



# BEYOND THE BINARY

POLICY BRIEF

Advancing Legal Recognition for  
Intersex Persons in India



CENTRE FOR  
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# BEYOND THE BINARY

POLICY BRIEF

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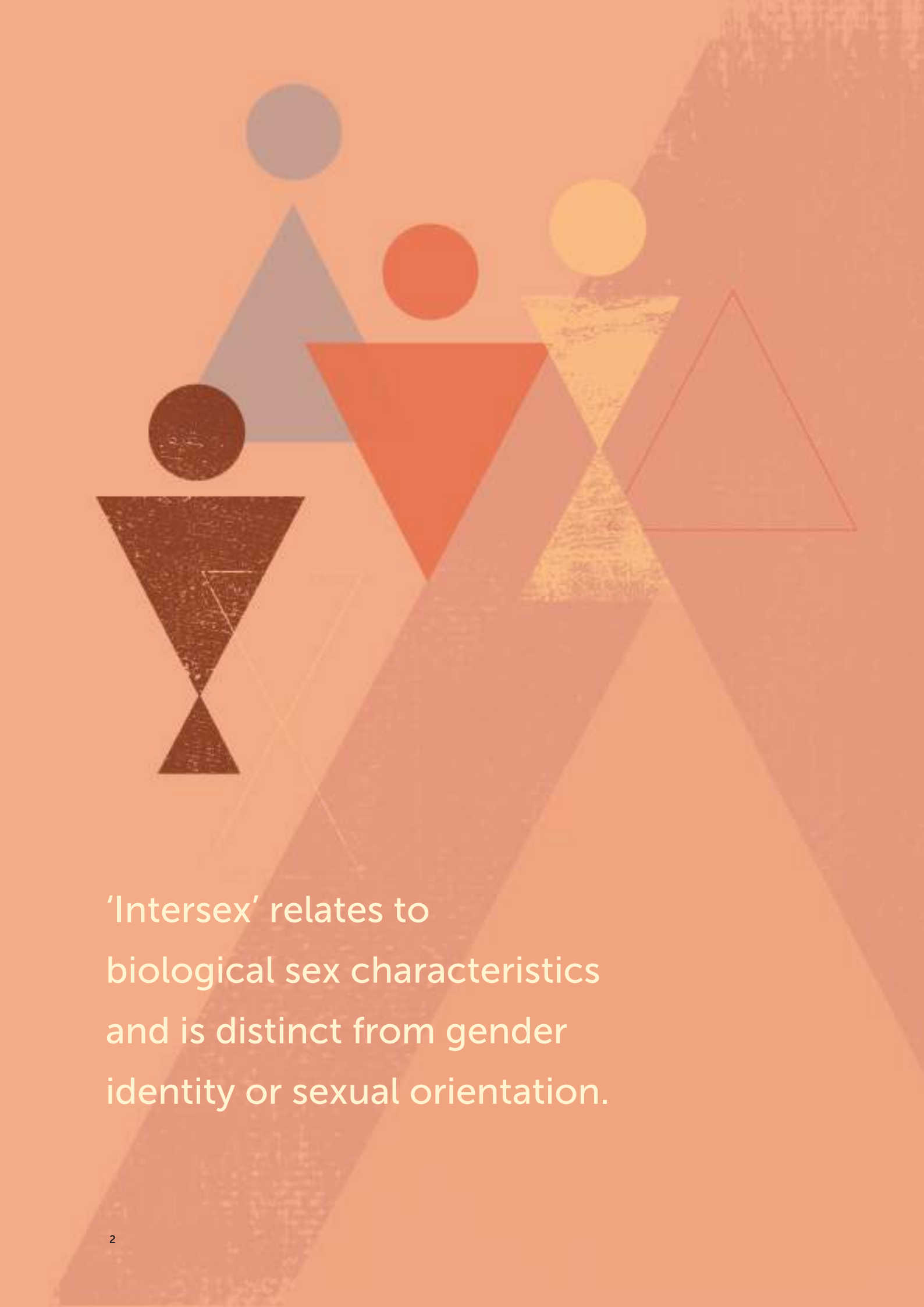
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An abstract geometric composition on a light orange background. It features several overlapping triangles and circles in various colors and orientations. A large, light blue triangle points upwards on the left. A dark brown triangle points downwards on the left. A large orange triangle points downwards in the center. A yellow triangle points downwards on the right. A light pink triangle points upwards on the right. There are also several circles: a light blue circle at the top left, a dark brown circle on the left, a red circle in the center, and a yellow circle on the right. The shapes are layered, creating a sense of depth and complexity.

'Intersex' relates to biological sex characteristics and is distinct from gender identity or sexual orientation.

## SECTION I

# Introduction

In India, intersex identities have remained largely unacknowledged. 'Intersex' is a term used to describe a range of bodily variations and includes persons born with sex characteristics that do not fit the typical binary notions of male or female bodies.<sup>1</sup>

It also includes variations at the chromosomal level that may not physically manifest at all.<sup>2</sup> 'Intersex' relates to biological sex characteristics and is distinct from gender identity or sexual orientation.

The first judicial mention of 'intersex persons' was in *NALSA v Union of India*<sup>3</sup> in 2014 where the Supreme Court of India referred to the intersex identity under the transgender umbrella.<sup>4</sup> Thereafter, the Madras High Court in a landmark judgment in *Arunkumar and Anr. v The Inspector General of Registration and Ors.*<sup>5</sup> prohibited sex (re)assignment surgeries on intersex infants and children. The term 'intersex' thereafter has been included under the Transgender Persons (Protection of Rights) Act, 2019, which has been recently passed, where 'person with intersex variations' is defined,<sup>6</sup> but there are no specific protections, prohibitions and entitlements that reflect an intersex person's experience.

This Policy Brief proposes the need for legal recognition of intersex persons in India. The first part of the Policy Brief highlights the role of intersex persons within the transgender persons' movement and that intersex persons' rights need to be understood even within the transgender umbrella. The second part of the Policy Brief articulates the need for having a comprehensive legal definition

of the term 'intersex' in India keeping in mind definitions from other parts of the world. The third section outlines the unique discrimination that intersex persons face. Finally, the Policy Brief makes some recommendations for effecting policy changes that lead to meaningful legal recognition of intersex persons.

