but the question of which legal measures can be used to regulate these surgeries has remained largely unexplored.<sup>8</sup> As slowly more information on the detrimental effects of intersex genital surgeries on children is becoming available, international and national human rights institutions have increasingly called out to implement legal measures that regulate the practice of performing these surgeries on children.<sup>9</sup> However, there has been disagreement on which legal measures are in the best interests of intersex children.<sup>10</sup>

This is the reason why I decided to make an inventory of the various legal approaches to intersex genital surgeries performed for purely “cosmetic” reasons on children; and, why I chose to analyse them in regards of their suitability to ensure the application of the concept of the best interests of the child. Thus, the questions guiding this thesis are as follow: *“Which different legal approaches are available for regulating intersex genital surgeries on children, and what is their potential in ensuring the application of the concept of the best interests of the child?”*

This research is restricted to the treatment of intersexuality in North America, Europe and Australia. As already indicated, the proliferation of intersex genital surgeries on children in these regions since the 1950s until the beginning of the 21<sup>st</sup> century can be seen as culturally and temporally contingent. It is the specific circumstances in the European and North American modern societies during the last century that has made possible the establishment of intersex genital surgeries as a common medical practice. The enhanced surgical techniques, the assumption that gender identity is mainly socially constructed and

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CO, 2015, para 37; Constitutional Court of Colombia, *Sentencia SU-337/99*; Constitutional Court of Colombia, *Sentencia T-551/99*; Special Rapporteur on Health, 2009, para 49 and FN 67; Special Rapporteur on Torture, 2013, para 88.

<sup>8</sup> Lev, 2006; Brinkmann/Schnweizer/Richter-Appelt, 2007.

<sup>9</sup> E.g.: Council of Europe, 2015(a), p. 9; German Ethics Council, 2012, p. 163-164; Special Rapporteur on Torture, 2013, para 88; Swiss National Advisory Commission on Biomedical Ethics, 2012, p. 18.

<sup>10</sup> See FN 7.

the common belief that everyone must fit the binary sex model in order to avoid stigmatization, all have been crucial in developing the strong social support for sex assignment surgeries.<sup>11</sup> Despite the fact that intersex genital surgeries are nowadays practiced in many regions around the world,<sup>12</sup> I will limit the scope of this thesis to an examination of the legal measures that have been implemented in Europe, North America and Australia, and their effects on intersex genital surgeries. Examples from other regions will be used whenever relevant.<sup>13</sup>

My exploration of possible legal measures to regulate intersex genital surgeries will be limited to proposals and practices that already exist.

The research focuses on the rights of the child that undergoes the genital surgery and will not consider the rights of the child's parents or of the child's community. The principle, that in "all actions concerning children [...] the best interests of the child shall be a primary consideration"<sup>14</sup> will guide my work in the following thesis. First more clarity is needed on the consequences of the different legal approaches for intersex children before the conflicting rights of the parents and the community can be taken into account. However, I do want to recognize at this stage that an integrated approach to the implementation of human rights could provide valuable perspectives on the issue of intersex genital surgeries. This approach, as it is advocated by legal scholar Eva Brems, takes into account all relevant human rights norms and rights-holders.<sup>15</sup>

The first chapter of this thesis will provide information on the methodology used for the analysis and the definitions of the terms employed throughout this thesis. Furthermore, it will provide information on the theoretical framework for the analysis – the concept of the best interests of the child. Regarding the methodology, in order to provide information on the development of intersex genital surgeries in the three regions examined, I will draw on

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<sup>11</sup> Ehrenreich/Barr, 2005, pp. 114-120; Levine, 2014, pp. 181-185; Wieringa, 2010, pp. 149-158.

<sup>12</sup> IGLHRC, 2011, pp.8-9; ISSA, n.d., Wieringa, 2010, p. 147.

<sup>13</sup> E.g.: Constitutional Court of Colombia, *Sentencia SU-337/99*; Constitutional Court of Colombia, *Sentencia T-551/99*; Constitutional Court of Colombia, *Sentencia T-912/08*.

<sup>14</sup> CRC, Art 3.1.

<sup>15</sup> Brems, 2014.

secondary sources by scholars of different academic disciplines.<sup>16</sup> The experiences of intersex persons with genital surgeries during infancy will be discussed by relying on the results of the Hamburger Study on Intersexuality.<sup>17</sup> The authoritative statements by international, national and local human rights institutions will guide my evaluation on the following question: which human rights are interfered with and possibly violated by intersex genital surgeries performed on children? The analysis of the different legal measures in the fourth chapter will rely on both primary as well as secondary sources. Different legislation and court decisions will be the objects of my analysis. I will further analyse legal approaches that have not yet been implemented but only proposed. Publications of different legal scholars and civil society organizations will provide me with information on the implications of the different legal measures examined.<sup>18</sup> General Comment No. 14 of the Committee on the Rights of the Child (CRC Committee) will provide me with the framework to evaluate whether the legal measures discussed are in the best interests of intersex children.

The second chapter offers an overview of the history of the development of intersex genital surgeries in Europe, North America and Australia and provides information on the experiences of persons that were subjected to intersex genital surgeries during their infancy.

The third chapter will analyse the human rights involved in the practice of intersex genital surgeries performed on children.

The fourth chapter gives an overview of the legal measures that can be employed to regulate intersex genital surgeries, which I will then evaluate with regard to their potential to ensure the application of the concept of the best interests of the child. The first part of the fourth chapter will discuss the extent to which different models for registering the legal sex of intersex children are in the best interests of these children. The sex registration models in Germany, the Netherlands and Australia will serve as case studies. The chapter then goes on to analyse how the explicit reference to *intersex* in anti-discrimination laws is in the best interests of intersex children. To illustrate the different legal approaches that exist for the

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<sup>16</sup> Dreger, 1998; Fausto-Sterling, 2000(a); Kessler, 1998; Mak, 2012.

<sup>17</sup> Brinkmann/Schweizer/Richter-Appelt, 2007; Schweizer/Richter-Appelt, 2012(a).

<sup>18</sup> E.g.: OII-Germany, 2013; Tamar-Mattis, 2006; White, 2014; Greenberg, 2006; Greenberg, 2012(a).

inclusion of intersex in equal treatment legislation, I will draw on a variety of examples from different countries. The final part of this chapter will discuss various legal measures that determine when intersex genital surgeries may be performed and analyse in how far they serve the best interests of intersex children. The relevant case studies will be the judgments by the Constitutional Court of Colombia and Malta's Gender Identity, Gender Expression and Sex Characteristics Act 2015 (GIGESC Act).

In the conclusion, I will determine which legal measures, given the current state of research, need to be implemented to ensure the best interests of the child. This conclusion can be seen as a snapshot of the current knowledge that is available on the practical consequences of the different legal approaches to intersex genital surgeries. As a result of the intensified research on this particular issue, unintended consequences of the different legal measures might be revealed for the future. Thus, a re-evaluation might be needed.

## **1. Methodological Considerations**

The lack of legal research on the issue of intersex genital surgeries was the main motivation for choosing this particular topic for my thesis. I believe that reliable research on the practical impact of legal measures is needed in order to ensure that human rights-friendly legislations and court decisions are enacted or passed. This first chapter of this study shall provide the reader with some background information on how I conducted my research as well as on the meanings of the terms that are used throughout this paper. Furthermore, it will explain the normative standard – *the best interests of the child* – for my analysis on the suitability of legal measures to regulate intersex genital surgeries performed on children.

### **1.1. Methodology**

Intersexuality and intersex genital surgeries can be approached from different perspectives and angles. As indicated in the introduction to this thesis, this paper will focus primarily on legal perspectives. However, in order to contextualise my research and point out its relevance, I will also provide insights into historical and psychological perspectives on intersex genital surgeries.

The research for this thesis is both descriptive and analytical. The goal is to first describe the legal measures that are currently applied or proposed to regulate intersex genital surgeries and then to analyse whether they are in the best interests of intersex children. The research can be considered as applied and reform-oriented, because it aims to conclude on the most adequate legal measures in order to address the issue of intersex genital surgeries on minors. The application of the concept of the best interests of the child will be the normative standard of evaluation that I will employ for this analysis.

By drawing on research on the historical development of intersex genital surgeries, as well as on the experiences that intersex persons have had due to these surgeries, I will contextualize my research and point out its *raison d'être* – the need to consider the implementation of legal measures to regulate intersex genital surgeries on infants. The publications by bioethics Alice Domurat Dreger, biologist Anne Fausto-Sterling, historian Geertje Mak and psychologist Suzanne J. Kessler will guide my work on the history of

intersex genital surgeries.<sup>19</sup> The focus herein will be on the development of medical practices since the 19<sup>th</sup> century, since it was during this period that intersex genital surgeries were increasingly performed. As Alice Dreger points out in one of her books,<sup>20</sup> the treatment of persons with atypical genitals had often differed from country to country of the same region. It is beyond the scope of this paper to provide a comprehensive description of the treatment of intersexuality in each country of the three regions examined. Thus, the elaboration will be limited to an overview of the general development of intersex genital surgeries in Europe, North America and Australia.

For the illustration of the experiences that intersex persons have made with genital surgeries, I will draw on the Hamburger Study on Intersexuality.<sup>21</sup> I chose to draw on the findings of this study for two main reasons. First, it is one of the most recent studies that researches the well-being of intersex persons and the experiences that they have made with the medical treatment of their intersexuality. Second, contrary to many other studies,<sup>22</sup> it focuses not only on the physical or sexual well-being of intersex persons but also researches their psychological well-being, their interests and the social experiences related to their intersexuality.<sup>23</sup> This avoids the reduction of intersex persons to their physical conditions and depicts them as multifaceted human beings.

The discussion on the human rights of the children concerned that are interfered with or potentially violated by intersex genital surgeries will mainly rely on statements and reports of institutions from the Council of Europe, the European Union and the United Nations (UN).<sup>24</sup> Additionally, I will draw on publications of national or local bodies working on human rights, such as the German and Swiss Ethics Committees<sup>25</sup> and the San Francisco Human Rights Commission<sup>26</sup>. There are a few more international, national and local

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<sup>19</sup> Dreger, 1998; Fausto-Sterling, 2000(a); Kessler, 1998; Mak, 2012.

<sup>20</sup> Dreger, 1998, pp. 16, 24.

<sup>21</sup> Brinkmann/Schweizer/Richter-Appelt, 2007; Schweizer/Richter-Appelt, 2012(a).

<sup>22</sup> Köhler et al., 2012; Lev, 2006; Minto et al., 2003(a); Minto et al., 2003(b); Schönbucher, 2012.

<sup>23</sup> Richter-Appelt, 2008, p. 63.

<sup>24</sup> E.g.: CAT Committee, CO, 2011, para 20; CRC Committee, CO, 2015, paras 42(b) and 43(b); Special Rapporteur on Torture, 2013, para 88.

<sup>25</sup> German Ethics Council, 2013; Swiss National Advisory Commission on Biomedical Ethics, 2012.

<sup>26</sup> Arana, 2005.

institutions working on human rights that have addressed intersex genital surgeries<sup>27</sup> but for several reasons these will not be discussed. Their findings would not add information to this research.<sup>28</sup> Some reports discuss the issue of early age intersex genital surgeries from a medical perspective instead of looking at it from a human rights-based approach.<sup>29</sup> In order to explain the relevance of the issues discussed, I will also include references to international human rights treaties, national legislation and publications of academics and intersex rights activists.<sup>30</sup>

The analysis of the legal measures that regulate intersex genital surgeries and how they ensure that the interests of intersex children are a primary consideration for deciding on issues affecting them will be based on both primary and secondary sources. I will collect different national laws and court decisions regarding the issue of intersexuality and intersex genital surgeries. I will further discuss legal approaches which have not yet been implemented but whose application has been advocated by activists or academic scholars. This inventory of possible legal measures will not be exhaustive, but provides an insight in the main legal approaches to intersex genital surgeries. For the discussion on the implications of the different legal measures, I will draw on publications of civil society organizations and studies by legal scholars.<sup>31</sup> I further consulted with intersex rights activists personally.<sup>32</sup> I will conclude on the most suitable legal measures to regulate intersex genital surgeries, by analysing how the legal measures comply with the framework for assessing and determining the children's interests of the General Comment No. 14.

Since there is still a lack of research on national laws or court decisions regarding intersex genital surgeries and their effects for intersex children, my conclusion can be seen

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<sup>27</sup> E.g.: Human Rights Commission New Zealand, 2008; Italian National Bioethics Committee, 2010; WHO, 2015.

<sup>28</sup> Australian Human Rights Commission, 2009; Australian Senate, 2013; ESCR Committee, CO, 2011, para 26; Human Rights Commission New Zealand, 2008; WHO, 2015.

<sup>29</sup> Italian National Bioethics Committee, 2010. See e.g.: pp. 17, 19-20.

<sup>30</sup> E.g.: Ehrenreich/Barr, 2005; International Covenant for Civil and Political Rights (ICCPR); Swiss Civil Code, Art. 13-19.

<sup>31</sup> E.g.: OII-Germany, 2013; Tamar-Mattis, 2006; White, 2014; Greenberg, 2006; Greenberg, 2012(a).

<sup>32</sup> [Zwischengeschlecht.org](http://Zwischengeschlecht.org).

as only preliminary.<sup>33</sup> Future research on the issue might reveal unintended or yet undetected consequences of the various legal measures, and this would consequently demand a reconsideration of their suitability to ensure the application of the concept of the best interests of the child.

## 1.2. Definitions

Since the intersex rights movement is divided on the question of which terminology should be used to describe “unusual”<sup>34</sup> sex characteristics, I need to clarify why I decided to employ certain terms and define their meanings.

In this thesis *intersex* will refer to “a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male.”<sup>35</sup> Intersex can be seen as “a socially constructed category that reflects real biological variation”<sup>36</sup>. These biological conditions can be roughly categorized in three different groups: Chromosomal variations, gonadal variations and hormonal variations. Chromosomal variations mean the unusual configurations of chromosomes that vary from the typical XX/XY combinations. Examples for these are the Klinefelter syndrome and the Turner syndrome. People with gonadal variations have mostly typical chromosomal combinations but their testes or ovaries show unusual specificities. These include the appearance of ovotestes (both ovarian and testicular tissues), only one testicle or ovary and streak gonads (which do not function as either testicles or ovaries). People affected by syndromes that are caused by hormonal variations produce hormones in an unusual quantity or form. This can result in the feminization or masculinization of bodies with typical chromosomal configurations. Examples for intersex conditions that are caused by hormonal

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<sup>33</sup> My inquiry on legal cases and legislation that have dealt with intersex genital surgeries strongly relied upon previous research by legal scholars (e.g. Greenberg, 2006; Greenberg, 2012(a)), civil society organizations (e.g. ISNA, 1999) and international organizations (e.g. Council of Europe, 2015(a)).

<sup>34</sup> When employing the word *unusual* or *atypical* for describing the appearance of intersexed genitals, I do not want to indicate that there is one true definition of what is *usual* or *atypical*. I rather want to reflect the societal understanding of how genital “usually” should look like and the rationale of performing early age intersex genital surgeries.

<sup>35</sup> ISNA(a), n.d.

<sup>36</sup> Ibidem.



variations are the Androgen Insensitivity Syndrome (AIS) and the Congenital Adrenal Hyperplasia (CAH).<sup>37</sup>

Accordingly, the umbrella term *intersex* describes different body variations that cause the appearance of atypical sex characteristics. There are different estimates about how many persons are born intersex. Anne Fausto-Sterling once came to the conclusion that about 1.7% of the human population is born with some form of atypical sex variation. However, out of this group only an estimated number of one to two persons out of 2000 are born with visible atypical sex characteristics.<sup>38</sup>

*Intersex* has a distinct meaning than the terms *transsexual* or *transgender*. Despite the factual differences in the definitions of these terms, they are often confounded and intersex is understood as being part of the term transgender.<sup>39</sup> The term transgender describes persons whose self-identified gender differs from the gender role that was assigned to them at their birth. Their gender expression and gender identity can either correspond to “the opposite” sex or not conform to the binary gender model at all. The sex characteristics of transgender at their time of birth usually show no abnormalities and can be described as typically female or male. However, they feel like their biological sex does not correlate with their gender identity. This is the reason why transsexuals pursue medical or surgical interventions in order to make their body appearance more female or male. Intersex and transsexuals often share the experience of undergoing genital surgeries and being dependent on hormonal treatment. However, whereas intersex persons are mostly medically treated when they are children and hence, cannot give their fully informed consent, transsexuals usually “choose”<sup>40</sup> themselves to undergo the gender re-assignment treatment. Some persons with intersex conditions indeed change their gender role during their lifetime and can therefore be considered transgender; but the majority feels comfortable with their assigned

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<sup>37</sup> Greenberg, 2012(a), pp. 13-14.

<sup>38</sup> Council of Europe, 2015(a), p. 15; Fausto-Sterling, 2000(b), p. 20.

<sup>39</sup> ISNA(e), n.d.

<sup>40</sup> It is debatable whether the decision to undergo gender re-assignment treatment is always a free choice. The legislation in many European countries requires irreversible medical alterations of the body before a person can obtain a change of the legal sex. This can pressure transgender to undergo gender re-assignment treatment in order to be able to legally change their sex/gender. See: TGEU, 2015(a).

gender.<sup>41</sup> Despite some similar experiences, such as the deprivation of autonomy and inadequate health services, transgender and intersex persons mostly face different forms of discrimination and human rights violations.<sup>42</sup> This is partly caused by the different legal situations that exist for intersex and transgender persons in many countries. For instance, in several countries intersex persons can change their legal sex by simply “correcting” a mistake on their birth certificate. For transgender persons on the other hand it is usually more difficult to obtain a legal sex change. If this is possible at all, they must almost always go through a lengthy procedure that often demands invasive medical treatment and consultations with psychologists.<sup>43</sup> An example is the case of *Philippines v. Jeff Cagandahan* where an intersex person could obtain a change of the legal sex while this would have been denied to a transgender person.<sup>44</sup> It is important to keep in mind the distinction between the medical, social and legal treatment of intersex and transgender persons.

The term *intersex* was introduced in 1917 by the biologist Richard Goldschmid, but it gained its importance mainly in the 1990s when the activist movement started to advocate for its use instead of the term *hermaphroditism*. Hermaphroditism was previously employed for describing “atypical” sex characteristics, but it was generally perceived as stigmatizing and labelling the persons concerned as “monsters” and “freaks”.<sup>45</sup> The employment of the term *intersex* should avoid negative connotations and reflect the intersex rights movement’s political demand to stop intersex genital surgeries.<sup>46</sup> However, since the term intersex is occasionally interpreted as referring to transsexualism or a third gender identity, some parents

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<sup>41</sup> Kaldera, 2001,

<sup>42</sup> ISNA(a), n.d.; Greenberg, 2012(b), 855.

<sup>43</sup> Van den Brink/Reuß/Tigchelaar, 2015(a), p. 285. See e.g.: Dutch Civil Code, Art. 1:24-24b (for *corrections*) and Art. 1:28 (for *changes*). Additional comment: Denmark and Malta allow for changing the legal sex unconditionally. See: Malta’s GIGESC Act, para 3(3), 4, 5; Motion to amend the Act on the (Danish) Civil Registration System, Art. 1.

<sup>44</sup> Supreme Court of the Philippines, *Republic of the Philippines v. Jeff Cagandahan*, Second Division (12 September 2008).

<sup>45</sup> Reis, 2007, pp. 536-537.

