




INTERSEXUALITY, BODILY AUTONOMY, AND HUMAN RIGHTS: A LEGAL CRITIQUE OF EARLY CLINICAL INTERVENTIONS

INTERSEXUALIDADE, AUTONOMIA CORPORAL E DIREITOS HUMANOS: A CRÍTICA JURÍDICA ÀS INTERVENÇÕES CLÍNICAS PRECOSES

INTERSEXUALIDAD, AUTONOMÍA CORPORAL Y DERECHOS HUMANOS: UNA CRÍTICA JURÍDICA DE LAS INTERVENCIONES CLÍNICAS TEMPRANAS

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ABSTRACT

The scientific basis of this article has corollaries in several other branches of the social and human sciences. Intersex people are defined in medical science as human beings who do not fit into the typical definitions of male or female gender. The right to protection of these people, to their very existence, is a matter of absolute delicacy, closely related to other areas of life, such as ethics, sociology, anthropology, human rights and, above all, health as the greatest good. Several aspects of daily life, such as human rights, bodily autonomy, and early surgical interventions, were analyzed through the lens of intersexuality as a right. The interferences of Catholicism under the binary aspect were analyzed clearly and objectively, creating a kind of barrier to new concepts of gender contrary to the binary system preached for centuries by Catholic rules. Understanding and accepting non-binary people in the current social context as holders of fundamental rights is a crucial task for the realization of the fundamental right to life, happiness, and the self-control of one's own body and will, such as avoiding premature surgeries, which will be studied, beginning with the free disposition of the body in these cases. Ultimately, the study led to a view of non-acceptance of premature surgical interventions considered "normalization" of sex, since they are technically conceptualized as discriminatory practices that should be eliminated by the State as the entity protecting and guaranteeing public order norms that encompass an entire community. The intersex theme was worked on diligently, and the subject was analyzed in a way that accepts their medical condition, which affirms that such people live with a disorder of sexual development, an inalienable pathological condition for people with this diverse genetic makeup. Thus, the necessary study arose for an analysis of the theme of intersexuality in Brazilian law and its social implications.

Keywords: Intersex. Binary System. Intersex Surgery. Human Rights. Bodily Autonomy.

RESUMO

A base científica do presente artigo tem corolários em diversos outros ramos das ciências sociais e humanas. Pessoas intersexo são definidas nas ciências médicas como seres

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humanos que não se encaixam nas típicas definições de gênero masculino ou feminino. O direito de proteção dessas pessoas, de existência das mesmas, é um tema de absoluta delicadeza, que guarda estreita relação com as demais áreas da vida, como ética, sociologia, antropologia, os direitos humanos e, acima de tudo a saúde como bem maior. Diversos aspectos da vida cotidiana como Direitos Humanos, autonomia corporal; intervenções cirúrgicas precoces, foram analisados sobre o crivo da intersexualidade como direito. Analisou-se de forma clara e objetiva as interferências do catolicismo sob o aspecto binário, criando uma espécie de barreira aos novos conceitos de gênero contrário ao binarismo pregado há séculos pelas regras católicas. Entender e aceitar as pessoas não binárias na atual conjectura social como pessoas detentores de direitos fundamentais é tarefa crucial para a concretização do direito fundamental a vida, felicidade, a própria disposição do corpo e da vontade, como na forma de evitar as cirurgias precoces que serão estudadas, a começar pela livre disposição do corpo, nestes casos. Por derradeiro o estudo conduziu a uma visão de não aceitação das intervenções cirúrgicas precoces ditas como “normalização” de sexo, posto que são tecnicamente conceituadas como práticas discriminatórias e que devem ser eliminadas do Estado como ente protetor e garantidor das normas de matéria de ordem pública que abarcam toda uma coletividade. O tema intersexo fora trabalhado com afinco e, ainda analisando o sujeito de maneira a aceitar sua condição médica que afirma haver que tais pessoas vivem como o distúrbio do desenvolvimento sexual, condição patológica inalienável a pessoas com essa genética diversa. Desta feita surgiu o estudo necessário para uma análise do tema intersexualidade no direito brasileiro e suas implicações sociais.

Palavras-chave: Intersexo. Binarismo. Cirurgia Intersexual. Direitos Humanos. Autonomia Corporal.

