

Examining the Status of Intersex People in the International Human Rights Framework

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Abstract: Intersex people are those whose sexual features do not fit within the framework of strictly male/female bodily attributes. Considering the social realities and prevalent perspectives manifested in the laws of most countries, which categorize individuals solely into the binary of man and woman—predicated upon presumed natural characteristics—referred to as binary laws, they face numerous challenges including social isolation and the infringement upon their fundamental rights being overlooked. As a result, individuals identifying as intersex are deprived of their rights to obtain identity documents, form families, or escape discrimination in all areas such as employment and participation in professional athletic competitions, thereby hindering their access to fundamental rights. Consequently, they may undergo involuntary and harmful surgical procedures with the intention of being categorized into one of the male/female binary categories, actions that constitute a violation of their bodily integrity, autonomy, and informed consent. Consequently, human rights activists and various international human rights organizations have in recent years taken the initiative to define and identify individuals who identify as intersex, recognizing the extent of violations of their rights at different levels, and emphasizing the necessity of upholding their rights.

Keywords: Human rights; Intersex people; Sexual minorities; Gender identity; Sexual orientation; International human rights framework

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Introduction

The predominant human perspective on gender from the beginning up to recent decades has been established based on "Heteronormativity," which entails the idea of the existence of two opposite genders. Heteronormativity is a belief that

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people are inherently divided into complementary and distinct genders

(male/female), each with specific roles in life. This belief considers the heterosexuality as the only sexual orientation or natural sexual orientation, and it asserts that sexual and marital relationships are only suitable for individuals with opposite genders. Based on this viewpoint, that teachings of various religious institutions appear to play a significant role in aligning the global public perceptions around it, social laws and legal regulations regarding conventional gender and sexual preferences depend on defining terms such as feminine, masculine, masculinity, and femininity to attract opposite genders to each other and ultimately reproduce. This normative framework typically categorizes sexes as male and female, genders as feminine and masculine, and sexual preferences as heterosexuality, thereby conforming to a binary system.

In recent decades, despite extensive support from political, religious, and traditional

institutions, the aforementioned viewpoint has come under severe attack with the emergence and spread of certain movements born out of modernity. It has been significantly marginalized in various societies to the extent that same-sex marriage has gained legal support in many communities and discussing it culturally and legitimizing it by individuals is no longer considered taboo, contrary to the past. However, these movements and their outcomes, due to their sole emphasis on individuals' sexual orientation, perceiving sex as strictly male or female, have not significantly contributed to the advancement of intersex people and have not taken effective steps towards identifying and upholding their rights. In the continuation of this research, following the clarification of the concepts of gender and sex and other related concepts necessary for understanding our subject, we will investigate the historical formation of the concept of rights for intersex people. Subsequently, we will discuss the position of this concept in the international human rights framework.

2 Gender and Sex Concepts

In this section, we delve into an examination of the fundamental concepts of gender and sex.

2.1 Definitions of Gender and sex by Scholars

Over the years, scholars considered gender and sex synonymous, leading

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to a general neglect of the identification of intersex people and overlooking their existence as individuals entitled to rights. However, over time, the evolution in the definitions of these two terms has even directed to a transformation in the perspectives of legal and human rights institutions regarding these concepts, and the jurisprudence of legal scholars and human rights activists has also undergone profound changes. For example, John William Money (1955) introduced the gender role concept, describing it as follows: "It refers to all the things a person does or expresses to indicate that they are a boy/man, a girl/woman. It also encompasses sexual orientation from an erotic perspective but is not limited to it."¹ In 1972, this prominent New Zealand psychologist revisited the aforementioned definition and proposed that gender and sex must be considered as two categories². He argued that sex can be determinable anatomically and psychologically, while gender should be understood as an internal belief and conviction regarding a person's identity as male or female, along with their behavioral manifestations³. This divergence in the proposed definition served as a starting point for some scholars to develop a new paradigm in the history of human thought concerning topics related to the concept of gender identity⁴.

