



# INTERSEXUALITY AND THE LAW: CURRENT EUROPEAN APPROACHES

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## Preface

The legal condition of intersex people in Europe is receiving increasing academic attention and some important steps have been taken towards avoiding that law does not perpetuate barriers to equality for this community and prevent the violation of their human rights. The issue has also entered the political debate both at the national and supranational levels leading some (very few) countries to adopt new legislations like those explicitly prohibiting medically unnecessary treatments on intersex children or introducing the «third gender/sex» alongside female and male, with the purpose of going beyond the binary concept of sex. However, other major issues need to be addressed and one of the most relevant concerns the widespread confusion between gender identity and sex characteristics: indeed, only a small minority of European countries (Malta, Portugal and Greece) have explicitly recognised sex characteristics as a prohibited ground of discrimination.

The analysis of Martina Molinari, a young gender studies scholar, is particularly interesting and innovative for at least two reasons.

First of all, because it adopts an interdisciplinary approach, combining legal research with socio-empirical data, which seems essential to uncover relevant facts, thus significantly contributing to current debates around the institutional responses to human rights violations experienced by intersex people. The position faced by this community is in the agenda of many European countries and both the EU and the Council of Europe have adopted soft-law documents with the aim of inspiring and guiding national legislators towards the full recognition of bodily integrity, the protection of the fundamental right to physical and mental health, the depathologisation of the intersex condition: however, the choice among possible alternative legal solutions is far from easy. Therefore, the awareness of the fact that the proper implementation of international and regional statements on intersex peoples' rights is facing major challenges brought the Author to critically analyse the recently adopted legal measures and to identify some criteria with the aim to overcome the limits of the protection currently offered to intersex bodies. For example, she shares concerns about the already mentioned «third gender» option because of the risk of increasing unnecessary surgeries on intersex children, given the lack of a clear legal recognition of the intersex condition

and she explores the limits of the use of anti-discrimination law to tackle intersex problems.

The second strength of this essay is represented by its policy recommendation part: the classification of existing laws into three different models is, in fact, followed by a well-argued appreciation of the so-called «holistic» approach towards the intersex legal dilemma which the Author recognizes in the Maltese recent legislation, without obliterating the persisting difficulties in the enforcement of some measures and the fact that «normalising» surgeries continue to be performed despite the ban.

The full awareness of the theoretical and practical complexities attached to the intersex condition and of the multiplicity of approaches prevents the Author from making absolute assumptions, rendering this essay an insightful and inspiring analysis of an often neglected topic of legal research.

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# INTERSEXUALITY AND THE LAW: CURRENT EUROPEAN APPROACHES

Martina Molinari

## Introduction

Usually, the birth of a child is a moment of shared joy for parents, family, and friends. The period before the actual birth of a child or before the sex of the child has been revealed, can include some intense curiosity regarding the sex of the child. Also, knowing a child's sex is often a substantial influence over purchases that a parent or prospective parent may make in respect of their child. However, an interesting situation arises if the sex of a baby cannot be determined as being «fully» male or female. In such cases, a disturbing sense of anxiety can take over the happiness felt in respect of the child.

Indeed, when a child is born with atypical genitalia, the situation may immediately take on the character of a tragedy and emergency (Tamar-Mattis, 2013 and Feder, 2014), both in terms of how the situation is presented by doctors and, consequently, how it is perceived by the parents of the child.

The lives of these children, who are immediately subject to a high level of invasiveness by healthcare professionals, are often associated with discrimination and human rights violations that persist into adulthood.

Children who do not fit into the «traditional» female-male binary at birth fall within the wider spectrum of intersexuality (Fausto-Sterling, 1993), an umbrella term which defines the condition of people whose sexual characteristics do not meet what it is considered typical for female or male bodies. According to the 2015 report 'Human rights and intersex people' published by the Commissioner for Human Rights of the Council of Europe, «Intersex individuals are persons who cannot be classified according to the medical norms of so-called male and female bodies with regard to their chromosomal, gonadal or anatomical sex. The latter becomes evident, for example, in

secondary sex characteristics such as muscle mass, hair distribution and stature, or primary sex characteristics such as the inner and outer genitalia and/or the chromosomal and hormonal structure» (Commissioner for Human Rights of the Council of Europe, 2015, 13).

From a medical point of view, sex differentiation starts between the 6<sup>th</sup> and 7<sup>th</sup> week of gestation of the embryo in the uterus. In that period, depending on the chromosome carried by the sperm that has penetrated the egg to form the embryo, the embryo usually develops into a fetus of the male or female sex. Nevertheless, sex development can be atypical, and, during or at the end of pregnancy, the genitalia of a baby may not be recognised as belonging exclusively to one sex or the other (Ainsworth, 2015). The baby may be classified as being “intersex”.

The intersex condition may also involve a person having secondary sex characteristics which do not reflect «traditional» male and female sexuality. In these cases, so-called «female» and «male» traits co-exist in a percentage that can vary from case to case. Even though intersexuality is congenital, and by definition is therefore a condition that exists from birth (Hughes, Houk, Ahmed, and Lee, 2006), in some cases intersexual traits may be discovered much later in the life of a person (Greenberg, 2012). Different medical situations are also included within the spectrum of intersexuality. Some authors have found up to forty different conditions that exist under the umbrella definition of intersexuality (Carpenter, 2016). Among the most well-known are, Klinefelter syndrome, Turner syndrome, Swyers syndrome and Morris syndrome (Harper, 2007 and Lorenzetti, 2015).

The intersex condition is currently considered an atypicality or disease (Lorenzetti, 2014). Precisely for this reason, the size and shape of the genitals of an intersex person assume a pivotal role in the decision of doctors to intervene and «normalize» the sex of the child. The motivation for these types of operations is usually based on the psycho-physical well-being of the child (Lorenzetti, 2015).

Although it is not possible to determine the precise percentage of the population who are intersex (Greenberg, 2012), it is generally thought that between 0.5 and 1.7 % of people may have intersex traits, and this could even be higher (Fausto-Sterling, 1993 and Carpenter, 2016).



Historically, the approach towards intersexuality has changed significantly (Fausto-Sterling, 1993). Nowadays, the medical protocols used at birth to address intersexuality largely reflect the works of Professor John William Money, according to whom the sex of a newborn is malleable (Osella, 2015). Therefore, in highly ambiguous cases it is thought that it is preferable to perform surgery and assign a child a sex as soon as possible after birth. If the baby is also raised as the sex assigned, it is thought that he or she is more likely to recognise himself or herself as the sex assigned to them (Greenberg, 2012, and Comeni, 2018).

A brief linguistic and methodological premise is needed when dealing with this area since the word *intersex* is quite broad and heterogeneous, both in its content and the issues to which it relates (Greenberg, 2012).

First, there has been wide-ranging debate over the nomenclature to adopt when talking about intersexuality. The term *intersexuality* itself has been questioned by academics and healthcare professionals. In 2005 in Chicago, a multidisciplinary team of medical and nonmedical experts called “The Chicago Consensus” coined a new name for the condition of intersexuality, namely *disorders of sex differentiation* (DSDs) (Hughes, Houk, Ahmed, Lee, LWPES Consensus Group, & ESPE Consensus Group, 2006). A DSD classification was also proposed in order to avoid terms, such as *hermaphroditism*, which are quite controversial and inaccurate. However, this new nomenclature did not receive widespread acceptance among intersexual people. Some authors and activists consider that the term «disorders» is pathologizing and it is more appropriate that intersex people themselves define the way in which they would prefer to be classified (Santamaria and Valerio, 2013). In this dissertation, I will use the term *intersexuality* and not DSD. I am aware that in the medical field it could be confusing to use intersexuality and perhaps the DSD taxonomy is more appropriate. However, I think that the issues discussed in this research can be better explained if I do not adopt a medical classification, considering the importance of the de-pathologization of this congenital condition, especially if the aim is to analyse the legal issues relevant to it. Moreover, most of the academic resources that I have found refer to the condition as *intersexuality*. Finally, it is of primary importance to consider the preference of intersex people about the definitions and terms used in relation to them (Lorenzetti, 2015).

Second, this work will mainly focus on Western legal systems - European ones in particular - despite most of them not addressing intersexuality. Almost all European legal systems show a legal loophole as far as concerns people who do not fit into the male-female dichotomy (Pikramenou, 2019). This is because the Western tradition has been built upon the binary system (Lorenzetti, 2018). This legal vacuum and the theory of the newborn's sex malleability make surgery the most common solution where there is discrepancy between the sex of a child and the two «institutionalised» sexes (Tamar-Mattis, 2013). The major problem with this approach is that the principle of body integrity is at stake where the will of the child is rarely considered, since the decision as to sexuality is usually taken by healthcare professionals and parents (Comeni, 2018).

Third, it is not easy to conduct research about intersexuality because data and evidence are scarce since this condition has been often hidden and stigmatised (Carpenter, 2016). There is no clear definition of the term, nor figures on the precise percentage of the population that presents with intersex traits. It is difficult to investigate legal issues connected with a condition on which there is inadequate information. Still, there are some facts on which can be relied. It is undoubtable that intersexuality exists as do intersex people. Also, as already mentioned, in Western societies the most common way to acknowledge sex is a dichotomy: in most states, a person can be only male or female. This can represent a real problem for people born with intersexual traits.