RESUMEN

La base científica de este artículo tiene corolarios en varias otras ramas de las ciencias sociales y humanas. Las personas intersexuales se definen en la ciencia médica como seres humanos que no encajan en las definiciones típicas de género masculino o femenino. El derecho a la protección de estas personas, a su propia existencia, es un asunto de absoluta delicadeza, estrechamente relacionado con otras áreas de la vida, como la ética, la sociología, la antropología, los derechos humanos y, sobre todo, la salud como el bien supremo. Diversos aspectos de la vida cotidiana, como los derechos humanos, la autonomía corporal y las intervenciones quirúrgicas tempranas, se analizaron desde la perspectiva de la intersexualidad como un derecho. Las interferencias del catolicismo bajo el aspecto binario se analizaron de forma clara y objetiva, creando una especie de barrera a nuevos conceptos de género contrarios al sistema binario predicado durante siglos por las normas católicas. Comprender y aceptar a las personas no binarias en el contexto social actual como titulares de derechos fundamentales es crucial para la realización del derecho fundamental a la vida, la felicidad y el autocontrol del propio cuerpo y la voluntad, como evitar cirugías prematuras, lo cual se estudiará, comenzando con la libre disposición del propio cuerpo en estos casos. En definitiva, el estudio condujo a una perspectiva de rechazo a las intervenciones quirúrgicas prematuras consideradas "normalización" del sexo, ya que se conceptualizan técnicamente como prácticas discriminatorias que deben ser eliminadas por el Estado, como entidad protectora y garante de las normas de orden público que abarcan a toda la comunidad. Se abordó a fondo el tema de la intersexualidad, analizándolo desde una perspectiva que acepta su condición médica, lo que afirma que estas personas viven con un trastorno del desarrollo sexual, una condición patológica inalienable para las personas con esta diversa composición genética. Por lo tanto, surgió la necesidad de un estudio para analizar el tema de la intersexualidad en el derecho brasileño y sus implicaciones sociales.



Palabras clave: Intersexualidad. Binarismo. Cirugía Intersexual. Derechos Humanos. Autonomía Corporal.



1 INTRODUCTION

The birth of the debate on the theme Intersexuality has an umbilical relationship with the Right to happiness that every human being seeks and that it is the duty of the State to protect him, the Right to happiness is linked to well-being, which is in the preamble of the 1988 constitution and in other constitutional understandings, as Saul Tourinho explains:

This "well-being" must be guaranteed through the full development of the city's social functions. What is evident is that the Constitution was concerned with the quality of life of people living in cities, trying, through specific policies, to ensure their happiness.⁶

Happiness is one of the bases of human well-being, and consequently ensures the basic principle of human dignity, and in this sense that the study of sexuality has as its primary basis, well-being and the protection of the human right to choose one's sexuality and feel good about it, and the 1988 constitution brought possibilities of this construction and protection to the right of sexuality combined with the right of each one to identify with sex that suits him.

The Federal Supreme Court itself has been making some judgments based on the Right to happiness, especially when it involves the issue of sexuality, as was the case of the judgment on the recognition of same-sex unions by the Federal Supreme Court in RE 477554 AgR/MG:⁷

"CIVIL UNION BETWEEN PEOPLE OF THE SAME SEX - HIGH SOCIAL AND LEGAL-CONSTITUTIONAL RELEVANCE OF THE ISSUE PERTAINING TO SAME-SEX UNIONS - CONSTITUTIONAL LEGITIMACY OF THE RECOGNITION AND QUALIFICATION OF THE SAME-SEX STABLE UNION AS A FAMILY ENTITY: A POSITION ENSHRINED IN THE JURISPRUDENCE OF THE FEDERAL SUPREME COURT (ADPF 132/RJ AND ADI 4.277/DF) - AFFECTION AS A LEGAL VALUE IMPREGNATED WITH A CONSTITUTIONAL NATURE: THE VALORIZATION OF THIS NEW PARADIGM AS A NUCLEUS THAT CONFORMS THE CONCEPT OF FAMILY - THE RIGHT TO THE PURSUIT OF HAPPINESS, A TRUE IMPLICIT CONSTITUTIONAL POSTULATE AND EXPRESSION OF AN IDEA-FORCE THAT DERIVES FROM THE PRINCIPLE OF THE ESSENTIAL DIGNITY OF THE HUMAN PERSON - SOME PRECEDENTS OF THE FEDERAL SUPREME COURT AND THE AMERICAN SUPREME COURT ON THE FUNDAMENTAL RIGHT TO THE PURSUIT

⁶ LEAL, Saul Tourinho. Right to Happiness. Rio de Janeiro: 2014. p. 370.