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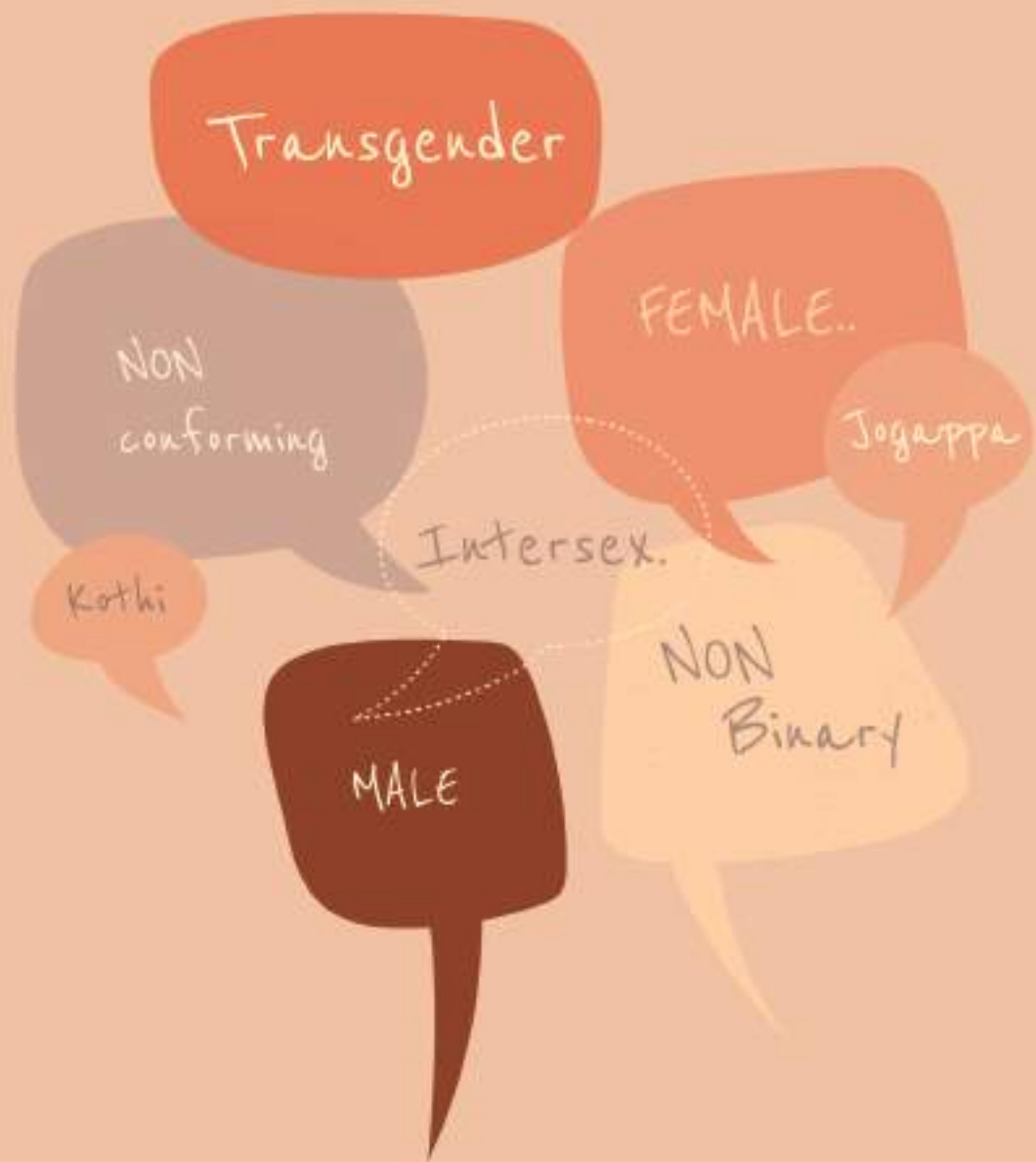
<sup>2</sup>United Nations Office of the High Commissioner of Human Rights (n 1).

<sup>3</sup>National Legal Services Authority v Union of India and Ors. (2014) 5 SCC 438.

<sup>4</sup>National Legal Services Authority (n 3) [47].

<sup>5</sup>Arunkumar and Anr v The Inspector General of Registration and Ors. W.P. (MD) No. 4125 of 2019 and W.M.P. (MD) No. 3220 of 2019.

<sup>6</sup>The Transgender Persons (Protection of Rights) Act 2019, s. 2(i).



While the trans rights movement is extremely vibrant and strong in seeking the right to self-identify one's gender identity, intersex persons working as part of the trans rights movement have been invisible, largely because so little was known about intersex persons.

## SECTION II

# Intersex Persons' Movements under the Transgender Umbrella

### A. INTERSEX PERSONS UNDER THE TRANSGENDER UMBRELLA

While LGBTQI movements and campaigns have gained momentum in recent years, intersex persons' issues still remain misunderstood even within other queer communities.<sup>7</sup> While the trans rights movement is extremely vibrant and strong in seeking the right to self-identify one's gender identity, intersex persons working as part of the trans rights movement have been invisible, largely because so little was known about intersex persons.