The fourth major issue to be considered is related to the previous one. Due to the dichotomy that characterises most legal systems, surgery is one of the most common ways to solve the clash between the uncertain sex of the intersex child and sex assignment – male or female (Greenberg, 2012, and Pikramenou, 2019). It is interesting to note that in the Chicago Consensus mentioned above, the approach towards this kind of surgery is paradoxical. In fact, the Consensus places the emphasis on the functional outcome of the intervention and discourages operations based on cosmetic appearance (Hughes, Houk, Ahmed, Lee, LWPES Consensus Group, & ESPE Consensus Group, 2006). However, among the reasons why early intervention could be useful in the treatment of intersexual children are that such intervention can «minimise parental concern and distress, facilitate parental bonding and mitigate the risk of stigmatisation» (Carpenter, 2016, 75-76). In Europe, there is no data available to prove the correctness of these assumptions. They are cultural rather than medical. The Consensus itself admits

that «there are no controlled clinical trials of the efficacy of early (...) versus late surgery (...), or of the efficacy of different techniques» (Hughes, Houk, Ahmed, Lee, LWPEs Consensus Group, & ESPE Consensus Group, 2006, 558). It is alarming that according to the Chicago Consensus, this type of surgery and the stigma that afflicts intersex people, could also lead to mental illness, such as post-traumatic stress disorder. Moreover, intervention can be accompanied by hormone treatment, which is lifelong and has irreversible effect (Comeni, 2018).

The relationship between intersexuality and the law is particularly interesting and problematic. In most legal systems, intersexuality is not recognised as legislation is founded purely on a binary conception of sex. Therefore, the invisibility of intersex people (Balocchi, 2010, Crocetti, 2013, and Tamar-Mattis, 2013) has dramatic consequences for their fundamental human rights and their exposure to discrimination.

The law, intertwined with social and cultural factors (Tamar-Mattis, 2013), seems unprepared to include intersex individuals in society and, at the same time, it seems to establish the conditions for the exclusion of the intersex community. Unsurprisingly, the law is currently unable to grant remedies against human rights violations and discrimination that intersex individuals routinely face.

This work's aim is to identify legal protections that can directly and indirectly recognize intersexuality at national, international, and European levels. The ultimate purpose of this work is to depart from the current state of play and develop a concrete proposal for effective legal protection of intersex human rights.

## 1. International and European legal protection of intersex people

On the international and European levels, the protection given to intersex people is still limited, and, most importantly, there is an absence of any binding legal instrument recognising intersex people. However, it is possible to observe that intersex issues have been gradually brought into the public consciousness by institutions such as the United Nations (UN), the Council of Europe, and the European Union, which have recently adopted some interesting intersex-related soft law instruments (Brink and Dunne, 2018). Within the UN framework, the intersex condition is gaining attention, and whilst there is no binding legislation protecting the rights of intersex individuals, many UN actors

and committees have affirmed that intersex people should enjoy human rights protections (Brink and Dunne, 2018).

Indeed, several UN human rights treaty bodies have expressed concern towards unnecessary and irreversible surgeries being carried out on intersex people and have called on states to adopt proper legislation in order to explicitly ban them. Among these actors, the most prominent have been the UN Human Rights Committee, the UN Committee against Torture, the UN Committee on the Rights of the Child, and the UN Committee on the Elimination of Discrimination against Women (Brink and Dunne, 2018).

The Council of Europe system represents another framework for the protection of intersex rights. In this case, the promotion of such rights has been carried out mainly by the Parliamentary Assembly of the Council of Europe and the Commissioner for Human Rights of the Council of Europe.

Intersex issues were described in detail and addressed in a 2017 Resolution by the Parliamentary Assembly which, relying on the principle of physical integrity, condemned unnecessary surgical and/or hormonal intervention on intersex individuals. It recommended the prohibition of these treatments and advised that a multidisciplinary medical approach should be taken (Parliamentary Assembly of the Council of Europe, 2017).

The Commissioner for Human Rights is another pivotal actor in the Council of Europe system for the promotion of intersex rights thanks to its 2015 Report on human rights and intersex people, in which recommendations to states were quite similar to those contained in the 2017 PACE Resolution (Council of Europe Commissioner for Human Rights, 2015).

There is an important legal gap in European Union law on intersex issues. In fact, intersex rights are not explicitly protected either in primary or secondary legislation. Therefore, it is not surprising that the Court of Justice of the European Union has not yet ruled on a case concerning intersex people.

In 2019, the European Parliament adopted the landmark Resolution of 14 February on the Rights of Intersex People, which called upon Member States to positively act in three main fields in order to protect intersex rights: medicalisation and pathologisation; identity documents discrimination; and public awareness. Even though the Resolution is

not legally binding, this step constitutes a fundamental awareness by a European Union institution, and it gives hope for greater inclusion of intersex issues within the European Union framework.

## 2. Three models of protection of intersex people

### 2.1 Methodological premise

In most legal systems, sex and gender are legally recognised as binary, and exclude those who fit neither a male nor female profile. This legal understanding of sex and gender has a strong impact on the lives of intersex people, who experience many forms of discrimination and violations of their human rights.

At this point, it seems necessary to distinguish between what is «gender identity» and what are «sex characteristics», and to provide definitions of them.

According to Article 6 of the 2007 Yogyakarta Principles, gender identity refers to «each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms», while sex characteristics are defined 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».

Even though the majority of current legal systems recognise both sex characteristics and gender identity only from a dichotomous perspective, the existence of more than two sexes and genders has been envisaged both in old and recent theories.

For instance, some indigenous North American populations recognise a «two spirits» identity, which covers many mixed gender roles. The term was coined in 1990 in Canada, during the Third Annual Intertribal Conference in Winnipeg to replace the potentially offensive *bardache*, which, before 1990, was primarily used to identify feminine Native men (Robinson, 2020).

*Femminiello* is another Neapolitan non-binary identity, but which is becoming extinct. The term generally referred to the gender variant of men who live and dress as women, even though academic literature does not offer a unequivocal definition of this (Zito, 2017).

An additional insightful example of gender identity beyond the binary notion comes from Australia. Indigenous Australians use the terms «sistergirls» and «brotherboys» to refer to transgender people in their community (Kerry, 2017). Explaining this experience through a Western binary framework could be challenging. However, the terms refer to indigenous people «[...] whose gender differs from that normatively expected of their assigned sex, including people who may or may not physically transition [...]» (Riggs and Toone, 2017, 229).

Gender and sexual plurality is also recognised in Indonesia. For instance, the ethnic Bugis culture, which is disseminated throughout the Sulawesi Indonesian island, recognises at least five categories of gender, among which includes *bissu*, and *calalai*'. Again, these non-binary identities are hard to define from a Western perspective. *Bissu* roughly refers to transgender shamans who receive spiritual powers from their combination of «female» and «male» elements. *Calabai*' and *calalai*' indicate, respectively, transgender women and transgender men (Davies, 2018).

This non-exhaustive list of non-binary gender identities shows that the traditional Western binary conception of sex and gender is not the universal approach. Indeed, third genders and non-binary classifications have existed throughout history and still exist in many areas of the world.

Likewise, in recent years, some Western countries have attempted to go beyond the binary concept of sex introducing some specific measures that can be considered falling into three main models. On one hand, two of the models are characterised by a partial approach since they tried to fill the legal void with individual measures. On the other hand, I found a holistic approach in one country only: Malta. Malta is currently the only European Union Member State that offers a complete legal framework explicitly aimed at protecting intersex people (Pikramenou, 2019).

Hence, the description of the models is accompanied by the analysis of the process that preceded the adoption of their legal provisions, in order to make the legal reasoning behind them more understandable and to better contextualise them.

Moreover, it seems appropriate to stress the implications that these models have since while some solutions appear to be theoretically effective, when they are implemented, important loopholes have emerged.

By virtue of this analysis, this work will consider the reports published by ILGA Europe, which is part of the wider International Lesbian, Gay, Bisexual, Trans and Intersex Association, ILGA, a worldwide federation of more than 1,600 organisations from over 150 countries. The ILGA was established in 1978 with the aim of promoting LGBTI rights and it now has consultative status at the UN Economic and Social Council. The main activities carried out by ILGA include advocacy, research, training and conventions, and communications (ILGA website).

## 2.2 The legal recognition of intersexuality: three models adopting partial and holistic approaches

The first model identified is based on the introduction of a third gender alongside female and male and, in doing so, it aims to go beyond a sexual dichotomy and to give legal status to intersex people. It also aims to avoid stigmatization, alleviate the anxiety of parents about this condition, and reduce the number of unnecessary surgeries (Brink, Reu, and Tigchelaar, 2015).

The first European country that legally recognised a third sex was Germany. The first step of the process that led to the introduction of this marker was the adoption in 2013 of section 22(3) of the Law on Civil Status – *Personenstandsgesetz* (PStG), allowing intersex children to leave their birth register blank with regard to a gender marker (Pikramenou, 2019). This followed the 2012 German Ethics Council recommendation to introduce a gender marker for those whose sex cannot be determined.

