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NEWBORN INTERSEX CHILDREN AND THEIR RIGHT TO SELF DETERMINATION  
IN COSMETIC MEDICAL INTERVENTIONS

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*ABSTRACT*

Intersexuality is a topic that has been considered taboo for a long time in society due to the ambiguity of sex does not 'fit' within the binary gender system. Over the years, medical professionals have considered it appropriate to practice medical cosmetic surgery to 'correct' the ambiguity of sex. Recently, it can be noted that studies have shown that many times these operations bring irreversible physical and psychological consequences on the intersex person, thus violating their fundamental rights.

This thesis seeks to create awareness about intersexuality, bringing to light the history behind cosmetic medical interventions. This thesis uncovers what has been going on through the years where there was no greater knowledge on the subject. In this sense, the author will explore the issue with an ethical and legal approach. Finally, we believe it is necessary for the countries to be informed about this issue, therefore revising their legislation by implementing laws that prevent the practice of these medical cosmetic interventions. Finally, the author will conclude with a series of recommendations for parents and responsible medical professionals, focused on the intersex newborn well-being.

CFR	Charter of fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law
IRO	International Refugee Organisation
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
NGO	Non-Governmental Organization
RCD	Reception Conditions Directive
SOGI	Sexual Orientation and Gender Identity
TFEU	Treaty on the functioning of the European Union
UDHR	Universal Declaration of Human Rights

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## INTRODUCTION

“Being born with a blend of female and male characteristics is surprisingly common: worldwide, up to 1.7% of people have intersex traits, roughly the same proportion of the population who have red hair,” according to the Office of the United Nations High Commissioner for Human Rights.<sup>1</sup>

“‘Intersex’ is a general term used for 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>2</sup> According to past beliefs and social norms, it is a commonly held belief that there exist only two types of biological structures regarding the ideal male and female.<sup>3</sup>

When individuals are born with ambiguous sex, “medical professionals may be quick to propose “corrective” surgeries and treatments aiming to “normalise” the sex of the child. Such surgeries are cosmetic rather than medically necessary.”<sup>4</sup> Doctors regularly submit intersex infants to operations in favour of waiting for the patient to reach a mature age whereby they can make an informed decision for themselves. “Many Member States legally require births to be certified and registered as either male or female.”<sup>5</sup> Is this the reason why doctors practice medical interventions on newborn intersex children? Dr. Anne Fausto-Sterling, Professor of Biology and Gender Studies of Brown University, asserts that the total number of people receiving surgery to “normalise” their genital appearance, amounting to one or two in 1,000 births, is not an insignificant number.

For many people, to be born intersex is considered taboo; we therefore do not have much information on the subject and that is why only some countries have legislation that protects intersex people from the consequences of medical interventions. As Zeid Ra ad Al Hussein,

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<sup>1</sup> Fact Sheet Intersex, Free & Equal United Nations for LGBT Equality

<sup>2</sup> What is Intersex? Intersex Society of North America <[http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) > accessed 7 May 2017

<sup>3</sup> Khabar, I., Gender Identity: Intersex Individuals, Volume 6, 2016, p.1

<sup>4</sup> Council of Europe. (2014). Human Rights Comment by Commissioner Nils Muižnieks. “A Boy Or A Girl Or A Person – Intersex People Lack Recognition In Europe.” < <https://www.coe.int/be/web/commissioner/-/a-boy-or-a-girl-or-a-person-intersex-people-lack-recognition-in-euro-1> >accessed 15 March 2017

<sup>5</sup> European Union Agency For Fundamental Rights, The Fundamental Rights Situation Of Intersex People (2015)

United Nations High Commissioner for Human Rights, refers: “There have been clear recommendations by several human rights mechanisms urging States to take steps to address these violations. In a few States, there have been important court judgments and recently, new laws have begun to protect the rights of intersex people.”<sup>6</sup>

After Malta implemented in their legislation the *Gender Identity, Gender Expression and Sex Characteristics Act* in 2015, “the first law to prohibit surgery and treatment on the sexual characteristics of minors without informed consent”<sup>7</sup>, society has been more aware of the consequences that these medical interventions produce in intersex newborn children. As the European Union Agency for Fundamental Rights recommends that: “legal and medical professionals should be better informed of the fundamental rights of intersex people, particularly children.”<sup>8</sup>

The decisions that doctors make, when choosing surgical interventions, irreversibly affect the life of an intersex person. There is also the risk that the parents’ decisions can be self-centred; and influenced by external factors, for example, cultural or religious traditions and beliefs, societal stigma, or even the parents’ own preferred gender of the newborn child. Instead, they should have the obligation to advocate in the best interests of the child, setting aside their own emotions and preconceptions. The case of Bruce Reimer, who was castrated when he was 7 months old due to a medical accident during a circumcision, and raised, as a woman, is a clear example of how gender cannot be chosen. This case study will be explored in further detail in chapter one. After reading this article the author chose this topic for this thesis due the interesting unexplored subject involved. It is intended to prove that genital cosmetic medical interventions are often unnecessary and also that one’s own gender cannot be chosen by another person. Intersexuality concerned these two theories.

As previously mentioned, society remains largely unaware of the problems surrounding Intersex people and the human rights violations they face, so one of the aims of this thesis is to improve consciousness about these issues. The author will endeavour to explore potential

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<sup>6</sup> United Nations Human Rights Office of the Commissioner, <[www.ohchr.org](http://www.ohchr.org)> accessed 7 may 2017

<sup>7</sup> Fact Sheet Intersex, Free & Equal United Nations for LGBT Equality

<sup>8</sup> European Union Agency For Fundamental Rights, The Fundamental Rights Situation Of Intersex People (2015)

solutions that protect the individual's right to decide for themselves, giving them the liberty to choose whom they want to be and not letting the medical community decide for them instead.

With the aim of shedding light on these issues, the author hopes that this thesis will contribute to the academic debate surrounding a subject that remains broadly unknown for most of the general public. It will show that Intersex people are part of our community and that society is not well-informed about the subject, and that it is often regarded as a taboo that people do not wish to talk about. This thesis will also explore the unintentional violations committed by the parents, doctors and others involved in taking decisions on the behalf of newborns, relating to surgeries that can develop risks to physical sensation, fertility, continence, and even life. This thesis will include a legal and medical analysis, which aims to argue why surgical "genital corrections" in newborns are unnecessary and should no longer be practiced. This controversy should be examined critically and thoroughly from a human rights perspective. Meanwhile it will suggest ideas to protect Intersex people and their right to self-determination, - "ability or power to make decisions for yourself." - <sup>9</sup>

Chapter I will establish a theoretical framework of the Gender Binary Model and attempt to explain the concepts of gender, sex and sexuality relating to Intersexuality and the classification of humankind beyond the two categories of 'male' and 'female'. After this, it will discuss the different aspects covered under the umbrella term 'Heterosexuality', including the 'Queer Theory' and the 'LGBTQI community' focusing on Intersexuality as the main issue. This will be illustrated with reference to the first case law of an intersex person who successfully sued the hospital and the doctor who practiced her medical intervention without her consent. Chapter II will explain the consequences of performing cosmetic medical interventions on intersex people at birth. It will explain why it is often believed necessary to perform these surgeries and how it affects an intersex person. The first part will explain this theory from the ethical point of view, followed by an exploration of the different reasons why it is considered important to protect the body integrity of an intersex person, at the same time ensuring their self-determination. Finally, the author aims to investigate the human rights that are being violated with these medical cosmetic interventions in newborn intersex children, which are the central feature of the legal analysis provided in this chapter. Chapter III will

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<sup>9</sup> Cambridge Dictionary



assess professional's theories concerning intersexuality and medical interventions. Moreover, this chapter is dedicated to proposing different recommendations for doctors and parents of intersex children.

## **CHAPTER I**

### **1. BREAKING THROUGH THE BINARY**

This first chapter is intended to create awareness of the differences that exist between a person's biological sex, gender identity and sexual orientation, and how these three concepts are related to intersexuality. This chapter will be divided into four parts; the first part will explain the definition of a gender binary system and how it is related to intersexuality. The second part will explain in greater detail the definition of intersexuality and how it is situated in history at the global level; the third part will compare the definition of gender and the definition of sex, which will be then divided into subsections discussing the differences between gender and sex, proceeding with the difference between gender identity and gender expression, and ending with the difference that exists between the concepts of transgender and cisgender. This differentiation is considered necessary since they have some points in common that can often confuse the reader.

Finally, the fourth part will focus on explaining what exists behind the concept of heterosexuality and with it the 'queer theory'. Moreover, it will explore aspects of the LGBTQI community, and whether it is appropriate for intersexuality to be part of this group.

#### **1.1. GENDER BINARY MODEL**

The aim of this section is to explore the definition of a gender binary system and explain how it is related with intersexuality.

“Sex, gender, and sexual preference were, until recently, indistinguishable terms. Thus, not only physical attributes but also behaviours could be used to assign sex. It was assumed that

true men have masculine behaviours and are attracted to women. If a person had ovaries they were a true female and would therefore be attracted to men”.<sup>10</sup>

Gender can be considered as a symbolic construction that refers to the set of socio-cultural attributes assigned to people from their sex and that can influence the perception of sexual differences as social inequality. “Like sex, gender is a multidimensional construct that refers to the different roles, responsibilities, limitations, and experiences provided to individuals based on their presenting sex/gender. Gender builds on biological sex to give meaning to sex differences, categorizing individuals with labels such as woman, man, and transsexual, among others. These categories are socially constructed, as humans both create and assign individuals to them.”<sup>11</sup>

On a daily basis, we are forced to identify ourselves within the traditional framework of male and female considered as the gender norms; which are characteristics or behaviours attributed to a particular sex by society.<sup>12</sup> It is arguable that society determines that we must belong to one of these two options, otherwise known as the ‘binary model’, and that we should therefore follow the rules of what is considered common behaviour within these gender norms.

For example, one is often required to fill out forms where questions are to designate which gender applies to them. “Population registration was introduced in the Netherlands in 1811 by Napoleon. From the start, information about people’s sex was one of the identity characteristics to be registered. Although information on the rationale behind this practice is scant, it probably has to do with gender-specific rights (or lack thereof) and duties, such as

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<sup>10</sup> Evolution of Intersexuality <<http://www.genderandhealth.ca/en/modules/sexandsexuality/gss-historical-perspectives-02.jsp#ref0002>> accessed 21 March 2017

<sup>11</sup> Johnson, J., Robin Repta, Sex and Gender: Beyond the Binaries, p. 20,-21, <[http://www.academia.edu/22313869/2\\_Sex\\_and\\_Gender\\_Beyond\\_the\\_Binaries](http://www.academia.edu/22313869/2_Sex_and_Gender_Beyond_the_Binaries)> accessed 1 July 2017

<sup>12</sup> Harland, B., What is a gender norm? <<http://peopleof.oureverydaylife.com/gender-norm-11041.html>> accessed 5 July 2017

military conscription for men.”<sup>13</sup> “Since the binary genders are the only ones recognised by general society as being legitimate, they enjoy an (unfairly) privileged status.”<sup>14</sup>

Cultures are largely structured by gender and sex, and it is expected that if you are born with female biological characteristics you should identify yourself as a woman and therefore express yourself as one. We live in a society accustomed to gender pressure, therefore for many people choosing the non- binary model is not a viable option. However, many people do not relate to the binary model, so it is difficult for them to define themselves as either male or female. “The first dent in this binary structure was introduced in 1970, when Article 1:17(2) of the new Civil Code (Burgerlijk Wetboek) provided for the situation that a newborn baby’s features raised doubts as to its sex. A possibility was created to indicate on the birth certificate that the child’s sex ‘cannot be determined’.”<sup>15</sup>

There are cases where one does not feel part of either of the two genders. Sometimes also a person can feel part of both. “Behaviour is never either nature or nurture. It is always a very complex interweaving of both.”<sup>16</sup> We can appreciate here that there is a vast, unexplored area beyond the typically understood concept of gender. Tyler Ford, the author of the article My Life Without Gender, states: “I have been out as an agender, or genderless, person for about a year now. To me, this simply means having the freedom to exist as a person without being confined by the limits of the western gender binary.”<sup>17</sup> As we can appreciate, Ford is one of many people who do not identify themselves with a particular gender. “Moving beyond the binary” involves two important elements: first, reconsidering how we have conceptualized

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<sup>13</sup> European Equality Law Review: European Network Of Legal Experts In Gender Equality And Non-Discrimination, Issue 2/2015, European Commission, p. 31 <<http://ec.europa.eu/justice/discrimination/files/elr2015-2.pdf>, accessed 5 July 2017> accessed 4 March 2017

<sup>14</sup> Trans, Student, Educational Resources, LGBT+Definitions <<http://www.transstudent.org/definitions>> accessed 2 Jun 2017

<sup>15</sup> European Commission, European Equality Law Review: European Network of Legal Experts in Gender Equality and Non-Discrimination, Issue 2/2015, ISSN 2443-9606, European Commission, p. 32 <<http://ec.europa.eu/justice/discrimination/files/elr2015-2.pdf>> accessed 5 July 2017

<sup>16</sup> Millis, M., Sex Difference vs. Gender Difference? Oh, I'm So Confused! : A "Sex Difference" Is a Sexually, Psychology Today, 2011, <<https://www.psychologytoday.com/blog/the-how-and-why-sex-differences/201110/sex-difference-vs-gender-difference-oh-im-so-confused>> accessed 1 Jun 2017

<sup>17</sup> Ford T., ‘My Life without Gender: Strangers are Desperate to Know what Genitalia I Have’, (The Guardian, 2015) <<https://www.theguardian.com/world/2015/aug/07/my-life-without-gender-strangers-are-desperate-to-know-what-genitalia-i-have>> accessed 3 May 2017

distinctions between masculine/feminine and male/female, and second, rethinking conceptualizations of gender as strictly social and of sex as strictly biological.”<sup>18</sup>

It is not widely considered an option to be genderless in today’s society; therefore, in the case of intersexual babies who are born with ambiguous genitalia, parents sometimes feel shameful about this condition and choose cosmetic surgery for their intersex children. Whilst male and female are considered the typical human divide, intersexual and LGBT (Lesbian, Gay, Bisexual, Transsexual Community) are teaching us how narrow the divide can be and that there is a whole range of possible genders and sexual orientation.