However, some other scholars have found the theoretical distinction between gender and sex and its subsequent effects elsewhere. For instance, Judith Butler⁵, while criticizing feminist ideologies, claimed that it was Simone de Beauvoir who first distinguished between "sex" and "gender" with her formulation⁶. Butler, a leading figure in the field, challenges binary conceptions of gender, proposing a more complex understanding that encompasses all marginalized gender identities. By rejecting the binary of male and female, Butler introduces the "gender fluidity"⁷ concept. According to this viewpoint, which can also find its roots in the intellectual framework of Foucault, homosexuality or sexual orientation in general is not a discovered identity but rather a structured categorization of knowledge. In an article titled "Performative Acts and Gender Constitution," Butler brings forth the argument that having such an understanding of gender as performative acts performed by individuals holds greater validity. Therefore, "appropriate acts of the man and woman is used for creating a certain social space that makes the seemingly natural binary of genders and legitimize it."⁸ In her book, Butler discusses how "gender" and "sex" terms are socially and culturally constructed and critiques feminism's attempting to turn "women" into a separate group

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because this causes the duality in gender relationships and provides an opportunity to create distinct categories (woman and man).⁹

In his book "Herculine Barbin," Paul Michel Foucault analyzes the case of an intersex individual. Herculine Barbin was a French intersex person whom Foucault describes as someone who was raised in society as a poor girl and exhibits almost entirely feminine behaviors, being deeply religious. Known to acquaintances as Alexina, Herculine eventually discovers that she is, in fact, male. Following legal proceedings that force a change in legal gender and personal documentation, Herculine Barbin finds themselves unable to accept their new identity and ultimately commits suicide.¹⁰ By stating these words, Foucault emphasizes an identity supported by the state and deemed obligatory for societal acceptance. Through the narrative of Barbin, one can perceive that "self-awareness and individuality cannot easily be achieved through the body, and such matters are not inscribed within a body."

In "Undoing gender", Butler reexamines binary gender notions and delves into the reconsideration of how an individual can present themselves as human without fully consenting to the binary dictations imposed upon them. To validate this, she refers to David Reimer, a male who underwent a gender reassignment surgery at 19 months

old, raised as a female, and later transitioned back to being a male in adolescence.¹¹ David's nature was based on the theory of John Money, which suggests gender is not inherently tied to "nature" but rather to "nurture." However, Butler focuses not on the nature versus nurture debate but on dismantling social processes that create gender inequalities. Instead, she contends that David does not confirm or refute any of the medical arguments and does not fit within the confines of accepted gender norms, yet this does not diminish his humanity.¹² Butler employs an approach that focuses on human health and well-being, reflecting on how the narratives of both structuralists (nurture) and essentialists (nature) regarding gender identity seek to diminish the value of individuals to something "between their legs."¹³ These theories are basically designed with the aim of creating the belief that gender inequalities are the result of social processes that can be challenged.

Queer and feminist theories have considerably influenced the law by raising claims about the right to determine the destiny of queer, intersex, and generally non-binary individuals. Furthermore, they have contributed to changing the legal frameworks used to describe "sex" and "gender," moving away from these two concepts and advocating for their reconceptualization. As a result, existing dual legal

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frameworks have become obsolete, requiring amendments to achieve gender equality and inclusivity for both intersex and non-binary individuals.

2.2 The Concept of Gender and sex in International Human Rights Documents

The term "sex" appears in numerous international legal documents. According to Article 2 of The Universal Declaration of Human Rights (UDHR), everyone is entitled to all the freedoms and rights contained in this Declaration, with no distinction including, race, language, sex, color, etc.

Similarly, the International Covenant on Civil and Political Rights considers the rights of all individuals regarding non-discrimination and equality before the law. Article 2, paragraph 1 of the Covenant establishes principles related to non-discrimination and emphasizes that "the rights recognized in the present Covenant shall be granted with no distinction of any kind, such as birth, property, social or national origin, political or other opinion, religion, language, sex, color, race, or other status."

According to Article 26, the law should prohibit all discriminations and guarantee to all individuals effective and equal protection against discrimination on any ground such as birth, property, social or national origin, political or other opinion, religion, language, sex, color, race, or other status.

Furthermore, Article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states that member countries of this treaty shall take all necessary measures to alter sociocultural behaviors of males and females, aiming to eliminate biases and traditional practices rooted in notions of gender inferiority or superiority and stereotypical gender roles.

Similarly, regarding gender (being male or female), Article 14 of the European Convention on Human Rights states that "discrimination on any ground e.g., language, color, race, sex, (...) is prohibited." Likewise, at the level of the European Union (EU), Article 10 of the Treaty on the Functioning of the EU stipulates that "the Union shall combat discrimination based on sexual orientation, age, belief/religion, race/ethnic origin, disability, or sex."

