

PRESENTACIÓN
José Thompson J.

INTERSEXUALIDAD Y LA OPINIÓN CONSULTIVA OC-24/17.
RETOS PENDIENTES DEL SISTEMA INTERAMERICANO
DE DERECHOS HUMANOS
Olga Lucía Camacho

INTERSEX AND THE LAW: HOW CAN THE LAW PROTECT
INTERSEX RIGHTS?
Luiza Drummond Veado

EDUCAÇÃO, DIREITO À NÃO-DISCRIMINAÇÃO DE LGBTI
E O ARTIGO 12.4 DA CADH
Sergio Gardenghi Suiama

MATRIMONIO, UN CONCEPTO JURÍDICO DINÁMICO.
ENTRE EL PERFECCIONISMO MORAL Y EL ENFOQUE IGUALITARIO
Eduardo Elías Gutiérrez López
Raymundo Gutiérrez López

VIABILIDAD DE UNA CONVENCION PARA LA
ELIMINACION DE LA DISCRIMINACION Y LA VIOLENCIA
POR ORIENTACION SEXUAL E IDENTIDAD DE GENERO
Cristhian Manuel Jiménez

EL MATRIMONIO IGUALITARIO: EL CASO DE HONDURAS
Y UNA PERSPECTIVA KANTIANA
Leonardo Rivera Mendoza

MATRIMONIO ENTRE PERSONAS DEL MISMO,
¿ES UN DERECHO RECONOCIDO Y TUTELADO
POR EL TRIBUNAL EUROPEO DE DERECHOS HUMANOS?
Carlos Enrique González Aguirre

LA OPINIÓN CONSULTIVA OC-24/17 SOLICITADA
POR COSTA RICA: EL RESULTADO DE UNA
CONSULTA ESTRATÉGICA
William Vega-Murillo
Esteban Vargas-Mazas

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Índice

Presentación	7
<i>José Thompson J.</i>	
Intersexualidad y la Opinión Consultiva OC-24/17. Retos pendientes del sistema interamericano de derechos humanos	11
<i>Olga Lucía Camacho Gutiérrez</i>	
Intersex and the Law: How can the law protect intersex rights?	37
<i>Luiza Drummond Veado</i>	
Educação, direito à não-discriminação de LGBTI e o artigo 12.4 da CADH	59
<i>Sergio Gardenghi Suiama</i>	
Matrimonio, un concepto jurídico dinámico. Entre el perfeccionismo moral y el enfoque igualitario ...	81
<i>Eduardo Elías Gutiérrez López</i> <i>Raymundo Gutiérrez López</i>	
Viabilidad de una convención para la eliminación de la discriminación y la violencia por orientación sexual e identidad de género	101
<i>Cristhian Manuel Jiménez</i>	
El matrimonio igualitario: el caso de Honduras y una perspectiva kantiana	125
<i>Leonardo Rivera Mendoza</i>	

**Matrimonio entre personas del mismo,
¿es un derecho reconocido y tutelado por el tribunal
europeo de derechos humanos?.....153**

Carlos Enrique González Aguirre

**La opinión Consultiva OC-24/17 solicitada
por Costa Rica: el resultado de una
consulta estratégica.....171**

William Vega-Murillo

Esteban Vargas-Mazas

Presentación

El Instituto Interamericano de Derechos Humanos (IIDH) presenta el número 66 de su Revista IIDH, publicada ininterrumpidamente desde 1985. Esta edición ofrece los artículos académicos y las reflexiones de ocho autores y autoras de Latinoamérica sobre el impacto y la aplicación de la reciente opinión consultiva OC-24/17 emitida por la Corte Interamericana de Derechos Humanos (CorteIDH) en lo concerniente a identidad de género, igualdad y no discriminación a parejas del mismo sexo.

En un contexto en el cual las personas lesbianas, gays, bisexuales, transexuales e intersexuales (LGBTI) continúan siendo una población sujeta a la discriminación y la violencia, la opinión consultiva OC-24 de la CorteIDH –emitida en noviembre de 2017 y solicitada por el Estado de Costa Rica– es de gran relevancia para los sistemas jurídico-políticos de nuestro continente ya que se constituye en el principal precedente acerca de la interpretación y el alcance de los derechos de las personas LGBTI en relación con las obligaciones estatales de cambio de nombre, la identidad de género y los derechos derivados de un vínculo entre parejas del mismo sexo.

Si bien en la región se han observado avances importantes en la generación de legislación y políticas públicas para la protección de las personas LGBTI, estos no son aún suficientes para garantizarles una vida libre de violencia y exclusión. Los estereotipos y la discriminación aún permean a nuestras

sociedades en el ámbito público y privado, convirtiéndose en obstáculos para la garantía de sus derechos.

Por lo tanto, a partir del importante paso que implica un precedente interamericano en la materia, el IIDH ha abierto este espacio editorial e investigativo para difundir reflexiones jurídicas y sociales que –desde el ámbito académico– incidan en la promoción de acciones que contribuyan a avanzar hacia el reconocimiento de la diversidad. En ese sentido, el IIDH abrió una amplia y exitosa convocatoria cuyo resultado fue el de una gran cantidad de artículos recibidos. Sin ser posible incluir todos los interesantes aportes, se han seleccionado algunos que suman ampliamente al debate.

