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NON-CONSENSUAL SURGICAL INTERVENTION: A GRAVE HUMAN RIGHT VIOLATION

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ABSTRACT:

“Binary” is the gender standard the society has laid out. People which doesn’t conform to the binary standards are not taken into account. But the question which is to be deliberated upon is who decides as to what the so called gender standard should be? What will be the plight of the people who do not conform to the standard laid down by the society? The road which lies ahead consists of transgender and intersex people. Intersex humans are neither male nor female. This paper explores the rights of intersex people against non consensual sex reassigning surgeries.

I. INTRODUCTION

The structure that carries genes is called chromosomes. Chromosomal makeup determines the sex of a baby. Humans carry 46 chromosomes. Women generally have 46XX chromosome and men have 46 XY chromosome. But there are births which have variation in chromosomes. Such people are called intersex humans. Father of an intersex boy had reported that he belongs to Rajasthan. He stated that in the past intersex children in his community were buried alive.¹ There is so much stereotype revolving around the third gender. This paper examines the same.

II. WHAT IS INTERSEX CONDITION?

¹ .-- Joseph AA, Kulshreshtha B, Shabir I, Marumudi E, George TS, Sagar R, et al. Gender Issues and Related Social Stigma Affecting Patients with a Disorder of Sex Development in India. Archives of Sexual Behavior. 2018;24(2):361-367.

The term Intersex was coined by Richard Goldschmidt in the year 1917. Intersex is a condition where physical sex ambiguities exist.² They are neither male, nor female. Intersex traits are of various types. Some individuals have both ovary and testis. The same may be coiled with one another, or may be distinct. There might be inconsistency between reproductive organs and genitals. Few have deviation from the typical chromosomal/ hormonal composition.

III. WHETHER INTERSEX CONDITION IS A DISORDER?

As per the Intersex Society of North America intersex condition is a variation and not a disorder. It states that “Congenital Adrenal Hyperplasia, for instance, is an inherited disorder affecting adrenal function. Many women with Androgen Insensitivity Syndrome have become comfortable with the term AIS, which is based on “syndrome.” But “syndrome” is a pattern of symptoms indicative of some disease or disorder. “Disorder” refers to the underlying cause, not intersexuality itself, and certainly not to the whole person”.³

IV. TRANSGENDERS vs. INTERSEX

Transgender people are people born with either male or female characteristics. But they choose to identify themselves with the opposite gender. On the other hand intersex people’s genetic framework is such that they neither belong to male nor female category.

V. ROOT CAUSE FOR INTERSEXUALITY

Intersexuality may arise because of the following causes-

- a. *First case* -An unfertilized ovum consists of 23 chromosomes that are haploid.

During rare circumstances the unfertilized ovum may divide into two different haploid ova.

Then these two may get fertilized by two different sperms to form two different zygotes

(basically two different babies with identical maternal genes but different sets of paternal genes; non identical twinning occurs like this). Then again during rare circumstances these two zygotes may fuse together to form a single zygote which may have intersex traits in certain cases.

² - Zucker, Kenneth J.; Bradley, Susan J.; Sullivan, Claire B. Lowry (March 1992). "Gender Identity Disorder in Children". *Annual Review of Sex Research*. 3 (1): 73–120. doi:10.1080/10532528.1992.10559876. ISSN 1053-2528

³ <https://isna.org/node/1066/>

b. *Second case* -Fertilization of a single ovum by two sperms (double fertilization) is a very rare occurrence and also intersexuality occurs only if the two sperms contain different sex chromosome (one containing X and the other Y). After double fertilization a triploid cell (cell with three sets of chromosome: one from ovum and one from each sperm) is formed. This cell undergoes division to form a two cell stage. Then if trisomic rescue of each cell takes place resulting in different gendered cells, then it results in intersexuality.