Many people often confuse the definition of gender with the definition of sex. The majority of people in society assume that a person’s gender must match their biological sex and yet this is not what happens in all cases. One can be born of the biologically male sex but ‘feel’ like a woman, and be born of the female sex and ‘feel’ like a man. At birth, humans associate gender with biological sex, which in some cases it is not correct. It is often possible to be born with a determined biological sex, but not feel related to gender.

The case of Bruce Reimer shows us that gender should not be chosen by other individual; this is not a decision to be made by a doctor or the parents. In 1965, Bruce was born with male sex characteristics; however, when he was 7 months old he was submitted to a circumcision, which, due to a malfunction of the electrical equipment, resulted in the mutilation of his entire penis. Bruce’s parents were completely devastated, therefore they went to see Dr. John Money, a well-known sexologist whose theory was that gender is determined by nurture and not by nature. Money’s suggestion was to remove Bruce’s penis, create a rudimentary vulva, and consequently have his parents raise him as a girl. The family accepted Money’s suggestion and decided calling him Brenda, bringing him up as a female without reference to his surgery.

After a few years, Bruce’s parents noticed that he was not comfortable with his female gender and therefore was not behaving as a girl. Money was still trying to prove his theory, which argues that: “there is a window of opportunity for surgery - a 'gender gate' - which lasted up

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<sup>18</sup> Johnson.JL, Repta, R., Sex and Gender: Beyond the Binaries, 2011, p.17

to the age of two. During that period, he argued, if the parents chose the sex of the child, the way they brought it up would determine the child's gender, not its physical characteristics.”<sup>19</sup>

When Bruce was thirteen, his family told him the truth about his condition and he began a new life as a male, after having a reconstruction of his penis. However, he committed suicide years later due to mental and physical problems resulting from the traumas of the experiment enacted upon by Dr. Money and his family. This case is a clear example of why gender cannot and should not be chosen by another person other than the individual in question.

“Intersexuality presents a challenge to the two-sex model by disrupting the logic of the “naturalness” of two and only two permanent sex categories.”<sup>20</sup> In the beginning of 2017, the top model Hanne Gaby Odiele revealed that she was an intersex person and that at the same time she did not feel part of the binary model; she didn't identify herself as either a man or a woman. “Odiele also wanted to highlight the invasive surgeries that she said are often carried out on intersex people because of a fear of non-binary bodies rather than any pressing medical need”.<sup>21</sup> Individuals like Odiele are important to the intersex community, as they raise cultural awareness about intersex issues and the debates surrounding them.

Some countries are more aware of the complex issues that intersexual people have in this society concerning the gender binary model. That is why some already have legislation that advocates some of the rights of intersex people, as we will see in Chapter II.

Whilst this discrimination may come from many different sources, a change in legislation in favour of advocating the rights of intersex people would arguably serve to normalise these issues for the general public, leading to an increase in understanding and empathy for these individuals, and therefore a decrease in the kind of discrimination that results from ignorance and unawareness within a given culture or society. The BBC News article ‘Canadian baby first without gender designation on health card’ relates to a baby who was born in Canada in

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<sup>19</sup> Dr Money and the Boy with No Penis: An Experiment On Nature Versus Nurture Goes Tragically Wrong <[http://www.bbc.co.uk/sn/tvradio/programmes/horizon/dr\\_money\\_prog\\_summary.shtml](http://www.bbc.co.uk/sn/tvradio/programmes/horizon/dr_money_prog_summary.shtml)> accessed 7 July 2017

<sup>20</sup> Kelly, M., INTERSEX: Sociologists for Women in Society Fact Sheet, 2007, University of Connecticut, <[https://www.socwomen.org/wp-content/uploads/2010/05/fact\\_03-2007-intersex.pdf](https://www.socwomen.org/wp-content/uploads/2010/05/fact_03-2007-intersex.pdf)> accessed 5 July 2017

<sup>21</sup> Khomami, N. ‘Model Hanne Gaby Odiele reveals she is intersex’, (The Guardian, 24 January 2017,) <<https://www.theguardian.com/world/2017/jan/24/model-hanne-gaby-odiele-reveals-she-is-intersex>> accessed 3 June 2017

2017 and who was the first baby without a gender designation. Parents of the child decided to do not choose a gender until the newborn is older. As the lawyer of the family states: "The assignment of sex in this culture is done when a medical person lifts up the legs and looks at the baby's genitals. But we know that the baby's own gender identity will not develop for some years until after they're born." <sup>22</sup>

## 1.2. INTERSEXUALITY

This section is based on an explanation of the concept of intersexuality, with specific reference to the different categories with which intersexuality is divided, and the scope that this condition has in the world in recent times.

This research is focused on the Intersex Community. "Intersex people are people born with sex characteristics (for example: genitals, gonads and chromosome patterns) that do not fit with typical binary notions of male or female bodies."<sup>23</sup> "They may be the result of variations in an individual's chromosomes, hormones, gonads, or genitalia. For example, having one ovary and one testis, or gonads that contain both ovarian and testicular tissue, are both intersex conditions. Chromosomal patterns that are XXY or XO instead of XX or XY are also intersex conditions. The genitalia of some but not all intersex individuals are not clearly identifiable as male or female."<sup>24</sup>

The term 'intersex' has been previously referred to the Greek mythology as 'hermaphrodite'. Book IV of the Metamorphoses tells of the gods Hermes and Aphrodite, who had a two-sexed child Hermaphroditus, whose body had merged with the female body of the nymph Salmacis, resulting in the possession of both male and female traits.

"By the late 1800s, through gynaecological sciences and numerous wartime military medical examinations, doctors gained a much better sense that "abnormal" sex anatomies were

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<sup>22</sup> 'Canadian Baby First Without Gender Designation On Health Card', (BBC News, 3 July 2017) <[http://www.bbc.com/news/world-us-canada-40480386?ocid=socialflow\\_facebook&ns\\_mchannel=social&ns\\_campaign=bbcnews&ns\\_source=facebook](http://www.bbc.com/news/world-us-canada-40480386?ocid=socialflow_facebook&ns_mchannel=social&ns_campaign=bbcnews&ns_source=facebook)> accessed 04 July 2017

<sup>23</sup> Intersex, United Nations Campaign for Free and Equal Equality

<sup>24</sup> International Commission of Jurists <<https://www.icj.org/sogi-casebook-introduction/chapter-six-intersex/>> accessed 4 July 2017

actually quite common.”<sup>25</sup> After that, in “the late-nineteenth century, doctors began reporting dozens of cases a year of “hermaphroditism” and “pseudo-hermaphroditism.”<sup>26</sup> Richard Goldschmidt was the first to introduce the term ‘intersex’ in his book *Intersexuality and the Endocrine Aspect of Sex* published in 1917, where he combined the Latin word “inter” (meaning in between) and “sexus” (sex) to put together a new theory.<sup>27</sup> After this publication, the word ‘intersex’ has become more frequently used.

Even though intersex condition was already acknowledged by specialists, it was not approved by society as it did not complement the established binary gender model. That is the reason that, in the 1950s, “Johns Hopkins University created a team and became the first medical center to offer an organized multi-disciplinary approach to intersex, one that sought to essentially eliminate intersex in early childhood. The approach developed there came to be known as the “optimum gender of rearing” model.”<sup>28</sup>

The history of intersexuality took a radical turn in the 90s, when intersexual people began to make their stories public. Society became aware of the cosmetic medical interventions intersex people undergone in childhood without giving consent. Many of them did not even knew the true reason why these surgeries were performed. “Since the mid-1990s, a steadily growing number of intersex people in Europe and all over the world have found the courage needed to raise their voices and denounce the human rights violations suffered by intersex people. In order to do this, they had to overcome secrecy, shame, pathologisation or self-pathologisation and society’s vast knowledge gap about the concerns (or even the sheer existence) of intersex people. Such challenges were – and still are – hard to overcome.”<sup>29</sup>

Nowadays, the phenomenon of intersex has the medical term ‘Disorders of Sex Development’ (DSD) and was introduced in 2005 at the International Consensus Conference on Intersex. However, some intersex people do not approve this term, as they believe it is used in an

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<sup>25</sup> What’s the History behind the Intersex Rights Movement? Intersex Society of North America <<http://www.isna.org/faq/history>> accessed 20 May 2017

<sup>26</sup> Ibid

<sup>27</sup> Tomas Kollen, *Sexual Orientation and Transgender Issues in Organizations: Global Perspectives on LGBT Workforce Diversity*, Switzerland, 2016

<sup>28</sup> What’s the History behind the Intersex Rights Movement? Intersex Society of North America 2017 <<http://www.isna.org/faq/history>> 20 May 2017

<sup>29</sup> Ghattas, D., *Standing Up For The Human Rights Of Intersex People – How Can We Help?* 2015

incorrect way. For example, “The Organisation Intersex International (OII) and other activists objected to use DSD in general, stating that the DSD guidelines are primarily about gender and assuring parents and doctors that the right gender can be chosen without consultation with the child.”<sup>30</sup> Therefore, it is well known that people related to this subject do not consider the term appropriate, because no one should rightfully choose the gender of another person.

As we can see here, the intersex term is not recent; indeed, it has existed for years, but it was seen as taboo, because it was not deemed “normal”; thus, not much work has been undertaken to explore this area in any real depth. It is important to highlight here that society should be aware of the problems this community suffers each day, mostly in relation to their human rights. Governments should protect against discrimination, especially relating to sex discrimination against intersex people.

### ***1.2.1 INTERSEX CATEGORIES***

To understand more about intersexuality it is important to mention the different categories in which an intersex person can be placed. Intersex people are not only born with ambiguous sex but also are born with a mixture of gonads, chromosomes and external organs. The New York Times Health Guide has explained four categories of intersexuality thus: <sup>31</sup>

*“46, XX Intersex. The person has the chromosomes of a woman, the ovaries of a woman, but external (outside) genitals that appear male. This usually is the result of a female fetus having been exposed to excess male hormones before birth. The labia ("lips" or folds of skin of the external female genitals) fuse, and the clitoris enlarges to appear like a penis. Usually this person has a normal uterus and Fallopian tubes. This condition is also called 46, XX with virilization. It used to be called female pseudohermaphroditism.”*

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<sup>30</sup> Curtis E. Hinkle, Why is OII not using the term DSD or Disorders of Sex Development?, [www.intersexualite.org](http://www.intersexualite.org)

<sup>31</sup> Wherrett DK. Approach To The Infant With A Suspected Disorder Of Sex Development. *Pediatr Clin North Am.* 2015;62(4):983-99. PMID: 26210628 < [www.ncbi.nlm.nih.gov/pubmed/26210628](http://www.ncbi.nlm.nih.gov/pubmed/26210628).> accessed 2 May 2017



*“46, XY Intersex. The person has the chromosomes of a man, but the external genitals are incompletely formed, ambiguous, or clearly female. Internally, testes may be normal, malformed, or absent. This condition is also called 46, XY with undervirilization. It used to be called male pseudohermaphroditism. Formation of normal male external genitals depends on the appropriate balance between male and female hormones; therefore, it requires the adequate production and function of male hormones.”*

*“True Gonadal Intersex. Here the person must have both ovarian and testicular tissue. This may be in the same gonad (an ovotestis), or the person might have one ovary and one testis. The person may have XX chromosomes, XY chromosomes, or both. The external genitals may be ambiguous or may appear to be female or male. This condition used to be called true hermaphroditism. In most people with true gonadal intersex, the underlying cause is unknown, although in some animal studies it has been linked to exposure to common agricultural pesticides.”*

*“Complex or Undetermined Intersex Disorders of Sexual Development. Many chromosome configurations other than simple 46, XX or 46, XY can result in disorders of sex development. These include 45, XO (only one X chromosome), and 47, XXY, 47, XXX -- both cases have an extra sex chromosome, either an X or a Y. These disorders do not result in a condition where there is discrepancy between internal and external genitalia. However, there may be problems with sex hormone levels, overall sexual development, and altered numbers of sex chromosomes.”*

After mentioning these four categories that explain intersexuality, we can appreciate that the condition is complex and that it is not only related to ambiguity of sex, as is often believed. It is important to analyse both internally as well externally an intersex person, to be able to place them into one or another category. As we mentioned above, the most known categories

with which intersexuality is explained are: ‘female pseudohermaphroditism’, ‘male pseudohermaphroditism’, ‘true hermaphroditism’ and ‘undetermined intersex’.

The majority of people and governments only recognise two sexes – male and female – thus, intersex people do not fit into their notion of typical society. Intersexuality is considered a new subject; thus, many people are unaware of the existence of intersex people. We may note that some countries have recently adopted measures to fight against unnecessary medical interventions in intersex people, but there are also many other countries that commit violations against intersex individuals.

### ***1.2.2 INTERSEX IN HISTORY***

There is not much legislation to support intersexuality; therefore having legislation protecting a person’s gender identity may help to prevent unnecessary medical interventions. This section will focus on the different approaches countries have towards the issue of intersexuality. The framework will be divided within six global continents: Europe, Asia, Africa, North and South America, and Australasia.