Al respecto, en la presente Revista podremos leer en el artículo “Intersexualidad y la opinión consultiva OC-24/17. Retos pendientes del sistema interamericano de derechos humanos” que Olga Lucía Camacho Gutiérrez realiza un análisis, en el contexto de la violencia médica, de las razones por las cuales la intersexualidad se encuentra en la actualidad en un escenario constante de censura y discriminación orientada por el sistema sexo-género.

Por su parte, Luiza Drummond Veado en “Intersex and the Law: How can the law protect intersex rights?” nos presenta un estudio acerca del concepto de persona intersexual, el movimiento social en torno al mismo, la manera en que este se enmarca en las legislaciones nacionales y el derecho internacional, así como los derechos y el reconocimiento de esta comunidad.

En “Educação, direito à não-discriminação de LGBTI e o artigo 12.4 da CADH”, cuyo autor es Sergio Gardenghi Suiama, se realiza una importante reseña acerca de los derechos a la

educación y no discriminación de las personas LGBTI a la luz de los sistemas interamericano y europeo de protección de los derechos humanos.

“Matrimonio, un concepto jurídico dinámico. Entre el perfeccionismo moral y el enfoque igualitario” –de Eduardo Elías Gutiérrez López y Raymundo Gutiérrez López– es el artículo en el cual se estudian los antecedentes y las mutaciones del concepto dematrimonio, en el contexto jurídico mexicano, y la resistencia presentada por las autoridades federativas a modificar su regulación.

En el trabajo titulado “Viabilidad de una convención para la eliminación de la discriminación y la violencia por orientación sexual e identidad de género”, Cristhian Manuel Jiménez nos brinda un análisis de las perspectivas, la viabilidad y la necesidad de elaborar una convención para la eliminación de la discriminación y la violencia por orientación sexual e identidad de género, en el contexto de la Organización de las Naciones Unidas.

Leonardo Rivera Mendoza nos presenta “El matrimonio igualitario: el caso de Honduras y una perspectiva kantiana”, donde profundiza acerca de los problemas que surgen al tratar el tema del matrimonio igualitario a la luz de la reciente opinión consultiva OC-24/17 de la CorteIDH, el concepto de Immanuel Kant al respecto y la situación jurídica del Estado hondureño sobre el tema.

En el texto titulado “Matrimonio entre personas del mismo sexo: ¿Es un derecho reconocido y tutelado por el Tribunal Europeo de Derechos Humanos? Reflexiones en torno a la sentencia Chapin y Charpentier contra Francia”, Carlos Enrique González Aguirre nos expone un estudio enmarcado en la

jurisprudencia del Tribunal Europeo de Derechos Humanos, a la luz de la sentencia emitida por este en el caso Chapin y Charpantier contra Francia, respecto al matrimonio entre personas del mismo sexo que es –sin duda– uno de los debates de mayor abordaje en los últimos años.

Por su parte, William Vega-Murillo y Esteban Vargas Mazas –autores de “La opinión consultiva OC-24/17 solicitada por Costa Rica: El resultado de una consulta estratégica”– analizan el uso de la función consultiva de la CorteIDH para suprajudicializar la megapolítica respecto al reconocimiento de los derechos sexuales y reproductivos así como el de los demás derechos de las personas LGBTI y otras categorías en Costa Rica.

Agradecemos a las autoras y los autores sus valiosos artículos y aportes. Esperamos que los mismos sean de relevancia, tanto para el estudio y la investigación de las personas lectoras como para la reflexión jurídica de todos los actores del sistema interamericano de derechos humanos.

José Thompson J.
Director Ejecutivo, IIDH

Intersex and the Law: How can the law protect intersex rights?

*Luiza Drummond Veado**

Introduction

The United Nations Office of the High Commissioner for Human Rights (OHCHR) defines intersex people as those who “are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.”¹ Intersex is an umbrella term that includes people with different sex characteristics. It is estimated that 1.728% of the population have bodies that differ from the medical standard of male and female body.² Not all intersex persons have their conditions visible at the moment of birth, but half of those who do are submitted to operations to “normalize” the appearance of their genitals.³

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1 United Nations Office of the High Commissioner for Human Rights (OHCHR), “Free & Equal Campaign Fact Sheet: Intersex” (*OHCHR*, 2015) <https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf> accessed 22 April 2017.

2 Melanie Blackless and others, “How sexually dimorphic are we? Review and synthesis” [2000] 12 *American Journal of Human Biology*, p.151.

3 Intersex Society of North America, “How common is intersex?” <<http://www.isna.org/faq/frequency#fn2>> accessed 22 April 2017.

