

Submission to the  
Office of the High Commissioner for Human Rights

on

**THE DUTY TO RESPECT, PROTECT AND FULFIL THE  
HUMAN RIGHTS OF INTERSEX PERSONS IN INDIA**

for preparation of the  
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## **About**

The Centre for Health Equity, Law & Policy is a research, knowledge production and advocacy forum which works on law & policy issues related to health, embedding its work in the right to health as envisaged within India's constitutional framework and her international commitments. It is located at the Indian Law Society, Pune.

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## Context

Discourse surrounding intersex people is often restricted to forced and non-life saving medical interventions against intersex infants. Less spoken about are other forms of violence that the intersex community at large is commonly subjected to, such as the surrender, abandonment or even infanticide of intersex children.<sup>1</sup> Minors with intersex variations are at heightened risk of being trafficked, and even being “handed over”,<sup>2</sup> regardless of legal adoption procedures. Similarly, while the aspect of secrecy of forced medical interventions on intersex infants is often brought up, lesser acknowledged is the harm propagated by the overarching purposeful societal and ‘archival silences’.<sup>3</sup> These are disabling silences<sup>4</sup> that lead to the denial, erasure and invisibilisation of subaltern<sup>5</sup> identity labels, including the intersex identity. They also precipitate a lack of sociotechnological infrastructure for people belonging to or identifying with such identities. Such persons become vulnerable to violence without any practical recourse, and are caught in a vicious cycle of oppression.

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<sup>1</sup> Centre for Law and Policy Research and Solidarity Foundation. *Beyond the Binary: Advocating Legal Recognition for Intersex Persons in India*. 2020.  
<https://vartagensex.org/wp-content/uploads/2020/07/119-clpr-intersex-lgl-rcgntn-policy-brf-2020.pdf>

<sup>2</sup> Bhattacharjee, Sumit. “KGH Doctor “Gives Away” Baby with Intersex Traits to Transgender Group.” *The Hindu*, 19 June 2021,  
[www.thehindu.com/news/national/andhra-pradesh/kg-h-doctor-gives-away-baby-with-intersex-traits-to-transgender-group/article34862043.ece](http://www.thehindu.com/news/national/andhra-pradesh/kg-h-doctor-gives-away-baby-with-intersex-traits-to-transgender-group/article34862043.ece). Accessed 11 Oct. 2024.

<sup>3</sup> Moss, Michael, and David Thomas. *Archival Silences*. Routledge, 11 May 2021.

<sup>4</sup> Mannergren Selimovic, Johanna. “Gendered Silences in Post-Conflict Societies: A Typology.” *Peacebuilding*, vol. 8, no. 1, 30 July 2018, pp. 1–15, <https://doi.org/10.1080/21647259.2018.1491681>.

<sup>5</sup> Spivak, Gayatri Chakravorty. *Can the Subaltern Speak?: Reflections on the History of an Idea*. New York, Columbia University Press, 1988.

# Root causes of violations of the human rights of intersex persons

The transgender, gay and lesbian communities often bear the brunt of violence because of the visibility of their presentation and expression. Intersex persons, on the other hand, might go years without realising their identities - depending on the type of intersex variation they have, and the surgery they may have had during childhood to modify their external genitalia. More often, however, intersex persons might become aware of their identity only upon facing ancillary medical complexities such as nerve damage, chronic incontinence, and complications in reproduction.

## I. Rigid patriarchal binaries

Patriarchy is briefly summarised as a system of control, violence, and oppression and the maintenance of power imbalances through the reinforcement of social constructions that solely benefit one category of people (cis-gendered heterosexual men from upper social stratas) over the rest through the enforcement of conceptual binaries and dichotomies. The intersex identity is often sought to be erased, ousted or 'corrected' precisely because it is thought to be a non-normative presentation<sup>6</sup> of the 'natural' sex binary.