In *NALSA v Union of India* the Supreme Court of India for the first time recognized the discrimination faced by and affirmed the rights of intersex persons under the transgender umbrella. It defined "intersex" as a person whose genitals are ambiguously male-like at birth, but when this is discovered, the child who is previously assigned to the male sex would be re-categorized as an intersex person.<sup>8</sup>

Following the decision in *NALSA*, there have been cases in various High Courts where persons sought the right to employment for transgender persons, and many of these Petitioners were intersex persons. In *Nangai v The Superintendent of Police*,<sup>9</sup>

the Madras High Court directed reinstatement of the Petitioner, Nangai (an intersex person who identified as a woman), as a woman police constable, upholding her right to self-identify her gender.<sup>10</sup> The Court recognized that compelling a person to undergo medical examination for gender determination without a legislation violated their fundamental rights under Article 21 of the Constitution of India<sup>11</sup> and stated that not treating Nangai as a woman, on the basis of medical declaration of her being a transgender and forcing her to accept her identity as such, would violate her fundamental right to equality, non-discrimination, freedom of speech and expression, life and personal liberty guaranteed by the Constitution of India.<sup>12</sup> The Court further condemned statutory and customary laws that have recognized only male and female sexes, stating that "*unfortunately, from time immemorial, there is a third sex and the people belonging to the third sex have not been recognized and treated as normal human beings with dignity*"<sup>13</sup>. In *G. Nagalakshmi v Director General of Police*<sup>14</sup>, the Petitioner was an intersex person who was declared to be a 'pseudo-hermaphrodite' or 'transsexual' and

the Madras High Court set aside her dismissal from the post of police constable<sup>15</sup> and upheld her self-identified gender as female<sup>16</sup>. The Madras High Court in 2014 and the Rajasthan High Court in 2016 have also upheld the right to self-identify one's gender in the cases of *T. Thanusu v Secretary to Government of Tamil Nadu*<sup>17</sup> and *Ganga Kumari v State of Rajasthan*<sup>18</sup> where the petitioners were intersex persons who were selected as a woman police constable, and who had applied for the post of woman police constable, respectively.

The legal interventions initiated by intersex persons have taken the transgender persons' movement in India forward, but the recognition of intersex persons and their specific issues still remain invisible within the trans rights umbrella.

Despite the important role that intersex persons play in transgender rights' movements, there is still lack of legal recognition of the identity of intersex persons' in India, their struggles and the discrimination they face.

## B. THE INVISIBILITY OF INTERSEX IDENTITY

While intersex persons are stigmatized and encounter prejudice regularly, empirical data regarding the lives of intersex persons' and the kind of discrimination they face is lacking.<sup>19</sup> The intersex identity is invisible primarily because it is considered the same as the transgender identity.<sup>20</sup>

The term 'intersex' is also an umbrella term<sup>21</sup> and is different from the transgender category, although the two identities may overlap and share some concerns and struggles.

While the transgender identity is a person's self-determined gender, which could be male, female, non-conforming, non-binary, kinship based identities and personhood like hijra, kinnar, kothi, jogappa or others; the intersex identity is linked to the sex of persons that is not male or female or is non-binary.

Conflating transgender and intersex identities makes invisible the unique and particular concerns of intersex persons.<sup>22</sup> Despite the social and legal developments in India that have begun to make space for different sexualities and gender identities, intersex persons (those who would have once been called hermaphrodites or 'eunuchs') remain even more marginal than transgender persons.

As many as 1.7% of children are born intersex - with reproductive organs, genitals, hormones or chromosomes that do not fit the usual expectations of male and female, according to the United Nations.

They are often made to undergo surgery to bring the appearance and function of their genitalia into line with that expected of males or females, which research suggests can lead to psychological damage later in life. There is also the widespread reality of abandonment of intersex babies and children, infanticide and mutilation and these issues are largely ignored, even among the LGBT+ community, because of their small population and because they are widely misunderstood.

Only when intersex persons are legally recognized it would be possible to address some of these specific concerns of the community.



Therefore, intersex persons and their rights must be identified along with transgender persons. This policy brief emphasizes that even with overlaps, specific vulnerabilities that accrue to intersex persons that

have already been recognized by law need to be addressed in their specificity. This will center the protections for intersex and trans persons under various judgments.

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<sup>8</sup>National Legal Services Authority (n 3) [47].

<sup>9</sup>Nangai v The Superintendent of Police, Karur District 2014 SCC OnLine Mad 988, (2014) 4 Mad LJ 12.

<sup>10</sup>Nangai (n 9) [36]-[37].

<sup>11</sup>Nangai (n 9) [38].

<sup>12</sup>Nangai (n 9) [40].

<sup>13</sup>Nangai (n 9) [18].

<sup>14</sup>G. Nagalakshmi v Director General of Police 2014 SCC OnLine Mad 2536, (2014) 7 Mad LJ 452.

<sup>15</sup>G. Nagalakshmi (n 14) [14].

<sup>16</sup>G. Nagalakshmi (n 14) [9].

<sup>17</sup>T. Thanusu v Secretary to Government of Tamil Nadu 2014 SCC OnLine Mad 3475, (2014) 6 Mad LJ 93 at [18]-[19].

<sup>18</sup>Ganga Kumari v State of Rajasthan MANU/RH/1466/2017 at [28], [30]-[31].

<sup>19</sup>'I Want to Be like Nature Made Me': Medically Unnecessary Surgeries on Intersex Children in the US' (Human Rights Watch, 25 July 2017) 83 <<https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>> accessed 8 December 2019.

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<sup>21</sup>Dan Christian Ghattas, 'Human Rights between the Sexes: A preliminary study on the life situations of inter\* individuals' (Heinrich Böll Stiftung, October 2013) at 10 <[https://www.boell.de/sites/default/files/endf\\_human\\_rights\\_between\\_the\\_sexes.pdf?dimension1=ds\\_feminismus](https://www.boell.de/sites/default/files/endf_human_rights_between_the_sexes.pdf?dimension1=ds_feminismus)> accessed 8 December 2019.

<sup>22</sup>Dan Christian Ghattas (n 21) at 8.

The Yogyakarta Principles ('the Principles') are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles provide a binding legal standard on the human rights of gay, lesbian, bisexual, transgender and intersex persons and the obligations of States to promote and protect these rights, ensure full equality and address discrimination.

## SECTION III

# The Need For A Separate Legal Definition Of Intersex Persons

### A. INTERSEX PERSONS UNDER THE TRANSGENDER UMBRELLA

In India, the 'intersex' identity is barely recognized, either socially or legally. The first notable judicial mention of the term 'intersex' in Indian jurisprudence can be seen in *NALSA v Union of India*,<sup>23</sup> where the Supreme Court ('the Court') considered the historical background of transgender persons in India.

The Court stated that many transgender-related identities, cultures and experiences<sup>24</sup> were perceived, and mentioned some of these experiences.