In the past, intersex people were referred to as “hermaphrodites,” a term that is normally used in biology to describe animals that have both male and female reproductive organs.⁴ This term was utilized between 1950 and 1990 because the medical community used the characteristics of the visible genitalia to determine an individual’s sex.⁵ Due to its misleading and stigmatizing nature, the term “hermaphrodite” should no longer be used to refer to intersex people.⁶

Currently, medical experts state that there are nine characteristics that determine an individual’s sex.⁷ Individuals who do not fall within the typical medical differentiation of one or more of those categories are medically considered to be intersex. Intersexuality had its narrative mostly determined by medicine, overshadowing the social, political and legal implications of the status of intersex people.⁸

The protection of intersex rights is not very present in domestic and international law. The intersex movement gained force in the 1990s and attempted to change this situation by

4 Emi Koyama, *Introduction to Intersex Activism* (Intersex Initiative Portland 2003), p.4.

5 Julie A. Greenberg, *Intersexuality and the Law* (NYU Press 2012), p.15.

6 Alice D. Dreger and others, “Changing the Nomenclature/Taxonomy for Intersex: A Scientific and Clinical Rationale” [2005] 18(1) *Journal of Paediatric Endocrinology and Metabolism*, pp.732-733.

7 Julie A. Greenberg (n 5) p.11. Those attributes include “genetic or chromosomal sex, gonadal sex (reproductive sex glands), internal morphologic sex (seminal vesicles, prostate, vagina, uterus, and fallopian tubes), external morphologic sex (genitalia), hormonal sex (androgens or estrogens), phenotypic sex (secondary sexual features such as facial hair or breasts), assigned sex and gender of rearing, and gender identity.”

8 Francesca Romana Ammaturo, “Intersexuality and the ‘Right to Bodily Integrity’: Critical Reflections on Female Genital Cutting, Circumcision, and Intersex ‘Normalizing Surgeries’ in Europe” [2016] 25(5) *Social & Legal Studies*, p. 602.

advocating for the protection of intersex rights.⁹ The best known example of an intersex rights violation is the practice of subjecting intersex children to unnecessary surgeries at a very early age to make their genitals look similar to what is expected of male and female bodies.¹⁰

This article will address how intersex rights should be protected by law. It will first define intersex and show how the intersex movement has developed. Then, it will present the different legal issues that are faced by intersex people and will highlight the few existing good practices. Finally, this paper will show how the law should take into consideration the particularities of intersex people and protect their rights.

The concept of intersex

Intersex people do not fall within the division of male and female that the law encompasses as sex.¹¹ Sometimes they have characteristics of both sexes and at other times they lack the characteristics that would be determinant in including them in either of the two sexes. Accordingly, the term intersex includes

9 Julie Greenberg and others, “Beyond the Binary: What Can Feminists Learn from Intersex and Transgender Jurisprudence?” [2010] 17(1) *Michigan Journal of Gender & Law*, p.13.

10 Katrina Roen, “Queerly sexed bodies in clinical contexts: Problematising conceptual foundations of genital surgery with intersex infants.” in Potts and others (eds), *Sex and the Body* (Dunmore Press 2004), p. 89.

11 Cfr. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI Preamble; UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) Preamble; Inter-American Commission on Human Rights, American Declaration of the Rights and Duties of Man, 2 May 1948, art.17; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, art.12.

individuals who have “variations in sex characteristics” that differ from those who are generally perceived as “normal.”¹²

Sex characteristics “refer to the chromosomal, gonadal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia and/or chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure.”¹³

It is important to highlight that, although individuals with different types of sex characteristics fall within the scope of intersexuality, not all intersex people perceive themselves in the same way. Intersex people “experience the same range of sexual orientations and gender identities as non-intersex people.”¹⁴

The Yogyakarta Principles define sexual orientation as “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”¹⁵ and gender identity as “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 [...] and other expressions of gender, including dress, speech and mannerisms”.¹⁶

12 Human rights and intersex people, 12 May 2015, CommDH/IssuePaper (2015)1, p.15.

13 Malta, Gender Identity, Gender Expression and Sex Characteristics Act, Chapter 540, ACT XI of 2015, as amended by Acts XX of 2015 and LVI of 2016,¹⁴ April 2015, para.2.

14 OHCHR (n. 1).

15 International Commission of Jurists, Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, Preamble.

16 Ibid.

Although the terms sexual orientation, gender identity and sex characteristics are not synonymous, they are interrelated as layers that form an individual’s personality.¹⁷ In the particular situation of intersex people, society’s lack of acceptance of their sex characteristics as normal is what violates their human rights, independently of their sexual orientation or gender identity.

The intersex movement

The intersex movement came into being in the 1990s in order to raise awareness of the human rights violations suffered by intersex people. The Intersex Society of North America (ISNA) was established in 1993.¹⁸ The movement was later strengthened by the publication of diverse academic articles on intersex topics outside the medical arena and by the creation of events to bring attention to the intersex struggles.

Julie Greenberg states that, at the beginning of the intersex movement, “[f]eminist theory provided a supportive framework for people whose gender identity did not conform to the sex assigned to them at birth, as well as those who had developed an intersex identity. It also helped many intersex persons understand how their medical treatment had been based on societal assumptions about appropriate genitalia and gender roles.”¹⁹

Nevertheless, the intersex movement did not receive the help that it expected from the feminist movement to ban non-consensual surgeries to “normalize” intersex children, also

17 Council of Europe Commissioner for Human Rights, *Human rights and intersex people* (2015), p.15.

18 Intersex Society of North America, “Dear ISNA Friends and Supporters” <<http://www.isna.org/>> accessed 22 April 2017.