## II. Patriarchal colonialism as a politics of control

Research<sup>7</sup> suggests that factors such as gender, race and local politics were purposefully weaponized by colonisers to idealise western ideals and norms and penalise 'otherness' in relation to the body, despite atypical hormonal levels not being exclusive to intersex persons<sup>8</sup>. The effect of such "othering"<sup>9</sup> is the invisibilisation of intersexuality, such as the discourse on Caster Semenya, Dutee Chand and Imane Khelif's 'eligibility' to participate in sports as women in the face of diverse female bodies' non-conformity to western ideas of femininity and 'femaleness'.<sup>10</sup>

## III. Honour-shame code of patriarchal social control

Indian society has succeeded in upholding and reinforcing patriarchal morality via dual social codes of conduct: honour and shame. Ignominy and social ostracization of a dishonoured individual - and by extension, their dishonoured family - is an exercise of evoking humiliation and 'shame' to serve as socially acceptable extra-judicial punishment and deterrence. This social outcasting is stringent because shame is contagious<sup>11</sup>: should any person interact with a dishonoured individual, they risk being labelled as dishonourable as well. Indeed, this contagion is an

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<sup>6</sup> Roemer, Moritz. "Making Intersex and Non-Binary People Count? Ambivalent In\_visibilities in the German Microcensus." *Journal of Gender Studies*, vol. 32, no. 8, 9 Oct. 2023, pp. 898–909, <https://doi.org/10.1080/09589236.2023.2258077>. Accessed 7 Nov. 2024.

<sup>7</sup> Akande, Rabiya. "An Imperial History of Race-Religion in International Law." *American Journal of International Law*, 19 Oct. 2023, pp. 1–78, <https://doi.org/10.1017/ajil.2023.58>. See also: Boateng-Ade, Evelyn. "Free at Last: An Introspective Guide into the Embedded Roots of Colonialism in the Current State of Healthcare in Ghana." *Undergraduate Journal of Public Health*, vol. 6, no. 0, 29 Apr. 2022, <https://doi.org/10.3998/ujph.2310>.

<sup>8</sup> Atypical hormonal levels are also commonly observable in people with PCOS, diabetes, etc.

<sup>9</sup> Keener, Kayla. *Under Western Authority: Discourses of Intersex, "FGM", and Human Rights*. 17 Jan. 2018, [scholarspace.library.gwu.edu/concern/gw\\_etds/7h149q056](https://scholarspace.library.gwu.edu/concern/gw_etds/7h149q056).

<sup>10</sup> Karkazis, Katrina, et al. "Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes." *The American Journal of Bioethics*, vol. 12, no. 7, July 2012, pp. 3–16, [www.ncbi.nlm.nih.gov/pmc/articles/PMC5152729/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC5152729/), <https://doi.org/10.1080/15265161.2012.680533>.

<sup>11</sup> Karen, Robert. Shame. *The Atlantic Monthly*, 1992, <http://michaelseabaugh.com/wp/wp-content/uploads/2021/12/Shame.pdf>.

effective incentive for parents<sup>12</sup> of intersex persons to unethically permit or even seek genital “normalising” or “correcting” surgeries and encourage propagation of the practice despite them being forms of violence and violations.

#### IV. Preference for a "normal" child

There are two characteristics of a child considered "normal" at birth in India - male<sup>13</sup>, and fully able-bodied. The intensification of misogynistic attitudes has led to what used to be a male-child preference evolving into a sinister repulsion towards female children at large. The desire for able-bodied children is reflected, for example, in the preamble to the *Medical Termination of Pregnancy Act, 1971*, which expressly lists eugenics as one of its primary grounds of permitting abortion. With such legitimization of normativity, it is no surprise that intersex children are considered "abnormal." Additionally, some studies showed that parents of intersex children preferred a male sex re-assignment, possibly because of the social advantages of growing up as a male in a patriarchal society.<sup>14</sup>

#### V. The non-guarantee of sex education in schools

School-level sex education has been scapegoated as a morality issue for decades in India, leading to several states such as Maharashtra, Karnataka, Rajasthan, Gujarat and Madhya Pradesh effectively banning it,<sup>15</sup> diluting its contents or not implementing it in government schools. This has occurred as a result of protests by parents and teachers alike on the grounds of age-inappropriateness, and unfounded concerns that the formal introduction of the very idea of sex would inevitably lead to an increase in adolescent sexual behaviour. In some states, bans have led to school teachers' reluctance to even broach the topics of anatomy and physiology in relation to sex organs and sex variations.<sup>16</sup>

Even in states that have not banned sex education from being taught in schools, there is a lack of incorporation of Comprehensive Sexuality Education into syllabi. It is perceived as a tool challenging normativity<sup>17</sup> because it empowers individuals to question and cease performance of the very gender norms that patriarchy relies so heavily upon.<sup>18</sup> Talking about diverse sexual identities and attractions in relation to physical acts of sex and the concept of pleasure is viewed as starkly 'contrary' to paternalistic socio-cultural morality.

