

## CHAPTER I

### INTERSEXUALITY: DEFINITION AND MAIN ISSUES

#### 1. Introduction

Usually, the birth of a child is a moment of shared joy, and before the event one of the most inflamed curiosity regards the sex of the child. Parents, as soon as they know the child's sex, direct their purchases over specific items. What happens instead if the sex of the baby is hard to define as “fully” male or female? In some cases, a disturbing sense of anxiety can take over such happiness.

Indeed, when a child is born with ambiguous genitalia, the case immediately takes on significant tragedy and emergency, both in terms of how is presented by the doctors and, consequently, how it is perceived by the parents.

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

Children who do not fit in the “traditional” sex binary at birth fall within the wider spectrum of intersexuality, a condition concerning the chromosomal, gonadal, and anatomical sex development. This latter is considered atypical, as it leads to primary and secondary sex characteristics that do not reflect the traditional male and female canons. The so-called female and male traits coexist in these individuals with a percentage that can vary from case to case.

The relationship between intersexuality and the law is particularly interesting and problematic. In most legal systems, intersexuality is not recognised as legislations are founded on a binary conception of sex: therefore, the invisibility of intersex people has dramatic consequences over their fundamental human rights and their exposure to discrimination.

The law, intertwined with social and cultural features, seems unprepared to include intersex individuals in the society and, at the same time, it seems to establish the conditions for the exclusion of the intersex community. Unsurprisingly, the law is currently incapable of grant remedies against the human rights violations and discrimination that intersex individuals usually face.

In the European legal landscape this is a particularly controversial matter, even if, both at the regional and national level, it is considered one of the most developed and inclusive when it comes to human rights.

These are the reasons why, in this work, I will analyse the place of intersexuality has a place in the European legal system and, consequently, what role European law – both of the Council of Europe and of the European Union – can play in addressing intersex issues.

The work is mainly intended as a research within academic publications, current legislations, and international and European law instruments. In addition to this, a more cultural and social side is added, involving intersex individuals, with needs and proposals put forward by them.

In the next paragraph, I will begin with a definition of intersexuality, through a concise description of the major problems related to this condition and a brief account of the various approaches and measures adopted throughout history.

In the second Chapter, will I analyse the international and European legal landscapes in order to understand if they are capable of protecting intersex human rights, and if there are any international legal tools aimed at this. I take in consideration three systems: The United Nations, the Council of Europe, and the European Union.

In the third Chapter, I will focus on some European national legislations and the instruments adopted to tackle intersex issues. I will divide the different approaches into three main categories: the third gender/sex option in the German and Austrian legislation, then the Belgian approach based on the self-determination principle and, eventually, the pioneering Maltese legal system with a final analysis of the Italian situation. In this Chapter, the legal analysis has been accompanied by an empirical focus on the effectiveness of those legal measures.

In the final Chapter, I will conclude with some observations on the role that law should play in its controversial relationship with intersexuality, and I will take in consideration the perspectives of the intersex community. The aim is to address with a deeper approach the issues related to the intersex condition and identify which legal measures are the more appropriate and effective, going beyond the mere academic legal analysis.

The work shows that law, from a mean of erasure and oppression, can – and should – acknowledge the existence of intersex individuals. Among the most pressing measures to adopt, law should provide intersex people with adequate legal protection, and it should involve them in the law and policy making process. Indeed, the final Chapter will show that their inclusion in the legislative process serves to better define the issues and to design more complete and effective solutions. Some major problems are almost neglected by academic research, but they emerge from the stories and testimonies of intersex individuals.

It therefore appears a fundamental revolution in the European legal landscape, both at regional and national levels, which must address intersexuality through a more holistic and systemic approach. However, this change of direction is necessarily determined by a symmetrical development in culture and education.

## 2. A definition of intersexuality

Intersexuality is an umbrella term which defines the condition of people whose sex characteristics do not meet what it is considered typical for female or male bodies. The most explicative examples are children born with both genitalia – male and female ones – or those who are born with some male or female traits but whose sex is difficult to be assigned. According to the 2015 Report ‘Human rights and intersex people’ 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*”<sup>1</sup>.

From a medical point of view, the sex differentiation starts between the 6<sup>th</sup> and 7<sup>th</sup> week in the uterus. In that period, depending on the chromosome carried by the sperm that reaches the egg, the foetus develops the male or female sex. Nevertheless, the sex development can be atypical and at the end of the process the genitalia cannot be recognised in one sex or another.

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<sup>1</sup> Commissioner for Human Rights of the Council of Europe (2015), *Human rights and intersex people: issue paper*, CoE, p. 13.