19 Julie Greenberg and others (n. 9), p.17.

known as intersex genital mutilation (IGM).²⁰ Despite the similarities of IGM to the scenario of female genital mutilation (FGM), most of the feminist movement decided not to accept requests for help from the intersex movement.²¹

The intersex movement also connected with the lesbian, gay, bisexual and trans (LGBT) movement. Intersex activists copied many of the techniques and strategies that the LGBT movement was using to bring attention to their rights.²² These movements share a number of concerns, such as misconceptions and misinformation from society in general as well as from members within their own group.²³

However, as not all intersex people are included under the LGBT umbrella, many intersex persons are not represented by the LGBT movement. In addition, some intersex activists worry that the specific issues that relate solely to the reality of intersex people are ignored by the LGBT movement and that the “I” of intersex should only be added to the LGBT acronym when intersex rights are advocated with the same force as those of the other groups.²⁴

There are other discussions that have been present within the intersex movement, such the use of the disability framework

20 Cheryl Chase, ‘Cultural Practice’ or ‘Reconstructive Surgery’? US Genital Cutting, the Intersex Movement, and Medical Double Standards, in Stanlie M. James and Claire C. Robertson (eds), *Genital Cutting and Transnational Sisterhood: Disputing US Polemics* (University of Illinois Press 2002), pp. 141-145.

21 Julie A. Greenberg (n 5), p. 99.

22 Ibid., p.101.

23 Council of Europe Commissioner for Human Rights (n. 18), pp.15-16.

24 Emi Koyama, “Adding the ‘I’: Does Intersex Belong in the LGBT Movement?” (*Intersex Initiative*) <<http://www.intersexinitiative.org/articles/lgbti.html>> accessed 22 April 2017.

through an alliance with physicians and the idea of intersex as an identity movement. Those who believe that intersex should be dealt with through the disability rights movement approach utilize the terminology “disorders of sex development” and believe that the only way to avoid non-consensual surgeries is to work with the medical community.²⁵ Moreover, the medical approach attempts to conciliate activists and doctors, eliding questioning of the medical reasoning.

On the other hand, the identity movement focuses on getting “people to understand that there are not just two pre-existing sexes. There is an infinite combination of possibilities on the spectrum of sex and gender.”²⁶ The identity movement argues that intersex people do not fall within any of the existing sexes and it advocates for intersex not to be considered an abnormality.

Like any human rights movement, there is no consensus on strategies within the intersex movement. Even among people who have the same ideas, there are different understandings as to the correct way that the intersex movement should deal with advocating for its rights. What the movement as a whole does agree on is that the intersex reality must be addressed and their rights should be guaranteed.

The intersex movement has been able to organize four international intersex fora where intersex rights and issues have been given visibility and advocates have come together to strengthen the movement. At the Third International Intersex Forum, which took place in 2013 in Malta, the intersex activists

25 Consortium on the management of disorders of sex development, *Clinical Guidelines for The Management of Disorders of Sex Development in Childhood* (2008).

26 OII intersex network, “On a third sex” (*OII Intersex Network*, 16 January 2012) <<https://oiiinternational.com/2614/on-third-sex/>> accessed 22 April 2017.

present adopted the Declaration of Malta.²⁷ This Declaration states the common demands of the movement and the advocates at the Forum called on international and domestic human rights actors to help develop the protection of intersex people. Although the Declaration is not legally binding, it is a document drafted by the intersex community that is useful to those people and governments that wish to increase intersex protection in their countries.

Intersex and the Law

There are few known litigations dealing with the subject of intersex as these cases only started to show up at the end of the 1990s and the beginning of the 2000s. Internationally, intersex related rights are not present in any hard laws and there are no international cases.

Although international human rights law is also applicable to violations of the human rights of intersex people, there was no mention internationally of intersex before the creation of the Yogyakarta Principles in 2007.²⁸ Hard law and case law that are focused on intersex rights can only be found in the domestic law of certain countries, but the number of those countries remains small and intersex rights protections are very few.

27 Declaration of Malta (Public Statement by the 3rd International Intersex Forum, Valetta, Malta, 2013) < <https://oiiieurope.org/malta-declaration/> > accessed 22 April 2017.

28 International Commission of Jurists (n. 15) Preamble.

Intersex and International Law

To highlight intersex human rights violations, in 2016 the United Nations has initiated the campaign “Free and Equal – United Nations for intersex awareness.”²⁹ Moreover, since 2011, four different UN Committees on 22 occasions have addressed how IGM is a human rights violation in their concluding observations on different country reports.³⁰

29 United Nations, “United Nations for Intersex Awareness” (*United Nations Free & Equal*, 2016) <<https://www.unfe.org/intersex-awareness/>> accessed 22 April 2017.

