

**A COMPARATIVE ANALYSIS OF THE CONTENT OF PARENTAL
RESPONSIBILITIES AND RIGHTS DURING THE “SEX ALTERATION DECISION-
MAKING PROCESS” OF INTERSEXED INFANTS**

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“Always the innocent are the first victims,’ he said. ‘So it has been for ages past, so it is now’.”

JK Rowling *Harry Potter and the Philosopher’s Stone* (1997) 185

DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third-party rights and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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SUMMARY

This thesis investigates whether the sex alteration decision-making process for intersex infants forms part of a parent's responsibilities and rights. The United Nations Convention on the Rights of the Child, 1989 and the South African Children's Act, 38 of 2005 both express and support the ideology of parental responsibilities instead of parental rights. Further, these documents provide that in all matters involving a child, parents have to act with their child's best interests as their primary concern. These notions have contributed significantly to the protection and promotion of children's rights in various ways. Yet, intersex infants have largely been excluded from this progression. It is a well-established principle in law that parents have a wide discretion to consent on behalf of their child to general medical intervention but there are instances where this capacity is and should be limited. It is argued in this thesis that the sex alteration decision-making process is one area in which a parent's discretion should be limited.

Intersex persons have historically been subjected to discrimination and "othering" because they do not conform to either the male or female binary. Consequently, this prejudice has resulted in intersex rights being marginalised. Some jurisdictions have attempted to implement legislation to regulate intersex rights. However, the decision-making process in respect of the sex alteration of infants remain largely unregulated. Malta is currently the only jurisdiction that legislatively prohibits sex alteration surgery on minors unless they are able to consent themselves. South Africa initially lacked any type of regulation on the sex alteration decision-making process but recent proposals have the potential to change this position significantly. The proposed amendments to the Children's Act will remove the decision-making capacity of a parent regarding sex alteration surgery. However, it is submitted that this amendment in its current format is ineffective, as more substantive engagement is needed. There are certain decisions that a child needs to make themselves with the appropriate parental guidance. Finally, this thesis also offers suggestions as to possible strategies and measures that could be implemented within South Africa's legal framework to address the issue of sex alteration surgery on intersex infants.

OPSOMMING

Hierdie tesis ondersoek die vraag of die besluitnemingsproses gedurende die geslagsverandering van interseks babas deel uitmaak van ouerlike verantwoordelikhede en regte. Beide die Verenigde Nasies se Konvensie op die Regte van die Kind, 1989 en die Suid-Afrikaanse Kinderwet, 38 van 2005 verwoord en ondersteun die idee van ouerlike verantwoordelikhede eerder as ouerlike regte. Hierdie dokumente bepaal verder dat in alle aangeleenthede waar kinders betrokke is, ouers met die beste belang van hul kinders as hul primêre oorweging, moet optree. Bogenoemde idees het al op 'n betekenisvolle wyse en op vele maniere bygedra tot die beskerming en bevordering van kinderregte. Nietemin word interseks babas grootliks uit hierdie vordering uitgesluit. Dit is 'n goed gevestigde regsbeginsel dat ouers 'n wye diskresie het om namens hul kinders tot algemene mediese ingryping toe te stem maar daar is gevalle waar hierdie bevoegdheid beperk word en beperk behoort te word. Dit word in hierdie tesis geargumenteer dat die besluitnemingsproses vir geslagsverandering as 'n voorbeeld dien van waar 'n ouer se diskresie behoort beperk te word.

Vanuit 'n geskiedkundige perspektief is interseks persone nog altyd aan diskriminasie en "andersheid" blootgestel omdat hulle nie aan die binêre begrippe van "manlik" en "vroulik" voldoen nie. Hierdie vooroordeel het daartoe gelei dat interseks regte gemarginaliseer is. Sommige jurisdiksies het wel al gepoog om wetgewing te implementeer om interseks regte te reguleer. Die besluitnemingsproses rondom geslagsverandering van interseks babas bly egter grootliks ongereguleerd. Malta is tans die enigste jurisdiksie wat geslagsverandering van kinders op wetgewende wyse verbied tensy die kinders self daartoe kan toestem. Oorspronklik het Suid-Afrika ook enige tipe regulering in die verband ontbreek maar onlangse voorstelle het die potensiaal om hierdie posisie aansienlik te verander. Die voorgestelde wysigings tot die Kinderwet sal die bevoegdheid van besluitneming tot geslagsverandering van 'n ouer wegneem. Tog word dit aan die hand gedoen dat hierdie wysiging in die huidige formaat oneffektief is, aangesien verdere substantiewe betrokkenheid benodig word. Daar is sekere besluite wat 'n kind self moet maak terwyl hulle gepaste ouerlike begeleiding ontvang. Die tesis bied ook voorstelle tot moontlike strategieë en meganismes wat in die Suid-Afrikaanse regs konteks geïmplementeer kan word om

die kwessie rondom die besluitnemingsproses vir die geslagsverandering van interseks babas aan te spreek.

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LIST OF ABBREVIATIONS

5ARD	5 Alpha Reductase Deficiency
ACHPR	African Charter on Human and People Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACT	Australian Capital Territory
APA	American Psychological Association
BDRA	Births and Deaths Registration Act 51 of 1992
CAC	<i>Código de la Infancia y la Adolescencia</i> / Child and Adolescent Code 2006
CAH	Congenital Adrenal Hyperplasia
CAIS	Complete Androgen Insensitivity Syndrome
CAT	United Nations Convention Against Torture
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CTPA	Choice on Termination of Pregnancy Act 92 of 1996
DHA	Department of Home Affairs
DIMP	Draft identity management policy
DSD	Disorder of Sex Development
ECHR	European Convention on Human Rights
ELC	English Law Commission
FGM	Female genital mutilation
FLRA	Family Law Reform Act 1995
GIGESC	Gender Identity Gender Expression and Sex Characteristics Act 2015
GMA	German Medical Association
ICD	International Classification of Diseases
ICEDW	International Convention on the Elimination of All Forms of Discrimination Against Women
ICESCR	The International Covenant on Economic, Social and Cultural rights
IGM	Intersex genital mutilation
ISSA	Intersex South Africa

LBGTQIA+	Lesbian, Gay, Bisexual, Pansexual, Transgender, Genderqueer, Queer, Intersexed, Agender, Asexual, and Ally Community
SALRC	South African Law Reform Commission
SCDSS	South Carolina Department of Social Services
SDA	Sex Discrimination Act
UDHR	United Declaration of Human Rights
USA	United States of America
WHO	World Health Organization
YP	Yogyakarta Principles
YP + 10	Yogyakarta Principles Plus 10

CHAPTER 1: AN INTRODUCTION AND AIM OF THESIS

1 1 Problem identification

Medical advancements have enabled parents to enquire about their child's sex as early as the first trimester.¹ A study undertaken in 2008 revealed that 64% of mothers would enquire about their baby's sex before their child's birth.² "Is it a boy or girl?" is the leading question that is asked by expectant parents.³ It is not surprising that children born with ambiguous sexual characteristics present complex issues of a legal, medical, social and ethical nature.⁴ Intersexed children are brought into a society that has been conditioned to cater to a binary sex system.⁵

"Intersex" is a broad term used when an individual is "born with a sexual or reproductive autonomy" that does not correspond with the accepted physical binary definition of male and female.⁶ It is estimated that one in every 2000 infants are born displaying intersex characteristics.⁷ Therefore, it is expected that between 1.7 and 4% of the global populace exhibits varying degrees of intersex traits.⁸ Presently, there is very little data available regarding the number of intersexed infants that are routinely referred by medical practitioners to undergo sex alteration surgery. However, it is

* The idea for this dissertation is based on the research and arguments put forward in S Thompson "Parental responsibilities and rights during the 'gender reassignment' decision making process of intersex infants in South Africa", a research paper written as part of the requirements for the completion of a LLB law degree at Stellenbosch University. These ideas will be used frequently throughout this thesis. Some of these ideas also have been published in L Mills & S Thompson "Parental responsibilities and rights during the 'gender reassignment' decision-making process of intersex infants: Guidance in terms of Article 5 of the Convention on the Rights of the Child" (2020) 28 *International Journal of Children's Rights* 547–570.

¹ M Kearin, K Pollard & I Garbett "Accuracy of sonographic fetal gender determination: predictions made by sonographers during routine obstetric ultrasound scans" (2014) 17 *AJUM* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5024945/>> (accessed 02-06-2019).

² Kearin et al (2014) *AJUM* 17 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5024945/>>. SF Ahmed, S Morrison & IA Hughes "Intersex and gender assignment; the third way?" (2004) 89 *Arch Dis Child* 857 848: Gender development research has observed that infants begin to distinguish between the sexes as early as the end of their first year.

³ Ahmed et al (2004) *Arch Dis Child* 847.

⁴ 847.

⁵ The term "intersex" and "intersexed" are used interchangeably throughout this thesis.

⁶ EM Horowicz "Intersex children: Who are we really treating?" (2017) 17 *Medical Law International* 183 184.

⁷ 184. *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People* (2011) keynote address by the Deputy Minister of Justice and Constitutional Development the Hon JH Jeffery, MP at the *National Engagement on the Promotion and Protection of the Human Rights of Intersex Persons* at the Protea Hotel Parktonian, 2011 (copy on file with author) iii.

⁸ K Haas "Who will make room for the intersexed?" (2004) 30 *Am J L & Med* 41 41.

estimated that, on average, one to two intersex individuals per 1000 live births are exposed to surgery.⁹ Intersex infants will be referred for the initial surgery within the first month of infancy, but further “reconstruction”¹⁰ will often take place during childhood. Statistics reveal that between 30-80% of all intersex children who initially undergo surgery¹¹ are exposed to at least three to five surgeries¹² in their lifetime.¹³ These surgeries are primarily cosmetic¹⁴ in nature, with no medical benefits and are unnecessary to ensure the health of the child. There are only three instances in which sex alteration surgery will be necessary to ensure the well-being of the child.¹⁵ These instances occur when there is a likelihood of gonadal cancer; if the internal organs are situated on the outside of the body; and lastly, in a case where an opening for urine to be expelled is lacking.¹⁶

⁹ Hida “How Common is intersex? An Explanation of the Stats” *Intersex Campaign for Equality* (01-04-2015) <<https://www.intersexequality.com/how-common-is-intersex-in-humans/>> (accessed 20-07-2020). The San Francisco Human Rights Commission estimated that in 2005 approximately five infants are subjected to sex alteration surgery every day alone in the USA: SS Uslan “What parents don’t know: Informed consent, marriage, and genital-normalizing survey on intersex children” (2010) 85 *Ind L J* 301 302.

¹⁰ Further reconstruction refers to the construction of “functional vaginas” and “correcting damaged penises” and removal of internal sex organs.

¹¹ K Haas “Who will make room for the intersexed” (2004) 30 *Am J L & Med* 41 42. If one refers to the earlier work of Dr Money, please refer to chapter 2 of a detailed discussion on Money’s role in the history of intersex persons, he expressed that surgery on intersex infants had to be performed as soon as possible. This would preferably be done before the eighteenth to the twenty-fourth month of infancy: HG Beh & M Diamond “An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery in Infants with Ambiguous Genitalia” (2000) 7 *Mich J Gender & L* 1 16.

¹² In instances where a vaginoplasty has been performed, the patient will often be referred for surgical revisions. The intersexed child will also require multiple visits to a medical practitioner as well as having to dilate her vagina with a plastic applicator daily, as most of these surgeries happen in infancy her parents will have to perform this duty, which is psychologically scarring for the child in question, which in effect can be classified as sexual abuse: SR Benson “Hacking the gender binary myth: Recognizing fundamental rights for the intersexed” (2005) 12 *Cardozo J L & Gender* 31 46. The extremity of these procedures are also highlighted by a story involving a twelve-year-old intersexed girl who was told under false pretences that she had ovarian cancer and needed a hysterectomy: Haas (2004) *Am J L & Med* 43.

¹³ SS Uslan “What parents don’t know: Informed Consent, Marriage, and Genital-Normalizing Survey on Intersex Children” *Ind L J* 85 (2010) 301 307. Furthermore, it is estimated that every day in the USA five intersex children are exposed to surgery that will leave them with physical and emotional repercussions: Haas (2004) *Am JL & Med* 41.

¹⁴ D O’Conner “A Choice to Which Adolescents Should Not Be Exposed: Cosmetic Surgery as Satire” (2012) 15 *J Health Care L & Pol’y* 157 157-158: It is submitted by O’Connor that cosmetic surgery is a means to rectify the pain that resulted for an individual not meeting ordinary social standards. However, this reinforces what society sees as normal, therefore causing the affected person to be the carrier of the condition.

¹⁵ L Mills & S Thompson “Parental Responsibilities and Rights during the ‘Gender reassignment’ Decision-making Process of Intersex Infants: Guidance in Terms of Article 5 of the Convention on the Rights of the Child” (2020) 28 *International Journal of Children’s Rights* 547 547.

¹⁶ Human Rights Watch and Interact 2017; Mills & Thompson (2020) *International Journal of Children’s Rights* 549.

Research suggests that when parents are electing cosmetic sex alteration surgery for their child, they are often acting with the best interests of their child in mind.¹⁷ Evidence indicates that parents normally make a positive selection for “sex assignment surgery” based on psychosocial or cultural considerations.¹⁸ It is submitted that currently there is no single case that can be cited that supports the long-term physical or psychological benefits of sex alteration surgery.¹⁹ Subsequently, intersex activists have been challenging the performance of sex alteration surgery on intersex infants since the 1990s.²⁰

It is submitted that the decision for an intersexed infant to undergo sex alteration surgery should not be made by one decision maker. The state, parents and the child form part of a triparty relationship and it is this relationship collectively that should participate in the decision-making process. Parents²¹ are the primary caregivers of their children; however, the state is obliged to aid parents in the exercising of their responsibilities and rights by enacting legislation to empower them to make decisions that will be in their children’s best interests.²² The existing position in South Africa is that parents are obliged to register their child within seven days of their birth.²³ This places pressure on parents as the child’s sex has to be indicated on their birth certificate.²⁴ As a result, parents are “forced” to assign a sex to their child. This is because social and legal policies will not allow the child to have a status in society unless they are designated to be either male or female. Ultimately, it should be the child who decides on surgery at an age where they have sufficient maturity to do so and when they understand the full consequences of their decision.

¹⁷ Hermer (2007) *Cardozo J L & Gender* 262.

¹⁸ 263.

¹⁹ A Davidson “Beyond the Locker Room: Changing Narratives on Early Surgery for Intersex Children” (2011) 26 *Wis J L Gender & Soc’y* 1 8.

²⁰ J Dolgin “Discriminating Gender: Local, Medical, and Social Presumptions about Transgender and Intersex People” (2017) 47 *Sw L Rev* 61 83.

²¹ Furthermore, for purposes of this dissertation ‘parents’ will also include legal guardians of a child such as state appointed officials etc.

²² For instance, identification documentation requires that the sex of the individual be recorded and reflected. According to the South African Identification Act 68 of 1997 one’s ‘gender’ must be recorded in order to receive an identification document.

²³ Section 9 of the South African Births and Deaths Registration Act 51 of 1992.

²⁴ E Mamacos “Are South Africans ready for gender-neutral birth certificates?” (30-04-2019) W24 <<https://www.w24.co.za/SelfCare/Wellness/Mind/are-south-africans-ready-for-gender-neutral-birth-certificates-20180430>> (26-05-2019).

Albeit that it is piecemeal, a number of jurisdictions have gradually begun to recognise the absence of protective mechanisms available to intersexed infants and their parents. Some have implemented proactive legal mechanisms that promote the ability of intersexed infants and their parents' to make informed and voluntary decisions. South Africa currently lacks a legal framework regulating surgical intervention of intersex infants. Recent proposals have however the potential to alter this position. Despite these proposals, there is of yet no formal adoption and hence no legal mechanisms in place to prevent sex alteration surgery being performed on babies. It is necessary to consider the mechanisms implemented in other jurisdictions to provide insight into the current status of this problem.

1 2 Rationale for the study

The law restricts the capacity of mentally undeveloped persons to perform juristic acts.²⁵ An *infans's* declaration of will is not recognised, as they lack the capacity to act entirely.²⁶ The purpose of this restriction is to protect infants against their own immature judgement and ensure that they do not make a decision that will disadvantage them in later life.²⁷ Therefore, one of the components of parental duties is that parents can make a multitude of decisions on behalf of their children.²⁸ This is also true in instances when a child needs medical treatment.

When parents consider sex alteration surgery to be performed on their child, the consequences of their decision are not limited to the particular surgery but will also give rise to social, cultural and personal challenges for the parents and the intersexed child. When a child is born intersexed, parents are placed in a precarious position as they have to make a decision that will have a lasting effect on the rest of their child's life.²⁹ Surgical intervention will often be introduced by clinicians as the foremost option to enable parents to satisfy the social expectation of a binary sex.³⁰ It is equally important that there are mechanisms put into place by the state to enable parents to make an informed choice. In many jurisdictions, parents are forced to choose sex

²⁵ H Kruger , A Skelton (eds), M Carnelley , S Human , H Kruuse, L Mofokeng , J A Robinson & L Tshingana *Law of Persons in South Africa* 2nd ed (2018) *Law of Persons in South Africa* 114.

²⁶ Kruger & Skelton *et al* 115: An *infans* refers to someone who is under the age of seven.

²⁷ 114.

²⁸ Farrugia (2000) *Cal W Int'l L J* 131.

²⁹ Horowicz (2017) *Medical Law International* 192.

³⁰ 188.

alteration because of social pressures as well as a lack of regulation and protective measures to guide parents in their decision-making.

1 2 1 Terminology

The surgery that intersex infants are forced to undergo, has normally been referred to as “gender reassignment” or “genital normalization” surgery.³¹ Sex, gender and sexuality are core components that underlie an individual’s personal identity.³² “It is submitted that the correct term for the surgery that intersex infants undergo is ‘sex assignment surgery’ or ‘intersex genital mutilation’”. This argument will be fully explored in chapters 2 and 6 of this thesis.³³

1 2 2 Parental responsibilities and rights

Although children are independent legal subjects, they are reliant on others for guidance to aid their development.³⁴ The belief that parental interests should take precedence over their children’s interests no longer applies.³⁵ Rather the importance of a parent’s responsibility to aid in their child’s development has been continuously stressed. Parents are required to support a child while they are developing, and support and help them identify who they are so that they are able to eventually make decisions independently.

Furthermore, it is generally presumed that parents, when making decisions concerning their children’s well-being, will only make decisions that will benefit their children.³⁶ However, this may not always be the case, as in some circumstances parents will lack the necessary information and structure to be able to make such a decision. Consequently, states have a further responsibility to develop an environment that will allow parents to have the freedom and security to make a decision that will

³¹ Mills & Thompson (2020) *International Journal of Children’s Rights* 547 551.

³² Ahmed *et al* (2004) *Arch Dis Child* 847. R Sloth-Nielsen “Gender normalisation surgery and the best interest of the child in South Africa” (2018) *Stell LR* 48 48. E M Horowicz “Intersex children: Who are we really treating?” (2017) *17 Medical Law International* 183 190.

³³ Please see Chapter 2 for a discussion in this regard.

³⁴ J Bridgeman “Accountability, Support or Relationship Conceptions of Parental Responsibility” (2007) *58 N Ir Legal Q* 307 307.

³⁵ P Cumper “Let’s Talk about Sex: Balancing Children’s Rights and Parental Responsibilities” (2006) *26 Legal Stud* 88 89.

³⁶ Farrugia (2000) *Cal W Int’l L J* 127.

promote their children's best interests.³⁷ The state is also obliged to intervene in cases where parents are not complying with the parental duties and obligations granted to them.³⁸

Medical decision-making for and on behalf of children is a particular area where the concept of children having rights becomes meaningful.³⁹ The general position is that any medical procedure that is performed without valid consent from the patient, is unlawful.⁴⁰ However, because of an infant's lack of capacity, their parents will act on their behalf.⁴¹ Therefore intersex infants are in a very vulnerable position as their non-existent capacity.

1 2 3 International framework

The CRC is the international point of departure for any matter concerning children's rights,⁴² as it codifies the ideology that children are independent legal subjects and not extensions of their parents.⁴³ The CRC enshrines many rights to which children are entitled, which include but are not limited to protection against discrimination based on any of the listed grounds, one being sex (Article 2); the right to an identity (articles 7 and 8); the best interests of the child (Article 3); and to have their parents being assisted by the state in the exercise of their parental responsibilities and rights (Article 5).

In 2006, the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity ("Yogyakarta Principles") were drafted.⁴⁴ These principles, although not binding international law, have grown

³⁷ Article 5 of the CRC emphasises that States have the obligation to allow parents to exercise rights and responsibilities over their children. However, their obligation is two-fold as they have the combined duty to allow develop means and procedures in which to allow parents to exercise these duties.

³⁸ Farrugia (2000) *Cal W Int'l L J* 131 & Arts 3(2) and 5 of the United Nations Convention of the Rights of the Child ("CRC") The Convention on the Rights of the Child ("CRC") (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

³⁹ Jones (2005) *Intl J Child Rts* 129.

⁴⁰ M Newbould "When Parents Choose Gender: Intersex, Children, and the Law" (2016) 24 *Med Law Rev* 474 478.

⁴¹ Jones (2005) *Intl J Child Rts* 129.

⁴² S J Lee "A Child's Voice vs a Parent's Control: Resolving Tension Between the Convention of the Rights of the Child US Law" (2017) 117 *Columbia Law Review* 687 688.

⁴³ D Archard *Children rights and childhood* 2 ed (2009) 58.