This legal measure was highly criticised by intersex advocates and intersex civil society organisations. The major complaints concerned the potential of this measure to increase the incidence of unnecessary surgery on intersex individuals being carried out due to the absence of recognising the intersex condition that this classification creates. The argument was that, in order to avoid «othering» their intersex child, parents would be incentivised to give their consent to «normalising» surgeries (Brink and Dunne, 2018).

These grievances were also supported by the Commissioner for Human Rights of the Council of Europe in a 2015 Issue Paper.

In a 2017 landmark decision, the German Federal Constitutional Court held that this provision violated the right to personality and the ban on discrimination. In particular, the Court stated that the «unspecified» gender or the blank option could not reflect the gender identity perceived by intersex people, who do not see themselves as genderless. As the provision of the Civil Status Act violated the rights to personal development and equality, the Court asked the Parliament to either abolish the gender requirement at birth or to provide a positive third gender option for intersex people (Dunne and Mulder, 2018).

In 2018, following these developments, the German Government introduced a third option gender marker (ILGA Europe, 2020), which, since it is not based on the principle of self-determination, is only available to intersex people who provide a medical certificate of their condition or, in special circumstances, a sworn statement (Brink and Dunne, 2018).

The new German legal gender recognition model was criticised again by the intersex community and activists. In fact, the need for a medical certificate exacerbates the pathologization of the intersex condition and it puts intersex people in significant danger of re-traumatisation because many intersex individuals also face problems in accessing their medical records (OII Europe, 2018).

With regard to the practise of intersex genital mutilation, in 2008, the Association of Intersexed People/XY Women submitted a Shadow Report to the Convention on the Elimination of All Forms of Discrimination Against Women. It highlighted a series of human rights violations often faced by intersex people, among which includes the removal of their gonads, genital amputation and irreversible genital surgery interventions carried out on both minors and adults. The Shadow Report clarified that these violations occur in Germany as well as in many other countries (Association of Intersexed People / XY Women, 2008).

Consequently, the Committee on the Elimination of All Forms of Discrimination Against Women called upon Germany to review the situation of intersex human rights. As a consequence of this, in 2012, the German Ethics Council published its Ethical Guidelines and Recommendations on the Medical Treatment of Intersex. In this



publication, the Council emphasised that the decision whether to carry out surgery on intersex people should always be taken by the individual concerned when possible, and only for the safeguarding of the child's well-being in the case of minors. However, there were no positive implications flowing from those guidelines, as the incidence of surgery being carried out on intersex individuals did not decrease between 2005 and 2014 (Pikramenou, 2019).

In 2017, the Committee on the Elimination of All Forms of Discrimination Against Women expressed concern about the lack of a legal framework explicitly prohibiting «normalising» surgeries and for effective remedies available to intersex people who have undergone such treatments without their consent. It recommended that the German Government adopt adequate legislative provisions in respect of this.

Despite the concluding observations of the above-mentioned Committee in 2017, the ILGA found in 2019 that «[t]he government made no progress (...) on banning non-consensual and medically unnecessary surgeries on intersex children» (ILGA Europe, 2020, 53), acknowledging that the German approach towards those practices had not changed.

A similar path was taken by Austria, where it is possible for intersex people to make a gender entry in their civil status record other than male or female. This was because of a pivotal decision by the Austrian Constitutional Court (Austrian Constitutional Court website).

A case in Austria decided in 2018, concerned an intersex individual who asked for the removal of the male gender entry for them in the civil status register and for the replacement of it with «inter», «diverse», «X», «indefinite» or a similar term. As the registry office refused the request and the administrative court upheld the decision, the case reached the Austrian Constitutional Court.

First, the Constitutional Court tried to define intersexuality, stating that it differs from transsexuality as gender determination can be inconclusive because of atypical development of the anatomic, chromosomal, or hormonal gender.

Second, following the European Court of Human Rights case-law, the Court held that the concept of «private life» protected by Article 8 of the ECHR covers gender identification, name, and sexual orientation and sexual life. The Court's reasoning was that legal gender recognition should be conform with individual gender identity, and

that variations of gender development should be officially recognised as a specific gender identity.

The Court also stated that the Civil Status Act refers to «gender» in general, allowing an entry option other than «male» or «female». The Civil Status Act, in the Court's opinion, should be then applied to protect the rights of those with atypical sex development. Therefore, gender markers in civil registers must reflect an individual's own self-determined gender identity.

The decision of the Court was explicitly influenced by the reasoning of the German Constitutional Court on a third gender option and the ECHR case-law, as it referred to the ECHR cases *A.P., Garçon and Nicot v. France*, *Christine Goodwin v. United Kingdom*, *Hämäläinen v. Finland*, *Schlumpf v. Switzerland*, *Van Kück v. Germany*, and *Y.Y. v. Turkey*.

In recognising a gender other than male and female, the aim of the Court was to prevent unnecessary and irreversible surgery from being carried out on intersex individuals (Pikramenou, 2019). However, in the decision, the definition «gender identity» prevailed over that of «sex characteristics», with the latter being more appropriate in the case of intersexuality. These two concepts were often applied in the decision as if they were interchangeable. The inaccuracy of the terminology used may raise confusion and it may put in doubt whether the decision concerned trans or intersex people.

Also in November 2018, the European Commission found that it remained unclear, after the decision of the Austrian Constitutional Court, whether Austria had correctly implemented this ruling (Brink and Dunne, 2018).

Despite the Constitutional Court's decision and its aim, the ILGA found that in 2019 intersex people still «faced serious hurdles in accessing the third gender marker» (ILGA Europe, 2020) due to the mandatory medical assessment requirement, which is needed to be carried out by an expert group that has never been formally established.

Moreover, the Constitutional Court ruling did not decrease the number of «normalising surgeries», as proven by the CEDAW Recommendation to Austria issued in July 2019. In fact, in the concluding observations of the ninth periodic report of Austria, the UN treaty body urged the Austrian Government to «[d]evelop and implement a rights-based health-care protocol for intersex persons, ensuring that children and their parents are appropriately informed of all options, that the children are involved, to the greatest

extent possible, in decision-making about medical interventions, that their choices are respected and that no person is subjected to surgery or treatment without their free, informed and prior consent» (Committee on the Elimination of All Forms of Discrimination against Women, 2019).

The CEDAW Recommendation was followed, in August 2019, by the Recommendation of the Ministry of Health on healthcare protocol for intersex people. Nonetheless, the ban on «normalising» surgeries was not mentioned in the Ministry's document (ILGA Europe, 2020).

According to the second model, legal gender recognition is based on the self-determination principle, and it provides that any lasting psycho-medical condition for the legal recognition of adults' gender identity is not necessary (Cannoot and Decoster, 2020). Some European countries adopted this model: namely Denmark, Ireland, Luxembourg, Malta, Norway, Portugal, and Belgium. This model allows individuals over the age of sixteen to be recognised as their preferred gender under a simple procedure, which does not require any medical or civil status preconditions (Brink and Dunne, 2018).

In 2017, in order to simplify the administrative procedure to change a gender marker and name in the civil registry, Law of 25 June 2017 – *Loi réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets* – was adopted by Belgium. The title of the law clearly indicates that the measure was mainly addressed to trans people. However, intersex people can benefit from it as well (ILGA Europe, 2020).

Indeed, this law provides that the change of sex on birth certificates does not require medical nor hormonal treatment. Rather, it is possible by a simple declaration, and, for minors, with the additional requirement of the approval of parents and a psychiatrist. Moreover, the procedure for the change of a first name on official IDs was easier well, putting at the centre the self-determination principle and dropping the age for request to 12 years (Meier and Motmans, 2020).

However, in June 2019, the absence of non-binary gender identities in the new Gender Recognition Act was declared unconstitutional by the Belgian Constitutional Court. It held that the Act represented a violation of the right to equality, and the right to gender

self-determination: Article 8 of the European Court of Human Rights (ECHR) (Canoot and Decoster, 2020). Following this landmark decision, the Belgian Parliament was required to amend its legislation to recognise non-binary and genderfluid identities. A third gender marker is likely to be adopted by it (ILGA Europe, 2020).

Even though the model based on self-determination could present some key advantages for intersex people, there is evidence that it does not positively impact on their right to bodily integrity. In fact, in February 2019, the Committee on the Rights of the Child found that intersex children were still subjected to unnecessary medical interventions and asked Belgium to prohibit such treatments (Committee on the Rights of the Child, 2019). Subsequently, in April 2019, Belgium was asked by the Committee on the Rights of Persons with Disabilities to indicate the measures taken to prohibit and prevent such non-consensual treatment (Committee on the Rights of Persons with Disabilities, 2019). Therefore, in order to improve the condition of intersex people in Belgium, the ILGA recommended prohibiting unnecessary medical treatment without full and informed consent. Moreover, considering the judgment of the Belgian Constitutional Court, the ILGA invited Belgium to ensure that legal gender recognition based on self-determination be effectively available without discrimination (ILGA Europe, 2020).

Finally, the third model, only adopted by Malta so far, is characterised by a holistic approach towards the intersex legal dilemma.

In 2014, an amendment to the Maltese Constitution made Malta the first European country to include the expressions «gender identity» and «variations of sex characteristics» in its constitution. Moreover, in 2015, Malta adopted the Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC Act) and became the first European Union country to explicitly ban cosmetic surgery on intersex individuals. This Maltese legislation is particularly important in so far as it concerns intersex issues from many points of view (Balocchi, 2019).