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<sup>12</sup> Bishop, Amie. Harmful Treatment: The Global Reach of So-Called Conversion Therapy. *OutRight Action International*, 2019.

<sup>13</sup> Das, Arpita. "Aching to Be a Boy': A Preliminary Analysis of Gender Assignment of Intersex Persons in India in a Culture of Son Preference." *Bioethics*, vol. 34, no. 6, June 2020, pp. 585–92, <https://doi.org/10.1111/bioe.12750>.

<sup>14</sup> Joseph, Angela Ann, et al. "Gender Issues and Related Social Stigma Affecting Patients with a Disorder of Sex Development in India." *Archives of Sexual Behavior*, vol. 46, no. 2, 20 Sept. 2016, pp. 361–367, <https://doi.org/10.1007/s10508-016-0841-0>.

<sup>15</sup> Pawsey, Gauri. "Challenging the Status Quo of Sex Education in India." *Feminism in India*, 13 Dec. 2020, [feminismindia.com/2020/12/14/challenging-the-status-quo-of-sex-education-in-india/](https://doi.org/10.1177/26318318231155993), <https://doi.org/10.1177/26318318231155993>.

<sup>16</sup> Dey, Amrita. Formal And Informal Sexuality Education: A Study of Kolkata. 2015, *Jadavpur University*, PhD, [https://ncert.nic.in/division/der/pdf/Amrita\\_Dey.pdf](https://ncert.nic.in/division/der/pdf/Amrita_Dey.pdf).

<sup>17</sup> Mallick, Saberi. "Navigating Comprehensive Sexuality Education in India: Cultural Sensitivities and Implementation Challenges." Orfonline.org, OBSERVER RESEARCH FOUNDATION ( ORF ), 12 June 2024, [www.orfonline.org/expert-speak/navigating-comprehensive-sexuality-education-in-india-cultural-sensitivities-and-implementation-challenges](http://www.orfonline.org/expert-speak/navigating-comprehensive-sexuality-education-in-india-cultural-sensitivities-and-implementation-challenges). Accessed 23 Oct. 2024.

<sup>18</sup> Patterson, Susan, et al. "How Men and Women Learn about Sex: Multi-Generational Perspectives on Insufficient Preparedness and Prevailing Gender Norms in Scotland." *Sex Education*, vol. 20, no. 4, 7 Nov. 2019, pp. 441–456, <https://doi.org/10.1080/14681811.2019.1683534>. Accessed 27 Sept. 2020.

## VI. The intersex identity is not explicitly mentioned in undergraduate medical curriculum

The medical curriculum stipulated by the Guidelines for Competency Based Medical Education (CBME) Curriculum, 2024<sup>19</sup> includes very limited and ambiguous mentions of intersex variations, all of which consider them as abnormalities that ought to be “corrected” or done away with. As such, intersexuality has only been inferred in the following topics:

Module	Topic	Description (supplied)
Physiology	Reproductive Physiology	Intersex implied as “abnormalities” in relation to sex differentiation.
Paediatrics	Chromosomal Abnormalities	Only 2 explanations of intersexuality (Turner’s Syndrome and Klinefelter Syndrome) have been considered in relation to their “genetic basis, risk factors, clinical features, complications, prenatal diagnosis, management and genetic counselling.”
Anatomy	Principles of Genetics, Chromosomal Aberrations & Clinical Genetics	Again only 2 Turner’s Syndrome and Klinefelter Syndrome have been considered in relation to their “genetic basis & clinical features.”
Psychiatry	Gender Identity Disorder	Pathologizes non-normative expressivity of gender, and the intersex identity can only be inferred from their (one singular use in the entire document) of the term ‘LGBTQIA+ community’.