⁴⁴ D Brown "Making Room for Sexual Orientation and Gender Identity in International Human Rights Law: An Introduction to the Yogyakarta Principles (2010) 31 *Mich J Intl L* 821 822.

in influence and have been incorporated by various states, including South Africa.⁴⁵ Forced “treatment” for sexuality constitutes one of the most severe infringements of medical health and freedom, and prevention of this continued reality is one of the main aims of the Yogyakarta Principles.⁴⁶ A relevant principle embodied in the new Yogyakarta Principles Plus 10 (“YP + 10”) is the prevention of sex alteration surgery for intersex infants.⁴⁷ The Yogyakarta Principles were drafted with the intention of not creating new rights for intersex persons but rather to give content to the rights that LGBTIQ+ persons are already entitled to.⁴⁸ Yet, currently, intersex persons are being denied those rights, as in many jurisdictions policies exist which prevent intersex people from having access to basic human rights unless they undergo “sex assignment surgery”.

1 2 4 Current South African legal position on intersex infants

It is estimated that in South Africa, one in every thousand persons born, are intersexed: one of the highest rates globally.⁴⁹ The country currently lacks a specific framework regulating the procedure to be followed when a child is born intersexed.⁵⁰ Since South Africa’s democratisation, human rights have been at the forefront and the courts, as well as society, have been continuously taking steps to rectify abuses of the past. One of the major benefactors of this movement is family and children’s rights

⁴⁵ 825-826. The 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 as adopted on 10 November 2017, Geneva available at: <http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf> (accessed 10-02-2019).

⁴⁶ Brown (2010) *Mich J Intl L* 831.

⁴⁷ Principle 32 & The 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 as adopted on 10 November 2017, Geneva available at:<http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf> (accessed: 10-02-2019).

⁴⁸ S Quinn *An Activist’s Guide to The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2010) <https://www.asiapacificforum.net/media/resource_file/Activists_Guide_Yogyakarta_Principles.pdf > 6 19.

⁴⁹ C Collison “Intersex babies killed at birth because ‘they’re bad omens’” (24-01-2018) *Mail&Guardian* <<https://mg.co.za/article/2018-01-24-00-intersex-babies-killed-at-birth-because-theyre-bad-omens>> (accessed 17-03-2019).

⁵⁰ The Alteration of Sex Description and Sex Status Act 49 of 2003 read with the section 27(A) of the Births and Deaths Registration Act 51 of 1992 does enable one to officially change their sex after they have gone for ‘sex assignment surgery’.

law, as seen with the legalisation of same-sex marriage and criminalising corporal punishment by parents.⁵¹ Despite these advancements, many inequalities remain within these areas of law and this includes issues surrounding intersexed children.

Presently, section 129 of the Children's Act legalises sex alteration surgery. This provision allows parents to give proxy consent for medical procedures for a child if certain requirements are met.⁵² This legalisation is presently being reconsidered to some extent, in light of a proposed amendment to the Children's Act. The proposed amendment extends the current definition of "genital mutilation" which would prohibit parties from consenting to procedures like sex alteration surgery on intersex infants.⁵³ Any surgery performed on a child without informed consent which physically alters their genitalia or causes injury, will constitute genital mutilation and prosecution can subsequently occur.⁵⁴

A separate proposal by the Department of Home Affairs ("DHA") seeks to amend the current identity management policy to be more inclusive of sexual and gender identities.⁵⁵ This proposal includes the addition of a third sex option for registration purposes.⁵⁶ The current position in South Africa of having no option to choose a sex other than male or female limits parents' options, as they need to obtain a birth certificate for their intersexed child.⁵⁷ A birth certificate represents the entry to legal existence in many respects. It is required to obtain an identity document; to be registered at a school and for parents to be able to apply for a child support grant.⁵⁸

⁵¹ *The Lesbian and Gay Equality Project and Eighteen Others v Minister of Home Affairs* 2006 1 SA 524 CC para 86.

⁵² Section 129 (2) – (5) of the Children's Act.

⁵³ The Children Third Amendment Bill (calls for comments opened on 19 July 2018), available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180719childrensamendmentbill-draft.pdf> (accessed 23-03-2019).

⁵⁴ The Children Third Amendment Bill, <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/180719childrensamendmentbill-draft.pdf> (accessed 23-03-2019).

⁵⁵ D Shelton "Preface on Identity" (2006) 49 *The Geo Wash Int'L L Rev* 1 3.

⁵⁶ 3.

⁵⁷ E Mamacos "Are South Africans ready for gender-neutral birth certificates?" (30-04-2019) W24 <<https://www.w24.co.za/SelfCare/Wellness/Mind/are-south-africans-ready-for-gender-neutral-birth-certificates-20180430>> (accessed 26-05-2019).

⁵⁸ Section 5 of the Social Assistance Act 13 of 2004; ss 7 and 13 of the Identification Act 68 of 1997; Western Cape Government "Admission to Schools" (28-09-2013) Western Cape Government <<https://www.westerncape.gov.za/service/admissions-schools>> (accessed 26-05-2019).

1 3 Research question

The primary question that this dissertation seeks to address is what the content of parental responsibilities and rights are when a decision is to be made as to the possible sex alteration of an intersex infant. To answer this question, it is necessary to investigate how these responsibilities and rights have been phrased in the international legal framework and compare the position in South Africa to that of a number of foreign jurisdictions where some development in this respect has started to take place. The dissertation will therefore further examine which duties should fall on the state in order to enable parents to exercise their parental responsibilities and rights in such a manner as prescribed by international law. It will also determine whether the South African government implements such duties.

1 4 Hypothesis

This dissertation centres its study on the *infans*: children from the time they are born until the age of seven.⁵⁹ Parents are considered the primary caregivers of children and are therefore responsible for their upbringing. However, international law has also placed responsibilities on states to empower parents to make decisions that are in their children's best interests. Infants are an especially vulnerable category of children as they are legally prevented from having any contribution towards any decisions affecting them. This rationale exists because they are considered not to possess sufficient mental maturity. The presumption is that parents will make decisions that they believe are in their children's best interests. However, often parents' opinions are influenced by social, cultural and economic factors, as well as their background. These preconceptions can be detrimental and could cause physical and psychological damage to the child throughout their childhood and extend further into adulthood. Therefore, if this observation is proven accurate, the decision for parents to elect "sex assignment surgery" does not fall exclusively within the context of parental responsibilities and rights.

⁵⁹ Kruger & Skelton *et al* 115.

1 5 Methodology

This dissertation is comparative in nature and will follow a thematic approach in this regard. The past two decades have seen some global recognition towards the recognition of intersex rights.⁶⁰ Australia, Colombia, Malta, and Germany have been at the forefront of introducing various techniques to create legal inclusion of intersex persons.⁶¹ The jurisdictions of Canada, the United States of America and India provide some further useful insight into the possible legal remedies that may protect this vulnerable group. Furthermore, the broader international legal framework needs to be re-examined in order to bring states in line with the *mores* underlying international jurisprudence. The jurisdictions selected each present a different perspective on the complexities surrounding intersex infants and sex alteration surgeries. In addition, each jurisdiction also presents a component that may be beneficial in resolving the problem faced in the South Africa context concerning the legal position of intersex infants. Historical context is imperative as it indicates the development, or lack thereof, of attitudes and legal reform towards intersex persons, as well as the legal relationship that exists between parents and their children. Journal articles, legislation and case law, where available and applicable, will be analysed. International instruments and codes will provide vital standards for the comparative component of this dissertation.

1 6 Sequence of chapters

Chapter 2 of this thesis will provide an analysis of the historical background pertaining to intersex persons. It will also illustrate the struggle that intersex persons have experienced over time and the stigma created around intersex bodies. The use and definitions of certain terms will also be an important component of this chapter and the use of terminology concerning social and legal integration and acceptance will be analysed. Thereafter chapter 3 will consider the content and meaning of parental responsibilities and rights from both an international and domestic perspective. Specific attention will be paid to the roles of parents within the context of medical decision-making. This will be examined in light of various international guidelines, as well as considering the different approaches taken in foreign jurisdictions. Chapter 4

⁶⁰ F Garland & M Travis "Legislating Intersex Equality: Building the Resilience of Intersex People through Law (2018) 38 *Legal Studies* 587 590.

⁶¹ Garland & Travis (2018) *Legal Studies* 590.

will examine the best interests of the child principle. This principle will be studied in terms of various international conventions, codes and soft law, as well as the South African Constitution and Children's Act 38 of 2005. Particular emphasis will be placed on the rights to bodily and psychological integrity, identity, equality, health, freedom of expression and the right to be heard. These rights will be considered in conjuncture to the best interests of the child principle within the context of intersex infants and sex alteration surgery. Chapter 5 will describe the current position and existing laws protecting intersex infants in foreign jurisdictions. It will also consider the regulations implemented by the state that should enable parents to exercise their parental responsibilities and rights effectively in this difficult decision-making process. The levels of success and failure of the methods employed by other jurisdictions will be mentioned. Furthermore, a description of South Africa's current and proposed legislative framework will be provided and the possible impact of the proposed amendments discussed. Chapter 6 will analyse the existing position of sex alteration surgery in a global context, with a particular focus on the position in South Africa. Finally, the last chapter will make recommendations and conclude on the current status of sex assignment surgery for intersex infants in South Africa.

CHAPTER 2: HISTORICAL CONTEXT AND TERMINOLOGY

2 1 Introduction

Men and women have been categorised into the male and female sexes, both biologically and socially. Therefore, it becomes difficult to comprehend and regulate a so-called “anomaly” such as intersex. The intersex and transgender communities have experienced many social and legal challenges throughout history. The use of derogatory language and ignorance towards these communities has further contributed to the stigma associated with being intersexed and transgendered.

At the outset, it is important to recognise that each individual has had their own experience with gender, and bodies are very personal entities. For these reasons, it is impossible to use terminology that will appropriately reflect each individual’s experience of self.¹ However, terminological categorisation has particular significance for the Lesbian, Gay, Bisexual, Pansexual, Transgender, Genderqueer, Queer, Intersexed, Agender, Asexual, and Ally, + (“LBGTQIA+”)² demographic,³ as terms have shaped their lives either negatively or positively.⁴ Certain core terms relating to the intersex community have been given a provisional definition but many terms are

¹ JM Scherpe “The Legal Status of Intersex Persons: An Introduction” in JM Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 1 2.

² As the language that was used to discuss gender identity and sexual orientation evolved so did the abbreviation, what was previously known as ‘LGBT’ has widened significantly. The letter ‘Q’ gained attention during the turn of the 21st century, while some insisted that it stood for ‘questioning’, representing individuals who were still discovering their gender identities and sexual orientation. Others however favoured the interpretation of the word ‘queer’ as a means to take back the derogatory association of the word as a power emblem: M Gold “The ABCs of L.G.B.T.Q.I.A. +” *The New York Times* (07-06-2019) <<https://www.nytimes.com/2018/06/21/style/lgbtq-gender-language.html>> (accessed 25-06-2020). This acronym is an example of how it is possible to empower a term which was previously negatively interpreted into something which is now positive. Please refer to M Gold’s article for a more in-depth analysis of the origins and development of the L.B.G.T.Q.I.A.+ acronym.

³ J Pieterse “Dictionaries and Discourses of Deviance: Changing Lexical Representations of ‘Moffie’ and the Reorganisation of Sexual Categories among Afrikaans Speakers during the Second Half of the Twentieth Century” (2013) 65 *South African Historical Journal* 618 619: “Moffie” is an offensive Afrikaans term that is used to describe someone who is gay, usually a man. The word has its origins from the word “mophy” which was used amongst South African seafarers to derogatorily describe a well-groomed young man. However, there is a difference of opinion as to its origin, as another possible etymology would be a bastardisation of the word “mofrodite” which was a castrated Italian opera singer. “Trassie” was another derogatory term that was commonly used in the pre-constitutional era in South Africa, it was a derogatory Afrikaans term used to refer to intersex persons or men who dressed in women’s clothing. Although, a common term in the pre-constitutional era and socially accepted, in modern times this word is highly offensive and insulting towards gay persons: Pieterse (2013) *South African Historical Journal* 624.

⁴ P R Dunne *The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation* Doctor of Philosophy (Law), Trinity College (2018) 35.

either ill-defined or lack clarity; the term “intersex” being one such term. Despite modern medical, legal and social advancements, there is still a tendency to conflate the meanings of certain words when considering gender law and matters regarding the LBGTQIA community. Consequently, this contributes to a lack of understanding by society. Therefore, this thesis needs to examine and contextualise the language that is used in this framework.⁵ Terms such as “hermaphrodite”, “sex”, “gender”, “intersex”, transgender”, “normalisation”, “cosmetic surgery” “gender identity” and “reassignment” need to be defined clearly. Empowering individuals through accurate terminological reinforcement could enhance social acceptance of the different sexual bodies.

2 2 A historical perspective

The term “hermaphrodite” is inherited from Greek mythology and refers to an individual who is simultaneously both male and female, which in humans was considered anatomically impossible.⁶ However, this term has continued to be used to describe intersex persons throughout the ages.⁷

Evidence suggests that, although there is no structured perception of hermaphroditism, two predominate models have been inherited from history.⁸ The model of Hippocrates and Galen defined sex as a spectrum.⁹ Male and female fell on opposite ends of the spectrum. However, intersex was included in the middle of the spectrum as a third sex.¹⁰ Juxtaposed, the Aristotelian model was divided: Aristotle viewed male and female as complete opposites with no intermediaries.¹¹ However, he also acknowledged the existence of the intersexed state.¹² This interpretation did not view hermaphroditism as an anatomical ambiguity that affected the individual as a whole but was limited to the genitals.¹³ Therefore, unlike Hippocrates, Aristotle

⁵ Dunne *Obtaining Legal Gender Recognition* 35.

⁶ Newcombe (2017) 109 *Law Libr J* 230.

⁷ It is acknowledged that the discussion of the timeline is slightly fragmented and may appear somewhat disjointed it must be taken into account that the most important and relevant events are highlighted in this discussion.

⁸ Kennedy (2016) 39 *UNSWLJ* 815.

⁹ 815.

¹⁰ ML Rosin “Intersexuality and Universal Marriage” (2005) 51 *Law & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues* 51 60.

¹¹ 60.

¹² 60.

¹³ Kennedy (2016) 39 *UNSWLJ* 815.

theorised that intersex was a mutation and was the result of an excess of the generative matter of an embryo.¹⁴ It can be said that Aristotle's view is more in line with the traditional understanding of what it means to be intersexed, whereas Hippocrates's module is contemporary and promotes the idea of a multi-sex spectrum.

Classic antiquity, together with Christian ideologies, established the foundation upon which modern Western culture is based.¹⁵ For centuries, Christianity dominated the language and interpretation surrounding social norms and gender issues.¹⁶ Western society, which was dominated by canon law, initially refused to recognise the existence of intersex persons or any persons who did not conform to the male or female binary.¹⁷ However, in the Middle Ages "hermaphroditism"¹⁸ began to be recognised as a medical condition.¹⁹ The *Zedler Lexicon* – a German Publication published in 1732 – also referred to the legal principles surrounding intersex persons, stating that an intersex individual would be classified according to the dominant sex characteristics they displayed.²⁰ This interpretation was adopted well into the medieval era and remained the general position for intersex persons until the late 19th century.

2 2 1 The Medieval Era: The sixteenth to nineteenth centuries

The implications of being classified as intersex in the medieval era were severe, as such persons were often excluded from partaking in legal and social activities. They

¹⁴ Rosin (2005) *Law & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues* 60.

¹⁵ A Wijffels "Intersex: Some (Legal-)Historical Background" in J M Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 181 182.

¹⁶ 182.

¹⁷ M Carpenter "The "Normalization" of Intersex Bodies and Othering of Intersex Identities in Australia" (2018) 15 *Bioethical Inquiry* 487 487. Intersex book 182: Although, supposedly strict Christianity has had a very strong opposition to the LGBTIQ+ community, the message from Christ in Epistle to the Galatians in Christian text states that there must be no discrimination on the base of one's race, social status or gender in order to enter the Kingdom of Heaven. Furthermore, emphasising the ideology that gender equality exists within Christianity, is belief that the soul has no gender.

¹⁸ P Newcombe "Blurred Lines – Intersexuality and the Law: An Annotated Bibliography" (2017) 109 *Law Libr J* 229: Hermaphrodite' is an outdated and derogatory term previously used to describe an intersex person.

¹⁹ Kennedy A "Fixed at Birth: Medical and Legal Erasures of Intersex Variations" (2016) 39 *UNSWLJ* 813 815 and Intersex book 185: the first indication was in the German *Zedler Lexicon* and the French *Encyclopaedia*.

²⁰ Wijffels "Intersex: Some (Legal-)Historical Background" in *The Legal Status of Intersex Persons* 185: If the features of the person are balanced, then they will make an oath to choose one sex, as it would be wicked to use both sexes. If the individual was still a child, they would be raised as male. When the person wanted to get married medical professionals would have to undertake an investigation to determine the sex. Society insisted on treating an intersex person as a pariah and a condition that they wanted to 'explain away'.

were treated with superstition and often ostracised from their communities.²¹ In sixteenth century England, children who were born displaying intersex characteristics were unable to be baptised until they were either the male or female sex.²² Early Scottish law dictated that if a person was determined to be a hermaphrodite and no prominent clear sexual distinction was prevalent, that individual was precluded from concluding a marriage.²³ Medieval society viewed intersex persons suspiciously, as there was the perception that they would take advantage of their ambiguous sexual characteristics to participate in “immoral” sexual behaviour.²⁴ Long expressed the general position taken by medical practitioners in the 1800s as follows:

“I believe that we owe it to these poor unfortunates to impress upon them, as well as upon others, that they are not part man and part woman ... The peculiarities which make them appear mixed, are only deformities like hair-lip or club-foot”.²⁵

This statement indicates that medical practitioners impressed upon their patients that being a “hermaphrodite” was a deformity and not a means to commit sexual immorality.²⁶ Practitioners from the seventeenth century were consumed with the idea of protecting sexual “purity”²⁷ and preventing sexual deviance and dishonesty, which was associated with intersexed bodies.²⁸

During the nineteenth century, medical science asserted jurisdiction over the body.²⁹ Medical practitioners of the time never suggested a “cure” for anomalous anatomy; rather, the proposed solution was to make the patient aware of their actual sex and implement social changes to correspond therewith.³⁰ The focus in medieval legal and medical culture was on diagnosing and ensuring the individual concerned was made aware of the fact that they were abnormal. It was stressed that society

²¹ Kennedy (2016) 39 *UNSWLJ* 817.

²² EM Horowicz “Intersex children: Who are we really treating?” (2017) 17 *Medical Law International* 183 189.

²³ L-A Barnes “Gender Identity and Scottish Law: The Legal Response to Transsexuality” (2007) 11 *Edinburgh L Rev* 162 163.

²⁴ This would generally be referring to the fear that people would starting to participate in homosexual acts and thus give rise to a ‘deviant’ state sexual of existence; Carpenter (2018) *Bioethical Inquiry* 488.

²⁵ JW Long in 1896 quoted in Carpenter (2018) *Bioethical Inquiry* 488.

²⁶ 488.

²⁷ A notion that mostly likely originated from the teachings of the religious leaders of the time.

²⁸ JW Long in 1896 quoted in Carpenter (2018) *Bioethical Inquiry* 488.

²⁹ Kennedy (2016) 39 *UNSWLJ* 817.

³⁰ 817.

would not accept intersex persons and subsequently, they needed to disguise their true nature.

2 2 2 The twentieth century: Dr John Money's Optimal Gender Theory

The practice of sex alteration initially arose in the USA from performing surgical gender-conforming practices on adolescent children. It was later revised and performed on infants because practitioners wanted to reduce the amount of harmful psychosomatic effects.³¹ The clinical practice of treating intersex bodies reached a turning point twenty years ago.³² Initially, medical practitioners attempted to minimise the concerns of aggrieved intersexed adults whose bodies had been surgically "rectified" in infancy.³³ However, by 1997 reports began to be published concerning the plight of intersex persons and the degree of harm that they had suffered due to medical gender-confirming procedures experienced in childhood. As a result of these disclosures, the original reform guidelines were promulgated for intersex surgeries.³⁴ The guidelines supported the position of continuing "social gender assignment" but simultaneously required practitioners to promote surgeries that did not reinforce a specific gender identity.³⁵ These guidelines were disregarded by clinicians, as they believed that there was a lack of scientific evidence that suggested that such surgeries were too dangerous and would negatively affect the intersex patient.³⁶

The American Academy of Pediatrics ("AAP") initially classified intersex surgery as a "social emergency" requiring immediate intervention and this approach continued well into the early 2000s.³⁷ It was only in 2006 when the Consensus Statement on Management of Intersex Disorders ("Consensus Statement")³⁸ was adopted that the approach towards non-consensual surgeries on intersex persons began to change. Although the Consensus Statement adopted a more patient-friendly model, it did not

³¹ Garland & Diamond "Evidence-based reviews of medical interventions relative to the gender status of children with intersex conditions and differences of sex development" in *The Legal Status of Intersex Persons* (2018) 85.

³² 81.

³³ 81.

³⁴ 81-82.

³⁵ 82.

³⁶ 82.

³⁷ Davidson (2011) *Wis J L Gender & Soc'y* 9.