First, it established the right to gender identity, to bodily integrity, and to physical autonomy. It acknowledged that the right to gender identity must not be subjected to any proof of surgical intervention or any other medical treatment. Second, with regard to anti-discrimination and the promotion of equality, the GIGESC Act established the duty of the State to remove discrimination and harassment based on sexual orientation, gender identity, gender expression, and sex characteristics. Moreover, the State had the

duty to promote equality on the same basis. With regard to intersex issues, the introduction of the grounds of gender expression and sex characteristics marked a concept of sex/gender that goes beyond the traditional dichotomy. In particular, the deployment of gender expression denoted the expansion of the scope of the Act to the gender spectrum as a whole. Third, the GIGESC Act provided the right to bodily integrity and physical autonomy in relation to the condition of intersex people, considering the common practice of «normalising» surgery to which they are usually subject. Paragraph 14(1) clarified the unlawfulness of «any sex assignment treatment and, or surgical intervention on the sex characteristics of a minor which treatment and, or intervention» if they «can be deferred until the person to be treated can provide informed consent». The medical intervention should be performed only under exceptional circumstances when an agreement is reached between an interdisciplinary team and the persons exercising parental authority over the minor involved. Also, the intervention carried out must not be driven by social factors, according to the best interest of the child as expressed in the Convention on the Rights of the Child. Lastly, the GIGESC Act successfully depathologised all forms of sexual orientation, gender identity, and gender expression (GIGESC Act, 2015).

In 2016, the Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act strengthened this approach as it was adopted to «affirm that all persons have a sexual orientation, a gender identity, and a gender expression, and that no particular combination of these three characteristics constitutes a disorder, disease, illness, deficiency, disability and, or shortcoming» (Preamble, p. 1).

With regard to legal gender recognition, the Maltese legal framework offers a model based on self-determination. Indeed, under the GIGESC Act, it is possible to easily change an assigned gender on official documents and, in 2015, the Maltese Government introduced the «X» gender option on identification documents (Pikramenou, 2019).

The Maltese legislation has made pioneering progress toward the recognition of the human rights of intersex people in the last decade. In a 2015 factsheet, this development was acknowledged by the UN (Carpenter, 2018).

However, as to the effectiveness of the legal framework, intersex activists have claimed that medical interventions are still being practiced in Malta both domestically and on Maltese citizens overseas, due to legal loopholes and lack of enforcement in the

legislation (StopIGM.org, 2019). ILGA Europe found that «normalising» surgeries continue to be performed notwithstanding the ban (ILGA Europe, 2020) and, for this reason, on 26 June 2019, the UN Committee on the Rights of the Child recommended Malta to protect intersex children against those practices (Committee on the Rights of the Child, 2019).

### 2.3 Major issues in national approaches towards intersexuality

Undoubtedly, the sexual and gender binarism characterising most Western countries' approaches to intersexuality enhances the difficulties that a legislator may encounter in addressing the intersex condition and in protecting intersex human rights, especially with regard to intersex children. Yet, from the analysis of the above-mentioned European national legal systems, it has emerged that this is not the only obstacle.

One of the most common misconceptions concerns the confusion between gender identity and sex characteristics. According to the definitions given by the Yogyakarta Principles, intersexuality is more related to sex characteristics (European Union Fundamental Rights Agency, 2015). However, most legal systems often fail to adequately use this definition and, in addition, only a small minority of countries began to include «sex characteristics» in their legal frameworks aimed at the protection against discrimination of intersex people (Brink and Dunne, 2019).

Quite interestingly, some laws face an additional difficulty represented by the absence in the national language of the distinction between gender and sex, as occurs in Germany (Canoot and Decoster, 2020).

There are also other legal systems where there is no real distinction between gender and sex. For example, in the 2018 decision of the Austrian Constitutional Court, even though the aim was to allow intersex persons to have the right to make an accurate entry into the civil register, the Court preferred to use the term «gender identity» rather than «sex characteristics», and those two concepts were often applied as if they were interchangeable (Verwaltungsgerichtshof Österreich, 2018).

The introduction of a third sex or gender is the most common solution offered to include intersex people in a strictly binary system, but its structure is significantly different

from case to case and there are doubts about its effectiveness, as the ILGA and other civil organisations have claimed.

The first crucial distinction needs to be made between a third marker based on self-determination and one that is not.

In relation to a marker based on self-determination, as already highlighted, this presents key advantages for intersex people, since it lightens the bureaucratic procedure to obtain a third legal gender recognition, it does not require medical proof, and it has high symbolic value. For intersex people, the absence of medical requirements is particularly important. In fact, many intersex individuals do not have access to their medical records, and for others the need to show their medical past could evoke traumatic events, especially in cases where there have been intersex genital mutilations.

On the other hand, delineating a third sex not based on self-determination but one that is mandatorily assigned only to intersex individuals and those who show a medical diagnosis, can create problems. It could increase the stigma about the intersex condition, driving parents and healthcare professionals to opt for surgery for minors.

The second issue that emerges with the delineation of a third sex option is the fact that it can have a positive or passive assignation. In the first instance, a specific naming of the sex/gender appears on the identification documents, as «X» in the case of Malta or «diverse» in the German legal system. On the other hand, a third sex can be passively expressed, leaving the entry space for gender blank, as used to be the case in Germany before the 2017 decision by the German Federal Constitutional Court. As the Court found, this second approach could violate the right to personality and the ban on discrimination. Moreover, as pointed out by the Austrian Constitutional Court, if a person's gender is not officially recognised as a specific gender identity, there could be a violation of private life under Article 8 of the ECHR.

In the case of positive assignation of a third gender, a third difference should be made among the terms used to express the third sex. In fact, with some terms such as «diverse» or «other», there is the real risk that the stigma and the discrimination of intersex people will increase. Instead, it would be appropriate to consult intersex individuals in order to choose a term that is positive, respectful, and as inclusive as possible.

The intersex condition still lacks recognition and protection in the European Union. Single legal measures tend to be ineffective and, instead, increase the stigmatisation of the intersex condition. Moreover, they are often challenging to implement.

Even the Maltese case, the most comprehensive and systemic approach towards intersexuality in the European Union, manifests a substantial ineffectiveness, as intersex genital mutilations are still carried out on intersex children and individuals.

Primarily, it should be acknowledged that European Union legal systems fail to engage with intersexuality and many UN treaty bodies and intersex civil organisations are recently starting to denounce this situation.

The failure by national legal systems to address intersex issues should be rectified both with new normative frameworks and with proper implementation of existing rules. For instance, the Maltese example shows that despite the explicit ban on «normalising» surgeries – frequently suggested by bodies including the Committee on the Elimination of All Forms of Discrimination against Women, the Committee on the Rights of the Child, and Committee on the Rights of Persons with Disabilities – the problem persists.

In shaping an adequate legal framework, a more systemic, comprehensive, and human rights-based approach should be taken.

It is also imperative that intersex people must be involved throughout the entire legislative process. Their needs, in fact, are considerably peculiar and complex. This is the reason why, in this work, some alternatives to the current approaches in European Union legal systems are put forward, mainly considering proposals from the intersex community.

Importantly, reference should be made to countries that have not yet in any way attempted to address the intersex issue. Some countries legislation does not provide for a third sex, nor for an explicit ban on «normalising» surgeries, and nor they have introduced the principle of self-determination. However, theoretically speaking, unnecessary and irreversible medical or surgical treatments on intersex children and individuals could be considered against the principles of the European Union, national constitutions, and they could be recognised as illegal under some specific national laws.

For instance, intersex people are supposedly protected under the Italian legal framework, despite intersexuality not being mentioned in any Italian legal provision. Indeed, Law 219/2017 on informed consent prescribes that no medical treatment may be



started or continued without the free and informed consent of the person concerned, except in cases expressly provided by law. Moreover, it establishes the right to know one's own health condition and the right to be fully informed, kept up to date with it and for this to be done in an understandable manner, with regard to diagnosis, prognosis, benefits, and risks of diagnostic tests and health treatments, as well as possible alternatives and the consequences of any refusal of health treatment.

In addition, intersex individuals who have experienced human rights violations may take legal action against their perpetrators under article 582 of the Italian Criminal Code. It condemns and provides remedies for personal injuries that have been inflicted an illness to the body or mind.

Another interesting piece of Italian legislation to analyse in relation to «normalising» surgeries is Law 7/2006 on the prevention and the prohibition of female genital mutilation (FGM) practices. It lays down measures to prevent, fight and repress FGM. FGMs, conceived as violations of the fundamental right to bodily integrity and of the right of the health of women and girls, are defined as those female genital mutilations carried out in the absence of therapeutic needs, such as clitoridectomy, excision, and infibulation.

Even though at first glance, Law 7/2006 seems to potentially addresses unnecessary intersex surgery, this is only partially true. Indeed, as it refers to *female* genital mutilations, the scope of the Law is restricted, and it seems to exclude all cases outside the term «female».