Intersexuality is a congenital, therefore it is a condition that exists at or from birth<sup>2</sup>. In some cases, intersexual traits are discovered late in the life of the person. In fact, where it is the chromosomal makeup which has developed atypically, it can be difficult to find out at birth. Eventually, this kind of traits can be discovered in case of virilisation in girls<sup>3</sup>, breast augmentation in boys<sup>4</sup> or other late “anomalies”.

It becomes clear that the word *intersex* is quite broad and heterogeneous. It represents different medical situations; some authors found up to forty conditions under this umbrella definition<sup>5</sup>. Moreover, it is not possible to rely upon a precise percentage of the population who is intersex because it could be difficult to diagnose them and because of the stigma that afflicts intersex people most of the time<sup>6</sup>. It is possible to say, without scientific precision, that between 0.5 and 1.7 % people may have intersex traits, but for the reasons given above, they could be more<sup>7</sup>.

In the history, the approach towards intersexuality has significantly changed, as pointed out by, among others, Anne Fausto-Sterling in her article *The Five Sexes*<sup>8</sup>. In this evolution, religious and philosophical traditions have played an important role in shaping the attitude of common people and scholars. Initially, hermaphrodite figures are present in some myth about human origins<sup>9</sup>. One interesting example is the hermaphrodite in Plato's *Symposium*<sup>10</sup>; according to the author, in fact, there was a third sex, characterised by both male and female traits, which got lost during time. In Jewish books of law intersexuality started to be regulated; in the Talmud and Tosefta there are norms which address people of mixed sex, most of them are about preventing those people from do what “normal” people can<sup>11</sup>. In Europe, from the Middle Ages emerged a different approach. Intersex people had to choose one of the two

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<sup>2</sup> Hughes, I. A., Houk, C., Ahmed, S. F., Lee, P. A., LWPES Consensus Group, & ESPE Consensus Group (2006), *Consensus statement on management of intersex disorders*, Archives of disease in childhood, 91(7), p. 556.

<sup>3</sup> *Ibidem*.

<sup>4</sup> *Ibidem*.

<sup>5</sup> Carpenter M. (2016), *The human rights of intersex people: addressing harmful practices and rhetoric of change*, Reproductive Health Matters, 24:47, p. 74.

<sup>6</sup> *Ibidem*.

<sup>7</sup> *Ibidem*.

<sup>8</sup> Fausto-Sterling A. (1993), *The Five Sexes: Why male and female are not enough*, The Sciences, March/April 1993 pp. 20–24.

<sup>9</sup> *Ivi*, p. 23.

<sup>10</sup> Santamaria, F., Valerio, P. (2013), *Bambini e adolescenti intersessuali: quali dilemmi?* La Camera Blu. Rivista Di Studi Di Genere, (9), p. 2.

<sup>11</sup> Fausto-Sterling A., *op.cit.*, p. 23.

institutionalised sexes and “*stick with it*”<sup>12</sup>. Unfortunately, it is possible to state that this latter approach has lasted until the present day, in 2020.

When an intersex child born, the case is treated as an emergency<sup>13</sup> and the priority is to assign one of the two sexes available. The way in which intersexuality is approached nowadays at birth largely reflects the works of the Professor John William Money<sup>14</sup> who, in the second half of 1900 wrote about the treatment of intersex people. In his opinion, the sex of the newborn is malleable, therefore in highly ambiguous cases it is preferable to perform a surgery and assign a sex as soon as possible<sup>15</sup>. Then, according to his theory, if the baby is raised as the sex assigned, he or she will recognise himself or herself in the sex given<sup>16</sup>.

Intersexuality carries some important issues, which most of the time concern the legal field. The aim of this work is to analyse which are the problems inherent to intersexuality in Western legal systems and whether there are any measures taken in order to protect intersex people.

Firstly, there has been a 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 which is *disorders of sex differentiation* (DSDs)<sup>17</sup>. A DSD classification was also proposed in order to avoid terms, such as *hermaphroditism*, which are quite controversial and not accurate. However, this new nomenclature did not receive a widespread acceptance among intersexual people<sup>18</sup>. Some authors and activists consider that the term *disorders* is pathologizing and it is more appropriate that intersex people define in which way they prefer to be called<sup>19</sup>. In this work, I will use the term *intersexuality* and not DSD. I am aware that in the medical field it could be confusing and maybe the DSD taxonomy is more appropriate.

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<sup>12</sup> *Ibidem*.

<sup>13</sup> Comeni A. (2018), *La condizione intersessuale: una testimonianza*, GenIUS, anno V, numero 1, aprile 2018, p. 12.

<sup>14</sup> *Ibidem*.