⁷BRAZIL. Federal Supreme Court (2. Panel). Interlocutory Appeal in Extraordinary Appeal No. 477,554 AgR/MG. Aggravating factor: Carmen Mello de Aquino Netta, represented by Elizabeth Alves Cabral. Aggravated: Edson Vander de Souza and the Institute of Social Security of Employees of the State of Minas Gerais. Rapporteur: Justice Celso de Mello. Brasília, DF, August 16, 2011. *Diário da Justiça Eletrônico*, Brasília, DF, n. 157, p. 1-19, 17 ago. 2011. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628633>. Accessed in: 10/23/2024

OF HAPPINESS - YOGYAKARTA PRINCIPLES (2006): RIGHT OF ANY PERSON TO FOUND A FAMILY, REGARDLESS OF THEIR SEXUAL ORIENTATION OR GENDER IDENTITY - RIGHT OF THE PARTNER, IN A SAME-SEX STABLE UNION, THE PERCEPTION OF THE BENEFIT OF THE PENSION FOR THE DEATH OF ONE'S PARTNER, PROVIDED THAT THE REQUIREMENTS OF ARTICLE 1,723 OF THE CIVIL CODE ARE OBSERVED - ARTICLE 226, § 3, OF THE FUNDAMENTAL LAW CONSTITUTES A TYPICAL NORM OF INCLUSION - THE COUNTER-MAJORITARIAN FUNCTION OF THE FEDERAL SUPREME COURT IN THE DEMOCRATIC STATE OF LAW - THE PROTECTION OF MINORITIES ANALYZED FROM THE PERSPECTIVE OF A MATERIAL CONCEPTION OF CONSTITUTIONAL DEMOCRACY - THE CONSTITUTIONAL DUTY OF THE STATE TO PREVENT (AND, EVEN TO PUNISH) "ANY DISCRIMINATION THAT UNDERMINES FUNDAMENTAL RIGHTS AND FREEDOMS" (CF, ART. 5, XLI) - THE NORMATIVE FORCE OF CONSTITUTIONAL PRINCIPLES AND THE STRENGTHENING OF CONSTITUTIONAL JURISDICTION: ELEMENTS THAT MAKE UP THE DOCTRINAL FRAMEWORK THAT GIVES THEORETICAL SUPPORT TO NEO-CONSTITUTIONALISM - APPEAL FOR AN APPEAL DISMISSED. NO ONE CAN BE DEPRIVED OF THEIR RIGHTS BECAUSE OF THEIR SEXUAL ORIENTATION. (STF, RE 477554 AgR, Rapporteur: Justice CELSO DE MELLO, Second Panel, judged on 08/16/2011, DJe-164).

Thus, choosing the theme as the focus of study was quite interesting, in the sense that, in modernity, the categorization of beings is measured according to the physical reference, if it is born as genitalia it is a girl, if it is born with a penis it is a boy; However, the concept of intersex comes as a seal of rupture of such rule, as it shapes new effects to what was previously considered binary on the gender aspect.

The justification for the choice of the theme is closely related to theoretical and practical concepts and, necessarily, the current evolution of society. The social relevance of the theme is a subject of total relevance, deserving other academic debates in order to scientifically clarify such issues.

Like the study, the concept of binarism (which simplifies the issue of sex into men and women) is broken and neutralized, with such an outcome occurring in the face of the violation of rights and freedoms, the self-determination of life, body, health, autonomy of will, all these criteria directly linked to the most basic rights of the human being as a being of rights, and as Foucault explains about the complexity of sexuality, which goes beyond the basic question of binarism:

Nevertheless, the idea that one should have real sex is far from being dispelled. Whatever the opinion of biologists in this regard, we find, at least in a diffuse state, not



only in psychiatry, psychoanalysis and psychology, but also in public opinion, the idea that between sex and truth there are complex, obscure and essential relations⁸

Conceptualizing human gender is a multifaceted function and, in any case, it encompasses a variety of understandings on the subject that go beyond the simple and dichotomous title between feminine and masculine. In the past, highlighting or conceptualizing gender was a task seen as simple in allusion to the term masculine and feminine.

With social evolution, overcoming various historical and philosophical processes, a definition of what could be considered as gender was sought, according to social adjustments. The classic example in the search for identity and formalization of what gender is, was brought by the French philosopher Simone de Beauvoir, who in her work "The Second Sex" of 1949, elaborated the following phrase "one is not born a woman, one becomes a woman", a very new concept of what would be human gender.

Thus extracting that the conceptualization of gender came from factors such as social construction as a defining means.

On the other hand, the conceptualization of gender, originating from Catholic currents, neurological sciences, sociology, sought to expose that typical approaches to gender should be fixed in relation to the biological concept, linking the concept to historical binarism, criticizing the application of such a theory today, where social relations change surprisingly quickly.

Throughout social evolution, several ideological beliefs have emerged, one of them very widespread in the Western world was Christianity, bringing its biblical explanation about gender, in which it should be interpreted as man and woman, leaving no room for any other interpretation.

The historical context refers to the thesis that Catholicism is a doctrine linked to the Catholic Church and that it recognizes only the biological sex male and female. Bringing the emergence of the term Catholic binarism that will be studied later.

The Catholic view on the theme of gender has been overcome, with human and social evolution, as well as that of various branches, both in the medical sciences and in the social sciences, consequently the concept of gender has been remolded, redefined, expanded, seeking a more intersectional view of gender.