<sup>46</sup> Ibidem.

have been reluctant to call their children “intersex”. They fear that this could label their children once again as freakish, abnormal or “queer”.<sup>47</sup>

For these reasons, some people prefer the term *Disorder of Sex Development (DSD)* to *intersex*. In 2005, the participants of a conference on the treatment of intersexuality in Chicago advocated for the first time for the replacement of the term *intersex* with *DSD*. They believed that the usage of a medical description can ensure better medical care for the patients and avoid gender identity politics and the sexual connotations that are often associated with the term *intersex*.<sup>48</sup> The change of terminology is reflected in the outcome document of the conference, the *Chicago Consensus Statement*<sup>49</sup>, which has been endorsed by many organizations.<sup>50</sup> Some people who generally appreciate the medical perspective on intersexuality have criticized the term *disorder* for its negative connotation. This has resulted in a new interpretation of DSD as “Differences in Sex Development” which has been supported by several civil society organizations.<sup>51</sup>

Persons opposing the use of the term DSD (whether it abbreviates *Disorder* or *Differences in Sex Development* does not matter) argue that the medical term pathologizes intersexed bodies and reiterates the belief that every person can fit into the binary sex system – which can be seen as the main reason why intersex genital surgeries are performed.<sup>52</sup>

The change of the terminology to the term DSD has had several positive impacts for the intersex rights movement. It has attracted many activists who oppose “cosmetic” intersex genital surgeries on children but who do not want to challenge the binary sex system.<sup>53</sup> In some instances, the alliance with the Lesbian, Gay, Bisexual and Transgender (LGBT) movement has led to the disregard of the specific situation of persons with intersex conditions as well as the primary goal of the intersex rights movement – the end of sex “normalizing”

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<sup>47</sup> Ibidem; Greenberg, 2012(a), p. 93.

<sup>48</sup> Reis, 2007, pp. 537-538; Greenberg, 2012(a), p. 93.

<sup>49</sup> Lee, Peter A. et al., 2006, p. e488.

<sup>50</sup> The American Academy of Pediatrics and the Accord Alliances have both endorsed the Chicago Consensus Statement. See: Greenberg, 2012(a), p. 23; Accord Alliance, n.d.

<sup>51</sup> E.g.: The Dutch Network for Intersex/DSD (NNID) opted for the use of the terms intersex/DSD. DSD stands therein for *Differences in Sex Development*. See: NNID, n.d.

<sup>52</sup> Spurge, 2009, p. 108; Greenberg, 2012(a), p. 93.

<sup>53</sup> Koyama, 2006.

surgeries on children. This is reflected by the fact that some LGBT organizations have added the “I” to the acronyms of their names without paying specific attention to the situation of intersex persons.<sup>54</sup> Hence, distancing the intersex rights movement from the LGBT rights movement through the application of a medical framework which the DSD terminology offers, could help raise awareness for the specific practice of intersex genital surgeries performed on children.

However, labelling persons with “atypical” genitalia as having a “disorder”, or even as “different”, carries the risk that intersex genital surgeries can always be legitimized in some circumstances. I further believe that the DSD terminology de-politicizes the issue of intersex genital surgeries. It fails to recognize that heteronormativity and the binary sex model are the main causes that these surgeries are carried out on children’s bodies.<sup>55</sup>

After my consultation with intersex rights activists, I decided to use the term *intersex person* instead of *person with DSD* in this paper.<sup>56</sup> I believe that *intersex* better reflects the power relations between “normally” and “abnormally” sexed persons as regulated by law. Furthermore, I see an empowering element in the term *intersex*, which recognizes the persons concerned as rights-holders who have the autonomy to decide over their own bodies.<sup>57</sup>

Some organizations have opted for the employment of the expression *persons with intersex condition* in order to avoid both identity politics and the medicalization of intersex individuals.<sup>58</sup> The term *condition* is then intended to refer to the social position of intersex persons instead of a medical condition. However, some intersex persons have argued that the word *condition* seems still as pathologizing.<sup>59</sup> Because of this, I will use the expression *intersex condition* only when referring to the biological condition that causes the intersexuality.

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<sup>54</sup> Koyama, n.d.

<sup>55</sup> Spurge, 2009, p. 108.

<sup>56</sup> Email from Daniela Truffer/Markus Bauer, 17 May 2015; Information by Anonymous, 21 May 2015; Viloría, 2014.

<sup>57</sup> Spurge, 2009, p. 107.

<sup>58</sup> See: NNID, n.d

<sup>59</sup> For a discussion on the meaning of the term *condition* see Miriam van de Have’s comments to Hida Viloría’s article: Viloría, 2014.

Another term that will be used throughout this analysis is *intersex genital surgery*. By referring to this type of surgical intervention, I do not mean surgeries that are medically necessary and essential for the physical health of a person. I use this term to describe surgeries that are only done for “cosmetic” reasons. The term intersex genital surgeries also includes procedures that are not necessarily surgical, such as vaginal dilation<sup>60</sup> or hormone therapy. Furthermore, the term intersex genital surgeries also encompasses medical interventions such as *gonadectomies*<sup>61</sup> and *hysterectomies*<sup>62</sup>.

Some other recurrent terms in this paper will be *sex* and *gender*. While sex is usually understood as referring to biological sex characteristics, gender generally describes the roles and behaviours that are attributed to people based on their sex.<sup>63</sup> Legal primary sources tend to use the terms sex and gender interchangeably. This makes it difficult to know when they refer to someone’s gender identity or sex characteristics. Therefore, when it is unclear whether a legislation or a court decision refers to the concept of sex or gender, I will generally use the term sex. This is in particular relevant for my elaboration on different sex registration models. Therein I will mostly apply the term sex, while knowing that some models really register someone’s gender identity and not sex characteristics.

### **1.3. The analytical framework: The best interests of the child**

The concept of *the best interests of the child* is the normative standard that will be applied in my analysis to determine which legal measures are suitable to regulate intersex genital surgeries performed for “cosmetic” purposes on children. The human rights concept has been enshrined in several provisions of the Convention on the Rights of the Child 1989 (CRC)<sup>64</sup> as well as other international, national and local human rights laws.<sup>65</sup> Article 3.1 of

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<sup>60</sup> Vaginal dilation the process of inserting a metal stick or other material into the vagina in order to widen it and/or prevent its narrowing. See: Kraus-Kinsky, 2013, p. 162.

<sup>61</sup> Surgical removal of gonads. See: Marriam Webster, accessed on 30 June 2015.

<sup>62</sup> Surgical removal of uterus. See: Free Dictionary, accessed on 30 June 2015.

<sup>63</sup> Stanford Encyclopedia of Philosophy, 2011. The definitions of sex and gender are often controversially disputed. For additional input on this issue see: Butler, 1990; Fausto-Sterling, 2012.

<sup>64</sup> CRC, Art. 3.1., 9, 10, 18, 20, 21, 37(c), 40.2(b).

<sup>65</sup> CRC Committee, GC, 2013, para 2.

the CRC guarantees the best interests of the child and is regarded as one of the four main general principles of the convention.<sup>66</sup> It reads as follows:

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”*<sup>67</sup>

Since all UN member states except for the United States and Somalia have ratified the CRC,<sup>68</sup> Article 3.1 creates the obligation for almost all countries in the world to take the best interests of the child as the primary consideration in all measures affecting children.

Apart from binding human rights treaties, the concept of the best interests of the child is also mentioned in the *Yogyakarta Principles (2007)*. The Yogyakarta Principles is a set of guidelines that demonstrates how the current international human rights norms can be applied to issues of sexual orientation and gender identity. It is also the only international document that is regarded as having some authoritative value and that explicitly addresses the human rights of intersex persons and in particular the issue of intersex genital surgeries. No binding international human rights treaty has ever mentioned *intersex*. Principle 18 on the “Protection of Medical Abuse” is the main provision of the Yogyakarta Principles that directly refers to intersex genital surgeries performed on children. Principle 18(B) urges states to

*“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”*<sup>69</sup>

In accordance with this Principle and Article 3.1 of the CRC, I will use the concept of the best interests of the child as the normative standard for evaluating the strengths and weaknesses of different legal measures in regulating intersex genital surgeries performed during infancy. For the analytical framework of my analysis, I will use the General Comment No. 14 of the CRC Committee, which specifies the application of the best interests of the

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<sup>66</sup> E.g.: CEDAW, Art. 5(b), 16.1(d). See: CRC Committee, GC, 2003, para 12.

<sup>67</sup> CRC, Art. 3.1.

<sup>68</sup> United Nations Treaty Collection, accessed 13 June 2015.

<sup>69</sup> Yogyakarta Principles, 2007, Principle 18(B).

child. The General Comment is suitable for my analysis since it sets out guidelines on how to assess and determine the best interests of the child in individual cases as well as in collective measures affecting a broader group of children.

In the following, I will provide the reader with an overview of the concept of the best interests of the child pursuant to the General Comment No. 14 of the CRC Committee. I will focus therein on the aspects that are relevant for the issues at stake.

### **1.3.1. Three elements of the best interests of the child**

According to the General Comment No. 14, the concept of the child's best interests is threefold. It includes a substantive right that guarantees that the interests of the child are not regarded at the same level than that of the other interests. Instead, they must be given more importance during the decision-making.<sup>70</sup> The second element of the best interests of the child is a fundamental, interpretative legal principle. This principle ensures that the CRC must be interpreted in the manner that serves the best interests of the child most effectively.<sup>71</sup> The third element concerns the rules of procedure for determining the best interests of the child in each case. The rules of procedure have to include an evaluation of the possible consequences that might arise for the child concerned as a result of the decision being made. In addition, there needs to be a justification that explains why the decision being made is considered to be the most suitable and as well, to what extent it will truly serve the best interest of the child.<sup>72</sup>

### **1.3.2. The obligations of states to apply the concept of the best interests of the child**

General Comment No. 14 clarifies that Article 3.1 of the CRC establishes three types of state obligations.<sup>73</sup> First, the state party has the obligation to ensure that the best interests of the child is taken as a primary consideration for undertaking public actions.<sup>74</sup> Second, the

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<sup>70</sup> CRC Committee, GC, 2013, paras 6(a), 37.

<sup>71</sup> Ibidem, para 6(b).

<sup>72</sup> Ibidem, para 6(c).

<sup>73</sup> Ibidem, para 14.

<sup>74</sup> Ibidem, para 14(a).

state party must demonstrate for every decision being made how the best interests of the child have been assessed before the decision was made and to what extent the final decision was in the best interests of the child.<sup>75</sup> Third, the contracting state must undertake actions to ensure that also the private sector is taking the child's best interests as a primary factor during decision-making processes.<sup>76</sup>

### **1.3.3. The assessment and determination of the best interests of the child**

The CRC Committee provides a scheme for assessing and determining the best interests of the child in its General Comment No. 14. This scheme will be applied in the later analysis in order to reveal whether a legal measure is in the best interests of intersex children. It is divided into two steps:<sup>77</sup> the “best-interests assessment”<sup>78</sup> and the “best-interests determination”<sup>79</sup>.

The *best-interests assessment* is a procedure carried out by the decision-makers – ideally a multidisciplinary team – that considers all relevant elements of the best interests of the child. The specific elements are then weighted against each other in order to find the solution that ensures the most holistic enjoyment of the rights recognized in the CRC and its protocols.<sup>80</sup> General Comment No. 14 proposes a preliminary list of elements that must be taken into account when assessing the child's best interests. The proposed elements that are relevant for the discussion on intersex genital surgeries are:<sup>81</sup>

1. The views of children must be taken into account for every decision-making that affects these children. The realization of Article 12 of the CRC is a precondition for implementing Article 3.1 and the concept of the best interests of the child (Art. 12).<sup>82</sup>

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<sup>75</sup> Ibidem, para 14(b).

<sup>76</sup> Ibidem, para 14(c).

<sup>77</sup> Ibidem, paras 46-47.

<sup>78</sup> Ibidem, para 47.

<sup>79</sup> Ibidem, para 47.

<sup>80</sup> Ibidem, paras 47, 80-82.

<sup>81</sup> Ibidem, para 52.

<sup>82</sup> Ibidem, paras 43, 53-54.



2. For the assessment of the best interests of the child, it must be considered that children are a heterogeneous group and have different needs and characteristics. The individual identity of every child including someone's sex, sexual orientation, gender identity, religion etc. must be taken into account (Art. 8).<sup>83</sup>
3. The protection and care of children as well as their safety must be taken into consideration during the assessment of the child's best interests. This shall include the overall well-being and development of the child and the child's protection from violence, injury, abuse, peer pressure, bullying, etc. Not only does the current safety and integrity of the child have to be held in mind but also the possible effects on the child's future well-being (Art. 3.2, 19, 32-39).<sup>84</sup>
4. The protection or improvement of the child's health must be central in the decision-making. The different medical options must be evaluated and the child has to be enabled to participate in the decision-making by providing age adequate information and, when possible, granting the child the right to provide the informed consent (Art. 24).<sup>85</sup>

After the assessment of all the different elements of the best interest of the child, a formal process with strict procedural safeguards must follow in order to determine how to implement the best interests of the child most effectively.<sup>86</sup>

For the *best-interests determination*, the CRC Committee proposes a list of procedural safeguards and guarantees that the contracting state needs to implement.<sup>87</sup> First off, in order to properly identify the interests of the children being affected by the measures and ensure their participation in the decision-making, special attention needs to be placed on transparent communication with the children.<sup>88</sup> Second, the facts and information about a particular case need to be obtained by well-trained professionals.<sup>89</sup> Third, in order to avoid

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<sup>83</sup> Ibidem, paras 55-57.

<sup>84</sup> Ibidem, paras 71-74

<sup>85</sup> Ibidem, paras 77-78.

<sup>86</sup> Ibidem, para 47.

<sup>87</sup> Ibidem, paras 85-99.

<sup>88</sup> Ibidem, paras 98-91.

<sup>89</sup> Ibidem, para 92.

negative effects for children due to prolonged decision-making, the procedures or processes impacting children have to be prioritized.<sup>90</sup> Fourth, the decision-makers must be qualified professionals who are experienced in the subject of concern. The group that is assessing the child's best interests needs to be, if possible, a multidisciplinary team.<sup>91</sup> Fifth, the child's right to have appropriate legal representation before courts or equivalent bodies must be ensured.<sup>92</sup> Sixth, any decision that affects a child must be motivated, justified and explained. If the final decision diverges from the child's view on the specific issue, the reasons for the discrepancy must be disclosed.<sup>93</sup> Seventh, mechanism to appeal or revise the decision must be established.<sup>94</sup> Eighth, the adoption of a measure that affects children demands a child's-rights impact assessment (CRIA). The CRIA is a procedure that is meant to predict the impact of the implemented measures on the enjoyment of the rights of the children affected. The outcome of the CRIA is to be publicly available and has to contain recommendations for amendments, alternatives and improvements.<sup>95</sup>

#### **1.4. Summary**

The first chapter of this study provided the reader with an insight into the methodological approaches to the topic of intersex genital surgeries being performed on children. The next chapter will give an overview of the historical development of these surgical interventions and their impacts on the psychological and physical health of intersex persons.

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<sup>90</sup> Ibidem, para 93.

<sup>91</sup> Ibidem, paras 94-95.

<sup>92</sup> Ibidem, para 96.

<sup>93</sup> Ibidem, para 97.

<sup>94</sup> Ibidem, para 98.

<sup>95</sup> Ibidem, para 99.

## **2. Background Information on Intersex Genital Surgeries**

The treatment of intersexed genitalia has varied over time and space and is still changing due to the expanding knowledge on intersexuality and the impacts of intersex genital surgeries. In the following chapter I will provide an overview over the development of genital surgeries performed for “cosmetic” purposes on intersex children. Furthermore, in order to demonstrate some experiences that intersex persons make due to genital surgeries during childhood, I will present the most recent results of the Hamburger study on intersexuality.

### **2.1. The development of intersex genital surgeries**

With the emergence of biology as an academic discipline in the late 18<sup>th</sup> and early 19<sup>th</sup> century, the scientific knowledge about the biological reasons for atypical sex characteristics increased. This was accompanied with the establishment of the belief that all unusual sex variations must be erased through medical interventions. In the late 19<sup>th</sup> century the medical techniques had enhanced to a level that made it possible to render atypically sexed genitals less “ambiguous”.<sup>96</sup>

Hence, the starting point for the history of the development of intersex genital surgeries will be the end of the 19<sup>th</sup> century and will span all the way to today. In the following elaboration, I will commence with an explanation of how the sex of intersex persons was determined between the late 19<sup>th</sup> and early 20<sup>th</sup> century. This chapter will then go on to discuss the *Optimal Gender Policy* between the 1950s and the 1990s. Finally, it will provide an insight into the developments regarding intersex genital surgeries and the intersex rights movement since the beginning of the 1990s.

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<sup>96</sup> Mak, 2012, pp. 163, 171.

### **2.1.1. The sex assignment of intersex persons from the late 19<sup>th</sup> to the early 20<sup>th</sup> century**

From the 1890s onwards, an increasing number of intersex adults consulted doctors to receive surgeries on their genitalia.<sup>97</sup> As doctors were more and more asked to erase any doubt about someone's sex, they were increasingly confronted with the question to which extent they should fulfil the wishes of their clients. Suddenly they found themselves encountered with questions such as: "How can the "true" sex of an intersex person be determined?" And what were doctors supposed to do if the sex to which the person wished to belong to was not that person's "true" sex?<sup>98</sup>

These questions were answered differently in different periods of time. According to Alice Dreger, between the years 1870-1915 doctors believed that the gonadal tissue, whether it was testicular or ovarian, was the determining factor for assessing somebody's "true" sex.<sup>99</sup> That meant that persons with testes were declared to be men and persons with ovaries to be women, regardless of their body appearance or gender expression.<sup>100</sup> Consequently, Dreger called this period "the Age of Gonads".<sup>101</sup> According to her, the Age of Gonads was terminated by William Blair Bell in 1915.<sup>102</sup> Bell claimed that the often dysfunctional glands cannot be the sole criterion for assessing someone's sex. Instead, one also had to take into account other factors such as the general body appearance.<sup>103</sup>

### **2.1.2. The Optimal Gender Policy**

After the gonads lost importance for the assessment of someone's "true" sex, it was then the appearance of the genitalia that was taken as the main criterion for assigning a sex to a person with atypical sex characteristics.<sup>104</sup> Accordingly, the period between the 1950s to

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<sup>97</sup> Ibidem.

<sup>98</sup> Ibidem, p. 171.

<sup>99</sup> Dreger, 1998, pp. 29.

<sup>100</sup> Ibidem, p. 154.

<sup>101</sup> Ibidem, p. 139.

<sup>102</sup> Ibidem, p. 158. Other scholars such as Geertje Mak have postulated that the *Age of Gonads* terminated already earlier, namely at around 1900, when the first intersex genitals surgeries were performed. For more discussion on the Age of Gonads see: Mak, 2012, pp. 138-163, 183.

<sup>103</sup> Dreger, 1998, p. 165.

<sup>104</sup> Greenfield, 2012(a), p. 15.

the 1990s has been called “the Age of the Genitalia”.<sup>105</sup> It was during this period that the psychologist John Money and his team from the Johns Hopkins University in Baltimore founded the *Optimal Gender Policy*. This policy, which was originally called the *Optimum Gender of Rearing*,<sup>106</sup> supported the belief that in order to ensure the healthy psychosocial development of children with atypical genitals, their genitals must be surgically altered to look either typically male or female soon after their birth.<sup>107</sup> John Money adopted the view that someone’s gender identity is completely malleable until the child reaches the age of 18 months.<sup>108</sup> Intersex genital surgeries were claimed to be necessary so that parents could be properly convinced about their child’s sex and could raise their child with one stable gender role. In order not to raise the doubts of parents whether the sex assignment of their child was the “right” one, doctors often kept the parents in the dark about details of their child’s intersex condition.<sup>109</sup> Discretion was in general an essential element of the early Optimal Gender Policy. Money and his colleagues propagated that parents should not tell their intersex children about their intersexuality or provide them with detailed information about their intersex condition. This would allegedly only confuse them and obstruct a healthy psychosocial development.<sup>110</sup>

The Optimal Gender Policy meant in practice that a child with ambiguous genitalia was assigned to the sex that was feasible to bring about through genital surgeries.<sup>111</sup> When it was easier to create typically female looking than male looking genitalia through genital surgeries, the child would be assigned female. Since phalloplasty<sup>112</sup> was in general more difficult to undertake than feminizing medical procedures, around 90% of the children born with atypical genitals were assigned female and subjected to feminizing treatment.<sup>113</sup> The high number of children that were assigned to the female sex was also due to the fact that

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<sup>105</sup> Ibidem.

<sup>106</sup> Schweizer/Richter-Appelt, 2012(a), p. 100.

<sup>107</sup> Fausto-Sterling, 2000, p. 46

<sup>108</sup> Ibidem, p. 63; Kessler, 1998, p. 14;

<sup>109</sup> Fausto-Sterling, 2000, pp. 63-64, Kessler, 1998, p. 23.