The Committee on Economic, Social and Cultural Rights, in its General Comment No. 20, states that it ensures equal rights for males and females in the enjoyment of cultural, social, and economic rights.

Furthermore, since the adoption of the Covenant, the "gender" concept has evolved in the context of prohibiting discrimination to encompass not only physiological traits but also societal structures of gender expected roles, biases, and stereotypes, which may pose

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difficulties to achieving equality in cultural, social, and economic rights. Considering these issues, "sex (being male or female)" is used as a foundational factor in regulations concerning non-discrimination in human rights treaties and is often implies "gender"¹⁴.

The WHO defines "gender" as "the characteristics that arise from the social roles and relations between females and males," including "relationships, roles, and norms between groups of men and women."¹⁵

The CEDAW, which aims to support females' rights in all areas, resulted from the work of the Commission on the Status of Women. Originally established as a subsidiary body of the Commission on Human Rights in 1946, this swift establishment of the commission was in response to pressure from women's rights activists. In 1992, a General Recommendation issued by the United Nations Committee on the Elimination of Discrimination Against Women indicated that "gender-based violence" refers to "violence directed against females because of their gender or that affects women disproportionately." Also, it is considered "a form of discrimination that inhibits females' ability to enjoy freedom and rights on the basis of equality with males."¹⁶

The 1993 Declaration on the Elimination of Violence Against

Women is the first international document to explicitly address violence against females, defining it in its first article as any gender-based violence that leads to psychological, sexual, or physical suffering or harm to females, including threats of such acts, coercion, or arbitrary deprivation of liberty, occurring in private or public life."

General Recommendation No. 35 of the CEDAW states that "this committee, in its legal philosophy, has highlighted the inseparable connection of discrimination against women with other factors, including nationality or race, sexual orientation, homosexuality, bisexuality, transgender identity, or women's intersex status." Based on this premise, given that women experience various forms of discrimination that have severe negative impacts on them, the committee recognizes that gender-based violence severely impact females to different degrees or through different means, necessitating appropriate political and legal actions.¹⁷

In recent years, as gender studies have progressed and movements for LGBT and intersex rights have gained momentum, international human rights bodies have begun to include non-binary individuals in gender and sex terminology. The Yogyakarta Principles, a non-binding international standard, advocate for the human rights of sexual minorities, ensuring that all individuals, regardless of

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gender identity or sexual orientation, enjoy full human rights without discrimination.¹⁸

Gender identity is a person's deep sense of being female, male, or another gender, which may or may not align with their sex assigned at birth, and includes personal perceptions of one's body (which may include physical changes or alterations in body function resulting from medical interventions, surgical procedures, or other purposes if freely chosen), as well as other gender-related characteristics such as clothing preferences, speech patterns, behaviors, and so forth.¹⁹ The United Nations (UN) defines "gender identity" as the reflection of "an individual's deeply experienced and felt sense of self," stating that "everyone has a gender identity, which is a fundamental aspect of their personality." Additionally, "sexual orientation" is described as a "emotional, romantic, and/or physical, attraction to other individuals" and "everyone has a sexual orientation, which is a part of their identity."²⁰

The United Nations Commission on Economic, Social, and Cultural Rights acknowledges that discrimination based on gender identity is prohibited. Transgender and intersex individuals often experience severe human rights abuses.²¹ Currently, international human rights treaties do not contain any clauses that permit a state to

guarantee rights to some while unjustly denying them to others based on sexual orientation or gender identity.²²

In 2017, over 10 principles and laws were adopted in the city of Yogyakarta, Indonesia, and additional regulations were added, elaborating on the requirements outlined in previous documents adopted in 2006. Currently, the Yogyakarta Principles and Laws also cover "gender expression" and "sexual features" as grounds for non-discrimination. "Sex features" are defined as "the way in which each person expresses their gender through physical appearance, including clothing, hair style, jewelry, makeup, behavior patterns, mannerisms, names, personal reference, and anything else related. Sex characteristics may or may not align with an individual's gender identity." Furthermore, "sex characteristics" are defined as "the physical attributes of each person related to sex (male or female), including reproductive organs and other reproductive and sexual anatomy, hormones, chromosomes, and secondary physical characteristics that develop during puberty."²³

It is evident that the term "gender" (male or female) appears in numerous international human rights documents, though it lacks a precise legal definition. There is no specific legislation that clearly defines the criteria for male and

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female. Legal interpretations of "gender (male or female)" follows the binary understanding of gender that predominates in modern societies. Until specific laws are established to determine who is considered male or female, physicians remain key authorities in assigning gender at birth.