Trisomic rescue is the process in which a fertilized ovum (double fertilized) containing three sets of chromosome loses one of these sets to form a normal diploid cell.

c. *Third case* -After fertilization, up to a period of 6 to 7 weeks of fetal development, the sexual organs of the fetus is not differentiated into a certain gender's organ. Instead it remains as a bipotential gonad (sexual organ capable of developing into either male or female sexual organs). If the genetic makeup of the fetus is XY, then the Y chromosome of the fetus has a gene named SRY gene (Sex determining Region Y gene). This gene produces a protein named SRY protein which acts on the bipotential gonad. It results in the differentiation of the gonad into testes (male sexual organ). During rare circumstances leading to mutation of the SRY gene, the SRY protein produced by it causes only partial differentiation of the bipotential gonad leading to the formation of a fully developed gonad consisting of both testicular and ovarian tissues (ovotestis). This results in true hermaphroditism.

VI. TYPES AND PREVALANCE OF INTERSEX CONDITION

This exists only in 5% of the total number of cases.⁴ A research on frequency of sex-variations was carried out by Anne Fausto- Sterling in the year 1955-1998 with Brown University undergraduates in the U.S. Their observation was as follows.⁵-

CAUSE	NUMBER OF BIRTHS
Klinefelter Syndrome	1 in 1,000 births

⁴ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3418019/>

⁵ Blackless, Melanie, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne, and Ellen Lee. 2000. How sexually dimorphic are we? Review and synthesis. __American Journal of Human Biology__ 12:151-166

Androgen Insensitivity Syndrome	1 in 13,000 births
Classical Congenital Adrenal Hyperplasia	1 in 13,000 births
Partial Androgen Insensitivity Syndrome	1 in 130,000 births
Late Onset Adrenal Hyperplasia	1 in 66 births
Vaginal Agnesis	1 in 6000 births
Ovotestes	1 in 83,000 births
Idiopathic (no discernible medical cause)	1 in 110,000
Latrogenic(caused by medical treatment)	No estimate
5 Alpha Reductase Deficiency	No estimate
Mixed Gonadal Dysgenesis	No estimate
Complete Gonadal Dysgenesis	1 in 150,000 births
Hypospadias (urethral opening between corona and tip of glans penis)	1 in 2000 births
Hypospadias (urethral opening in perineum or along penile shaft)	1 in 2000 births
Non XX and non XY	1 in 1666 births
Bodies that are neither male nor female	1 in 100 births

- Professor Olaf Hiort the chief of the Division of Pediatric Endocrinology and Diabetes in the Department of Pediatrics at Lübeck University, Germany, in the year 2013 has listed around 40 kinds of intersex variation.⁶

VII. INTERSEX CONDITION AND SEX SELECTION

The government of India has enacted the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (88) in 1994.⁷ The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 seeks to “provide for the prohibition of sex

⁶ Olaf Hiort, 2013, I-03 DSDnet: Formation of an open world-wide network on DSD, presentation at “4th I-DSD Symposium”, June 2013

⁷ [Bioethics Forum blog – Preventing Homosexuality \(and Uppity Women\) in the Womb? Archived 2016-04-02 at the Wayback Machine](#), Alice Dreger, Ellen K. Feder, [Anne Tamar-Mattis](#) (2010), at Hastings Center Bioethics Blog,

selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female feticide; and, for matters connected therewith or incidental thereto". In a study carried out by Heino Meyer- Bahlburg in 1990, it was observed that there was a wide usage of prenatal testing and hormone treatment for avoiding traits of intersex. Intersex children are subject to infanticide⁸. Though the act prohibits sex selection and lays a check on prevention of female feticide, it doesn't address intersex feticide. In a country where a gender which falls within the binary trait (female) is not happily accepted by all, isn't there a necessity to address intersex people's right to live in particular?