⁸ FOUCAULT, M. *Herculine Barbin: the diary of a hermaphrodite*. Rio de Janeiro: Francisco Alves, 1982.

After World War II (1939-1945) and with the Universal Declaration of Human Rights in 1948, humanity, especially the West, was moving towards postmodernity, and this postmodernity brought with it the opposition to the hegemonic discourse on gender, establishing points of inclusion of sexual diversity, criticizing old and outdated concepts of sexual standards once exposed.

Also in this postmodern environment, the change in the concept of gender seeks to break the binary method, determining to break the sexual stability between only the male and female genders.

Along with these new social and conceptual developments on gender identity, the identification of the condition of intersex people in relation to the need for early surgeries is a topic that screams high controversy, whether legal, medical, ethical or psychological, and each situation should be relatively considered.

And, the present study seeks in this article to demonstrate the way in which the legal world has debated the theme of intersexuality, exposing a point of fundamental importance to the operators of the social human sciences and the strengthening of the dignity of the human person.

The present study is characterized as a qualitative research, of an exploratory-descriptive nature, developed through bibliographic and documentary review. Scientific productions in the areas of Law, Bioethics, Medicine and Social Sciences were analyzed, as well as national and international normative documents, judicial decisions and reports from multilateral organizations focused on the protection of the human rights of intersex people. The approach adopted was eminently interdisciplinary, prioritizing the critical analysis of the legal and biomedical discourse in the light of the principles of human dignity, bodily autonomy and non-discrimination. The selection of sources favored materials indexed in recognized databases, consolidated doctrinal works and normative reference instruments, with subsequent interpretative systematization of the findings, seeking to offer an articulated understanding between scientific data, theoretical foundations and the current legal framework.

2 INTERSEX

The theoretical concept, intersexuality should be studied as a social phenomenon by which people are born with variations in sexual, chromosomal, gonadal, hormonal and/or genital characteristics, which do not fit into the typical exclusively male or female patterns."

The concept is profoundly at odds with the criteria previously and ontologically exposed, on which the premise of binarism as a gender category was only accepted, based on chromosomal parameters.

However, intersexuality should not be confused with sexual orientation, as an intersex person can be homosexual, heterosexual, bisexual, that is, it is a complexity that does not have a simple definition, as it requires a multidisciplinary analysis, as Nadia Perez explains⁹:

Intersex is a term of medical origin that was incorporated by activism to designate people who are born with bodies that do not fit into what we understand by male or female bodies. According to ISNA2, intersex is a general definition used to explain the variety of conditions in which people are born with reproductive organs and sexual anatomies that do not fit the typical definition of male or female.³ They are bodies that clash with our binary cultural parameters, that shuffle and cause strangeness to those who see them or that do not fit into what Susan Bordo calls representations of intelligible bodies that "encompasses our representations scientific, philosophical, and aesthetic aspects about the body – our cultural conception of the body, which includes beauty norms, health models, and so on" (Bordo, 1997:33). They are bodies that slide into the representations of what is considered truly human, situating themselves in the interstices between what is normal and what is pathological.

The social parameter defines a conduct to be followed when it comes to gender, which gives rise to social segregation, social stigmatization of intersex people because they are "different".

Given the total lack of social knowledge on the subject, intersex people are often associated with hermaphrodite beings, bringing a racist connotation, which makes individuals invisible to the social environment, all of this being just a reproduction of the mythical concept on the subject.

The biological characteristics of intersex people are evident in the sense that they totally disagree with the so-called normal standards of understanding the sexuality of the human being.

The ideological war waged between medicine and law are key points for the study of the theme that aims to safeguard freedom and the protection of the fundamental right to health.

⁹ PINO, Nádia Perez. Queer theory and intersex: invisible experiences of unmade bodies. *Cadernos Pagu*, Campinas, SP, n. 28, p. 149–174, 2016. Available at: <https://periodicos.sbu.unicamp.br/ojs/index.php/cadpagu/article/view/8644800>. Accessed on: 1 dez. 2024.



In the context of intersexuality, it is shown that the occurrence of such a condition is more than common, however, almost nothing is known about the subject from a scientific point of view, specifically with regard to the guarantees of human rights such as self-determination of will, freedom and disposing of one's own body.

Intersex individuals are those who have sexual characteristics that make it difficult to identify them as fully male or female.

The erroneous belief that the appropriate parameter of gender stereotypes should only be the binary has been embedded in the social environment, totally clashing with and making invisible the figure of intersex, individuals who, as already exposed, are relegated, given discrimination in the sense that their genetic identification becomes confusing and difficult to identify.

3 CRITICISM OF THE CATHOLIC BINARISK

Christian philosophy and its rules are rooted in the Catholic figure of Jesus, having as a sacred book the Catholic Bible with rules of gender and social conduct.