In recent years, the concept of "gender characteristics" has been defined to safeguard intersex individuals from human rights violations resulting from binary gender norms. Concurrently, the understanding of "gender" has evolved significantly. Previously, gender discrimination primarily targeted women. Although discrimination against females remains persistent, the definition of "gender" now encompasses "gender identity" and "gender characteristics." These terms are internationally recognized and employed in legislation, official reports, and judicial proceedings to ensure comprehensive recognition of the various ways gender can be identified, experienced, and expressed.

3 Intersex Individuals' Rights in the International Human Rights Framework

In this section, we delve into an examination of some documents in which one may seek intersex individuals' rights.

3.1 The United Nations

Main documents of the UN, including the United Nations Charter and its covenants, generally and sometimes specifically and extensively, discuss the necessity of

identifying and respecting all human being rights, albeit it took years for member states of the UN to initiate discussions about the rights of sexual minorities at various regional and international levels. In April 2003, the Brazil's representative at the United Nations Human Rights Commission presented a "historic and unexpected resolution to prevent discrimination based on sexual orientation to the United Nations Human Rights Commission."²⁴ This resolution faced considerable resistance from several countries, including Bahrain, Saudi Arabia, Malaysia, Pakistan, Zimbabwe, and Vatican.²⁵ However, it garnered support from Japan, the EU, and many countries in Latin America, Eastern and Central Europe.²⁶ Three years later, Norway advanced the cause by presenting a joint declaration on human rights violations based on gender identity and sexual orientation on behalf of 54 countries.²⁷

In 2011, South Africa spearheaded the first resolution on gender identity and sexual orientation, requesting the UN High Commissioner for Human Rights to present a draft report documenting "discriminatory acts and laws of violence against people based on their gender identity and sexual orientation."²⁸ the UN published its first and only report on the topic, highlighting global declarations regarding discrimination based on

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sexual orientation. This report underscored the historical hatred leading to violence and discrimination against LGBT individuals, affecting areas such as torture, detention, education, healthcare, and employment.²⁹ Consequently, Two significant events took place in 2011: a statement signed by 85 countries that called for homosexuality decriminalization, and adoption of a resolution proposed by South Africa that marked the first UN resolution in support of LGBT rights.³⁰

In 2014, the second resolution was presented under the guidance of Uruguay, Colombia, Chile, and Brazil, requesting the UN High Commissioner for Human Rights to update the 2011 report to "share appropriate measures and strategies to overcome discrimination and violence in current international human rights standards and laws."³¹ In 2016, the UN adopted its 3rd resolution on gender identity and sexual orientation, deciding to appoint an independent expert for a 3-year period to protect against violence and discrimination based on sexual orientation, and to implement gender identity aiming at "assessing the use of international human rights tools to overcome violence and discrimination against individuals based on gender identity or sexual orientation."³² Despite all the UN efforts and its member countries, the latest report from the International Lesbian, Gay,

Bisexual, Trans and Intersex Association (ILGA) shows that same-sex relations are severely condemned in 72 countries. Among these, 45 countries enforce discriminatory laws against both men and women.³³ Furthermore, according to the Transgender Europe (TGEU) organization, transgender individuals are recognized as criminals in 57 out of 114 surveyed countries and are subject to legal persecution.³⁴

It is noteworthy that the rights of intersex persons have not been fully addressed at the UN level thus far. However, significant activities have taken place in this regard, with the first attempt by the UN to increase awareness about intersex individuals observed in 2014. This occurred when several UN agencies condemned forced and non-consensual sterilization of intersex individuals in a joint statement.³⁵ In 2015, under the "Free & Equal" campaign, the UN addressed the issue of human rights violations against intersex people, particularly focusing on the harms caused by sex assignment operations.³⁶ In the same year, UN member countries and the UN General Assembly agreed to end inequalities by 2030 and adopted the "2030 Agenda for Sustainable Development," including 17 Sustainable Development Goals.³⁷ This agenda, based on international human rights treaties and the UDHR, aims to complement and

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achieve the Millennium Development Goals.