In Europe:

In 2015, Malta became the first country to sign the *Gender Identity, Gender Expression and Sex Characteristics Act*, which provides to any person the possibility to change their gender identity, and also bans unnecessary surgery on intersex newborns. “This law is a major step forward for trans and intersex persons in Malta, and shows the way forward for Europe.”<sup>32</sup>

After Malta adopted in its legislation protection for the rights of intersex people, we can see that it has raised awareness in many other countries, which are already reviewing their legislation with the intention of protecting the intersex people. The European Parliament states: “Member States are currently reviewing their laws and policies in relation to sex

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<sup>32</sup> Malta Adopts Ground-Breaking Gender Identity, Gender Expression And Sex Characteristics Law, April 2, 2015, European Parliament’s <<http://www.lgbt-ep.eu/press-releases/malta-adopts-ground-breaking-gender-identity-gender-expression-and-sex-characteristics-law/>>accessed 5 July 2017

characteristics (i.e. issues relating to intersex people). This includes examples of states currently developing medical and legal protocols to deal with intersex aspects from birth”<sup>33</sup>

As previously mentioned, gender identity is related to intersexuality, that is why in some cases having legislation to protect gender identity could help to defend the rights of intersex people. We believe that, if medical professionals or parents are not pressured to choose a particular gender, they may not perform medical reassignment surgeries. “Legal gender recognition is the process by which administrations change the name and/or gender marker of trans individuals in their records so official registers and documents (such as identity documents, birth or civil status certificates, school diplomas, etc.) match these individuals’ gender identity. As of April 2016, 22 Member States (including Norway as of July 2016) foresaw this procedure in law. Procedures in Denmark, Ireland, Malta and Norway require no psychiatric diagnosis; no compulsory medical intervention, surgery or sterilisation; and no compulsory divorce.”

Germany is one of the few countries that since 2013 do not force parents to determinate a specific gender for their newborn, in this way, they give the child the freedom to choose their own gender in the future.<sup>34</sup> Moreover, since 2014, Germany is also reviewing their legislation to improve their “policies relating to gender identity and sex characteristics, and suggest improvements.”<sup>35</sup>

In Asia and Africa:

Intersex children are more too often considered a mistake of nature; therefore there is much infanticide in these countries. As there is not much information about it, they often believe that the fact of being born with intersex characteristics is a product of witchcraft, which is why Kenya, Uganda, South Asia and China each have a large number of cases of mutilations,

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<sup>33</sup> Selun, B., Summary Report, Legislation And Policies On Gender Identity And Sex Characteristics, European Commission, Berlin, 27 Octobre 2016

<sup>34</sup> Comment by Nils Muižnieks, Council of Europe’s Human Rights Commissioner, OII Europe, 9 May 2014 <<https://oiiurope.org/intersex-people-lack-recognition-in-europe-comment-by-nils-muiznieks-council-of-europes-human-rights-commissioner/>>accessed 5 May 2017

<sup>35</sup> Selun, B., Summary Report, Legislation and policies on gender identity and sex characteristics, European Commission, Berlin, 27 Octobre 2016

abandonments, and murders of intersex newborn children. For example, in China a baby born with both male and female genitals was found abandoned in a Chinese park.<sup>36</sup> The parents of this newborn rejected the individual because of genitalia ambiguity. Defenceless people suffer each day the consequences of the shame that some parents can feel upon having children with ambiguous genitals. These cases are a clear example of the mix of cultural stigma and a lack of information that some countries are still experiencing with regards to intersex births. However, in “South Asia, Bangladesh has offered an "other" gender category on passport applications since 2011, Nepal began recognising a third gender on its census forms in 2007 while Pakistan made it an option on national identity cards in 2011, and India added a third gender category to voter lists in 2009. While transgender or intersex people have long been accepted in Thailand and are officially recognised by the country's military, they do not have any separate legal status.”<sup>37</sup> We can note that several Asian countries are implementing the ‘third gender’ option in their legislation even though others still condemning intersexuality.

In America:

It is acknowledged that in 2016, “the Chilean government released a document that urges doctors in the South American country to no longer perform “normalization” surgeries on intersex children.”<sup>38</sup> Camilo Godoy Peña, a member of the LGBT community, wrote a letter to the President of Chile, Michelle Bachelet, requesting that an increased defence of the rights of the intersex people be urgently exercised. After this, the government released a series of recommendations to protect intersex people from unnecessary medical interventions.<sup>39</sup>

In Colombia, “In 1999, the Constitutional Court of Colombia issued ruling for two intersex-related cases that restricted physicians' and parents' ability to surgically "correct" the genitals

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<sup>36</sup> Lau, M., ‘Baby born with male and female genitals found abandoned in Chinese park’ (South China Morning Post, 24 August 2005)

<[http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites\\_Reis.pdf](http://pages.uoregon.edu/healarts/studies/alternatives/Alt%20PDFs/Hermaphrodites_Reis.pdf)> accessed 30 May 2017

<sup>37</sup> Germany Allows 'Indeterminate' Gender At Birth, (BBC News, 1 November 2013)

<<http://www.bbc.com/news/world-europe-24767225>> accessed 5 July 2017

<sup>38</sup> Lavers, M., Chilean Officials oppose Intersex Children ‘Normalization’ surgery, 11 January 2016

<<http://www.washingtonblade.com/2016/01/11/chilean-officials-oppose-normalization-surgery-for-intersex-children/>> accessed 5 June 2017

<sup>39</sup> Ibid

of intersex children without their consent”<sup>40</sup> Eventhough, this case helped raising awareness, the Colombian Legislation have not improved any protection for intersex people yet.

In 2017, in Canada a baby was the first without a gender designation. Parents of the child decided to do not choose a gender until the newborn is older.

In Australia:

International Intersex Australia is one of the organizations that work hard to protect the rights of intersex people, providing information and offering support. Together with others in 2017, create the Darlington Statement, which prioritizes the human rights of intersex people.

“In 2013, Australia adopted the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act – the first law to include intersex status as a stand-alone prohibited ground of discrimination. The Australian Senate has also carried out an official inquiry into the involuntary or coerced sterilization of intersex people.”<sup>41</sup> With this example we can note that Australia is committed to seek protection for intersex people.

Giving the option of being able to choose your gender, outside the binary system can help to make society aware of the intersex condition. “The 2016 census for the first time had the option to record gender as male, female or other. The Australian Bureau of Statistics introduced the same standard earlier this year and the Australian Passport Office allows citizens to identify themselves as M, F or X.”<sup>42</sup>

As we can note, Australia is one of the countries that most defends intersex people. Despite this, they have not reformed their legislation against genital procedures yet, but there are many organizations that will provide information and support on the subject. “In February

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<sup>40</sup> The Colombia Case: Intersex in the Global Human Rights Struggles, Intersex Initiative, <<http://www.intersexinitiative.org/law/colombia.html>> accessed 05 July 2017

<sup>41</sup> Fact Sheet Intersex, Free & Equal United Nations for LGBT Equality <<https://www.unfe.org/wp-content/uploads/2017/05/UNFE-Intersex.pdf>> accessed 7 May 2017

<sup>42</sup> Pash, C., A Third Gender Option Is Now Recognised By An Australian Health Insurer, Business Insider, <<https://www.businessinsider.com.au/a-third-gender-option-is-now-recognised-by-an-australian-health-insurer-2016-10#HBRfwCODrf4DJAWe.99>> accessed 7 May 2017

2017, the Rationalist Society of Australia – a secular free thought organisation – published its white paper on genital autonomy, where all forms of medically unnecessary, non-consensual genital modification were condemned as violations of human rights.”<sup>43</sup>

New Zealand:

“New Zealand gave its transgender citizens a new gender category on their passports in 2012, with the introduction of "X" for "undetermined or unspecified".<sup>44</sup> As previously mentioned, if there is still no concrete legislation for the protection of intersex people, implementing legislation related to gender identity could help in a certain way.

As demonstrated above, countries that base their legislation on the recognition of the human rights of the intersex individual are likely to lessen the stigma surrounding intersex and gender-diverse people, resulting in less shame experienced by the individual, and also less opportunity for social discrimination against them. It is important to protect the physical integrity and self-determination of intersex people by creating laws against unnecessary medical interventions. It is clear that many countries lack legislation relating to intersex genital modification or sex discrimination. However, some of them already have legislation regarding gender identity, and if we are able to adopt the point of view that choosing a gender at birth is not mandatory (instead, being able to change it at a later stage in life), this could reduce the practice of unnecessary medical interventions upon intersex people.

### **1.3. SEPARATING GENDER FROM SEX**

While the author has previously referred to the differences between gender and sex, this part aims to explain these differences in greater detail. Later we will explore the differences between gender identity and gender expression. In the last part of this section we will explain

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<sup>43</sup> Koch, C. and Wisdom, T., Surgery To Make Intersex Children ‘Normal’ Should Be Banned (The Conversation, 4 June 2017) <<https://theconversation.com/surgery-to-make-intersex-children-normal-should-be-banned-76952>> accessed 27 May 2017

<sup>44</sup> Pasquesoone, V., 7 Countries Giving Transgender People Fundamental Rights The U.S Still Don’t, April 9, 2014, <<https://mic.com/articles/87149/7-countries-giving-transgender-people-fundamental-rights-the-u-s-still-won-t#.twQzUn0xi>> accessed 5 July 2017

the differences between transgender and cisgender, due these two concepts will help to understand the problematic around gender and sex.

The American Psychological Association defines gender as, “the condition of being male, female, or neuter. In a human context, the distinction between gender and sex reflects the usage of these terms: Sex usually refers to the biological aspects of maleness or femaleness, whereas gender implies the psychological, behavioral, social, and cultural aspects of being male or female (i.e., masculinity or femininity.)”<sup>45</sup> Therefore, it is helpful to note that the difference between these two concepts is that ‘gender’ is related with the social characteristics with which a culture associates a person’s biological sex whilst ‘sex’ relates to the reproductive organs with which a person is born.

### ***1.3.1 GENDER IDENTITY VS. GENDER EXPRESSION***

It is important to acknowledge that people’s identities are not always comprised of a single ‘gender’ or ‘sex’, and that these concepts are multi-faceted, relating to how a person perceives themselves and how they project themselves within a societal framework. This section relates to the difference between ‘gender identity’ and ‘gender expression’.

The American Psychological Association defines gender identity “to one's sense of oneself as male, female or something else.”<sup>46</sup>

Each day we communicate our gender with outward expressions of our identity, which can serve to give other people a sense of who we are as individuals. “Gender expression is how a person publicly presents their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person’s chosen name and pronoun are also common ways of expressing gender”<sup>47</sup>

Sometimes people can get confused between these two concepts, due to the fact that they are quite similar, and often used interchangeably. A person can feel in a certain way and express themselves in the same or another way. “One important concept to remember regarding gender identity and gender expression is that gender is expressed on some level by pretty much all of

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<sup>45</sup> APA Dictionary Of Psychology (2nd ed.). Washington, DC: Author. 2015

<sup>46</sup> APA, 2011

<sup>47</sup>Ontario Human Rights Commission, Gender Identity and Gender Expression <<http://www.ohrc.on.ca/en/gender-identity-and-gender-expression-brochure>> accessed 4 May 2017

us in our broad society. When gender expression do not conform societal sex and gender norms, is when this antidiscrimination protections for LGBT community become legally important.”<sup>48</sup>

For this thesis, the author has conducted several interviews with people belonging to the LGBT (Lesbian, Gay, Bisexual, Trans) community. One of the interviews made in Athens concerns the case of a girl who talked about the differences between her gender identity and gender expression. She preferred dressing as a man; she did not like dresses, make up, or high heel shoes, for example, and in other words would consider herself as a ‘tomboy’. But she explained that she did not identify herself as man, although people would often consider her masculine due the fact that she did not dress in a traditionally feminine way. In her own words: “one thing is how you feel, and another is how people see you”.

It is important that the state promotes a variety of options to an intersex child's parents, beyond the established binary system. Many times, as previously mentioned, the pressure of having to classify the child as either ‘male’ or ‘female’ can affect their emotional well-being in a number of different ways. “In 2014, Denmark became the first European country to adopt a gender identity law based on the same self-determination principle whereby an individual above the age of 18 may obtain a change in legal sex on the basis of her/his gender declaration, without the need for verification by a third party.”<sup>49</sup> This law allows people the possibility of choosing a specific gender based on their own identity.

“The notion of ‘gender identity’ offers the opportunity to understand that the sex assigned to an infant at birth might not correspond with the innate gender identity the child develops when he or she grows up”.<sup>50</sup> This is the ideological basis upon which this thesis is based, with the aim of demonstrating that cosmetic medical interventions in intersex children are often counter to their innate gender identity, as well as being both dangerous and widely

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<sup>48</sup> Sandeen, A., Gender Expression And Gender Identity Are Two Separate Concepts, 7 May 2011, ShadowProof <<https://shadowproof.com/2011/05/07/gender-expression-and-gender-identity-are-two-separate-concepts/>>accessed 24 June 2017

<sup>49</sup> Law N. . 752 Af 25-06-2014, Lov Om Ændring Af Lov Om Det Centrale Personregister (Amendment Of The Act Of The Civil Registration System) < <http://www.ft.dk/samling/20131/lovforslag/1182/index.htm>> accessed 23 June 2017

<sup>50</sup> Human Rights and Gender Identity, Commissioner for Human Rights, Strasbourg, 2009



irreversible. How can doctors decided and assign a specific sex to an intersex newborn, if the child hasn't yet had the time to develop their own gender identity? Dr. Eric Vilain, director of the Centre for Gender-Based Biology at UCLA, where he studies the genetics of sexual development and sex differences states that: "People tend to define sex in a binary way — either wholly male or wholly female — based on physical appearance or by which sex chromosomes an individual carries. But while sex and gender may seem dichotomous, there are in reality many intermediates." <sup>51</sup>

These concepts are important when understanding that a person's identity is based on more than their biological sex; therefore, before practicing medical interventions on intersex children, those responsible for the individual should take into account all the areas in which the individual may potentially be affected by their decision.