Specifically, Catholicism began in Brazil at the beginning of colonization, by inheritance from the Portuguese. Catholicism was erected as the official religion of Brazil in the federal constitution of 1824.

This phenomenon of imprinting a certain religion on the State lasted in Brazil until 1890, when by decree Catholicism was abolished as a state religion and religious freedom was proclaimed as pillars of the secular state.

Even though the constitution of a religion to be followed, Catholicism, was abolished from the state rules, it still remained the largest and most accepted religion in the country, given that its social negation is refuted.

Studying sexuality, the social advances linked to the subject, is, without a doubt, a real taboo for religion. In this system, the sexuality of the human being is only seen in the binary criterion, in the existence of only the male being, and the female being.

The traditional view of the Catholic Church on sexuality, more specifically in relation to intersex people, is a path sought in total respect for the fundamental right to life, liberty, and one's own body.

In the present study on criticism, the binary rule is shouldered with the doctrinal rigidity proposed by the ideology of the church. Religious thought is based on interpretations of the Bible and carries its millennial traditions, where it is maintained that God created man

and woman as unique beings. The archaic thought related to the religious view does not recognize the diversity and complexity of human relationships, nor even their evolution.

Intersex people are born with characteristics that are not identifiable as either a man or a woman, thus contradicting all the dictates of binary rules. The state has a duty to humanely protect these people.

The criticism is supported in the sense that the Catholic Church can recognize intersexuality not as a disease, but should, in respect for the right to happiness embedded in the protection of the being, apply and promote the inclusion of intersex people in the community so that they can exercise their rights and duties of civil life as a normal human being.

4 INTERSEX SURGICAL INTERVENTION.

Note that the theme is extremely complex, given that studying the reasons and motives that lead parents of intersex newborn children to choose the "sex" of the child brings a huge problem, because such surgery will inevitably seek to reproduce the social yearnings of that society.

In the medical literature, when an intersex baby is born, the medical team exposes the need for the family to perform an "intersex conformation" surgery immediately, aiming to weave social and biological patterns about the baby.

It was demonstrated by the teachings coming from a historical context and rooted in ideological doctrine moved by binary Catholicism, surgical interventions on babies as the sexual condition of an intersex person was, in any case, normal.

It was understood to seek the normalization of gender, in the effort to fit the person into the male or female gender, in this way, the concepts of hermaphroditism and intersexuality are intertwined, as Ana Karina, Ana Bastos and Isabel Lima explains¹⁰:

The concepts of hermaphroditism and intersexuality are historically intertwined, functioning in some civilizations as similar concepts, or hermaphroditism being perceived as a subcategory of intersexuality. The word hermaphrodite, according to Fausto-Sterling (2000) emerged in Greece, related to a myth that describes the life of Hermaphrodites. Hermes (the son of Zeus) and Aphrodite (goddess of beauty and sexual love) had a very beautiful son and a nymph fell in love with him, but not being

¹⁰ CANGUÇU-CAMPINHO, Ana Karina; BASTOS, Ana Cecília de Sousa Bittencourt; LIMA, Isabel Maria Sampaio Oliveira. The biomedical discourse and that of social construction in research on intersexuality. *Physis Journal of Collective Health*, v. 19, n. 4, 2009.



reciprocated she asked the gods for them to become one, and so it was done, they became one body.

From the studies, it was seen that most surgical interventions were done in a non-consensual manner, since they were still performed when they were very young, leaving the desire for one's own body as a home.

The need for the study began in the 1990s, when some social movements began to contest the social "adequacy" surgeries that were performed on intersex people. At the time, several cases were exposed where many people who as children underwent these surgeries, did not adapt to the gender creating through surgery.

Soon with the emergence of the critical current on mutilations, several agencies adhered to the criticism, aiming at greater freedom for human beings in choosing their gender identity.

For the occurrence of early surgeries in intersex people, there are several factors that must be present, namely: psychological support, at this point parents and doctors seek and believe that adjusting the genitalia will generate a typical social appearance, thus avoiding social stigmatization.

It is also necessary to highlight social factors that add a lot when forming an identity.

That said, it is clear and evident that early surgical interventions aimed at the sexual "normalization" of the intersex person, confront head-on with the most diverse guarantees of human rights. In this case, the protection of the right to choose is not evoked, but rather a divergent interest, either by the medical team or by the family, leaving aside the most forceful foundation of life in society, which is to have respect for the most intimate desires, starting with the sexual option.

5 HUMAN RIGHTS VIOLATIONS ARISING FROM EARLY SURGERY

The basis for confronting the theme has great problems in the sense that performing early surgeries as a way of "correcting" the sexual criterion is, in any sense, an arrow in the chest of constitutional guarantees. The practice of mutilation of organs of intersex human beings is the subject of much analysis by global protection organizations.