While explicit reference to the rights of intersex and non-binary individuals is not present in the text of this agenda, its broad statement aims to address sexual health, the rights of gender-diverse individuals, and intersex issues. The preamble of this agenda, beginning with the phrase "Leave no one behind," seeks to embrace those who have been marginalized due to their gender identity, sexual orientation, expression, and sex characteristics.

Accordingly, the third goal of the agenda³⁸ is "ensuring healthy lives and promoting well-being for all at all ages,"³⁹ including the prohibition of involuntary medical procedures that violate bodily integrity, physical anatomy, and individuals' health.⁴⁰ The fifth goal is to "achieve gender equality and empower all females" including intersex individuals.

Intersex individuals identify themselves as "women", "girls", "intersex women", or "intersex girls". Goal 10.2 aims to support all people in political, economic, and social spheres regardless of their gender, while Goal 10.3 strives to reduce inequalities imposed by discriminatory approaches, policies, and laws. Discrimination against intersex individuals is typically enforced through approaches, policies, and laws that ignore these individuals and are incompatible with their needs. Consequently, these laws lead to the exacerbation

of negative social attitudes like Interphobia. Ultimately, Goal 16 aims⁴¹ to promote the concept of "inclusive societies" to shift societal beliefs towards recognizing and accepting intersex individuals in modern communities.

In its special reports in 2013 and 2016, the United Nations Special Rapporteur condemned medical interventions on intersex infants and called for prohibiting such operations and irreparable damages.⁴² The next step lies with the authorities of member countries of the UN to enact appropriate laws to prohibit involuntary genital operations on infants. However, the violation of intersex individuals' rights extends beyond medical issues, and anatomical aspects of their bodies. Intersex individuals are exposed to numerous human rights violations in all aspects of their lives, which must be addressed by UN member countries at both international and national levels.

3.2 *European Human Rights Framework*

In 2015, two reports were published regarding the conditions of intersex rights in the EU. The EU Agency for Fundamental Rights (FRA) released a report focusing on fundamental rights conditions of intersex individuals. Additionally, OII Europe and ILGA Europe, supported by the EU, published a report titled "Supporting Human Rights of Intersex People, How Can You Help?" According to data

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provided by them, there is indeed little attention given to intersex individuals in the EU. This is because most European countries recognize individuals as either male or female, leading to fundamental rights violations for intersex individuals, ranging from discrimination to non-consensual medical interventions.⁴³ As of now, Malta stands alone in Europe with a comprehensive legal framework protecting intersex rights across all sectors.⁴⁴ The referenced reports highlight Germany as the pioneering EU nation to introduce a third option on birth certificates.⁴⁵ Following these reports, Portugal, Greece, and Austria have also enacted laws regarding intersex individuals.

The purpose of this section is to analyze intersex laws in multiple countries and their impacts on other areas. Legal developments regarding gender identity and sexual orientation directly affect intersex individuals, as "sex" and "gender" are often conflated under the law. Therefore, the legal framework of sexual orientation and gender identity will be examined in this section to demonstrate how it impacts the rights of intersex individuals.

It should be noted that the EU has published 2 reports on the legal conditions of intersex individuals, both of which mention that there are legal areas that implicitly cover intersex individuals. These countries include Sweden, Slovenia,

Romania, the Netherlands, Finland, and Denmark.⁴⁶ In these cases, intersex rights are covered under "gender" and "gender identity" or "both gender and gender identity."⁴⁷ Since the publication of the aforementioned reports in 2015 and subsequent substantial developments, Luxembourg, Ireland, and Belgium have recently introduced laws based on self-determinations.

3.3 *American Human Rights Framework*

In recent years, intersex and SOGI rights have significantly progressed in the American region. In some countries such as Brazil, Uruguay, and Argentina the legal status of SOGI rights or civil unions or same-sex marriage has become meaningful, supported by anti-discrimination laws, anti-crime laws, and powerful courts in this field, as well as movements advocating for LGBT rights. In 2015, a report was published by the Inter-American Commission on Human Rights on violence against intersex and LGBT individuals,⁴⁸ expressing its concern about the human rights violations against these individuals. It stated: "The bodies of intersex individuals do not conform physically to the medical and cultural standards defined for (women) and (men), and as a result, actions are taken regarding them." These actions include genital operations and gender reassignment procedures carried out without

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informed consent of these individuals. Most of these operations are irreversible and aim to normalize the individual's genitalia appearance. Such operations result in significant harm to intersex children and adults, including chronic pain throughout life, loss of sensation or numbness in the genital area, infertility, and reduced or lost ability to experience sexual pleasure. These operations often lead to forced sterilization. Based on available data, these interventions are standard practices in countries across the Americas continent."