30 The Committee against Torture has declared that IGM is “inhuman treatment” on six occasions: Consideration of reports submitted by States parties under article 19 of the Convention - Germany, 12 December 2011, CAT/C/DEU/CO/5; Concluding observations on the seventh periodic report of Switzerland, 7 September 2015, CAT/C/CHE/CO/7; Concluding observations on the sixth periodic report of Austria, 27 January 2016, CAT/C/AUT/CO/6; Concluding observations on the combined sixth and seventh periodic reports of Denmark, 4 February 2016, CAT/C/DNK/CO/6-7; Concluding observations on the fifth periodic report of China with respect to Hong Kong, China, 3 February 2016, CAT/C/CHN-HKG/CO/5; Concluding observations on the seventh periodic report of France, 10 June 2016, CAT/C/FRA/CO/7.

The Committee on the Right of the Child has stated that IGM is a “harmful practice” on eight occasions: Concluding observations on the combined second to fourth periodic reports of Switzerland, 26 February 2015, CRC/C/CHE/CO/2-4; Concluding observations on the combined fourth and fifth periodic reports of Chile, 30 October 2015, CRC/C/CHL/CO/4-5; Concluding observations on the combined third and fourth periodic reports of Ireland, 29 January 2016, CRC/C/IRL/CO/3-4; Concluding observations on the fifth periodic report of France, 29 January 2016, CRC/C/FRA/CO/5; Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, 3 June 2016, CRC/C/GBR/CO/5; Concluding observations on the third to fifth periodic reports of Nepal, 3 June 2016, CRC/C/NPL/CO/3-5; Concluding observations on the second periodic report of South Africa, 30 September 2016, CRC/C/ZAF/CO/2; Concluding observations on the fifth periodic report of New Zealand, 30 September 2016, CRC/C/NZL/CO/5.

The Committee on the Elimination of Discrimination against Women has also utilized the term “harmful practice” to refer to IGM on five occasions: Concluding observations on the combined seventh and eighth periodic reports of

In 2015, the Human Rights Council adopted a Report of the Office of the United Nations High Commissioner for Human Rights³¹ in which it was stated that States should prohibit medically unnecessary procedures on intersex children and that they should create internal anti-discrimination measures. Nevertheless, there are no decisions at the present time that focus solely on intersex rights nor any recommendations on intersex rights in the Universal Periodic Review process.³²

In the human rights regional systems, there have not yet been any reports on individual petitions relating to intersex human rights violations. Nevertheless, the topic has been approached in different ways by the different regions. The Council of Europe (CoE) has adopted Resolution 1952, in which the CoE calls on its member States to ensure that intersex children have their physical

France, 22 July 2016, CEDAW/C/FRA/CO/7-8; Concluding observations on the combined fourth and fifth periodic reports of Switzerland, 18 November 2016, CEDAW/C/CHE/CO/4-5; Concluding observations on the sixth periodic report of the Netherlands, 18 November 2016, CEDAW/C/NLD/CO/6; Concluding observations on the combined seventh and eighth periodic reports of Germany, 3 March 2017, CEDAW/C/DEU/CO/7-8; Concluding observations on the combined sixth and seventh periodic reports of Ireland, 3 March 2017, CEDAW/C/IRL/CO/6-7.

The Committee for Persons with Disabilities has stated three times that IGM is a “violation of integrity.” Concluding observations on the initial report of Germany, 13 May 2015, CRPD/C/DEU/CO/1; Concluding observations on the initial report of Chile, 13 April 2016, CRPD/C/CHL/CO/1; Concluding observations on the initial report of Italy, 31 August 2016, CRPD/C/ITA/CO/1.

31 UN Human Rights Council, Discrimination and violence against individuals based on their sexual orientation and gender identity Report of the Office of the United Nations High Commissioner for Human Rights, 4 May 2015, A/HRC/29/23.

32 ARC International, the International Bar Association and the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), “Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review” [2016], p. 67

integrity protected.³³ In addition, the CoE Commissioner for Human Rights in 2015 published a report on the different human rights violations that intersex people suffer, such as the lack of legal recognition in the region.³⁴

In the Inter-American System of Human Rights, the Inter-American Commission on Human Rights (IACHR) has addressed the invisibility of intersex people and declared IGM to be medical violence in its report “Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas.”³⁵ Moreover, in 2013 and 2017 the IACHR held public hearings on the topic of intersex rights.³⁶ However, State representatives did not participate in either hearing, which led to a lack of official responses directly related to the hearings.

The Asia Pacific Forum of National Human Rights Institutions (APFNHRI) has dealt with intersex rights by publishing a manual for national human rights institutions. In this manual, the APFNHRI refers to the rights to physical integrity, non-discrimination, effective remedies and redress, recognition before the law, and some good practices in the region.³⁷

33 Council of Europe Parliamentary Assembly, Resolution 1952/2013, “Children’s right to physical integrity.”

34 Council of Europe Commissioner for Human Rights (n. 18).

35 Inter-American Commission on Human Rights, “Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas,” OAS/Ser.L/V/II.rev.1, 12 November 2015.

36 IACHR, 147 Period of Sessions, March 15, 2013, Situation of Human Rights of Intersex Persons in the Americas; 161 Period of Sessions, March 20, 2017, Human Rights Situation of Intersex People in the Americas (Ex-officio).