When referring to the term 'intersex', the judgment states: *"Eunuch: Eunuch refers to an emasculated male and intersexed to a person whose genitals are ambiguously male-like at birth, but this is discovered the child previously assigned to the male sex, would be recategorized as intersexed – as a Hijra."*<sup>25</sup> The above extract implies that the Court subsumed the term 'intersex' within the term

'eunuch', a derogatory term with colonialist connotations used for gender minorities and transgender persons.<sup>26</sup>

Although in *NALSA* the Court exhibited an expansive, progressive and inclusive knowledge of different gender identities, no separate discussion or deliberation around the specific vulnerabilities and rights of 'intersex' persons was explored.

After the *NALSA* judgment, three different statutes have been drafted in India pertaining to the rights and entitlements of transgender persons. The Rights of Transgender Persons Bill, 2014 ('2014 Bill') was drafted to formulate and implement a comprehensive law to protect the rights of transgender persons. The definition of 'transgender person' as provided in Clause 2(t) of the 2014 Bill is extracted below:

"(t) 'transgender person' means a person, whose sense of gender does not match with the gender assigned to that person at birth and includes trans-

men and transwomen (whether or not they have undergone sex reassignment surgery or hormone therapy or laser therapy etc.), gender-queers and a number of socio-cultural identities such as –kinnars, hijras, aravanis, jogtas etc.”<sup>27</sup>

The above definition does not encompass intersex persons. In 2014 in India, the intersex rights movement was in its nascent stages and there was no real undressing of the existence of a separate intersex identity.

Thereafter The Transgender Persons (Protection of Rights) Bill, 2016 ('2016 Bill') was introduced in the Lok Sabha to protect the rights and to secure the welfare of transgender persons and for matters connected therewith and incidental thereto.<sup>28</sup>

The definition of 'transgender person', provided in Clause 2(i) of the 2016 Bill is extracted below:“(i) “transgender person” means a person who is— (A) neither wholly female nor wholly male; or (B) a combination of female or male; or (C) neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.”<sup>29</sup>

The 2016 Bill was the first draft legislation to include the phrase 'intersex' to connote persons with intersex variations within the transgender persons' definition. It is notable, however, that the term 'intersex' was not defined at all.

After the 2016 Bill was introduced in the Lok Sabha on 2 August 2016, it was referred to the Standing Committee on Social Justice and Empowerment for examination and report.<sup>30</sup> The Standing Committee considered various materials and inputs from different stakeholders in formulating its report, and stated the following in the Preface:

*“The Committee would like to assure and remind to all the members of transgender community that, “A*

*historic shift is underway, you are not alone in your struggle for the end of violence and discrimination. It is a shared struggle. Transgender is not an anomaly. It is a part of the spectrum of people’s realities.*

While there is no shame in being gay, lesbian, bisexual, transgender or intersex or even straight - there is a most certainly shame and dishonor in being a homophobe, a transphobe and a bigot”.<sup>31</sup>

The preface acknowledged the intersex identity, but the report's introduction equated intersex persons with 'eunuchs'. It stated that 'intersex' people are not visibly distinguishable in the West, but on the contrary, 'eunuchs' in India dress and behave in a characteristic manner, in addition to living in groups and standing out ubiquitously in the Indian subcontinent.<sup>32</sup>

The Standing Committee report mentions intersex persons frequently, but always in the context of 'hijra' or 'eunuch'. The report, however, clarified that *“eunuch’ refers to people who wish to be treated as neither male nor female and to embrace a lifestyle that is in conformity with their sexual divergence” – and “does not include intersex persons who pretend to lead their lives as either males or females and embrace a normal lifestyle.”<sup>33</sup>*

The Committee stated that the 2016 Bill does not include, address and protect the interests of intersex persons and recognized in particular that their concerns differ from the concerns of transgender persons.<sup>34</sup> The Standing Committee recommended renaming the 2016 Bill as “The Transgender and Intersex Persons (Protection of Rights) Bill, 2016”.<sup>35</sup> The Ministry of Social Justice and Empowerment responded to this recommendation by stating that 'transgender' is an umbrella term, which necessarily includes intersex persons and declined to amend the Bill holding that it was unnecessary.<sup>36</sup> The Standing Committee also notably commented on the definition of 'transgender person' in the 2016 Bill, that it conflated intersex and transgender persons, even though they are different.<sup>37</sup> The Committee

recommended adding a separate definition of the phrase ‘persons with intersex variations’, as – *“Persons who at birth show variations in their primary sexual characteristics, external genitalia (sic), chromosomes, hormones from the normative standard of female or male body are referred to as persons with intersex variations”*.<sup>38</sup> Considering intersex persons’ specific medical concerns, the Committee also recommended that the 2016 Bill include punishments for abortion of intersex foetus’ and forcible surgical assignment of the sex of intersex infants.<sup>39</sup>

## Thereafter, the Transgender Persons (Protection of Rights) Act, 2019 (‘2019 Act’) was passed in December 2019.

The 2019 Act for the first time defines a ‘person with intersex variations’ and also transgender persons to include intersex persons as follows:

**“2(i) “person with intersex variations” means a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standard of male or female body.”<sup>40</sup>**

*“2(k) “transgender person” means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, gender queer and person having such socio-cultural identities as kinner, hijra, aravani and jogta”.*<sup>41</sup>

There has been widespread criticism of the 2019 Act which has now been passed, including on the ground of failure to name and substantively include any intersex rights.<sup>42</sup> Although intersex persons were defined in the 2019 Act, the Act still failed to enact specific protections, prohibitions and entitlements that are unique to intersex persons.<sup>43</sup>

## B. INTERSEX PERSONS’ RIGHTS IN A COMPARATIVE CONTEXT

The lack of comprehensive legal recognition and protections for intersex persons in India’s domestic laws is contrasted by an abundance of such provisions in other jurisdictions. Laws of Germany vis-à-vis the European Union, Australia, Kenya and South Africa are noteworthy in defining the term ‘intersex’, and, thereby providing insights regarding defining the term in a better manner in India.