The commission has recommended that member countries "make necessary modifications to laws and policies to prevent unnecessary medical operations on intersex adults and children. This prohibition should be enforced unless these operations are deemed necessary and involve medical risks, provided they are conducted with the individual's free and prior consent. Non-essential medical operations and other interventions should be postponed until the individual can make their own decisions."

The American Court of Human Rights interpreted the provisions of the American Convention on Human Rights within the scope of its jurisdiction, particularly concerning the rights of LGBT individuals, especially transgender rights. This court has affirmed the

right to privacy under the American Convention, ensuring the protection of private life. This court has upheld the right to confidentiality or privacy under the American Convention, stating that if "a set of factors, including individuals' dignity such as the ability to freely develop one's personality, guarantee personal identity, and define one's personal relationships are involved,"⁴⁹ the court has emphasized: "The set of attributes and characteristics that distinguish an individual from the rest of society, and in this regard include certain other rights, subject to the specific subject matter and conditions."⁵⁰

Article 64 of the American Convention on Human Rights states: "Each member state of the Organization of American States can request an advisory opinion from the Inter-American Court of Human Rights on the promotion of human rights and the conformity of its domestic laws with this convention." On May 18, 2016, Costa Rica sought an advisory opinion on whether the Convention's signatories should acknowledge changes in name and identity data based on individuals' preferred gender identity. Additionally, they inquired if the parties should recognize the economic rights derived from same-sex relationships.⁵¹

Later, in advisory opinion, the Inter-American Court of Human Rights stated that the Inter-

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American Commission on Human Rights required countries to grant same-sex couples the right to marry. Moreover, it mandated that governments provide a swift, straightforward, and cost-free process for individuals to change their name and gender marker on official documents to reflect their gender identity.⁵² This opinion specifically addressed the rights of intersex individuals, particularly concerning issues of nonconformity and norms or discriminatory practices, which negatively impact the quality of healthcare services and may result in denial or lack of provision of services.

3.4 Asian Charter of Human Rights

In Asia, some human rights are enshrined in the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration. Member countries of this association include Singapore, Philippines, Brunei, Lao People's Democratic Republic, Malaysia, Cambodia, Darussalam, Indonesia, Thailand, Myanmar, and Vietnam.⁵³ In 2009, the Association formed the International Committee on Human Rights to advocate for human rights. By mid-2012, this committee had drafted its own Human Rights Declaration, with the first five principles guaranteeing the human rights of "all individuals"⁵⁴, while the subsequent principles ensure all cultural, social, economic, political, and civil rights. The ASEAN Human Rights Declaration guarantees more rights in

comparison to the UDHR. For example, it explicitly ensures the right to access to water and sanitation services (Article 28, paragraph e), secure environment (Article 28, paragraph f), progress and development (Article 36), and enjoy peace (Article 30).⁵⁵

However, despite this, both the ASEAN Human Rights Declaration and the actions of the ASEAN Commission on Human Rights have been heavily criticized. The UN High Commissioner for Human Rights has pointed out problems such as the lack of meaningful and comprehensive consultation with civil society in this declaration, which do not comply with international standards.⁵⁶ The US Department of State expressed serious concern about certain principles and provisions of this declaration may undermine and erosion of universal human rights and fundamental freedoms enshrined in the UDHR. These troubling aspects include the use of "cultural relativism" concept to suggest that the rights enumerated in the UDHR do not apply universally; the assertion that domestic laws may prevail over international human rights; and a tone that may imply collective will superiority over individual rights."⁵⁷ The regional human rights mechanism of the ASEAN can be controversial, but at the same time, it represents hopeful efforts for protecting human rights in the region, albeit with compulsory

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jurisdiction limited to member states of the association.