In relation to the intersex condition, Italian legislation provides only soft law instruments, such as the 2010 Guidelines of the National Bioethics Committee (“Comitato Nazionale per la Bioetica”, CNB). However, the title to these Guidelines – «Disorders of sex differentiation in minors: bioethical aspects» – already indicates a medicalised approach, which risks pathologizing the intersex condition *a priori* (Osella, 2015). Moreover, these guidelines advocate raising a child either in a «male» or «female» way, bringing out a rigid dichotomic understanding and distorted view of gender and sexual identity, which in fact should not be reduced to two different educational approaches depending on the sex of the child. Even though the Guidelines suggest the delay of unnecessary surgical treatment, they seem to implicitly assume the

necessity to «normalize» bodies to fit one of the two sexes (Osella, 2015 and Lorenzetti, 2018).

Despite the Guidelines by the CNB being a soft law instrument and the fact that they have been in place since 2010, they perpetuate the confusion around the intersex condition in the Italian framework. Intersexuality is highly pathologised, incongruent and conflicting solutions are proposed, and social features of the issue play a key role in determining outcomes.

The above-mentioned Italian legal instruments do not seem to adequately protect the fundamental rights of intersex individuals (Lorenzetti, 2015), as unnecessary irreversible surgery and hormone treatments are still not prohibited and are in fact carried out in Italy.

It follows that legislation that lacks explicit measures to protect rights can hardly properly address intersex issues. What could be a better solution, then?

The legal recognition of intersex people could take place through establishing a self-determination principle, ensuring that it is applied without discriminating against those who fall outside binarism, as the Austrian case has shown.

Moreover, national laws already in force could be adapted to include crimes that are prohibited to be carried out against intersex people. In this respect, the laws on informed consent and FGMs could be revised. FGMs, which are widely condemned at the European Union level and for which States have already taken numerous measures to combat them, could be extended to intersex cases. It is necessary, to this end, to review the categories of people to which they refer, because as long as the laws against FGMs can only be invoked in respect of by women, they will not be open to those who do not fully fall into this category.

Finally, the European Union might also learn from the approaches of non-European constitutional courts that have already ruled on intersex cases. For instance, an interesting approach comes from the Colombian Constitutional court.

Through the interpretation of some key constitutional provisions, a decision of the Columbian Constitutional Court permitted the development of a consolidated legal framework for surgery for intersex individuals (Rubio-Marin and Osella, 2017). Strongly relying on the right to dignity, the right to develop a personality, and the right to equality, the Court adopted a «middle-ground» approach (Greenberg, 2006). Indeed,

even though it recognised that atypical genitalia are not a health threat *per se*, it refused to take a clear stance on banning «normalising» surgeries, given the complexity of the issue. Instead of an explicit ban on «normalising» surgeries – which is theoretically justified – the Court preferred to raise the standards of parental consent for such treatments.

In Columbia, parental consent must therefore be in writing, it is required only for children under the age of five, and it should be informed, qualified, and persistent. Physicians, who must provide complete information, must also disclose to parents the dangers of early surgery, and the existence of other paradigms, such as the possibility to delay treatments (Greenberg, 2006). Moreover, the parent authorisation must be persistent: it should be given on several occasions, and over a reasonable time. Yet, when these conditions are met, parents still retain the last word, reflecting the principle *in dubio pro familia* (Rubio-Marin and Osella, 2017).

The Colombian Court also adopted a pragmatic approach towards the legal registration of intersex persons. It acknowledged that a person's civil status is strictly linked to their legal capacity, and it noticed that the Colombian Government only recognised two genders, even though a binary approach is not the only option, as other legislation has shown. The Court held that a tension exists between the interest of the State in identifying its citizens through a gender classification, and an individual's right to identify themselves. Although the Court remained pragmatic, it called on the legislator to provide suitable rules for those who can be registered as neither female nor male, and it set out some criteria about the impossibility in some situations of assigning sex at birth. First, sexual diversity cannot be an obstacle to the identification of legal personality. Second, no justification can exclude children from being able to register their legal personality, including the ambiguity of their genitalia at birth. Finally, medical care cannot be denied to intersex individuals under any circumstances (Rubio-Marin and Osella, 2017).

As Greenberg identified, the Colombian model has a «middle-ground» position between the dominant protocol – based on early surgery – and a complete moratorium on all early surgery (Greenberg, 2006). As the Colombian approach relies on the doctrine of informed consent, it could represent a remarkable pattern to follow for those other

countries that have already include informed consent as the basis for medical intervention in their legislation, such as in Italy.

### 3. The perspective of the people involved: a way forward

The European legal landscape regarding intersex issues is dismal. It is incapable of making intersex people more resilient and it sometimes makes their living conditions worse.

The need to design appropriate legislation is evident, and the complexity of the issues involved makes this task even more challenging. Indeed, intersex-related issues are systemic and intertwined with both legal and social aspects.

In this work, the role of law is analysed from the perspective of the people involved. The analysis of the legislative solutions has been carried out without obliterating the voice of intersex activists. The stories of some intersex individuals are presented in this study to provide a more concrete and indepth level of analysis, and key proposals from the intersex community are taken into account.

First, the involvement of intersex individuals in this analysis is required to better grasp the violations and discriminations that they face. Indeed, when the community makes its demands, it considers its own needs. Differently, the drawing up of measures only by outsiders can result in inappropriate or harmful solutions, as has already occurred.

Second, amendments to the current legislation proposed by the intersex community seem to be the outcome of a human rights-based and more systemic approach.

#### 3.1 The role of law

Despite the discourse regarding intersexuality gaining increased attention in recent years at national, international, and European levels, intersex people still face human rights violations and discrimination.

Therefore, it is urgent to re-think the proper role of the law in addressing intersex issues, particularly in national contexts, since existing measures, as outlined above, have partly failed.

An interesting study for this review is *Legislating Intersex Equality: Building the Resilience of Intersex People through Law* by Fae Garland and Mitchell Davis.

First, it is interesting in that it represents the first – and so far, the only – qualitative study considering the relationship between intersex experiences and the law. Second, the authors conducted 17 interviews with intersex rights activists in order to understand the impact of the law on their daily lives. Third, it provides a successful combination between academic research and the perspectives of the people involved.

Garland and Mitchell categorised national approaches towards intersexuality into three categories: non-responsive, status-based, and holistic. The non-responsive approaches are the most common. This category refers to those countries that do not recognise intersex people at all, such as Italy. Status-based approaches mainly aim for formal equality between intersex and other individuals, for instance through third gender markers or anti-discrimination law. They are the dominant method employed by countries that address intersex issues. Among the countries previously mentioned, Belgium and Germany can be considered to fall within this category. Lastly, only Malta has adopted a holistic approach with the introduction of the GIGESC Act, as it directly challenged the medical jurisdiction's to make decisions about intersex individuals. It explicitly outlawed unnecessary sex assignment treatment, permitted the self-determination of gender identity, and extended «hate crime» legislation to include «sex characteristics» as a protected ground.

Although most national methods fall under the umbrella of formal equality, in the interviews conducted by Garland and Travis, intersex activists voiced a pervasive concern about the substantive inequalities that they usually face.

Indeed, activists indicated that the major substantive inequalities faced by intersex individuals included medical/individual power imbalance, the lack of long-term follow-up regarding their medical care, the inadequacy of information and consultation with healthcare personnel, and difficulty in getting access to medical records.

Intersex activists expressed significant concerns towards «normalising» surgeries, in conjunction with the impossibility of challenging authorities due to a lack of resources, the trauma that many intersex individuals experience, and the reliance on medicine on account of initial medical interventions made to some of them.

For these reasons, formal equality approaches seem inadequate to address intersex issues. Garland and Travis outlined their ineffectiveness, the risk that they are limiting for the intersex community, and their harmfulness.

First, even though most of the respondents to Garland and Travis' interviews acknowledged the potential use of third gender markers and that they were slightly positive about the use of anti-discrimination law, they also highlighted the ineffectiveness of these approaches, as they do not challenge, interfere with, nor recognise medical decisions.

Moreover, activists were concerned that formal equality approaches could limit the intersex movement, as they presume that discrimination is the only issue that intersex people must deal with. Instead, intersexuality-related problems arise from systemic problems within society and the legal structure, rather than from direct discrimination. Besides, many respondents ascribed the limitation of their activities to the fact that their issues are often predominately included with LGBT ones.

Lastly, the interviews showed a broad concern about the harmfulness of status-based approaches, with regard to a third gender marker, as they expose sensitive information, they risk stigmatizing intersex individuals, and they fail to recognise sex as a spectrum. The role of the law appears fundamental to address intersex issues since it determines who is entitled to participate in society and who is not. As for now, many legal systems fail to recognise intersex people as full participants in society, and, furthermore, they legitimise the violation of intersex fundamental rights and the medical jurisdiction over intersex bodies.

Among the legal systems previously mentioned, Malta is the only one that adopted a systemic approach through a substantive equality stance. Most of the respondents found the explicit ban on non-therapeutic interventions and the involvement of the intersex community during legal reform as the two main positive features of Maltese legislation. Despite some weaknesses of the GIGESC Act, including the provision of a minimal fine where unnecessary surgery is carried out and not preventing parents from seeking treatment in other countries, it serves as an indicator of what should be the role of law and of the state in tackling intersex matters.