³⁸ 9-10.

advocate for the end of surgeries entirely.³⁹ Furthermore, in the years to come it was determined that the findings generated from the Consensus Statement were tentative at best because of the low level of scientific evidence that was available to support the surgeries.⁴⁰

However, it was in the 1950s that the main treatment model was established which endorsed the era of surgical “rectification” of ambiguous genitals for intersex persons.⁴¹ This model was developed by sexologist, Professor John Money, and his psychological gender identity theory. The “traditional paternalistic treatment model”, inspired by Money’s theory, was the predominant approach used in cases concerning intersexed children.⁴² This model determined that sexual ambiguity in an infant could be classified as a “psychological” emergency, which would require immediate intervention to prevent gender dysphoria⁴³ in later life.⁴⁴ It was the general opinion that parents would not be comfortable with their child’s sexual ambiguity.⁴⁵ Consequently, medical practitioners would suggest immediate surgical alteration as the only option for parents.⁴⁶ They rationalised that this approach was needed in order to mitigate against social stigma that was associated with intersexuality.⁴⁷

Money theorised that gender was learned socially and that children were not born with a gender identity.⁴⁸ He asserted that their gender identity would develop from

³⁹ With regard to surgery, the Consensus Statement acknowledged that there was very limited data on the benefits of the surgery and the presumption that early intervention will relieve parental distress surrounding their child’s ambiguous sexual characteristics. Furthermore, it also no longer defined an intersex child as a ‘social emergency’: Davidson (2011) *Wis J L Gender & Soc’y* 10. See also Hupf (2010) *William & Mary Journal of Race, Gender, and Social Justice* 83.

⁴⁰ Garland & Diamond “Evidence-based reviews of medical interventions relative to the gender status of children with intersex conditions and differences of sex development” in *The Legal Status of Intersex Persons* (2018) 82-83.

⁴¹ L Hermer “paradigms Revised: Intersex Children, Bioethics & (and) the Law (2002) 11 *Annals Health L* 195 196; R Hupf “Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital Normalizing Surgery” (2015) 22 *Wm & Mary J Women & L* 73 80 & Ben-Asher (2006) *Harv J L & Gender* 61.

⁴² AC Lareau “Who decides- genital-normalizing surgery on intersexed infants (2003) 92 *Geo L J* 129 131.

⁴³ V Pasterski “Gender Identity and Intersex Conditions” in J M Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 65 68: Gender dysphoria arises when the gender that is assigned at birth and the gender identity that the individual themselves experience differs. This conflict will generally manifest in a persistent refusal to identify with the gender they were assigned with at birth. Please refer to section 3.3 of this chapter for a more in-depth description of ‘gender dysphoria’.

⁴⁴ Lareau (2003) 92 *Geo L J* 131.

⁴⁵ 131.

⁴⁶ 131.

⁴⁷ P Newcombe “Blurred Lines – Intersexuality and the Law: An Annotated Bibliography (2017) 109 *Law Libr J* 221 222.

⁴⁸ Horowicz (2017) *Medical Law International* 186.

observing the surrounding social behaviour of others.⁴⁹ His “optimal gender theory” proposed that humans are gender neutral until they reach the age of two.⁵⁰ Money believed that if (a) children were raised in a gender role that corresponded with their genitalia and (b) were not told about the surgical procedure, their gender identity would develop according to their assigned sex.⁵¹ At the outset, Money’s theory seemed to be a success and was consequently adopted by the medical community. However, in the 1990s, this approach was eventually disproven by an experimental case of Money known as the John/Joan case.

Dr Money applied his “optimal gender theory” to the case of Bruce/David Reimer. David⁵² was not born intersex but was the casualty of a failed circumcision in early infancy, which resulted in the largest part of his penis being burnt off.⁵³ Money proposed sex alteration surgery to David’s parents, as he believed that David was still young enough to develop a gender identity that corresponded to his assigned sex.⁵⁴ At the outset, the surgery was seen as a complete success. However, the reality was that the experiment was a failure. The case of David Reimer illustrated the worst possible consequences that could result from sex alteration surgery.⁵⁵

From early childhood, David rejected his assigned sex and all attempts from his parents to feminise him.⁵⁶ In his early adolescence, his parents explained the circumstances surrounding his sex alteration surgery and consequently, David immediately began to take steps to defeminise his body and reclaim his male gender identity.⁵⁷ However, David suffered extreme psychological trauma as a result of the initial sex alteration surgery.⁵⁸ The result of this trauma was a continuous battle with depression and David committed suicide in his thirties.⁵⁹

⁴⁹ 186.

⁵⁰ Kennedy (2016) *UNSWLJ* 818.

⁵¹ 818-819 & R L White “Preferred Private Parts: Importing Intersex Autonomy for *M C v Aaronson*” (2014) 37 *Frodham Int’l LJ* 777 785.

⁵² White (2014) *Frodham Int’l LJ* 785,786,787: David was originally named Bruce and after undergoing sex assignment surgery in infancy, he was renamed Brenda by his parents to promote his new gender identity.

⁵³ 785.

⁵⁴ 785-786.

⁵⁵ J Dolgin “Discriminating Gender: Local, Medical, and Social Presumptions about Transgender and Intersex People” (2017) 47 *Sw L Rev* 61 72.

⁵⁶ White (2014) 37 *Frodham Int’l LJ* 787.

⁵⁷ 787; Dolgin (2017) *Sw L Rev* 72.

⁵⁸ White (2014) 37 *Frodham Int’l LJ* 786.

⁵⁹ 786.

Although the actual results of Money's theory were discovered in the 1990s, his influence on the treatment of intersex persons persisted for nearly three decades.⁶⁰ Money's approach continued support to a binary view of sex, which has consequently played a substantial role in developing a judicial response in cases involving the intersex community.⁶¹ The effects of his "normalisation" practices continue to have ramifications for the intersex community today.⁶² Money has been called the "quintessential social constructionist"⁶³ as his theory endorsed promoting a culture of secrecy and denial, which has persisted in the stigmatisation of intersex persons.⁶⁴

The late 19th through to the early twentieth century saw a drastic change in the anthropological underpinnings upon which Western society rested.⁶⁵ The rigid view of gender identity and issues surrounding gender identity were challenged.⁶⁶ Whereas in the past discussions surrounding transsexuality and intersexuality did not take place openly, the modern twenty-first century has experienced a surge of support for gender issues as well as related human rights matters.⁶⁷ The twenty-first century established new terminology to be used when discussing intersex and transgender bodies. Previously used terms to describe intersex persons such as "hermaphrodite", "trassie" "pseudohermaphrodite", "androgynous"⁶⁸ "hybrid", "imposter", "monstrosity"⁶⁹ and "disorder of sexual development" have become outdated and are considered derogatory in the light of a developing human rights movement towards the

⁶⁰ 787.

⁶¹ Dolgin (2017) *Sw L Rev* 63.

⁶² Hupf (2015) *Wm & Mary J Women* 82.

⁶³ M Carpenter "The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities" in J M Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 445 482.

⁶⁴ A Davidian "Beyond the Locker Room: Changing Narratives on Early Surgery for Intersex Children" (2011) 26 *Wis J L Gender & Soc'y* 1 6.

⁶⁵ Wijffels "Intersex: Some (Legal-)Historical Background" in *The Legal Status of Intersex Persons* 199.

⁶⁶ 199.

⁶⁷ 199.

⁶⁸ M Lavee & T A Partock "Four sexes, two genders: The rabbinic move from legal to essentialist polarisation of identities" in J M Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 165 166: This term was initially inherited from Greek but was later translated into Tannaitic texts. Androgynes refers to individuals who are born displaying both male and female genitals in part or full. However, this definition has no etymology to 'hermaphrodite'.

⁶⁹ M Carpenter "The 'Normalisation' of Intersex Bodies and 'Othering' of Intersex Identities" in J M Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 445 449.

LBGTQIA+⁷⁰ community.⁷¹ Yet, despite the developing change in diagnostic terminology, the majority of society continues to use the incorrect language to understand the complexities surrounding intersex bodies.⁷² Consequently, intersex persons continue to be treated as having a deformity and are considered atypical. This is largely due to physicians' persistence in advising surgery for intersex babies to "normalise" their untypical sex traits.⁷³

2 3 Terminology

2 3 1 Sex⁷⁴

The terms of "sex" and "gender" have and still are continuously confused with one another. The two terms are not synonyms, but socially they have been treated as such.⁷⁵ The legal community has contributed to this misinterpretation as it endorses "sex" and "gender" as synonyms on legal documentation.⁷⁶ Consequently, by continuing to support a binary system,⁷⁷ certain members of the community are prevented from gaining access to basic human rights.⁷⁸ The distinction between "sex" and "gender" is important as it illustrates why "transgender" and "intersex" persons differ. Moreover, using these terms in the correct context illustrates why one cannot define "intersex" as a disorder.

According to the American Psychological Association ("APA"), sex refers to an individual's biological status, categorised as male, female or intersex.⁷⁹ Despite the APA recognising intersex as a third sex category, "sex" is still regarded as binary within

⁷⁰ Please refer to fn 4 of this chapter for a brief historical overview of the development of the acronym and the reasoning behind some of the wording that is used.

⁷¹ M Carpenter "Intersex Variations, Human Rights, and the International Classification of Diseases" (2018) *Health and Human Rights Journal* <<https://www.hhrjournal.org/2018/08/intersex-variations-human-rights-and-the-international-classification-of-diseases/>> (accessed 26-01-2019).

⁷² Kennedy (2016) 39 *UNSWLJ* 817.

⁷³ 817.

⁷⁴ It is asserted that the terminology used throughout this thesis is written in a manner which promotes the essence of the argument. Often authors will refer to either 'sex' or 'gender' but in a way which does not reflect the appropriate context or response.

⁷⁵ Horowicz (2017) *Medical Law International* 186.

⁷⁶ Ben-Asher (2006) *Harv J L & Gender* 55-56.

⁷⁷ Barnes (2007) *Edinburgh L Rev* 162 164.

⁷⁸ In the decision of *National Legal Services Authority v Union of India* (2014) 5 SCC 438, the court came to the conclusion that by not recognising hijras as a third sex category in India it was an infringement upon their human rights: S Shah "The Legal Status of Intersex Persons in India" in J M Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 281 287.

⁷⁹ American Psychological Association "Guidelines for psychological practice with lesbian, gay and bisexual clients" (2012) 67 *Am Psychol* 10 11.

the social and legal community. Generally, external anatomy is used to determine if someone is male or female, but the determination of an individual's sex' depends on several factors⁸⁰ including but not limited to chromosomes, hormone prevalence, as well as external and internal genitalia.⁸¹ However, each characteristic on their own is insufficient to determine one's "sex". Kusum states that there is no single criteria that can be used to differentiate "sex" and divide humans into male or female.⁸² Consequently, it is possible for a person to externally present a particular "sex" trait but internally to present another.⁸³

The debate as to whether "sex" is purely dualistic has been considered for many years. With conflicting views expressed by scientists, legal academics, philosophers and sociologists alike, many support the opinion that "sex" cannot only be limited to male and female but rather that "sex" is a spectrum with more than two sexes available.⁸⁴ Moore stated an opinion that sex is an ill-defined entity and that variations from a typical male to female exist,⁸⁵ whereas Bartholomew affirmed that a "pure" man and woman was uncommon and unlikely.⁸⁶ He favoured the idea that sex is not dualistic and supported the notion that there will usually be a degree of ambiguity. Furthermore, Charles Debierre, a French Professor of anatomy, in 1854 went as far as to propose the addition of "doubtful sex"⁸⁷ to be included as a sex category alongside male or female, as an option to include on a birth certificate.⁸⁸ Supporting the idea of expanding the definition of "sex" to include other variations was Joseph-Napoléon Loir, a French surgeon.⁸⁹ He argued that medical practitioners should use the expanding knowledge of embryology to aid the development of French civil law by

⁸⁰ P Newcombe "Blurred Lines – Intersexuality and the Law: An Annotated Bibliography" (2017) 109 *Law Libr J* 221 227.

⁸¹ American Psychological Association "Answers to Your Questions About Transgender People, gender identity, and Gender Expression" (2020) < <https://www.apa.org/topics/lgbt/transgender>> 1. Kusum (1983) *Journal of the Indian Law Institute* 74-75: Moore is of the opinion that there are further characteristics that should also be included when considering an individual's sex, and these include sex rearing and psychological sex.

⁸² Kusum *Journal of the Indian Law Institute* (1983) 74.

⁸³ Newcombe (2017) 1 *Law Libr J* 205.

⁸⁴ Please refer to the Hippocrates and Galen model discussed under section 2 "An Historical Assessment of Intersex Persons".

⁸⁵ Kusum "Legal Implications of Sex Change Surgery" (1983) 25 *Journal of the Indian Law Institute* 74.

⁸⁶ 74.

⁸⁷ A third sex category.

⁸⁸ G Mak "Doubtful Sex in Civil Law: Nineteenth and Early Twentieth Century Proposals for Ruling Hermaphroditism" (2005) 12 *Cardozo J L & Gender* 197 197.

⁸⁹ 197.

shedding light on cases where sex was contested. He believed that it would be in the interests of morality and family security, and beneficial for families in general if the legislators were to create the option to register new-borns⁹⁰ as “doubtful sex” on their birth certificates.⁹¹

The view that “sex” is merely dualistic has made the recognition for intersex persons all the more difficult, as the medicalisation of intersex persons has been used as a method to reinforce the binary persecution of “sex”.⁹² Enforcing this binary view allows one to “explain away” the reality that the male and female sex are not the only sexes that exist. “Sex” continues to be misrepresented in academic literature. Despite limited progress in advancing intersex rights, the law remains blind to the subtleties of “sex” and “gender” identity with its persistence in trying to assign individuals in accordance with a binary system.⁹³

2 3 2 Gender

Barnes describes “gender” as a “nebulous” term that is not easily defined.⁹⁴ Many attempts have been made at defining and explaining what “gender” is. Historically, and across numerous cultures, there have been various methods of categorising people according to gender.⁹⁵ The word “gender” originates from the old French word “gendre” that meant “kind, sort, genus”.⁹⁶ Before the 1950s, gender was only applicable in grammar, not to persons.⁹⁷ During the 50s and 60s, sexologists realised that their sex reassignment agenda could not be sufficiently defended only using the words “transsexual” and “sex”.⁹⁸

⁹⁰ Recognition in the law enables a person to have access to identification documents, such as an Identification Document and a Passport, but which also allows one to access to welfare benefits, education, healthcare benefits and housing: Shah “The Legal Status of Intersex Persons in India” in *The Legal Status of Intersex Persons* 281. This will be discussed in more detail in Chapter 4 and Chapter 5.

⁹¹ Mak (2005) 12 *Cardozo J L & Gender* 197-198.

⁹² Dolgin (2017) *Sw L Rev* 63.

⁹³ B Vanderhost “Whither Lies the Self: Inters and Transgender Individuals and a Proposal for Brain-Based Legal Sex” (2015) 9 *Harv L & Pol’y Rev* 241 242.

⁹⁴ Barnes (2007) *Edinburgh L Rev* 162 173.

⁹⁵ Dolgin (2017) *Sw L Rev* 75.

⁹⁶ G Garg & R Marwaha “Gender Dysphoria (Sexual Identity Disorders)” <<https://www.ncbi.nlm.nih.gov/books/NBK532313/>> (accessed 01-06-2020).

⁹⁷ It is reported that “Latin based language categorise nouns and their modifier as masculine or feminine and for this reason are still referred to as having a gender”. American College of Paediatricians (2017) *Issues L & Med* 289.

⁹⁸ 289.

Typically, a child's gender will be determined based on their chromosomes and anatomy at birth.⁹⁹ However, gender does not refer to biological sex but instead refers to the psychological and cultural characteristics associated with biological sex.¹⁰⁰ Gender is considered to be something that bodies do in comparison to sex which is what bodies are.¹⁰¹ Consequently, gender is not a biological concept but a sociological and psychological term.¹⁰² Ben-Asher defines gender as a social behaviour that is located on a spectrum that falls between hyper-masculinity and hyper-femininity.¹⁰³ Similarly, Greenberg states that gender is primarily "used to refer to the cultural or attitudinal qualities that are characteristic of a particular sex".¹⁰⁴ Therefore, simply stated, "gender" refers to behaviours, feelings and attitudes that a particular culture associates with an individual's sex.¹⁰⁵

In many cultures, "gender" has been considered to only be binary, thereby confining persons to mutually exclusive categories of male, female, man, woman, boy and girl.¹⁰⁶ Consequently, it has been used to separate individuals into socially accepted "male" and "female" roles that correspond with their sex. The result of this narrow interpretation is that there is an assumption that one's gender identity will consistently align with their sex, which will not always be the case.¹⁰⁷ Transgenderism, as opposed to intersex, concerns individuals' gender, thus not their sex, which is a distinction that society often fails to recognise. Considering this misclassification, the definition of "transgender" is another important term to consider.¹⁰⁸

Unlike most Western ideologies, the Native American culture provides a unique interpretation of "gender", by recognising three or four social gender categories.¹⁰⁹

⁹⁹ G Garg & R Marwaha "Gender Dysphoria (Sexual Identity Disorders)" <<https://www.ncbi.nlm.nih.gov/books/NBK532313/>> (accessed 01-06-2020).

¹⁰⁰ American College of Paediatricians "Gender Dysphoria in Children" (2017) *32 Issues L & Med* 287 287.

¹⁰¹ Ben-Asher (2006) *Harv J L & Gender* 52.

¹⁰² American College of Paediatricians (2017) *Issues L & Med* 287.

¹⁰³ Ben-Asher (2006) *Harv J L & Gender* 52.

¹⁰⁴ JA Greenberg "Defining Male and Female: Intersexuality and the collision between law and biology" (1999) *41 Arizona Law Review* 265 274.

¹⁰⁵ S Thompson (2018) 7; I Lynch & M Van Zyl Justice *delayed: Activist engagement in the Zoliswa Nkonyana murder trial* Cape Town: Triangle Project ix & Vanderhost (2015) *Harv L & Pol'y Rev* 243 fn 17.

¹⁰⁶ American Psychological Association "Guidelines for psychological practice with transgender and gender nonconforming people" (2015) *70 Am Psychol* 832 834.

¹⁰⁷ 834.

¹⁰⁸ See 3 2 2 below.

¹⁰⁹ 76: This approach has also been adopted by the Alaskan Natives.

Included as a gender option within Native American culture is the two-spirit woman. The two-spirit woman is a term adopted amongst tribes to refer to an individual who embodies feminine and masculine duality.¹¹⁰ A further example of inclusive “gender” variance is found in Indian society. In April 2014, the Indian Supreme Court delivered a judgment¹¹¹ that gave legal recognition to transgender and *hijras*¹¹² gender identities and rights.¹¹³ This was an attempt to decrease the stigmatisation that was associated with the *hijras* community by granting constitutional support for the recognition of a third gender.¹¹⁴ The Supreme Court in the *NALSA* decision made a promise to protect and promote the rights of the *hijras* and transgender community, thereby ensuring their fundamental human rights as stipulated in the Constitution of India.¹¹⁵ This recognition is supposed to enable social access to State institutions which previously excluded *hijras*.¹¹⁶ The *NALSA* case is considered to be a “landmark” decision as it opens the

¹¹⁰ JHL Elm, JP Lewis, KL Walters & JM Self “I’m in this world for a reason”: Resilience and recovery among American Indian and Alaska Native two-spirit women” (2016) 20 *Journal of Lesbian Studies* 352-353.

¹¹¹ *National Legal Services Authority v Union of India* (“*NALSA*”) (2014) 5 SCC 438.

¹¹² The term *hijras* is used to describe persons who are either: intersexed, transgender or cross dressers: J Mok & S Linning “Hidden world of the hijras: Inside India’s 4,000-year-old transgender community where religious respect doesn’t protect them from modern-day discrimination” *Daily Mail* (30-06-2015) <<https://www.dailymail.co.uk/news/article-2852834/Hidden-world-hijras-Inside-India-s-4-000-year-old-transgender-community-religious-respect-doesn-t-protect-modern-day-discrimination.html>> (accessed 17-06-2019). The court in the *NALSA* judgment gave an alternative interpretation of *hijras*. The judge stated that the *hijras* community is unique to India and differs from other identities all over the world. These individuals are biologically male but they oppose all masculine identities, they are not either men or woman. Therefore, by enabling them to identify as a separate third sex, it would allow them access to their human rights: Shah “The Legal Status of Intersex Persons in India” in *The Legal Status of Intersex Persons* 287.

¹¹³ 281.

¹¹⁴ J Mok & S Linning “Hidden world of the hijras: Inside India’s 4,000-year-old transgender community where religious respect doesn’t protect them from modern-day discrimination” *Daily Mail* (30-06-2015) <<https://www.dailymail.co.uk/news/article-2852834/Hidden-world-hijras-Inside-India-s-4-000-year-old-transgender-community-religious-respect-doesn-t-protect-modern-day-discrimination.html>> (accessed 17-06-2019).

¹¹⁵ The court stated that as there were no domestic regulations in place to protect the transgender and *hijras* community Article 14, 15, 16, 19(1)(a) and 21 of the Indian Constitution must be read in conjunction to the applicable international human rights law. These provisions collectively were interpreted as gender neutral: Shah “The Legal Status of Intersex Persons in India” in *The Legal Status of Intersex Persons* 281, 285.

¹¹⁶ Dolgin (2017) *Sw L Rev* 77. The Court ordered that State institutions had to put the following measures in place: (a) to ensure legal recognition for self-identified gender of transgender individuals, (b) establish distinct “HIV Sero-surveillance” areas, (c) provide medical care and social welfare operations, (d) create public bathroom facilities that were inclusive and (e) generally address the intolerance and create public awareness and acceptance within society at large: Shah “The Legal Status of Intersex Persons in India” in *The Legal Status of Intersex Persons* 285.

possibility for parties to challenge gender binaries and variations within Indian society.¹¹⁷

2 3 2 1 *Gender dysphoria*

Gender dysphoria, also termed “transsexualism”, arises when individuals do not identify with the gender identity that was assigned to them at birth.¹¹⁸ For the majority of children, the sex and gender that is assigned to them at birth correspond with their gender identity.¹¹⁹ Persons with gender dysphoria often experience distress and will be in conflict with themselves,¹²⁰ as they will want to live as the sex that they were assigned at birth.¹²¹ They are unable to correlate to their gender expression when recognising themselves within stereotypical binary roles of male or female.¹²² Some children, especially those that are born intersex, may experience incongruity between their assigned sex and their gender identity in later life.¹²³

2 3 2 2 *Transgender*

Individuals who are transgender challenge the presumption that sex and gender are parallel to one another and that both an individual’s gender identity and sex are immutable.¹²⁴ The colloquial understanding of “transgender” refers to individuals who are born with a clear biological sex but psychologically identify with a different gender.¹²⁵ The most simplistic way to explain the difference between “intersex” and

¹¹⁷ Shah “The Legal Status of Intersex Persons in India” in *The Legal Status of Intersex Persons* 282 & 283.