### ***1.3.2 TRANSGENDER VS. CISGENDER***

This section will explain the definitions of transgender and cisgender. It is important to understand these concepts, as they are both related to gender and biological sex, therefore it is valuable to be able to differentiate these two, especially in the case of intersex people.

The majority of population is considered 'cisgender', as opposed to being 'transgender'. For example, when the sex of a baby is declared by doctors as male, this is due to the baby having male physical characterises, and therefore the baby's family would usually assumed that the child must identify later as a boy, and subsequently as a man- however, this is not always the case. When a person's gender identity matches their biological sex, they are considered a 'cisgender' person. The Oxford English Dictionary defines cisgender as: "Denoting or relating to a person whose sense of personal identity and gender corresponds with their birth sex". Accordingly to this definition of cisgender, people who are born, as intersex should arguably identify as intersex. Conversely, those whose gender identity does not correspond to their birth sex are termed 'transgender', to be explored in more detail below.

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<sup>51</sup> Meade-Kelly, V., Male or female? It's not always so Simple: UCLA Researchers Are Studying The Biological Origins Of Sexual Orientation And Gender Identity, 20 August 2015 <<http://Newsroom.Ucla.Edu/Stories/Male-Or-Female>> accessed 23 June 2017

The term cisgender has been widely debated within the LGBTQI community. Navy Brynn Tannehill, a transgender veteran, argues to the Huffington Post, "When someone is referred to as a 'cisgender lesbian' or 'cis gay man' by a transgender person, it is often in a negative way," "The addition of 'cis' or 'cisgender' is used to imply a certain level of contempt and a desire that they leave discussions on transgender issues. It also implies that they don't, can't or won't ever understand transgender issues"<sup>52</sup> We can therefore note that this term is not always well regarded within the LGBTQI community, and can carry negative connotations depending on the context in which it is used.

"The term "transgender" is generally used to refer to a person whose sex (i.e., anatomy, hormones, chromosomes) are inconsistent with their gender (i.e., sense of self, behaviour, appearance)."<sup>53</sup> For example, on the basis of this definition, people who are born with male characteristics but identify as women are regarded 'transgender'. This is the case of Caitlyn Jenner, formerly known as Bruce Jenner, an Olympic icon from the 1970s and now an American television personality. She was born with male characteristics, grew up as a male, married Kris Jenner and had two daughters, however she never identified as man. At the age of sixty-five she decided to become a woman. Several times she told the media that she never felt part of society and identifying herself as male was a nightmare, and that after sixty-five years she could finally be who she really wanted to be, as a woman. People who do not "fit" with the binary model often suffer from discriminatory behaviours. Gail Wyatt, clinical psychologist and director of the UCLA Sexual Health Program, states that: "It's essential for clinicians to maintain an open dialogue with transgender patients and not inadvertently compound the rejection and denial they often face."<sup>54</sup>

Being transgender does not require the practice of medical interventions. "There are an estimated 700,000 transgender women and men in the United States; only about a quarter of transgender women have had genital surgery. There is a common misperception that such

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<sup>52</sup> Tannehill, B., The New 'C' Word, (Huffing Post, 24 July 2014) <[http://www.huffingtonpost.com/brynn-tannehill/the-new-c-word\\_b\\_5617913.html](http://www.huffingtonpost.com/brynn-tannehill/the-new-c-word_b_5617913.html)> accessed 5 June 2017

<sup>53</sup> Grollman, E., Transgender, Genderqueer, Cisgender... What Do These Terms Mean? 5 October 2017, <<https://kinseyconfidential.org/transgender-genderqueer-cisgender-terms/>> **accessed 7 May 2017**

<sup>54</sup> Meade-Kelly, V., Male or female? It's not always so simple: UCLA Researchers Are Studying The Biological Origins Of Sexual Orientation And Gender Identity, 20 August 2015 < <http://newsroom.ucla.edu/stories/male-or-female>> accessed 23 June 2017

surgery is somehow “required” to be a transgender woman or man, akin to a certificate from the Transgender Licensing Board”.<sup>55</sup>

We can acknowledge that gender is not always aligned with biological sex, so it would be important to let the intersex child develop themselves, being able to discover feelings, preferences and so on, trying to build their own identity.

#### **1.4 BEYOND HETEROSEXUALITY**

This section will be focused on sexual orientation. It will try to explain the reason people in many societies often assume that heterosexuality is the only behaviour pattern with which people should identify. Being able to determine your own sexuality is one of the aims this thesis advocates with regards to intersex people. Moreover, this section develops with an explanation of the ‘Queer Theory’ and goes on to explore whether intersexuality it is an appropriate component of the LGBT Community.

We live in a society which is composed by two biologically defined sexes: men and woman, and this leads to the theory that if you are born male you should be attracted to women and if you are born female you should be attracted to men; this is called heterosexuality. Religious doctrines, the media, and our education system, among others, have often taught us that this is the only system that exists which involves the alignment of biological sex, sexual orientation and gender identity and the adaptation to the gender norms. The professor of sociology at Houston University, Janet Saltzman referred to gender norms as: “behaviour that is expected of people on the basis of the status to which they are assigned, given their sexual biology”<sup>56</sup> We have determined patterns and therefore for some people it would be difficult to see beyond what is consider "normal" and with it is directly associated the definition of heterosexuality.

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<sup>55</sup> Bizzinger, B., Caitlyn Jenner: The Full Story, (Vanity Fair, July 2015) <<http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-bruce-cover-annie-leibovitz>> accessed 5 June 2017

<sup>56</sup> Chafetz, J., Gender Equity: An Integrated Theory Of Stability And Change, 1990, p. 35

Heterosexuality is the basis of sexual reproduction, because of the need for the male and female gametes to come together to form an embryo and develop into a human foetus. This is generally done through sexual intercourse, but there are other methods, such as IVF (In Vitro Fertilisation).

In order to continue the human race, we obviously need a sufficient level of heterosexuality in our species, so we can reproduce. We have evolved sexual dimorphic traits to aid mate selection. These differences arguably stem from the fact that the female has to carry the baby in their womb for around 9 months, so both sexes have developed different physical and emotional traits, hormones (e.g. testosterone) and behaviour (e.g. courtship rituals and mating strategies) that increase the success of reproduction and survival.

It is hard for people who are “sexually different” to integrate their non-traditional being, and sometimes it is even more difficult for their family to accept it because many parents of intersex children do not want their children associated in anyway with sex ambiguity. It is really important as a society to be informed about this issue to combat the disadvantage suffered by intersex people.

We are accustomed to a heteronormative society, so what if you do not fit into that pattern? We are aware that ideas can be varied and were contested over time, as we can see in Sigmund Freud, the father of psychoanalysis, who believed that “human beings were inherently bi-sexual and that ultimately it was social influence, and particularly familial influences, that determined the sexual orientation of the adult human being.”<sup>57</sup> Thus, with it appears a very large umbrella of possibilities, which is known as the ‘Queer Theory’: “From the 1900’s onwards, this theory emerged deconstructing the normative categories of mainstream (heteronormative) society, opening up space for the expression of a diverse range of identities and experiences”, as Jill Steans referred in her book *Gender and Relations*. These types of theories open the doors to different concepts, as we will see below.

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<sup>57</sup> Jill Steans, *Gender and International Relations*, p. 80

### ***1.4.1 QUEER THEORY***

Many times intersexuality has been placed inside the Queer Theory; that is the reason we will explain this theory and, moreover, we will attempt to define if intersexuality is part of the LGBT Community.

Everything that is not related to heterosexuality is part of the ‘unusual’ area called ‘Queer’. We can find here the LGBTQI (Lesbian, Gay, Transgender, Bisexual, Queer, Intersex) community, who do not feel part of heteronormative society because of their sexual preferences or their own identity. They represent a minority who are still fighting for a wider acceptance in society. This may not always be easy, but they are trying to encourage people to be and accept themselves. Since they do not regard themselves as having the same rights as heterosexual people, it is valuable exercise to deconstruct heteronormative conceptions of gender and sexuality, thereby clearing up space for new ways of thinking.

Not long ago, the word “queer” was used as an insult, and can still be used in this way, as a term of hatred used to refer to homosexual people. The American Psychological Association defines ‘queer’ as a “controversial slang, in the main pejorative, referring to gays and lesbians or relating to homosexual orientation.”<sup>58</sup> It is acknowledged that ‘queer’ means ‘odd’, and that is the way society has traditionally viewed the LGBTQI community. This word has since been appropriated ironically by the LGBTQI community, and is now used to define non-normative identities: behaviour different to the binary model of which the majority of society is a part.

There are people who do not consider appropriate to use the term ‘queer’, because it is offensive, and there are people who advocate using the word queer as ‘liberating’ by reclaiming its meaning. Rosemary Hennesy, Professor of English and Director of the Centre for the Study of Women, Gender, and Sexuality at Rice University, considers that the queer theory “calls into question obvious categories (man, woman, latina, jew, butch, femme), oppositions (man vs. woman, heterosexual vs. homosexual), or equations (gender = sex) upon

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<sup>58</sup> American Psychological Association, Dictionary Of Psychology (2nd ed.). Washington, DC: Author, 2015

which conventional notions of sexuality and identity rely”<sup>59</sup>. As mentioned before, within this ‘queer theory’ we find the LGBTQI community. This is a considerable group seeking to defend their rights. Whilst this research focuses on intersex people, it is also important to define these concepts, as Frédéric Edel, research at the National School of Administration and a professor in public law at the University of Strasbourg describes: “The term LGBT therefore denotes both a group of persons defined by their sexual orientation (lesbian, gay or bisexual) and a group of persons defined by their identity (understood as being different from their physical gender at birth). Lesbian refers to females who are attracted to other females, Gay refers to males who are attracted to other males, Bisexual refers to males or females who are attracted to both sexes, female and male, Transgender refers to persons whose deeply felt sense of gender is different from their physical characteristics at the time of birth.”<sup>60</sup>.

The LGBTQI community cannot only be defined by their gender identity or sexual orientation. There is a range of possible permutations that comprise this minority; therefore it is relevant to construct a distinction between them. According to the Oxford Dictionary, ‘Sexual Orientation’ is defined as “a person's sexual identity in relation to the gender to which they are attracted; the fact of being heterosexual, homosexual, or bisexual”.<sup>61</sup> In simpler terms, sexual orientation refers to whom you are sexually attracted and there are different labels for it, which are heterosexuality (the most common), homosexuality, bisexuality and asexuality. Heterosexuality refers to when a person is sexually attracted to the opposite gender. Homosexuality refers to when a person is sexually attracted to the same gender. Bisexuality refers to the attraction for more than one gender. Asexuality refers to being without any attraction. Until now it is acknowledge that sexual orientation refers not only to sexual attraction, but also to the capacity for emotional and affectional relationships.

Intersexual people are part of this ‘queer’ group and it is the reason they seek to provide society with guidance in this regard. LGBTQI activists are trying to spread consciousness about the consequences cosmetic medical interventions can produce on intersex children, in terms of both physical and psychological effects.

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<sup>59</sup> Rosemary Hennessy, “Queer Theory: A Review of the differences Special Issue and Wittig’s The Straight Mind,” *Signs* 18 (Summer 1993), p. 964

<sup>60</sup> Edel, F., *Case Law of the European Court Of Human Rights Relating To Discrimination On Grounds Of Sexual Orientation Or Gender Identity*, Council of Europe, 2015

<sup>61</sup> Oxford Dictionary

In recent years, studies and the media have shown the trauma that these individuals experience due to their ambiguous genitalia, and how it is related to their gender identity. Some countries are already implementing protection against cosmetic medical intervention upon ambiguity of sex, as “Germany has become the first nation in the world to find a surgeon guilty of conducting non-consensual surgery on an intersex child. Christiane Völling has finally been awarded damages in her long-running court case against the German surgeon who removed her reproductive organs.”<sup>62</sup> For example, Christiane Völling was born with an indeterminate sex, also known as ‘mixed female-male genitals’, and was raised as a boy even though she considered herself a woman. When she was 18 years old, a doctor decided to practice genital surgery, converting her into a man, thus removing female internal organs, without her consent. “The doctor had been found guilty of unlawful intervention at a previous trial in 2008. The judges ruled that the surgeon should have aborted the operation at this stage. During the trial, seen as setting a precedent, Christiane V. said she had been converted to a man against her will. While she demanded ‘at least’ 100,000 euros in compensation, she said she mostly sought ‘moral recompense.’ The surgeon, who has now been found guilty on three separate occasions.”<sup>63</sup> This trial has been a massive achievement for intersex people and their right to self-determination.

Throughout the years, this community has been discriminated and has suffered violence and hatred, therefore it is important to create consciousness around it, as can be seen by the efforts of some institutions: “The former High Commissioner Navi Pillay on 2013 launched a public information campaign designed to raise awareness of homophobic and transphobic violence and discrimination and promote greater respect for the rights of LGBT people everywhere”<sup>64</sup>

Approximately a total of seventy-four countries have criminal laws against sexual activity deemed as lesbian, gay, bisexual, transgender or intersex, according to the International Lesbian, Gay, Bisexual, Trans and Intersex Association. (ILGA). In many countries people are being killed because of their sexual orientation; however, people must accept that there are groups of people who are attracted to the same sex, others who are born with ambiguities

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<sup>62</sup> Christiane Völling Wins Damages For Non-Consensual Surgery In Civil Suit Against Surgeon, (OII Australia-Intersex Australia, 7 September 2009) <<https://oii.org.au/3501/christiane-voelling-wins-damages-nonconsensual-surgery/>> accessed 5 June 2017.

