

Intersex Children Have Rights Too

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Intersex children in India are often subjected to unregulated surgeries without their consent. (Ron Lach/Pexels)

By Abhinav Mehrotra and Amit Upadhyay, OP Jindal Global University

SONIPAT, June 26 – A doctor from King George Hospital in Visakhapatnam, in the southern Indian state of Andhra Pradesh, clandestinely gave away a newborn child to a community of transgender people in May 2021, in the belief that it was born with sexual organs similar to eunuchs. The baby was said to have been abandoned by its parents.

A representative of the National Council for Transgender Persons subsequently made clear that “babies who are termed as intersex infants are not transgender. They may be born with diverse sex characteristics which cannot be classified as male, female or transgender”.

Ambiguous genitalia among newborns is a poorly understood subject in India and is a prime reason for unfortunate decisions by parents and even doctors to either abandon or relinquish such babies to the care of transgender people.

More often than not, distraught parents of babies born with intersex characteristics take uninformed decisions to have surgeries performed on their children to escape social stigma.

In April this year, the Supreme Court issued notice to the central government, following a petition seeking to safeguard the rights of intersex children. Amid the struggle for recognition of the rights of sexual minorities, the rights of intersex children are often neglected.

Such children are frequently subjected to unregulated surgical procedures without their consent as they do not possess normative feminine or masculine traits, violating their right to privacy and bodily and decisional autonomy.

In 2019, Tamil Nadu banned medically unnecessary surgeries and upheld the informed consent rights of intersex children.

The term “intersex” is defined as disorders or differences of sex development (DSD) and covers innate sex characteristics that do not fit into normative feminine or masculine bodies.

Children with DSD face intense public scrutiny and sexual violence and are often subjected to medically unnecessary surgeries without their consent to make them fit into the gender binary.

Intersex children are born with atypical sex anatomies and reproductive organs, including ambiguous genitalia, e.g. ‘enlarged’ clitoris, fused labia, absence of the vagina, unusually small penis or micro-penis, breast development among males, etc.

Gender being a social concept, differs from sex, which is based on anatomical characteristics. Many parents see sex and sexual characteristics as a binary involving masculine or feminine markers.

While many children with DSD may have obviously different bodies, some may fit within the male/female binary categories while others may represent the range of human diversities that refuse to be reduced to the two categories of males and females.

Due to the stigma associated with DSD, such medically unnecessary and cosmetic “normalising” surgeries continue to be carried out without considering the child’s own individual and future behavioural identity which are mostly unknown at birth or during infancy.

Such a child may also grow up and identify with a gender other than that assigned at birth or sex assigned by parents.

From a legal perspective, children's health rights intersect with law, medicine, and human rights. They are intended to guide the delivery of health services in a non-discriminatory manner that protects and promotes the dignity and personal autonomy of the child, including children with DSD.

Such an understanding is missing in India as children with DSD are seen as gender non-conforming, posing a threat to the gender-conforming majority.

People with DSD variations may be subjected to unnecessary medical interventions in the name of "normalising" treatment without informed consent.

Such cases call for actions for medical negligence, as without this information, parents could not give lawful consent to the treatment of their children.

Despite the absence of steps at the municipal level, the international community has been proactive in recognising the rights of children with DSD to live free from discrimination and violence (including in medical settings) that have been affirmed by multiple United Nations bodies, as well as regional human rights mechanisms across Africa, Europe and the inter-American system.

In 2006, a group of international human rights law experts drafted the Yogyakarta Principles on the Application of International Law in Relation to Sexual Orientation and Gender Identity.

Such protection is extremely important for minor children, especially those with non-conforming gender characteristics who often have a difficult relationship with health and medical systems and require that their rights to life, education, sanitation, healthcare, employment, and asylum are protected.

Another important safeguard under international law is Article 12 of the Convention on the Rights of Child, which is designed to ensure that all children have a voice that is accorded due respect and that their view is given due consideration in the light of their age and maturity.

In the context of medical decision-making, this may mean that medical personnel and parents have an obligation to inform the child of the nature of any proposed treatment before it is undertaken.

Further, it is possible to read CRC's Article 12 as protecting the rights of small children from non-urgent invasive intervention as these procedures may leave people traumatised.

Unlike children with DSD, a transgender is a person whose sense of personal identity and gender does not correspond with their birth sex and they decide to undergo gender confirmation surgeries as per their choice.

The Indian Supreme Court has upheld the right to bodily integrity, safeguarding decisional autonomy as well as the right to self-determination of gender identity. Hence, the rights of children with DSD should be protected against such medically unnecessary surgeries.

For the law to develop on the sensitive issue of protecting forced medical treatment of children with DSD, the key elements for laws on the protection of the human rights of intersex people need to align with international human rights standards.

This would enable governments at the national and state levels to prohibit forced or coerced medical interventions concerning intersex characteristics, such as non-emergency medical interventions performed without full, free, and informed consent.

To put in place measures to combat infanticide and other forms of violence against children with DSD, governments could ensure full and equal access to health care.

They could prohibit and combat discrimination against intersex persons, including in education, employment, healthcare settings, recreational activities, sports, and all aspects of cultural life.

Such measures could extend to ensuring intersex children's access to services, justice and effective remedy, provide persons full access to their medical records and ensure legal recognition of gender identities.

The Transgender Persons (Protection of Rights) Act of 2019 recognises "third gender" as a separate category, but such an umbrella term covers numerous other genders.

Intersex communities criticise this broad-based categorisation. There is, therefore, a need to provide recognition to intersex identity as separate from transgender in the 2019 Transgender Act to safeguard the interests of children with DSD.

Going forward, proactive measures could be instituted by putting in place an active and problem-solving mechanism for intersex children that would help them reduce the impact on their mental health.

The focus now can shift towards ensuring protective measures such as youth education, supportive relationships and social participation through legally recognised rights safeguarding their dignity.

Abhinav Mehrotra is an assistant professor at OP Jindal Global University. Amit Upadhyay is an associate professor at OP Jindal Global University.

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