¹¹⁸ Pasterski “Gender Identity and Intersex Conditions” in *The Legal Status of Intersex Persons* (2018) 68.

¹¹⁹ G Garg & R Marwaha “Gender Dysphoria (Sexual Identity Disorders)” <<https://www.ncbi.nlm.nih.gov/books/NBK532313/>> (accessed 01-06-2020).

¹²⁰ American Psychological Association “What is Gender Dysphoria?” (2016) <<https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>> (accessed 01-06-2020).

¹²¹ Pasterski “Gender Identity and Intersex Conditions” in *The Legal Status of Intersex Persons* (2018) 68.

¹²² G Garg & R Marwaha “Gender Dysphoria (Sexual Identity Disorders)” <<https://www.ncbi.nlm.nih.gov/books/NBK532313/>> (accessed 01-06-2020)

¹²³ G Garg & R Marwaha “Gender Dysphoria (Sexual Identity Disorders)” <<https://www.ncbi.nlm.nih.gov/books/NBK532313/>> (accessed 01-06-2020).

¹²⁴ Dolgin (2017) *Sw L Rev* 65.

¹²⁵ Kusum (1983) *Journal of the Indian Law Institute* 73.

“transgender” is that “intersex” is “about the experience of body”.¹²⁶ Transgender persons struggle with their gender identity¹²⁷ as they do not identify with the gender that is assigned to them, because of the biological sex that they are born with.¹²⁸ Consequently, transgender persons include individuals that identify as “non-binary, genderqueer, androgynous, bi-gender and non-gendered”.¹²⁹ Recently, the transgender community has acquired acknowledgement and is gaining social acceptance, as is also indicated by the fact that the World Health Organization (“WHO”) no longer identifies transgenderism as a mental disorder.¹³⁰

It is clear that the legal challenges experienced by persons who are intersex need to be separated from those experienced by transgender individuals.¹³¹ Intersex persons often oppose surgery to alter their sex, whereas transgender persons want to have surgery so that their gender identity will correspond with their desired sex. In recent years, trans individuals have become more visible in society in comparison to intersex persons, because of persistent activism that they have exhibited. This activism has resulted in their legal, social, and political visibility having gained more attention and acknowledgement.¹³² Although both of these communities have different

¹²⁶ JM Scherpe “Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons” in JM Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 203 and Dolgin (2017) *Sw L Rev* 68.

¹²⁷ Pasterski “Gender Identity and Intersex Conditions” in JM Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 65: Gender identity is defined as the following: “the core sense of the self as male, female or somewhere on the spectrum, outside the binary”. This definition must not be confused with ‘gender role’, as gender role refers to “behaviours, preferences and characteristics that differ, on average, between males and females”.

¹²⁸ *Human Rights Campaign* “Understanding the Transgender Community” <<https://www.hrc.org/resources/understanding-the-transgender-community>> (accessed 08-03-2020).

¹²⁹ E Blincoe “Sex Markers on Birth Certificates: Replacing Model with Self-Identification” 57 59.

¹³⁰ *BBC News* “Transgender no longer recognised as ‘disorder’ by WHO” (29-05-2019) <<https://www.bbc.com/news/health-48448804>> (accessed 03-07-2020). In 2012, the American Psychiatric Association altered its manual to include the term ‘gender dysphoria’ which replaced the term ‘gender identity disorder’, this was a result from the consensus amongst the medical and psychological community that experiencing a gender that differs from the one an individual was assigned at birth cannot be termed a disease or disorder it is just a variation of human experience: *Human Rights Watch* “New Health Guidelines Propel Transgender Rights” (27-05-2019) <<https://www.hrw.org/news/2019/05/27/new-health-guidelines-propel-transgender-rights>>(accessed 14-07-2020).

¹³¹ JM Scherpe “Lessons from the Legal Development of the Legal Status of Transsexual and Transgender Persons in JM Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 203 203.

¹³² Scherpe “Lessons from the Legal Development in *The Legal Status of Intersex Persons* 203 & P Dunne “Towards Trans and Intersex Equality: Conflict or Complementary?” in JM Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 217 217. This has been achieved through persistent activism by transgender individuals, media attention in the last decade has also brought to light the difficulties trans individuals have faced in attempting to gain access to surgery.

aims, they have one similarly common goal: they are both striving for equal opportunities so their self-identities will and can be recognised.

2 3 3 Intersex

The definition of “intersex” is still very much open to debate amongst the medical and intersex community.¹³³ Within the biomedical sphere, the term “disorder/difference of sex development” (“DSD”) is the most widely adopted definition used to describe intersex persons medically.¹³⁴ This term was adopted in 2006 by a Clinical Consensus Statement¹³⁵ and replaced previous medical terminology used to describe intersex bodies.¹³⁶ However, the use of this term is problematic from both a social and legal perspective. Medically it may not seem to be derogatory to use the term “disorder”, as the context refers to an individual’s anatomy which deviates from the medical norm of male or female.¹³⁷ However, the social association of the word “disorder” has a negative connotation. “Disorder” refers to an abnormality or malfunction, thus there is the perception that normalisation of the bodies of those concerned needs to happen

¹³³ JA Greenberg “Health Care Issues Affecting People with an Intersex Condition or DSD: Sex or Disability Discrimination” (2012) 45 *LOY L A L Rev* 849 853. Pieterse (2013) *South African Historical Journal* 624: In the South African pre-constitutional era the word “trassie” was used to describe an intersexed person. The word was so commonly used it was incorporated into the 1965 edition of the *Handwoordeboek van die Afrikaanse Taal*. An intersex person was defined as: “‘Tweeslagtige wese met onvolledig ontwikkelde geslagsorgane van albei geslagte; hermafrodite’ (literally: intersexed being with incompletely developed reproductive organs of both sexes: hermaphrodite)”. In South Africa, section 1 of the Alternation of Sex Description and Sex Status Act 49 of 2003 Act provides the following definition of an intersex person: “means a person whose congenital sexual differentiation is atypical, to whatever degree”. This definition is not very comprehensive and it fails to explain the complexities surrounding intersex characteristics. A proposed definition by Intersex South Africa (“ISSA”) proposes the following definition of intersex to be included in the proposed children’s amendment bill:

“[A]n umbrella term used to describe a wide range of natural bodily variations in sex characteristics. Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit normative binary notions of male or female bodies – such variations may involve atypical genitalia, hormonal differences, or combinations of chromosomal genotype and sexual phenotype other than XY and XX. Some intersex traits are visible at birth while others are not apparent until puberty. Some chromosomal intersex variations may not be physically apparent at all”: ISSA Submission to the Portfolio Committee on Social Development on the Children’s Amendment Bill [B18-2020] 11.

See further chapters 5 and 6 of this thesis for a discussion of these proposed amendments.

¹³⁴ Scherpe “The Legal Status of Intersex Persons: An Introduction” in *The Legal Status of Intersex Persons* (2018) 2.

¹³⁵ DC Ghattas Standing Up for the Human Rights of Intersex People- How can you help? *ILGA Europe* (2015) 1 20.

¹³⁶ 20.

¹³⁷ Scherpe “The Legal Status of Intersex Persons: An Introduction” in *The Legal Status of Intersex Persons* (2018) 2.

through medical intervention, to satisfy the social perceptions of normality.¹³⁸ The word “difference” has gained support in contrast to “disorder” as it suggests a non-threatening neutral term.¹³⁹ “Difference” merely means that the individual is not the same as their comparator. Others have proposed using a term that includes the word “variance” when speaking about non-typical sex presentation, as this inclusion would also encourage a positive association with the sex spectrum.¹⁴⁰ Despite gradual review and removal by the WHO of some of the pathologising terms used in the context of sexual and gender minorities from the International Classification of Diseases (“ICD”), the classifications of intersex variations remain phrased in terms of psychological abnormality.¹⁴¹ It is submitted by Carpenter that the WHO should replace the term DSD in the ICD with more neutral terminology.¹⁴² In the past two decades, activists and scholars have adopted the term “intersex” to oppose the derogatory association with Disorder of Sex Development.¹⁴³

Based on the above discussions, the distinction between “intersex” and “transgender” becomes clear: “intersex” concerns an individual’s body and their physical being, whereas transgender concerns an individual’s gender identity.¹⁴⁴ Intersex persons are born with characteristics that do not conform to the medical and social norms of “normal” female and male bodies. Transgender persons, in turn, are born with bodies that do correspond with the medical and social norms of a typical male or female body but their gender identity does not match their sex.¹⁴⁵ Consequently, gender does not have to correspond with sex, especially when an intersex person can rather choose surgery as an option in their later life.¹⁴⁶ Sometimes the consequence of an intersex child being subjected to surgery in infancy will be that

¹³⁸ 3.

¹³⁹ I Hughes “Biology of Fetal Sex Development” in J M Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 25 32.

¹⁴⁰ 32.

¹⁴¹ M Carpenter “Intersex Variations, Human Rights, and the International Classification of Diseases” (2018) 20 *Health and Human Rights Journal* 1 1.

¹⁴² Carpenter (2018) *Health and Human Rights Journal* 1

¹⁴³ Newbould (2016) 24 *Med Law Rev* 475; M Carpenter “Intersex Variations, Human Rights, and the International Classification of Diseases” (2018) *Health and Human Rights Journal* <<https://www.hhrjournal.org/2018/08/intersex-variations-human-rights-and-the-international-classification-of-diseases/>> (accessed 26-01-2019).

¹⁴⁴ Ghattas Standing Up for the Human Rights of Intersex People- How can you help? *ILGA Europe* (2015) 20.

¹⁴⁵ 20.

¹⁴⁶ A Puluka “Parent versus State: protecting Intersex Children from Cosmetic Genital Surgery” (2015) *Michigan State Law Review* 2095 2140.

they do not identify with the sex that they have been assigned. Thus, in such instance, a person can be both intersexed and transgendered.

2 3 3 1 *Intersex in the modern age*

The contemporary interpretation of “intersex” regards sex as a spectrum. It represents a variety of sexual characteristics that occur naturally within the human species.¹⁴⁷ Furthermore, the interpretation also recognises physical evidence that sex is not only binary but includes variations of sexual characteristics.¹⁴⁸ Individuals who are born intersexed do not form part of the strict male or female category because of their unique sexual characteristics.¹⁴⁹ The “intersex” category is broadly defined and includes chromosomal, gonadal, hormonal and external morphologic variations.¹⁵⁰ These differences can occur at the time of gamete formation, fertilisation or foetal development.¹⁵¹ Due to a lack of accurate knowledge, society is inclined to perceive intersex incorrectly, and regularly confuses it with transgenderism. This is also because of the ill-perceived fluidity that supposedly exists between “gender” and “sex”. This mischaracterisation is often due to a limited biological view expressed by healthcare professionals.¹⁵² As “intersex” has a strong biological component in conjunction with a social and legal one, the impact of language contributes significantly to creating acceptance of this sex spectrum.

Not all intersex conditions are immediately identifiable once a child has been born, as they do not always present in the form of ambiguous genitalia.¹⁵³ There are many manifestations of intersex characteristics and they can be divided into male affected and female affect instances. Genetically, male and female embryos are biologically identical during the first seven weeks of gestation.¹⁵⁴ The distinction between the sexes only becomes biologically evident towards the end of the first trimester. It is only after the seven-week period that hormonal triggers are released, which stimulate the

¹⁴⁷ Ghattas Standing Up for the Human Rights of Intersex People- How can you help? *ILGA Europe* 9.

¹⁴⁸ 9.

¹⁴⁹ 9.

¹⁵⁰ N Ben-Asher “The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties (2006) *Harv J L & Gender* 51 51 (fn 2).

¹⁵¹ Cardozo journal 10

¹⁵² Ghattas Standing Up for the Human Rights of Intersex People- How can you help? *ILGA Europe* 9.

¹⁵³ Newcombe (2017) 1 *Law Libr J* 227.

¹⁵⁴ Greenberg (1999) *Arizona Law Review* 279.

development of either testes or ovaries.¹⁵⁵ The biology of sex development in fetuses is declared to be a binary procedure, determined by the potential of the embryonic tissue to manifest with either male or female characteristics.¹⁵⁶ However, biomedical deviations can occur within this developmental pathway, which in turn gives rise to an alternative sex category, that is, “intersex”.

2 3 3 2 *Various categories of intersex*

Various intersex categories exist. Male affected instances of intersex include (1) mixed gonadal dysgenesis, (2) XY Gonadal dysgenesis, (3) disorders of androgen production and action and (4) other instances of XY DSD.¹⁵⁷ Female affected instances include (1) Congenital Adrenal Hyperplasia (“CAH”) and (2) other instances of XX DSD.¹⁵⁸ The most dominant intersex condition presented in persons presenting as chromosomally female, is CAH.¹⁵⁹ This is the most typical cause of ambiguous genitalia in a new-born.¹⁶⁰ Individuals with CAH have both a uterus and ovaries. However, an increase in adrenal androgen production (hormone levels) causes the female foetus to assume male characteristics. This variation can result in infants having a larger than normal clitoris which resembles a penis.¹⁶¹ Often a new-born infant displaying such characteristics will be mistaken for a male at birth because of the external gonadal presentation.¹⁶² However, upon further detailed examination, the “scrotum” will be empty of palpable gonads and this will generally raise queries regarding the infant’s sex.¹⁶³ Generally, sex alteration in these types of cases would be undertaken within the first 18 to 24 months of infancy; after this period, an alteration

¹⁵⁵ 227.

¹⁵⁶ Hughes ‘Biology of Fetal Sex Development’ in *The Legal Status of Intersex Persons: An Introduction* 44.

¹⁵⁷ 38-41.

¹⁵⁸ 32-37.

¹⁵⁹ Hermer (2002) *Annals Health L* 205.

¹⁶⁰ Hughes “Biology of Fetal Sex Development” in *The Legal Status of Intersex Persons: An Introduction* 44; AA Parsa & M I New “Steroid 21-hydroxylase deficiency in congenital adrenal hyperplasia” (2017)165 *Steroid Biochem Biol* 2 11.

¹⁶¹ Sloth-Nielsen (2018) *Stell LR* 50; Hermer (2002) 11 *Annals Health L* 205-206; Hughes “Biology of Fetal Sex Development” in *The Legal Status of Intersex Persons: An Introduction* 38.

¹⁶² Hughes “Biology of Fetal Sex Development” in *The Legal Status of Intersex Persons: An Introduction* 38.

¹⁶³ 38.

would only take place if the individual exhibits a strong association with male gender identity.¹⁶⁴

In persons presenting chromosomally male, the most frequent intersex condition is Complete Androgen Insensitivity Syndrome (“CAIS”).¹⁶⁵ CAIS is the result of a mutation in the androgen receptor (which responds to hormones such as testosterone) which results in the androgen protein being unable to bind androgen.¹⁶⁶ Although biologically male, many of them have “external genitalia and, after puberty, secondary sex characteristics of a female”.¹⁶⁷ These individuals will generally have internal testes but will lack a uterus and ovaries and have a “blind-ending” vagina.¹⁶⁸ Children presenting traits of CAIS are generally raised female; this is especially the case when a child’s external genitals are sexually ambiguous or even remotely female. These traits will only become apparent upon puberty when the adolescent “female” does not have a menstrual cycle.¹⁶⁹

A further instance that occurs in male individuals is mixed gonadal dysgenesis. This case is generally exhibited by an ambiguous appearance of the genitalia.¹⁷⁰ Generally, most individuals affected by this “condition” are typically developed males and may not know that they are affected.¹⁷¹ Another intersex condition affecting individuals exhibiting male chromosomes is 5 Alpha Reductase Deficiency (“5ARD”).¹⁷² 5ARD affects individuals that are genetically male. Although they have testes, their bodies

¹⁶⁴ 38 and 39: Most cases of intersex will not be life threatening and consequently unnecessary. However, a salt-losing form of CAH can be dangerous and medical intervention would be necessary. There are other instances in which medical intervention is required when a child is born intersex but these are limited to very extreme cases. HG Beh & M Diamond “David Reimer’s Legacy Limiting Parental Discretion” (2005) 12 *Cardozo J L & Gender* 5 12: Another instance is when an infant is born with anomalous genitalia as well as a severe pelvic defect, this is known as cloacal exstrophy. However, in this case, surgical reconstruction of the pelvic organs is medically necessary not sex alteration. Refer to section 2 3 in Chapter 1 in this regard, that intersex children are often subject to unnecessary medical intervention. Hughes ‘Biology of Fetal Sex Development’ in *The Legal Status of Intersex Persons: An Introduction* 39: It is submitted that the majority of persons with CAH who underwent surgery, stated that the long-term effects were traumatising as they experienced a lack of sexual pleasure and it impacted negatively on their ability to form an intimate relationship with a potential partner.

¹⁶⁵ Sloth-Nielsen (2018) *Stell LR* 50. Hughes “Biology of Fetal Sex Development” in *The Legal Status of Intersex Persons: An Introduction* 35: This ‘condition’ was previously named testicular feminisation syndrome.

¹⁶⁶ Hughes “Biology of Fetal Sex Development” in *The Legal Status of Intersex Persons* 35.

¹⁶⁷ Hermer (2002) 11 *Annals Health L* 206; Sloth-Nielsen (2018) *Stell LR* 50.

¹⁶⁸ Hermer (2002) 11 *Annals Health L* 206; Sloth-Nielsen (2018) *Stell LR* 50.

¹⁶⁹ 206.

¹⁷⁰ Hughes “Biology of Fetal Sex Development” in *The Legal Status of Intersex Persons* 32-33.

¹⁷¹ 32-33.

¹⁷² R Sloth-Nielsen “Gender normalisation surgery and the best interest of the child in South Africa” (2018) 29 *Stell LR* 48 50.

do not produce *dihydrotestosterone* (a hormone) which compromises the development of the external sex organs.¹⁷³ Persons with 5ARD can be born with a micro-penis or with genitalia that do not look either male or female.¹⁷⁴ Finally, XY Gonadal Dysgenesis refers to an abnormal formation of the testis in early foetal development during sex determination.¹⁷⁵ Many testis-determining genes are needed to develop the bipotential gonad as a testis.¹⁷⁶

Today intersex variations continue to be treated as physical “malformations” that require rectification.¹⁷⁷ Surgical intervention persists in being used as a tool to “explain away the intersex”.¹⁷⁸ Furthermore, it furnishes society with a “solution” to control the “abnormality” of sex variations.¹⁷⁹ Despite developing activism, the social and medical community continue to make it challenging for intersex persons to feel accepted. By using the correct terminology and exposing society to correct medical and legal terminology, greater levels of understanding will follow and the confusion surrounding intersex bodies lessened.

2 3 4 Terminology used for the surgical procedures that intersex persons undergo This surgery that is performed on intersex individuals has been given many names such as “gender reassignment” and “gender normalisation” surgery.¹⁸⁰ Generally “gender reassignment” and “gender normalisation” surgeries fall into the category of cosmetic surgery, because the surgery is entirely based on improving the appearance of an individual.¹⁸¹ “Cosmetic surgery” has long since been treated as a means to correct “deformities”. The rationale behind “cosmetic surgery” is to change an individual's appearance to satisfy the expectations of what society considers being

¹⁷³ MedlinePlus “5-alpha reductase deficiency” (2017) <<https://ghr.nlm.nih.gov/condition/5-alpha-reductase-deficiency>> (accessed 04-03-2020).

¹⁷⁴ MedlinePlus “5-alpha reductase deficiency” (2017) <<https://ghr.nlm.nih.gov/condition/5-alpha-reductase-deficiency>> *Genetics Home Reference* (accessed 04-03-2020).

¹⁷⁵ Hughes “Biology of Fetal Sex Development” in *The Legal Status of Intersex Persons* 33.

¹⁷⁶ 33.

¹⁷⁷ Carpenter (2018) *Bioethical Inquiry* 488.

¹⁷⁸ Dolgin (2017) *Sw L Rev* 63.

¹⁷⁹ 63.

¹⁸⁰ A Puluka “Parent versus State: protecting Intersex Children from Cosmetic Genital Surgery” (2015) *Michigan State Law Review* 2095 2098.

¹⁸¹ American Board of Cosmetic Surgery “Cosmetic Surgery vs. Plastic Surgery” <<https://www.americanboardcosmeticsurgery.org/patient-resources/cosmetic-surgery-vs-plastic-surgery/>> (accessed 10-03-2020).

“normal”.¹⁸² Without the existence of these “deformities”, operating on the individual would be illegal.¹⁸³ Historically, it was important for the surgeon to insist that the malady is not physical but is actually the psychological pain that results from the “defects”.¹⁸⁴ This is the same reasoning used to justify performing surgery on intersex infants. Most cases involving a child being born intersex will not be life-threatening nor detrimental to the child’s health, thus rendering surgery redundant and unnecessary.¹⁸⁵

Presently, there are three predominate names given to the surgery that are performed in relation to intersex infants, namely “gender reassignment surgery”, “gender normalisation surgery” and genital normalisation. All of these terms are problematic as they are inaccurate and contribute to the already existing stigma that surrounds intersex bodies. It is proposed that an appropriate term for the surgical procedure that intersex infants undergo is “sex alteration surgery”. This definition is more applicable as an intersex infant is having surgery that physically alters their sex. A surgeon will modify the ambiguous external and internal genitalia of the infant to reflect either “normal” male or female genitals. Furthermore, using “alteration” as another component of the definition will also be effective. “Alteration” means to change something, as an intersex infant’s genitals will be changed to correspond with what is regarded as “normal” sex organs.¹⁸⁶

Another term that is progressively being introduced to intersex rights discourse is “intersex genital mutilation”. According to the *Cambridge Dictionary*, mutilation refers to “the act of damaging something severally especially by violently removing a part.”¹⁸⁷ Arguably this term, although harsh in its formulation, is rather accurate when describing the surgical process that intersex infants are forced to undergo. An intersex child’s genitals will be cut, and parts will be removed in order to make their sex reflect either male or female.¹⁸⁸

¹⁸² Puluka (2015) *Michigan State Law Review* 2098.