VIII. INTERSEXUALITY UNDER THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

Sex Chromosome Aneuploidy is a condition where there is a deviation from normal count of X and Y chromosome. Diagnosis of SCA is on rise.⁹ Variations such as 45 X, 47 XXY are identifiable at the fetus stage itself. Thus such children are aborted. But it is to be noted that most of these cases lead a life of normal expectancy.¹⁰

As per Sec 3 2(ii) of the Medical Termination of Pregnancy Act, 1971 a child can be aborted only if "it would suffer from physical or mental abnormalities as to be seriously handicapped". Most of the intersex conditions do not fall under emergency health concerns.¹¹ Out of all the intersex conditions, only Congenital Adrenal Hyperplasia, Aphallia and Cloacal exstrophy falls under emergency health concerns.¹² In cases having Congenital Adrenal Hyperplasia taking up treatment throughout one's life would enable them to lead a life with good health .Their life span

⁸ *Civil Society Coalition on Human Rights and Constitutional Law; Human Rights Awareness and Promotion Forum; Rainbow Health Foundation; Sexual Minorities Uganda; Support Initiative for Persons with Congenital Disorders (2014). "Uganda Report of Violations based on Sex Determination, Gender Identity, and Sexual Orientation"*

⁹ Brun JL et al. Prenatal diagnosis and management of sex chromosome aneuploidy: a report on 98 cases. *Prenatal Diagnosis*, 2004, 24:213–218.

¹⁰ Abramsky L, Chapple J. 47,XXX (Klinefelter syndrome) and 47,XYY: estimated rates of and indication for postnatal diagnosis with implications for prenatal counseling. *Prenatal Diagnosis*, 1997, 17:363–368.

¹¹ <http://www.transfaithonline.org/empower/basics/intersex/types/>

¹² id

is also normal.¹³ In case of Cloacal Exstrophy currently the survival rate is 100% with the advancement in science.¹⁴

The MTP Act, 1971 has not addressed as to what “seriously handicapped” means, hence intersex people are aborted without any basis which is a constitutional violation.

IX. SEX REASSIGNING SURGERIES: A DESIDERATUM?

Surgery on intersex children is being carried out in the name of sex reassigning surgeries. They are either assigned the role of male or female after such surgeries. An atypical genital is not a health issue first of all.¹⁵ John Money in his research has observed that intersex people who did not undergo sex reassigning surgeries had less rate of psychopathology. They could cope up well. So it is not mandatory that sex reassigning surgery is required in all the cases. A study was carried out by Minto regarding the consequences of such surgeries. They observed that¹⁶-

- a. There was no evidence to show that such surgeries have positive psychosocial outcomes.
- b. There is no guarantee that the person undergoing the surgery might associate himself with that gender in the future.

There is no proof of favorable upshot.¹⁷ Surgeries for the sake of social acceptance at an early age are unnecessary. It is purely because of binary gender mindset. Such cosmetic surgeries have irreversible effect on the child, and surgeries for removal of gonads would push the child to

¹³ Congenital adrenal hyperplasia. *MedlinePlus*. February 2014; <http://www.nlm.nih.gov/medlineplus/ency/article/000411.htm>.

¹⁴ L.L. Woo, J.C. Thomas, J.W. Brock. Cloacal exstrophy: a comprehensive review of an uncommon problem *J Pediatr Urol*, 6 (2010), pp. 102-111

¹⁵ K Karkazis, A Kon & A Tamar-Mattis,

¹⁶ Minto CL et al. The effect of clitoral surgery on clinical outcome in individuals who have intersex conditions with ambiguous genitalia: a cross sectional study. *Lancet*, 2003, 361(9365):1252.

¹⁷ Submission 88 to the Australian Senate inquiry on the involuntary or coerced sterilisation of people with disabilities in Australia Archived 23 September 2015 at the Wayback Machine, Australasian Paediatric Endocrine Group (APEG), 27 June 2013

undergo hormonal replacement therapy throughout their lifetime and hence should be prohibited at an early age.¹⁸

Even in later stages of one's life, they should not be compelled to undergo such surgeries. Such surgeries on adults also do not prove to be successful. A study was conducted on "57 46XY DSD adults. They had undergone genital surgery. It was observed that 47.1% were dissatisfied with the functional results, 47.4% with clitoral arousal, 37.5% with their sex life, 56.3% had painful coitus and 44.2% were suffering from sexual anxieties."¹⁹ Thus no person may it be intersex or transgender person shall be compelled to undergo such surgeries without their consent.

X. THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019

As per Sec 3 of the Gender Identity, Gender Expression and Sex Characteristics Act, 2015 of Malta "No person shall not be required to provide proof of a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychiatric, psychological or medical treatment to make use of the right to gender identity." In NALSA case it was observed that none shall be forced to undergo sex reassigning surgery, sterilization or any other medical procedure for them to be legally recognizable. But contradicting that The Transgender Persons (Protection of Rights) Act, 2019 states that for the sake of gender change, a transgender person has to undergo sex reassigning surgery.

Informed consent as per Nolo's Plain law dictionary means "An agreement to do something or to allow something to happen, made with complete knowledge of all relevant facts, such as the risks involved or any available alternatives. For example, a patient may give informed consent to medical treatment only after the health care professional has disclosed all possible risks involved in accepting or rejecting the treatment. A health care provider or facility may be held responsible for an injury caused by an undisclosed risk"²⁰. It is not that everyone can afford such surgery.

¹⁸ <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>

¹⁹ S Creighton, et al., Timing and nature of reconstructive surgery for disorders of sex development e Introduction, JOURNAL OF PEDIATRIC UROLOGY (2012), <http://dx.doi.org/10.1016/j.jpuro.2012.10.001>. 16 P Lee, et al., Review of recent outcome data of disorders of sex development (DSD): Emphasis on surgical and sexual outcomes, J. OF PEDIATRIC UROLOGY (2012)

²⁰ https://www.law.cornell.edu/wex/informed_consent

Even if it is affordable, they might choose not to undergo such surgery. Thus it is clearly violating their freedom. Consent to undergo the surgery cannot be construed as an informed consent.

XI. INTERVENTION- A CONSCIENCE DECISION

Since a child doesn't have the ability to consent for undergoing sex reassigning surgery, unless it is necessary to save the child's life sex reassigning surgeries should not be carried out on them. As per Sec 92 of the IPC²¹, doctor can take up agency by necessity in life threatening situation without informed consent. Anything done outside that doesn't extend protection to doctors.

- a. **Unnecessary intervention-** In **Janaki Kumar v.Sarafunnisa**²² the doctor was held liable for sterilizing without consent from the patient when it was not a life threatening situation. In **Videto v. Kennedy**²³ it was observed that in cases where surgery is not essential, such as cosmetic surgeries the doctor is under an obligation to disclose the expected common risk to the patient. Thus when an intersex adult comes for surgery the doctor has to disclose the cons of the surgery. In **Lakshmi Rajan v.Malar Hospitals**²⁴ it was held that the consent that the patient gave for carrying out abdominal hysterectomy is not valid since she doesn't have the ability to understand the medical jargon. Since it was not out of necessity, the consent given by the patient was held to be void. Similarly consent given by a intersex child who is not capable of understanding the need for such surgery when it is not a life threatening situation is not consent as such. Though such inference seems to be legally correct, a law is required for the same.

b. **Why a separate law on informed consent for such surgeries is required?**

Positively few cases have ruled in favor of intersex people. In the famous Colombia case, the court held that the parents don't have unlimited rights to give consent for cosmetic

²¹ <https://indiankanoon.org/doc/870189/>

²² Appeal No. 850 of 1998. (1999) 1 CPJ 66

²³ (1981), 17 C.C.L.T. 307 (Ont. C.A.)

²⁴ (1998) CPJ 586

genital surgeries on their intersex child. Christiane Volling is the first intersex person who sued for damages for non- consensual surgical intervention. He succeeded. But on the contrary owing to the lack of proper law, the constitutionality of such intervention wasn't looked into in Mc. Aaronson's case. In **M.C. v. Aaronson** an intersex boy was surgically operated to change gender as a female. There wasn't any urgent need to do so. The child after growing up identified himself to be a male. As per the Southern Poverty Law Center "In M.C.'s condition, there is no way to tell whether the child will ultimately identify itself as a boy or a girl. Instead, the doctors decided to assign M.C. female gender and change his body to fit their stereotype of how a girl should look".²⁵ The court dismissed the complaint. The court did not fade away the harm caused to the boy. But it stated that since there was no regulation on the same for guiding doctors in the matter, its constitutionality can't be looked into. Thus even though such intervention is not justified, since there was no law on the same, action couldn't be taken.