In Asia, the vocabulary related to individuals outside the traditional binary genders differs compared to other countries. South Asia contains identities defined as the "third gender"; identities such as Khwaja Sira in Pakistan, Meti in Nepal, Hijra in Bangladesh and India, and Aravani and Thirunangai in India.⁵⁸ In Southeast Asia, terms that refer to transgender women include "mak nyah" in Malaysia, "kathoe" in Thailand, and "waria" in Indonesia.⁵⁹ In the Philippines, the term "bakla" is usually used for describing individuals who were assigned male at birth but identify themselves feminine or the third gender.⁶⁰ Many transgender females may prefer the term "binabae" (bina means "native woman" in Filipino language) as it reflects their community. In East Asia, the term "kwaa-sing-bit." is used in Hong Kong.⁶¹ In some Asian areas (e.g., the Philippines and Nepal), the term "third gender" and "third sex" refers to all individuals who are homosexual, bisexual, or transgender. The oversight of certain groups, especially intersex individuals, bisexual and lesbian females, and transgender males, often leads to their marginalized status.⁶² Despite limited information on the rights of intersex individuals in the region, reports show that "gender normalization" operations and other medical interventions

occur in Thailand, Hong Kong, Vietnam, China, and Indonesia.⁶³

In Feb 2018, the first Asian Intersex Forum was held in Bangkok, Thailand, during which participants established the Intersex Asia organization. This marked the inception of the first Asian human rights network for intersex individuals, composed of activists advocating for the rights, associations, and movements of intersex people.⁶⁴ The outcome of this forum was reflected in its public statement, which reaffirmed and reinforced the principles outlined in the Malta Declaration and the Pre-Intersex Forum Statement at the ILGA Asia Conference in 2017. It called for "continued efforts towards ending discrimination against intersex individuals, advancing and protecting the human rights of Asian intersex individuals, and ensuring the right to life, self-determination, physical autonomy, and bodily integrity."⁶⁵

4 Conclusion

Intersex individuals have long faced significant injustices and human rights violations from birth, striving for equality and recognition of their rights. However, despite their efforts, legal systems have frequently disregarded their demands. The majority of judicial systems have remained silent in the face of repeated injustices against this group, and despite efforts and demands from human rights institutions and international

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organizations, they continue to sacrifice intersex individuals' rights to preserve the rights of the majority. Nevertheless, multiple judicial systems have gradually distanced themselves from the binary understanding of "gender" and "sex". Some interpret "sex" inclusively, recognizing intersex individuals, while others have amended their legal frameworks to encompass the rights of intersex individuals. Additionally, efforts are being made to adopt gender-neutral language and enact laws that ensure the rights of all individuals, regardless of their adherence to traditional gender binaries. Therefore, the findings of the present study indicate that non-binary legal frameworks are part of a transition towards a gender and sex-neutral legal future. Legal rights are now not only called upon to accommodate individuals outside the binary understanding of gender, including intersex individuals, but must also confront the emerging trend towards gender-neutral legal frameworks.

Historically, legal frameworks have had to evolve to encompass individuals whose rights are violated because of their gender/sex. For decades, females were marginalized in legal rights, a simple example of which is illustrated by the UDHR initially using "man" to mean "human being". Between 1947 and 1962, the Commission on the Status of Women worked to change

discriminatory laws and raise awareness about females' rights. Despite these efforts, gender inequality within the binary system persists. The UN has emphatically stated that "gender equality is not only an essential human right, but also a critical foundation for a sustainable, prosperous, and peaceful world. While the world has progressed in women's empowerment and gender equality, girls and women still suffer from violence and discrimination." The Council of Europe emphasizes that gender equality is crucial for human rights, democracy, competition, economic growth, and respect for rule of law. Although women's legal status in Europe has improved, true gender equality remains elusive. Since the binary concept of male/female perpetuates inequality, achieving non-binary or gender equality may be key to universal equality. Scholar Okin argues that eliminating gender distinctions leads to greater justice, suggesting that non-binary recognition can similarly enhance justice for all. Future laws regarding "persons" or "individuals regardless of their gender" will be, as seen in the laws of various countries including New Zealand, Australia, Greece, and Malta moving away from gender and gender-based distinctions. Currently, non-gender/non-sexual rights are emerging primarily in the realm of family law, but there are discussions suggesting that this type