<sup>110</sup> Kessler, 1998, p. 29; Schweizer/Richter-Appelt, 2013, pp. 107-108.

<sup>111</sup> Kessler, 1998, p. 18-21.

<sup>112</sup> Surgical construction or repair of a penis. See: Oxford Dictionaries, accessed on 30 June 2015.

<sup>113</sup> Chase, 1998, p. 192.

when a child had an “adequate” penis but was born with functioning female reproductive organs, the child would be “turned into” a girl. For the doctors, the capacity to procreate was considered more important than to have intact genitals.<sup>114</sup> Contrary to the general approach, in these cases the gonads were the determining factor for the sex assignment, not the genitals.

### **2.1.3. What has happened since the 1990s?**

Since the *Optimum Gender of Rearing* model by Money rendered intersexual bodies invisible, not much public discourse on intersexuality existed until the 1990s. In the 1990s, however, a number of intersex persons came out and publicly shared their experiences with intersex genital surgeries. Many of them strongly criticized the existing medical protocol which they claimed caused physical and psychological harm and human rights violations.<sup>115</sup>

Cheryl Chase, intersex herself, founded in 1993 the Intersex Society of North America (ISNA) which was the first formally established intersex organization. Although ISNA was first intended to function as a peer support group, the organization turned quickly into a political movement whose main demand was to end intersex genital surgeries performed on children.<sup>116</sup> ISNA was until now the most influential organization for the intersex rights movement. However, in 2008 Cheryl Chase took the decision that it was time to change the organization’s approach and fight alongside doctors instead of fighting them. This decision resulted in the dissolution of ISNA and the creation of a new organization called the Accord Alliance that followed the approach of the Chicago Consensus Conference.<sup>117</sup>

The dissolution of ISNA and Cheryl Chase’s adoption of the DSD nomenclature represents the division of the intersex rights movement into two different advocacy approaches. One approach seeks the alliance with the LGBT rights movement and presumes that in order to end intersex genital surgeries, the societal perception of appropriate sex and

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<sup>114</sup> Fausto-Sterling, 2000, p. 5; Ehrenreich/Barr, 2005, pp. 121-123.

<sup>115</sup> McClintock, n.d.; Preves, 2004, p. 257.

<sup>116</sup> Chase, 1998, pp. 197-198.

<sup>117</sup> Accord Alliance, n.d.; ISNA(b), n.d.

gender behaviours must be challenged.<sup>118</sup> The other approach is to identify with the perspectives of the critical disability rights movement and to pursue a re-consideration of the definition of what a “normally” sexed body is and better medical care for intersex persons.<sup>119</sup>

Due to ISNA’s and other intersex rights organizations’<sup>120</sup> advocacy, physicians have started to change the medical practice since the early 2000s.<sup>121</sup> The consensus statement from 2006 demonstrated the willingness of many doctors to take into account the experiences of intersex persons and revise the medical protocol regarding intersexed genitals.

Despite the fact that many doctors have become cautious about medically unnecessary, painful and irreversible genital surgeries on non-consenting intersex children, it is assumed that many children with atypical genitals are still subjected to these medical procedures.<sup>122</sup> A study conducted in 2007 in the area of Seattle found that the majority of parents still consent to genital surgeries on their children.<sup>123</sup> The same study held that if the parents opt for surgical interventions on their children’s genitals, the doctors usually perform it.<sup>124</sup> The German *Network for DSD/Intersexuality*<sup>125</sup> presented in 2009 the results of a survey on the prevalence of intersex genital surgeries. Out of the total number of 434 intersex persons surveyed, only 18.5% have never had any genital surgery. The participants included 166 children between the age of 4 and 12 years old, of which only 13% have not had any genital surgery in their life. Among the 66 teenagers that were surveyed, 9% have never had any surgery and out of the 110 adults, only 10% have not experienced surgical interventions on their genitals.<sup>126</sup> These numbers reveal that even among young intersex children, the prevalence of genital surgeries in Germany is still high. The lack of more extensive data in other countries makes it, however, difficult to estimate how many “cosmetic” genital surgeries on intersex children are regularly performed.

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<sup>118</sup> Greenberg, 2012(a), pp. 94-95.

<sup>119</sup> Koyama, n.d.; Levine, 2014, p. 178.

<sup>120</sup> E.g.: Organization Intersex International (OII); Intersexuelle Menschen e.V. Bundesverband.

<sup>121</sup> Dreger/Herndon, 2009, pp. 205-206.

<sup>122</sup> Greenfield, 2012(a), p. 21.

<sup>123</sup> Parisi, 2007, p. 355.

<sup>124</sup> Ibidem.

<sup>125</sup> Universitätsklinikum Schleswig-Holstein, n.d.

<sup>126</sup> Jürgensen, 2009, slide 6.

## 2.2. The Hamburger Study on Intersexuality

The Hamburger research group on intersexuality has been researching the experiences of intersex persons with the medical treatment of their intersex condition since 2000. The research group was established as a result of the increasing criticism of subjecting intersex children to early genital surgeries.<sup>127</sup> In 2012, results of a survey in which 69 intersex persons were interviewed became available. The survey participants were between the ages of 16 and 60. 83% of the participants were assigned after their birth to the female sex, the rest to the male sex. At the time of the survey, 81% of the participants lived in a female gender role, 12% in a male gender role and 7% in a role that did not correspond to either a typically male or female role.<sup>128</sup>

Almost all participants have had either “cosmetic” genital surgeries or gonadectomies. Many of these procedures were undertaken in the first years of their lives. 96% of the survey participants have received hormone therapy and 55% genital surgeries, such as surgeries on the external genitalia or the urethra, surgical vaginal dilation and vaginoplasties. 92% of the persons that had gonads at their time of birth have had them removed through gonadectomies.<sup>129</sup>

43% of the participants were satisfied with the surgical outcome, 11% were partly satisfied and 46% were unsatisfied. In particular the group of persons with Complete Androgen Insensitivity Syndrome (CAIS) complained about the fact that their gonads were removed, mostly without their consent. The participants that were unsatisfied with their medical treatment criticized particularly the insufficient information they had received, the lack of psychological counselling, the undertaking of irreversible medical interventions that resulted in pain and loss of sexual sensation, the side-effects of their hormone therapy and humiliating practices such as photography of their genitals and the display of their genitals to students.<sup>130</sup>

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<sup>127</sup> Schweizer/Richter-Appelt, 2013, p. 187.

<sup>128</sup> Ibidem, pp. 192-193.

<sup>129</sup> Ibidem, p. 194.

<sup>130</sup> Ibidem, pp. 194-195.



70% of the participants felt comfortable with the gender role that was assigned to them at the time of birth. Almost the half (48%) showed, however, some insecurity about their own gender identity. 28% of the people that took part in the survey showed some aspects of a gender identity that could neither be described as female or male.<sup>131</sup>

About 60% of the participants would need psychological counselling due to some kind of psychological difficulty, such as anxiety and insecurity about their body. The quality of their sexual life was significantly lower than the one of non-intersex persons. The participants reported sexual problems and insecurity in relationships. They were often less satisfied with their own sexual function and had less often functioning partnerships than the control group of non-intersex persons. Almost half of the participants (47%) feared sexual contact and pain during sexual intercourse.<sup>132</sup>

### **2.3. Conclusions**

This chapter was started off with a brief history over the development of intersex genital surgeries performed on children since the late 19<sup>th</sup> century. It was around the shift to the 20<sup>th</sup> century that the medical techniques advanced to a level that made it possible to perform “cosmetic” genitals surgeries on intersex adults in order to erase the doubt about their “true” sex. In the 1950s, John Money and his team established the Optimal Gender Policy which claimed that altering children’s atypical genitals is necessary to ensure their healthy psychosocial development. Until the intersex rights movement challenged the claim that these surgical procedures are in the best interest of intersex children in the 1990s, the early age genital surgeries had been the common medical practice. Since then, the medical protocol has changed significantly, but many children with atypically looking genitals are still subjected to genital surgeries.<sup>133</sup>

This chapter further demonstrated that intersex genital surgeries generate many different experiences. The Hamburger Study on Intersexuality reveals that almost half (46%)

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<sup>131</sup> Ibidem, p. 196.

<sup>132</sup> Ibidem, pp. 192-197.

<sup>133</sup> Jürgensen, 2009, slide 6; Parisi, 2007, p. 355.

of the surveyed persons were not satisfied with the medical treatment. Painful and humiliating experiences caused by the medical treatment were reported as well as psychological and sexual problems later in life. However, 43% of the participants were satisfied with the treatment, signalling that not all patients completely reject the performance of intersex genital surgeries.<sup>134</sup> Since some of the experiences that are generated by intersex genital surgeries have very negative and sometimes traumatic effects on the physical and psychological health of the patients concerned, it is time to consider introducing legal measures that regulate the practice of performing these surgeries on non-consenting children.

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<sup>134</sup> Schweizer/Richter-Appelt, 2013, pp. 194-198.

### 3. Intersexuality and Human Rights

Since the beginning of the intersex rights movement, activists have claimed that intersex genital surgeries that are performed for “cosmetic” purposes on children violate the basic human rights of the children concerned.<sup>135</sup> Since to my knowledge only one national court, the Constitutional Court of Colombia, and no international human rights court has ever decided on the question whether genital surgeries performed for “cosmetic” purposes on intersex children would legally constitute a human rights violation, we do not have clarity on this issue.<sup>136</sup> It is unsettled whether irreversible surgical alterations of intersexed genitalia for “cosmetic” purposes, which can lead to painful and traumatic experiences, are proportionate to the purpose of protecting children from social stigmatization.

Despite the fact that most likely only one court has ruled on this issue, in the last ten years institutions of the Council of Europe, the European Union and the UN as well as national and local institutions working on human rights have addressed intersex genital surgeries in their activities.<sup>137</sup> Since no international human rights treaty has ever mentioned *intersex* and the Yogyakarta Principles are not binding on states, these institutions have relied upon general human rights provisions of binding treaties for discussing the involvement of human rights in the practice of performing intersex genital surgeries on children.

In the following chapter I will examine how certain human rights provisions have been applied to intersex genital surgeries by international, national and local human rights institutions. Despite the fact that many human rights provisions are involved in the practice of intersex genital surgeries,<sup>138</sup> I will limit the discussion to those rights that have received

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<sup>135</sup> Ehrenreich/Barr, 2005, p. 115; Preves, 2005, p. 279; Public Statement by the Third International Intersex Forum, 2013, Preamble.

<sup>136</sup> Constitutional Court of Colombia, *Sentencia SU-337/99*; Constitutional Court of Colombia, *Sentencia T-551/99*; Constitutional Court of Colombia, *Sentencia T-912/08*.

<sup>137</sup> Agius/Tobler, 2011; Arana, 2005; CAT Committee, CO, 2011; Council of Europe, Resolution 1952 (2013); CRC Committee, CO, 2015; German Ethics Council, 2013; Swiss National Advisory Commission on Biomedical Ethics, 2012.

<sup>138</sup> International human rights institutions have mentioned interferences in the right to health, the right to information, the right to privacy and family life, the right to decide on the number and spacing of children, the right to found a family, the right to be free from discrimination, right to be free from torture and other cruel, inhuman and degrading treatment or punishment, the right to integrity of the person, rights of the child, including the right of children to express their views freely and to have their views taken into consideration on

the most attention. Hence, I will examine how the right to bodily integrity, the prohibition of torture and ill-treatment and the right to self-determination have been invoked in the discussion. Additionally, I will analyse the views of authoritative human rights bodies on the claim that intersex genital surgeries can be regarded as “harmful practices”. The selected human rights norms and issues are certainly interrelated and interdependent but for the sake of clarity and since they reflect different approaches to intersexuality and intersex genital surgeries, I will discuss each of them separately.

### **3.1. The right to bodily integrity and the prohibition of torture and ill-treatment**

Many human rights institutions have focused on the right to bodily/physical integrity and the prohibition of torture and ill-treatment when discussing intersex genital surgeries performed on children. The right to bodily integrity as such is rarely explicitly mentioned in human rights treaties<sup>139</sup>, rather its existence is interpreted through other provisions<sup>140</sup> such as the right to private life,<sup>141</sup> the right to security<sup>142</sup> or the prohibition of torture and other ill-treatment<sup>143</sup>. The European Court for Human Rights (ECtHR) discusses interferences in the right to physical integrity of a person usually under the ambit of Article 8, on the right to private and family life, and in especially severe cases under Article 3, on the prohibition of torture and other ill-treatment.<sup>144</sup> In the CRC the right to bodily and mental integrity is guaranteed by Article 19 which urges states to protect the child from physical or mental violence and other abuses and maltreatment.<sup>145</sup>

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matters which concern them in accordance with their age and maturity and the rights to self-determination and personal autonomy (this list is not exhaustive). See: WHO, 2014, p. 1; FRA, 2015, p. 2; Council of Europe, 2015(a), p. 31.

<sup>139</sup> The Fundamental Rights Charter (FRC) from the European Union is one of the few human rights treaties that explicitly provide for the right to physical and mental integrity. See: FRC, 2000, Art 3.

<sup>140</sup> Colombia Law School, 2010, p. 36; Roagna, 2012, p. 24.

<sup>141</sup> The right to private life is enshrined in e.g. Art. 16 of the CRC, Art. 8 of the ECHR, Art. 17 of the ICCPR, and Art. 12 of the Universal Declaration of Human Right (UDHR).

<sup>142</sup> The right to security is enshrined in e.g. Art. 5 of the ECHR, Art. 9 of the ICCPR and Art. 3 of the UDHR.

<sup>143</sup> The prohibition of torture and other ill-treatment is enshrined by the Convention against Torture, Art. 37 of the CRC, Art. 3 of the ECHR, Art. 7 of the ICCPR and Art. 5 of the UDHR.

<sup>144</sup> ECtHR, *Y.F. v. Turkey*, para 33; ECtHR, *Bensaid v. UK*, para 47; Roagna, 2012, pp. 24-27.

<sup>145</sup> CRC, Art. 19.

The Council of Europe established a clear link between the violation of the right to physical integrity and intersex genital surgeries when it passed the landmark resolution 1952 on *Children's right to physical integrity* in 2013.<sup>146</sup> This resolution addresses genital surgeries performed on intersex children alongside with issues such as female and male genital circumcision. It urges states to conduct more research on the specific situation of intersex persons and to ensure that no intersex child is subjected to genital surgeries for “cosmetic” purposes.<sup>147</sup> As a follow-up to the resolution, in 2014 the Council of Europe High Commissioner Nils Muižnieks published a Human Rights Comment in which he once more condemned intersex genital surgeries on infants as violations of the right to bodily integrity and self-determination.<sup>148</sup> The most recent undertaking by the Council of Europe in regard to intersex genital surgeries performed on children is the publication of a comprehensive report on the human rights situation of intersex persons in 2015.<sup>149</sup> The report states clearly that “as a result of surgeries or other sex-altering medical interventions, intersex people are denied their right to physical integrity”<sup>150</sup> and hence, urges states to end non-consensual and medical unnecessary intersex genital surgeries performed on children.<sup>151</sup>

Some human rights institutions do not explicitly mention the right to bodily integrity but make references to violations of the prohibition of torture and ill-treatment when discussing intersex genital surgeries.<sup>152</sup> The prohibition of torture is considered an absolute human right whose interference can never be justified.<sup>153</sup> It is enshrined in the Universal Declaration for Human Rights (UDHR)<sup>154</sup> and several human rights treaties including the European Convention on Human Rights (ECHR)<sup>155</sup> and the International Covenant for Civil

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<sup>146</sup> Council of Europe, Resolution 1952 (2013), para 2.

<sup>147</sup> Ibidem, para 7.5.3.

<sup>148</sup> Muižnieks, 2014.

<sup>149</sup> Council of Europe, 2015(a).

<sup>150</sup> Ibidem, p. 14.

<sup>151</sup> Ibidem, p. 8.

<sup>152</sup> E.g.: CAT Committee, CO, 2011, para 20; Special Rapporteur on Torture, 2013, para 88.

<sup>153</sup> Nowak, 2012(a), pp. 274-275.

<sup>154</sup> UDHR, 1948, Art. 5.

<sup>155</sup> ECHR, 1950, Art. 3.

and Political Rights 1966 (ICCPR)<sup>156</sup>. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) adopted in 1984 re-affirmed the absolute prohibition of torture, established a precise definition of torture and specified the respective state obligations.

In 2013, the Special Rapporteur on Torture, Juan E. Méndez, argued in his report to the Human Rights Council that there is a general consensus that irreversible and intrusive medical treatment, which does not serve any therapeutic purpose, may constitute torture or ill-treatment when it is undertaken without the fully informed consent of the patient.<sup>157</sup> According to this definition – which expands the definition of torture by Article 1 of the CAT<sup>158</sup> – intersex genital surgeries performed for “cosmetic” purposes on children and without their fully informed consent can be considered as torture or ill-treatment.

For the first time in 2011 the Committee for the Convention against Torture (CAT Committee) addressed intersex genital surgeries in its concluding observation to Germany. It expressed concern about the lack of access to investigations and redress for intersex persons that were subjected to “cosmetic” genital surgeries and/or had their reproductive organs removed without their effective consent or those of their legal guardians.<sup>159</sup> In 2015 this was followed by the Committee on the Rights of Persons with Disabilities (CRPD Committee) which expressed in its concluding observations to Germany that it was concerned about the lack of implementation of the recommendations “regarding upholding bodily integrity of intersex children”<sup>160</sup> that were made to Germany by the CAT Committee in 2011.<sup>161</sup>

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<sup>156</sup> ICCPR, 1966, Art. 7

<sup>157</sup> Special Rapporteur on Torture, 2013, para 32.

<sup>158</sup> Article 1 of the CAT defines torture as “*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*” See: CAT, Art. 1.

<sup>159</sup> CAT Committee, CO, 2011, para 20.

<sup>160</sup> CRPD Committee, CO, 2015, para 37.

<sup>161</sup> Ibidem, paras 37, 38(d).

The second major UN institution dealing with torture, the Special Rapporteur on torture and ill-treatment, also addressed intersex genital surgeries recently. His report to the Human Rights Council in 2013 stated that all countries shall repeal laws which allow non-consensual intersex genital surgeries and forced sterilization.<sup>162</sup>

With this the Special Rapporteur established, as the first UN body, a concrete link between intersex genital surgeries and the involuntary sterilization of children. Subsequently in 2014, the UN Interagency Statement on sterilization<sup>163</sup> addressed the involuntary sterilization of intersex persons more in detail. According to this statement, intersex persons are alongside with other groups such as persons with HIV or persons with disabilities often sterilized without their fully informed consent. By referring to reports and comments by UN Treaty Bodies, the statement held that sterilization has been classified as a violation of various human rights, including the right to privacy, the right to health, the right to found a family and the right to be free from discrimination.<sup>164</sup>

By referring to concluding observations of the CAT and the CRC Committee,<sup>165</sup> in 2015 the High Commissioner for Human Rights stated in his latest report on discrimination and violence against LGBTI persons that involuntary and unnecessary medical intersex genital surgeries on children breach the prohibition of torture and ill-treatment.<sup>166</sup>

In addition to international human rights bodies national and local bodies working on human rights issues have also addressed intersex genital surgeries under the ambit of the right to bodily integrity and prohibition of torture and ill-treatment. The report of the San Francisco Human Commission in 2005 stated that “it is unethical to disregard a child’s intrinsic human rights to privacy, dignity, autonomy, and *physical integrity* by altering genitals through irreversible surgeries for purely psychosocial and aesthetic rationales”[emphasize added].<sup>167</sup>

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<sup>162</sup> Special Rapporteur on torture, 2013, para 88.

<sup>163</sup> WHO, 2014.

<sup>164</sup> WHO, 2014, p. 1. Examples for concluding observations, general comments and views on communications are: CAT Committee, CO, 2006, para 23; CEDAW Committee, VC, 2006, paras 11.2 - 11.4; CESCR Committee, GC, 1994, para 31.

<sup>165</sup> CAT Committee, CO, 2011, para 20; CRC Committee, CO, 2015, para 43(b).

<sup>166</sup> UNHCHR, 2015, paras 14, 38.

<sup>167</sup> Arana, 2005, p. 17.