<sup>15</sup> Carpenter M., *op.cit.*, p. 75.

<sup>16</sup> Comeni A., *op.cit.*, p. 13-14.

<sup>17</sup> Hughes, I. A., Houk, C., Ahmed, S. F., Lee, P. A., LWPES Consensus Group, & ESPE Consensus Group (2006), *op.cit.*, pp. 554–563.

<sup>18</sup> Santamaria, F., & Valerio, P. (2013), *op.cit.*, p. 4.

<sup>19</sup> *Ibidem*.

However, I think that the issues discussed in this research would be better explained if I do not adopt a medical classification because it is important to de-pathologize these congenital conditions, especially if the aim is to analyse their legal issues. Moreover, most of the academic resources that I have found refer to the above-mentioned condition as *intersexuality*. Finally, it is of primary importance to consider the will of intersexual people about the definitions and terms to use regarding them.

Secondly, this work will mainly focus on Western legal systems - European ones particularly - and most of them do not address intersexuality. Almost all European legal systems show a legal loophole as far as concern people who do not fit in the male-female dichotomy<sup>20</sup>, because the Western tradition has been built upon the binary system<sup>21</sup>. The latter legal vacuum and the theory of the newborn's sex malleability make surgeries the most common solution in case of discrepancy between the sex of the child and the two "institutionalised" sexes. The major problem about this approach is that the principle of body integrity is at stake and rarely the will of the child is taken into account, since the decision is usually taken by healthcare professionals and parents<sup>22</sup>.

Thirdly, it is not easy to conduct a research about intersexuality because data and evidence are scarce since this condition has been often hidden and stigmatised<sup>23</sup>. There is not a clear definition nor the precise percentage of the population that presents intersex traits. It is hard to work on legal issues of a condition which has not clear borders. Still, there are some certain facts. It is undoubtable that intersexuality exists and so do intersex people. Also, as already remarked, in the western societies the most common way to acknowledge sex is a dichotomy: in most of the States, a person could be only male or female. This could represent a real problem for people who born with intersexual traits.

The fourth major issue is related to the previous one. Due to the dichotomy that characterises most of the legal systems, surgeries are one of the most common way to solve the clash between the uncertain sex of the intersex child and the sex assignment

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<sup>20</sup> Pikramenou N. (2019), *Intersex in Europe*, Intersex Rights: Living Between Sexes, Springer International Publishing, p. 140.

<sup>21</sup> Lorenzetti A. (2018), *Il "trattamento" giuridico della condizione intersessuale*, GenIUS, anno V, numero 1, aprile 2018, p. 6.

<sup>22</sup> Comeni A., *op.cit.*, p. 13.

<sup>23</sup> Carpenter M. (2016), *op.cit.*, p. 74.

– male or female - required<sup>24</sup>. It is interesting to notice that in the Chicago Consensus, already mentioned above, the approach towards this kind of surgeries is paradoxical. In fact, the Consensus gives the emphasis on the functional outcome of the interventions and discourages those operations based on the cosmetic appearance<sup>25</sup>. However, among the reasons why early interventions could be useful in the treatment of intersexual children are that those operations could “*minimise parental concern and distress, facilitate parental bonding and mitigate the risk of stigmatisation*”<sup>26</sup>. Here, there are no data available to prove the correctness of these assumptions and those hypotheses are cultural rather than medical. The Consensus itself admit that “*there are no controlled clinical trials of the efficacy of early (...) versus late surgery (...), or of the efficacy of different techniques*”<sup>27</sup>. It is alarming that according to the Chicago Consensus, these surgeries and the stigma that afflicts intersex people, could also lead to mental illnesses, such as the post-traumatic stress disorder<sup>28</sup>. Moreover, intervention could be accompanied by hormone treatments, which are irreversible and lifelong<sup>29</sup>.

Finally, a third gender has been suggested in order to tackle the clash between intersexuality and the female-male dichotomy. It is a measure that at least recognises the existence of intersex people, but it is not without negative externalities. There is a rich debate of academics, researchers, and policymakers over it. First, it should be decided which third gender is to be used: in fact, the terminology has a primary importance in avoiding stigmatisation. Furthermore, when the third gender is introduced into a legal order, it is necessary to decide whether it should be understood as compulsory and therefore assigned to anyone who does not fall within binarism or whether, instead, it can be chosen according to the principle of self-determination. In first case, intersex people’s integration in society could be at stake and the stigma attached to them could be augmented. Moreover, it must be pointed out that European

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<sup>24</sup> Pikramenou N., *op.cit.*, p. 140.

<sup>25</sup> Hughes, I. A., Houk, C., Ahmed, S. F., Lee, P. A., LWPES Consensus Group, & ESPE Consensus Group, *op.cit.*, p. 557.