The Civil Status Law, 2007 in Germany requires that gender of all children be documented in their birth register, but allows persons to be identified as neither female nor male if, at birth, neither sex can be assigned to the child.<sup>44</sup> The relevant sections of the Civil Status Law state as follows:

*“§ 21 Entry in the birth register*

*(1) The following information is documented in the birth register: ...*

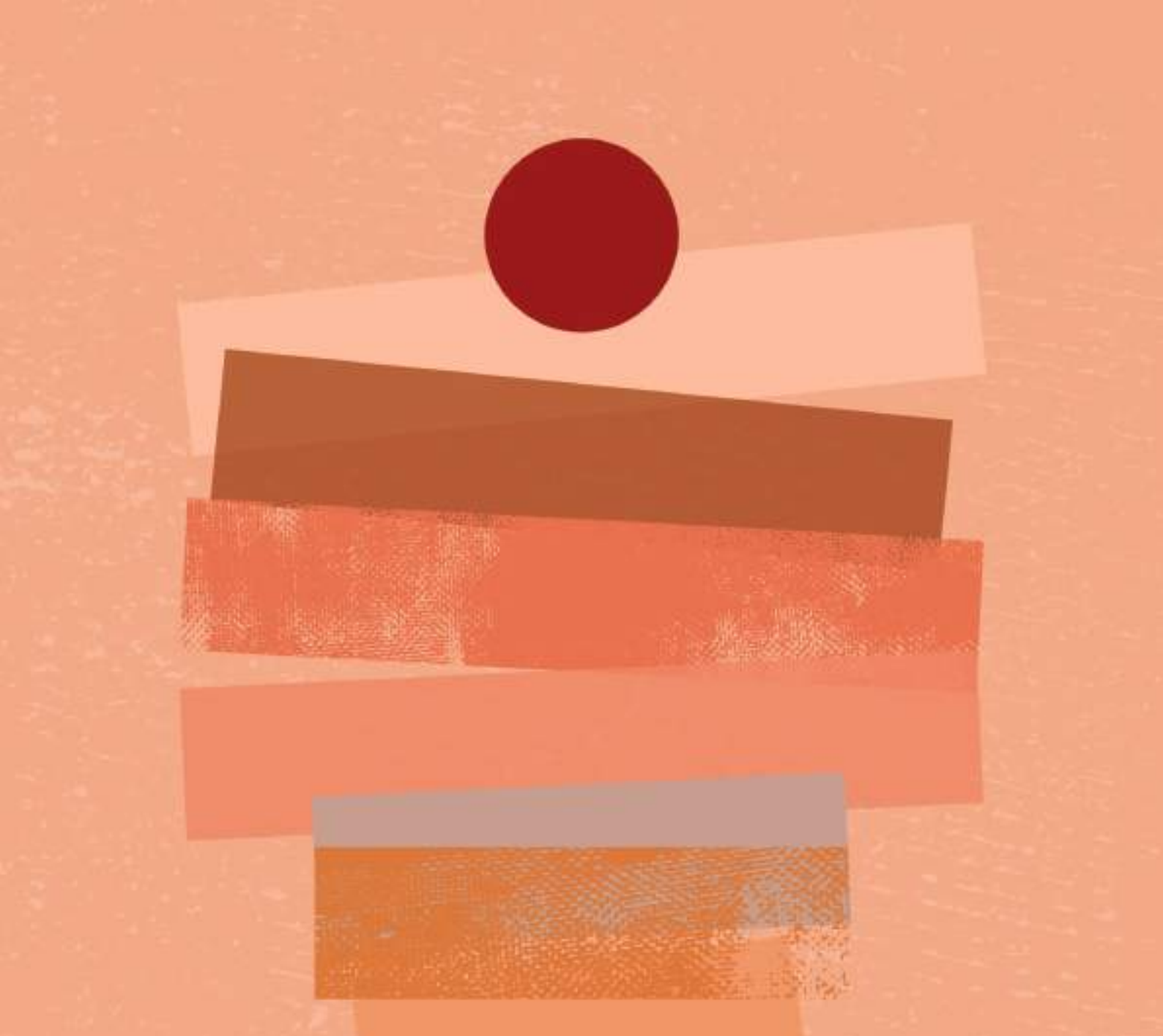
*3. the child’s gender,*

*§ 22 Missing data ...*

*(3) If the child can be assigned neither the female nor the male gender, that person’s civil status shall be documented in the birth register without indicating the person’s gender.”<sup>45</sup>*

Section 22(3) of the Civil Status Law, 2007 was introduced only in 2013 and persons whose gender was not ‘clearly female or male’ were not covered by any legal provision earlier.<sup>46</sup>

In the case of *1 B v R 2019/16* before the Federal Constitutional Court of Germany, the



Malta is the first EU Member State to explicitly provide protection against discrimination on the ground of 'sex characteristics'. The 'Gender Identity, Gender Expression and Sex Characteristics Act' requires public services to eliminate unlawful discrimination and harassment on the ground of sex characteristics.

constitutionality of Sec. 21(1) read with Sec. 22(3) of the Civil Status Act was challenged on the grounds of it being violative to the fundamental right of intersex persons' general right of personality under Art. 2(1) (right to personality) read with Art. 1(1) (right to human dignity) of the Basic Law. Further it was also challenged as violating the principle of equal treatment under Art.3(1) of the Basic Law and right to non-discrimination under Art. 3(3) of the Basic Law.<sup>47</sup>

Sec. 21(1) read with Sec. 22(3) of the Civil Status Act mandates that an individual has to identify themselves in binary gender terms as either male or female. It thereby violates the fundamental right provided under Art.3(3) by discriminating against persons who do not permanently identify in the scheme of binary genders, and thus unconstitutional. The Federal Constitutional Court in this regard stated that if Civil Status Act requires a gender entry, but at the same time denies persons recognition of their gender identity of their choice under Civil Status Act, it specifically threatens the self-determined development and protection of these persons' personality.