The Swiss Ethics Committee took a similar approach and argued in its report in 2012 that past violations of the right to bodily and psychological integrity that were caused by the medical protocol to treat intersexuality must be acknowledged. The report demands that all unnecessary medical surgeries shall be deferred until the child can provide the free and informed consent for the procedure.<sup>168</sup>

The German Ethics Council was a bit more reserved in its report on intersexuality in 2012. Although the Council report states that intersex genital surgeries performed on children for “cosmetic” purposes constitutes an interference of the right to physical integrity, it also argues that “such treatments cannot be subject to blanket ethical rejection”<sup>169</sup>. Instead only those interferences which are incompatible with the human dignity of the children concerned should be rejected.<sup>170</sup> The report does not further define the concept of *human dignity*.<sup>171</sup>

### **3.2. The right to self-determination**

Another human right that is often invoked in the discussion on intersex genital surgeries is the right to self-determination or autonomy. This is illustrated by the Council of Europe’s press release regarding the issue paper on human rights and intersex persons that was published in 2015. It states: “Europe disregards intersex people’s *right to self-determination* and physical integrity” [emphasize added]<sup>172</sup>.

*The right to self-determination* and *the right to autonomy* are commonly understood as the same principle. Hence, I will use these two terms interchangeably in the following discussion. They both signify that persons possess the right to decide on all issues affecting themselves independently and without the interference of others.<sup>173</sup>

One also has to differentiate between the meaning of an individual’s right to self-determination and a nation’s collective right to self-determination. The collective right to

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<sup>168</sup> Swiss National Advisory Commission on Biomedical Ethics, 2012, p. 18.

<sup>169</sup> German Ethics Council, 2012, p. 95.

<sup>170</sup> Ibidem.

<sup>171</sup> Ibidem, pp. 163-164.

<sup>172</sup> Council of Europe, 2015(b).

<sup>173</sup> Internet Encyclopaedia of Philosophy, n.d.



self-determination is based on the principle of sovereignty and guarantees the right of peoples to organize their political, social, economic and cultural life without interferences from the outside. It is manifested in several international treaties and declarations such as the ICCPR, the International Covenant for Economic Social and Cultural Rights (ICESCR) and the Declaration on the Rights of Indigenous Peoples 2007.<sup>174</sup>

The individual right to self-determination/autonomy which is my focus in this chapter, has only been mentioned as such in a few human rights documents. The Convention on the Rights of Persons with Disabilities (CRPD) is one of those human rights treaties that provide explicit references to the right to autonomy.<sup>175</sup> If not explicitly stated, the right to self-determination/autonomy is often interpreted as part of the right to privacy. The right to autonomy is considered as the freedom to act in the private sphere according to someone's will as long as it does not interfere with the rights of others.<sup>176</sup> As stated above, the right to privacy is protected in several human rights treaties such as the CRC (Art. 16), the ECHR (Art. 8) and the ICCPR (Art. 17).<sup>177</sup>

The right to autonomy is usually limited for children. It is generally their parents or guardians who have the legal capacity to decide on all issues concerning their well-being.<sup>178</sup> The interference with the children's right to self-determination is widely seen as legitimate since it is assumed that children do not have the mental capacities and experiences to decide in their best interests.<sup>179</sup> Even if parents or guardians generally have the legal capacities to decide for their children, the CRC holds in Article 12 that children must still have the right to express their views on all issues affecting them and that "due weight"<sup>180</sup> must be given to these views for the final decision-making process. This shall be done in accordance with the age and maturity of the child.<sup>181</sup>

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<sup>174</sup> ICCPR, Art. 1, ICESCR, Art. 1; UNDRIP, Preamble, Art. 3 and 4.

<sup>175</sup> CRPD, 2006, Preamble (n), Art. 3(a), 16.4, 25(d).

<sup>176</sup> Nowak, 2012(b), p. 373.

<sup>177</sup> CRC, Art. 16; ECHR, Art. 8; ICCPR, Art. 17.

<sup>178</sup> Sax, 2012, p. 423. See e.g.: Swiss Civil Code, Art. 13-19; Austrian Civil Code, para 151.

<sup>179</sup> Ross, 1997, pp. 42-43.

<sup>180</sup> CRC, Art. 12.1.

<sup>181</sup> Ibidem.

The legal authority of parents to decide in all issues affecting their minor children is, however, often diminished when it comes to medical treatment. Depending on the national legislation, the consent of the child might be required before medical treatment can be undertaken. In order to include children in the process of decision-making, they must be considered to possess the cognitive capacities to fully understand the situation and decide rationally what they want.<sup>182</sup> The requirements to consider minors mature enough to provide the free and informed consent for medical treatment differ from country to country, and in the United States from state to state.<sup>183</sup> Some countries like as Belgium require a certain age, others like as France conduct an individual assessment of the child's mental capacities.<sup>184</sup>

If the child is legally not entitled to consent, the legal guardian is the one who decides whether medical treatment is undertaken. In order to ensure that the right to self-determination of the child is not arbitrarily interfered with, it is required that the parents must provide the *free and informed consent*. The doctrine of the informed consent is founded on the principle of autonomy as well as other human rights principles such as the prohibition of discrimination.<sup>185</sup> The doctrine requires that the patient or the patient's legal representative is fully informed about all risks, benefits and alternatives to a procedure and gives voluntary consent without external coercive influences.<sup>186</sup> There are several international treaties and declarations that exist on the issue of informed consent.<sup>187</sup> One is the Declaration on the Promotion of Patients' Rights in Europe 1994 which specifies the elements of the doctrine in its third article. Similar to Article 12 of the CRC Article 3.5 of the Declaration states that

“[w]hen the consent of a legal representative is required, patients (whether minor or adult) must nevertheless be involved in the decision-making process to the fullest extent which their capacity allows.”<sup>188</sup>

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<sup>182</sup> Special Rapporteur on Health, 2009, para 5.

<sup>183</sup> FRA, 2015, p. 7; Coleman/Rosoff, 2013, pp. 789-791.

<sup>184</sup> FRA, 2015, p. 7.

<sup>185</sup> Special Rapporteur on Health, 2009, para 19.

<sup>186</sup> Greenberg, 2012(a), p. 30; Norman, 2010, p. 36; Special Rapporteur on Health, 2009, paras 9, 13, 15.

<sup>187</sup> E.g.: The Nuremberg Code, 1947, Art. 1; Declaration of Helsinki, 1964, Art. 25-32; Council of Europe's Convention on Human Rights and Biomedicine, 1997, Art. 5; FRC, Art. 3.

<sup>188</sup> Declaration on the Promotion of Patients' Rights in Europe, 1994, Art. 3.5.

The same article further states that the consent of the patient is always required “for the preservation and use of all substances of the human body”<sup>189</sup>. Thus according to this article, intersex genital surgeries performed during infancy would demand the consent of the child concerned.

Many human rights bodies have argued that intersex genital surgeries performed on children can potentially constitute violations of the children’s right to self-determination. In which exact aspects the right is violated is, however, often not explained.<sup>190</sup> Nonetheless, by examining the reports of these bodies closely it can be determined that the right to self-determination is mainly invoked in two ways.

In the first way, several human rights institutions have criticized that the requirements for the informed consent of the child concerned or of the respective guardian were not sufficiently met. As a result, the intersex child’s right to self-determination was arbitrarily interfered and hence, violated.<sup>191</sup> In the second way, a number of human rights bodies have recognized that the imposition of the binary sex model on intersex persons and the legal obstacles to change one’s legal sex hamper the enjoyment of right to self-determination of intersex persons.<sup>192</sup>

Regarding the first way, several international, national and local human rights bodies have called attention to the importance of safeguarding the informed consent guarantees for early intersex genital surgeries.<sup>193</sup> For example, the CAT Committee in 2011 and the CRC Committee in 2015 both expressed their concern that intersex genital surgeries performed on children have violated informed consent guarantees. However, they used different standards to evaluate the compliance of informed consent guarantees. Whereas the CAT Committee criticized that intersex genital surgeries were performed “without effective, informed consent

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<sup>189</sup> Ibidem, Art. 3.8.

<sup>190</sup> E.g.: Council of Europe, Resolution 1952 (2013), para 7.5.3.; CRC Committee, CO, 2015, 43(b); German Ethics Council, 2012, pp. 86, 104, 130; Swiss National Advisory Commission on Biomedical Ethics, 2012, pp. 5, 16, 18.

<sup>191</sup> Special Rapporteur on Health, 2009, paras 46, 49; UNHCHR, 2011, para 57.

<sup>192</sup> Council of Europe, 2015(a), p. 9; Council of Europe, 2015(b); German Ethics Council, 2012, pp. 129-130.

<sup>193</sup> E.g.: Agius/Tobler, 2011, p. 84; Arana, 2005, pp. 17-19, 25, 26; CAT Committee, CO, 2011, para 20; CRC Committee, CO, 2015, para 42(b); UNHCHR, 2011, para 57.

of the concerned individuals or their legal guardians”<sup>194</sup>, the CRC Committee seemed to be only concerned whether the child’s right to consent in a free and informed manner was violated.<sup>195</sup> Hence, the CRC Committee conveyed the message that medically non-necessary intersex genital surgeries require the informed consent by the child concerned while the CAT Committee did not conclude on the question of whether it is the child or the guardian who has the legal capacity to consent to the treatment.

The claim that the subjection of intersex children to the binary sex model and the inflexible procedures for obtaining a legal sex change can potentially violate the right to self-determination of intersex persons has been expressed by institutions such as the Council of Europe and the German Ethics Council.<sup>196</sup>

### **3.3. Intersex genital surgeries as *traditional harmful practices***

The question of whether intersex genital surgeries can be regarded as *harmful practices* is discussed separately in this chapter since these particular practices cannot be subsumed under one human rights provision. Rather, they involve a number of different human rights issues, including the right to bodily integrity and the doctrine of informed coonsent.<sup>197</sup> The CRC is one of the few treaties that contains explicit references to the obligation to work towards “abolishing traditional practices prejudicial to the health of children” in its Article 24.3.<sup>198</sup> Since the CEDAW does not contain any explicit reference to traditional harmful practice, the CEDAW Committee relies upon several provisions of the convention for discussing harmful practices.<sup>199</sup>

The CEDAW and CRC Committee defined harmful practices as traditional practices that constitute violations of human rights and discrimination on the basis of sex, gender and other grounds that cause physical and mental harm and are kept in place by social norms.<sup>200</sup>

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<sup>194</sup> CAT Committee, CO, 2011, para 20.

<sup>195</sup> CRC Committee, CO, 2015, para 42(b).

<sup>196</sup> Council of Europe, 2015(a), p. 9; Council of Europe, 2015(b); German Ethics Council, 2012, pp. 129-130.

<sup>197</sup> CEDAW/CRC Committee, GR/GC, 2014, paras 14, 15(a)(b)(d).

<sup>198</sup> CRC, Art. 24.3.

<sup>199</sup> It relies upon the Art. 2, 5 and 16 of the CEDAW. See: CEDAW/CRC Committee, GR/GC, 2014, FN 8.

<sup>200</sup> CEDAW/CRC Committee, GR/GC, 2014, paras 15(a)(b)(c).

They are undertaken regardless whether the persons concerned provides the full and informed consent.<sup>201</sup> Examples for practices that have been declared harmful practices are female genital circumcision (FGC),<sup>202</sup> child marriage and polygamy.<sup>203</sup>

The intersex rights movement in the United States started to draw analogies between FGC and intersex genital surgeries performed on children already in the late 1990s.<sup>204</sup> Nancy Ehrenreich and Mark Barr were two of the first legal scholars that analysed the similarities between intersex genital surgeries performed for “cosmetic” purposes on young children and female genital circumcision (FGC).<sup>205</sup> They argued that these two practices show many similar features and that like FGC, intersex genital surgeries are a cultural practice that violates the child’s right to bodily integrity and sexual autonomy.<sup>206</sup> The motives for the practice of early intersex genital surgeries and FGC are equally culturally formed instead of biologically compelled.<sup>207</sup> In both cases the practitioners of the practice claim that the alteration of children’s genitals is needed to avoid the stigmatization of children with unusual genitalia. Thus, in both cases, the doctors who perform intersex genital surgeries as well as the traditional practitioners undertaking FGC are responding to societal expectations of how someone’s body should look like.<sup>208</sup> Ehrenreich and Barr argue further that intersex genital surgeries on children, such as FGC, reinforce gender norms and traditional, patriarchal understandings of sexuality. The decision whether an intersex child is assigned to the female

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<sup>201</sup> Ibidem, para 15(d).

<sup>202</sup> I decided to use the expression *female genital circumcision (FGC)* instead of *female genital mutilation (FGM)* or *female genital cutting* due to the fact that the word *mutilation* carries a strong negative connotation and is often rejected by the communities practicing FGC. Furthermore, by using the word *circumcision* I would like to refrain from depicting the genital circumcision of women and girls as a grave human rights violation while the circumcision of men or boys is regarded as a legitimate cultural or religious practice. The term *female genital cutting* on the other hand, is not always correct because not all practices involve the cutting of body parts. Hence, the word *circumcision* seems to me the least stigmatizing and most neutral term to use. See: Van den Brink/Tigchelaar, 2012.

<sup>203</sup> CEDAW/CRC Committee, GR/GC, 2014, paras 6, 18-27.

<sup>204</sup> ISNA lobbied actively, but without success, to include references to intersex genital surgeries for “cosmetic” purposes in the congressional bill to prohibit FGC in the United States. See: Chase, 1998, pp. 204-206; Kessler, 1998, pp. 81-83.

<sup>205</sup> Ehrenreich/Barr, 2005.

<sup>206</sup> Ibidem, pp. 83-85, 110-120, 138.

<sup>207</sup> Ibidem, p. 114.

<sup>208</sup> Ibidem, p. 115.

or the male sex relies upon traditional, sexist stereotypes of gender roles in the society and intimate relationships.<sup>209</sup> To clarify on the previous explanation, the primary criterion to assign a child with unusual genitalia to the male sex is the size of the child's potential penis. The criterion of the assignment to the female sex is often the fertility of the child. In practice that means that if a child with functioning male reproductive organs has a penis that is regarded as too small for future vaginal intercourse, this child will be most likely assigned to the female sex. Consequently, in most cases the size of the phallus/clitoris will be reduced and the functioning reproductive organs removed, even if this causes infertility in the child and potentially the loss of sexual sensation. On the other hand, if a child's phallus/clitoris is large enough to be considered a penis but the child has functioning female reproductive organs, the child will most likely also be assigned female. This normally results in the performance of a clitorereduction which often leads to reduced sexual sensation. Thus, the possibility to procreate for persons with female reproductive organs is assigned a higher importance than the preservation of sexual sensation.<sup>210</sup>

According to the analysis of Ehrenreich and Barr, intersex genital surgeries performed for “cosmetic” purposes on children would meet the criteria of the definition of harmful practices as established by the CEDAW and CRC Committee. They can be regarded as traditional practices that discriminate against persons with intersexed genitalia; they cause physical and mental harm, are upheld due to social norms and undertaken regardless of whether the child concerned has given its free and informed consent.<sup>211</sup>

The claim that early age intersex genital surgeries performed for “cosmetic” purposes are similar to FGC and hence, should also be regarded as harmful practices was acknowledged by the San Francisco Human Rights Commission in 2005.<sup>212</sup>

It took international human rights bodies until the year 2015 to address the claim that like FGC, medically unnecessary intersex genital surgeries on children need to be considered

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<sup>209</sup> It could be claimed that the sex assignment of each newborn relies upon traditional, sexist stereotypes of gender roles; no matter how the child's genitalia look like.

<sup>210</sup> Ehrenreich/Barr, 2005, pp. 121-123.

<sup>211</sup> CEDAW/CRC Committee, GR/GC, 2014, paras 15(a)(b)(c)(d).

<sup>212</sup> Arana, 2005, p. 9.

as harmful practices. Although the joint general recommendation on harmful practices by the CEDAW and the CRC Committee from November 2014 made references to plastic genital surgeries, it still ignored intersex genital surgeries.<sup>213</sup> However a couple of months later, in the month of February, 2015 the CRC Committee for the first time discussed intersex genital surgeries under the ambit of harmful practices to the jubilation of the intersex rights movement.<sup>214</sup> It was in the section on harmful practices in its concluding observation to Switzerland that the committee urged the Swiss government “to ensure that no one is subjected to unnecessary medical or surgical treatment during infancy or childhood”<sup>215</sup>.

### 3.4. Conclusions

Intersex genital surgeries involve a number of different human rights issues. International, national and local human rights bodies have invoked several human rights norms to conclude that medically unnecessary intersex genital surgeries performed during infancy can amount to human rights violations. These institutions have in particular focused on the right to bodily integrity,<sup>216</sup> the prohibition of torture and ill-treatment<sup>217</sup> and the right to self-determination<sup>218</sup> in the discussion on early age intersex genital surgeries. Additionally, the CRC Committee recently followed the approach of intersex rights activists and acknowledged that medically unnecessary surgeries that are performed for “cosmetic” reasons on the genitalia of intersex children can be regarded as harmful practices.<sup>219</sup>

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<sup>213</sup> CEDAW/CRC Committee, GR/GC, 2014, para 8.

<sup>214</sup> CRC Committee, CO, 2015, paras 42(b), 43(b); Zwischengeschlecht.org, 2015.

<sup>215</sup> CRC Committee, CO, 2015, para. 43(b).

<sup>216</sup> E.g.: Council of Europe, Resolution 1952 (2013); Arana, 2005, p. 17.

<sup>217</sup> E.g.: CAT Committee, CO, 2011, para 20; Special Rapporteur on Torture, 2013, para 88.

<sup>218</sup> E.g.: Council of Europe, 2015(a), p. 9; German Ethics Council, 2012, pp. 129-130; Special Rapporteur on Health, 2009, paras 46, 49.

<sup>219</sup> CRC Committee, CO, 2015, paras 42(b), 43(b).

#### 4. National Legal Frameworks and Intersexuality

In the previous chapter, I pointed out how authoritative human rights institutions have expressed their concerns over “cosmetic” intersex genital surgeries being performed on non-consenting children. These human rights institutions have increasingly called out for the implementation of legal measures that will ensure that the human rights of intersex children and adults are being upheld.<sup>220</sup> They have focused on three types of legal measures. Some human rights institutions have advocated for implementing flexible sex registration procedures that would allow intersex persons to register or change their legal sex according to their self-identified gender.<sup>221</sup> Other institutions have called out for implementing legal measures that would determine when early age intersex genital surgeries could be performed.<sup>222</sup> And others have promoted the inclusion of *intersex* in national anti-discrimination laws.<sup>223</sup>

In the following chapter, I will discuss how states have implemented these three types of legal measures and which models for their implementation have been proposed. I will draw on relevant case studies and analyse in how far they are in the best interests of intersex children. When no appropriate case studies are available for the legal measures discussed, I will give a hypothetical discussion to what extent they would be in the best interests of intersex children. I will do this by evaluating the extent to which the legal measures discussed comply with the General Comment No. 14 framework for assessing and determining the best interests of children (see chapter 1.3).

My first step will be to analyse the compliance of three different sex registration models with the General Comment No. 14 framework. After that, I will go on to provide a short overview on the different approaches of covering discrimination on the basis of someone’s intersexuality in anti-discrimination legislation. Lastly, this chapter will evaluate to what extent three different types of legal measures that regulate the practice of performing

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<sup>220</sup> E.g.: Special Rapporteur on Torture, 2013, para 88; Council of Europe, 2015(a); FRA, 2015.

<sup>221</sup> E.g.: Council of Europe, 2015(a), p. 9; German Ethics Council 2012, pp. 166-167.

<sup>222</sup> E.g.: CAT Committee, CO, 2011, para 20; Special Rapporteur on Torture, 2013, para 88.

<sup>223</sup> E.g.: Council of Europe, 2015(a), p. 9; UNHCHR, 2015, paras 78(h)-79(c).



early age intersex genital surgeries have complied with the *best-interests determination framework*.