In their essay, Farland and Travis emphasised that the state should protect intersex rights through substantive equality methods, as its responsibility towards all of its

citizens requires this. Moreover, this approach acknowledges the role that the state has played in creating problems in respect of intersex issues. The essay also defines intersex issues as persistent, pervasive, and systemic, rather than individual (Garland and Travis, 2018).

### 3.2 Troubled life experiences

When investigating the role that law should play in tackling intersex issues, it seems that in order to better understand the inequities that intersex individuals face, it is necessary to take into account intersex's people needs as they emerge from their experiences, even though it can be difficult for traumatised intersex individuals to tell their stories.

One of the most significant testimonies in relation to the intersex movement is the story of David Reimer (Harper, 2007 and Greenberg, 2012), a Canadian national who, whilst not born with intersexual traits, received treatment that reflected John Money's approach towards intersexuality (Tamar-Mattis, 2013). The case is often referred to as «the John/Joan case» (Butler, 2004).

David was born in 1965 as a male and, at the age of eight months, during surgery to remove phimosis (inability to the foreskin to retract), his penis was severely damaged. Without knowing how to proceed, his parents eventually turned to Professor John Money, who suggested removing the male damaged genitalia and for the parents to raise David as a girl. In Money's view, a person's sex was malleable and, if modified at birth, and the child is raised in conformity with the sex assigned to them, the individual will recognise himself or herself assigned that sex. His theory was based on methods employed to treat individuals with ambiguous genitalia at birth (Tamar-Mattis, 2013).

David's parents followed Money's recommendations, and David became Brenda. Nonetheless, between the ages of nine and eleven, Brenda started to realise that she was not a girl, so Money adopted very pressing – and at times degrading – methods to make her conform to the female gender, including having her imitate coitus with her brother.

Then, a new set of psychiatrists and doctors permitted Brenda to change her path, and then Brenda became David again. He asked for, and received male hormones, a phallus, and had his breasts removed. Despite David never recognising himself as being female,

determining the failure of Money's approach, Money claimed the success of the sex reassignment, which was the first-ever conducted on a non-trans or non-intersex child. At the age of almost thirty, David met the sex researcher and psychologist Milton Diamond, who reviewed his case. Diamond revealed to David that the supposed success of his sex reassignment had been used to legitimize the widespread use of infant sex change in cases of hermaphroditism and genital injury (Colapinto, 2000). The violence suffered during his life caused David to develop severe depression, which also affected his relationships. David committed suicide in 2004 (Colapinto, 2004).

Another interesting testimony is that shared by the Italian intersex activist Alessandro Comeni (Comeni, 2018). Alessandro was born in 1973 with atypical genitalia and his case was treated as an emergency. He was assigned the female sex and early cosmetic surgery was carried out on him, followed by numerous medical examinations during his childhood and he was given hormonal treatment for almost two decades. Due to these treatments, Alessandro was subject to irreversible changes to his body, severe psychological trauma, and many health problems. None of the medical interventions were performed with the full and informed consent of Alessandro, who eventually discovered the truth in adulthood about why they were being carried out and discontinued them. Moreover, Alessandro linked similar violent dynamics towards intersex children back to the theories and works of Money at the John Hopkins Hospital in Maryland, in the United States (Comeni, 2018).

Lastly, the Swiss intersex activist Daniela Truffer had a similar experience. As she had atypical genitalia and it was difficult to assign her a sex, the doctors chose for her. They analysed her body in search of a vagina, and, as they did not find it, they opened her abdomen. When the doctors found testes, they threw them away without disclosing anything in relation to this.

At the age of seven, Daniela was subject to more surgery so that she would conform to the sex assigned to her. Those treatments left her with scars and in pain. Then, at the age of twelve, female hormone treatment was prescribed for Daniela. This treatment had caused her to suffer from osteoporosis by the age of thirty. In her testimony, Daniela affirmed that a high percentage of intersex people commit suicide because of the surgery they have endured and the shame they have experienced (Batha, 2017).



### 3.3 Proposals and remarks from the intersex community

The acknowledgment of the *de facto* inequalities that intersex people usually face helps to better understand the proposals for change coming from the intersex community.

In his work *Human Rights between the Sexes*, Dan Christian Ghattas, an intersex activist and co-founder of OII Europe and now its Executive Director, provided five recommendations for international actors in respect of intersex issues. These turned out to be significant in the light of the analysis of the international state of play on intersex issues.

First, from a global context, actors should spread knowledge of the existence of intersex individuals and provide international bodies and partner organisations with information on intersex issues. Second, qualitative, and quantitative studies should be encouraged to be carried out in order to increase the visibility of intersex individuals in different countries. Third, international actors should promote and financially support national, continental, and international conferences in which intersex individuals can voice their needs and organise themselves. Fourth, actors should intensify collaboration with, and gaining the support of, NGOs that work on human rights breaches against intersex individuals. Lastly, Ghattas advised global actors to take into consideration intersex individuals in all areas of project work as a cross-sectorial topic (Ghattas, 2013).

The organisation co-founded by Ghattas, OII Europe (Organisation Intersex International Europe), is an autonomous affiliate of OII (Organisation Intersex International), which is a decentralised global network of intersex associations. It was founded on 10 December 2012 in Stockholm during the Second International Intersex Forum (OII Europe website), an annual event organised and supported by ILGA and ILGA-Europe. Among its activities, OII Europe prepares good practice maps, legal toolkits, and annual reports on the situation of intersex people.

In 2013, the Third International Intersex Forum, supported by ILGA and ILGA-Europe, took place in Valletta, Malta. During this event, the Malta Declaration was adopted by 34 intersex activists representing 30 intersex organisations (OII Europe website).

The 2013 Malta Declaration affirmed the existence of intersex individuals, and called for the end of discrimination against intersex people and the assurance of the right to

bodily integrity, physical autonomy, and self-determination. Therefore, it asked to put an end to «normalising surgeries» and other degrading treatments.

Moreover, in contrast with the assumption that a third gender marker would solve many intersex issues, the Malta Declaration asked to «register intersex children as females or males, with the awareness that, like all people, they may grow up to identify with a different sex or gender» and to «ensure that sex or gender classifications are amendable through a simple administrative procedure at the request of the individuals concerned». Furthermore, the Malta Declaration advised removing sex or gender as a category on birth certificates or identification documents, as currently is the case with respect to race or religion.

With regard to medical issues, the Malta Declaration urged to depathologise intersexuality, to ensure full information and access to medical records, and to recognise that medicalization and stigmatisation of intersex people may result in significant trauma and mental health concerns.

In view of their requests, activists called on international, regional, and national human rights institutions to provide visibility to intersex issues in their works. Moreover, they asked national governments to address the above-mentioned concerns and to draw up adequate solutions, directly involving intersex representatives and organisations.

In 2014, the Riga Statement was released after a European intersex meeting organised by OII Europe and facilitated by ILGA Europe. Taking into account the Malta Declaration, the Riga Statement identified four objectives in order to fully implement human rights, bodily integrity, and self-determination for intersex individuals in Europe (OII Europe website).

First, the Riga Statement recommended to challenge the binary concept of sex, and to consider sex as a spectrum. The same was recommended in relation to gender. Second, in view of protecting intersex people from discrimination, the Riga Statement called for the adoption of anti-discrimination legislation on the ground of sex characteristics. Third, it encouraged «all stakeholders that have a specific role to play in intersex people's wellbeing such as, but not limited to, health care providers, parents and professionals working in the area of education, as well as society in general, are instructed on intersex issues from a human rights perspective». Lastly, the Riga Statement requested to explicitly ban non-consensual treatment on intersex people.

In 2017 in Vienna, the first OII Europe community event took place, led by 28 intersex people from 16 Council of Europe member states. After the meeting, the 2017 Vienna Statement was issued (OII Europe website).

The Vienna Statement started with a request to «recognise intersex people as a community that has specific and vital needs and that their human rights need protection». Consequently, national governments were asked to ban unnecessary treatments on intersex individuals and to effectively implement this prohibition, ensuring that doctors and healthcare professionals respect it and do not operate without consent. States were also urged to include «sex characteristics» as a ground in the anti-discrimination legislation and to grant reparations to those who have been victims intersex genital mutilation (IGM). Moreover, governments were solicited to install an easy administrative process to facilitate gender/sex marker change based on self-determination and self-declaration, guaranteeing, where possible, the availability of neutral markers. The Vienna Statement also included calls to action to educational institutions, medical and health care providers, media, and allies.

In 2019, Ghattas, in conjunction with OII Europe and with the collaboration of ILGA Europe, released an insightful toolkit for law and policymakers to protect intersex individuals in Europe. In his work, Ghattas highlighted all areas of life in which intersex people are more vulnerable, proposing some alternatives to the current approaches towards such issues (Ghattas, 2019).

The toolkit begins with some basic facts about the intersex community. After the definition of intersexuality and the explanation of the main issues in respect of it, it clarifies that the term «Disorder of Sex Development» (DSDs) is to be avoided, as it pathologizing and does not align with human rights. Moreover, the toolkit acknowledges that medical intervention on intersex children is still the rule in Europe, and that, despite the commonalities, IGM and FGM follow different legal standards, as FGM is widely addressed in the European legal landscape. In the first part of his toolkit, Ghattas also brings out the role that social norms play in the violation of intersex human rights and explains the importance of giving parents appropriate support when an intersex child is born.

