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Intersex Children, Autonomy and the Right to Health

Introduction:

Intersexuality is a controversial topic which has been discussed widely within the discipline of social sciences. Basically, the term intersex refers to a person whose chromosomes, gonads or external genitals do not form exclusively male or female sex. As a result, many intersex children are subject to sexual reassignment surgery and hormone treatment from the early stages of their life despite the fact that this intervention is rarely medically necessary (see also, Haas, 2004, p.42). This situation have been criticized by many poststructuralist gender scholars and queer activists (members of gay, lesbian, bisexual, transgender human rights movement) who argue that binary opposition of sexes (male/female) and the gender roles attributed to them are social constructs and therefore intersexuals people should not be forced to fit in one single sex. Approaching the topic from a legal perspective, this paper will specifically deal with the medical intervention on intersex children within the framework of human rights and examine the emerging tensions between different human rights concerning the medical procedure that intersex children are subject to without their consent.

Medical Intervention on Intersex Children: Why is it a human rights issue?

Despite being condemned by a wide range of intersex associations¹, American Academy of Pediatrics (AAP) and many other medical authorities suggests that the best time for genital surgeries are between 6 weeks to 15 months birth of a child². Since a child between 6 weeks to 15 months is too young to be capable of forming its own views, the medical intervention is applied on the intersex children without its consent. Including AAP, many medical authorities

¹ Read the statement published by Intersex Initiative at:
<http://www.intersexinitiative.org/articles/consensus.html>

² See "Timing of Elective Surgery on the Genitalia of Male Children With Particular Reference to the Risks, Benefits, and Psychological Effects of Surgery and Anesthesia" at
<http://aappolicy.aappublications.org/cgi/content/abstract/pediatrics;97/4/590>

have been stating that the early medical intervention on genital organs is crucial for the best interest of the child. In other words, they justify the intervention by stating that they protect the intersex child's emotional and psychological development by treating them as early as possible. This situation initially generates critical human rights issues, especially when the surgeries are not medically urgent.

Article 5 of the Convention of Human Rights and Biomedicine clearly sets as a general rule that “ an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it” and adds that the person in question should be provided necessary information about the intervention as well. The issue of consent and autonomy has been lying in the hearth of the human rights discourse and it leads to leads to several dilemmas when the person in question is not able to give consent. In her discussion on the principle of individual autonomy and paternalistic beneficence, Aasen (2009, pp.57-58) argues that the notion of human vulnerability can be regarded as an important balancing point between paternalism, autonomy and the justification of an intervention. Children are generally considered to be a vulnerable group and there exist a special convention to emphasize only on children as the right holder, namely the UN Convention on the Rights of the Child (CRC). In the next section, I will discuss the basic principles of the CRC in relation to the intersex children and highlight the major dilemmas and tension between different rights.

Sexual Reassignment of Intersex Infants in Relation to CRC:

The UN Committee on the Rights of the Child has drawn attention to the four articles of the CRC as the general principles (Sandberg, 2009, p.71): Article 2 (the right to non-discrimination), Article 3 (the best interest principle), Article 6 (the right to life and development), Article 12 (the right of the child to be heard). Among them I will basically emphasize on the interplay between the best interest principle and the right of the child to be heard when the surgeries are not medically necessary and/or urgent.

According to a report published by Australian Human Rights Commission in 2009, intersex children have been operated to make a person's body conform with common views about what a male or female body should like. Haas (2004, p.42) argues that surgeries are performed so that the children will not be psychologically harmed when they realize that they are different from their peers. Hence, the justification behind the medical intervention is generally the assumption that it is for the best interest of the child. There is an explicit attempt of protecting the child from diverse social pressure and different kinds of mental traumas. In

legal terms, this perspective is supported by the CRC's Article 3 which is related to the best interest principle³. It is, however, a direct violation to Article 12 since the medical intervention is performed without the consent of the child. Indeed, there is limited study that shows that an operated intersex child is healthier than the unoperated one (Haas, 2004, p.46). Furthermore, an operated child might still be psychologically affected as soon as he/she grew up and learns about his/her medical history. Article 10(2) of the Convention of Human Rights and Biomedicine states that "Everyone is entitled to know any information collected about his or her health". This principle should also embrace the people who were subject to sex reassignment surgery during their childhood and therefore obliges parents or authorities to inform the intersex child about the surgery they had.

Medical intervention on intersex children can be evaluated within the framework Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity which was released in 2007.