#### 4.1. Legal sex registration

While personal status laws do not directly regulate when intersex genital surgeries are performed, they can in some instances impact the decision of whether or not genital surgeries are to be performed on children. Most legal systems demand that newborns are registered with either the female or the male sex shortly after their birth.<sup>224</sup> The majority of countries in the three regions examined now provide for the possibility to change the legal sex later in life.<sup>225</sup> However, in order to conduct a legal sex change the person concerned must usually fulfil certain requirements. Depending on the country, these requirements might include the obligation to undergo gender re-assignment treatment or to be diagnosed with a mental disorder.<sup>226</sup> In some countries such as Denmark and Malta, transgender persons can now change their legal sex unconditionally.<sup>227</sup>

Despite the fact that the transition from one legal sex to another is currently becoming easier, sex is still mostly defined in a binary way. Only a few legal systems have broken out of this gender dualism and intersex children are now registered without any legal sex or with a non-binary sex category.<sup>228</sup> Furthermore, some more countries, mainly in Asia and Oceania, have introduced the possibility for adults and authorized minors to change their sex marker to non-binary categories on certain identification documents.<sup>229</sup>

In the following elaboration, I will analyse three of these implemented or proposed sex registration models and determine to what extent they take into account the elements of

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<sup>224</sup> Council of Europe, 2015(a), p. 37. E.g.: Austrian Personal Status Law, para 2(2)(3).

<sup>225</sup> TGEU, 2015(a); Transgender Law Center, n.d.

<sup>226</sup> TGEU, n.d.

<sup>227</sup> Malta's GIGESC Act, paras 3(3), 4, 5; Motion to amend the Act on the (Danish) Civil Registration System, Art. 1.

<sup>228</sup> Dutch Civil Code, Article 1:19d(1); German Personal Status Law, para 22(2); ACT Government, 2014; Internal Affairs, n.d., p. 4.

<sup>229</sup> Haider, 2009; High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014]; Supreme Court Division Bench Nepal, *Pant v. Nepal* (2007); Pink News, 2013; Supreme Court of India, *National Legal Services Authority v. Union of India and others* (2014); The New Zealand Herald, 2012.

the framework for assessing and determining the child's best interests. The evaluation on the best-interests assessment will focus on the four elements explained in chapter 1.3.3. In order to analyse the compliance with the *best-interests determination framework* I will focus mainly on two requirements of the framework: to ensure that the child's views are considered and that experts, preferably in form of a multidisciplinary team, are involved in the decision on the child's sex registration. Furthermore, when relevant, I will evaluate whether the requirements to take decisions that affect children in a timely manner, to provide mechanism for appealing or revising the decision and to set up a CRIA are met (see chapter 1.3.3).

My first step will be to analyse the sex registration models of Germany and the Netherlands. Both of these countries require that children with unclear sex are to be initially registered without any sex. Secondly, I will analyse the implications that introducing non-binary sex categories would have for intersex persons. The case study that will aid me for this analysis is the judgment of the Australian High Court in the *Norrie* case. Thirdly, I will give a hypothetical discussion on how the abolishment of sex as a relevant legal category would be in the best interests of intersex children. Finally, I will conclude on whether the three discussed sex registration models seem to ensure that the children's best interests are a primary consideration for registering or changing their legal sex.

#### **4.1.1. Blank sex registry: The German and Dutch sex registration models**

The German Ethics Council recommended in its report on intersexuality in 2012 that the German personal status law should be amended in order to ensure the non-discrimination of intersex persons. One specific recommendation called for the provision of allowing intersex persons the possibility to postpone their sex registration until they have decided their sex for themselves. The maximum age for this decision should be defined by law.<sup>230</sup>

As a result of this report, the German legislators amended the personal status law in 2013.<sup>231</sup> A new paragraph was introduced which requires children that are born with an

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<sup>230</sup> German Ethics Council, 2012, p. 167.

<sup>231</sup> Dethloff/Gössl, 2014, p. 139.

unidentifiable sex to be initially registered without any sex.<sup>232</sup> Subsequently, an updated administrative rule clarifying the interpretation of the personal status law was issued.<sup>233</sup> The rule clarifies that for the purpose of registering a newborn, sex is to be understood in a binary way. Categories like *intersex* or *diverse* are not permissible when registering someone's sex.<sup>234</sup> Furthermore, the rule establishes that if the sex can be determined at a later stage and a medical certificate that proves the child's sex is provided, one can obtain a new birth certificate with a binary sex marker.<sup>235</sup>

A similar law exists in the Dutch civil code. In 1970, the Dutch legislators introduced Article 1:17(2) in the New Dutch Civil Code, which required that the birth certificate of children with unclear sex were to state that the child's sex could not be determined. In 1995, this provision was changed to Article 1:19d of the current Dutch Civil code which states that "[i]f the child's gender is doubtful, then a birth certificate will be drawn up in which is recorded that the sex of the child could not be determined."<sup>236</sup> The Article then goes on to explain that three months after the initial registration, a final birth certificate will be issued. In the case that the child's sex can be determined during these three months and the registry receives a medical certificate that proves the child's sex, the child's sex will be reported on the final certificate. If the registry does not receive a medical prove, then the final birth certificate will be issued without stating the child's sex.<sup>237</sup> The results of a non-quantitative survey in the Netherlands indicate that at least in most cases the child's sex has been determined after the three-month period.<sup>238</sup> Concerning the sex registration on international travel documents, the Dutch and German blank sex registry is reflected with an X on passports. This is in accordance with the regulations of the International Civil Aviation Organisation.<sup>239</sup>

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<sup>232</sup> German Personal Status Law, para 22(2).

<sup>233</sup> PStG-VwV-ÄndVwV, 2014, paras 20(f), 21(d), 22(d(bb)).

<sup>234</sup> PStG-VwV, 2014, para 21.4.3.

<sup>235</sup> Ibidem, para 22.2.

<sup>236</sup> Dutch Civil Code, Article 1:19d(1).

<sup>237</sup> Ibidem, Article 1:19d(2)(3).

<sup>238</sup> Van den Brink/Tigchelaar, 2014(a), p. 4; Van den Brink/Reuss/Tigchelaar, 2015(a), FN 19.

<sup>239</sup> Van den Brink/Reuss/Tigchelaar, 2015(a), p. 284.

The Dutch and German sex registration models do not intend to establish a third legal sex category. In the case of Germany, this is made clear in the administrative rule to the personal status law where paragraph 21.4.3 defines sex in a binary way.<sup>240</sup> In addition, by relying on this administrative rule, the Higher Regional Court Celle denied the request of an individual to change the legal sex to *inter* or *divers* in 2015.<sup>241</sup> However, the court ruled that the applicant could have requested the cancellation of the current sex marker and remain without any registered sex.<sup>242</sup> The decision that sex is to be understood as binary confirmed a similar judgment led by the Regional Court of Munich in 2003.<sup>243</sup> Already then, an individual requested to change the legal sex to *Zwitter* (German word for *hermaphrodite*) which the Regional court denied by arguing that this would create uncertainties in law.<sup>244</sup> What is interesting to note, is that in this case the court argued that the applicant did not satisfy the definition of a *true hermaphrodite* because this would require the occurrence of both testes and ovaries in one body. The question whether an intersex person that satisfies this narrow definition would have the right to be registered as *Zwitter* remains open.<sup>245</sup>

In 2007 the Dutch Supreme Court clarified that in the Netherlands the deletion of one's sex marker cannot be requested. The court held that there was no legal basis for exchanging the sex marker of an individual to the category "unknown".<sup>246</sup>

Contrary to that, newborns with unclear sex in New Zealand do get registered with a third sex marker called "indeterminate" on their birth certificates. Similarly to Germany and the Netherlands, the registration with the sex "indeterminate" is used as a temporary measure until the sex can be identified. In order to exchange the "indeterminate" sex marker with F or M, a decision from a family court is needed.<sup>247</sup>

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<sup>240</sup> PStG-VwV, 2014, para 21.4.3.

<sup>241</sup> OLG Celle, 21.1.2015, 14 W 28/14, para 1.

<sup>242</sup> Ibidem.

<sup>243</sup> Regional Court of Munich, 30.06.2003, 16 T 19449/02.

<sup>244</sup> Agius/Tobler, 2011, pp. 83-84.

<sup>245</sup> Ibidem.

<sup>246</sup> HR, 30 March 2007, ECLI:NL:HR:2007:AZ5686; Van den Brink/Reuss/Tigchelaar, 2015(a), pp. 287-288.

<sup>247</sup> Internal Affairs, n.d.; Schoeman/Bookman, 2014, p. 171.

The non-registration of one's legal sex in Germany and the Netherlands can also be due to administrative reasons. For example, German citizens residing in the Netherlands are often registered without any legal sex. This is because German identity cards do not mention any legal sex. Thus, when Germans use their identity card for registering their residency in a Dutch city hall, the registry is obliged to leave their legal sex indeterminate.<sup>248</sup> This means that the non-registration of a legal sex marker does not automatically indicate that the person's sex is unclear; rather, it can also be due to administrative reasons which is different from the registration with a third legal sex category. Administrative reasons are rarely the cause for a person's registration with a third sex category.

The intention of the German and Dutch sex registration model is to reduce the stigmatization of intersex children and the pressure on parents to assign the "right" sex to their intersex child shortly after birth. This should prevent irreversible medical interventions, which could be regretted later on in life, to be performed.<sup>249</sup> Despite its well-intended objectives, the amendment of the German personal status law has met a lot of criticism by intersex rights activists from all around the world.<sup>250</sup> The main criticism is that the new provision does not provide an extra choice to register the child without any sex, but creates a legal obligation to do so. This has led to the fear that the children concerned are exposed to a forced outing of their intersexuality and consequent stigmatization. Furthermore, the obligation to provide a medical certificate that states the child's sex in order to register for a sex marker is feared to incentivize parents and doctors to opt for undertaking "cosmetic" intersex genital surgeries on the child. The power to decide over the child's sex assignment is transferred to the medical profession, away from the parents and the child concerned.<sup>251</sup>

In contrast to the German personal status law, the Dutch provision on the sex registration of children with unidentified sex has not raised much discussion. The reason for this could be that when the original provision was implemented in 1970, not much attention

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<sup>248</sup> Van den Brink/Reuss/Tigchelaar, 2015(a), pp. 264, 286.

<sup>249</sup> Ibidem, p. 286; Dethloff/Gössl, 2014, pp. 140, 143.

<sup>250</sup> OII Australia, 2013(b); OII Germany, 2013; Vilorio, 2013.

<sup>251</sup> Dritte Option, n.d.; OII Germany, 2013.

was paid to issues related to intersexuality. Another reason could be that in the Dutch legal system, no medical certificate is required in order to register a newborn.<sup>252</sup>

Both the Dutch and the German provision are in tension with the rest of the legal system which is based on a binary division of sex. For example, in both Germany and the Netherlands it is unclear whether persons without any registered sex can get legally married. This is because in Germany marriage is only possible for a *man* and a *woman*<sup>253</sup> and in the Netherlands only for “two persons of different or the same sex”<sup>254</sup>. Hence, these legal gaps could become problematic in the future.

By enacting the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC Act) in 2015, Malta introduced the possibility for parents to postpone the sex registration of their child until the child turns 18 years old.<sup>255</sup> This provision is, however, significantly different from the German and Dutch blank sex registry. First, it does not create any obligation for parents to register their child without any sex but creates the option to do so. And second, the non-registration of a child’s sex is not limited to intersex children but possible for every child. The enactment of the Act has been celebrated as a milestone in the transgender and intersex rights movement and the possible deferral of a child’s sex registration a success for transgender and intersex children.<sup>256</sup>

#### **4.1.1.1. Best-interests assessment**

One element of the best-interests assessment is to take into account the views of the children concerned in the decision-making. The children that are affected by the Dutch and German blank sex registry are mostly too young to express their views on the registration process. Most intersex adults – who I believe can better empathize with intersex children than non-intersex adults since they know what it means to be intersex – have clearly advocated against registering children without a legal sex or with a third sex category. The

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<sup>252</sup> Van den Brink/Reuss/Tigchelaar, 2015(a), p. 287.

<sup>253</sup> Dethloff/Gössl, 2014, p. 146.

<sup>254</sup> Dutch Civil Code, Art. 1:30(1).

<sup>255</sup> Malta’s GIGESC Act, para 7(4).

<sup>256</sup> TGEU, 2015(b).

participants of the Third International Intersex Forum (2013) issued a statement where they expressed their belief that in most societies, it would be too challenging for intersex children to grow up without being identified as either boys or girls. They recommended “that intersex children be registered as females or males with the awareness that, like all people, they may grow up to identify as a different sex or gender.”<sup>257</sup> Contrary to this perspective, it can be noted that the blank sex registry could be advantageous for all those intersex children that do not identify with their assigned sex/gender. For these children it would be significantly easier to register their self-identified gender. The German Ethics Council intended for this effect when it recommended allowing for the postponement of the sex registration of intersex children. The Maltese GIGESC Act has also aimed to prevent that a child’s legal sex marker does not match the child’s gender identity. Hence, a child’s views on the blank sex registry would most likely depend on whether the child feels comfortable with the assigned sex/gender. This means that it is hardly possible to identify the views on the blank sex registry of intersex children as a group.

Another element of the best-interests assessment is that children must not be treated as a homogenous group. From the first appearance, the German and Dutch sex registration models treat children with unclear sex all the same – they are *all* initially registered without any sex marker.<sup>258</sup> However, when taking a closer look at the intentions of the Dutch and German sex registration models, it becomes clear that the blank sex registry is meant to ensure that parents and doctors are given ample time to make a deliberate decision on the sex assignment of each child. This can be seen as an attempt to recognize the heterogeneity of intersex children and to ensure that an individual assessment of what is best for each individual child takes place.

The question whether the blank sex registry would improve the overall well-being of the children concerned cannot be comprehensively answered since there is disagreement on

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<sup>257</sup> The third intersex forum and identification documents, 2013.

<sup>258</sup> In the Netherlands it is likely that not every child with unclear sex is registered without a legal sex since no medical certificate is needed for registering a newborn. Hence, it is the parents’ decision which sex is registered and they might opt for registering a binary sex category.

this issue. Despite the intention of the registration models to prevent unnecessary intersex genital surgeries and the stigmatization of intersex children,<sup>259</sup> intersex rights activists have argued that the blank sex registry could have counter-productive effects for these children.<sup>260</sup> In any case, it could be argued that the forced outing of intersex children and their potential stigmatization could be prevented if, as in Malta, the legal system would allow one to register non-intersex children without any sex.

There is further disagreement on the question of whether the blank sex registry in Germany and the Netherlands is beneficial or harmful for the health of intersex children. This is because it is unclear whether the blank sex registry could increase or decrease the number of intersex genital surgeries being performed on children. Once again, this concern would be irrelevant for the Maltese model since in Malta no medical certificate is needed to register the child's legal sex.

#### **4.1.1.2. Best-interests determination**

The blank sex registry of children with unclear sex in Germany and the Netherlands defers the power to decide on the sex assignment of the child to doctors. The views of the intersex child and its representatives do not have to be taken into account for the decision. Furthermore, the doctors deciding are not required to consult with experts on gender or intersex issues. Thus, the German and Dutch blank sex registry goes against the requirements of the best-interests determination framework, which calls for taking into account the children's views and the involvement of experts, preferably in form of a multidisciplinary team, in the decision-making.

A positive aspect of the German and Dutch sex registration model is that it is in accordance with the requirements of the best-interests determination framework when it comes to providing an accessible mechanism for appealing or revising the child's sex assignment. According to paragraph 47(2) of the German Personal Status Law and Articles

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<sup>259</sup> Van den Brink/Reuss/Tigchelaar, 2015(a), p. 286; Dethloff/Gössl, 2014, pp. 140, 143.

<sup>260</sup> Dritte Option, n.d; OII Germany, 2013.



1:24-24b of the Dutch Civil Code, the child's sex registry can be corrected in cases where an intersex child develops sex characteristics contrary to the assigned sex.<sup>261</sup>

Neither the Dutch nor the German legislation creates the obligation to establish a CRIA that assesses how the blank sex registry affects the children concerned. However, Germany has set up a working group on "Intersexuality/Transsexualism" which is currently evaluating the blank sex registry and, if necessary, will make recommendations on how it should be amended.<sup>262</sup> It can be argued that a similar initiative exists in the Netherlands. On request of the Dutch Ministry for Security and Justice, a study on the consequences of leaving the legal sex in certain cases undetermined was undertaken.<sup>263</sup> This partly included an evaluation of the implementation of the blank sex registry. Hence, both the Netherlands and Germany can be considered as complying with the requirement of the best-interests determination framework to undertake a CRIA.

#### **4.1.2. Third legal sex categories: The Australian *Norrie* case**

The intersex rights movement has often wrongly been associated with the claim that intersex children shall be raised with a "third" gender identity that is neither male nor female.<sup>264</sup> Furthermore, some people believe that intersex persons automatically identify with a non-binary gender.<sup>265</sup> In reality, most intersex advocacy organizations reject the proposal to register intersex children with a third legal sex category. This could lead to the stigmatization of these children and would not make their life easier, but harder.<sup>266</sup> In addition, the intersex rights movement is primarily about the acceptance of sex diverse bodies and not about gender diversity.<sup>267</sup> Like non-intersex persons, intersex persons have a variety

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<sup>261</sup> Dutch Civil Code, 1:24-24b; German Personal Status Law, para 47(2).

<sup>262</sup> Deutscher Bundestag, 2014.

<sup>263</sup> Van den Brink/Tigchelaar, 2014(a).

<sup>264</sup> ISNA(f), n.d.

<sup>265</sup> OII Australia, 2013(a).

<sup>266</sup> ISNA(f), n.d., OII Australia, 2013(a); OII Australia, 2014(b), p. 11.

<sup>267</sup> OII Australia, 2014(b), p. 1.

of gender identities that include male, female, non-binary and multiple identities.<sup>268</sup> However, the majority of intersex persons identify with the assigned gender.<sup>269</sup>

Some organizations and individuals further argue that the introduction of a third legal sex category would even reinforce the binary sex model, instead of making it weaker. When all individuals with a gender identity that differs from the traditional notion of female and male are classified in one separate gender category, then the categories *female* and *male* become stronger and less gender diverse. Hence, the introduction of a third gender could enforce the confirmation that persons with a typically female or male gender identities are the “norm” and everybody else is an exception to the rule.<sup>270</sup> Moreover, Gina Wilson, former president of the Australian branch of the Organization Intersex International (OII), claimed that the classification of intersex persons in a sex category called *intersex* would only intensify the marginalization and discrimination of intersex persons. Wilson further argued that there is no clear-cut definition of being intersex and by trying to categorize intersex persons, arbitrary inclusions and exclusions from the definition would be created.<sup>271</sup> Angela Kolbe, legal scholar and practitioner, shared Wilson’s concerns. However, she also argued that by introducing a legal category called “intersex”, intersexuality would become a valid sex category instead of being regarded as a disease or malformation. This could delegitimize the medicalization of intersex bodies and make intersex genital surgeries punishable.<sup>272</sup>

Since 2007, countries such as Australia, Bangladesh, India, Nepal, New Zealand and Pakistan have introduced sex registration procedures that allow for the possibility of reporting third – in some instances even fourth and fifth<sup>273</sup> – sex categories on certain

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<sup>268</sup> OII Australia, 2014(a). This is also well expressed by a video of the youth organization Inter/Act. See: Inter/Act, 2014.

<sup>269</sup> OII Australia, 2014(b), p. 5.

<sup>270</sup> Cabral, cited in Open Society Foundation, 2014, p. 21; OII Australia, 2013(a).

<sup>271</sup> Wilson, 2012.

<sup>272</sup> Kolbe, 2009, p. 16.