¹⁸³ DO’Conner “A Choice to Which Adolescents Should Not Be Exposed: Cosmetic Surgery as Satire” (2012) 15 *J Health Care L & Pol’y* 157 157.

¹⁸⁴ O’Conner (2012) *J Health Care L & Pol’y* 158 166.

¹⁸⁵ Hughes ‘Biology of Fetal Sex Development’ in *The Legal Status of Intersex Persons: An Introduction* 38-39. Please also refer to footnote 121 of this chapter as well as of Chapter 1.

¹⁸⁶ Chapter 6 critically evaluates why these terms are inappropriate in detail.

¹⁸⁷ <http://dictionary.cambridge.org/dictionary/english/mutilation> (accessed 20-02-2021).

¹⁸⁸ Chapter 6 evaluates this definition.

2 4 Conclusion

History and language have had an impact on the intersex community. These observations need to be made to address the misapprehensions that been reinforced towards intersex persons throughout the decades. Modern human rights discourse has exposed the impact that incorrect terminology can have on a community. If society continues to use the incorrect terminology, it will contribute to the culture of stigma. The “problem” is not individuals having intersex characteristics, nor is it individuals having different gender identities that do not align with being “male” or “female”. The problem lies with how society and laws define these persons, based on what they consider to be “normal”.

“Transgenderism” and “intersex” do not have the same meaning. Neither does “sex” and “gender”. However, these terms have often been confused and as a result, the distinction between the various terms and their counterparts have become unclear. This misconception has proceeded to create uncertainty in the language surrounding intersex bodies. Using words that have a negative association support the idea that intersex bodies are abnormal and that they needed to be altered to be socially and legally accepted. The attempt to combat unnecessary surgeries on intersex infants starts with embracing the diversity of intersex bodies. Therefore, the medical, legal and social disciplines need to adopt the same terminology that would positively support intersex persons. This will also enable parents to feel less pressured when having to make a decision regarding their intersex infant. If medical practitioners use constructive terms and parents receive a positive response about their child being born intersex, it will lessen the likelihood of parents choosing surgery to “normalise” their children’s bodies.

The subsequent chapter will examine the content of parental responsibilities and rights. This chapter will investigate what a parent’s responsibility is in respect of medical decision-making for their child. Parents ordinarily face significant challenges and responsibilities when raising a child. This becomes even more difficult when raising a child that is different, as parents will have to be their child’s voice, as well as advocates of their child’s rights.

CHAPTER 3: THE CONTENT AND MEANING OF PARENTAL RESPONSIBILITIES AND RIGHTS

3 1 Introduction

3 1 1 Purpose and scope of the chapter

The previous chapter explored the importance that terminology and definitions play in creating an understanding and acceptance – for social and legal purposes – of persons who do not conform to the medical and social norms of male and female bodies. It was revealed that language can either have detrimental or beneficial effect, depending on how it is used. Therefore, by continuing to use language that is outdated, and derogatory, historically biased stigma will remain. The chapter explained that the law is the primary tool that is used to guide society, and if there is ambiguity or terminological errors in legal texts, this will do little to create certainty. Often the association attributed by language will dictate the level of acceptance and the proactive engagement of society with the issue in question. For instance, using the term “parental responsibility” as opposed to “parental power” illustrates a shift from a paternalist approach and endorses a child positive approach instead. Often legal development will begin with a change of attitude and terminology.

This chapter will consider both the theoretical and practical implications of the parent-child relationship. First, the historical development of the relationship will be explored to highlight positive changes that have taken place. The chapter will also analyse the meaning and implications that flow from the term “parental responsibilities and rights”, both in the domestic and international legal frameworks. Lastly, parental responsibilities and rights will be examined in the context of medical procedures, and in this regard, the scope and limitations of parental consent will be considered.

3 1 2 General remarks

The law recognises that the parent-child relationship is *sui generis*, as the degree of responsibility that is involved between the parties is unlike any other relationship in existence. The consensus surrounding the concept of parental responsibility is the

principle that parental power needs to be exercised for the child's exclusive benefit.¹ This would not only involve considering the child's best interests but also respecting and facilitating the individual child's progressive maturity and autonomy.² However, because of the initial unequal treatment of the relationship, the focus has been misplaced on parental authority and power, instead of promoting and protecting children and their rights.³ Although it would be the natural presumption that children do not need rights against their parents, as they should be able to trust that their parent is acting in their best interests, this is not realistic.⁴ Parents will often make decisions for their children based on their own personal customs and beliefs. Thus, often what a parent may believe to be an altruistic act, may actually be negating the child's right to an open future, because it is based on their parents' own biases.⁵

It is incorrect to say that the law's recognition of parental rights entitles parents to make decisions concerning all aspects of a child's self, especially of the child's body or to dictate decisions that belong to the child's future adult self.⁶ Yet this is the tendency, as the perception exists that the parent-child relationship affords parents a unique "power" over their children.⁷ To establish the extent to which medical decision-making falls within the ambit of parental responsibilities and rights and the extent to which the decisions should be taken by parents, a variety of limitations of parental consent will be considered. It will be argued that consent to sex alteration surgery falls outside the scope of parental authority because it has the risk of being significantly detrimental to a child's future self.

¹ J Ferrer-Riba "Parental responsibility in a European perspective" in JM Scherpe (ed) *European Family Law Volume III Family Law in a European Perspective* (2016) 284.

² Ferrer-Riba "Parental responsibility in a European perspective" in *European Family Law Volume III* 284.

³ E Erlings "Is Anything Left of Children's Rights: How Parental Responsibility Erodes Children's Rights under English Law" (2016) 24 *Intl J Child Rts* 624 626.

⁴ JE Coons, R H Mnookin & S D Sugarman "Puzzling over children's rights" (1991) 1 *BYULR* 307 317.

⁵ HG Ben & M Diamond "David Reimer's Legacy Limiting Parental Discretion" (2005) 12 *Cardozo Journal of Law & Gender* 5 5.

⁶ A Ouellette "Shaping Parental Authority over Children's Bodies" (2010) 85 *Ind LJ* 955 977.

⁷ Ouellette (2010) *Ind LJ* 955, 956 & 977.

3 2 Parental responsibilities and rights

3 2 1 The historical context of parental responsibilities and rights

It is well established that, owing to a child's age, inexperience and historical disempowerment, children are among the most vulnerable⁸ members of society.⁹ Historically, children were treated as the property of their parents and it is only in the past two decades that they have been recognised as independent right bearers.¹⁰ Children were considered to be extensions of their parents and therefore until they reached the age of majority, subject to their parents' authority. Initially, states were tentative to promote children's rights, as they did not want to intrude upon matters that were considered to fall within the purview of family privacy.¹¹ There was also the presumption that parents would, in any event, make decisions that were in their child's best interests¹² and therefore, there was no need for state intervention.¹³ However, this is not the case, as for some children home is not always a refuge.¹⁴ It became necessary for states to take a proactive role in protecting children's interests against potential rights abuses that can occur within the private family sphere.¹⁵ It is, however, a challenge for lawmakers to create legislation that recognises and respects the rights

⁸ SJ De Boer "Who is responsible for our kids – A look into the Parent/State Relationship in raising children" (2010) 7 *Regent J Int'l L* 375 380: the vulnerability of children extends beyond their physical capacity and includes their psychological capacity. Therefore, they are also in need of psychological protection.

⁹ E Sutherland "Child Law: Respecting the Rights of Children" in EC Reid & D Visser (eds) *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013) 81.

¹⁰ SN Hart "From property to Person Status Historical Perspective on Children's Rights" (1991) 46 *American Psychologist* 53. HH Jr Foster & DJ Freed "A Bill of Rights for Children" (1972) 6 *Fam L Q* 343 344: The philosophy of children's rights became prominent in the sixteenth and seventeenth centuries and favoured the approach of recognising children as independent human beings, who are entitled to their own fundamental rights and freedoms and not extensions of their parents. Foster & Freed "(1972) 6 *Fam L Q* 344: In the case of *In re Gault* 387 US 1 1967 ("*Gault*") & Foster & Freed 1972 *Fam L Q* 345-346: the essence of the *Gault* case was that a child's point of view must not be treated as incidental to the parents view. It determined that the *parens patriae* doctrine cannot be given blatant applicability. The case was compared to the famous cross-racial marriage case *Loving v Virginia* 388 U.S 1 (1967) in which it was determined that marriage is protected from unreasonable state regulation the argument was extended to say that this should include the parent-child relationship.

¹¹ Sutherland "Child Law: Respecting the Rights of Children" in *Private Law and Human Rights* 82.

¹² Chapter 4 of this thesis will provide an in-depth analysis of the 'best interests principle', as there are varying degrees of the principle throughout international law as well as various jurisdictions own domestic legislation.

¹³ Sutherland "Child Law: Respecting the Rights of Children" in *Private Law and Human Rights* 82.

¹⁴ It is estimated that as many as 275 million children worldwide are subject to domestic violence within the family home. Unicef "Behind Closed Doors the Impact of Domestic Violence on Children" (2006) <<https://www.unicef.org/media/files/BehindClosedDoors.pdf>> 1-15.

¹⁵ B de Villiers "The rights of children in international law: guidelines for South Africa" (1993) 3 *Stell LR* 289 290.

of both parties. Consequently, promoting parental rights and responsibilities but also advancing children's autonomy and interests have seen a slow process of development.

3 2 2 The origins of parental responsibilities and rights

Early legal history demonstrates the religious and cultural maltreatment to which children were subjected, as a result of their powerless position within the family.¹⁶ Family life has been significantly influenced by theological practices, as religious doctrines supported strict enforcement of parental authority.¹⁷ Roman law illustrated the concept of absolute parental authority through the doctrine of *patria potestas*.¹⁸ This doctrine dictated that the father, as the head of the family,¹⁹ had sovereignty over all that belonged to the immediate family group.²⁰ This doctrine gave the *paterfamilias* a proprietary, magisterial and arbitrary power over all his legitimate children.²¹ He became entitled to the right of ownership of his children's "body, name, sale, trade, education, religion and emancipation".²² The magisterial component included the right to sentence a child to death,²³ as well as the infliction of corporal punishment.²⁴

¹⁶ DM Richett & JR Hudson "The Socio-Legal History of Child Abuse and Neglect: An Analysis of the Policy of Children's Rights" (1979) *J Soc & Soc Welfare* 849 852.

¹⁷ Coons et al (1991) *BYULR* 328: According to Canon law children had the capacity to be able to make moral choices at the age of seven, this entitled a child to take communion and to confess. Therefore, children were given immense responsibility according to the practices of the time and one which was often influenced by their parents.

¹⁸ L Mills *Considering the best interest of the child when marketing food to children: An analysis of the South African regulatory framework* LLD thesis Stellenbosch University (2016) 43 and A McGillivray "Children's Rights, Paternal Power and Fiduciary Duty: From Roman law to the Supreme Court of Canada" (2011) 19 *Int'l J Child Rts* 21 22,25: Western history illustrates the incapacity of children, under the common law and Roman law children were grouped with mentally disabled persons.

¹⁹ He was as known as the *paterfamilias*.

²⁰ McGillivray (2011) *Int'l J Child Rts* 23; JM Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* LLD thesis University of South Africa (2009) 26.

²¹ McGillivray (2011) *Int'l J Child Rts* 23; Mills *Considering the best interest of the child* 43; Kruger *Judicial interference with parental authority* (2009) 18.

²² McGillivray (2011) *Int'l J Child Rts* 25. The status of a child under the *patria potestas doctrine* was similar to that of a slave. Kruger observes that the doctrine did not expire when a child reached majority but operated as long as the father lived unless the child has been emancipated: JM Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* LLD thesis University of South Africa (2009) 25.

²³ This was known as *ius vitae necisque*.

²⁴ McGillivray (2011) *Int'l J Child Rts* 25. Richett & Hudson comment that the approach in Rome was similar to the position in Greece as a child was also seen as the property of the father, who could decide whether the child lived or died. Furthermore, the traditional Greek practice of *Amphidromia* entitled a father to decide whether his infant child would be accepted into the family or whether they would be put to death. This echoed the Roman position regarding the *patria potestas doctrine* whereby a father could

Furthermore, the *paterfamilias* was also entitled to manage his household in the manner which he saw fit, without any interference from the Roman Empire, as the state was obliged to respect his authority as the head of the household.²⁵ This approach initially advanced the principle that children were extensions of their parents, demonstrating that a child was seen as an *object* over which a parent had control, not a *person*.²⁶

Patria potestas transcended legal status and became established in Roman culture, to the extent that it developed into a common societal norm.²⁷ Domestic discipline was considered to be the core component of the *patria potestas* doctrine and remained so throughout the classical period in Roman law.²⁸ This harsh approach intensified the ideology that corporal punishment should be used as the dominant method for child-rearing.²⁹

The *patria potestas* doctrine existed alongside the *parens patriae* doctrine, a doctrine that regulated the fiduciary duty placed on the state to care for those that were incapable of caring for themselves.³⁰ Originally this power was vested in the Emperor owing to his title of *pater patriae* – meaning father of the state – and extended aspects of capacity and guardianship to groups that were considered to be vulnerable.³¹ The state had limited power and would only intervene in instances where there was no other alternative available.³² The doctrine of *patria potestas*, and the regulation of custody, control and corporal punishment which operated within Roman-based canon law, eventually filtered into the English law.³³

Before the eighteenth century, English common law paid little attention to children's rights.³⁴ The English position of parental authority saw the father as the head of the

mutilate, abandon, sell or kill one of his children. These practices remained prominent in Western European society for a number of years. Richett & Hudson (1979) *J Soc & Soc Welfare* 852.

²⁵ Mills *Considering the best interest of the child* 44.

²⁶ D Archard *Children: rights and childhood* 2 ed (2004) 144.

²⁷ Richett & Hudson (1979) *J Soc & Soc Welfare* 852.

²⁸ JM Kruger *Judicial interference with parental authority: a comparative analysis of child protection measures* LLD thesis University of South Africa (2009) 23.

²⁹ Richett & Hudson (1979) *J Soc & Soc Welfare* 852-853.

³⁰ McGillivray (2011) *Int'l J Child Rts* 26.

³¹ 26; Mills *Considering the best interest of the child* 45: This included orphaned children, mentally disabled persons and orphans.

³² One can observe that in South Africa the origins of this rule have been translated into modern legal culture with the High Court acting as the upper guardian to all minors.

³³ McGillivray (2011) *Int'l J Child Rts* 25.

³⁴ SN Hart "From Property to Person Status" (1991) 46 *American Psychologist* 54.

family and his authority extended to every aspect of his child's life. Legally, children were in a subordinate position and were considered objects to be used by the father as he deemed appropriate.³⁵ They were often mistreated, abused, abandoned and ignored as a result of this unlimited parental power.³⁶ The method which a father used to obtain obedience from his children did not matter and he was legally allowed to physically beat them.³⁷ Roman-based canon law developed by the ecclesiastical courts was adopted by the English common law in terms of custody, control and corporal punishment.³⁸ Furthermore, parents had an additional duty under English law to provide maintenance for their children.³⁹ Despite this parental duty, there was an absence of legal mechanisms to protect children against abuse. This step introduced an indication of a more modernised approach in which the state could become involved in instances where it was blatant that the child was being mistreated by the parent.⁴⁰

In contrast, Roman-Dutch law adopted a Germanic approach in regulating parental authority, rather than that of the Roman legal approach, as *patria potestas* was not recognised in the Netherlands.⁴¹ In Roman-Dutch law, parents had both authority and responsibility from which various rights and duties flowed. Contrary to other jurisdictions' approaches, both the father and the mother had authority over the children, although a mother's parental authority was subject to that of the father.⁴²

³⁵ Richett *et al* (1979) *J Soc & Soc Welfare* 853.

³⁶ Hart (1991) *American Psychologist* 53.

³⁷ Richett *et al* (1979) *J Soc & Soc Welfare* 853.

³⁸ McGillivray (2011) *Int'l J Child Rts* 26.

³⁹ 855: Richett observed that the Elizabethan Poor Laws of 1601 recognised that parents had a two-fold responsibility towards their children's wellbeing: (i) a moral obligation and (ii) a legal obligation. This Act consequently allowed for the state to become involved in instances where the parent-child relationship was inadequate. LR Sidman "The Massachusetts Stubborn Child Law: Law and Order in the Home" (1972) 6 *Family Law Quarterly* 33 33-34: Sidman identifies a further instance of state intervention into private family life was the Massachusetts' Stubborn Child Law ("MSCL"). The MSCL stated that 'stubborn' children of whatever sex could be "imprisoned in a house of correction for not more than six months or by a fine of not more than two hundred dollars, or by both." In 1971 the Supreme Judicial Court of Massachusetts held that this state involvement was a valid exercise of state power into family life.

⁴⁰ Although there is a need for state regulation in instances where children are being taken advantage of and abused, caution is required with how much the state should become involved. Sidman (1972) *Fam LQ* 34: Sidman on page 34 states that the Stubborn Child Statute of the Commonwealth of Massachusetts of 1646 was considered to represent a legitimate exercise of state power and was not considered to intrude upon family life. There is a need to establish an equilibrium between state interference and state protection.

⁴¹ Kruger *Judicial interference with parental authority* (2009) 47.

⁴² 48.

Thus, both parents were responsible for various duties of care towards their children and this included medical care, education, and material needs such as food and shelter.⁴³ Unlike in Roman law, parental authority concluded upon the attainment of majority.⁴⁴ A further difference to the Roman law position was that parents were limited in their power of chastisement. Roman-Dutch parents were only allowed to inflict moderate chastisement.⁴⁵

It is clear that there is a difference between Roman, English and Roman-Dutch concepts of parental authority and power. English and Roman law took a far harsher approach towards children, with the emphasis being placed on the role and authority of the father. Roman-Dutch law, although mainly emphasising a child's material needs as opposed to psychological and emotional needs, focused on the obligations that parents had towards their children. This changed dramatically in the subsequent centuries with international bodies recognising the importance of physical, psychological and emotional needs being considered of equal importance.

3 2 3 The United Nations Convention on the Rights of the Child

Historically under international law, children have been defined according to their vulnerability and were afforded protection on the basis of their physical and psychological immaturity.⁴⁶ The first international instrument to provide for the protection of children, The Declaration of the Rights of the Child 1959,⁴⁷ did not provide for concepts such as "capacity" and "competency" in its children's rights discourse and as such parents were given an unfettered power as their children's exclusive decision makers.⁴⁸ This changed with the introduction of the United Nations Convention on the Rights of the Child ("CRC").⁴⁹

⁴³ Mills *Considering the best interest of the child* 46.

⁴⁴ Kruger *Judicial interference with parental authority* (2009) 48. Kruger explains further at 48 that majority in the sixteenth century was reached when a woman turned 20 and a man turned 25. The only exception was the right of obedience that was owed by a child to their parents.

⁴⁵ SN Hart "From Property to Person Status" (1991) 46 *American Psychologist* 53 and Mills *Considering the best interest of the child* 47.

⁴⁶ Varadan (2019) *International Journal of Children's Rights* 306.

⁴⁷ UN General Assembly, Declaration of the Rights of the Child, 20 November 1959, A/RES/1386(XIV), available at: <https://www.refworld.org/docid/3ae6b38e3.html> [accessed 4 May 2020].

⁴⁸ Varadan (2019) *International Journal of Children's Rights* 306.

⁴⁹ UN Committee on the Rights of the Child (UNCRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child 2003, CRC/GC/2003/5, available at: < <https://www.refworld.org/docid/4538834f11.html> > (accessed 14-03-2019).

The CRC is an international document that was initially introduced as a mechanism to address the inequality and suffering that was experienced by children during the Second World War.⁵⁰ All United Nations member states have ratified the CRC, apart from the USA,⁵¹ indicating a global commitment to ensure that children's best interests are recognised.⁵²

The CRC aims to balance two contrasting viewpoints: (a) that children are vulnerable and require additional special protection; but also that (b) children are simultaneously independent members of society and individuals with their own rights.⁵³ Therefore, the CRC developed a new status of the child based on the recognition that the child is a person and is a subject of rights.⁵⁴ It is a shift away from the traditional perspective that children are merely passive objects of control.⁵⁵

The CRC is based on four fundamental principles,⁵⁶ which are intended to guide the interpretation of the Convention and influence the implementation of the CRC in national legislation.⁵⁷ A crucial principle out of the four fundamental principles is the best interests of the child principle,⁵⁸ as it encompasses the very essence of the CRC and underlies all the other provisions contained therein.⁵⁹ This principle predates the

⁵⁰ S J Lee "A Child's Voice vs A Parent's Control: Resolving Tension Between the Convention on the Rights of the Child US Law" 117 (2017) *Columbia Law Review* 687 695.

⁵¹ Lee (2017) *Columbia Law Review* 687

⁵² Article 3(1) of the CRC.

⁵³ Lee (2017) *Columbia Law Review* 687.

⁵⁴ J Zermatten "The Best Interests of the Child Principle: Literal Analysis and Function" 18 (2010) *International Journal of Children's Rights* 483 483.

⁵⁵ Lee (2017) *Columbia Law Review* 687-688.