<sup>63</sup> Ibid

<sup>64</sup> OHCHR, Combatting Discrimination Based On Sexual Orientation And Gender Identity

of sex, people who do not feel comfortable with their biological sex, and others, all of whom suffering constantly of harassment, violence, discrimination, ill-treatment and imprisonment, and therefore they cannot live a normal live. As the Secretary of State, Hilary Clinton, declared in the United Nations' Palais des Nations in Geneva in 2011: "These dangers are not 'gay' issues. This is a human rights issue. Just as I was very proud to say the obvious more than 15 years ago in Beijing that human rights are women's rights and women's rights are human rights, well, let me say today that, Human rights are gay rights and gay rights are human rights, once and for all."<sup>65</sup>

The Yogyakarta Principles<sup>66</sup> outline that we have to respect others' preferences relating to their sexual orientation and gender identity; in that matter society', cannot assume that the binary model is the only standard. In the same way, "The United Nations has been working with Member States to reject discrimination and criminalization based on homophobia and transphobia. While the denial of human rights for LGBT persons persists throughout the world today, over 30 countries have decriminalized homosexuality in the past 20 years. In the face of resistance, determined efforts from the U.N., associated NGOs, and representatives of Member States to guarantee the human rights of LGBT persons have been gaining momentum. Today, under the leadership of Secretary-General Ban Ki-moon, there is no doubt that the U.N. is making progress toward the global inclusion of LGBT rights in our basic human rights".<sup>67</sup> As previously mentioned, years ago it was considered common to criminalize homosexuals, who were even condemned to death for behaving in a atypical way, or because of having different sexual preferences compare with the common denominator and even now we still have predominant cases such as in Chechnya, Russia, where a number of people are being arresting and killed due their sexual orientation. Authorities are abusing gay people in an unofficial detention camp due their homophobia. "The United Nations experts urged the authorities to end the persecution, saying that Chechens were "living in a climate of fear fueled by homophobic speeches by local authorities." They also demanded that the

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<sup>65</sup> Patel, M., The Little-Known Origin of Gay Rights are Human Rights, 2015, [www.advocate.com](http://www.advocate.com)> accessed 7 May 2017

<sup>66</sup> [Yogyakartaprinciples.org](http://Yogyakartaprinciples.org)

<sup>67</sup> Juneau, G., and Rubin, N., Are LGBT Rights Human Rights? <[www.apa.org](http://www.apa.org)> accessed 7 May 2017



authorities immediately release all detainees, thoroughly investigate the anti-gay campaign and hold the persecutors accountable.”<sup>68</sup>

This case reflects that LGBTQI people are still in danger across the world. It is important to acknowledge the violations committed against them and that there is an afflicted community within society, seeking for the acceptance of their fellow citizens and, above all, the government protection from persecution.

### ***1.4.2 INSIDE LGBT?***

It is important to analyse whether the intersex community belongs within the LGBT group. There are many theories about this; some saying that intersex does not belong to the LGBT group since this group was created in relation to sexual orientation. Some people believe that “Adding the I to LGBTQA+ may leave out most people in the intersex community because most don’t identify as queer, and possibly make some straight intersex people feel as though they have nothing to offer the movement.”<sup>69</sup>

As explained above, the problem here is the difference between sexual orientation, as referred to by the acronym ‘LGB’, gender identity in the symbol T, and the fact that intersex people are born with an ambiguity of sex, not gender. Pidgeon Pagonis, writer of the article 7 ways adding I to the LGBTQA acronym refers that “Adding the I to LGBTQA+ may have the unintended consequence of making parents of intersex babies assume their child will grow up to identify as queer, and as such, opt for surgeries as a twisted way of cutting away the gay.”<sup>70</sup> “Generally speaking, intersex is not an identity category. “While some intersex people do reclaim "intersex" as part of their identity, most regard it as a medical condition, or just a

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<sup>68</sup> Chan, S., U.N. Experts Condemn Killing and Torture of Gay Men in Chechnya, (NY Times, April 13 2017) <<https://www.nytimes.com/2017/04/13/world/europe/un-chechnya-gay-men-killing-abuse.html?action=click&contentCollection=Europe&module=RelatedCoverage&region=EndOfArticle&pgtype=article>> accessed 7 May 2017

<sup>69</sup> Pagonis, P., 7 Ways Adding ‘I’ to the LGBTQA+ Acronym Can Miss the Point, (Everyday Feminism Magazine, 29 June 2016) <<http://everydayfeminism.com/2016/06/intersex-lgbtq-misses-the-point/>> accessed 30 June 2017

<sup>70</sup> Ibid

unique physical state. Most intersex people identify and live as ordinary men and women, and are gay, lesbian, bisexual, or straight.”<sup>71</sup>

Other theories assert that intersex people should be included within the LGBTQI group as it is beneficial in many ways: “Whether you identify as L,G,B,T, or I, you might have faced discrimination, harassment or felt suffocated by society’s traditional gender norms. By their very nature, different organisations will have different advocacy and lobbying priorities, but they can all describe what it feels like to be in a minority group fighting for their human rights.”<sup>72</sup> The intersex community does not have much visibility or recognition worldwide, therefore belonging within the LGBTQ group could help to combat shame and cultural taboos, creating a safer atmosphere where these groups of people could live without fear of persecution.

The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association believe that: “There are a couple of reasons for adding the "I" to LGBT. First, intersex bodies are pathologized and erased in a way that is similar to how homosexuality has historically been treated within psychiatry. Even though homosexuality has been officially depathologized for three decades, transgender people are still labelled as having "gender identity disorder" and thus treated as something abnormal rather than a natural human variety. From this point of view, intersex is just another sexual minority that is pathologized and treated as "abnormal.””<sup>73</sup> There are differences between all the abbreviations in the acronym ‘LGBTQI’, since this group defends freedom of sexual orientations, gender identities and sex characteristics. It is important to note that, whilst each group defends a different concept, all are related minorities and endeavour to fight against discrimination; therefore, the benefits of belonging within the group within are arguably far greater than the disadvantages.

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<sup>71</sup> Intersex Faq, Intersex Initiative, 29 June 29 2008 < <http://www.intersexinitiative.org/articles/intersex-faq.html> > accessed 30 June 2017

<sup>72</sup> European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, ILGA < <https://www.ilga-europe.org/what-we-do/our-advocacy-work/trans-and-intersex/intersex> > accessed 7 May 2017

<sup>73</sup> Koyama, E., Adding the "I": Does Intersex Belong in the LGBT Movement? Intersex Initiative, <<http://www.intersexinitiative.org/articles/lgbti.html>> accessed 30 June 2017

## CONCLUSION OF CHAPTER I

As we have already explained, society is accustomed to living under a binary system. People are often socially pressured to belong within two gender stereotypes, two biological sexes, and one sexual orientation. However, day-by-day, people suffer from discrimination based on biological sex, gender identity and sexual orientation, and this is often due to a lack of information within society. That is what this chapter has tried to readdress: to explore what lies beyond the established binary system. It is important to remember that this thesis is based on intersex people. This group of people within the LGBTQI community are outside the binary system and therefore it is important to acknowledge that this minority exists and that they are fighting for their rights, which many times are violated. Also there are people who believe intersex community is not part of the LGBTQI group, due to the fact that intersex condition is not directly related to sexual orientation and are the other groups 'Lesbian, Gay and Bisexual'. There exists a diversity of gender, and is important not to confuse it with sexual orientation, and also to provide objective information about sexual orientation, gender identity, and gender expression, among others concepts relating the LGBTQI community, in order to raise awareness on the grounds of equality and non-discrimination.

In conclusion, it is a common misconception that sexual orientation and gender identity are connected and even worse to believe that they are the same. The YouTube broadcaster Brendan Jordan explained these two concepts by stating: "Sexuality is who you go to bed with, and gender identity is who you go to bed as, that's the simplest way I can describe it." It is important to be able to distinguish these concepts as they may seem similar but are not. Both involved a range of aspects and connotations, and many times, because of a lack of information, members of society can make irreversible errors against these individuals.

## CHAPTER II

The second chapter of this thesis will be based on explaining the consequences of performing cosmetic medical interventions on intersex people after birth. It will explain why it is often believed necessary to perform these surgeries, and how they can affect an intersex person. The first part will try to explain this situation from an ethical point of view. The second part will focus on explaining why it is considered necessary to protect an intersex person's self-determination and their 'body integrity'. Finally, the third part will mention the human rights that are violated with the often unnecessary practice of reassigning the sex of an intersex newborn child. The chapter will end with a conclusion of why cosmetic medical interventions in newborn intersex children should be far more regulated.

### 2. BEYOND MEDICAL INTERVENTIONS: BIOETHICS ANALYSIS

This section will explain the consequences of cosmetic medical interventions in intersex children from an ethical point of view. Although there are many questions that must be addressed when a baby is born, an important one is which gender the newborn is. We can acknowledge the importance of gender in our society, and everything that comes with it, therefore the expected answer would be whether the newborn is a girl or a boy. But what happens when the answer is ambiguous? "While the importance conferred to sex as a classifier does not pose difficulties for most people, it does create serious problems for those who do not neatly fit within the "female/male" dichotomy. This is because society does not usually recognise a person without reference to their sex, and as a result, the ability of intersex and trans people to enjoy their human rights is especially impacted by the current normative confines of sex and gender."<sup>74</sup>

Throughout the years, different medical interventions have been practiced on intersex people. Because society's understanding of intersexuality is arguably very limited, practising cosmetic medical interventions in order to "fix" people who are born with ambiguous sex are considered for some people the correct way to resolve this issue. But why does society insist on "fixing" intersex people? Although being born with a mixture of genitals, chromosomes

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<sup>74</sup> Agious. S., Human Rights and Intersex People, Council of Europe Commissioner for Human Rights, 2015

and gonads is not a common situation, it should not be considered as a taboo. Dr. Arlene Baratz, a breast radiologist refers: “Our chromosomes don’t tell us who we are”<sup>75</sup> This is why it is important to analyse the subject in a more open way to try and prevent abuse. These medical interventions are considered ‘Genital Mutilations’. The NGO Report to the 2nd, 3rd and 4th Periodic Report of Switzerland on the Convention on the Rights of the Child (CRC) considered that “cosmetic medical interventions for sex ambiguity as genital mutilations due to the fact they have irreversible consequences on the child, who never gave his consent. These consequences could be hormones treatments, mutilations, and infertility, among others.”<sup>76</sup>

There are still people who think that medical interventions on intersex children are the best option to protect the child's wellbeing, therefore it is often the product of a lack of information surrounding this issue, on the part of both the parents and the doctors involved. “The appearance of the external genitalia in DSD generally causes no medical problems or immediate health threats to the child. Moreover, most surgical interventions are irreversible and may restrict later options for sex reversal.”<sup>77</sup> In a report presented to the Parliamentary Assembly of the Council of Europe (PACE), Rapporteur Marlene Rupprecht confirmed the occurrence of routine surgeries and medical interventions, but contradicted the claimed benefits, stating:

“Different empirical studies in Germany have shown that until now 96% of all intersex persons across different categories had received hormonal therapy. 64% of persons medicalisation of intersex people concerned had received a gonadectomy; 38% a reduction of their clitoris, 33% vaginal operations, and 13% corrections of their urina [ry] tract. Many had been submitted to a series of operations and were confronted with post-operative complications. Relevant treatment was traumatising for them and often involved humiliating procedures such as being exposed to large groups of medical professionals and students studying this

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<sup>75</sup> Cox, Carmen, Intersex Babies: Boy or Girl and Who Decides? (ABC News Radio, March 17, 2011) <<http://abcnewsradioonline.com/health-news/intersex-babies-boy-or-girl-and-who-decides.html>> accessed 7 July 2017

<sup>76</sup> Periodic Report of the Switzerland on the Convention on the Rights of the Child

<sup>77</sup> Wiesemann C, Ude-Koeller S, Sinnecker GHG, Thyen U. Ethical Principles And Recommendations For The Medical Management Of Differences Of Sex Development (DSD)/Intersex In Children And Adolescents. European Journal Of Pediatrics, 2010

curious phenomenon. For many, the interventions linked to their syndrome had long-term effects on their mental health and wellbeing.”<sup>78</sup>

This informational chart made to intersex people and created by the International Intersex Australia Organization<sup>79</sup> reflects that in an amount of 170 intersex people, most of them do not agree with cosmetic medical interventions.