<sup>273</sup> In the Australian Capital Territory newborns can be registered with the sex categories, *female*, *male*, *unspecified*, *indeterminate* and *intersex* (they can also be registered with all three non-binary categories). Adults and authorized minors can further change their legal sex to one or all three of these non-binary sex categories. See: ACT Government, 2014.

identification documents.<sup>274</sup> Most of these countries have a common law system which in contrast to civil law countries usually do not have a central registry but keep separate records for different identification documents. This makes it possible for different identification documents to show different sex markers. For example, citizens of New Zealand can change the sex marker to an X on their passports but not on their birth certificates.<sup>275</sup> This is impossible for nationals of countries with a civil law system, such as Germany or the Netherlands, because there is only one central source that registers all relevant information.<sup>276</sup>

The introduction of third legal sex categories has mostly been the result of advocacy efforts by transgender and queer communities.<sup>277</sup> This was also true for the decision by the Australian High Court in the *Norrie* case<sup>278</sup> which granted a transsexual person the right to change her<sup>279</sup> legal sex to “non-specific”. The High Court held that the *Births, Deaths and Marriages Act 1995* of New South Wales (NSW) recognizes that in some cases a person’s sex is neither female nor male, but “indeterminate”.<sup>280</sup> If a person with an “indeterminate” sex applies for a legal sex change and fulfils the necessary legal requirements,<sup>281</sup> the Registrar must change the applicant’s sex to the sex marker “non-specific”.<sup>282</sup> This is necessary in order to ensure the accuracy of the law and to reflect the nature of a person’s sex correctly on identification documents.<sup>283</sup>

The decision is formally binding only in NSW but since the legislations in many other states and territories of Australia are similar to the one of NSW, the *Norrie* case could also

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<sup>274</sup> Haider, 2009; High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014]. Supreme Court Division Bench Nepal, *Pant v. Nepal* (2007); Pink News, 2013; Supreme Court of India, *National Legal Services Authority v. Union of India and others* (2014); The New Zealand Herald, 2012.

<sup>275</sup> Van den Brink/Reuss/Tigchelaar, 2015(a), p. 284; Schoeman/Bookman, 2014, pp. 170, 175.

<sup>276</sup> Van den Brink/Reuss/Tigchelaar, 2015(a), p. 284.

<sup>277</sup> E.g.: Supreme Court Division Bench Nepal, *Pant v. Nepal* (2007); Supreme Court of India, *National Legal Services Authority v. Union of India and others* (2014).

<sup>278</sup> High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014].

<sup>279</sup> Norrie stated specifically that she uses the pronouns “she” and “her” in order to refer to herself. Thus, I will do the same in this paper. See: Groom, 2014.

<sup>280</sup> High Court of Australia, *Norrie v. NSW Registrar of Births, Deaths and Marriages* [2014], para 32.

<sup>281</sup> Birth, Deaths and Marriages Registration Act 1995, Sector 32A, 32B, 32DA, 32DB and 32DC.

<sup>282</sup> High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014], para 46.

<sup>283</sup> Ibidem, para 32.

serve as a legal precedent for other regions.<sup>284</sup> The High Court’s judgment could have two specific implications for the legal situation of intersex persons. First off, despite the fact that the *Norrie* case concerned an adult who pursued a legal sex change, the judgment could impact the sex registration of intersex newborns. Since the court ruled that one’s sex shall never be registered inaccurately,<sup>285</sup> the Registrar would be legally obliged to register a newborn with an unidentifiable sex with a non-binary sex marker such as “non-specific” or “intersex”.<sup>286</sup> This would be similar to the sex registration model of New Zealand.<sup>287</sup> Similar concerns for the German and Dutch sex registration model could be raised as well (see chapter 4.1.1). Secondly, according to the court’s reasoning, intersex persons that fulfil the requirements for changing their legal sex, which include the obligation to undergo a “sex affirmation procedure”,<sup>288</sup> could be granted the right to change their sex marker to “intersex”.<sup>289</sup>

The *Births, Deaths and Marriages Act 1995* holds that minors can change their legal sex if their parents apply to the Registrar.<sup>290</sup> This means that according to the ruling in the *Norrie* case also minors with “indeterminate” sex can request a change of their legal sex to “non-specific”, if their parents approve this. This could be relevant for intersex minors whose gender identity is neither exclusively male nor female. In fact, 7% of the interviewees in the Hamburger study on intersexuality did not identify as either male or female.<sup>291</sup> Hence, for them, the registration with a non-binary category could be a viable option. In the following, I will analyse how the implication of the *Norrie* judgment that minors, including intersex/transgender minors, can change their legal sex to “non-specific” complies with the best-interests assessment and best-interests determination framework.

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<sup>284</sup> Keyes, 2014, pp. 130, 134.

<sup>285</sup> High Court of Australia, *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014], para 32.

<sup>286</sup> Keyes, 2014, pp. 129-130.

<sup>287</sup> Schoeman/Bookman, 2014, p. 171.

<sup>288</sup> Birth, Deaths and Marriages Registration Act 1995, Sector 32A, 32B, 32DA.

<sup>289</sup> Keyes, 2014, pp. 128, 131, 133.

<sup>290</sup> Birth, Deaths and Marriages Registration Act 1995, Sector 32B(2).

<sup>291</sup> Schweizer/Richter-Appelt, 2012, pp. 192-193.

#### 4.1.2.1. Best-interests assessment

Some intersex advocacy organizations advocate in favour of introducing third sex categories for gender diverse persons.<sup>292</sup> The movement has further called out for introducing non-bureaucratic procedures that make it possible to change the legal sex on request.<sup>293</sup> The requirement in the *Norrie* case to undergo a “sex affirmation procedure”<sup>294</sup> before changing the legal sex would accordingly not be in line with the views of most intersex persons. This means that the ruling in the *Norrie* case would only partly comply with the requirement of the best-interests assessment framework of taking into account the views of the children affected or their representatives.

The introduction of non-binary categories such as “non-specific” in the *Norrie* case symbolizes that gender identities of individuals, including intersex persons, are more diverse than the binary sex model stipulates. This means that the *Norrie* judgment recognizes the heterogeneity of gender identities of adults and children and hence, would be in accordance with the best-interests assessment framework, which demands the consideration of the diverse identities of children.

Another requirement of the best-interests assessment framework is that all measures affecting children shall be advantageous for their security and overall well-being. The countries in Asia that have introduced non-binary sex categories have done this as an attempt to ensure the non-discrimination of persons with non-binary gender identities.<sup>295</sup> For example, the ruling by the Indian Supreme Court in the *NALSA* case to grant individuals the right to register their sex as a third category was an effort to reduce the marginalization and discrimination against people known as *hijra* – a term that describes people with non-binary gender identities.<sup>296</sup> Hence, the legal recognition of persons with “third” gender identities – this can also include intersex children – could reduce their legal and social discrimination.

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<sup>292</sup> OII Australia, 2014(b), p. 4; The third intersex forum and identification documents, 2013.

<sup>293</sup> The third intersex forum and identification documents, 2013.

<sup>294</sup> Birth, Deaths and Marriages Registration Act 1995, Sector 32A, 32B, 32DA.

<sup>295</sup> E.g.: Supreme Court Division Bench Nepal, *Pant v. Nepal* (2007).

<sup>296</sup> Supreme Court of India, *National Legal Services Authority v. Union of India and others* (2014);

Here again, the ruling in the *Norrie* case was in accordance with the best-interests assessment framework.

However, the health of the persons applying for a change to the sex category “non-specific” could be negatively impacted. This is a possibility because the requirements to change one’s legal sex include the obligation to undertake a sex affirmation procedure. In NSW, a sex affirmation procedure involves the surgical alterations of the body and the person’s sterilization.<sup>297</sup> Hence, this can have detrimental effects on the health of the applicant who could possibly be an intersex/transgender child.<sup>298</sup>

#### **4.1.2.2. Best-interests determination**

In order to change the legal sex of minors in NSW, the minor’s parents must apply for the sex change at the Registrar.<sup>299</sup> Furthermore, two doctors must prove that the person concerned fulfils the criterion of having undergone a sex affirmation procedure.<sup>300</sup> Hence, the power to decide on whether or not a minor may change the legal sex is transferred to the minor’s parents and the medical profession. The doctors that issue the confirmation of the minor’s sex affirmation procedure are most likely experts on sex re-assignment treatment. However, it is not formally required that a multidisciplinary team is involved in the decision-making. Hence, the procedure to change the legal sex of minors in NSW does not serve the elements of the best-interests determination framework to consider the views of the minors concerned and to involve a multidisciplinary team in the decision-making.

Moreover, the procedure to change the legal sex to “non-specific” in NSW does not meet the requirement of the best-interest determination framework to decide on issues affecting children in a timely manner. This is because before being able to apply for the legal

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<sup>297</sup> Birth, Deaths and Marriages Registration Act 1995, Sector 32A.

<sup>298</sup> Interesting to note is that according to the Birth, Deaths and Marriages Registration Act 1995 intersex persons that were assigned to the “wrong” sex, must also undergo a sex affirmation procedure before being able to change the sex. See: Birth, Deaths and Marriages Registration Act 1995, Sector 32A.

<sup>299</sup> Ibidem, Sector 32B(2).

<sup>300</sup> Ibidem, Sector 32C.

sex change, the applicant first has to undergo gender re-assignment treatment, which usually takes a long time.<sup>301</sup>

#### **4.1.3. Abolishment of sex as a category to be registered on identification documents**

A proposal for solving the dilemma of forcibly excluding or including persons in the categories male and female is to abolish “sex” as a category for identification purposes. If the sex of intersex newborns would no longer need to be registered, parents and doctors would arguably become less pressured to determine the children’s sex shortly after their birth.<sup>302</sup> This could lead to fewer irreversible medical interventions in order to erase the children’s sex ambiguity. Since bureaucratic requirements in order to change the legal sex would not need to be fulfilled anymore, it could become easier for intersex children and adults to change between different gender roles and have multiple gender identities, including non-binary ones. By abolishing sex as a legally relevant category, the hegemonic binary sex model would be challenged since it would legally no longer exist.<sup>303</sup> This could de-legitimize the existence of gender-segregated areas in a society, such as gender-divided bathrooms, which could then be compared to race-divided bathrooms.

On the other hand, some people fear that the abolishment of sex as a legal category would make the discrimination of sexual minorities and women unidentifiable. Since no gender-disaggregated data would exist anymore, it would become difficult to monitor gender inequality. Some forms of affirmative action, such as quotas for women, could not be undertaken anymore since the target group would no longer be legally distinguishable.<sup>304</sup> This in turn could lead to the enhanced marginalization and underrepresentation of women in certain functions. Since intersex women and girls are exposed to multiple forms of discrimination, the enjoyment of their human rights could be particularly hampered.

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<sup>301</sup> The National Health Service in the United Kingdom stated in its *Equality and Diversity Strategy 2013-2016* that the average waiting time for gender re-assignment treatment is six years. No similar data could be found for Australia. See: Gatesway Foundation, NHS Foundation Trust, 2013, p. 13.

<sup>302</sup> Lembke, 2011, p. 6.

<sup>303</sup> Kolbe, 2009, p. 163.

<sup>304</sup> Van den Brink/Tigchelaar, 2014(a), pp. 5-6; Kolbe, 2009, p. 163.

Another argument for keeping sex as a legal category is that for some people, the sex marker on legal documents can be an important element for manifesting their identity. For example, for some transgender persons, including those intersex persons that do not identify with their assigned sex, changing their legal sex and becoming legally recognized can be seen as an important step in their self-identification.<sup>305</sup>

Moreover, abolishing the legal sex registration could have implications for the medical care of intersex and transsexual persons. By eliminating the legal basis for the binary sex model, state funded gender re-assignment and hormone treatments could fall under pressure.<sup>306</sup>

Until now, no country has completely abolished sex as a category in personal registration or identification processes. Since it is claimed that in Australia, Europe and North America men and women have same rights and duties, no problems should arise when the legal category sex would be abolished. In practice however, in some instance the laws in these regions do treat people differently because of their sex. This is the case in family law, where parenthood or custody for children is often granted based on different requirements for mothers and fathers.<sup>307</sup> Another example for the unequal treatment of men and women is the conscription to the military, which usually only affects men. Moreover, affirmative action often distinguishes on the basis of sex, mostly to the benefit of women. Furthermore, in countries where same-sex marriage is not allowed, some people are denied to marry their partner on the basis of sex. This means that if sex as a relevant legal category would currently be abolished, some legal problems would be created.<sup>308</sup>

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<sup>305</sup> Email from Sophie Chapel, 10 July 2015.

<sup>306</sup> Ibidem.

<sup>307</sup> E.g. Dutch affiliation law provides for different requirements to legally become a mother and a father. See: Van den Brink/Tigchelaar, 2015(b).

<sup>308</sup> Van den Brink/Tigchelaar, 2014(a), pp. 5-6; Kolbe, 2009, pp. 162-163. There are many more areas of the law that treat men and women differently. For obtaining an indication of the number of Dutch laws that distinguish on the basis of sex, see: Van den Brink/Tigchelaar, 2014(b).



#### 4.1.3.1. Best-interests assessment

In order to assess whether abolishing sex as a relevant legal category would be in accordance with the requirement of the best-interests assessment framework of taking into account the views of the children concerned, I must once again rely on the views of intersex adults on this matter as a substitute for those of intersex children. One indication of how most intersex adults think about abolishing sex as a legal category can be seen in the statement released by the Third International Intersex Forum in 2013. It states that “[i]n the future, as with race or religion, sex or gender should not be a category on birth certificates or identification documents for anybody”<sup>309</sup>. Thus, the participants of the Forum envision a world where the category sex is legally not relevant anymore, but they do not believe that this is possible at the current stage. That means that abolishing the legal category sex would generally be in line with the views of most intersex persons.<sup>310</sup> The question is only when this is possible.

I argue that abolishing sex as a legal category for identification purposes would recognize that sexes and gender identities are too diverse for being able to classify them in a few legal sex categories (even if they include non-binary categories). It would take into account the heterogeneity of people in general, including (intersex) children, and hence, would be in this point in compliance with what the best-interests assessment framework requires.

The question whether the abolition of sex as a legal category would increase or decrease the well-being of intersex children cannot be comprehensively answered. On the one hand, if the binary sex model would become less rigid and allow for more sex diversity, the stigmatization of intersex children could be prevented. On the other hand, there are concerns that abolishing sex as a legal category at the moment could have negative

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<sup>309</sup> The third intersex forum and identification documents, 2013.

<sup>310</sup> It has to be noted that the above cited statement is only one perspective on abolishing the legal category sex and cannot be seen as representative for the opinions on this issue of all intersex persons or all intersex advocacy groups.

implications for women and girls, including intersex women and girls, when it comes to the enjoyment of their human rights.<sup>311</sup>

Lastly, how would the abolition of the legal category sex affect the health of intersex children? Also this question cannot be fully determined but there are indications that if the category sex would be legally abolished, arguably fewer intersex genital surgeries would be performed. This is because the binary sex model would be weakened and parents would be less fearful that their intersex child will become stigmatized if it does not conform to the typical image of being a boy or a girl. Furthermore, parents and doctors would feel less pressured to determine the child's sex shortly after birth for registration purposes.

#### **4.1.3.2. Best-interests determination**

If sex as a legal category would be abolished, the best-interests determination would become irrelevant. This is because no procedure would exist anymore to determine which legal sex is assigned to a newborn.

#### **4.1.4. Conclusions**

The analysis of the different sex registration models has revealed that none of the three examined models serves fully all elements of the General Comment No. 14 framework to assess and determine the interests of children.

The main shortcoming of the German and Dutch sex registration models is that they defer the power to decide on the child's sex assignment to the medical profession. The child's views, in accordance with the child's age and maturity, do not necessarily have to be taken into account. This is different from the situation in Malta where parents determine the child's legal sex marker by "following the express consent of the minor, taking into consideration the evolving capacities and the best interests of the minor"<sup>312</sup>. The Maltese model which allows all parents to postpone the sex registration of their newborn, regardless whether the

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<sup>311</sup> Van den Brink/Tigchelaar, 2014(a), pp 5-6; Kolbe, 2009, p. 163.

<sup>312</sup> Malta's GIGESC Act, para 7(4).

child is intersex, could further reduce the risk that an intersex child is forcibly outed by the blank sex registry and consequently exposed to stigmatization. Hence, the elements of the Dutch and German sex registration models that seem not to be in the best interests of intersex children could most likely be improved by taking the Maltese GIGESC Act as a role model.

Concerning the ruling in the *Norrie* case, the introduction of the sex category “non-specific” seems generally to be in the best interests of intersex children. What is not in their best interests is that in order to request a legal sex change in NSW, intersex persons are required to fulfil a sex affirmation procedure. Hence, the introduction of third legal sex categories that can be freely chosen by adults and authorized minors is most likely in the best interests of children, including intersex children.<sup>313</sup> Nevertheless, I cannot be certain in this conclusion since there is disagreement on whether third sex categories weaken or strengthen the traditional notions of *maleness* and *femaleness*. In case that it would strengthen it, the number of intersex genital surgeries could increase in order to make a child fit the understanding of being a boy or a girl.

It is difficult to predict whether abolishing sex as a legal category would be in the best interests of intersex children. This is because it is unclear how it would affect the enjoyment of human rights by (intersex) women and the access to state-funded health care services by transsexual and intersex persons. Abolishing the legal category sex is an option that needs to be further examined since it would solve the problem of forcibly assigning a sex/gender to (intersex) children and would eliminate the legal basis for the rational of undertaking intersex genital surgeries on infants. Despite the fact that the binary sex model is deeply enshrined in the legal traditions of societies in Australia, Europe and North America, some countries in these regions have shown initiatives to discuss the possibility of

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<sup>313</sup> Denmark and Malta both allow for changing the legal sex unconditionally, but neither of them provide for the possibility to change the sex marker to a non-binary category. See: Malta’s GIGESC Act, paras 3(3), 4, 5; Motion to amend the Act on the (Danish) Civil Registration System, Art. 1.

eliminating sex for registration purposes. One such initiative is the previously mentioned Dutch report on the possibility of leaving the legal sex in certain cases undetermined.<sup>314</sup>

## **4.2. Anti-discrimination laws**

Another type of legal measure that could impact the practice of performing intersex genital surgeries is anti-discrimination laws. Opponents of early age intersex genital surgeries have argued that these surgeries are manifestations of the discrimination against all intersex persons.<sup>315</sup> According to this argument, the prevalence of intersex genital surgeries during childhood could be reduced if the non-discrimination of intersex children is guaranteed. In addition, this could improve the quality of life of intersex persons significantly since, as the Council of Europe reported in 2015, intersex persons are currently facing discrimination in all spheres of life.<sup>316</sup> Furthermore, the legal protection of intersex persons against discrimination could have an educational role for the society when it comes to accepting children for who they are.

I argue that it is quite obvious that including explicit references to intersex in anti-discrimination is in the interests of intersex children. By having a look at the best-interest assessment framework, it becomes evident that the inclusion of intersex in anti-discrimination laws meets all relevant elements of the framework (see chapter 1.3.3). First, it would be in line with the views of intersex children and adults, since intersex rights activists have continuously called out for their protection from discrimination.<sup>317</sup> Second, the explicit inclusion of intersex in anti-discrimination laws would recognize that the diversity of children and adults must be protected. Third, the overall well-being of intersex children would be improved since they would be protected from discriminatory treatment. In addition, since laws sometimes have an educational role, the inclusion of intersex in anti-

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<sup>314</sup> In addition to the Dutch report, the Dutch parliament recently voted in favor of eliminating the documentation of the legal sex where possible. Australia has undertaken similar initiatives. See: Australian Government, 2013, p. 5, para 26; Van den Brink/Tigchelaar, 2014(a); Vreerwerk, 2015.

<sup>315</sup> Australian Senate, 2013, p. 70; Ehrenreich/Barr, 2005, p. 115; Tamar-Mattis, 2012, p. 8.

<sup>316</sup> Council of Europe, 2015(a), p. 43.

<sup>317</sup> E.g.: Statement of the European Intersex Meeting in Riga, 2014.

discrimination legislation could reduce the societal stigmatization of intersex children. Fourth, according to reports by the UN, the obligation to protect intersex children from discrimination includes their protection from harassment, bullying in schools and coercive medical treatment.<sup>318</sup> In line with this, the inclusion of intersex in anti-discrimination laws would protect intersex children from physical violence such a bullying or coercive medical treatment and hence, would be beneficial for their health.

According to these arguments, there is not much doubt that explicitly covering the discrimination based on intersexuality in equal treatment legislation is in the best interests of intersex children. This is why I decided not to undertake a formal assessment of whether or not the inclusion of intersex in anti-discrimination laws meet the requirements of the framework of the General Comment No. 14. What I will do in the following elaboration is to provide a brief overview of the different approaches that can be used when covering the discrimination on the basis of someone's intersexuality by equal treatment legislation.