37 Asia Pacific Forum of National Human Rights Institutions, “Promoting and Protecting Human Rights: Sexual Orientation, Gender Identity and Sex Characteristics - A Manual for National Human Rights Institutions,” June 2016.

Although intersex rights have been gaining visibility in the international sphere, these rights are still marginalized and have not been granted the attention that they deserve.

Intersex and domestic law

Domestic law has also not been very successful in addressing and protecting intersex people's rights. There are, however, some countries that have enacted laws to protect intersex individuals within their jurisdiction. The most well-known case is Malta's "Gender Identity, Gender Expression and Sex Characteristics Act" of 2015, the first law in the world to specifically prohibit IGM.³⁸ Malta is the only country that has any kind of legal regulation of medical practices with regard to intersex bodies.³⁹

With respect to non-discrimination, Australia is the only country to have explicit protection against discrimination on the specific grounds of intersex status.⁴⁰ Other countries, like Bosnia and Herzegovina⁴¹ and South Africa,⁴² have begun to include "sex

38 Malta (n. 15), para. 14.

39 In the same year, the Chilean Ministry of Health published instructions prohibiting IGM in the country. However, the instructions were cancelled less than a year after their publication. Chile, Ministerio de la Salud, Circular N°18, Instruye Sobre Ciertos Aspectos de la Atención de Salud a Niños y Niñas Intersex, 22 December 2015.

40 Australia, Sex Discrimination Act 1984, as amended by the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, Section 5C-7D.

41 ILGA Europe, "Anti-discrimination law updated – great step forward in Bosnia and Herzegovina" (*ILGA Europe*, 14 July 2016) <<http://www.ilga-europe.org/resources/news/latest-news/anti-discrimination-law-updated-bosnia-herzegovina>> accessed 22 April 2017.

42 South Africa, Judicial Matters Amendment Act, No. 22 of 2005, Amendment of section 1 of Act 4 of 2000, p.16.

characteristics" in their non-discrimination laws. Although the topic of intersex rights is starting to appear in some domestic laws, the number of countries that have enacted laws protecting intersex rights remains minimal.

Another advance in the domestic protection of intersex people is that, on rare occasions, there has been domestic litigation on individual cases of intersex rights violations. The first case related to intersex issues to reach a Constitutional Court occurred in Colombia (Judgment SU-337/99).⁴³ This case dealt with the different nuances of the consent needed for sex-designating surgery. The most well-known litigation on an intersex subject occurred in Germany, where an intersex individual successfully sued a surgeon for damages because he had failed to provide her with adequate information as to the procedure that removed her female reproductive organs.⁴⁴

There are not many known cases relating to intersex rights and they are all in the domestic sphere. However, just like the creation of new laws, the number of litigations on intersex rights has grown over the years, which has strengthened the intersex movement.

Intersex Rights

The growing visibility of intersex rights in the international sphere and the enactment of new domestic laws on the topic have only been made possible because of the indefatigable work of advocacy by the intersex movement. The intersex movement has been proving that human rights law can be used as a tool to

43 Colombia, Constitutional Court, Judgment SU-337/99, 12 May 1999.

44 Germany, Regional Court Cologne, Volling, 25 O 179/07, 25th Civil Division, February 6, 2008.

protect intersex rights. The exponential growth of the movement has been impressive.

Intersex advocacy has given special attention to the development of four pillars of rights: the prohibition of non-consensual surgeries; the legal recognition of intersex people; access to justice and accountability, and non-discrimination.

Non-discrimination

Like other marginalized groups, intersex people are discriminated against throughout the world. The UN has stated that intersex people are “vulnerable to discriminatory practices in a range of settings, including access to health services, education, public services, employment and sports”⁴⁵ because of their sex characteristics.

As mentioned above, only a handful of countries have included protection against discrimination on the basis of individuals being intersex or having non-binary sex characteristics. However, intersex people are victims of discrimination everyday around the globe, which leads to other human rights violations such as the right to life. The right to life of intersex people, like that of all persons, is protected under Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Nevertheless, it is “violated in discriminatory sex selection” and “preimplantation genetic diagnosis, other forms of testing, and selection for particular characteristics.”⁴⁶

The International Covenant on Economic, Social and Cultural Rights also applies to intersex people, but these rights are

45 OHCHR (n. 1), p.1.

46 Council of Europe Commissioner for Human Rights (n 18), p. 30.

continually being violated as studies have shown that intersex people have higher levels of early school leaving⁴⁷ and lower levels of high-paid jobs.⁴⁸

All violations of intersex rights are, to some extent, related to the discrimination that intersex individuals suffer. To develop the protection of intersex rights, States and the international community should focus on combating structural discrimination with laws and programs of inclusion.

Non-consensual surgeries and physical integrity

The most discussed topic regarding the legal protection of intersex people is non-consensual surgeries, also known as IGM, that damage the physical integrity of intersex persons. IGM consists of “medically unnecessary cosmetic surgeries on infants born with an intersex condition,”⁴⁹ which the UN has recognized as a form of torture, prohibited under Article 7 of the ICCPR as well as under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

These “interventions are rarely life-sustaining measures in a narrow sense, since intersex individuals generally have completely healthy bodies. These measures solely serve to socially adapt the intersex individual to the socially dominant corset of two sexes/genders.”⁵⁰

47 Tiffany Jones, “The needs of students with intersex variations” [2016] 16(2) Sex Education: Sexuality, Society and Learning, p. 610.