The study of medicine is confined to the normative sex binary of female and male, therefore concepts such as hormones, puberty, reproduction and its ancillary bodily occurrences are not studied or taught in the context of people that do not fit within the sex binary. As a result, it is not commonly understood that intersex persons may experience such milestone biological occurrences differently, or might not experience them at all.

## VII. Consent

Consent for surgeries conducted on intersex persons is a complex issue that calls for increased scrutiny and regulation. Carrying out a medical intervention on minor intersex persons in light of their inability to consent or refuse is inherently an act of violence against intersex persons and the intersex identity at large.

### A. Parental consent

Obtaining parental consent to perform forced “corrective” surgeries on intersex minors fails to fulfil two key contingencies:<sup>20</sup> that the medical intervention ought to be life-saving, and that it ought to be in the best interests of the child. In reality, such surgeries are reportedly carried out on

<sup>19</sup> National Medical Council, Guidelines for Competency Based Medical Education (CBME) Curriculum 2024, [https://www.nmc.org.in/MCIRest/open/getDocument?path=/Documents/Public/Portal/LatestNews/organized\\_compressed.pdf](https://www.nmc.org.in/MCIRest/open/getDocument?path=/Documents/Public/Portal/LatestNews/organized_compressed.pdf)

<sup>20</sup> Behrens, Kevin G. “A Principled Ethical Approach to Intersex Paediatric Surgeries.” *BMC Medical Ethics*, vol. 21, no. 1, 29 Oct. 2020, [bmcmedethics.biomedcentral.com/articles/10.1186/s12910-020-00550-x](https://doi.org/10.1186/s12910-020-00550-x), <https://doi.org/10.1186/s12910-020-00550-x>.

intersex persons irrespective of parental consent, or with inadequate<sup>21</sup> information provided to the parents to sufficiently derive informed consent from them, as misplaced as such consent might be in law.

### **B. Consent obtained through or due to misinformation**

Unequal power dynamics between a patient and medical practitioner(s) due to vulnerability and information asymmetry is well documented.<sup>22</sup> When medical practitioners overstep the bounds of professional conduct as guided by medical ethics and provide unsolicited non-medical opinions regarding conditions without sufficient disclaimers, it is inevitable that such opinions may be perceived<sup>23</sup> as medical facts by patients or families of patients. Similarly, phrasing intersex variations as a ‘disorder’ or ‘abnormality’ is bound to skew societal perception of a natural occurrence, and may play into pre-existing myths and unfavourable beliefs held with regard to intersexuality.

## **VIII. Absence of ‘intersex’ in State records**

At present, a person’s sex is recorded by the State at various points such as at birth and death,<sup>24</sup> for disability certificates, for admissions to schools, and for employment. None of these occasions offer ‘intersex’ as a selection option. This might be due to the lack of understanding of SOGIESC concepts (as evidenced by the fact that even today the terms ‘gender’ and ‘sex’ are thought to be synonymous and are used interchangeably by the Indian government across its records<sup>25</sup>). Ultimately, this leads to the invisibilization and non-recognition of intersexuality in procedures.

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<sup>21</sup> “The Rights of Children Born Intersex.” *Amnesty International*, 10 May 2017, [www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/](http://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/).

<sup>22</sup> Greco, Cinzia. “Too Much Information, Too Little Power: The Persistence of Asymmetries in Doctor-Patient Relationships.” *Anthropology Now*, vol. 12, no. 2, 3 May 2020, pp. 53–60, <https://doi.org/10.1080/19428200.2020.1826178>. Accessed 1 Apr. 2021.

<sup>23</sup> Dreger, Alice Domurat. *Intersex in the Age of Ethics*. University Publishing Group, 1999, p.31.

<sup>24</sup> Vijayanunni, M., et al. “Handbook on Civil Registration - Census 1991.” Registrar General & Census Commissioner of India, 1997.