The Federal Constitutional Court observed that application of Sec. 22(3) (missing data) of the Civil Status Act means that the gender entry in the birth register can be left blank and does not alter the gender binary and implies that *"legal recognition of another gender identity is ruled out and that the gender entry has simply not been clarified yet, that a solution has not been found yet or even that it has been forgotten."* Further, it stated that it does not imply positively recognising a person as per their perceived gender and therefore, it is an inaccurate entry in the birth register.<sup>48</sup> After the Federal Constitutional Court declared the provisions unconstitutional, Germany's Parliament adopted a new law in December 2018 wherein people not identifying within the gender binary can choose the category 'diverse' on official documentation.<sup>49</sup>

Malta is the first EU Member State to explicitly provide protection against discrimination on the ground of 'sex characteristics'. The 'Gender Identity, Gender Expression and Sex Characteristics Act'<sup>50</sup> requires public services to eliminate unlawful discrimination and harassment on the ground of sex characteristics. It also requires public services to promote equality of opportunity for all, irrespective of these characteristics.

In Spain, the Basque Country Act 14/2012 on non-discrimination based on gender identity includes references to "intersex persons".<sup>51</sup>

In the United Kingdom, the Scottish Offences (Aggravation by Prejudice) Act 2009 includes intersex issues in its very wide definition of gender identity i.e. "not standard male or female"<sup>52</sup>

The Alteration of Sex Description and Sex Status Act (No. 49 of 2003) ('Act') in South Africa defines intersex persons as "persons whose congenital sexual differentiation is atypical to whatever degree."<sup>53</sup> This law is accompanied by other statutes including the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 which inserted the term 'intersex' within the definition of 'sex' in 2005, thereby making it a prohibited ground for discrimination.<sup>54</sup>

Possibly the most progressive legislation is the Sex Discrimination Act, 1984 amended by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act, 2013 from Australia which defines intersex widely, as follows:

***"Section 4(1) - intersex status means the status of having physical, hormonal or genetic features that are:***

- (a) neither wholly female nor wholly male; or***
- (b) a combination of female and male; or***
- (c) neither female nor male<sup>55</sup>"***

However, even this legislation does not protect intersex children from Intersex Genital Mutilation ('IGM').

The Yogyakarta Principles ('the Principles') are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles provide a binding legal standard on the human rights of gay, lesbian, bisexual, transgender and intersex persons and the obligations of States to promote and protect these rights, ensure full equality and address discrimination.<sup>56</sup> The Yogyakarta +10 additional principles recognize the unique needs and characteristics of intersex people through its understanding of sex characteristics (as mentioned in the Preamble). The Preamble defines sex characteristics as *"each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty."*<sup>57</sup> The expansive definition provides a powerful tool for the recognition of intersex rights in the context of changes to sex characteristics, and discrimination on the basis of

sex characteristics. Principle 31 calls for an end to sex/gender registration and inclusion in legal identification documents.<sup>58</sup>

Principle 32, which provides for bodily and mental integrity, recognizes that forced and coercive medical practices violate human rights principles and bodily integrity and calls on governments to combat the stigma and stereotypes that underpin treatment.

To properly enforce and recognize intersex persons' rights, a clear, cogent and comprehensive definition of 'intersex' is essential. One can argue that the way ahead for India begins with enacting a proper legal definition of intersex persons that takes into account insights from a comparative perspective.

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<sup>24</sup>National Legal Services Authority (n 3) [47].

<sup>25</sup>National Legal Services Authority (n 3) [47].

<sup>26</sup>Dipika Jain, 'Shifting Subjects of State Legibility: Gender Minorities and the Law in India' (2017) 32(1) Berkeley Journal of Gender, Law and Justice 39 <<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1362&context=bglj>> at 58 accessed 8 December 2019.

<sup>27</sup>The Rights of Transgender Persons Bill 2014, cl 2(t).

<sup>28</sup>The Transgender Persons (Protection of Rights) Bill 2016, Long Title.

<sup>29</sup>The Transgender Persons (Protection of Rights) Bill 2016, cl 2(i).

<sup>30</sup>'Special Funds for Transgenders', (Government of India, Ministry of Social Justice and Empowerment, 8 January 2019 <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=187295>> accessed 8 December 2019.

<sup>31</sup>Standing Committee on Social Justice and Empowerment, The Transgender Persons (Protection of Rights) Bill, 2016 (LS 2016-17, 43) at ix.

<sup>32</sup>Standing Committee on Social Justice and Empowerment (n 31) at 1-2.

<sup>33</sup>Standing Committee on Social Justice and Empowerment (n 31) at 2.



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<sup>38</sup>Standing Committee on Social Justice and Empowerment (n 31) at 93.

<sup>39</sup>Standing Committee on Social Justice and Empowerment (n 31) at 93.

<sup>40</sup>The Transgender Persons (Protection of Rights) Act 2019, s. 2(i).

<sup>41</sup>The Transgender Persons (Protection of Rights) Act 2019, s. 2(k).

<sup>42</sup>'India: Transgender Bill Raises Rights Concerns' (Human Rights Watch, 23 July 2019) <<https://www.hrw.org/news/2019/07/23/india-transgender-bill-raises-rights-concerns>> accessed 8 December 2019

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<sup>49</sup>'Germany adopts intersex identity into law', (BBC, 1 January 2019) <<https://www.bbc.com/news/world-europe-46727611>> accessed 9 December 2019.

<sup>50</sup>Gender Identity, Gender Expression and Sexual Characteristics Act 2015, s. 13 <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>> accessed 9 December 2019.

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<sup>52</sup>Offences (Aggravation by Prejudice) (Scotland) Act 2009 (asp 8), ss. 2(2) and 2(8).

<sup>53</sup>The Alteration of Sex Description and Sex Status Act 2003, s. 1 <[https://www.gov.za/sites/default/files/gcis\\_document/201409/a49-03.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a49-03.pdf)> accessed 9 December 2019.

<sup>54</sup>Promotion of Equality and Prevention of Unfair Discrimination Act 2000, ss. 1(1) and 6 <<http://www.justice.gov.za/legislation/acts/2000-004.pdf>> accessed 9 December 2019.

<sup>55</sup>Sex Discrimination Act 1984, s. 4(1) <<https://www.legislation.gov.au/Details/C2018C00499>> as amended by Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, s. 7 <<https://www.legislation.gov.au/Details/C2013A00098>> accessed 9 December 2019.