48 Tiffany Jones and others, *Intersex: Stories and Statistics from Australia* (Open Book Publishers 2016), p.150.

49 Julie A. Greenberg (n. 5), p. 27.

50 Dan Christian Ghattas, *Human Rights between the Sexes A preliminary study on the life situations of inter* individuals* (Heinrich Böll Foundation 2013), p.18.

All of those who belong to the intersex movement may not agree on how to implement the protection of intersex people against IGM, but there is a general agreement that this protection must exist. There are three proposed alternatives to the question of whose consent should be given: the parents, the intersex individual after reaching a consenting age, or an outside ethics committee.⁵¹

This question has been open ever since the first known IGM case was decided by the Constitutional Court of Colombia in 1999.⁵² In this case, a mother requested a precautionary measure that would allow her intersex child to be submitted to sex-designating surgery. The child was designated as female at birth, but upon reaching the age of three, a doctor stated that the child had ambiguous genitalia. The Court decided that there was no need for a precautionary measure since the life of the child was not endangered by not having the surgery. The Court also stated that the surgery should not be done without the consent of the intersex individual.

The Constitutional Court further discussed when would be the right moment for an individual to give consent to the surgery, but the only other conclusion was that each case should be analyzed individually by experts.⁵³ Since the Constitutional Court's decisions are only valid *inter partes*, the 1999 decision is not applicable to other intersex people in Colombia.

In 2008, another case dealing with similar rights reached the same Constitutional Court.⁵⁴ This case was brought by the

51 Julie A. Greenberg (n. 5), p. 29.

52 Colombia, (n. 45).

53 Ibid., paras. 88-90.

54 Colombia, Constitutional Court, Judgment T-912/08, Pedro v. Seguridad Social et al, 18 December 2008.

father of a five-year-old intersex child who was denied a genital-conforming surgery by a medical board that reasoned that the child could only give consent when he reached 18 years of age. The Court, once again, did not determine the appropriate age for an intersex individual to give consent. It did, however, resolve the case by ordering a medical team to be formed within forty-eight hours to provide the pertinent information to the child and his parents.⁵⁵ If the child and the parents agreed on doing the surgery following the information provided by the team, the surgery could be legally performed. If there was no agreement, the child would have to be eighteen years old in order to give proper consent.

With respect to who should give the consent, the Maltese legislation that prohibits IGM offers a more satisfactory answer by stating that intersex individuals have the final decision over their bodies. However, even in this case, implementation of the law is still being discussed. Malta's law states that the surgery must be deferred "until the person to be treated can provide informed consent,"⁵⁶ but leaves open the question as to when an individual is considered to be able to give informed consent.

Each of the solutions to the question of consent for genital-conforming surgeries has been open to criticism.⁵⁷ Moreover, with respect to any of the solutions, "the medical community [should] investigate whether genital-normalizing surgeries are recommended solely for social and psychological, as opposed to medical, concerns."⁵⁸

55 Ibid., para. 2.4.2.

56 Malta (n. 36), para.14.

57 Julie A. Greenberg (n. 5), p.38.

58 Alyssa Connel Lareau, "Who Decides? Genital-Normalizing Surgery on Intersexed Infants" [2003] 92(1) Georgetown Law Journal, p.151.

Furthermore, it is always important to remember that the bodies in question belong to the intersex individuals and, unless there is a medical need for surgery, they are the only ones who can decide on how their bodies are going to look.⁵⁹ In that sense, the Maltese legislation closely follows the work of the intersex movement and its needs and it should be used as a model.

Legal recognition

Legal recognition was defined by the APFNHRI as “having legal personhood and the legal protections that flow from that.”⁶⁰ Intersex people face the problem that, in some jurisdictions, they are not even allowed to obtain identification documents as most countries require an indication of the child’s sex in order to officially register births, “which limits the recognised sexes to the “F” and “M” dichotomy.”⁶¹ One example is the Kenyan case of Richard Muasya, an intersex individual who was denied his right to a birth certificate because he had ambiguous genitalia.⁶²

One solution that has been used to deal with this issue is the inclusion of a “third sex” in documents. Australia, for example, has addressed the 19% of intersex people who prefer not to use a binary gender marker⁶³ by adopting a law that recognizes “X,” which “refers to any person who does not exclusively identify

59 Cheryl Chase, “What Is the Agenda of the Intersex Patient Advocacy Movement?” [2003] 13(3) *Endocrinologist*, pp. 240-241.