<sup>25</sup> To name a few, the options for the category of “gender” in (i) the [e-application form for legal aid on the website of the National Legal Services Authority](#) are ‘Male’, ‘Female’ and ‘Other’ - despite NALSA being the petitioner in the landmark Supreme Court judgment that discussed the concept of ‘gender identity’ at length; (ii) the [main passport application form for Fresh or Re-issue of Passport](#) are ‘Male’, ‘Female’ and ‘Transgender’; (iii) the [application for new registration for both, general electors and overseas\(NRI\) electors](#) are ‘Male’, ‘Female’ and ‘Third gender’.

## Good practices, including legal protections and other specific measures

The Indian judiciary has had to grapple with the intersex identity over the past three decades and has adjudged favourably for the intersex community in a handful of cases as summarily described below.

### I. On entry of sex in the birth register

In *Mulla Faizal v State of Gujarat* (2000)<sup>26</sup>, the Gujarat High Court held that Section 15 of the *Registration of Births and Deaths Act, 1969* read with Rule 12 of the Rules framed thereunder oblige the designated authorities to grant change of sex in the birth register and to issue a corrected birth certificate subsequent to necessary enquiries - including, if necessary, a medical opinion.

In *Shri Vinod H.N v State of Karnataka* (2013),<sup>27</sup> the Karnataka High Court placed reliance on the Mulla Faizal case, and directed the authorities to effect change accordingly.

### II. On recognition of intersex persons as a Socially and Educationally Backward class

In *Jackuline Mary v The Superintendent of Police, Karur* (2014)<sup>28</sup>, the Madras High Court held that in the absence of a law prescribing the mode for determination of the sex of an individual, the twin tests upon which sex is determined are (1) physical characteristics found at the time of birth of the child and (2) recognition of his/her sex by the society at large. It further set aside the impugned order of termination from service issued by the Superintendent of Police, Karur District, and directed the respondents to issue a subsequent order permitting the petitioner to join duty as Grade II Police Constable [Woman] with continuity of service.

### III. On forced “corrective” surgeries on intersex infants and children

In *Arunkumar & Anr. v Inspector General of Registration & Ors.* (2019)<sup>29</sup> the Madras High Court, while upholding the right of transgender persons in heterosexual relationships to marry also recorded that ‘transgender’ is an umbrella term that includes intersex persons. Vitaly, the court also directed the Government of Tamil Nadu to issue an Order banning corrective surgeries on intersex infants and children.

In *X v Director of Health Services* (2023)<sup>30</sup> the Kerala High Court considered whether parents have a right to decide the gender of their minor child in the absence of the minor's consent and being ignorant of the child's gender identity. The court referenced a broad range of material that validated intersex identity, including (i) domestic precedents, (ii) the *Transgender Persons (Protection of Rights) Act, 2019*, (iii) findings of the Council of Europe and the European Union, and (iv) international documents such as General Comment No.20 of 2016 by the United Nations Convention on the Rights of the Child. Ultimately, the court directed the government to issue an order regulating sex-selective surgeries on infants and children within three months. Until such time, sex-selective surgery were to be permitted only based

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<sup>26</sup> 2000 SCC OnLine Guj 31.

<sup>27</sup> Writ Petition No. 32978 of 2013.

<sup>28</sup> 2014 SCC OnLine Mad 987.

<sup>29</sup> 2019 SCC OnLine Mad 8779.

<sup>30</sup> 2023 SCC OnLine Ker 6244.

on the opinion of a State Level Multidisciplinary Committee of experts that such surgery was essential to save the life of the child/infant.

In *Srishti Madurai Educational Research Foundation v State (NCT of Delhi)* (2023) (*decision pending*),<sup>31</sup> the petitioners filed a contempt petition in the Delhi High Court seeking relief on two fronts: first, initiation of contempt proceedings for non-compliance of an order of July 2022 passed in the original writ petition regarding the implementation of recommendations made by the Delhi Commission for Protection of Child Rights (DCPCR) submitted to the Government of National Capital Territory of Delhi, and second, a ban on medically unnecessary, sex-selective surgeries on intersex minors. Per the latest updates on this case, the respondent-State has placed on record that:

1. A Committee under the chairmanship of the Dean, Maulana Azad Medical College was constituted by Directorate General of Health Services to draft a policy regarding sex-selective surgeries on intersex infants and children (per a letter dated 25 August 2023);
2. A State Level Multidisciplinary Committee (SLMC) had been constituted with Heads of various departments (per a notification dated 28 February 2024); and that
3. The Special Secretary Council had issued a letter (dated 26 March 2024) to the SLMC to address the management issue for children with the Disorder of Sexual Differentiation (DSD) requiring Sex Reassignment Surgery, in terms of the Status Report submitted by the Committee dated 03 March 2021.