XII. THE LANDMARK MADRAS HIGHCOURT'S JUDGMENT

The honorable Madras HC in **Arunkumar and Sreeja v. The Inspector General of Registration**²⁶ and Ors ruled that sex reassigning surgeries should not be carried out on intersex children. It directed the Tamilnadu government to pass an order on the same. The court stated that "Time has come when they are brought back from the margins into the mainstream". It held that "The parents must be encouraged to feel that the birth of an intersex child is not a matter of embarrassment or shame". Even though judgments are law under Article 13 of the Indian Constitution, since it is a High Court judgment it is not binding throughout the country. Thus a law for protecting transgender and intersex rights on such matters should be enacted as early as possible.

XIII. ABORTION AND NON CONSENSUAL SURGERY- A CONSTITUTIONAL VIOLATION?

²⁵ *Southern Poverty Law Center (May 14, 2013). "Groundbreaking SLPC Lawsuit Accuses South Carolina Doctors and Hospitals of Unnecessary Surgery on Infant"*

²⁶ WP(MD) No. 4125 of 2019

The constitutional rights of intersex people are gravely violated through abortion and non consensual sex reassigning surgeries in the following ways-

- a) ***Gender expression-*** In the NALSA case the court held that the freedom of gender expression is a fundamental right under Article 19 1(a) and the state should not restrict, interfere or prohibit the same. It was observed that “values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1) (a) of the Constitution of India and the State is bound to protect and recognize those rights.” Intersex people’s gender identity is a matter of their privacy, personal integrity and autonomy. Thus aborting them or carrying out sex reassigning surgery without their consent is a grave violation of Article 19 1(a).

b) ***Violation of Right to Life-***

1. Right to Dignity- It is part and parcel of Art 21. In **Javed vs. State of Haryana**²⁷ it was observed that dignity of each individual is to be protected. In Francis **Coralie Mullin vs. Administrator, Union Territory of Delhi**²⁸ it was held that everyone has the right to express oneself in diverse forms. Thus gender being a question of one’s personal identity, why should it be interfered with unnecessarily?

2. Right to choose personal identity- Malta is the first country which banned non –consensual sexual intervention. Sec 3 of Gender Identity, Gender Expression and Sex Characteristics Act, 2015 guarantees gender identity which is as follows-

“(1) All persons being citizens of Malta or habitually resident in Malta have the right to -

(a) the recognition of their gender identity;

(b) The free development of their person according to their gender identity;

²⁷ AIR 2003 SC 3057

²⁸ 1981 AIR 746, 1981 SCR (2) 516

(c) Be treated according to their gender identity and, particularly, to be identified in that way in the documents providing their identity therein; and

(d) Bodily integrity and physical autonomy.”

Self determination is a facet of Art 21 since it is indispensable for personal liberty.

In **I.R. Coelho v. State of Tamil Nadu**²⁹ it was held that one has the right to choose his identity under Article 21. In **NALSA v. Union of India**³⁰ the honorable court observed that one has the right to decide their self- identified gender. In **Puttaswamy’s**³¹ judgment it was observed that the right to bodily integrity is a fundamental right under the constitution. In **Anuj Garg V Hotel Association of India**³² it was observed that the personal autonomy includes positive and negative right as well. Every individual has the right to take decision in his affairs, to express themselves, and to decide what they should do. This right also includes the right of non-interference by others. Thus aborting a child based on gender or assigning a gender to it without its consent is clearly violative of personal identity which is a facet of Art 21. Thus a law is to be enacted like that of Malta.

3. Right to Privacy- In **Sunita Tiwari V UOI**³³, the petitioner contested the constitutionality of female genital mutilation for religious purposes. The court held that the bodily privacy of women can’t be violated in the name of religion. This is a question of her integrity. Justice D Y Chandrachud stated that –

“Why should the bodily integrity of a woman be subject to some external authority?
One’s genitals are extremely private affairs”.