⁵⁶ These principles are: The principle of non-discrimination (Art 2), the child's right to life, survival and development (Art 6), the respect for the views of the child (Art 12) and the principle of the best interests of the child (Art 3).

⁵⁷ UN Children's Fund (UNICEF), *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The case of migrant children including unaccompanied children*, June 2012, available at: <https://www.refworld.org/docid/5135ae842.html> [accessed 8 April 2020] 11.

⁵⁸ Art 3. This principle will be discussed in detail in Chapter 4.

⁵⁹ UN Children's Fund (UNICEF), *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The case of migrant children including unaccompanied children*, June 2012, available at: <https://www.refworld.org/docid/5135ae842.html> [accessed 8 April 2020] 11.

CRC⁶⁰ and had already been incorporated into the domestic legislation of most member states.⁶¹

When one is attempting to give effect to the best interests of the child principle, certain parameters need to be considered.⁶² Children are independent legal subjects who need guidance in order to develop. In any decision affecting a child, the individual child and their opinions must be taken into account. They need to be taught to take responsibility for their decisions and therefore need to be able to participate in the decision-making process.

The child's right to participate has made the CRC unique in comparison to any other international document.⁶³ It presents a new concept for international law and a challenge for most countries⁶⁴ as the majority of states did not have legislation that actively engaged children in the decision-making process. The Committee on the Rights of the Child (the "Committee") identified Article 12 as another one of the four general principles: this means that it is one of the rights that is compulsory to consider when implementing any of the other rights in the CRC.⁶⁵ This right states that in any matter concerning the child, the child must be able to voice their views⁶⁶ and the weight

⁶⁰ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 8 April 2020] furthermore, it was already included in the 1959 Declaration of the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, United Nations Convention on the Rights of Persons with Disabilities and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

⁶¹ UN Children's Fund (UNICEF), *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The case of migrant children including unaccompanied children*, June 2012, available at: <https://www.refworld.org/docid/5135ae842.html> [accessed 8 April 2020] 11. The adoption of the best interests of the child principle into the CRC has been attributed to the reality that it has long been a central feature in family law of many countries national law. Subsequently, it has been incorporated into the African Charter on the Rights and Welfare of the Child 1990 and the EU Charter of Fundamental Rights: P Alston & B Gilmour-Walsh, *The Best Interests of the Child. Towards a Synthesis of Children's Rights and Cultural Values* (1996) 3.

⁶² The best interests of the child principle will be analysed in detail in chapter 4.

⁶³ Art 12 of the CRC & Lee (2017) *Columbia Law Review* 692. "Every Child's Right to be heard: A resource guide on the UN Committee on the Rights of the Child General Comment No. 12" 3: Participation is defined as the following:

"an ongoing process of children's expression and active involvement in decision-making at different levels in matters that concern them. It requires information-sharing and dialogue between children and adults based on mutual respect, and requires that full consideration of their views be given, taking into account the child's age and maturity".

⁶⁴ "Every Child's Right to be heard A resource guide on the UN Committee on the Rights of the Child General Comment No. 12" 1

⁶⁵ 3

⁶⁶ *Hokkanen v Finland* [1993] 19 EHRR 139 para 61 stated that when the court considers the child's best interests in a matter, the Court will place a lot of significance on the wishes expressed by the child.

which is attached to these views will be considered in light of the age and maturity of the child in question.⁶⁷ Evidence suggests that allowing child-participation has a widespread beneficial effect by not only contributing to the child's personal development but will also improve overall decision-making and the protection of children.⁶⁸

Parents do not always have sufficient knowledge of their children's future lives to be able to make an informed decision on what would be in the best interests of their child.⁶⁹ The child would be the only individual who would have the unique body of knowledge about their lives, and what is needed to satisfy their needs and concerns, but this comes only from their own direct experience.⁷⁰ Consequently, as the child is the only person with this insight, their perspective needs to be taken into consideration. By allowing children to participate in decisions that will affect them emotionally, physically and psychologically, they are empowered to take control of their own lives.⁷¹ State parties often forget that Article 12 does not impose an obligation on the child to participate, it provides a right. Therefore, not only is there a duty and responsibility on parents to support their child's participation but state parties also have an obligation to provide mechanisms to enable parents to engage with their children and ensure they are part of the decision-making process.⁷²

Article 5 of the CRC provides that "States Parties shall respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised". The use of 'evolving capacities of the child' illustrates a departure from the previous perceptions of children as mere objects that require protection, and instead supports children as independent right holders under international law.⁷³ The Committee defines Article 5 as an "enabling provision", as it draws attention to the notion that childhood is dynamic and not stagnant. Parents and

Therefore, Art 3 and 12 are often linked together as Art 3 can generally only be achieved if Art 12 is taken properly into account.

⁶⁷ Art 12 of the CRC.

⁶⁸ Every Child's Right to be heard: A resource guide on the UN Committee on the Rights of the Child General Comment No. 12" 5-7.

⁶⁹ 5.

⁷⁰ 5.

⁷¹ Lee (2017) *Columbia Law Review* 693.

⁷² Article 5 of the CRC.

⁷³ Varadan (2019) *International Journal of Children's Rights* 307.

state parties need to take cognisance of the obligation to guide children in a manner that promotes independent decision-making.⁷⁴ This obligation includes the parental responsibility of promoting their children's cognitive, physical, social and emotional development.⁷⁵ Mills and Thompson argue that it would appear at first sight that 'evolving capacities' as defined in Article 5 has no bearing on infants, as the law does not recognise that they have many capacities. However, this particular provision in the CRC is very important when considering intersex infants and the surgery they are subjected to.⁷⁶ The phrase "in a manner consistent with the evolving capacities of the child" places an obligation on parents and state parties to support and guide children, not dictate to them in the decision-making process. This interpretation has also been supported by the Committee:

"Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children's autonomy and self-expression and which have traditionally been justified by pointing to children's relative immaturity and their need for socialization".⁷⁷

This is a significant point, especially for the recognition of intersex infants' rights. According to the Committee's interpretation of Article 5, the 'evolving capacities' of intersex infants must be promoted in a positive manner, which will allow them to independently make decisions later in their life. Parents have an obligation to appropriately direct and guide their children, and this must be respected by all parties. Yet a crucial component of that direction and guidance is for parents to realise that their children are their own independent persons, that they have a right to be able to get to know their own bodies and it is the parents' responsibility to guide them with this appropriately.⁷⁸

⁷⁴ UN Committee on the Rights of the Child (CRC), *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, available at: <https://www.refworld.org/docid/460bc5a62.html> (accessed 3 April 2020) para 17.

⁷⁵ Varadan (2019) *International Journal of Children's Rights* 307 & UN Committee on the Rights of the Child (CRC), *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, available at: <https://www.refworld.org/docid/460bc5a62.html> (accessed 3 April 2020) para 17.

⁷⁶ Mills & Thompson (2020) *International Journal of Children's Rights* 557.

⁷⁷ UN Committee on the Rights of the Child (CRC), *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, available at: <https://www.refworld.org/docid/460bc5a62.html> (accessed 3 April 2020) para 17.

⁷⁸ Mills & Thompson (2020) *International Journal of Children's Rights* 547.

Furthermore, the Committee also encourages the holders of parental responsibilities and rights to appreciate the possibilities that lie within infants.⁷⁹

“In these ways, parents (and other caregivers) are normally the major conduit through which young children are able to realize their rights”.⁸⁰

Thus, it is clear from Article 5, as well as the Committee’s interpretation of the provision, that parents play an essential role in advancing their child’s capacities. The Committee has also supported a unique interpretation of “evolving capacities”, specifically concerning infants. They support the notion that possibilities lie within infants and parents are responsible for unveiling this potential by showing the child how to think and act for him, or herself.⁸¹ However, this needs to be done with the appropriate “direction and guidance”. Parents need to be educated and given the necessary tools with which to understand how to best guide their children. Some parents may be highly educated and psychologically competent to make decisions for their child, but this does not necessarily mean that they should do so.⁸² Sometimes parents are not the best-equipped persons to make decisions regarding their children’s interests, such as in instances involving medical decision-making where guidance by a medical practitioner would be necessary.⁸³ This is a responsibility that partly falls to the state, as it needs to implement policies that encourage parents to make decisions that will be in their children’s interests, rather than their own.⁸⁴

Furthermore, Article 18 of the CRC clearly stipulates that parents have responsibilities in terms of their children. These responsibilities include acting in their children’s best interests and assisting their children, by guiding them, to become independent persons. This further supports the best interests of the child principle, as it provides that state authorities cannot be the primary parties to be held responsible

⁷⁹ UN Committee on the Rights of the Child (CRC), *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, available at: <https://www.refworld.org/docid/460bc5a62.html> (accessed 3 April 2020); Mills & Thompson (2020) *International Journal of Children’s Rights* 558

⁸⁰ UN Committee on the Rights of the Child (CRC), *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, available at: <https://www.refworld.org/docid/460bc5a62.html> (accessed 3 April 2020) para 17.

⁸¹ Mills & Thompson (2020) *International Journal of Children’s Rights* 558.

⁸² 559.

⁸³ 559.

⁸⁴ 559.

for a child's upbringing but must have guidelines in place to support parental decision-making.⁸⁵ Article 18(2) recognises that state parties have the responsibility to create and implement mechanisms, such as legislation, to assist parents in making decisions that promote their children's best interests.⁸⁶ In addition, states are obliged to put a framework in place that will allow parents access to information and support when they need to make challenging decisions concerning their child's well-being.⁸⁷

Thus, it is submitted that the provisions that are discussed above should be read together when making a decision regarding a child, as the decision-making process is complex and involves many different components that need to be taken into account. The CRC seeks to address the previous inequalities experienced by children and compel states to take a proactive approach towards children's rights. In the CRC, member states have a threshold, guideline and standard to create domestic law which ensures a child's safety and protection.⁸⁸ Despite this document being a sound basis for the legal protection and promotion of children's rights, domestic law often fails to comply with the guidelines set out therein. This is particularly relevant in the context of intersex infants, as many of the rights afforded to children are taken away from them because of the actions of parents during the sex alteration decision-making process.

3 3 Comparing parental responsibilities and rights in various jurisdictions

3 3 1 Use of "responsibilities" in legislation

The majority of jurisdictions have adopted legislation⁸⁹ that incorporates parental responsibilities and rights into their national framework to prioritise the parents' duty of responsibility towards a child.⁹⁰ The rationale for this development was the need for jurisdictions to comply with the CRC, as all signatory states have an obligation to

⁸⁵ Ferrer-Riba Parental responsibility in a European perspective" in *European Family Law Volume III* 291.

⁸⁶ Article 18(2) of the CRC.

⁸⁷ Article 18(2).

⁸⁸ "General Comment No 14" (2013) 4. (Also available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 15 April 2020) para 6. See also chapter 4 at 1 2 and 2 1 below.

⁸⁹ Some examples include the Children Scotland Act 1995, The Children Act 1989 in England, The South African Children's Act 2005, the Family Law Act [SBC 2011] Ch 25 of British Columbia, the Children and Young People Act 2008 of the Australian Capital Territory and The Families Act 24 of 1989 in New Zealand.

⁹⁰ JM Kruger "State intervention and child protection measures in Scotland - Lessons for South Africa" 39 *CILSA* (2006) 504 506.

incorporate the CRC into their national legislation.⁹¹ In contrast to parental authority, the term “parental responsibility” is considered to provide a more appropriate description of the duties and obligations that belong to a parent in respect of their child.⁹² It is submitted that by including the term “responsibilities” in contrast to “*patria potestas*” or “authority”, states indicate their willingness to embrace a child-centric approach, as opposed to parent-centric. This reflects the CRC’s aim by favouring a social and legal paradigm shift of embracing a more child-centric approach. Many European countries, however, have failed to adopt the term into their national legislation while others have done so, as is the case of England, Wales, Portugal and Denmark.⁹³ Elsewhere, South Africa, British Columbia in Canada and the Australian Capital Territory have all incorporated “parental responsibilities and rights” into their legislation.⁹⁴

3 3 2 Germany

Germany still uses the concept of “custody” when referring to parental responsibilities and rights.⁹⁵ Custody refers to the rights and obligations in making decisions regarding an individual’s care, property, and residence this in the case of a child.⁹⁶ Germany, unlike most other jurisdictions, has not enshrined children’s rights into its Constitution, the *Grundgesetz*,⁹⁷ neither has it integrated the term “parental

⁹¹ UN Children's Fund (UNICEF), *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The case of migrant children including unaccompanied children*, June 2012, available at: <https://www.refworld.org/docid/5135ae842.html> [accessed 8 April 2020] 7.

⁹² Ferrer-Riba “Parental responsibility in a European perspective” in *European Family Law Volume III* 287.

⁹³ 286.

⁹⁴ See footnote 95 of this chapter and see also Mills *Considering the best interest of the child* 139. JM Scherpe *The present and future of European family law* (2016) 102: Other European countries have also started to adopt more child-centric language through modern legislation such as the Carolinian Civil Code and the Norwegian *Lov om barn og foreldre* which all positively reinforce the child as the center of the relationship.

⁹⁵ D Martiny “The changing concept of ‘family’ and challenges for family law in Germany” in JM Scherpe (ed) *European Family Law Volume II* 65 78.

⁹⁶ Martiny “The changing concept of ‘family’ and challenges for family law in Germany” in *European Family Law III* 78.

⁹⁷ National CRC Monitoring Mechanism “Children’s rights in the constitution” (2020) < <https://www.institut-fuer-menschenrechte.de/en/national-crc-monitoring-mechanism/topics/childrens-rights-in-the-constitution/> > (accessed 09-04-2020).

responsibilities” into legislation.⁹⁸ However, despite these deficiencies, the concept of “parental responsibilities and rights” have been given context within recent years.⁹⁹

Germany has adopted the approach endorsed by the CRC and followed the trend of most European states by promoting the rights of children and moving away from the concept of parental authority. Article 6(2) of the German Civil Code indicates this shift as the Code recognises that, although parents have a natural right to care and bring up their child, they also have a duty. The German Basic Law of 1953 overruled the previous provisions of the Civil Code, which stated that a father had “parental authority” over his children.¹⁰⁰ Consequently, parents do not have “parental powers/authority” but rather the obligation of “parental care”¹⁰¹ towards their children.¹⁰² Furthermore, German law recognises children as subjects of fundamental rights and gives them the ability to implore all the rights that are provided for in the *Grundgesetz*.¹⁰³

A significant change that has resulted from the development of the parent-child relationship is that violence is no longer a legal means to discipline children.¹⁰⁴ In 2000, the German Government introduced a prohibition of the previous “parental privilege” of corporal punishment.¹⁰⁵ The reason for this change was primarily based on safeguarding the child’s physical, emotional and psychological health. There is a fear that if parents are allowed to use violence to discipline their children, children will develop violent tendencies and this would increase the risk for domestic abuse within the home.¹⁰⁶ The German Government wanted to bring parental practices in line with the CRC’s aims for promoting the overall well-being of the child as well as ensuring that children are raised in a non-violent manner.¹⁰⁷ Thus, the primary rationale for

⁹⁸ N Dethloff “Parental Rights and Responsibilities in Germany” (2005) 39 *Fam L Q* 315 315.

⁹⁹ 315.

¹⁰⁰ N Dethloff National Report: Germany Parental Responsibilities 1.

¹⁰¹ Parental care includes both rights and responsibilities.

¹⁰² Dethloff (2005) *Fam L Q* 316.

¹⁰³ National CRC Monitoring Mechanism “Children’s rights in the constitution” (2020) <<https://www.institut-fuer-menschenrechte.de/en/national-crc-monitoring-mechanism/topics/childrens-rights-in-the-constitution/>> (accessed 09-04-2020).

¹⁰⁴ K-D Bussmann “Evaluating the Subtle Impact of a Ban on Corporal Punishment of Children in Germany” 13 (2004) *Child Abuse Review* 292 292.

¹⁰⁵ Bussmann (2004) *Child Abuse Review* 293: German Civil Code 1631 II BGB (Civil Law, 2000): “Children have a right to a non-violent upbringing. Corporal punishment, psychological injuries and other degrading measures are impermissible”.

¹⁰⁶ Bussmann (2004) *Child Abuse Review* 293.

¹⁰⁷ 293

introducing these legislative changes is to give parents guidelines on how to behave towards their children.¹⁰⁸

3 3 3 England and Wales

In 1988, the English Law Commission (“ELC”) commented that English statutes used incongruent terms such as “rights and authority”, “powers and duties” and “parental rights and duties” to describe the uniqueness of the parental-child relationship.¹⁰⁹ The ELC referred to the case *Gillick v West Norfolk and Wisbech Area Health Authority* (“*Gillick*”)¹¹⁰ for clarity on what parental obligations entail, and they concluded that using the word “right” for purposes of the parent-child relationship would create confusion as it was actually a natural duty that arose, not a right.¹¹¹ The ELC stated that using the term “parental rights” was thus inappropriate and replaced the term with “parental responsibility”.¹¹²

Section 3(1) of the Children Act 1989 describes parental responsibilities as “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”. Parental responsibility is required to be understood in accordance with the child’s welfare principle,¹¹³ therefore designating parents as the primary holders of their children’s welfare.¹¹⁴ Although courts have ruled that parents can override a competent child’s refusal of consent, Article 12 of the CRC continues to recognise the right of the child to participate in matters that affect them, with due regard attached to their own decision.¹¹⁵ It is problematic that often these types of disputes happen within the family and do not reach the court’s scrutiny. It can

¹⁰⁸ 294.

¹⁰⁹ The English Law Commission, in its Discussion Paper on Family Law Review of Child Law Guardianship and Custody (Law Commission No 172, 1988) 2.4

¹¹⁰ [1986] AC 112 & T Grimwood “Gillick and the consent of Minors: Contraceptive Advice and Treatment in New Zealand” (2009) 40 *VUWLR* 743 743: the case concerned a mother that took the Department of Health and Social Services in England to court because of their family planning regulations. The guidelines enabled a child under the age of 16 to receive contraceptives without a parent’s consent. The mother believed that in order to protect her child’s best interests she needs grant consent and have knowledge of the situation.

¹¹¹ [1988] 2 W L R 398.

¹¹² E Erlings “Is Anything Left of Children’s Rights? How Parental Responsibility Erodes Children’s Rights under English Law” (2016) 24 *The International Journal of Children’s Rights* 624 625.

¹¹³ Section 1 of the Children Act 1989. This principle is entrenched in Article 3 of the CRC and has been adopted into the domestic law of many states.

¹¹⁴ Erlings (2016) *The International Journal of Children’s Rights* 627.

¹¹⁵ G Douglas “The changing concept of ‘family’ and challenges for family law in England and Wales” In J M Scherpe (ed) *The present and future of European family law II* (2016) 2234.

be said that frequently the success of a children's exercise of their right to participate in matters affecting them, is dependent on the relationship that exists between the parents and the child.¹¹⁶

The English law differs from that of other jurisdictions in that, despite reforming and including the term "parental responsibilities" in its legislation, England still allows for corporal punishment. Section 58 of the Children Act 2004 limits the rights of parents to physically chastise their children, however, parents have not explicitly been prohibited from spanking their children.¹¹⁷ The only limitations in force in this respect are that parents are not allowed to use an instrument, such as a belt, to physically punish their child and neither can they leave a mark on their child.¹¹⁸

3 3 4 Australia

Family law in Australia is regulated by the Family Law Reform Act 1995 ("FLRA"), which is a revision of the previous Family Law Act 1975.¹¹⁹ The FLRA transformed family law in Australia through terminological reformation and redefining the parent-child relationship.¹²⁰ The amendments to Australian family law are based on the English Children's Act 1989.¹²¹ This is apparent especially in respect of section 60B of the FLRA, which redefines the parent-child relationship.¹²² These provisions include the term "parental responsibilities" instead of "parental rights"¹²³ and defines it as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to children."¹²⁴ This terminological change illustrates a new approach to children rights law, as it identifies children as subjects, not objects, with their own

¹¹⁶ Douglas "The changing concept of 'family' and challenges for family law in England and Wales" in Scherpe *European family law II* (2016) 34.

¹¹⁷ A Rowland, F Gerry & M Stanton "Physical punishment of children: time to end the defence of reasonable chastisement in the UK, USA and Australia (2016) 25 *International Journal of Children's Rights* 165 181.

¹¹⁸ Rowland etc (2016) *International Journal of Children's Rights* 181-182.

¹¹⁹ JJ Cumming, R D Mawdsley & E De Waal "The 'best Interests of the Child', Parents' Rights and Educational Decision-Making for Children: A comparative Analysis of Interpretations in the United States of America, South Africa and Australia" (2006) 11 *Australia & New Zealand Journal of Law and Education* 45 54.

¹²⁰ R Bailey-Harris "The Family Law Reform Act 1995 (CTH): A New Approach to the Parent/Child Relationship" (1996) 18 *Adel La Rev* 83 83.

¹²¹ Bailey-Harris (1996) *Adel La Rev* 83.

¹²² 84.

¹²³ Cumming et al (2006) *Australia & New Zealand Journal of Law and Education* 54.

¹²⁴ Section 61B of the FLRA.

rights, which parents have an obligation to recognise and respect.¹²⁵ Australian legislation also stipulates that parental responsibilities include responsibilities for the children's long-term development and well-being, as well as their immediate daily care.¹²⁶

Furthermore, the FLRA also stipulates when parents are prohibited from giving their consent in certain instances and when the state is required to become involved in child-sensitive matters.¹²⁷ There are certain instances in which parents will not be able to provide consent because of the nature of the procedure, the Family Court of Australian or a Territory or State Supreme Court will be the only bodies that can provide the necessary consent.¹²⁸ This common law power that enables a court to make an order that it considers to be for the care, welfare or protection of a child, is known as the *parens patriae* or the "welfare principle".¹²⁹ To assist in matters where the medical procedures would be considered to be of a sensitive nature, the Family Court established guidelines¹³⁰ that specifically regulate sterilisation and "medical treatments which may not in themselves be grave and irreversible but may be of significant risk, ethically sensitive or disputed".¹³¹

Australian legislation has generally been proactive towards the protection of children and their rights, more so than other jurisdictions. However, one of the areas that have not been progressive is the regulation of bodily chastisement. Throughout Australia, it is lawful for parents to use corporal punishment on their children, based on the "reasonable chastisement" defence.¹³² The various territories in Australia all have separate pieces of legislation that further elaborate or inform on the common law right of "reasonable chastisement".¹³³ In New South Wales it will be considered

¹²⁵ Bailey-Harris (1996) *Adel La Rev* 84.