As far as concerns the protection of intersex people against the violation of their right to bodily integrity, the toolkit strongly recommends for states to include in their legislation

an explicit ban of non-necessary treatments. The Maltese GIGESC Act is treated as a best practice example. Then, it is emphasised that personal, prior, free, and fully informed consent plays a key role.

In addition, appropriate and proportionate legal sanctions for those who conduct non-necessary medical operations and treatments is suggested to be implemented. The extension of the retention period for medical records to a minimum of 40 years and the establishment of an independent working group are also recommended.

It is worth remarking that Ghattas discourages the adoption of two frequently used terms in legislation. First, he considers that the law should not rely on the definitions of «medically necessary» or «medically indicated» to distinguish when intervention is warranted. In fact, even though medical treatments are usually described as a medical emergency (Tamar-Mattis, 2013), «there are few and relatively rare cases in which the intersex infant's life is at risk and immediate treatment is actually indicated/necessary» (Ghattas, 2019, 19). Second, Ghattas notes that legislation often requires that treatment be postponed until «the child's gender identity manifests». Ghattas warned about this expression, as it reinforces the misconception that physical sex characteristics should be linked to gender identity and it carries the risk that doctors and parents declare the manifestation of the child's gender identity in order to carry out interventions on the child's sex characteristics.

Considering anti-discrimination law, the introduction of the notion of «sex characteristics» as a ground to protect against the discrimination of intersex people was advised to be adopted by Ghattas. Indeed, it is a universal and clear notion that includes all human beings, and it carries principles of equality and equity. Besides, it «allows bodily diversity and the diversity of the human sexes to be acknowledged and legally recognised» (Ghattas, 2019, 21). Further, at the same time, it gives them visibility.

In the toolkit, health problems that intersex usually face are considered to be both physical and psychological. Indeed, health problems caused by unnecessary and invasive treatments – such as genital insensitivity, impaired sexual function, sterility, massive internal and external scarring, chronic pain, chronic bleeding and chronic infections, osteopenia and osteoporosis at a very young age, metabolic imbalance – can result in long-term psychological issues, such as post-surgical depression, trauma, psychological stress, suicidal thoughts, and self-harm. Consequently, the toolkit

highlights that intersex people should be granted access to health services and medical practitioners should be aware of the intersex condition and the most common issues related to it. Moreover, the lack of counselling is pointed out in the toolkit, as well as the fact that treatments and medication needed as a direct consequence of normalising interventions are often not covered by health insurance, establishing a significant financial burden.

In addition, Ghattas denounces the wide discrimination of intersex people in the education and employment fields, as the intersex community constitutes one of the most vulnerable groups, reinforcing once again the need of adding «sex characteristics» as a prohibited ground of discrimination.

The analysis on gender markers at birth and legal gender recognition pointed out in the toolkit deserve attention, especially bearing in mind the measures proposed at the national level, as previously considered.

First of all, Ghattas reminds that, despite common beliefs, intersex individuals may recognise themselves as male, female or of a non-binary gender. After this consideration, it follows that the third sex/gender option can only be useful to the intersex cause if certain requirements are met. Indeed, the third option should be available on a voluntary basis and to all people, without forcing parents of intersex children to register such children with a third sex/gender. Moreover, when adopting the third option legislation, the intersex community should be involved as much as possible and, once adopted, the entire body of national legislation should be adapted to the third option, to avoid legal loopholes and to ensure that people who choose this option have equal access and equal rights.

Following the reasoning of the European Court of Human Rights and international human rights bodies, Ghattas elucidated that legal gender recognition needs to be based on principles of self-determination and personal autonomy. Moreover, as stated by Ghattas, «gender marker in official documents that reflects and recognises the person's gender identity has a positive impact on an individual's mental and emotional health» (Ghattas, 2019).

Hence, there is a necessity for legislation that allows intersex children and adolescents to change their gender marker more easily. Also, the procedures for legal gender recognition should provide neither the need for medical evidence nor the non-

involvement of the person concerned, because these requirements are a violation of human rights.

With regard to sport, with an explicit reference to the 2018 IAAF Regulations, the toolkit invites states to legally «ensure that regulations and practices in public and private sectors, e.g. in international competitive sport, do not bypass national protection and anti-discrimination legislation and provisions» (Ghattas, 2019, 18).

Other useful insights come from StopIGM.org/Zwischengeschlecht.org, which is an international human rights non-governmental organisation based in Switzerland. It was formed in 2007 and is led by intersex persons, their partners, families, and friends. This NGO aims to represent the interests and the needs of intersex people and their relatives, to raise awareness about intersexuality, and to fight IGM practices and other human rights violations perpetrated on intersex people. The activities that the NGO carries out includes participation at congresses, providing support for genital mutilation survivors, participation in UN Human Rights mechanisms, lobbying, and engaging in legal parliamentary initiatives (StopIGM.org).

One of the most noteworthy StopIGM.org works is its publication of the *Report to the 3<sup>rd</sup> to 6<sup>th</sup> Report of Malta on the Convention on the Rights of the Child*. This Report, in contrast with the praise that the Maltese approach has generally received, emphasizes the shortcomings that characterize the Maltese system. Indeed, the Maltese GIGESC Act was categorised by Garland and Travis under the umbrella of holistic approaches, giving prominence to its positive aspects.

Indeed, StopIGM.org recognised the pioneering introduction of the ban on IGMs, but it denounced that no effective legal or other protections have been put in place to prevent all IGM practices, both domestically and overseas. Moreover, the Report outlined that intersex children continue to be sent overseas for genital mutilations by the Maltese Government (StopIGM.org, 2019).

StopIGM.org also highlighted the lack of data collection, of monitoring IGM practices, of effective legal measures to ensure the accountability of perpetrators. Finally, the NGO claimed that no effective legal measures are put in place to ensure access to redress and justice for IGM survivors.

The Report then traces the failure of the GIGESC Act on four main bases. First, there is a significant distinction between the penalties for IGM and those for FGM. In fact,

sanctions for FGM are double those for IGM and they include the possibility of imprisonment for a period from five to ten years. Second, StopIGM.org found that IGM is not under any extraterritorial protection, while for FGM the extraterritoriality principle is applied. Third, in the case of FGM, «[w]hosoever aids, abets, counsels, incites, procures or coerces a female to excise, infibulate or otherwise mutilate the whole or any part of her own genitalia, shall be guilty of an offence and shall be liable, on conviction, to the punishment laid down under this article» (Maltese Criminal Code). Instead, as far as the Code concerns IGM, only medical practitioners or other professionals are punishable in respect of it under the law. Therefore, for instance, doctors who urge parents to go to foreign hospitals are *a priori* immune from prosecution, and the same can be said regarding those who aid, abet, counsel, incite, procure or coerce intersex children to be submitted to IGM. Lastly, the GIGESC Act, according to the Maltese Government, exempts «hypospadias repair» from being prosecuted as IGM. «Hypospadias repair» involves surgery to reposition the urethral opening of the penis and is the most frequent IGM practice. Apparently, it is the only IGM that is performed in Malta. Instead, for other IGM practices, according to the StopIGM.org Report, the country is sending children overseas – such as to the United Kingdom, Belgium, and Italy – for surgery (StopIGM.org, 2019).

The Report also acknowledged the lack of statistics on intersex births which, consequently, leads to the difficulty of monitoring ongoing mutilations. Moreover, StopIGM.org found that in Malta there are still obstacles to redress, including in respect of fair and adequate compensation to intersex mutilation survivors. The individuals concerned often do not find out about their medical history until much later in life, and they may be afflicted by severe trauma caused by those practices.

### 3.4 Main issues emerging from the intersex community's voice

The European legal framework, seen from the intersex community perspective, is even more inadequate than as depicted by legal scholarship. Intersex people widely argue in support of a more systemic approach, which should be capable of tackling intersexuality-related issues.

The seriousness of the inequalities for intersex individuals clearly emerges in their stories and the violations they routinely face just seem not possible in the European framework. Indeed, they do take place.

Some intersex-related issues involve such complexity that the issues are difficult to understand by those who are not involved. For instance, the third gender marker, in order to have a positive impact, should involve a dramatic modification of the legislation currently based only on a binary distinction, otherwise those who recognise themselves under the third option are likely to be largely excluded from the civil and societal life.

The Maltese legislation, seen through the lens of the intersex community, takes a totally different approach. Even though the GIGESC Act is often considered a good model to follow thanks to its systemic and holistic approach, some activists have revealed its deficiencies and ineffectiveness.

The GIGESC Act is the perfect example of the gap between what is theoretically appropriate but empirically inadequate. For instance, despite the explicit ban on «normalising» surgeries, those interventions are still performed, and doctors suggest to parents to have their children treated in countries where a prohibition on IGM is still not in place.

The debate over the third sex/gender option takes place at a much more complex level. The analysis of the intersex community highlights that the way in which it is currently implemented in some countries is ineffective and put intersex individuals at risk. For example, when German legislation provided for a third gender option, it seemed to be a pioneering step toward equality. However, it emerged that it was rather a status-based measure that carried with it the risk to increase discrimination against, and stigma toward, intersex people.