Parenting debate topic (percentages, n=170)	Strongly Agree	Agree	Neutral/ Unsure	Disagree	Strongly Disagree
Children should have genitals that precisely match the sex they are reared as.	2.9	5.3	16.5	20.0	55.3
Genitals (e.g. clitorises/ penises) that do not fit a size 'norm', should be surgically altered in size.	2.4	1.8	8.2	14.7	72.9
Doctors should engage in surgical interventions on intersex kids, without knowing long term outcomes.	1.8	0.6	5.3	12.4	80.0
People should select against having intersex offspring (e.g. using IVF selection techniques).	1.8	2.9	14.7	14.1	66.5
Health providers should be able to apply interventions to my sex characteristics (such as surgeries, sterilisation or hormonal treatments) without my informed consent.	2.4	0.6	5.3	8.8	82.9
Adequate choices and information were given to my parents about my congenital sex variation when it was first diagnosed.	4.7	4.7	22.4	14.1	54.1

What happens if it is a bad decision because one does not feel any relationship between their newly assigned sex, and their gender identity? The Human Rights Campaign defines gender identity as “one's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.”<sup>80</sup> A clear example of this is the psychological trauma endured by these people as a result of many years without being listened to. “For 22 years, intersex people have been fighting surgical "genital corrections" on

<sup>78</sup> Agious, S., Human Rights and Intersex People, Council of Europe Commissioner for Human Rights, 2015

<sup>79</sup> Carpenter, M., Intersex: “Stories and Statistics from Australia”, (OII Australia, 3 February 2016)

<<https://oii.org.au/30313/intersex-stories-statistics-australia/>> accessed 4 May 2017

<sup>80</sup> Sexual Orientation and Gender Identity Definitions, Human Rights Campaign, <<http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions>> accessed 7 July 2017

children with variations of sex anatomy, which they criticise as Intersex Genital Mutilations (IGM). For 16 years, they have invoked the UN Convention on the Rights of the Child. Since 2008 survivors engage with the United Nations human rights mechanisms, and since 2012 with the Committee on the Rights of the Child.”<sup>81</sup>

As there is no way to know which sex would be the most preferred by an intersex newborn, someone else invariably decides soon after the birth, removing them of their freedom to choose, their freedom of expression, and their right to self-determination. As Cheryl Chase, intersex person and founder of the Intersex Society of North America contends: “An operation, should not be done to assuage parental embarrassment or anxiety; it should be chosen, if it is chosen at all, by an intersex individual who is old enough to make her own decision and give proper consent.”<sup>82</sup> The Resolution 1952 (2013) ‘Children’s right to physical integrity’ of the Parliamentary Assembly recommends:

“Undertake further research to increase knowledge about the specific situation of intersex people, ensure that no-one is subjected to unnecessary medical or surgical treatment that is cosmetic rather than vital for health during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to persons concerned, and provide families with intersex children with adequate counselling and support.”<sup>83</sup>

Clearly each intersex case is different; as previously mentioned, there are a number of different intersex types. However, in every case, the aim of both doctors and parents should be to protect the intersex person’s rights, according to the principle of self-determination and body integrity.

## **2.1 PROTECTION OF SELF-DETERMINATION AND BODY INTEGRITY**

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<sup>81</sup> Truffer, D and Bauer, M., Press Release by StopIGM, 03 February, 2015

<sup>82</sup> Weil, E., What if It’s (Sort of) a Boy and (Sort of) a Girl? <[www.nytimes.com](http://www.nytimes.com)> accessed 7 may 2017

<sup>83</sup> Council of Europe, Parliamentary Assembly, ‘Children’s Right to Physical Integrity’, Article, 7.5.3, 2013

In this section we will explain carefully the importance of the right of self-determination and the protection of ‘body integrity’ concerning cosmetic medical interventions on intersex newborn children.

### 1. Self – Determination

Each person that is born develops different characteristics, preferences, interests etc., that make them unique compared others. With this in mind, how can someone else choose your gender? The advocacy group, Intersex Society of North America recommends a new management strategy for intersexual children, which is the avoidance of medical interventions in intersex children, who naturally cannot decide these matters for themselves.<sup>84</sup>

‘Individual Self-Determination’, as the Cambridge Dictionary refers, is the “ability or power to make decisions for yourself”. “This seems to be the theoretical viewpoint through which the acquisition and maintenance of identities may be better understood”.<sup>85</sup> Accordingly to his, we must take into account that if others take the decision of practicing medical interventions on the intersex patient without their consent, the future identity is being brought into play. “These procedures violate individuals’ rights to self-determination, bodily integrity and physical autonomy. They come into conflict with children’s rights—to protection, to preserve their own identity, and to express their views about matters that affect them”.<sup>86</sup> It is very important to have adequate information related to the subject and to respect the autonomy of the patient, since it is a personal choice.

Each person should have the possibility to decide who they want to be in the future and, in order to reach that point, the person needs to grow up, experimenting life and thus choosing their own future. For this purpose, the founder of Brujula Intersexual, an Intersex Mexican Organisation, Laura Inter, states: “It seems to me that the right thing is always inform the person. It is never valid to hide information; the doctor’s job is to explain to the person as

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<sup>84</sup> Isna’s Recommendations for Treatment, ISNA, < <http://www.isna.org/node/138> > accessed 7 may 2017

<sup>85</sup> Vlachopoulos, S., Kaperoni, M. , Moustaka, F., The Relationship Of Self-Determination Theory Variables To Exercise Identity, Psychology Of Sport And Exercise, 2010, p.266 <[www.elsevier.com/locate/psychsport](http://www.elsevier.com/locate/psychsport)> accessed 14 June 2017

<sup>86</sup> Stewart, C., Intersex Rights (often violated) are Human Rights, (Erasing 76 Crimes, 2016) <<https://76crimes.com/2016/09/14/intersex-rights-often-violated-are-human-rights/>> accessed 19 June 2017



many times as necessary, in a way that helps an individual understand their intersex variation as it is, something natural.”<sup>87</sup> In regards to this comment, intersex children should be able to collect information and identify themselves before subjecting themselves to genital surgery. As the Journal of Psychology and Clinical Psychiatry refers: “Gender identity is simply reflecting on the fact that regardless of whether we were male or female, our gender was not based on our sex organs; rather, it was determined by our conditioning and our social beliefs; our social influences and our behavior”<sup>88</sup> An example of this, mentioned previously, is the case of doctor John Money who removed Bruce Reimer’s penis due an earlier incident during a basic procedure and advice Reimer’s family to raised him as a girl, claiming that nurture was superior that nature in the context of developing one’s gender identity. “It may be described as: extremely unethical from many points of views, and some would even argue that it crosses moral and legal boundaries, in regards to sexual exploitation and exposure”<sup>89</sup>

To understand intersex people needs, it is important for doctors and parents listen to the individual before taking any decision. Janik Bastien, a sociology professor and an intersex woman explains: “Medical professionals were convinced that they had an exclusive prerogative to manage intersex bodies, and the authority and legitimacy to establish and direct protocols. Participation of intersex people was absent. This dominant behaviour led to the enormous harm many of us have been subjected to”.<sup>90</sup> Therefore, before taking any decision regarding an intersex body, the patient must be able to express him or herself in that way that would make them part of the decision-making. Mr. Anunnaki Ray, a gender/intersex activist, affirms: “How we act, dress, appear as, whom we become, and what surgeries or hormones we may or may not want, should now be up to our own Self-Determination”<sup>91</sup> The Journalist Emily Greenhouse wrote an article for the The New Yorker newspaper detailing her interview

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<sup>87</sup> Inter, L., The Situation of the Intersex Community in Mexico, (Intersex Day, 3 October 2016) <<http://intersexday.org/en/situation-mexico> > accessed 20 June 2017

<sup>88</sup> Khabar, I. Gender Identity: Intersex Individuals, Journal of Psychology and Clinical Psychiatry, Volume 6 Issue 7 – 2016 <<http://medcraveonline.com/JPCPY/JPCPY-06-00406.pdf>,>accessed 14 June 2017

<sup>89</sup> Ibid

<sup>90</sup> Bastien, J., How medical discourse dehumanizes intersex people, (Intersex Day, October 2016) <<http://intersexday.org/en/medical-discourse-bastien-charlebois/>>accessed 20 June 2017

<sup>91</sup> Anonnuki, R., A Male/Female Mosaic Brain Proves We Need the Self-Determination of Gender, 15 setiembre 2015 <<https://anunnakiray.com/2016/09/15/a-malefemale-mosaic-brain-proves-we-need-the-self-determination-of-gender/>,>accessed 7 June 2017

with Jim Ambrose, an intersexual person who is against to medical interventions in intersex children. As he stated: “If they choose, later, to have a surgery—if it’s their choice”.<sup>92</sup>

In 2015, Nils Muižnieks, Council of Europe Commissioner for Human Rights, stated:

“European countries have been slow in recognising and upholding the human rights of intersex people and the gender diversity they represent. It is urgent to end unnecessary medical treatment and surgery of intersex individuals without their consent; to respect their right not to undergo sex assignment treatment; to review medical classifications which treat variations in sex characteristics as a pathology; and to ensure intersex persons’ right to self-determination by facilitating their legal recognition in official documents.”<sup>93</sup>

Muižnieks cites ‘consent’ as a key principle of his argument against immediate medical intervention. The concept of consent can be broken down into three main facets:

The decision must be made voluntarily, without coercion or influence.

- The patient must be provided with sufficient knowledge so as to be informed about the various issues relating to the medical intervention.
- The patient must have the capacity to make these decisions, and therefore be of a fit mental state and an age whereby they can be fully aware of the implications of their decision.

In the case of immediate medical interventions, it is clear that the individual, being an infant, does not have the capacity to decide at that time whether a medical intervention is desirable for them. Once it is established that the individual cannot consent at that age, the question then becomes whether it would be better to perform an medical intervention immediately, and in doing so, deny the individual their right

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<sup>92</sup> Greenhouse, E., New Era for Intersex Rights, (The New Yorker, 2013) <<http://www.newyorker.com/news/news-desk/a-new-era-for-intersex-rights>>accessed 19 June 2017

<sup>93</sup> Council of Europe Commissioner for Human Rights, Europe Disregards Intersex People’s Right To Self-Determination And Physical Integrity, Strasburg, 2015

to autonomy; or whether it would be better to wait until the individual is of a sufficient age to make the decision themselves.

## 2. Body Integrity

Doctors and parents often feel a time pressure when making decisions regarding intersex infants; thus, it is common to practice ‘corrective genital surgery’ to intersex children, violating their body integrity among other principles and rights. The Convention on the Best Interest of the Child, argues:

“In line with the recommendations of the National Advisory Commission on Biomedical Ethics on ethical issues relating to intersexuality, we must ensure that no one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to the children concerned, and provide families with intersex children with adequate counselling and support.”

Intersexuality has widely been considered taboo in society. Therefore we can highlight that it is extremely important to provide information to families and medical institutions about the consequences of unnecessary medical interventions. After years of effort to inform society in many ways about this issue, people today are more aware of the risks that these unnecessary medical practices take and, in this way, there is more protection with regards to gender identity, body integrity, sexual satisfaction, reproductive organs and the quality of life that concern an intersex person. However, sex reassignment operations are still routinely performed on intersex people and nowadays they are known as genital mutilations that have several lifelong consequences concerning the intersex body. These consequences might be irreversible causing painful scarring, sterilization, and reduction of sexual sensitivity among others. As Mauro Cabral, director of the Global Action for Trans Equality (GATE), an Argentinian trans and intersex activist, states:

“I have many scars, lack of sensibility in the skin between my belly button and my pubis and immense tiredness. The treatment with general anaesthesia I had to undergo to for many years has left me exhausted for life.” “The

feeling that I share with many other intersex people is that of someone who has been raped many times and who, moreover, has to deal with the experience of living in a culture where this kind of interventions are not considered to be nor rape nor mutilation but a standard medical treatment.”<sup>94</sup>

These medical practices violate the human rights of intersex people in many aspects, as be explained in greater detail. For now, we can highlight the child's vulnerability in the face of these practices. It is not recommended that parents and doctors subjected intersex children to these kind of procedures, as it may only be a result of a lack of information about intersexuality, or perhaps the cultural feeling of shame, that influences them to choose this approach. As the article 7.2 of the Resolution 1952 of the Parliamentary Assembly of the Council of Europe recommends Member States to:

“Initiate focused awareness-raising measures for each of these categories of violation of the physical integrity of children, to be carried out in the specific contexts where information may best be conveyed to families, such as the medical sector (hospitals and individual practitioners), schools, religious communities or service providers.”<sup>95</sup>

Advocating body integrity and the right to self-determination is extremely important to the fact that they are being violated with the practice of cosmetic medical interventions in intersex newborn children, as has been detailed in this section. Having legislation that protects this two would help creating awareness towards intersex condition.

## **2.2 HUMAN RIGHTS VIOLATED...**

### **WITH THE PRACTICE OF MEDICAL INTERVENTIONS**

This section will explore the human rights that are being violated via the practice of cosmetic medical interventions in intersex newborn children, which is the central feature of the legal analysis provided in this chapter.

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<sup>94</sup> Gender and Excellence, 1 April 2011 <<https://nugenderandexcellence.wordpress.com/2011/04/01/meet-mauro-cabral/#more-173>>accessed 1 July 2017

<sup>95</sup> Resolution 1952 of the Parliamentary Assembly of the Council of Europe, Article 7.2

The United Nations Human Rights Office of the High Commissioner, states that: “Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.”<sup>96</sup>

Each person is born with rights and duties; the rights that protect individuals from violations and the duties that must be fulfilled in order to live in peace. In the case of a person who is born intersex, it is necessary to take into account that there are many rights that are being violated when practicing of medical interventions in order to eradicate an infant’s sexual ambiguity. Some specialists consider that the practice of these surgeries is a way in which the intersex person is helped not to suffer a future life of discrimination, for example but what is really committed is the violation of certain fundamental rights of the person. “The human rights violations linked to this stigma include medically unnecessary surgeries and other invasive treatment of intersex babies and children without consent, which have been condemned as harmful practices and ill treatment by UN bodies, as well as infanticides of intersex babies; and widespread and life-long discrimination, including in education, employment, health, sports, accessing public services, birth registration and obtaining identity documents.”<sup>97</sup> Some of the human rights of the person that are often being violated with the practice of cosmetic surgery in intersex people include the following:

### ***2.2.1. RIGHT TO LIFE***

“Intersex people’s right to life can be violated in discriminatory “sex selection” and “preimplantation genetic diagnosis, other forms of testing, and selection for particular characteristics. Such de-selection or selective abortions are incompatible with ethics and human rights standards due to the discrimination perpetrated against intersex people on the

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<sup>96</sup> United Nations Human Rights Office of the High Commissioner, What are Human Rights?, <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> accessed 7 July 2017

<sup>97</sup> A Step Forward For Intersex Visibility And Human Rights, 25 September 2015, <<http://www.ohchr.org/EN/NewsEvents/Pages/Astepforwardforintersexvisibility.aspx> > accessed 7 May 2017

basis of their sex characteristics.<sup>98</sup> Intersex newborns may end up suffering tragic consequences, including infanticide in some countries. Some people who are not informed or who have not had the appropriate support when having intersex children, believe that being born with a mixture of organs is a serious mistake, and therefore parents and doctors think that ending the life of these intersex children is the best decision. For example, in Kenya, there are cases where parents relate intersex children with a curse or witchcraft, and therefore kill the intersex newborn as a result.<sup>99</sup> In China, a father tried to kill his intersex newborn three times due considering him a ‘monster’.<sup>100</sup> In December 2015, there was a fatal mutilation of intersex Kenyan teenager Muhadh Ishmael by his family because he did not comply his family’s expectations.<sup>101</sup>

Legislation includes the following:

- Article 3 of the *Declaration of Human Rights* states:  
“We all have the right to life, and to live in freedom and safety”
- Article 6.1 of the *International Covenant on Civil and Political Rights* states:  
“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”
- Article 2 of the European Convention of Human Rights states:  
“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”
- Article 6.1 of the *Convention on the Rights of the Child* states:  
“States Parties recognize that every child has the inherent right to life.”