<sup>26</sup> Carpenter M. (2016), *op.cit.*, pp.75-76.

<sup>27</sup> Hughes, I. A., Houk, C., Ahmed, S. F., Lee, P. A., LWPES Consensus Group, & ESPE Consensus Group, *op.cit.*, p. 558.

<sup>28</sup> *Ibidem*.

<sup>29</sup> Comeni A., *op.cit.*, p. 13.

legal systems are based on the binary conception of gender<sup>30</sup>; it is uncertain if the third gender could be an effective solution.

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<sup>30</sup> Pikramenou N., *op.cit.*, p. 140.



## CHAPTER II

### INTERNATIONAL AND EUROPEAN PROTECTIONS FOR INTERSEX PEOPLE

On the international and European level, the protection given to intersex people is still limited. However, it is possible to observe that intersex issues are gradually brought on the public scenario by institutions such as those of United Nations, the Council of Europe, and the European Union. In this chapter, I will analyse the existent anti-discrimination protections offered by those three international organisations and that could be applied to grant human rights to intersex people.

#### 1. The United Nations system

Within the United Nations framework, in recent times, the intersex condition is gaining attention, but there are no legally binding acts for its protection. Starting with the Universal Declaration of Human Rights (UDHR), article 1 states that “*All human beings are born free and equal in dignity and rights*”. Even though gender identity, gender expression, and sex characteristics are not mentioned as a ground for protection in the UDHR, many United Nations actors and Committees affirmed that intersex people enjoy human rights protections<sup>31</sup>.

Since 2011, the UN Human Rights Council, the inter-governmental body within the United Nations system responsible for the promotion and protection of human rights, started to express “[...] *grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity*”<sup>32</sup>. Then, in 2016, the Council created the mandate of the Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity with the aim of addressing this concern<sup>3334</sup>. Initially, the UN Independent Expert focused on the fact that intersex and trans people are particularly vulnerable as far as concern the access to healthcare. Moreover, the Expert called for an intersectional approach towards SOGI-related

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<sup>31</sup> Directorate-General for Justice and Consumers, European Commission (2018), *Trans and intersex equality rights in Europe - a comparative analysis*, p. 36.

<sup>32</sup> United Nations Human Rights Council (2011), *Resolution 17/19 Human rights, sexual orientation and gender identity*.

<sup>33</sup> Directorate-General for Justice and Consumers, European Commission (2018), *op.cit.*, p. 36.

<sup>34</sup> Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender identity (2018), *Violence and discrimination based on gender identity*, A/73/152, p. 3.

issues and recognised the special features of intersex people, which may not be covered by the grounds of sexual orientation and gender identity<sup>35</sup>.

In the UN system, the UN human rights treaty bodies are composed by independent experts and their aim is to monitor the implementation of the core international human rights treaties. These bodies have also played a key role in bringing the intersex condition into the international public debate.

The UN Human Rights Committee (OHCHR), the treaty body that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR), in recent Concluding Observations on periodic reports to State parties has remarked the equality and non-discrimination rights of intersex and trans people, affirming that States should explicitly prohibit discrimination on the basis of gender identity and expressing concern about practises that medicalise intersex and trans bodies<sup>36</sup>.

Interestingly, the UN Committee against Torture (CAT) has played a pivotal role in the promotion and protection of intersex rights. The main concerns expressed by the CAT have regarded the unnecessary and irreversible surgeries on intersex bodies and, therefore, the Committee called for the protection of the physical integrity of intersex people<sup>37</sup>. An example could be found in the Concluding observations on the seventh periodic report of the Netherlands. In this case, the CAT stated that the State party should “[t]ake the legislative, administrative and other measures necessary to guarantee respect for the physical integrity and autonomy of intersex persons and to ensure that no one is subjected during infancy or childhood to non-urgent medical or surgical procedures intended to decide the sex of the child without his or her informed consent”<sup>38</sup>. Moreover, the Committee encouraged the State to establish “impartial counselling services and psychological and social support for all intersex children and their parents, so as to inform them of the consequences of unnecessary and non-urgent surgery and other medical treatment to decide on the sex of the child and the possibility of postponing any decision on such treatment or surgery

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<sup>35</sup> Directorate-General for Justice and Consumers, European Commission (2018), *op.cit.*, p. 37.

<sup>36</sup> *Ivi*, p. 38.

<sup>37</sup> *Ibidem*.

<sup>38</sup> Committee against Torture (2018), *Concluding observations on the seventh periodic report of the Netherlands*, CAT/C/NLD/7, [53](a).