Sexual Reassignment of Intersex Infants in Relation to Yogyakarta Principles:

Although the category of 'sex' is included in many covenants as an important ground to be protected from discrimination⁴, the absence of the terms 'sexual orientation' and 'gender identity' causes a blurred area considering the human rights violations against LGBTI (lesbian, gay, bisexual, transgender and intersex) people. Considering these group of people as 'vulnerable' and therefore in need of a special focus within the treaty of human rights discourse, Yogyakarta Principles were developed by 29 experts including one former UN High Commissioner for Human Rights, thirteen current or former UN human rights specialists, office holders or treaty body members, a number of academics and activist and launched as a global charter for gay rights during 2007 in Geneva (O'Flaherty and Fisher, 2008, p.233). Among the 29 principles declared, I will focus on the one which is related to the protection from medical abuse.

Principle 18 states that "No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed".

³ CRC, Article 3(1): In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

⁴ ESCR, Article 2(2); CPR 2(1); CRC 2 (1)

Accordingly, any medical intervention to an intersex child can be considered as a medical abuse.

Cases of Ramsos and Gonzales: Colombian Court Decisions in relation to intersexuality

Gonzalez v Colombia (1995)

Gonzalez was not born with an intersex condition however, his case is famous due to being related to sex reassignment surgery on a child and gender identity. Gonzalez was a boy who was accidentally castrated during circumcision. His doctors and parents decided on a sex reassignment surgery and hormone treatment to change the castrated boy from male to female. When Gonzalez was informed about the surgery as a teenager he applied to the courts on the basis that the operations were performed without his consent (Haas, 2004, p.49). The Colombian Constitutional Court found that Gonzalez's fundamental right to human dignity and gender identity were violated by the operation. The court decision is crucial due to its direct reference to 'gender identity' which was not a very popular term within the framework of human rights at that period of time. Also, the emphasis on 'human dignity' is notable as the "general assumption in human rights discourse is that the respect for autonomy is essential for the respect for human dignity" (Aasen, 2009, p.53). Hence, the medical intervention on Gonzalez without his consent was considered as a direct violation to his autonomy and dignity as well.

Ramsos v Colombia (1999)

Although Ramsos was born with male chromosomes, he was unable to process male hormones and could not develop external genitalia. Due to his undeveloped penis, he was thought to be a baby girl. Doctors were not aware that Ramsos was intersex until the child was three years old. When the pediatrician became aware that the child was intersexed, a genital reconstruction was recommended to remove the small penis and gonads and to construct a vagina. Considering the famous case of Gonzalez, the hospital required legal authorization prior to the surgery. The trial court stated that "nobody could determine what the gender identity of this child would be except for the child herself" and denied Ramsos's family to give consent to the surgery (Haas, 2004, p.51). This decision underscores the protection of the child's autonomy and self determination concerning 'gender identity'. Here, it is vital to refer to the Article 14 of the Convention of Human Rights and Biomedicine, which is about non-selection of sex. The article says "the use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex,

except where serious hereditary sex-related disease is to be avoided”. The article has no direct reference to the conceptualization of ‘gender identity’. Yet, it can be interpreted in a way that will encompass genital surgeries which will alter the child’s current sex, and any treatment which is aimed to shape the gender identity of the child in question.

Conclusion:

The human rights discourse is based on the protection of all human rights as they are equally important, interrelated and interdependent. However, in certain conditions, this unity of human rights is challenged when the realization of a certain right leads to the decline of another one. Medical intervention on intersex children raises many critical questions concerning the child’s autonomy and right to health. In terms of the legal terrain provided by CRC, the major conflict is between a child’s right to be heard and the principle of best interest. On the one hand, medical intervention that is applied without the child’s consent is justified by being beneficial for the emotional and psychological wellbeing of the child. On the other hand, these interventions are considered to be a direct violation to the human dignity of the child who has right to have a say in such a critical condition that will affect his/her life. It is crucial to underline the fact that one of the major reasons that triggers the tension between Article 3 and Article 12 of CRC is the fact that majority of human rights conventions and covenants has no direct reference to ‘gender identity’ or ‘sexual orientation’. The prevailing heterosexist gender binaries lead to many authorities to think that sexual reassignment of intersex children will be beneficial for them to be integrated into the social norms without any problem. However, this circle (re)produces the hegemonic gendered ideologies. This is why the court decisions from Colombia and the establishment of Yogyakarta Principles are very important.

References:

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4- Sandberg, K. (2009). Children's Right to Participate in Health Care Decisions In Aasen, Halvorsen & B. d. Silva (Eds.), *Human Rights, Dignity and Autonomy in Health Care and Social Services: Nordic Perspectives*.

5- O'Flaherty, M., & Fisher, J. (2008). Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles. *Human Rights Law Review* 8(2), 207-248.

Websites:

The Intersex Initiative

<http://www.intersexinitiative.org/>

The Yogyakarta Principles

<http://www.yogyakartaprinciples.org>

Convention on the Rights of the Child

<http://www2.ohchr.org/english/law/crc.htm>

Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=164&CL=ENG>