<sup>56</sup>Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity' (International Commission of Jurists, March 2007) <<https://www.refworld.org/docid/48244e602.html>> accessed 9 December 2019.

<sup>57</sup>The Yogyakarta Principles Plus 10 – Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles' (International Commission of Jurists, 10 November 2017) <<https://www.refworld.org/docid/5c5d4e2e4.html>> accessed 9 December 2019 at Preamble.

<sup>58</sup>The Yogyakarta Principles Plus 10 (n 57) Principle 31.

One major concern for intersex persons is Intersex Genital Mutilation ('IGM'), often performed at infancy or early childhood when their intersex variations become apparent, and where the infants' parents or doctors decide on life-altering surgeries for intersex children.



## SECTION IV

# Intersex Rights

Intersex persons face discrimination in ways that is sometimes similar to that faced by the LGBTQI community and sometimes very different. They have certain unique concerns beyond the concerns of other communities within the LGBTQI umbrella. As intersex persons may not conform to the male-female binary from birth, they often face discrimination from a young age, which is different from the discrimination that transgender persons face. As the intersex body is pathologized causing many medical interventions, intersex persons need different forms of protections from discrimination, which is rooted in child rights.<sup>59</sup>


While transgender persons' primary concern regarding the registration of their sex is the possibility of changing the sex registered at birth upon their own self-declarations,<sup>60</sup> however, intersex persons' have been concerned with the need to specify a sex at birth.<sup>61</sup> Removing sex recognition altogether, could resolve the concern of both communities (and other communities existing outside the gender binary).<sup>62</sup> This Policy Brief highlights two main concerns faced by intersex persons – protection from Intersex Genital Mutilation ('IGM'); and registration of sex at birth.

### (i) Protection from Intersex Genital Mutilation or the Right against Forced Surgery:

Intersex rights against forced surgery is one amongst many rights that require specific recognition in law.

One major concern for intersex persons is Intersex Genital Mutilation ('IGM'), often performed at infancy or early childhood when their intersex variations become apparent,<sup>63</sup> and where the infants' parents or doctors decide on life-altering surgeries for intersex children.<sup>64</sup> Such surgeries are performed for 'sex normalisation', i.e. to make intersex children conform to the gender binary.<sup>65</sup>

IGM can include clitoral reduction, removing sensitive erectile tissues to reduce clitoral size for cosmetic reasons, gonadectomies (removing gonads), forced sterilizations and procedures to end natural hormone therapy.<sup>66</sup> IGM is risky, immensely painful, damages nerves permanently, scarring and infections being some possible side effects. These procedures often require multiple operations, thereby increasing side effects and suffering. These

The background features a series of overlapping circles in shades of orange and yellow at the top. Below them, a series of triangles in similar colors are arranged in a row, creating a geometric pattern. The overall color palette is warm and monochromatic.

Registering sex of the child is also usually a precondition to obtaining a complete birth certificate. This also adds pressure on doctors and families to specify the sex as either male or female and therefore to conduct forced surgeries.

invasive surgeries are rarely life sustaining measures, since intersex individuals usually lead completely healthy lives.<sup>67</sup> A few necessary surgeries that intersex persons may undergo are removing urinary tract obstructions and repairing bladder exstrophy for children born with exposed internal organs.<sup>68</sup>

The international community has recognized the gravity of human rights violations against intersex persons through IGM and consequently, numerous countries have enacted laws recognizing intersex persons and accorded them rights to protect them against their unique concerns.<sup>69</sup>

The World Health Organisation's ('WHO') report titled 'Sexual Health, Human Rights and the Law' recommends deferring intersex genital mutilation (IGM) until the intersex persons can decide for themselves.<sup>70</sup> Similarly, the WHO, the Office of the High Commissioner for Human Rights ('OHCHR'), UN Women, The Joint United Nations Programme on HIV and AIDS ('UNAIDS'), the United Nations Development Programme ('UNDP'), the United Nations Population Fund ('UNFPA') and the United Nations Children's Fund ('UNICEF') jointly opposed early genital surgeries on intersex children in 2013, stating, *"intersex persons, in particular, have been subjected to cosmetic and other non-medically necessary surgery in infancy, leading to sterility, without informed consent of either the person in question or their parents or guardians."*<sup>71</sup>

Recently, the Madras High Court delivered a landmark judgment in *Arunkumar and Anr. v The Inspector General of Registration and Ors.*<sup>72</sup> where Justice G.R. Swaminathan addressed the issue of forced surgery on intersex children.<sup>73</sup> The Court held that parental consent cannot be equated with the consent of the child and prohibited medical

## procedures being performed on intersex children at birth.

The Court directed the Tamil Nadu Government to issue a Government Order to effectively ban SRS on intersex infants and children and also directed the Government to launch awareness programmes in this regard.<sup>74</sup>

In August 2019, complying with the High Court order, the Tamil Nadu Government issued a Government Order (G.O. (Ms) No. 355 dated 13.08.2019)<sup>75</sup> and became the first state in India to ban sex assignment surgeries on intersex children.<sup>76</sup>

The Yogyakarta Principles apply international human rights law to gender expression and sex characteristics apart from sexual orientation and gender identity.<sup>77</sup>

The Yogyakarta Plus 10 principles rectified the issues from the "best interest of the child" principle, which, under Principle 32, maintains that forced and coercive medical practices violate the human rights principles of freedom from torture, cruel, inhuman, and degrading treatment notwithstanding what the "best interest of the child" is considered.<sup>78</sup> This principle demands a person's free, prior and informed consent, except in medically urgent situations.<sup>79</sup>

The Yogyakarta Plus 10 match the 2017 Darlington Statement (Australia), a joint statement by intersex activists in New Zealand and Australia and the 2013 Malta Declaration. The Malta Declaration demands: *"To put an end to mutilating and 'normalising' practices such as genital surgeries, psychological and other medical treatments through legislative and other means. Intersex people must be empowered to make their own decisions affecting own bodily integrity, physical autonomy and self-determination."*<sup>80</sup>

Similarly, the Darlington Statement demands *"the immediate prohibition as a criminal act of deferrable medical interventions, including surgical and hormonal interventions, that alter the sex characteristics of infants and children without personal consent. We call for freely-given and fully*

*informed consent by individuals, with individuals and families having mandatory independent access to funded counseling and peer support.*<sup>81</sup>

Hence, the complete prohibition of all forced surgeries on intersex infants and children needs to be made legally.