¹²⁶ 88. Bailey-Harris comments that this is clear from ss 64B(6), 65(G)(1)(a)(ii) and 65(P).

¹²⁷ Please refer to chapter 5 discussion on medical decision making limitations in Australia.

¹²⁸ D Bryant "It's My Body, isn't it? Children, Medical Treatment and Human Rights" (2009) 35 *Monash University Law Review* 193 198.

¹²⁹ 198.

¹³⁰ The most important consideration is what would be in the child's best interests but the court would also take the risk to child, the invasiveness of the procedure and whether the procedure would be permanent.

¹³¹ Bryant (2009) *Monash University Law Review* 198.

¹³² A Rowland, F Gerry & M Stanton "Physical punishment of children" time to end the defence of reasonable chastisement in the UK USA and Australia" 25 *International Journal of Children's Rights* (2017) 165 184.

¹³³ Global Initiative to End All Corporal Punishment of Children *Corporal punishment of Children in Australia* (2020) <<http://www.endcorporalpunishment.org/wp-content/uploads/country-reports/Australia.pdf>> 2. For further information on the various legislative regulations please consult the

unreasonable if a parent applies force to a child's neck or head.¹³⁴ Furthermore, a parent is also prohibited from applying force to any part of the body that will cause or threaten to cause harm to the child that will last for more than a brief period: In these cases, the defence of "lawful correction" will not apply.¹³⁵

3 3 5 Malta

Maltese legislation continues to support the Roman law definition of "parental authority", rather than the modern notion of "parental responsibilities".¹³⁶ There has been academic criticism that amendments need to be made to the existing legislation in Malta and that the idea of "parental power" should be replaced with "parental responsibility".¹³⁷ It has also been suggested that emphasis should be placed on the obligations that parents have to provide namely care and security for their children, rather than parents controlling their children.¹³⁸ It is interesting that, despite the slow development of parental responsibilities and rights in Maltese law, they are one of the leading countries in promoting intersex children's rights. The Gender Identity Gender Expression and Sex Characteristics Act ("GIGESC") was promulgated specifically for protecting intersex infants from unnecessary and invasive surgeries.¹³⁹

3 3 6 Colombia

In the past two decades, Colombia has been one of the most proactive countries in developing a child-centred legislative approach, despite a rather conservative history. Initially, family law in Colombia, much like many other Latin American countries, had a patriarchal approach to the parent-child relationship.¹⁴⁰ The legislation used to protect children in Colombia was the Code of Minors 1989 but under this Code,

following "Northern Territory; the Criminal Code Act (s27), Queensland; the Criminal Code Act 1899 (s280), South Australia; the Criminal Law Consolidation Act 1935 (s20), Tasmania; the Criminal Code Act 1924 (s50), Western Australia; the Criminal Code 1913 (s257) and in Victoria; the common law rule".

¹³⁴ Rowland et al *International Journal of Children's Rights* (2017) 184.

¹³⁵ 184.

¹³⁶ R Farrugia "It's All Happening in Family Law in Malta" *Int'l SURV Fam L* (2001) 285 288.

¹³⁷ Farrugia *Int'l SURV Fam L* (2001) 288.

¹³⁸ 228.

¹³⁹ Section 14 of the GIGESC. This Act and the development that has taken place in Malta concerning intersex persons will be discussed in more detail in Chapter 5.

¹⁴⁰ M Herrera & F Lathrop "Parental Responsibility: A Comparative Study of Latin American Legislation" (2016) 30 *Int'l J L Pol & Fam* 274 274.

children were not considered to be rights bearers.¹⁴¹ The Code of Minors was regarded to be insufficient and was replaced in its entirety when the Colombian government promulgated the *Código de la Infancia y la Adolescencia*, the Child and Adolescent Code 2006 (“CAC”).¹⁴² The CAC endorsed an approach of comprehensive protection for children.¹⁴³ “Comprehensive protection” is described in the Code as recognising children as independent rights bearers, as well as guaranteeing and protecting the rights possessed by children.¹⁴⁴

Included in the CAC’s provisions is the regulation of the *responsabilidad parenta* (“parental responsibilities”). *Responsabilidad parenta* is a set of duties that parents have towards their children which include promoting the best interests of their children, encourage autonomous decision-making and allowing their children to participate in decisions that will affect them directly.¹⁴⁵

Despite an initial lack of proactive engagement in child-orientated legislation, Colombia has redefined the parent-child relationship with a child-centred approach. In spite of the policy reform, Colombian legislation continues to legalise corporal punishment as a form of parental power. Article 18 of the CAC states that children are to be protected against any form of corporal punishment but this provision is in conflict with Article 262 of the Civil Code 1883 which allows parents to discipline their children.¹⁴⁶ Colombia is currently taking measures to reform its legislative position on corporal punishment. In 2019, the *Alianza Nacional contra la Violencia hacia las* was

¹⁴¹ G Friedemann-Sánchez & M Grieve “General Background on Colombian Laws of Violence against Women, Orders of Protection, and Shelters” *Hubert Humphrey School of Public Affairs* <<https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/FriedemannSanchezGrieve.pdf>> 2.

¹⁴² G Friedemann-Sánchez & M Grieve “General Background on Colombian Laws of Violence against Women, Orders of Protection, and Shelters” *Hubert Humphrey School of Public Affairs* <<https://www.ohchr.org/Documents/Issues/Women/SR/Shelters/FriedemannSanchezGrieve.pdf>> 2

¹⁴³ Unicef Global Affairs *Canada Building a comprehensive child protection system in Colombia: the architecture, costs and gaps* (2015) 14.

¹⁴⁴ Unicef Global Affairs *Canada Building a comprehensive child protection system in Colombia: the architecture, costs and gaps* (2015) 14.

¹⁴⁵ Herrera & Lathrop (2016) *Int'l J L Pol & Fam* 278. In order to comply with their obligation to protect children’s rights, the State introduced a further mechanism to ensure parents are exercising their parental responsibilities appropriately. The National Family Protection Register (“NFRP”) lists the names and personal records of individuals who have, without just cause, failed to provide support to their children. This information pertaining to NFRP is regulated by the courts and local magistrates: United Nations Fund for Population Activities “Parental and Family Responsibilities” (1996-1997) 23 *Ann Rev Population* 67 67. One can clearly see the influence of the CRC in Colombian legislation.

¹⁴⁶ Global Initiative to End All Corporal Punishment of Children *Corporal punishment of Children in Colombia* (2020) < <https://endcorporalpunishment.org/reports-on-every-state-and-territory/colombia/>> 2.

created by the government and included a commitment to ensure the prohibition of corporal punishment.¹⁴⁷

3 3 7 South Africa

As discussed above, the change from “parental power” to “parental responsibility” also introduced a new dimension to South African family law culture.¹⁴⁸ This progress, although piecemeal over the years, has developed to create a legal system that is more child-centric instead of parent-centric. The South African Law Reform Commission (“SALRC”) in its review of the Child Care Act 74 of 1983, recognised that the common law notion of “parental power” was inappropriate and should be replaced with the concept of “parental responsibility”.¹⁴⁹ The SALRC also recommended that the components of parental responsibilities and rights should be reformed to promote the new child-orientated legislative approach.¹⁵⁰ Consequently, the Child Care Act was considered to be unsuitable for the new democratic South Africa and was replaced with the Children’s Act.¹⁵¹

The Children’s Act provides for four aspects as part of “parental responsibilities and rights”.¹⁵² Section 18 of the Children’s Act lists that parental responsibilities and rights include care, contact, guardianship and maintenance. The most important responsibility for purposes of this discussion is “care”, which closely relates to what was previously defined as “custody”.¹⁵³ While “custody” denotes an authority that

¹⁴⁷ This was set out in the National Development Plan 2018-2022. Global Initiative to End All Corporal Punishment of Children *Corporal punishment of Children in Colombia* (2020) <<https://endcorporalpunishment.org/reports-on-every-state-and-territory/colombia/>> 2.

¹⁴⁸ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* (“*Freedom of Religion*”) 2019 ZACC 34 para 12.

¹⁴⁹ The South African Law Reform Commission, in its Discussion Paper on the *Review of the Child Care Act* (Project 110, 2002) 7.3.

¹⁵⁰ The South African Law Reform Commission, in its Discussion Paper on the *Review of the Child Care Act* (Project 110, 2002) 7.3: the SALRC proposed that the term ‘contact’ replace ‘access’ and the term ‘care’ replace ‘custody’. These recommendations were adopted by the legislature and included in the Children Act 38 of 2005.

¹⁵¹ This will be discussed in more detail in Chapter 4 regarding the best interests of the child.

¹⁵² See s 1 of the Act.

¹⁵³ Care is defined as follows in section 1 of the Children’s Act:

- “(a) within available means, providing the child with –
 - (i) a suitable place to live;
 - (ii) living conditions that are conducive to the child’s health, well-being and development; and
 - (iii) the necessary financial support;
- (b) safeguarding and promoting the well-being of the child;
- (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards;

parents have over their children, “care” is more child-orientated as it emphasises the responsibility parents have towards their children.¹⁵⁴

In the case of *M v Minister of the Police*¹⁵⁵ the court explained that a parent’s duty of care is to ensure a child is equipped with the appropriate skills to be able to navigate life’s challenges.¹⁵⁶ This responsibility includes encouraging a child to develop according to their own pace and in light of their own challenges. Judge Sachs in *S v M (Centre for Child Law as Amicus Curiae)*¹⁵⁷ further emphasised the responsibility of parents to guide their children, which involves teaching their children how to confront difficult decisions and setbacks.¹⁵⁸ A parent is responsible for each aspect of their growing child’s life, therefore a parent needs to consider if their actions will affect that growing and developing child in a manner that will promote their interests and capacities. In this respect, the case of corporal punishment once again can be used as an example.

Originally, moderate and reasonable bodily chastisement is included in the scope of parental responsibilities and rights. However, the Constitutional Court in 2019, in the decision of *Freedom of Religion South Africa v Minister of Justice and Constitutional Development (“Freedom of Religion”)*¹⁵⁹ declared that the common law¹⁶⁰ defence of moderate and reasonable corporal punishment against children

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- (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of, the child’s rights set out in the Bill of Rights and the principles set out in Chapter 2 of this Act;
 - (e) guiding, directing and securing the child’s education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child’s age, maturity and stage of development;
 - (f) guiding, advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child’s age, maturity and stage of development;
 - (g) guiding the behaviour of the child in a humane manner;
 - (h) maintaining a sound relationship with the child;
 - (i) accommodating any special needs that the child may have; and
 - (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.”

¹⁵⁴ C Feldhaus & C van den Heever “The Sexual Orientation of a Parent as a Factor When Considering Care” (2013) 16 *PELJ* 292 302 & Thompson (2018) 15.

¹⁵⁵ 2013 5 SA 622 GNP.

¹⁵⁶ Para 22; Thompson (2018) 17.

¹⁵⁷ 2008 3 SA 232 (CC).

¹⁵⁸ Para 34.

¹⁵⁹ 2019 ZACC 34

¹⁶⁰ See *YG v The State* [2017] ZAGPJHC 290 where at para 33 the Court explained that it was a common law rule parents decided the method and extent of force that was used to discipline the child (as long as it was not excessive). Courts had upheld this rule for decades as they were of the opinion that this was a parental discretion and part of private family life, and consequently interference would be unjustified.

without any legal consequences to be unconstitutional.¹⁶¹ The court referred to the fact that, historically, it was viewed as a socially important attribute that parents had independent authority in raising their children,¹⁶² as discussed above. The question regarding the unconstitutionality of the defence was additionally affected by a parent's right to express their religious and cultural practices.¹⁶³

The court further recognised that parents have an obligation to guide their children and this is often done through disciplinary measures. The intention of the court is not to charge parents with a crime but rather to guide them to use more positive ways to discipline their children.¹⁶⁴ This is further substantiated by the best interests principle in that a child's best interests must always be considered paramount in all matters affecting them.¹⁶⁵ Furthermore, the Children's Act provides a vast range of protective measures for children¹⁶⁶ which aims to prevent non-violent parenting, especially in light of the high levels of child abuse that takes place throughout South African society.¹⁶⁷ Research has found that even minimal forms of physical punishment can have negative effects on children, resulting in a child adopting violent tendencies or aggression.¹⁶⁸ Parents' actions and attitudes are a foundation for their children's development. It was found that, although one can argue that verbally reprimanding children could be just as traumatising and harmful,¹⁶⁹ physical damage leaves permanent scars, and coupled with the psychological scars, may negatively impact the child for the rest of their life. These findings, it will be argued below, are also important considerations when during the sex alteration decision-making process.

¹⁶¹ 2019 ZACC 34 para 3 & 76.

¹⁶² Para 8.

¹⁶³ Para 16.

¹⁶⁴ 2019 ZACC 34 para 68 & Sonke Gender Justice "Victory for child rights and violence prevention in South Africa as defence of reasonable chastisement ruled out of line with Constitution" <<https://genderjustice.org.za/news-item/victory-child-rights-violence-prevention-sa-defence-reasonable-chastisement-ruled-line-constitution/>> (accessed 23-01-2020).

¹⁶⁵ Para 43: Historically disciplinary chastisement has been used as a scapegoat for parents to escape assault or battery charges.

¹⁶⁶ 2019 ZACC 34 para 12.

¹⁶⁷ *Sonke Gender Justice* "Victory for child rights and violence prevention in South Africa as defence of reasonable chastisement ruled out of line with Constitution" <<https://genderjustice.org.za/news-item/victory-child-rights-violence-prevention-sa-defence-reasonable-chastisement-ruled-line-constitution/>>(accessed 23-01-2020).

¹⁶⁸ Staff Writer "Landmark moment for children's rights in South Africa" (28-12-2018) *Mail&Guardian* <<https://mg.co.za/article/2018-11-00-landmark-moment-for-childrens-rights-in-south-africa/>> (23-01-2020)

¹⁶⁹ 2019 ZACC 34 para 33.

3 4 Parental responsibilities and rights involved during medical decision-making

3 4 1 General approach/comments

Because of infants' lack of capacity, it is considered logical that parents should make all medical decisions on behalf of their infants.¹⁷⁰ When a child is subject to surgery during early infancy, the child cannot have a say in the matter and will often only realise in adulthood or early adolescence that a particular type of surgery has been performed on them.¹⁷¹ Early surgical intervention for infants is not necessarily negative. The majority of surgeries will be necessary, such as in the case of a gastrointestinal congenital anomaly or congenital heart defects.¹⁷² However, there are instances where a parent will make a decision based on their own personal preferences,¹⁷³ and surgical intervention is not necessary, such as cosmetic surgery on intersex infants.¹⁷⁴ These invasive and unnecessary surgeries are problematic. Elliston assumes that by granting consent to a surgical procedure(s), the interests of the child are being safeguarded and parents are not making the decision based on society's pressures.¹⁷⁵ However, it is submitted that this is not always the case: parents can often be influenced by their own upbringing and personal biases when making a decision(s) for their child.¹⁷⁶ Although parents may believe that they are

¹⁷⁰ See also 2.3 of this Chapter regarding t Article 12 & 5. The obligation on parents and member states to promote a child's right to participate as set out in Art 12 of the CRC. Although a child may not have the capacity to consent at their current age, it does not mean that they will never have the capacity to consent. Therefore, in cases where a medical procedure is of a deeply personal nature it is advisable to delay it until such a time that the child is in the position to be able to make the decision themselves. The term 'evolving capacity' in of Art 5 of the CRC further supports this proposal. As it indicates that 'evolving capacities' need to be viewed positively, and authoritative bodies should not dictate to child but guide the child.

¹⁷¹ F Garland & M Travis "Legislating intersex equality: building the resilience of intersex people through law" (2018) 38 *Legal Studies* 587 595.

¹⁷² L Hinton, L Locock, A-M Long & M Knight "What can make things better for parents when babies need abdominal surgery in their first year of life? A Qualitative interview study in the UK" (2018) 8 *BMJ Open* < <https://bmjopen.bmj.com/content/bmjopen/8/6/e020921.full.pdf>> 1: This anomaly can include: exomphalos, gastrochisis or Hirschprung's disease.

¹⁷³ These preferences can include cultural, religious and social. Please see the discussion in Chapter 4 under the heading of 'equality'.

¹⁷⁴ Garland and Travis submit that cosmetic genital surgeries on children have no real medical nor social benefit and actually contribute to long-term psychological and physical health problems. Garland & Travis (2018) *Legal Studies* 594.

¹⁷⁵ Elliston (2007) 53.

¹⁷⁶ Jehovah Witnesses parents for instance will often refuse the transfer of blood for their children even in cases where their children will not otherwise survive. This will be discussed in more detail section 4 2 1 of this chapter.

acting in their child's best interests, they could be depriving their child of their future self's autonomous decision-making. It is essential that when parents make a decision that they think will benefit their child, they need to take into consideration the possible long-term effects on all aspects of the child's well-being.

An established principle of medical practice is that an individual should not be subjected to medical intervention without giving voluntary and informed consent.¹⁷⁷ "Consent" is defined as the "[v]oluntary and continuing permission of a patient to receive a particular medical treatment, based on adequate knowledge of the purpose, nature, likely effects and risks of that treatment ...[a]nd any alternatives to it".¹⁷⁸ The United Nations Special Rapporteur on Health expressed that in order to protect human dignity and autonomy, informed consent in the context of medical intervention goes further than mere acknowledgement: It has to be voluntary, and appropriately informed.¹⁷⁹ The common law position in South Africa stipulates that persons who have the requisite decision-making capacity are legally allowed to refuse any life-sustaining medical treatment or surgical procedure.¹⁸⁰ The case of *Castell v De*

¹⁷⁷ P Dunne "Towards Trans and Intersex Equality: Conflict or Complementary?" in J M Scherpe, A Dutta & T Helms (eds) *The Legal Status of Intersex Persons* (2018) 217 224. In New Zealand the law regulating medical procedures where there is no consent is very strict. Medical practitioners are prohibited from treating any individual without their informed consent unless it is an emergency or in unique circumstances. If they do, they can be charged with common law battery or be held liable for negligence. Furthermore, there is no statutory regulation on the consent or withholding of consent in the case of minors: T Grimwood "Gillick and the consent of minors: contraceptive advice and treatment in New Zealand" (2009) 40 *VUWLR* 743 745. The quintessence of informed consent is that there will be a complete disclosure of all the benefits, risks and alternatives of the proposed procedure and how it will impact upon their health: United Nations General Assembly Right of everyone to the enjoyment of the highest attainable standard of physical and mental health A/64/272, para 15.

¹⁷⁸ R S Harper *Medical Treatment and the Law: The Protection of Adults and Minors in the Family Division* (1999) 81. The South African Sterilisation Act 44 of 1998 describes consent as the following:

"For the purposes of this Act, "consent" means consent given freely and voluntarily without any inducement and may only be given if the person giving it has—

- (a) been given a clear explanation and adequate description of the—
 - (i) proposed plan of the procedure; and
 - (ii) consequences, risks and the reversible or irreversible nature of the sterilisation procedure;
- (b) been given advice that the consent may be withdrawn any time before the treatment; and
- (c) signed the prescribed consent form."

¹⁷⁹ United Nations General Assembly Right of everyone to the enjoyment of the highest attainable standard of physical and mental health A/64/272 para 13 and 26; ISSA Submission to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020] 12.

¹⁸⁰ L Jordaan "The legal validity of an advance refusal of medical treatment in South African law (part 1) (2011) *De Jure* 32 35.

*Greeff*¹⁸¹ confirmed that this right originates from a person's essential right to self-determination, which also includes an individual's right to bodily integrity.¹⁸²

When determining the capacity of a child to consent to medical procedures, the English law decision of *Gillick*¹⁸³ has become the point of departure. The approach established in this case, known as "*Gillick* competence", has been adopted in South African law¹⁸⁴ and has formed the foundation for many other common law jurisdictions' approaches to medical decision-making for children.¹⁸⁵ It was established in *Gillick* that a child that is under the age of 16, is capable of giving consent to their own medical treatment, on the condition that they are capable of understanding the consequences of such treatment, thus if they were "*Gillick* competent".¹⁸⁶ Generally in South Africa, a parent has to act as a proxy for their child if they are under the age of 12 in matters concerning medical decision-making. Children below the age of 12 are usually considered to lack the necessary capacity to understand the significance and consequences of the decision they are making.¹⁸⁷ This incapacity is not permanent but temporary because as children are guided and they mature, their decision-making capacity develops as well as their ability to reason. Although an infant will not have the requisite knowledge to be able to understand the nature and consequences of a decision in the present, in the future they will be able to understand. It is therefore critical for adult decision makers to consider the future decision-making capacity of the child when determining whether such a procedure is in their child's best interests.

In *Gillick* the court supported this notion by disregarding the ideology that parental authority was necessary unless it concerned a child's best interests.¹⁸⁸ Lord Scarman, who wrote for the majority judgment for the *Gillick* decision, commented that "parental rights are derived from parental duty and exist only so long as they are needed for the

¹⁸¹ 1994 4 SA 408 C para 421C: Ackerman J stated in the case:

"It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment."

¹⁸² Jordaan (2011) *De Jure* 35.

¹⁸³ [1986] AC 112.