Sex corrective surgery without the consent of the intersex person is violative of one’s right to privacy.

4. Right to Health- As per the preamble of the World Health Organization “Health is a state of complete physical, mental and social wellbeing”. In **Bandhua Mukti Morcha vs. Union of**

²⁹ AIR 2007 SC 861

³⁰ AIR 2014 SC 1863

³¹ AIR 2017 SC 4161

³² AIR 2008 SC 663

³³ 2006 (2) MPLJ 218

India³⁴: it was held that the right to live with human dignity embraces right to health as well. As already stated such unwanted sex reassigning surgeries have adverse effect on one's health and thus is violative of right to health under Article 21.

XIV. NEW LEGISLATION: ARBITRARY IN NATURE?

Right to Equality is guaranteed under Art 14 of the constitution. In the NALSA case the honorable Supreme Court held that equality is extended to "all persons". Intersex communities even though are in minority, for the sake of protecting their rights there is a need for a separate legislation for them. According to Prof. Willis in 'Constitutional Limitations', the doctrine of "equal protection of laws" prohibits class legislation but permits reasonable classification of persons or things. In **State of W.B. v. Anwar Ali Sarkar**³⁵ the Nexus test was applied. It is-

"In order to pass the test of permissible classification two conditions must be fulfilled

- (i) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out of the group, and
- (ii) That the differentia must have a rational relation to the object sought to be achieved by the act. The differentia which is the basis of the classification and the object of the act are distinct and what is necessary is that there must be nexus between them."

A separate legislation protecting the rights of the intersex people is indeed based on intelligible differentia since they don't fall under binary norms of gender. Such legislation would serve in protecting them from abortions, non consensual sexual intervention etc which is the object sought to be achieved. In **Maneka Gandhi v. Union of India**³⁶ the 'content and reach' of the 'great equalizing principle' enshrined in Article 14 was observed as follows: "The principle of reasonableness, which legally and philosophically, is the essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence." A separate legislation for

³⁴ 1984 AIR 802, 1984 SCR (2) 67

³⁵ 1952 AIR 75, 1952 SCR 284

³⁶ 1978 AIR 597, 1978 SCR (2) 621

intersex people is indeed reasonable and hence is not violative of Article 14. In **Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar**³⁷ it was observed that owing to some special circumstances / reasons particular to a person a law may be enacted for the person. The law is constitutional in nature. That is a class in itself. Here intersex people though are less in number there is a grave need to protect them from such abortions and surgeries and hence a law is to be enacted on the same.

XV. LEGISLATION :NOT A NEED, BUT A NECESSITY

In **Ramsumaran Prasad vs. Shyam Kumari**³⁸ it was observed that necessity is the kind of pressure which the law recognizes as serious and sufficient. There is an earnest necessity to bring in legislation to ban such surgeries immediately.

In **Valliamma Champaka Pillai vs. Siuvatani Pillai**³⁹ it was observed that the judgment of one High Court is not binding on the other. It has persuasive status only. The same was held in **Commissioner of Income tax V Thana Electricity Supply Ltd**⁴⁰. Thus a law should be enacted for the whole country to make intersex pre-natal screening, abortions, sex reassigning surgery on a child and non consensual sex reassigning on an adult as unlawful.

XVI. CONCLUSION-

Sex reassignment surgeries at an early age are in fact problematic and not problem solving. Sex reassignment surgeries may be carried out when the child reaches an age where it can decide on its own. No one shall be compelled to undergo the surgery on reaching the age of maturity. Such surgeries during childhood should be prohibited throughout the country unless it is life threatening. The surgery should be carried out in the best possible means after taking the informed consent of the patient concerned. Such data is to be kept confidential. Legislation on taking care of such intersex children should be enacted. An Act guiding medical professionals

³⁷ 1958 AIR 538, 1959 SCR 279

³⁸ (1923) 25 BOMLR 634

³⁹ (1979) 4 SCC 429

⁴⁰ 994 206 ITR 727 Bom

for dealing with intersex babies should be enacted. It is time for us to look beyond the binary gender stereotype.