As established in articles 1 and 2 of the Universal Declaration of Human Rights (1948):¹¹

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and must act towards each other in a spirit of fraternity.

Article 2

1. Everyone has the capacity to enjoy the rights and freedoms set forth in this Declaration without distinction of any kind, whether of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or any other status.

2. No distinction shall be made on the basis of the political, juridical or international status of the country or territory to which a person belongs, whether it is an independent territory, under trusteeship, without self-government, or subject to any other limitation of sovereignty.

In this way, intersex people are born free and have equal rights and this justifies the need to be treated as autonomous and, in a way, inviolable beings

In the current environment of seeking a right that is light on the path of respect for human rights rules, some principles have emerged that guide the autonomy of the will, they are: principle of the inviolability of the being, focusing on the impossibility of personal sacrifices to the detriment of third parties; principle of autonomy of the person, in the sense of guiding that every human being is endowed with the capacity to carry out any conduct, in order that his acts do not affect the rights of third parties, and, finally, the principle of human dignity, as the center of all study, basic in the construction of a constitutional right that is more currently humanized with modern concepts.

As a corollary of the defense of the rights of intersexes, the right to health, physical integrity, bodily autonomy, as well as the free development of personality stand out. The intersex subject must be given full right to develop freely, and his choices must be respected, given his autonomy of will.

Discriminatory practices are something that is sought to be annihilated, especially in the legal field, as a barrier to excesses and an indicator of inequalities.

¹¹ UNITED NATIONS. Universal Declaration of Human Rights. 1948. Available at: <https://www.unicef.org/brazil/declaracao-universal-dos-direitos-humanos>. Accessed on: 27 nov. 2024.



Violence regarding the mutilation of human organs at an early age is prohibited in international treaties accepted by Brazil, let's see the content of article 3 of the Universal Convention on Bioethics and Human Rights, 2005, as follows¹²:

Article 3 - Human Dignity and Human Rights

- a) Human dignity, human rights and fundamental freedoms must be respected in their entirety.
- b) The interests and well-being of the individual must take priority over the exclusive interest of science or society

Art. 5 - Autonomy and Individual Responsibility

The autonomy of individuals to make decisions must be respected, when they can be responsible for those decisions and respect the autonomy of others. Special measures should be taken to protect the rights and interests of individuals who are unable to exercise autonomy.

Article 6 - Consent

- a) Any preventive, diagnostic and therapeutic medical intervention should only be carried out with the prior, free and informed consent of the individual involved, based on adequate information. Consent must, where appropriate, be manifest and may be withdrawn by the individual concerned at any time and for any reason, without prejudice or prejudice.
- b) Scientific research should only be carried out with the prior, free, express and informed consent of the individual involved. The information should be adequate, provided in a comprehensible manner and include the procedures for withdrawing consent. Consent can be withdrawn by the individual involved at any time and for any reason, without entailing any disadvantage or prejudice. Exceptions to this principle should only occur when in accordance with the ethical and legal standards adopted by States, consistent with the provisions of this Declaration, particularly Article 27 and human rights.
- c) In specific cases of research carried out in a group of individuals or community, additional consent from the legal representatives of the group or community involved may be sought. In no case should the collective consent of the community or the consent of a community leader or other authority replace individual informed consent.

Art. 7 - Individuals without the capacity to consent

In accordance with the legislation, special protection must be given to individuals without the capacity to provide consent:

- a) Authorization for medical research and practice must be obtained in the best interests of the individual concerned and in accordance with national law. Nevertheless, the affected individual should be involved, as far as possible, both in the decision-making process on consent and its withdrawal; (...)

Article 8 - Respect for Human Vulnerability and Individual Integrity

Human vulnerability must be taken into account in the application and advancement of scientific knowledge, medical practices, and associated technologies. Individuals

¹² UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (UNESCO). Universal Declaration on Bioethics and Human Rights. Paris: Unesco; 2005. Available at: <https://www.unesco.org/en/ethics-science-technology/bioethics-and-human-rights> accessed on 06/24/2025



and groups of specific vulnerability must be protected and the individual integrity of each one must be respected.

Article 11 – Non-Discrimination and Non-Stigmatization

No individual or group should be discriminated against or stigmatized for any reason, which constitutes a violation of human dignity, human rights and fundamental freedoms.

As a corollary of the search for happiness, the conceptualization of human sexuality cannot be simply defined by the subject's genitalia, but must also be a reflection of several issues, both sociocultural, that come to give scope to the subjectivity of each person.

Imprinting sexuality on so-called socially established standards is in total confrontation with the freedom of self-determination, also demonstrating total disrespect for the dignity of the human subject.