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<sup>98</sup> Carpenter, M., “Submission On The Ethics Of Genetic Selection Against Intersex Traits”; Robert Sparrow (2013), “Gender eugenics? The ethics of PGD for intersex conditions”, *American Journal of Bioethics*, Vol. 13, No. 10, p 29-38.

<sup>99</sup> Grady, H., and Soy. A., ‘The midwife who saved intersex children’, (BBC news, 2017)  
<<http://www.bbc.com/news/world-africa-39780214>> accessed 12 June 2017.

<sup>100</sup> Wangshu, Q., ‘Father held for trying to kill his baby’, (China Daily, 2016)  
<[http://www.chinadaily.com.cn/china/2016-06/21/content\\_25781592.htm](http://www.chinadaily.com.cn/china/2016-06/21/content_25781592.htm)> accessed 12 June 2017

<sup>101</sup> Stewart, C., Intersex rights (often violated) are Human Rights  
<<https://76crimes.com/2016/09/14/intersex-rights-often-violated-are-human-rights/>> accessed 15 June 2017

The right to life is considered one of the most important rights a person has; therefore it is necessary in the case of people who are born with sex ambiguity for parents and medical professionals to have an open mind and not to think that the person necessarily has to fit within the binary system. As we have seen before, this kind of beliefs can lead people who are ill-informed to make detrimental decisions on behalf of the intersex person, as is the case when attempting to kill an intersex newborn. In the field of medical interventions, these actions can carry many consequences such as death, despite the fact that practicing surgeries in order to fix the sex of a person are often not medically necessary.

### ***2.2.2. PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT***

The United Nations Human Rights Office of the High Commissioner states: “In countries around the world, intersex infants, children and adolescents are subjected to medically unnecessary surgeries, hormonal treatments and other procedures in an attempt to forcibly change their appearance to be in line with societal expectations about female and male bodies. When, as is frequently the case, these procedures are performed without the full, free and informed consent of the person concerned, they amount to violations of fundamental human rights.”<sup>102</sup> Medical interventions could arguably be considered as torture, due to the fact that they could bring serious physical and physiological consequences. “Profound negative impacts of these often irreversible procedures have been reported, including permanent infertility, incontinence, loss of sexual sensation, causing life-long pain and severe psychological suffering, including depression and shame linked to attempts to hide and erase intersex traits. In many cases intersex people do not even have access to their own medical records or original birth certificates.”<sup>103</sup> In 2013, Juan E. Mendez, UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pointed out that “Intersex children are often subject to irreversible sex assignment, involuntary sterilisation and/or genital-normalising surgery, performed without their informed consent or that of their

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<sup>102</sup> UN And Regional Experts Urge, End Violence And Harmful Medical Practices On Intersex Children And Adults

<sup>103</sup> Ibid

parents “in an attempt to fix their sex.”<sup>104</sup> He “issued a strongly worded statement condemning non-consensual surgical intervention on intersex people as a form of torture.”<sup>105</sup>

Legislation includes the following:

- Article 5 of the *Universal Declaration of Human Rights* states:  
“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
- Article 7 of the *International Covenant on Civil and Political Rights* states:  
“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”
- Article 3 of the *European Convention of Human Rights* states:  
“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
- 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- 1987 European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment.

Medical interventions used to assign a sex against the express will of the individual can arguably be considered in many cases as a form of torture. The people who are victims of these acts are most often, by the nature of being infants, defenceless people who cannot express themselves appropriately. It is important to be aware of the consequences that these irreversible surgeries can produce, such as lack of sensation, infections, psychological and physical trauma, infertility and many others.

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<sup>104</sup> Report of The Special Rapporteur On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment by , Juan E. Méndez, United Nations, General Assembly, Human Rights Council, 2013.

<sup>105</sup> Agious. S., Human Rights and Intersex People, Council of Europe Commissioner for Human Rights, 2015



### 2.2.3. *RIGHT TO HEALTH*

The right to health is a right that we all have, as is also the case with an intersex child, which can be affected during the practice of such medical interventions as it can bring with it many detrimental consequences for health. As the United Nations Human Rights Office of the High Commissioner states: “The irreversible sex assignment, involuntary sterilization and involuntary genital normalizing surgery and other treatment performed on intersex children without their informed consent, leaves them with permanent, irreversible infertility and causes severe physical and mental suffering.”<sup>106</sup>

“These procedures are rarely medically necessary,<sup>107</sup> can cause scarring, loss of sexual sensation, pain, incontinence and lifelong depression and have also been criticized as being unscientific, potentially harmful and contributing to stigma.”<sup>108</sup>

Legislation includes the following:

- Article 25 of the *Universal Declaration of Human Rights* states:  
“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”
- Article 12 of the *International Covenant on Economic, Social and Cultural Rights* states:  
“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”
- Article 17 of the *Convention on the Rights of the Child* states:

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<sup>106</sup> Information Series On Sexual And Reproductive Health And Rights Lesbian, Gay, Bisexual And Transgender And Intersex People, United Nations Human Rights Office of the High Commissioner, <[http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO\\_LGTG\\_WEB.pdf](http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_LGTG_WEB.pdf)> accessed 25 June 2017

<sup>107</sup> PAHO/WHO, “Therapies”

<sup>108</sup> A/HRC/14/20 (2013), para. 23.

*“ States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health”*

- Article 24 of the *Convention on the Rights of the Child* states:

*“States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.”*

- Article 25 of the UN Convention on the Rights of Persons with Disabilities
- Article 11 of the European Social Charter - Right to protection of Health
- Article 13 of the European Social Charter - Right to social and medical assistance

The fundamental basis of this right is to ensure the health of people. Children not able to be responsible for themselves depend on the care of parents, guardians and in many cases medical professionals. In the case of intersex children, as with all children, it is essential to take care of their physical and mental health; therefore it is not advisable to have medical interventions practiced to assign a specific sex without the adequate consent of the individual, when they bring with them many consequences that can potentially affect the health of the child. For this reason we want to create awareness that medical cosmetic interventions in intersex people risk being highly detrimental to the patient's health in some cases causing depression, anxiety, among others.

#### ***2.2.4 RIGHT TO PRIVATE LIFE***

“The right to privacy encompasses the right to protection of a person's intimacy, identity, name, gender, honour, dignity, appearance, feelings and sexual orientation and extends to the home, the family and correspondence.”<sup>109</sup> This right refers to the person's own private life. The right to privacy states that we should be free to decide what we want in life. At the same time, it advocates and also protects person's individual autonomy. For example, in the case of

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<sup>109</sup> Md Sahabuddin Mondal, 11 February, 2017  
<[http://www.legalservicesindia.com/article/print.php?art\\_id=2260](http://www.legalservicesindia.com/article/print.php?art_id=2260)> accessed 2 June 2017

intersex children, gender, sex, and sexual orientation is what it is needed to protect. We propose that parents and doctors responsible for intersex children must respect these areas that are solely related to their patients.

“Requiring medical treatment in order to change legal gender is breaching with the individual’s right to respect for privacy as described in article eight of the European Convention on Human Rights. The right to privacy also implies the right for recognition of one’s own gender identity.”<sup>110</sup>

Legislation includes the following:

- Article 12 of the *Universal Declaration of Human Rights* states:  
“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”
- Article 17 of the *International Covenant on Civil and Political Rights* states:  
“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”
- Article 16 of the *Convention on the Rights of the Child* states:  
“No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation”
- Article 8 of the *European Convention of Human Rights* states:  
“Everyone has the right to respect for his private and family life, his home and his correspondence”

In conclusion, the right to privacy is a right that concerns us all. Each situation is perceived in a different way, so we must emphasise that, in the case of intersex people, it is important to

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<sup>110</sup> Lindstad, S., Children Have The Right To Their Own Gender Identity, 7 February 2017  
<<http://kjonnsforskning.no/en/2017/02/children-have-right-their-own-gender-identity>> accessed 4 May 2017

respect their gender, sex, and sexual orientation among others aspects of their identity. Sometimes when society believes that these people do not "fit" within the binary system as previously mentioned, sex reassignment is practiced, often irreversibly affecting one's sex, as well as their gender identity.

### ***2.2.5 PROTECTION FROM DISCRIMINATION***

Intersex people suffer from discrimination in many ways; they are often not accepted due the sex characteristics with which they were born. Society often forces people to adopt a particular gender; therefore these individuals are subjected to medical interventions, to determine a specific sex.

“The Council of the European Union and the European Parliament, as well as the Council of Europe, the UN High Commissioner for Human Rights, and the UN Special Rapporteur on Torture, have all pointed out that intersex people can suffer from discrimination that may result in ill treatment, especially during childhood.”<sup>111</sup> The UN has called for governments to end discrimination against intersex people:

“Ban discrimination on the basis of sex characteristics, intersex traits or status, including in education, health care, employment, sports and access to public services, and consult intersex people and organizations when developing legislation and policies that impact their rights.”<sup>112</sup>

Legislation includes the following:

- Article 14 of the *Convention of Human Rights* states:

*“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”*

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<sup>111</sup> European Union Agency For Fundamental Rights, *The Fundamental Rights Situation Of Intersex People*, Austria, 2015, p. 3

<sup>112</sup> Office of the High Commissioner for Human Rights, "United Nations for Intersex Awareness"

Each day intersex people seek protection against discrimination. As previously mentioned, European Legislation possesses some articles which may protect intersex people, although today there is still not concrete legislation that defends the people who are born with ambiguities of sex from the discrimination that they suffer every day. “In seven EU Member States, policy makers or courts embrace broader concepts. These may implicitly cover intersex, for instance: gender (in Austria, Denmark, Finland and the Netherlands; gender identity (in Romania and Slovenia); or both gender and gender identity (in Sweden).”<sup>113</sup>

It is important to note that there is not only discrimination against an intersex person regarding their sexual identity or sexual orientation, but there is also sex discrimination. In any event, discrimination against intersex people can begin when the child is born and the parents and doctors have to determine the sex of the person for the birth certificate. Afterwards, the discrimination continues at the moment that they are pressured into being part of a specific gender group, and thus are subjected to unnecessary cosmetic interventions. It is very important to be aware that intersex people are born with this condition and that they should not be subjected to any type of discrimination but rather should be accepted as the way they are.

#### ***2.2.6. RIGHT TO FREEDOM OF EXPRESSION INCLUDING FREEDOM OF INFORMATION:***

We believe that the ‘freedom of information’ is also one of the rights that are being violated by some doctors and parents by not providing the appropriate information corresponding to their condition to intersex people. The right to information is an extension of the right of expression, which should also concern in the case of intersex persons. Each person has the right to express themselves freely and independently without others impeding and omitting this action, whether by lack of appropriate information or otherwise:

“Freedom of Information (FOI) can be defined as the right to access information held by public bodies. It is an integral part of the fundamental right of freedom of expression, as recognized by Resolution 59 of the UN

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<sup>113</sup> European Union Agency For Fundamental Rights, The Fundamental Rights Situation Of Intersex People, Austria, 2015, p. 4

General Assembly adopted in 1946, as well as by Article 19 of the Universal (1948), which states that the fundamental right of freedom of expression encompasses the freedom to “to seek, receive and impart information and ideas through any media and regardless of frontiers”.<sup>114</sup>

Legislation includes the following:

- Article 19 of the *Universal Declaration of Human Rights* states:

*“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”*

- Article 19 of the *International Covenant on Civil and Political Rights* states:

*“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”*

- Article 11 of the *EU Charter of Fundamental Rights* states:

*“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”*

- Article 10 of the *Convention of Human Rights* states:

*“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This*

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<sup>114</sup> United Nations Educational, Scientific and Cultural Organization, Freedom of Information, <<http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/>>accessed 7 May 2017

*article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”*

When making decisions regarding intersex people, it is necessary to have sufficient and accurate information about the issue. For a long time intersexuality has been considered taboo, and for this reason people have often not been completely informed that the ambiguity of sex exists, and that many intersex people are born every year. It has often been seen as something ‘odd’ and therefore those responsible did not know what to do with them, resulting in many negative consequences for the individual.

### **2.2.7. RIGHT TO FAMILY LIFE**

An attempt is made to defend the right to family in the case of intersex people for two reasons. The first is that when performing medical interventions to the minor sometimes medical professionals removed reproductive organs that are not believed necessary and in this way they denied the opportunity for the intersex person to be able to reproduce. The second reason is that when performing these medical interventions to provide a defined sex sometimes it does not match the gender with which the person identifies, therefore in many cases makes it impossible for the intersex person to marry a person of the same gender.