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<sup>31</sup> Const. Cas(C) No. 1252 of 2023. See also: *Srishti Madurai Educational Research Foundation v State (NCT of Delhi)* 2022 SCC OnLine Del 5003.

## Gaps, obstacles, and challenges

Despite judicial acknowledgement of intersex identity, some key challenges remain in addressing human rights violations experienced by the intersex community, and their root causes.

### I. Gender-specific laws and intersex persons

In a 2021 dowry death case involving an intersex woman,<sup>32</sup> the counsel for the petitioner submitted that the deceased was “*not a female, but a transgender.*” The post mortem report stated that she was a “*true hermaphrodite,*” but no part of the judgment clarifies the distinction between trans and intersex identities. Although the argument in this particular case was not made in the context of seeking relief from the court to disallow special laws for women from being applied to transwomen or intersex women, such applications are frequently made,<sup>33</sup> to obstruct intersex and trans women’s access to justice.

### II. Negligible medical research on intersex bodies

Searches on databases specifically dedicated to medical research publications (such as PubMed) show a stark lacuna in Indian scientific academic literature on the study of intersex variations. This gap exists in both - studies that pathologize intersex persons as well as studies that simply explore the science behind intersex variations. For instance, a preliminary search of the phrase “intersex India” on PubMed showed merely 72 results<sup>34</sup> published between 1980 and 2024,<sup>35</sup> of which only 27 papers were published between 2019 and 2024, including ones where intersex variations were only vaguely mentioned. In these search results, intersexuality is variably referred to as hermaphroditism, disorders in sex development, persons with ambiguous or abnormal genitalia, etc. Moreover, some of the search results did not even pertain to humans - they were studies on animals such as rats and silkworms. Deliberate systematic dismissal<sup>36</sup> of intersex persons is a form of violence; the consequences of such indifference propagate insufficient understanding of the impact certain medications can have on intersex variations, leading to great and sometimes fatal harm.

### III. Lack of infrastructure and facilities for intersex persons

Although the *Transgender Persons (Protection of Rights) Act, 2019* separately defines the phrase “person with intersex variation,”<sup>37</sup> the intersex identity is subsumed within the definition of “transgender person, and not considered by itself.”<sup>38</sup> This demonstrates the abject lack of understanding by the State of the distinction between trans and intersex identities. A vicious cycle is perpetuated. Protections or remedies are not prescribed in law for the intersex community, thereby revealing a

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<sup>32</sup> *Ankit Kumar @ Hitesh v State of Haryana*, Criminal (Main) Petition No.32639 of 2021, decided on 18 November 2021.

<sup>33</sup> *Sumit Kataria v Commissioner of Police & Ors.*, W.P.(C) 14936 of 2024 & CM APPL. 62650 of 2024, order dated 23 October 2024.

<sup>34</sup> See [Appendix](#).

<sup>35</sup> In contrast, control searches made for “female genitalia India” and “male genitalia India” on PubMed showed 430 and 444 results respectively between 1980 and 2024, and 99 and 95 results respectively between 2019 and 2024. The term “genitalia” was included because merely searching for “female india” and “male india” led to upwards of 17,000 results between 1980 and 2024, and 4415 and 3739 results respectively between 2019 and 2024. Likewise, the term “genitalia” was used instead of “sex” because the latter term showed results pertaining to copulation more so than biological sex.

<sup>36</sup> Shah, Smita. *The Legal Status of Intersex Persons*. Ed. Jens M. Scherpe, Anatol Dutta, and Tobias Helms. Intersentia, 2018. 281–292. Print.

<sup>37</sup> *The Transgender Persons (Protection of Rights) Act, 2019*, §2(i).

<sup>38</sup> *Ibid*, §2(k).

stark lack of State infrastructure and facilities for intersex persons, including welfare schemes, healthcare, and proper documentation of identities, fueling further marginalisation.