The suggestion proposed by Ghattas to correctly introduce a third gender option in national legislation is widely ignored in European legal systems. It is sufficient to say that the German and Austrian legislation ignores the third option with the principle of self-determination, and legal loopholes persist as legislation is not modified in order not to exclude those who are assigned with this sex/gender marker.

As far as concerns the use of anti-discrimination law to tackle intersex problems, it is debatable whether that such law is useful (Lorenzetti, 2015). Garland and Travis agree



on the fact that anti-discrimination law has some limits as to being able to address intersex discrimination issues. They consider, for example, that such laws are incapable of addressing the main concern of intersex people, namely «normalising» surgeries.

Ghattas, instead, insists on the need for appropriate anti-discrimination legislation. In his work, he frequently proposes to add «sex characteristics» as a ground for prohibiting discrimination, in the light of the fact that intersex individuals are particularly vulnerable and discrimination and other human rights violations they face are more specific to them than to other parts of the population (Ghattas, 2019).

In addition to the focus on the analysis of general anti-discrimination laws, he often links different areas - such as education, health, access to justice – such laws, in such a way that his considerations take on a more concrete foundation, effectively highlighting what can be the outcome the of inclusion of «sex characteristics» as a ground for discrimination.

Another particularly important observation by the intersex community is the substantial and widespread regulatory difference between IGMs and FGMs, which has already been identified above in relation to Italian legislation.

Both Ghattas and StopIGM.org denounced the different legal treatment given to IGMs and FGMs. Furthermore, the Maltese GIGESC Act is not exempted from this discrimination because it establishes different penalties for IGMs from FGMs, as pointed out by StopIGM.org in its abovementioned Report.

The intersex community perspective offers useful reflections and proposals. In developing a new legal system, it is certainly clear that a first step should be to increase the involvement of intersex people, creating a meeting point between the legislative process and the individuals involved. Moreover, intersex people should be engaged at all phases of the legislative process, as well as in respect of long-term impact assessments of the measures adopted.

## Conclusions

The relationship between intersexuality and the law appears particularly complex. Indeed, in the European legal landscape, the intersex condition hardly finds a legal

place. Moreover, law, strictly based on the sex binary system, lays the foundations for intersex-related human rights violations and discrimination.

Interestingly, in recent years, intersexuality is gaining attention at international and European levels. However, intersex issues are not generally included in the top priority of the agendas of most institutions and analysis shows the absence of legally binding instruments concerning intersex human rights.

Comparing the major recommendations from UN treaty bodies and European institutions, and the proposals made by the intersex community, a significant difference in the approach toward intersex issues emerges.

International institutions mainly focus on the legal abolition of «normalising» surgeries and its effective implementation. Without prejudice to the fact that the ban on unnecessary and aesthetic surgeries is one of the major requests from the intersex community, this measure alone is not capable to effectively tackle this issue. For this reason, the intersex community suggests a more holistic approach, since the ban should be accompanied by a series of other measures.

Regarding banning unnecessary surgeries, it may be questioned whether such bans will be effective in practice, given the ability to circumvent them.

Mere advice to ban «normalising» surgeries appears sterile if placed in a context where the issue of intersexuality is not debated and explained. In this regard, states may find themselves unresponsive to this issue and, even if they followed the recommendations, they would find it very difficult to make the legal measures effective in practice.

The situation at the European Union level seems to be extremely paradoxical. While being a bulwark in defence of fundamental rights and freedoms, the European Union tolerates very serious human rights violations. Often it does not act to prevent them from occurring.

As outlined by the European Union Fundamental Rights Agency in 2015, «[i]n at least 21 Member States, sex “normalising” surgery is carried out on intersex children» (European Union Fundamental Rights Agency, 2015, 1), and, although five years have passed since that statement, the situation does not seem to have changed dramatically for the better.

Similarly, anti-discrimination law in the European legal framework, which is very sensitive to certain fundamental rights issues, fails to recognize sex as a spectrum and does not seem to have adequate means to protect intersex people.

Although anti-discrimination law has a limited role in the abolition of «normalising» surgeries, this field of law seems to be of fundamental importance for intersex people who, as mentioned above, are highly likely to be discriminated against in different areas of their lives.

The ground of sex characteristics is not included in European anti-discrimination legislation and this absence is reflected in the uncertainty regarding European Union law as a means of protection.

Moreover, this work discloses that European national measures aimed at tackling intersex issues are characterised by crucial shortcomings and defects. The third gender marker, one of the most debated measures, could be a useful tool to go beyond the sex dichotomy, as also suggested by OII Europe. Nonetheless, in Germany and Austria, there are no requirements for its inclusion.

In German legislation, the third gender is designed to be used only for intersex individuals, where a medical certificate has verified their status. In Austria, the significant confusion between «sex» and «gender» makes it difficult to implement the Constitutional Court decision that established the option of entering something other than «male» or «female».

The Maltese case is one of the most controversial. The GIGESC Act, a pioneering step towards the recognition and the protection of intersex human rights, is depicted as a model to follow. Yet, the true picture of the Maltese intersex people's situation collides with the theoretical and legal framework. The above-mentioned Report by StopIGM.org about Malta reveals a scenario, in which parents of intersex children are advised to have their children operated on countries where «normalising» surgeries are not yet explicitly banned.

Despite the weaknesses of the Maltese case, the worst situation arises in states where the debate on intersexuality has not even begun, such as in Italy. In these contexts, there is currently no space for discussion and the intersex condition, although it exists, is not recognised by the state and legal system.

Intersex people are therefore relegated to a paradoxical situation of invisibility and, even before making proposals and requests, they ask for their voice to be recognized. Quoting Judith Butler, «[t]here are humans, in other words, who live and breathe in the interstices of this binary relation, showing that it is not exhaustive; it is not necessary» (Butler, 2004, 65).

The perspective of the intersex community is particularly significant for law and policymakers. It brings out more issues than those described by academic works, and it highlights discrimination throughout intersex lives, from the moment of birth and continuing into private and family life, sport, and employment.

The solutions to intersex issues can and should not be simplistic. First, there should be continual communication with the intersex community throughout the entire legislative process. The involvement of the individuals concerned is essential, since, as already mentioned, they are the only ones who know the dynamics of their situation in its entirety and in a deep way.

Second, the approach towards intersex matters should be systematic. Measures for intersex people should be accompanied by research on the impact of them across the entire legal system, considering that a limited binary approach to gender has across the whole system. The legal measures should not be implemented without research on possible outcomes and legal loopholes.

Third, assessment of the effectiveness of measures adopted should be carried out, which is based on empirical data. For instance, the ban on «normalising» surgeries should be followed up by studies on how many of those surgeries are carried out after the commencement of the measure and what can be done to ensure that they are eliminated.

Lastly, all levels of law should apply to intersex issues. In a bottom-up process, the instances put forward by the intersex community should be properly considered and addressed by local, regional, national, and international laws and institutions.

The law can play a key role in tackling issues for intersex individuals. However, «(...) legal change cannot occur in a vacuum. It requires a broader social and cultural shift» (Cilia, 2017). Indeed, the current situation concerning intersex individuals is driven by cultural and social bias (Tamar-Mattis, 2013). The law should not be used as a means of reinforcing such biases. The solution should include a rethinking of educational and cultural norms. Raising awareness on intersexuality at the national, international, and

European levels should be one of the first steps to take, in order to create a space for debate in a place where it still does not exist or, if it does, has only minimal and marginal relevance.

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## Abstract

This essay focuses on the complex relationship between intersexuality and the law. It aims to highlight the issues that are emerging in European legal systems due to the lack of specific measures or legislation regarding gender identity, and the ad hoc legislation which does exist but fails to distinguish transsexualism from intersexuality.

The most pressing issue that the law should tackle is the performance of unnecessary, irreversible, and invasive surgery on intersex children. Indeed, most of European Member States do not explicitly legally ban this practice.

First, international and European Union law is considered noting that they do not provide for any legally binding instrument for the protection and recognition of intersex human right. However, in recent years they have shown to be progressively responsive towards intersex individuals.

Then, three legislative models are identified and the national legal frameworks corresponding to them analysed. The first, adopted by Germany and Austria, is based on the introduction of a third sex. The second is contained in Belgian legislation, and establishes the self-determination principle, which permits the choice of a preferred gender on identity documents, without particular requirements being met. The third approach has been adopted only by Malta so far. It is characterised by multiple measures and, accordingly, it is more systemic and holistic. In fact, the Maltese legislation explicitly recognises the intersex condition, and it conceives sex as a spectrum, thus going beyond gender binarism. Moreover, it prohibits discrimination based on sex characteristics, establishes the self-determination principle, and it bans irreversible, unnecessary, and aesthetic surgery from being carried out on intersex people.

Lastly, theoretical analysis on the role the law should play in tackling intersex issues is presented. Alongside, some factual cases of human rights violations on intersex people a way forward is proposed, considering the most interesting proposals and insights from the intersex community.

Keywords:

Intersexuality; Law; Sex Characteristics; Third Sex; Intersex Rights Movements.

Parole chiave:

Intersessualità; Diritto; Caratteristiche Sessuali, Terzo Sesso, Associazionismo intersessuale.