#### **4.2.1. Different approaches to include *intersex* in anti-discrimination legislations**

In 2005, South Africa became the first country worldwide that introduced an explicit reference to intersex in its equality legislation.<sup>319</sup> It did so by clarifying that intersex shall be interpreted as being part of the ground *sex*.<sup>320</sup> Since then a few other countries have followed the initiative to explicitly cover intersex in their anti-discrimination legislation. Some countries or regions have associated intersex with the grounds of gender identity or gender expression. Examples for this are the Scottish Offences Act 2009 and the legislation on the non-discrimination of transgender persons by the Autonomous Basque Community.<sup>321</sup> The most recent undertaking has been to introduce an intersex-specific ground in anti-discrimination laws. This was done first by Australia in 2013 when it introduced the ground

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<sup>318</sup> UNHCHR, 2015, paras 17, 42.

<sup>319</sup> Council of Europe, 2015(a), p. 44.

<sup>320</sup> Judicial Matters Amendment Act 2005, Act. No. 22 of 2005, Republic of South Africa, para 16.

<sup>321</sup> Ley 1472012, de 28 e junio, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales (Act 14/2012), Art. 6(4) ; Offences (Aggravation by Prejudice) (Scotland) Act 2009 (asp 8), para 2(8)8a).

“intersex status” in its equal treatment legislation.<sup>322</sup> With the enactment of the Maltese GIGESC Act in 2015, Malta continued this trend and amended the *Equality for Men and Women Act* to include the non-discrimination ground “sex characteristics”.<sup>323</sup>

There has been little discussion on which of the approaches of including intersex in the anti-discrimination legislation has served the interests of intersex adults and children the best. European Union reports have argued that intersex within the meaning of *sex* is more suitable than including it in the grounds *gender identity* or *sexual orientation*. This is because the discrimination of intersex persons is often linked to their assigned sex. For example, a person that was assigned to the female sex might not be allowed to marry a woman if the respective country does not provide for same-sex marriage. Furthermore, being discriminated against on the basis of one’s intersexuality means usually that one is discriminated against because of physical sex characteristics. Physical sex characteristics do not automatically affect one’s sexual orientation or gender identity. Hence, it would create a wrong perception of intersex persons when the discrimination based on intersexuality is covered by the grounds *gender identity* and *sexual orientation*.<sup>324</sup>

Most intersex rights activists support the introduction of an intersex-specific ground such as “intersex status” or “sex characteristics”.<sup>325</sup> This approach has the advantage of increasing the visibility of intersex persons.<sup>326</sup> Notwithstanding this claim, I argue that the introduction of a separate ground for *intersex* fails to challenge the binary understanding of sex. It creates the perception that *intersex* is distinct from sex. Instead by recognizing intersex as within the meaning of sex, the legal sex dualism could be effectively questioned.

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<sup>322</sup> Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, Act No. 98 of 2013.

<sup>323</sup> Malta’s GIGESC Act, para 19; para 14(1).

<sup>324</sup> Agius/Tobler, 2011, p. 82; FRA, 2015, p. 3.

<sup>325</sup> Statement of the European Intersex Meeting in Riga, 2014.

<sup>326</sup> Council of Europe, 2015(a), p. 46.

#### **4.2.2. Conclusions**

The report by the Council of Europe in 2015 stated rightly that all of the different approaches to cover the discrimination based on someone's intersexuality in anti-discrimination legislation have their value. For some legal systems one approach might be more suitable than another one. What is important is that discrimination based on someone's intersexuality is effectively covered by the equal treatment legislation.<sup>327</sup> Hence, some approaches to include intersex in national equal treatment legislations can create wrong perceptions of intersex persons. However, these approaches still have their value if they ensure the effective protection of intersex persons from discrimination based on their intersexuality.

#### **4.3. Legal measures that determine when intersex genital surgeries may be performed**

Legal scholar Julia A. Greenberg asserts that there are three types of legal measures that have been proposed for regulating intersex genital surgeries being performed on children. The first legal measure calls for enhanced informed consent guarantees. The second legal measure calls for an external entity, such as a court or a multidisciplinary committee to decide on whether or not the medical interventions can be performed. The third legal measure calls for the complete prohibition of all "cosmetic" intersex genital surgeries currently being performed on children.<sup>328</sup>

By relying on Greenberg's research, I will analyse in how far these three types of legal measures are in the best interests of intersex children. I will do this by analysing relevant court decisions and legislations. However for the discussion on the requirement to receive a court approval before undertaking intersex genital surgeries on children and the general prohibition of these surgeries, I will only be able to give a hypothetical analysis on how they would be in the best interests of intersex children. This is because no relevant case studies exist for both of these measures: no country has ever declared a complete prohibition of all

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<sup>327</sup> Ibidem, p. 46.

<sup>328</sup> Greenberg, 2012(a), p. 35.

intersex surgeries and no country has yet deferred the exclusive power to decide when early age intersex genital surgeries are performed to a court.

Due to the lack of available data on the legal measures discussed in this chapter and because of the difficulty in predicting of how these legal measures will impact the well-being of intersex children in practice, a *best-interests assessment* can hardly be undertaken. Furthermore, due the continuing disagreement on whether early age intersex genital surgeries are beneficial or harmful for the children concerned, it is difficult to assess the interests of intersex children regarding the legal measures regulating these surgeries. Hence, instead of doing a best-interests assessment, I will analyse how the legal measures comply with the *best-interests determination framework*. In my evaluation I will analyse how five of the listed safeguards in the General Comment No. 14 are taken into account by the legal measures discussed (see chapter 1.3.3). These five safeguards are: to ensure that the *child's views* are taken into account for the decision-making, to take decisions that affect children in the *shortest time possible*, to *involve experts*, preferably in form of a *multidisciplinary team*, in the decision-making, to *issue a reasoning* that explains how the child's interests were assessed, to establish a *mechanism to review* the decision and to *conduct a CRIA*. The other safeguards are not relevant for the discussed legal measures.

The following analysis will begin with a discussion on the judgments of the Constitutional Court of Colombia on intersex genital surgeries. These judgments will serve as the case study for analysing to what extent the establishment of informed consent guarantees is in the best interests of intersex children. Secondly, in order to analyse whether the decision-making by an external entity such as a court or a multidisciplinary committee is in the best interests of intersex children, I will discuss the Australian case *In re A* and the Maltese GIGESC Act. Finally, I will go into a hypothetical discussion on the extent to which a general prohibition of all “cosmetic” intersex genital surgeries performed on children would be in the best interests of the children.



#### 4.3.1. Informed consent guarantees: Judgments by the Constitutional Court of Colombia

As elaborated in chapter 3.2, the doctrine of *informed consent* for medical interventions requires that the patient or the patient's legal representative is adequately informed about all risks, benefits and alternatives to a procedure and that they consent to it independently and not due to external coercive influences.<sup>329</sup> Several international, national and local human rights bodies have called on states to ensure that intersex genital surgeries do not violate informed consent guarantees.<sup>330</sup> The reason why these bodies have focused on the doctrine of informed consent is that in the past the doctrine has often been violated when genital surgeries were performed on intersex children. This was due to the fact that the *Optimal Gender Policy* initially advised doctors to deliberately conceal information on the child's intersex condition from the parents and the child concerned. The concealment of information was believed to be necessary in order not to raise any doubts about the child's "true" sex.<sup>331</sup>

The only court that has most likely ever addressed the issue of informed consent for intersex genital surgeries performed on minors is the *Colombian Constitutional Court*.<sup>332</sup> Already in the year 1999, the Constitutional Court issued two judgments that clarified under which circumstances parents have the legal capacity to consent to intersex genital surgeries performed on their children.<sup>333</sup> The two cases concerned parents that sought a court order to authorize doctors to perform intersex genital surgeries on their children. The doctors involved had refused to proceed without the authorization of a court since, as a result of a court

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<sup>329</sup> Greenberg, 2012(a), p. 30; Norman, 2010, p. 36; Special Rapporteur on Health, 2009, paras 9, 13, 15.

<sup>330</sup> E.g.: Agius/Tobler, 2011, p. 84; Arana, 2005, pp. 17-19, 25, 26; CAT Committee, CO, 2011, para 20; CRC Committee, CO, 2015, para 42(b); UNHCHR, 2011, para 57.

<sup>331</sup> Tamar-Mattis et al, 2013, p. 47; Kessler, 1998, p. 29.

<sup>332</sup> In 2008 the Regional Court of Cologne also addressed the issue of informed consent in the context of intersex genital surgeries. However, the respective judgment did not involve intersex minors. It instead concerned an intersex adult that sued a doctor who removed the patient's sexual organs without the patient's informed consent. The defendant doctor was held liable and ordered to pay compensation to the plaintiff. See: OLG Köln, Az. 25 O 179/07\*, 12 Aug. 2009.

<sup>333</sup> Constitutional Court of Colombia, *Sentencia SU-337/99*; Constitutional Court of Colombia, *Sentencia T-551/99*.

decision in 1995, they had feared that it was against the law to perform genital surgeries on a minor.<sup>334</sup>

In the first judgment *Sentencia SU-337/99*,<sup>335</sup> the Court denied the mother of an 8-year-old child the right to consent to clitoroplasty, vaginal remodelling and gonadedctomy on behalf of her daughter.<sup>336</sup> The Court did this by relying heavily on Article 18 of the CRC that states that the best interests of the child shall be the basic concern for upbringing the child.<sup>337</sup> Even though the judgment recognized that the “informed, qualified and persistent consent”<sup>338</sup> of parents might substitute the consent of the child, it argued that since the child concerned had reached a level of maturity that allowed the child to be aware of her body and gender identity, the mother could not consent on behalf of her child.<sup>339</sup> The Court’s reasoning was based on three main findings: first, the *urgency* to operate was reduced since the child had already developed a stable gender identity, despite her atypical genitalia. Second, the subjection of a child at her age to genital surgery without medical reason could cause *feelings of punishment or aggression* in the child. Third, if the minor has reached a certain *age*, “then she has gained a degree of autonomy that deserves a greater Constitutional protection, and hence the legitimacy of the paternal surrogate consent is reduced considerably”<sup>340</sup>. Consequently, the Court ordered the competent authorities to establish an interdisciplinary team that assisted the child in its decision on whether or not to undergo genital surgeries.<sup>341</sup>

In its judgment, the court discussed at which age parental consent becomes invalid for the child. The court concluded that the child’s maturity and autonomy had to be evaluated on a case-by-case basis. Nevertheless, the court also stated that children above the age of five

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<sup>334</sup> In the *Sentencia No. T-477/95* the Colombian Constitutional Court had held that doctors had violated a child’s constitutional rights by performing feminizing genital surgeries after the child’s penis was deformed by a failed circumcision.

<sup>335</sup> The English translation of *Sentencia No. SU-337/99* is obtained from: Solórzano-Thompson, 2006,

<sup>336</sup> ICJ, 2011, p. 141.

<sup>337</sup> Solórzano-Thompson, 2006, p. 123.

<sup>338</sup> Ibidem, p. 131.

<sup>339</sup> Ibidem, p. 132.

<sup>340</sup> Ibidem, p. 131.

<sup>341</sup> Ibidem, p. 135.

have already usually gained an understanding of their gender identity and body, thus making parental consent invalid.<sup>342</sup>

In the second judgment – *Sentencia T-551/99* – the parents of a two-year-old intersex child were denied permission to provide their consent for “cosmetic” genital surgeries on their child. The permission was denied by arguing that the parents’ consent was not *informed, qualified and persistent*. The court clarified that in order for the parents to provide the informed, qualified and persistent consent needed, the parents must receive detailed information about the risks and dangers of the current treatment as well as about alternatives to the desired treatment, including the possibility to delay the surgeries. Furthermore, the court required that consent had to be given several times in written form and over a longer period of time.<sup>343</sup>

These two judgments by the Constitutional Court of Colombia in 1999 were the results of consultations with doctors, academics and civil society organizations. The Court recognized that there were two competing schools of thoughts regarding intersex genital surgeries. One school of thought, held by the majority of consulted doctors and scholars, argued that early age intersex genital surgeries are essential for the psychosocial development of the child. The other school of thought, made up of a smaller group of doctors as well as a few civil society organizations such as ISNA, argued that intersex genital surgeries are traumatic and harmful for children. By enhancing informed consent guarantees, the Court tried to find a middle-path between these two opposing perspectives.<sup>344</sup>

The Colombian Constitutional Court’s decisions from 1999 were reaffirmed by the judgment, *Sentencia T-912/08* in 2008. In this judgment, the Court ruled that the office of Social Security did right to deny the father of a 5-year-old child to consent to intersex genital surgeries performed on his child. The child was too old for parental consent, the mother as well had not consented to the procedure and the father’s consent was not informed, qualified and persistent. The judgment further clarified that the parents’ consent could only be valid if

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<sup>342</sup> Ibidem, p. 134.

<sup>343</sup> Greenberg, 2012(a), p. 37; White, 2014, p. 801.

<sup>344</sup> ICJ, 2011, p. 134.

their decision was in line with the recommendations of the medical board of the respective hospital. In addition, the court emphasized the need that both parents as well as the children concerned are assisted in their decision by social workers and therapists.<sup>345</sup>

Although the rulings by the Colombian Constitutional Court were appreciated by many intersex rights advocacy organizations,<sup>346</sup> there have also been critics that have argued that the judgments failed to protect the youngest and most vulnerable children.<sup>347</sup> The sociologist Morgan Holmes claimed that the court failed “to recognize the intrinsic value of a human being and of every human being’s right to bodily integrity”<sup>348</sup>. According to her, the court protected the right to bodily integrity of those that have already found their place in the binary sex/gender model, but denied this protection to newborns who have not gained a sense of their own identity and embodied subjectivity.<sup>349</sup>

Furthermore, some critics have argued that even if parents and children are provided with complete information and all informed consent guarantees are upheld, the inherent problems with parental consent for early age intersex genital surgeries are not resolved. The reasons for this is that despite the general assumption that parents usually decide in the best interests of their child, they might not be always in the best position to do so. Anne Tamar-Mattis, founder of the intersex advocacy organization *Advocates for Informed Choice*, has pointed out three major problems that still remain for intersex genital surgeries albeit enhanced informed consent guarantees. First, parents might not be able to realistically envision the long-term interests of their intersex children. Second, cultural biases that impact the decision, such as heteronormativity and the binary understanding of sex, are not eliminated by informed consent guarantees. Third, the authorization of intersex genital surgeries might often be motivated by the parents’ own interests, such as the avoidance of discomfort and embarrassment, instead of their child’s interests.<sup>350</sup>

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<sup>345</sup> Ibidem, p. 152.

<sup>346</sup> Greenberg/Chase, 1999; ISNA, 1999.

<sup>347</sup> Davidian, 2011, pp. 15-16.

<sup>348</sup> Holmes, 2006, p. 117.

<sup>349</sup> Kolbe, 2009, pp. 158-159.

<sup>350</sup> Greenberg, 2012(a), p. 38; Tamar-Mattis, 2006, pp. 82-88.

#### **4.3.1.1. Best-interests determination**

The rulings by the Constitutional Court of Colombia do not create any obligation that the views of the children concerned are taken into account for the decision whether intersex genital surgeries are to be performed, if the parents are authorized to provide the informed consent. However, the judgments do emphasize that once children have gained a certain level of autonomy and maturity, their own consent cannot be substituted by their parents' consent anymore. Hence, the judgments by the Colombian Constitutional Court can be regarded as meeting the requirement of the best-interests determination framework to take into account the children's views, according to their age and maturity, for making decision affecting them.

The best-interests determination framework further includes the requirement that decisions affecting children are made by experts, preferably a multidisciplinary team. According to the Colombian judgments, the decision whether intersex genital surgeries are to be performed on a non-consenting child is taken by the parents. Generally no experts on intersexuality and/or a multidisciplinary team participate in the decision-making. However, pursuant to the most recent ruling on the issue of intersex genital surgeries by the Colombian Constitutional Court, the parents and children are supervised in their decision by the hospital board as well as social workers and therapists.<sup>351</sup>

Regarding the requirement of the best-interests determination framework that decisions affecting children are taken in a timely manner, it has to be noted that the informed consent guarantees, as established by the Colombian Constitutional Court, demand that the consent is provided in stages over a longer period of time. This must be considered as an important safeguard because it ensures that the decision is taken deliberately and not as a result of shock and overwhelming emotions. The court does not specify how long this period of reflection must be.

The informed consent standards of the Colombian Constitutional Court do not include the obligation for parents to issue a formal explanation why they believe that their decision

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<sup>351</sup> ICJ, 2011, p. 152.

is in their child's best interests. This would be one requirement of the best-interests determination framework.

Furthermore, the court does not clarify in its judgments whether there is any mechanism to appeal or revise the decision on whether the parents' consent qualifies as informed, qualified and persistent.

Likewise, the Colombian Constitutional Court does not serve the element of the best-interests determination framework to undertake a CRIA that assesses the impacts of the enhanced informed consent guarantees on the children's rights. However in its judgment *Sentencia T-551/99*, the Colombian Constitutional Court did request two follow-up initiatives. One was a request to the medical profession to establish precise criteria for the parents' *informed, qualified and persistent consent*. The other one was that it demanded the legislative power to create legal certainty on the issue of consent in the context of intersex genital surgeries.<sup>352</sup> However, until now no legislation on the issue has been passed and there is no assessment whether the request to the medical profession has been met.

#### **4.3.2. Decision-making by a court or a multidisciplinary committee**

The Swiss and German Ethics Committee have both proposed in their reports on intersexuality that an external entity, such as a court or a multidisciplinary ethics committee, should be the decision maker on when intersex genital surgeries are to be performed on minors.<sup>353</sup> This would transfer the decision-making power to people that are emotionally uninvolved in the issue and could arguably avoid the problems that are created with the model of parental consent (see chapter 4.3.1).<sup>354</sup> In the following section, I will first shortly discuss the possible implications that a court decision could have on the performance of intersex genital surgeries on children and then go on to analyse the model of transferring the decision-making-power to a multidisciplinary committee.

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<sup>352</sup> Constitutional Court of Colombia, *Sentencia T-551/99*, para 29.

<sup>353</sup> German Ethics Council, 2012, pp. 163-164, Swiss National Advisory Commission on Biomedical Ethics, 2012, p. 18.

<sup>354</sup> Greenberg, 2012(a), pp. 38-39.

In the Australian case *In re A*<sup>355</sup>, the mother of a 14-year-old intersex minor sought the authorization from the family court on behalf of her son to undertake various genital surgeries in order to align the boy's body appearance with his gender identity. Since the medical procedures would result in A's sterilization, a court order had to be obtained before the surgeries could be performed. A had the intersex condition CAH and was raised as a girl but once he had reached the age of puberty, he started to virilise and increasingly expressed his male gender identity. Although the court in the end granted A the right to undertake masculinizing genital surgeries, it seriously considered denying A's request. The judge involved was not convinced that A was mature enough to "fully appreciate all aspects of the matter and to be able to assess objectively the various options available to him"<sup>356</sup>. The decisive information that finally convinced the court to grant A's request was a psychological attestation that stated that A would be of serious risk to commit suicide if the surgeries would be delayed until he had reached the age of maturity.<sup>357</sup>

Greenberg argues that this case is illustrative for the fact that judges are unlikely to have the necessary knowledge about intersexuality in order to decide on what is best for the intersex child concerned. Like parents and doctors, judges also have their own prejudices and preconceptions about sex, gender and sexuality that can hamper an objective decision-making considered to be in the best interests of the child.<sup>358</sup> I argue that their position might be even less suitable to decide on the child's best interests than that of the parents or doctors, since they neither know the child nor do they have the relevant medical knowledge about intersexuality. However, the advantage that judges do have in the decision-making is that they have the legal expertise to compare intersex genital surgeries to similar procedures such as FGC or the sterilization of minors and persons with disabilities.

Not only state institutions have proposed that it should be courts that decide on whether or not intersex genital surgeries are to be performed on children, also intersex

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<sup>355</sup> Family Court of Australia, *In re A*, FLC 92-402 16 FLR 715, 1993.

<sup>356</sup> *Ibidem*, para 15.

<sup>357</sup> *Ibidem*, paras 23-24.