## (ii) Legal Recognition of Sex at Birth

Most countries require registering a child's sex at birth, thus pressurizing parents to register the sex as either male or female.<sup>82</sup> Registering sex of the child is also usually a precondition to obtaining a complete birth certificate. This also adds pressure on doctors and families to specify the sex as either male or female and therefore to conduct forced surgeries.

The demand for registering the sex immediately after birth initiates the process of socializing the child as either a male or a female thereby forcing the child to conform to stereotypical assumptions associated with the binary genders.

Hence there should be a possibility of keeping the sex option open, and undecided in the birth certificate and to be added later. There is also a need to make change of sex in birth certificates easy and not cumbersome. The Gujarat High Court in the case of *Mulla Faizal v State of Gujarat*<sup>83</sup> has allowed this. This case dealt with an issue where the appellant who was born with an intersex variance but assigned the female gender at birth, sought a name and gender change in his birth certificate. The Registrar (Births and Deaths) rejected his application on the ground that no law mandated him to make a change in birth certificates in such circumstances. The court held that the argument of the Registrar was unreasonable in the present case as the original entry made reflecting the gender of the appellant as female could be considered erroneous in the present

case, and therefore held that the Registrar had the duty to make the corrections as requested by the appellant.

Certain countries allow changing the child's sex after initial registration. In South Africa, under the Alteration of Sex Description and Sex Status Act, 2003, intersex persons have the right to apply to the authorities to alter their sex description in the birth register.<sup>84</sup> The law in India similarly allows changing the sex assigned at birth as per the *NALSA* judgment.<sup>85</sup>

However, our Birth registration laws do not make it easy and allow for the change of any details only if it is a typographical error. As per Section 15 of the Registration of Births and Deaths Act, 1969, only when it is proved to the satisfaction of the Registrar that any entry made by him under the Act is erroneous in form or substance, or has been fraudulently or improperly made, only then can the original entry in the birth or death certificate be appropriately corrected or cancelled in accordance with the rules made by the State Government.<sup>86</sup>

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- <sup>80</sup>'Malta Declaration' (Organization Intersex International Europe, December 2013) at point 1 <<https://oiieurope.org/malta-declaration/>> accessed 8 December 2019.
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- <sup>84</sup>The Alteration of Sex Description and Sex Status Act 2003 (n 53) at s. 2.
- <sup>85</sup>National Legal Services Authority (n 3).
- <sup>86</sup>The Registration of Births and Deaths Act 1969, s. 15.

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Changing the sex/  
gender marker on  
documents including on  
birth certificates should  
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## SECTION IV

# Conclusion and Recommendations

This Policy Brief has argued for the need to recognize intersex persons and intersex rights legally, given their unique experiences and the inability of the overlap between transgender and intersex identities to address all the vulnerabilities and rights of the latter community. Legal recognition of intersex rights creates awareness about the unique identity of intersex persons, can curb IGM and other forms of discrimination and stigma that intersex persons face.

The Transgender Persons (Protection of Rights) Act, 2019 defines ‘person with intersex variations’ without extending any specific legal protection for the intersex community. Therefore, we need a law to provide the following specific protections for the intersex community:

### **A. A COMPLETE PROHIBITION ON NON-LIFE-SAVING SURGERIES ON INTERSEX BABIES AND CHILDREN:**

We need a law banning intersex infanticide, IGM and SRS of intersex infants and children and other ‘sex normalizing or assignment’ procedures, unless

they are life-saving/medically necessary. This is also in line with the directions of the Madras High Court in *Arunkumar and Anr. v The Inspector General of Registration and Ors.*<sup>87</sup>. Malta has enacted the Gender Identity, Gender Expression and Sex Characteristics Act, 2015 recognizing the right to bodily integrity and physical autonomy.<sup>88</sup> The Maltese legislation protects all children from non-consensual and non-urgent modifications to their sex characteristics.<sup>89</sup> A similar legislation should be enacted in India for recognizing the right to bodily integrity and autonomy since these rights are not included under the Transgender Persons (Protection of Rights) Act, 2019.

### **B. SEX REGISTRATION IN BIRTH CERTIFICATES CAN BE BROADENED TO INCLUDE NO SEX OR INCLUSION OF A TEMPORARY SEX/GENDER:**

Sex markers could be included when required for availing gender specific social entitlements catering to a specific gender. Sex registration options should include the ‘intersex’ identity. Further, sex registration at birth should be made optional, and the stakeholders must be provided with access

to counseling and education to enable informed decision-making. This allows for provision of gender specific services while providing an opportunity to the individual to change sex at a later age.

### **C) CHANGING OF SEX / GENDER MARKERS TO BE MADE EASY:**

Changing the sex/gender marker on documents including on birth certificates should be legally possible and without much difficulty. A common procedure should be established under The Registration of Births and Deaths Act, 1969 for changing the gender marker where required by any individual, and not only in the cases where the original entry is erroneous, or fraudulently or incorrectly made. This would be useful for not only intersex persons but also for transgender persons.

### **D) TRAINING:**

Intersex children face significant trauma, stigma and discrimination while growing up, which families/ caregivers, educational institutions, healthcare professionals, law and society must address meaningfully. Teacher training programmes must

address inclusive teaching methods, and they should spread knowledge about the existence of intersex persons in order to ensure that non-binary and gender questioning/non-conforming children are not harassed or discriminated. Additionally, doctors and parents must be similarly sensitized to ensure that they understand intersex variations and their specific concerns. Healthcare professionals/ institutions must ensure that intersex children and their caregivers receive necessary support.

### **E) SUPPORT:**

In addition to sensitization and training, psychological support must be provided to parents and intersex children. This includes not only an understanding of intersex persons and accepting the non-binary identities, but also taking them through each stage of life. Further, support from medical professionals for families to understand intersex persons is required, and should be state endorsed.

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# BEYOND THE BINARY

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