60 Asia Pacific Forum of National Human Rights Institutions (n. 39), p. 80.

61 Council of Europe Commissioner for Human Rights (n. 18), p. 37.

62 Kenya, High Court of Kenya, *Richard Muasya v. the Hon. Attorney General*, 2 December 2010.

63 Tiffany Jones and others (n. 50), p. 75.

as either male or female, as a gender identification in national documents.”⁶⁴

Although the creation of a third gender could resolve the situation of intersex children not receiving any documentation, the problems created by the gender binary system still remains because “[i]f only trans and/or intersex people can access that third category, or if they are compulsively assigned to a third sex, then the gender binary gets stronger, not weaker.”⁶⁵

A better and a long-term solution to the issue of the legal recognition of intersex people would be to end the requirement of the designation of sex in official documents. As the Declaration of Malta states, in the future “as with race or religion, sex or gender should not be a category on birth certificates or identification documents for anybody.”⁶⁶

This solution would also address the difficulties that intersex people face when trying to correct the sex marker in their official documents. Although some countries, like Argentina,⁶⁷ that follow the binary sex system have enacted laws that facilitate amending the recorded sex, they would not be necessary if sex were not a mandatory category in identification documents.

64 Australia, Australian Government Guidelines on the Recognition of Sex and Gender, July 2013, paras.19-20.

65 Open Society Foundations, *License to be yourself: laws and advocacy for legal gender recognition of trans people* [2014], p. 23.

66 Declaration of Malta (n. 29) Demands.

67 Argentina, *Ley 26.743 Identidad de Género - Establécese el Derecho a la Identidad de Género de las Personas*, 9 May 2012.

Access to justice and accountability

The intersex movement advocates for “adequate redress, reparation, access to justice and the right to truth”⁶⁸ for intersex people whose rights have been violated. Currently, there are no known cases of criminal charges related to the violation of intersex rights. There are, however, a handful of cases that ask for civil reparations.

The most known examples of cases for civil damages have happened in Germany. Christiane Völling⁶⁹ is allegedly the first intersex person to have received reparations for non-consensual sex designation surgery. She was raised as a boy and had her feminine reproductive system removed without her consent during an appendectomy. Mrs. Völling only discovered what happened forty years later, when she asked for her medical records. She sued the surgeon for damages and was awarded €100,000.

Another German case is that of Michaela Raab,⁷⁰ which is also related to a lack of information provided by medical personnel. She had her penis removed and was put on female hormone therapy and was not told that she had masculine chromosomes. The Nuremberg Court found that the clinic had to pay her compensation and a monthly pension as damages.

Litigation is beginning to help intersex people to achieve “[t] ruth, and accountability for past malpractice and human rights

68 Declaration of Malta (n. 29) Demands.

69 Germany (n. 46).

70 Von Katja Auer, ‘Intersexuelle verklagt ihre Ärzte’ (*Sueddeutsche Zeitung*, 26 February 2015) <<http://www.sueddeutsche.de/bayern/prozess-in-nuernberg-intersexuelle-verklagt-ihre-aerzte-1.2368704#redirectedFromLandingpage>> accessed 22 April 2017.

violations”⁷¹ and it is a tool that the intersex movement is learning how to use in order to advance the protection of their rights.

Conclusion

In a relatively short time, the intersex movement has extended international and domestic awareness of the issues that the intersex community has to face. However, despite the efforts made by the movement, intersex people are marginalized and stigmatized because they do not fit within the idea of what a “normal” body should be.⁷² This marginalization brings with it multiple violations of human rights that have not yet been resolved.

While there have not been many legal challenges regarding intersex rights, the law is now being seen as a powerful tool to achieve the changes that the intersex movement seeks to achieve. There is no doubt that intersex people, like all humans on the planet, are protected by the existing international human rights law.

However, the intersex movement has found that the law as it exists is not being used to protect intersex individuals and that there is a need for specific laws to address intersex rights.⁷³ The Maltese law that prohibits IGM is a good example of how the efforts of the movement to include intersex within the scope of law are finally starting to bear fruit.

In order to rightfully protect intersex rights, the movement has to strengthen itself by making alliances with other human rights

71 Council of Europe Commissioner for Human Rights (n. 18), p. 51.

72 Julie A. Greenberg (n. 5), p.127.

73 Declaration of Malta (n. 29) Demands.

movements that have existed for a longer time and are better resourced. On the other hand, international, regional and national human rights institutions must also act to raise awareness on intersex issues. More than that, these institutions need to take a stand to create instruments that guarantee the protection of intersex people, returning full control over their own bodies to intersex individuals.

The laws should be changed to include the intersex issues that are discussed throughout their texts. As a path to that change, it is important to include intersex voices and to ensure that intersex persons are allowed to participate in solidifying their own rights.

The laws should guarantee that intersex people are not discriminated against and that they are given the same opportunities as non-intersex people. Also, sex-designation surgeries should be regulated by law so that they can only be performed with the total consent of the individuals who are going to have their bodies altered. Furthermore, in order to guarantee that intersex people have the right to live normal lives, sex should be legally removed as a necessary category in identification documents. In the case that these laws are violated by the State or by a third party, the laws must guarantee the existence of effective remedies for intersex people to achieve redress.

It is true that laws alone cannot resolve all the violations of rights that have been and are still being perpetrated against intersex people. What the law can do is to be one of the many mechanisms that the intersex movement has as a means to achieve change, make intersex issues visible and enhance the quality of life of intersex people. Moreover, in protecting the human rights of intersex people, the intersex movement is teaching us that society is more complex and diverse than the binary system would have us believe.