<sup>358</sup> Greenberg, 2006, pp. 98-99; Greenberg, 2012(a), pp. 40-42.

individuals and advocacy organizations have supported this option. Tony Briffa, Australian and the first openly intersex mayor worldwide,<sup>359</sup> has argued on behalf of an intersex organization that the authorization for intersex genital surgeries by a family court would ensure that the interests of all parties are considered in the decision-making and that doctors have to explain all available alternatives to the surgeries.<sup>360</sup>

The problem of judges lacking the relevant knowledge for deciding what is best for the intersex child concerned could be avoided if the decision-makers were made up of a specialized multidisciplinary team. The team could consist of different experts such as specialized doctors, psychologists, social workers and intersex adults.<sup>361</sup> This option has also been proposed by the Consensus Statement from 2006 which called out for the establishment of multidisciplinary teams comprised of experts from different medical specializations as well as “if available, social work, nursing and medical ethics”<sup>362</sup>. According to this, some hospitals have started to form specialized multidisciplinary teams that support intersex children and their parents during the decision-process of whether medical treatment is necessary.<sup>363</sup> However, there is no legal obligation to establish these teams and the final power to decide on when to perform early age intersex genital surgeries usually still lies in the hands of the parents.

The only country that, to my knowledge, has created a legal obligation to establish a multidisciplinary team that takes part in the decision on when to perform intersex genital surgeries on children is Malta. The enactment of Malta’s GIGESC Act made intersex genital surgeries that are deferrable until the child concerned can provide the informed consent in principle unlawful.<sup>364</sup> There is only one exception to the general prohibition of performing intersex genital surgeries for “cosmetic” reasons on non-consenting children. This is when an interdisciplinary team decides jointly with the child’s guardian that the surgeries are in the

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<sup>359</sup> Briffa, 2014.

<sup>360</sup> Briffa, 2003, p. 37.

<sup>361</sup> Greenberg, 2006, p. 99.

<sup>362</sup> Lee, et al, 2006, p. e490.

<sup>363</sup> E.g.: Cincinatti Children’s, n.d.; Nationwide Children’s Hospital, n.d.

<sup>364</sup> Malta’s GIGESC Act, paras 3(3), 4, 5, 14(1).



child's best interests.<sup>365</sup> In accordance with Art. 12 of the CRC, the decision must "give weight to the views of the minor having regard to the minor's age and maturity".<sup>366</sup> Furthermore, it may not be "driven by social factors without the consent of the minor".<sup>367</sup> That means that early age intersex genital surgeries are in any case violations of the law if they solely serve the purpose of adjusting the appearance of the child's genitals to the cultural norm and are imposed against the minor's will.

According to the *GIGESC* Act, in the exceptional case that intersex genital surgeries may be undertaken, the decision-making power is to be shared by the parents and the interdisciplinary team. Thus, no surgery is undertaken if one of these two parties does not consent. The members of the interdisciplinary team are appointed by the Minister for Equality for a period of three years.<sup>368</sup> It lies in the Minister's discretion to decide which professionals seem adequate for the appointment.<sup>369</sup> Alongside the interdisciplinary team, the *GIGESC* Act orders the Minister for Equality to appoint a working group that "shall review the current medical treatment protocols in line with current medical best practices and human rights standards"<sup>370</sup>. The working group needs to consist of nine members, including three human rights experts.<sup>371</sup> Within one year, the working group has to issue a report that includes recommendations for revising the current medical protocols regarding intersexuality.<sup>372</sup>

The Maltese *GIGESC* Act was highly welcomed by intersex rights advocacy organizations. The model of shared decision-making between parents and the interdisciplinary team will avoid the problems that exist with parental consent (see chapter 4.2.1). However, there has been criticism that the *GIGESC* Act does not recognize that even when children are considered mature enough to provide the informed consent, they might be pressured by the parents or the environment to consent to genital surgeries.<sup>373</sup> The question

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<sup>365</sup> Ibidem, paras 14(2), 14(5(a)).

<sup>366</sup> Ibidem, para 14(2).

<sup>367</sup> Ibidem, para 14(5(b)).

<sup>368</sup> Ibidem, para 14(3).

<sup>369</sup> Ibidem, para 14(4).

<sup>370</sup> Ibidem, para 16(6).

<sup>371</sup> Ibidem, para 16(2)(4).

<sup>372</sup> Ibidem, para 16(6).

<sup>373</sup> Vioria, 2015.

remains whether “cosmetic” intersex genital surgeries can *ever* be in the child’s best interests and why these surgical practices are not regarded as harmful as FGC.

#### **4.3.2.1. Best-interests determination**

The decision by a court on the performing intersex genital surgeries ensures that the doctors must disclose all relevant alternatives to the proposed treatment and that the child’s views are represented in the decision-making. The Maltese GIGESC Act also emphasizes on the representation of the children’s views in the decision-making. The Act holds that in the exceptional cases that early age intersex genital surgeries may be undertaken, the decision by the interdisciplinary team and the parents must take into account the minor’s views, with regard to the minor’s age and maturity.<sup>374</sup> Hence, both decision-making models comply with the requirement of the best-interests determination framework of taking into account the children’s views, according to their age and maturity, for making decisions affecting them.

In the case that a court takes the decision on intersex genital surgeries, the judges involved will most likely consult with different experts on intersexuality. However, the final decision lies in the hands of the judges who are generally not experts on intersexuality. This differs from the decision-making model that the GIGESC Act establishes. According to the GIGESC Act, it is a specialized interdisciplinary team that decides jointly with the parents whether intersex genital surgeries are undertaken. This means that while the GIGESC Act fulfils the requirement of the General Comment No. 14, which calls for experts from different fields to participate in the decision-making, a court decision on the performance of intersex genital surgeries would be deficient in this point.

Another weak point of having a court decide on whether intersex genital surgeries are to be performed or not is that court proceedings generally take a long time.<sup>375</sup> As a result of this, decisions on whether or not to perform genital surgeries could be needlessly prolonged. Also, the decision-making by an interdisciplinary team jointly with the parents could take

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<sup>374</sup> Malta’s GIGESC Act, para 14(5(b)).

<sup>375</sup> In June 2015 the website of the government of United Kingdom stated the average time for concluding care proceedings cases was seven months. See: Gov.UK, n.d.

some time because the relevant information and facts for the decision must first be obtained. However, contrary to the decision-making by a court, there are no external influences that prolong the decision, such as bureaucratic requirements of court proceedings.

One positive aspect of having a formal court proceeding to decide on intersex genital surgeries would be that judgments usually include a motivation why the judges believe that the final decision is in the child's best interests. This would be in compliance with the best-interests determination framework that requires that each decision is accompanied with an explanation of how the children's best interests were assessed. The GIGESC Act as well explicitly states that in the exceptional case that early age intersex genital surgeries are undertaken, the surgeries must be considered as being in the child's best interests.<sup>376</sup> However, it does not require the issuing of a formal reasoning of how the child's interests were assessed.

The question whether a court decision on the performance of intersex genital surgeries could be appealed cannot be answered due to the lack of a relevant case study. In regards of the GIGESC Act, the Act does not establish any particular mechanism for appealing or revising the decision by the interdisciplinary team. Thus, in this point the GIGESC Act is not in conformity with the requirements of the best-interests determination framework.

Once again, it cannot be determined whether a court decision on the practice of intersex genital surgeries would create a CRIA since there is no relevant case study. Concerning the GIGESC Act, it could be argued that this Act complies with the requirement in creating a CRIA since it establishes a working group that could be regarded as being tasked to do a general CRIA of the effects of performing early age intersex genital surgeries.<sup>377</sup> Apart from the working group, the Act, however, does not create the obligation to assess how the enactment of the Act affects intersex children.

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<sup>376</sup> Malta's GIGESC Act, para 14(5(a)).

<sup>377</sup> Ibidem, para 16(6).

#### **4.3.3. Prohibition of all intersex genital surgeries performed on non-consenting children**

Several intersex rights activists and scholars from different disciplines have called out for an absolute prohibition of all intersex genital surgeries performed for “cosmetic” purposes on non-consenting children in all circumstances.<sup>378</sup> Their main argument is that these types of surgeries shall be deferred until there is reliable research that proves that they cause more benefit than harm for the children concerned.<sup>379</sup> Different scholars and intersex rights activists have argued that since intersex genital surgeries interfere with a variety of fundamental rights of the child, such as the right to bodily integrity and to procreation, parents or any other entity should never have the right to consent to genital surgeries on behalf of the children concerned.<sup>380</sup>

Critics of the ban of intersex genital surgeries performed on children in all circumstances argue that this would not take into account the specific situation of each child and family. It could prevent certain children from viable options to improve their quality of life. Furthermore, from a legal and moral point of view it is questionable why intersex genital surgeries on non-consenting children should be outlawed whereas similar types of surgeries such as surgeries on cleft lips or congenital limb malformations on children remain legal. Like intersex genital surgeries, these surgical interventions are also undertaken for adjusting the child’s appearance to the cultural and social standard.<sup>381</sup>

However, this argument can be countered by pointing out that intersex genital surgeries should not be compared to surgeries of cleft lips or limb malformations but rather to FGC. If that would be the case, it would mean that in countries where the law explicitly prohibits FGC on minors under any circumstances, such as in the United States,<sup>382</sup> there should also be no exception for undertaking medically unnecessary intersex genital surgeries

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<sup>378</sup> Chase, 2003; ISNA(c), n.d.; Lareau, 2003, p. 149.

<sup>379</sup> Greenberg, 2006, p. 89.

<sup>380</sup> Bird, 2005, pp. 67-68; Tamar-Mattis, 2006, pp. 88-89.

<sup>381</sup> Hermer, 2007, pp. 269, 271.

<sup>382</sup> 18 U.S. Code para 116(a).

on children.<sup>383</sup> Additionally, surgeries on cleft lips usually also improve physical functions such as speaking and chewing capabilities and the development of teeth.<sup>384</sup> Intersex genital surgeries are mostly undertaken for “cosmetic” reasons.

#### **4.3.3.1. Best-interests determination**

Most requirements of the best-interest determination framework are irrelevant for an absolute prohibition on all “cosmetic” early age intersex genital surgeries. This is because an absolute prohibition would not create an individual assessment that would determine whether or not intersex genital surgeries are to be performed in each specific case. This could be seen as problematic because it would not take into account that intersex children are a heterogeneous group with distinctive needs and social realities, and it would also fail to consider the individual views of children’s when it comes to intersex genital surgeries. Furthermore, a blanket ban on all intersex genital surgeries performed on non-consenting children would make the opinions of experts on intersexuality irrelevant. For example, in the case that a psychologist would determine that a certain intersex child is in serious risk of committing suicide if not allowed to undergo genital surgeries, the expert’s opinion would be disregarded and the prohibition upheld (such as it would be the case with FGC). These aspects of a general prohibition of all early age intersex genital surgeries could be seen as contrary to what the General Comment No. 14 requires for assessing and determining the child’s best interests.

Notwithstanding these arguments, intersex rights activists and the CRC Committee have declared “cosmetic” intersex genital surgeries performed on children as *harmful practices*.<sup>385</sup> The CEDAW and CRC Committee concluded in its Joint General Comment on harmful practices that all harmful practices must be prohibited.<sup>386</sup> The CRC Committee explicitly states in its Joint General Comment that it applies the issue of harmful practices to

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<sup>383</sup> Bird, 2005, p. 75; Ehrenreich/Barr, 2005, p. 140.

<sup>384</sup> Mouradian et al., 2006, p. 145.

<sup>385</sup> CRC Committee, CO, 2015, para. 43(b).

<sup>386</sup> CEDAW/CRC Committee, GR/GC, 2014, paras 54(b)(c).

the four general principles of the CRC. One of these principles is the best interests of the child (Art. 3(1)).<sup>387</sup> In addition, the CRC Committee urged Switzerland in its concluding observations to “ensure that no one is subjected to unnecessary medical or surgical treatment during infancy or childhood”<sup>388</sup>. According to this, a general prohibition of all intersex genital surgeries performed on children for “cosmetic” purposes would be in the best interests of the child since harmful practices can never be in the child’s best interests.

#### **4.3.4. Conclusions**

In the previous sections, I discussed three different types of legal measures that determine when intersex genital surgeries may be performed on non-consenting children. My analysis on the compliance of these legal measures with the best-interests determination framework reveals that none of the three measures satisfies all requirements of the framework.

The informed consent model as established by the Colombian Constitutional Court shows several shortcomings in regard of the General Comment’s framework for determining the child’s best interests. The only element of the best-interests determination framework that the Colombian Constitutional Court considered, is that the children’s views, according to their age and maturity, must be taken into account for making decision affecting them. This can be seen already as a big achievement because until the enactment of the GIGESC Act in 2015, no other country had limited the parents’ capacity to consent to intersex genital surgeries on their child. However, since the Colombian informed consent model does not ensure a sufficient number of procedural safeguards for deciding when to perform intersex genital surgeries, it must be concluded that is most likely not in the best interests of intersex children.

The second part of this sub-chapter discusses the requirement to receive the approval of an external entity before undertaking intersex genital surgeries on children. Due to a lack

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<sup>387</sup> Ibidem, para 31.

<sup>388</sup> CRC Committee, CO, 2015, para 43(b).

of relevant case studies, it cannot not be conclusively determined to which extent the decision-making by a court would meet the requirements of the best-interests determination framework. What can be concluded at the current state of research, is that the decision-making by a court would most likely not satisfy the requirement that experts on intersexuality – preferably in form of a multidisciplinary team – participate in the decision-making. In addition, the court proceedings could take a long time which would unnecessarily prolong the decision.

Concerning the GIGESC Act, the Act does create the obligation that when early age intersex genital are exceptionally performed, they must be considered as being in the *best interests of the child*. However, the Act does not oblige the interdisciplinary team and the parents to issue a reasoning that explains how the child's interests were assessed. In addition, the Act does not specify whether there is a mechanism of appeal and complies only partly with the requirement to set up a CRIA.

Despite the fact that the approval by an external entity for undertaking early age intersex genital surgeries would meet many requirements of the best-interests determination framework, the question whether these surgeries shall *ever* be performed on non-consenting minors is not resolved. According to the CRC Committee, “cosmetic” intersex genital surgeries performed on children can be considered as *harmful practices*, like FGC. In line with this, the absolute prohibition of intersex genital surgeries performed on non-consenting minors would be in the best interests of intersex children. The main argument against an absolute prohibition is that when a child is seriously depressed because of reasons connected to the appearance of its genitals, it would not be allowed to undertake genital surgeries until it can provide the informed consent. The GIGESC Act takes this situation into account by providing the possibility to make an exception to the general prohibition of performing intersex genital surgeries on children. The application of the GIGESC Act will show whether the Act ensures that no intersex child experiences any infringements of its human rights due to genital surgeries; or whether the absolute prohibition of performing intersex genital surgeries on non-consenting minors is the only legal measure that is in the best interests of intersex children.

#### 4.4. Conclusions

In the previous chapter I analysed three types of legal measures that could impact the enjoyment of human rights by intersex children.

The first part of this chapter reveals that in order to ensure that the child's best interests are a primary consideration when registering or changing the legal sex of intersex children, it is of the utmost importance to take the children's views, according to their age and maturity, into account. The sex registration procedures must guarantee that intersex children can register or change their legal sex according to their self-identified gender. In addition to this, more research on the possibility of abolishing sex as a legal category is needed. The elimination of the registration of sex could be a viable option in resolving the problems of assigning the "wrong" legal sex to a newborn and in eliminating the rationale for subjecting intersex children to irreversible body alterations.

In the second part of this chapter, I determined that the inclusion of *intersex* in national equal treatment legislations would be in the best interests of intersex children. While some approaches to cover intersexuality in anti-discrimination laws reflect a more adequate understanding of intersexuality than others, all of them have their value as long as they ensure the effective protection of intersex persons from discriminatory treatment based on their intersexuality.

Finally, the last part of this chapter analysed legal measures that determine when intersex genital surgeries may be performed on children. The analysis disclosed that by determining the extent to which the different legal measures serve the various elements of the best-interests determination framework, the question whether early age intersex genital surgeries can *ever* be in the best interests of the child remains unanswered. According to the position of some intersex rights activists and the CRC Committee, intersex genital surgeries performed on children are *harmful practices*; and harmful practices are never in the best interests of the child. Therefore "cosmetic" intersex genital surgeries performed on non-consenting minors would need to be legally prohibited in all circumstances. Malta's GIGESC Act is the first national legislation that generally prohibits intersex genital surgeries. Despite the fact that the Act provides for the exception that intersex genital surgeries may be



performed on non-consenting children if an interdisciplinary team decides jointly with the parents that this is in the child's best interests, it is an important step for ensuring the human rights of intersex children. The application of the GIGESC Act will show whether the safeguards that the Act provides are sufficient enough to ensure that the best interests of the child are being considered as a primary consideration when deciding on intersex genital surgeries.

## 5. Summary and Conclusion

The current study demonstrates that intersex persons face a number of challenges regarding the enjoyment of their human rights. International and national human rights bodies have expressed their concern that intersex persons are being subjected to human rights violations such as their right to bodily integrity, the prohibition of torture and other ill-treatment and their right to self-determination as a result of the intersex genital surgeries they have to undergo during their childhood. Furthermore, the CRC Committee determined in its last concluding observations to Switzerland that intersex genital surgeries performed on non-consenting children can be regarded as harmful practices and need to be prohibited. Consequently, international and national human rights institutions have called out for the implementation of legal measures that will ensure that the human rights of intersex children and adults are being upheld.<sup>389</sup> This call has been answered by a few countries that have addressed the situation of intersex persons in their national legislation or court decisions.<sup>390</sup>

General Comment No. 14 of the CRC Committee provided me with the framework to analyse the extent to which these legal developments can be considered in the best interests of intersex children. My analysis on different sex registration models reveals that it is crucial to consider the child's views, in accordance with its age and maturity, when wanting to register or change the child's legal sex. The second part of my analysis determines that the discrimination on the basis of intersexuality need to be effectively covered by anti-discrimination laws. Finally, I concluded that the enactment of Malta's GIGESC Act in April 2015 was an important step for ensuring the enjoyment of human rights by intersex children and adults; a move that has been celebrated as a giant success for the intersex rights movement. Malta's GIGESC Act made Malta the first country worldwide to acknowledge

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<sup>389</sup> E.g. CAT Committee, CO, 2011, para 20; Council of Europe, 2015(a), p. 9; German Ethics Council 2012, pp. 166-167

Special Rapporteur on Torture, 2013, para 88 ; UNHCHR, 2015, paras 78(h)-79(c).

<sup>390</sup> E.g. German Personal Status Law, para 22(2); Ley 1472012, de 28 e junio, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales (Act 14/2012), Art. 6(4); Malta's GIGESC Act; Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, Act No. 98 of 2013.

that genital surgeries can violate the rights to “bodily integrity and physical autonomy”<sup>391</sup> of intersex children. Although the GIGESC Act could be criticized for not establishing an absolute prohibition on performing intersex genital surgeries on non-consenting children, it can serve as a suitable role model for enacting similar legislation in other countries; this has been confirmed by the Council of Europe Commissioner for Human Rights who has urged states to follow Malta in its initiatives to guarantee the human rights of intersex persons.<sup>392</sup>

The first half of the year 2015 brought about major developments for the protection of human rights of intersex persons. Not only Malta has addressed intersex genital surgeries performed on non-consenting minors in its national legislation, international institutions such as the CRC and CRPD Committee, the United Nations High Commissioner for Human Rights, the Fundamental Rights Agency and the Council of Europe all have condemned these surgeries as human rights violations.<sup>393</sup> However, much work still lies ahead when it comes to wanting to ensure that no intersex child will have to experience infringements of its human rights due to genital surgeries in the future. Further legal research and in particular actions of international human rights bodies and national legislators are needed. Also non-legal measures such as raising awareness for the particular challenges of intersex persons are crucial. It is my modest hope that this current study will help to increase awareness of the human rights challenges that intersex persons face and to provide input in the discussion of which legal measures are suitable of guaranteeing the enjoyment of human rights by intersex children and adults.

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<sup>391</sup> Malta’s GIGESC Act, para 14(1).

<sup>392</sup> Council of Europe Commissioner for Human Rights, 2015.

<sup>393</sup> CRC Committee, CO, 2015, paras 42-43; CRPD Committee, CO, 2015, para 37; Council of Europe, 2015(a); FRA, 2015; UNHCHR, 2015, paras 14, 38.

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