Legislation includes the following:

- Article 16 of the *Universal Declaration of Human Rights* states:  
*“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”*
- Article 17 of the *International Covenant on Civil and Political Rights* states:  
*“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”*
- Article 23 of the *International Covenant on Civil and Political Rights* states:

*“The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”*

- Article 10 of the *International Covenant on Economic, Social and Cultural Rights* states:

*“The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependant children.”*

- Article 8 of the *European Convention on Human Rights* states:

*“Everyone has the right to respect for his private and family life, his home and his correspondence.”*

- Article 16 of the *European Social Charter* states:

*“With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.”*

It is important to understand that the consequences of performing medical interventions on intersex people in many cases violate the right to family life due intersex people are not given the opportunity to enjoy this right. Having the necessary information about the consequences that these practices entail in this type of cases could help to stop these violations to the inherent human rights of a person.

## CONCLUSION OF CHAPTER II

The aim of this second chapter has been to raise awareness about the rights and principles that are being violated with regards to medical interventions in newborns intersex infants. This phenomenon has been explained with an ethical point of view, as there is much controversy surrounding the ethics of these types of surgeries. As explained above, we believe that



cosmetic sex reassignment surgeries of intersex newborns are frequently unnecessary, since there is no guarantee that the sex chosen is appropriate for the individual. In addition, these interventions violate the principles and rights of the intersex person. Through this research we have reached to the conclusion that parents and doctors should give the intersex newborn the opportunity to develop and explore their own preferences, being able to seek information and then be the person to make the final decision with regards to their condition. It is important to mention that although many rights are being violated with this type of medical intervention, the one that we believe most relevant in this case is the power of decision or self-determination. All people should be free to make their own decisions, so we question why others are responsible for the decision that corresponds to the intersex person. Perhaps at birth they do not have the capacity to choose, but over time they will develop this autonomy, so it is opportune to wait for the person to reach an age in which they can make their own decisions.

### **CHAPTER III**

This chapter will provide different recommendations for parents of intersex children, all of them elaborated by the author of this thesis and other sources. As we have already mentioned, the parents of intersex children are forced to take important decisions, so these recommendations have been made in order to provide them a clearer idea regarding the subject.

On the other hand, many of the recommendations that will be mentioned were made by responsible doctors who suggest different solutions on how to intervene in a case of intersexuality. Finally a conclusion will be reached for both.

Behind medical interventions performed to intersex newborn children, there are people responsible for this decision-making. When a person with ambiguous sex is born, doctors are usually the ones who suggest parents perform surgeries to assign the newborn a specific sex. Sometimes, due to parent's lack of information related to this subject they accept this type of medical interventions without knowing the consequences. In other cases, doctors decide the

reassignment of sex without the consent of the intersex child's parents. The article 6 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, refers that:

“The parents are responsible for taking decisions for children due minors does not have the capacity to consent to an intervention. Although it is very important to highlight that the opinion of the child must be taken into account.”<sup>115</sup>

As previously mentioned, parents are responsible for making decisions towards their children; due to the fact minors do not have the capacity of consent. Therefore, parents should seek for the best interest of the infant; however, in order to reach the best decision, they must be properly informed. It requires having the necessary information for the decision-making. However, years ago doctors believed that with the appropriate surgery was possible to choose a determinate sex and there is still some doctors who believe in that theory. The Department of Health & Human Services, State Government of Victoria, Australia states that:

“Some patients who are now adults regard the decisions made when they were infants, children or adolescents as not being in their best interests. For example, patients have reported significant negative consequences of decisions where they ultimately feel that the wrong gender was assigned, where irreversible surgery was performed, and where the effects of surgery such as loss of sensation or loss of potential fertility have had lasting consequences for the person’s quality of life. In some cases, these outcomes occurred because the risk of embarrassment about difference and the related stigma was given undue weight in the decision-making process.”<sup>116</sup>

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<sup>115</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, article 6

<sup>116</sup> Department of Health & Human Services, State Government of Victoria, Australia, February 2013, <<https://www2.health.vic.gov.au>>accessed 3 July 2017

## RECOMMENDATIONS

Choosing a determinate sex towards intersex condition is a decision parents and doctors have every day. There is always going to be more than one opinion about the best decision towards this condition. This section will conclude with recommendations parents and doctors could use instead of surgery.

On the birth certificate of a person it is mandatory to define if your child is male or female and this is considered as one of the biggest challenges for the parents of an intersex child. The social pressure to choose the newborn's gender can lead to big mistakes like medical interventions when they are not really necessary. As the Australian Intersex Organisation states: "In the society we live in, assigning your child male or female is appropriate. Choose whichever seems predominant, based on the information available to you. Sex assignment does not actually require surgical or hormonal treatment."<sup>117</sup> Therefore it is advisable that at the time of birth, parents should assign the gender that best resembles the intersex newborn parents, giving the possibility over time to the intersex child to discover himself /herself and therefore making their own decisions after being properly informed about their condition.

The Clinical psychiatrist Vernon Rosario, consultant intersex patients and their families at the Clark-Morrison Children's Urological Centre at UCLA state that: "Accessibility of information and studies about these conditions are helping clinicians and patients and their families make informed choices."<sup>118</sup> To this day it is not possible to find as much information as desired since this subject is considered new in our society. However, over the years there is more and more information and people are starting to get interested on, and this is the first step for the decision-making towards intersex condition. Nowadays, there are already organizations advocating body integrity special in intersex people. They mentioned the human rights that are being violated with the practice of medical cosmetic interventions to

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<sup>117</sup> Your Child: Intersex Parents, (OII Australia, 19 May 2013) <<https://oii.org.au/parents/>>accessed 23 June 2017

<sup>118</sup> Meade-Kelly, V., Male or female? It's Not Always So Simple: UCLA Researchers Are Studying The Biological Origins Of Sexual Orientation And Gender Identity, 20 August 2015, <<http://newsroom.ucla.edu/stories/male-or-female>>accessed 23 June 2017

solve the ambiguity of sex. So all this type of information is necessary before making any kind of decision concerning sex reassignment surgeries.

“Support for patients and parents is a paramount in the difficult time surrounding decision making about any medical or surgical treatment of an intersex condition.”<sup>119</sup> Seeking for people who are related to this topic and wants to share their experience is a proper way to deal with it. Finding families who have gone through the same experiences and who can share their point of view objectively, giving the necessary support for these families, which have to make a decision towards this intersex children. Often support groups related with the subject are the best option to find information regarded to intersexuality.

In many cases the families of the intersex person may feel embarrassed to do not understand why their child is born "different" to others, therefore they agree to the pressure of practicing reassignment surgery to their child. The United Nations Human Rights Office of the High Commissioner states; “Parents of children with intersex traits often face pressure to agree to such surgeries or treatments on their children. They are rarely informed about alternatives or about the potential negative consequences of the procedures, which are routinely performed despite a lack of medical indication, necessity or urgency.”<sup>120</sup> Social pressure can greatly harm the decision making about surgeries in intersex children. This is one of the reasons, it is important to put aside embarrassment and focus on the child's well being.

Years ago, it was thought that the ideal was not to let the intersex person know about his condition but rather assign them a specific sex and raise them according to the chosen sex. It is now considered that the intersex person has the right to acknowledge his condition and thus be able to choose their own decisions towards their condition. “They should consistently be told the truth (this includes providers being honest about uncertainty), and should be given copies of medical records as soon and as often as they ask for them.”<sup>121</sup>

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<sup>119</sup> Department of Health & Human Services, State Government of Victoria, Australia, February 2013, <<https://www2.health.vic.gov.au>>accessed 3 July 2017

<sup>120</sup> The United Nations Human Rights Office of The High Commissioner, End Violence And Harmful Medical Practices On Intersex Children And Adults, UN And Regional Experts Urge, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>> accessed 23 June 2017

<sup>121</sup> What Does ISNA Recommend For Children With Intersex?, <<http://www.isna.org/faq/patient-centered>>accessed 3 June 2017

“Intersex children and adults should be the only ones who decide whether they wish to modify the appearance of their own bodies – in the case of children, when they are old or mature enough to make an informed decision for themselves.<sup>122</sup> We strongly believe that the intersex person should be the one taking decisions towards their own body and well-being. Reassignment of sex concerns only to the intersex person, therefore parents and doctors should wait for the individual’s consent.

“Puberty means that bodies change, and diagnosis with an intersex variation can happen at puberty or during adolescence. The same issues that arise with infant genital surgeries can also happen with medical interventions during adolescence. This can include interventions based on presumed gender identity.”<sup>123</sup> Another issue that we must take into consideration is that puberty brings with it many changes in a person’s body. It is advisable to wait for the body to complete their own development, and after that it would be easier to analyse what are the physical and physiological changes that an intersex person can experience.

### CONCLUSION CHAPTER III

We can come to the conclusion that for the responsible of taking decisions towards an intersex person it can be complicated, since until today there is not much information concerned intersex issues. Due lack of information society is not well informed about the consequences medical interventions can bring, therefore it is difficult to achieve other solutions for situations. However, these recommendations are for the intersex child parents as well for doctors who perform medical interventions. They are made to create awareness that reassignment of sex surgeries in newborns are not always necessary. Other solutions are provided to pursue in intersexuality cases.

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<sup>122</sup> The United Nations Human Rights Office Of The High Commissioner, End Violence And Harmful Medical Practices On Intersex Children And Adults, UN And Regional Experts Urge, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>>accessed 23 June 2017

<sup>123</sup> Your Child: Intersex Parents, (OII Australia, 19 May 2013) <<https://oii.org.au/parents/>>accessed 23 June 2017

## GENERAL CONCLUSION

There are many different approaches regarding the practice of cosmetic medical interventions to reassign the sex of an intersex person, ranging from the medical, psychological, anthropological, sociological, and ethical, among others. However, it is uncommon to find many legal studies on this subject. The intention of this thesis is to raise awareness about the human rights that are being violated through the practice of unnecessary medical interventions upon intersex people.

There remains a widespread lack of knowledge about intersexuality. That a healthy person can be born with ambiguity of sex, gonads or chromosomes, remains difficult to accept for many doctors and parents of an intersex child. This lack of knowledge also spreads to the medical cosmetic interventions that are performed upon intersex people in order to correct their ambiguity of sex. Many times, these decisions are made due the pressure that exists as a result of the culturally established binary gender system to 'fit' into one of the two traditional options, i.e. male and female. There is the risk that parents' decisions can be self-centred, and influenced by external factors: for example, cultural or religious traditions and beliefs, societal stigma, or even the parents' own preferred gender of the newborn child. Instead, they should have the obligation to advocate in the best interests of the child, setting aside their own emotions, bias and preconceptions.

Some people consider that the solution to this 'problem' is the practice of sex reassignment, although oftentimes, due a lack of available information, they do not know about the irreversible consequences that these medical interventions risk. It has been proved that in many cases these cosmetic medical interventions generate physical and psychological consequences for the intersex person. Therefore, it is advisable to wait for the intersex person to reach an age whereby they could implement their right to self-determination, being able to choose what they think is appropriate for their own body. In this way, those responsible would be respecting the individual's integrity.

In almost all countries it is mandatory to define the newborn's gender in the birth certificate. This is one of the reasons that doctors can feel pressure to practice 'genital corrections' in children with ambiguity of sex, with the intention that the child corresponds to one of the two gender options. We recognise that changing the binary gender mentality in society is a complex task, but it is important to raise the awareness that intersexuality exists, as the Office of the United Nations High Commissioner for Human Rights states: "Up to 1.7% of people have intersex traits, roughly the same proportion of the population who have red hair."<sup>124</sup> We should therefore acknowledge the phenomenon of intersexuality, as opposed to trying to 'correct' it.

After Malta adopted the Gender Identity, Gender Expression and Sex Characteristics Act in 2015, the first law to prohibit surgery and treatment on the sexual characteristics of minors without informed consent, it is expected that other countries will begin to review their legislation, implementing the protection of newborn intersex children, due the serious consequences that these medical interventions often result in, whilst at the same time violating their fundamental human rights.

In seeking to protect the intersex child's physical and psychological well-being, by promoting their autonomy and gender identity, we have made some proposals for parents and responsible medical professionals. However, these proposals are subject to the fact that countries need to reform their laws, thereby giving the opportunity to the intersex person to choose their own gender, as they deem it appropriate, and without having previously undergone sex reassignment surgery against their consent.

The first proposal for parents and professionals would be to choose the most appropriate gender for the child, in order to fulfil the requirements of the birth certificate. In this way, over time, the child will be given the opportunity to change the gender with which they truly identify, in this way exercising their right to self-determination.

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<sup>124</sup> United Nations High Commissioner for Human Rights

The second proposal would be for it to no longer be obligatory to identify the newborn intersex as only either 'male' or 'female' on the birth certificate. This option would give the intersex child the opportunity to be able to choose their own gender when they reach a suitable age. In this way they would be protecting all the rights that, as we have previously mentioned, are being violated with the practice of unnecessary cosmetic medical interventions. It is important that parents of the intersex person and the responsible doctors seek information about this condition, thereby helping the intersex child to understand their situation.

The third proposal would be that no specific gender necessarily be assigned at birth and that the term 'indeterminate' could instead be used to define intersex people. We believe that this proposal would contribute to the individual's psychological well-being, by encouraging the cultural acceptance of intersexuality by providing it as an option on the birth certificate, as opposed to the current situation whereby it is seen as a grave error of nature.

With the aim of shedding light on these issues, the author hopes that this thesis will contribute to the academic debate surrounding a subject that remains broadly unknown for most of the general public.



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