Under the cloak of protecting intersex people, and in an effort to minimize discrimination on the still taboo social topic, the Inter-American Commission on Human Rights (IACHR) in a report published on May 22, 2019 that deals with the subject, stated as follows¹³:

The principle of non-discrimination is one of the pillars of any democratic system, being one of the fundamental bases of the system of protection of human rights established by the Organization of American States. In fact, non-discrimination, equality before the law, the right to life, and personal integrity are founding principles of the Regional and Universal Human Rights System, with legal duties of special importance for lesbian, gay, bisexual, transsexual, and intersex (hereinafter "LGBTI") persons in the Americas. These principles and obligations are contained in the international human rights instruments of the Inter-American System (hereinafter the "Inter-American System" or IAHR), which seek the equality, autonomy, identity, and dignity of every person, and refer to the duty of all States to act with due diligence to prevent, investigate, suppress, and remedy all human rights violations. In fact, according to the jurisprudence of the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), at the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the domain of jus cogens. On it rests the legal scaffolding of national and international public order, permeating the entire legal system. It has been stated that the guarantee of equality and non-discrimination offered by international human rights standards applies to all people, regardless of their sexual orientation and gender identity or other condition." The IACHR considers that the expression "another condition" also includes bodily diversity, commonly associated with intersex people.

¹³ ORGANIZATION OF AMERICAN STATES. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Annual report 2018. Washington, D.C.: OAS, 2019. Available at: <https://www.oas.org/pt/CIDH/relatorios/IA.asp?Year=2018>. Accessed on: 20 nov. 2024



From the aforementioned report of the Inter-American Commission on Human Rights (IACHR) it was extracted that since 2013, this commission has sought to provide greater protection to intersex people, so much so that the General Assembly requested that greater protection be made available, as well as the implementation of public policies necessary to ensure that medical practices were in full compliance with human rights guidelines.

In an effort to provide greater protection to intersex people, the Commission has issued recommendations to member states, specifically of a protective nature, as follows¹⁴:

The Inter-American Commission on Human Rights concludes this report by making recommendations to promote a fluid dialogue with the States of the Region, with the aim of advancing the comprehensive protection of LGBTI persons in the Americas, through the consolidation of the guarantee, recognition, and promotion of the rights of these persons. (...)

8. Adopt and enforce effective measures to prevent and punish discrimination against LGBTI persons or those perceived as such in the health sector (...)

B. Prohibit any unnecessary medical intervention on intersex children that is performed without their free, prior and informed consent(...)

15. Adopt the necessary measures to prevent torture, cruel, inhuman or degrading treatment by public officials or those acting on behalf of the State, in public spaces and in places of deprivation of liberty, as well as all forms of police abuse, including the adoption of protocols and guidelines for law enforcement officials, as well as training and awareness on human rights, sexual orientation and non-normative gender identities, diverse bodies and the rights of LGBTI people. (...)

A - To consider as torture unnecessary medical interventions on intersex children that are carried out without their free, prior and informed consent (...) OAS, 2018, p 135-140.). (Emphasis added)

Linking early surgical interventions in intersex people to what can be called the crime of torture Law 9455/1997¹⁵, is undoubtedly a gigantic social advance towards legitimizing greater breadth the protection of those human beings considered as socially invisible.

Tracing punitive behaviors is a crucial means of giving greater attention to the theme and relating it to the innermost desire of the human being, than life in all its fullness.

¹⁴ ORGANIZATION OF AMERICAN STATES. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. Annual report 2018. Washington, D.C.: OAS, 2019. Available at: <https://www.oas.org/pt/CIDH/relatorios/IA.asp?Year=2018>. Accessed on: 20 nov. 2024

¹⁵ BRAZIL. Law No. 9,455, of April 7, 1997. Defines the crimes of torture and provides for other provisions. Diário Oficial da União, Brasília, DF, 8 Apr. 1997. Available at: https://www.planalto.gov.br/ccivil_03/leis/l9455.htm. Accessed on 26 Nov. 2024.



Law 9455/1997 that provides for the crime of torture, exposing the responsibility for early surgical interventions in intersex people without the possibility of a decision yet.

6 DISORDER OF SEXUAL DEVELOPMENT

Birth with life imposes the need to think about the well-being of the human being as the holder of the right to happiness, including his genetic sexual condition.

In addition, since the genetic formation of the being was not "normal", the concept of sexual differentiation disorder (DSD) emerged in the medical literature, in the words of pediatrician Isabel Rey Madeira, who wrote about the subject in a scientific article, stated:¹⁶

Disorders of sex differentiation (DSD) are congenital conditions in which the development of chromosomal, gonadal, or anatomical sex is atypical. Genital ambiguities may be present, configuring a problem that requires complex, agile and effective management.

(...)