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of rights expansion may extend to other legal areas such as legal recognition of individuals' identities, which forms the cornerstone of non-binary gender identities. The Malta Declaration explicitly states that "in the future, as has happened with religion or race, gender or sex shouldn't be recorded on identity documents or birth certificates." The transition from binary to non-gender/non-sexual frameworks is currently underway, as legal systems are currently transitioning from binary frameworks to more inclusive, non-binary or non-gendered paradigms. This transition is marked by individuals openly identifying as non-binary and demanding equal rights. Some legal systems are adapting to these new realities, though successful navigation of this period depends on appropriate legal interpretation. It is increasingly clear that gender is not limited to two categories, and the issue of intersex individuals also demonstrates that genders are not strictly confined to binary categories. Additionally, numerous human rights documents advocate for recognizing intersex identities, viewing gender as a "spectrum" or "continuum" rather than

a binary. The EU's approach, as seen in Advocate General Tesauro's theory in the 1995 *P. v. S.* case, exemplifies this broader understanding. In this theory, it is stated that "it is necessary to go beyond traditional categorization and acknowledge that in addition to the binary of male/female, there exists a spectrum of characteristics, behaviors, and roles shared between males and females. Therefore, gender itself should be viewed more as a continuum." Organizations advocating for the rights of intersex individuals also call for a broader interpretation of the concept of gender and promote the understanding that gender, like sexual identity, is a spectrum. Interpreting the law may entail a serious responsibility, as it requires making decisions based on ethics and human rights. Therefore, judicial bodies, in line with modern social and legal developments regarding gender and sex, should use intersexuality as a tool for an expanded interpretation of "gender" and enforce justice in this regard. Thus, understanding intersexuality as an aspect of gender may pave the way for further legislative actions.

Notes

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⁴ See: Haig. D, The inexorable rise of gender and the decline of

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sex: social change in academic titles, 1945–2001. *Arch Sex Behav*, 2004 ,pp. 87–96.

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⁸ Ibid

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¹⁰ Foucault, Michel, *Herculine Barbin: Being the Recently Discovered Memoirs of a Nineteenth Century*, UK, Vintage, 1980, p. 11.

¹¹ Colapinto, John, *As Nature Made Him*, UK, Harper Collins, 2000, p. 57.

¹² *Mind The Gap, Intersexuality and Injustice: Examining Gender Identity and Reassignment via Butler and David Reimer*, Available at : <http://www.zuzutadeushuk.com>

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¹³ Butler, Judith, *Undoing Gender*, New York, Routledge, 2004, p. 71

¹⁴ See: CEDAW General Recommendation, No. 28, 2010, para. 5.

¹⁵ World Health Organization, *Gender*. Available at: https://www.who.int/health-topics/gender#tab=tab_1

¹⁶ See: General Recommendation, No. 19, 1992, Art. 6

¹⁷ See: CEDAW/C/GC/35, para. 12.

¹⁸ Principle 2 of the Yogyakarta Principles addresses the application of international human rights law regarding sexual orientation and gender identity. It states: "Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction, or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or equal protection of the law, or the recognition, enjoyment, or exercise, on an equal basis, of all human rights and fundamental freedoms".

¹⁹ Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender

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Identity, 2006 Available at: <http://www.yogyakartaprinciples.org/>

²⁰ Living Free & Equal, What States Are Doing to Tackle Violence and Discrimination Against Lesbian, Gay, Bisexual, Transgender and Intersex People, United Nations, 2016, p. 18. Available at: <https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>

²¹ General Comment No. 20, Committee on Economic, Social and Cultural Rights, E/C.12/GC/20.

²² Free&Equal United Nations for LGBT Equality, Factsheet on International Human Rights Law and Sexual Orientation & Gender Identity, available at: https://www.unfe.org/system/unfe-6UN_Fact_Sheets_v6__International_Human_Rights_Law_and_Sexual_Orientation__Gender_Identity.pdf

²³ Yogyakarta Principles plus 10, Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles, adopted on 10, November 2017,

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http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

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²⁶ Ibid.

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³⁰ Gary Juneau and Rubin S. Neal, “Are LGBT rights human rights? Recent developments at the United Nations”, September 2015, 2015, p.1. available at: <http://www.apa.org/international/pi/2012/06/un-matters.aspx>
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³¹ Human Rights Council, A/HRC/RES/27/32, 27/32 Human rights, sexual orientation and gender identity, 2 October 2014, para. 32. See: also Targets 3.7 and 3.8. Ibid.

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³⁵ See: OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, WHO, ⁴³ European Union Agency for Fundamental Rights (FRA) (2015) “The fundamental

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