On the other hand, it is estimated that abnormalities of the genitalia occur in every 1 in 4,500 births, constituting a challenge for the pediatrician, who must be trained as a member of the multidisciplinary team that will provide care to the child and his family, since in most cases he is the first to come across the condition.

Thus, the medical recognition of the existence of disorders related to chromosomal alterations reflects greatly on the Law. Violence against the legal guarantees of people with these disorders is a topic of central importance when facing affirmative actions, giving rise to a duty of action.

The recognition and acceptance of people living with such a pathological condition, as well as the application of effective public policies such as a greater breadth in health support as a guarantee of the effectiveness of fundamental rights.

7 FINAL CONSIDERATIONS

Intersex are, as exposed in the work in detail, people who have a genetic differentiation from others. The concept of intersexuality carries with it the idea that people with this condition have variations in the development of sexual characteristics, which may involve chromosomal, gonadal, hormonal or genital differences in relation to traditional binary patterns."

¹⁶MADEIRA, Isabel Rey. Disorders of sex differentiation (DSD). *Pediatric Residency*, v. 4, p. 1. 2014. Available at: <https://cdn.publisher.gn1.link/residenciapediatrica.com.br/pdf/v4n1a10.p df>. Accessed on: 13 Aug. 2024.

Social standards show that the theme still has an excessive load of prejudice and this slips into the guarantees of Rights. To deny the existence of intersex people is to deny the existence of the State as plural, maintainer of guarantees and common interests, and it is also to deny the right of these people, as human beings, to exist with dignity.

The rupture of the Catholic binary emerges on the day when it is sought to legally constitute the various constitutional guarantees provided for all plurality of subjects, whether born intersex or born in "social standards" as a man or a woman, clearly and effectively having sexual identification.

The research also brought the stain involving the early form of mutilation of the genitals of people who are born intersex, demonstrating that not infrequently, such action goes against the most basic Fundamental Rights, such as health, the availability of the body, internal desire, among other rights that are annihilated in absentia, since as we have seen, Most surgeries do not involve the participation of the parties, giving rise to the desire for third parties, whether they are the parents or professionals who are part of the medical team, thus refuting the legitimate desire of the being to have the most intimate desires and desires.

Society is evolving and every day obtaining more knowledge and fading the prejudice about the subject, which is still very large, but this reflection on the subject also reflects on the new legal thinking that is gaining space, and legal thinking is the reflection of society's behavior, as Rodrigo da Cunha Pereira states¹⁷:

The consideration of sexuality as being more of the order of desire than of genitality makes a revolution in Law, as we will come to understand and consider that the subject of law is also a subject of desire. And it is the desiring subject, with his mistakes and successes, with his uniqueness, who performs legal acts, does and undoes business, marries, separates, has children.

Because they are considered "different" people from the point of view of genetics, politics and society, people with intersexuality are born with the so-called "disorder of sexual development", and the medical discourse only seeks to camouflage a discriminatory practice, and in this sense, Resolution No. 1,664/2003 of the Federal Council of Medicine, establishes that in article 2 of the Resolution a skillful treatment for the case: "Patients with anomalies of sexual differentiation should be assured of an early investigation with a view to an adequate

¹⁷ PEREIRA, Rodrigo da Cunha. *Sexuality Seen by the Courts*, Belo Horizonte: Ed. Del Rey, 2001, p.28



definition of gender and timely treatment". This resolution considers ambiguous genitalia as a case of biological and social urgency to be resolved immediately, which is true violence.

However, this institutionalized medical violence has been fought over the years, in 2001, there was a recommendation No. 001091/01-8 from the Prosecutor's Office of the Public Prosecutor's Office of the Federal District and Territories¹⁸ against early medical intervention in children. In addition, there is a Senate bill, regarding the Statute of Sexual Diversity, which deals with this issue and others, and in the bill, which prohibits any surgical intervention or discrimination regarding people who have two genitals, and doctors cannot force treatment related to the issue of sexuality, without being requested. This draft Statute of Sexual Diversity is based on statutes that exist in other countries such as Germany and Chile, for example.

The right to choose sex and sexuality must come from the individual, from his recognition as a being he wants to be, or he can even live with the ambiguity of genitalia, without a risk to his health. What is important is freedom of choice and the right to well-being and happiness, which is the basis of the dignity of the human person.

Society still has a lot to evolve in this matter, especially with the approval of the Statute of Sexual Diversity, which will be a beacon in the protection of the human rights of this minority, who have the right to be treated with respect and dignity, and to have the possibility and power to choose their own body, without the intervention of third parties and/or society's judgments.

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¹⁸ MPDFT. Public Prosecutor's Office of the Federal District and Territories. RECOMMENDATION NO. 001091/01-8 apud GUIMARÃES JUNIOR. Aníbal R. Surgical identity: the best interest of the intersex child with ambiguous genitalia. A bioethical perspective. p.89-90.

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