¹⁸⁴ Section 129 of the Children's Act confirms this approach.

¹⁸⁵ T Grimwood "*Gillick* and the consent of Minors: Contraceptive Advice and Treatment in New Zealand" (2009) 40 *VUWLR* 744.

¹⁸⁶ M Stauch, K Wheat and J Tingle *Text, Cases and Materials on Medical Law* 3rd ed (2004) 160.

¹⁸⁷ Section 129 of the South African Children's Act.

¹⁸⁸ S Gilmore & L Glennon *Hayes and Williams Family Law* 6th ed (2016) 420.

protection of the person and property of the child”.¹⁸⁹ This statement supports the approach that a parent’s interest in their child’s development does not amount to a right; rather it is a responsibility that needs to be respected. However, it is submitted that it is problematic that many of the jurisdictions that have adopted *Gillick* competence as their foundational standard, have not in fact implemented it fully,¹⁹⁰ especially when considering the impact that medically invasive surgeries may have upon infants’ later adult selves.¹⁹¹

The wide discretion afforded to parents to make medical decisions for their child based on social or aesthetic reasons can be equated to the decision to enrol their child in a specific school or obligate them to attend church.¹⁹² This is because the general position in law is that parents are entitled to make decisions that they believe will benefit their children.¹⁹³ The rationale for this discretion is based on the principle of family autonomy: Parents are given an almost unfettered discretion over medical treatment decisions.¹⁹⁴ In medical practice, the decisions of parents to change their children’s bodies through non-therapeutic surgical intervention is a matter of personal parental choice.¹⁹⁵ A parent acquires the responsibility to consent on their infant’s behalf, in their authorised capacity as a legal guardian. However, while parents are placed in this privileged position, certain parameters need to be established to ensure that the decisions that they are making are in their child’s best interests.

3 4 2 Limitations of parental consent in medical procedures

There are certain instances in which a parent’s ability to give consent for particular medical procedures will be limited. These instances include cases where a child will

¹⁸⁹ *Gillick v West Norfolk and Wisbech Area Health Authority*, 1986 1 AC (HL) 112, p. 184B

¹⁹⁰ T Grimwood “Gillick and the consent of Minors: Contraceptive Advice and Treatment in New Zealand” (2009) 40 *VUWLR* 746.

¹⁹¹ Elliston (2007) 231: Lord Donaldson in the *Re W (a minor) (medical treatment)* [1992] 4 All ER 627, CA argued that any child would be *Gillick* competent to consent to blood donation, however would unlikely for any non-therapeutic procedure (such as organ donation). What remains a point of content for *Gillick* competence is the level of understanding required for a child to be considered competent. The harsher the consequences of the procedure and the fewer the benefits, the less likely a child is deemed to understand. Whereas if the procedure was minimally invasive and would benefit the child in some way, they would be considered ‘competent’ for purposes of *Gillick* competence. This illustrates why merely weighing the gravity of the consequence with the degree of competence is a flawed method.

¹⁹² A Ouellette “Shaping Parental Authority over Children’s Bodies” (2010) 85 *Ind LJ* 955-967.

¹⁹³ Ouellette (2010) *Ind LJ* 965-967.

¹⁹⁴ 969.

¹⁹⁵ 955.

be disadvantaged if they did not receive the required treatment or it is determined that the proposed treatment will not be in their best interests. In these cases, the court will often intervene on the child's behalf but only if there is a third party who believes that the child's parents are not acting in their best interests.

The decision in the *Secretary, Department of Health and Community Services v JWB and SMB* (“*Marion*”) case provided clarity in Australian law regarding the limitations of parental responsibilities and rights in respect of a parent's ability to consent to medical procedures.¹⁹⁶ The various judgments addressed three main issues namely, the degree to which parents could consent to medical treatment on behalf of their child; the authority of the court to authorise medical treatment for a child; and the child's capacity to consent to their own medical treatment.¹⁹⁷ The primary concern in the *Marion* case was the parents' ability to consent to the sterilisation in the circumstances, as it was not needed to save the child's life or prevent serious harm.¹⁹⁸ Ultimately the court established that the test to be applied is one has to distinguish between therapeutic¹⁹⁹ and non-therapeutic²⁰⁰ sterilisation. The court said in cases concerning non-therapeutic sterilisation, parents would never be allowed to consent on behalf of their child.²⁰¹

¹⁹⁶ 1992 175 CLR 218. This case concerned a 14-year-old girl who suffered from mental illness, her parents wanted a court order allowing them to consent to her sterilisation on her behalf. The intention behind the sterilisation procedure was to prevent against menstruation and pregnancy because her parents feared that the psychological and behavioral consequences would cause their daughter unnecessary distress: K Parlett & K-M Weston-Scheuber “Consent to Treatment for Transgender and Intersex Children” (2004) 9 *Deakin Law Review* 375 377.

¹⁹⁷ Parlett & Weston-Scheuber (2004) *Deakin Law Review* 377.

¹⁹⁸ 377.

¹⁹⁹ Therapeutic sterilization would be limited to instances where it would be performed for the purpose of treating a disease of malady or the by-product thereof.

²⁰⁰ Non-therapeutic sterilisation on the other hand is any other type of sterilization other than therapeutic.

²⁰¹ Parlett & Weston-Scheuber (2004) *Deakin Law Review* 377. Furthermore, the court also provided definition to what would constitute a ‘special medical procedure’ – in this context sterilization – and came to the conclusion that it means any procedure which is for non-therapeutic purposes. In such cases the decision could not be made by the child's parents and therefore need to be sanctioned by a court: Bryant (2009) *Monash University Law Review* 198. The following serves as examples where an application has to be made by parents to the Family Court in order for their child to undergo medical treatment because a parents consent did not fall within the realm of parental responsibility: bone marrow harvest (Re: GWWW and CMW (1997) FLC 92-748), gonadectomies (Re: Sally [2010] FamCA 237), sex reassignment surgery (Re: A (a child)(1993) FLC 92-402), gender identity disorder treatment (Re: Alex (2004) FLC 93-175), treatment for persons who have ‘disorders of sexual development’ (Re: A (a child) (1993) FLC 92-402) and sterilisation of a child with mental disability (Re: Marion (1992) 175 CLR 218). S Stickland Association of Family and Conciliation Courts 51st annual conference Navigating the Waters of Shared Parenting: Guidance from the Harbor “To treat or not to treat: legal responses to transgender young people” < <http://www.familycourt.gov.au/wps/wcm/connect/af23685e-3f1e-4295->

3 4 2 1 *Jehovah's Witnesses*

The attainment of parental consent by Jehovah's Witnesses presents a unique challenge to medical practices in certain circumstances. Jehovah's Witnesses are a conservative Christian denomination who are widely known for refusing blood transfusions for themselves and their children.²⁰² They favour a literal interpretation of the Bible in that blood represents the sanctity of life and that God prohibits the transfer of whole blood or its primary components.²⁰³ The consequence for a member accepting a blood transfusion is two-fold: First, they will be ineligible to enter God's Kingdom "paradise"; and secondly they will be excommunicated from the church.²⁰⁴ The consequences of these harsh penalties are the reason why members refuse blood transfusions for themselves and their children.²⁰⁵

Courts often have had to intervene in these circumstances. In the United States of America ("USA") case of *Prince v Massachusetts*,²⁰⁶ the United State Supreme Court explained the position as follows:

"[P]arents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children".²⁰⁷

a8b4-d0458cd96ec0/Speech-Strickland-Transgender+Young.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE-af23685e-3f1e-4295-a8b4-d0458cd96ec0-INSbDkf> (2014) 1 8.

²⁰² M Radomyski "Medical Oaths: When Religion and Ethics Collide" (2011) 3 *Amsterdam L F* 68 74 & J Malherbe & A Govindjee "A question of blood: Constitutional perspectives on decision-making about medical treatment of children of Jehovah's Witnesses" (2010) 73 *THRHR* 61 62.

²⁰³ Malherbe & Govindjee (2010) *THRHR* 62 & Radomyski (2011) *Amsterdam L F* 74. 'Primary components' include white cells, plasma and platelets.

²⁰⁴ Radomyski (2011) *Amsterdam L F* 75: Prior to 2000 the Watchtower Society enforced a policy that excommunicated members automatically if they defied the Biblical teachings and received a transfusion. Although a new set of guidelines came into practice in 2000 saying that a member who did not comply was not expelled from the Church, the consequence remains the same. A member who receives a transfusion will be deemed to have revoked his own membership because of his actions. Thus, the consequence remains the same. A H M Antommara "Jehovah's Witnesses, Roman Catholicism, and Neo-Calvinism: Religion and State Intervention in Parental, Medical Decision Making" (2006) 8 *Journal of Law and Family Studies* 293 296: One is not considered to have sinned if one is subject to a transfusion against his or her will.

²⁰⁵ 76: It is estimated that there approximately 521 deaths per 100,000 live births because of a JW mother's refusal to accept blood during delivery.

²⁰⁶ 1944 321 US 158.

²⁰⁷ 1944 321 US 158 para 170.

However, Jehovah's Witness parents have been challenging the position that parental rights are not absolute. They are of the opinion that they should have the capacity to refuse a blood transfusion for their children due to their religious beliefs.²⁰⁸ The extent of parents' religious commitment in blood transfusion cases arguably favours the previous position of parental autonomy and authority rather than the modern position of the best interests of the child.²⁰⁹ The CRC affirms that parents have a right to guide their children, and guidance in this regard would include exposing their children to their own religion²¹⁰ and cultural beliefs.²¹¹ However, this right is qualified by a corresponding duty to act in their child's best interests and ensure their physical, psychological and general well-being is not being put at risk.²¹² Beaucamp submits that the best interests²¹³ will always override parental rights of control when there is a substantive risk to the welfare of the child.²¹⁴ He further argues that parents who are committed to compromising their children's health and subsequently life, even in instances of religious beliefs, actually pose a significant danger to their children.²¹⁵

In South African law, it is unconstitutional to withhold life-saving treatment for a child, also when parents refuse to grant consent for such procedures.²¹⁶ When medical practitioners advise parents that their child should receive a blood transfusion, it is generally because without that specific procedure they would die. In an emergency situation, treatment can be administered without the consent of the patient or by someone legally competent to give consent on the patient's behalf.²¹⁷ If a medical practitioner is confronted with a situation²¹⁸ where a parent or guardian refuses to give consent, the practitioner can refuse to comply with the parents' instructions and proceed with the treatment.²¹⁹

²⁰⁸ Woolley (2005) *Arch Dis Child* 715.

²⁰⁹ Antommara (2006) *Journal of Law and Family Studies* 293.

²¹⁰ Dethloff (2005) *Fam L Q* 316: In German law one of the responsibilities that parents have towards their children is to educate them and included in this right to educate is religious education.

²¹¹ Art 12 and 18 of the CRC.

²¹² Art 3 of the CRC & Section 28(f)(ii) of the Constitution.

²¹³ Article 3 of the CRC.

²¹⁴ Antommara (2006) *Journal of Law and Family Studies* 298.

²¹⁵ 298.

²¹⁶ Section 27(3) & 28(f)(ii) of the Constitution.

²¹⁷ D McQuoid-Mason "Parental refusal of blood transfusions for minor children solely on religious grounds - the doctor's dilemma resolved" (2005) 95 *SAMJ* 29 29.

²¹⁸ Such as a parent refusing to grant their consent for their minor child to receive a blood transfusion and such refusal would result in the unnecessary death of the child or prevent the child from suffering serious injury or disease.

²¹⁹ McQuoid-Mason (2005) *SAMJ* 29.

The court in *Hay v B*²²⁰ based their decision on constitutional considerations as the Children's Act had not yet come into operation. The right to life, coupled with the best interests of the child,²²¹ militate against any refusal to consent to life-saving medical procedures on part of the parents.²²² The court held that withholding treatment from a child during a medical emergency constitutes a violation of their human rights.²²³ The right to life is a basic constitutional value that cannot be violated in favour of the parents' religious beliefs.²²⁴ Although a parent's religious beliefs need to be respected, limiting the baby's right to life was not reasonable or justifiable and it was in the child's best interests to receive treatment.²²⁵

Subsequent to the *Hay v B* decision, the Children's Act came into effect and includes section 129, which regulates medical decisions regarding children. The Children's Act now provides legislative clarity on the position when parents withhold their consent for their child to be provided with a blood transfusion. Section 129(10) of the Children's Act states that a parent is prohibited from withholding consent for life-saving medical treatment for their child based on religious beliefs or any other beliefs.²²⁶ Section 129 provides for circumstances of an exception: in a case where a parent can show that there is another medically accepted option available for treatment other than the one proposed, the alternative treatment may be used.²²⁷ Furthermore, section 129(9) of the Children's Act illustrates the balance between state intervention in parental decision-making, imposed also by Article 5 of the CRC.²²⁸ This section provides that the High Court or a Children's Court will give consent in all instances where a parent or guardian refuses to do so.²²⁹ The High Court as the upper

²²⁰ 2003 (3) SA 492 (W) at 494: This case concerned an infant whose parents refused to allow a medical practitioner to administer a blood transfusion in order to save their life. The medical practitioner involved issued an urgent application to the court to be allowed to issue the transfusion contrary to parental consent. In the event that the child was prevented from receiving this life-saving treatment they would die within three to four hours. The court stated (at 495-496) that it was in the infant's best interests to receive treatment regardless of parental refusal. The court further stated that parents' considerations must be given due consideration; however, ultimately it must be considered what will be to the child's future benefit.

²²¹ Section 11 & 28(2) of the Constitution.

²²² Malherbe & Govindjee (2010) *THRHR* 62.

²²³ McQuoid-Mason (2005) *SAMJ* 29.

²²⁴ 29.

²²⁵ 29.

²²⁶ Malherbe & Govindjee (2010) *THRHR* 73.

²²⁷ 73.

²²⁸ Antommaria (2006) *Journal of Law and Family Studies* 294.

²²⁹ Malherbe & Govindjee (2010) *THRHR* 72.

guardian of all minors has a crucial role to play in any matter of medical decision-making concerning children.²³⁰ Therefore, coupled with the best interests of the child principle, the High Court is obliged to promote the interests and rights of children instead of concentrating on the rights of the state or the parents' interests.²³¹

In conjunction with the above-mentioned provisions of section 129, the court is also compelled to consider the following four factors when determining whether to allow parents to withhold their consent: (1) the nature of the illness concerned; (2) the intention of the proposed treatment; (3) the proposed treatment and the urgency thereof and (4) the prospects of recovery and availability of alternative treatments.²³² All these factors, in combination with the various interests of the parent, child and state must be taken into consideration by the approached court, in determining whether or not to uphold the parent's refusal.²³³ As a result, parents' decision-making capacity may be limited in certain instances. This is not because the parents are negligent or intend to harm their children, but rather because their children's interests may be impaired, and they are not necessarily aware of this fact.²³⁴

3 4 2 2 *Sterilisation*

It is a well-established principle in South African law that every person has the right to bodily integrity,²³⁵ including the right to reproductive choice.²³⁶ This reproductive choice may be removed through sterilisation. Sterilisation entails a medical procedure whereby a person will be rendered permanently incapable of reproduction and fertilisation.²³⁷ The Sterilisation Act 44 of 1998 regulates the process of sterilisation in South Africa. In terms of the Act valid sterilisation is only to be performed if the patient

²³⁰ 73.

²³¹ 73.

²³² 73.

²³³ 73.

²³⁴ In the Colombian Constitutional Court Decision *T-477* of 1995, it was established that in a medical decision-making context parents and their children have "shared capacity" to consent. The court stated that a child is not property to be owned by his or her parents and because they are constantly developing liberty and autonomy they require special constitutional protection in this regard: K Romero & R Reingold "Advancing adolescent capacity to consent to transgender-related health care in Colombia and the USA" 21 *Reproductive Health Matters* 186 188.

²³⁵ Section 12 of the Constitution.

²³⁶ T Boezaart *Child Law in South Africa* (2009) 11. Please refer to chapter 4 for a detailed discussion on the right to bodily integrity and the right to health of which reproductive freedom is an essential component.

²³⁷ Boezaart (2009) 11.

has given written and informed consent for the procedure.²³⁸ Sterilisation may not be performed on any person who is under the age of 18 unless failure to do so would endanger the person's life or negatively affect their physical health.²³⁹ For a child to lawfully undergo a sterilisation procedure, the parent or guardian of the child, together with the written opinion of an independent medical practitioner, who specifically states that the procedure will be in the child's best interests,²⁴⁰ must be obtained.²⁴¹ Furthermore, an additional requirement in the case of a child is that the legitimacy of the sterilisation procedure must be examined by a panel consisting of a psychiatrist, a nurse and either a psychologist or social worker.²⁴²

3 4 2 3 *Abortion*

As stated previously, the general position regarding surgeries performed on children under a certain age is that the parents will make the decision on the child's behalf. Unlike all other surgical procedures in South Africa, abortion presents a different process of regulation concerning the issue of child consent. Although an abortion constitutes an invasive medical or surgical procedure in terms of section 2, read with section 5 of the Choice on Termination of Pregnancy Act 92 of 1996 ("CTPA"), any woman²⁴³ who is less than 13 weeks pregnant, can terminate a pregnancy for any reason, and without her parents' permission.²⁴⁴ The only requirement for a valid abortion is the consent of the woman herself. In the case of a pregnant child, a medical practitioner or registered midwife should encourage the child to consult with a parent or guardian but regardless of whether she does so or not, the

²³⁸ C J Badul, A Strode & P P Singh "Obtaining informed consent for a sterilisation in the light of recent case law" (2018) 108 SAMJ 557 557.

²³⁹ Section 2(1) & (3).

²⁴⁰ Section 2(3)(c) of the Sterilisation Act 44 of 1998.

²⁴¹ Boezaart (2009) 11.

²⁴² Boezaart (2009) 12 & Section 3(2) read in conjunction to s 2(3)(b). S 3(1)(a),(b) & (c) of the act. The panel will have to take various factors into consideration in order to determine whether it will be in the best interests of the child. They will consider the following in the case of a child and a mentally ill person: (a) the age of the individual, (b) the physical health of the individual, (c) whether there are any other safe and effective means of contraception available and (d) whether at a later stage the individual would be able to make an informed decision.

²⁴³ In accordance with Section 1 of the CTPA "woman" includes any female person of any age.

²⁴⁴ Section 2(2) of CTPA.

abortion may be carried out with her consent.²⁴⁵ The question arises as to why a young child in this instance would not have to obtain her parent's permission to undergo a life-altering procedure, a procedure that could affect her physical, psychological and emotional future.

The reason for allowing the woman to make the independent choice regarding abortion is based on the right to have security and control over one's own body.²⁴⁶ Deciding to "have children is fundamental to a women's physical, psychological and social well-being",²⁴⁷ while it is considered to be a decision that only a woman can make because it is her body and hers alone. The right to bear a child is a personal choice.²⁴⁸

3 5 Conclusion

From the above analysis, it is clear that the content of parental responsibilities and rights have developed significantly in recent years. Historically, the parent-child relationship was dominated by parental power and children were viewed as the property of their parents. Today, especially through the introduction of the CRC, it is evident that children's rights are being promoted far more within the parent-child relationship than they were previously. The relationship no longer focuses on the rights of parents but rather concentrates on the responsibilities that parents have towards their children. Many foreign jurisdictions have some form of parental responsibilities and rights entrenched within their legislation, even though the terminology used may be different. The majority of these jurisdictions have a similar meaning attached to this term, namely that parents have obligations and duties towards their children to ensure that their interests are promoted and protected.

The focus on autonomous decision-making is a principle that has been strongly reinforced by the CRC, yet parents still maintain the authority to consent to medical procedures for their infants. The child's right to express their own opinion and views on matters that affect them, needs to be respected. This is especially relevant when

²⁴⁵ Sec 5(3) of Act 92 of 1996 the only limitations are in instances where the individual is (a) severely disabled or (b) a state of continued unconsciousness. In these circumstances a parent or other recognised persons can make a decision.

²⁴⁶ Preamble of the CTPA; s 12 of the Constitution.

²⁴⁷ Preamble of the CTPA.

²⁴⁸ Preamble of the CPTA.

considering decisions that will impact their development and life. Similarly, an essential component of parental responsibility is guiding children to enable them to make such decisions themselves. It is an important concept of parental responsibility for parents to consider that the impact of decisions that are made while a child is growing up, will not remain in childhood: the effects of such decisions may last well into adulthood.

This chapter further considered the role of parental decision-making in medical decisions. Despite the established position that parents are entitled to give consent on behalf of their child, this is not always the case. There are instances in which the state is required to intervene because the decision is determined to be of such a personal nature that neither parents nor other bodies should be given the right to make such a decision. One of the main concerns of limiting a child's capacity to consent is in certain instances is that there is the possibility that the child would be able to make the decision in the future. It is submitted that the issue surrounding consent on behalf of children in a medical context needs to be reconsidered. Children need to be guided and decisions which they will be able to make themselves as they mature should be postponed until they reach that stage in their development. In cases concerning physical, mental or psychological health or well-being, the child needs to be able to participate in such decisions, even if that means the decision will only be made in the child's future. In situations where immediate medical attention is required, parents are prevented from making a decision that will result in the death of their child; the same principle should apply to decisions that may be psychologically harmful and against the best interests of the child.

The next chapter will consider the best interests of the intersex child. It has been established that both parents and the state have an obligation when exercising parental responsibilities and rights to always consider the child's best interests in all decision-making. The best interests of the intersex child may be different from those of other children, as many of the challenges that they will experience as they develop, will be unique. The imperative, however, remains the same.

CHAPTER 4: THE BEST INTERESTS OF THE INTERSEXED CHILD

4 1 Introduction

4 1 1 Purpose and scope of the chapter

Chapter 3 explored the content of parental responsibilities and rights, as well as which factors parents should take into consideration when assisting their children in decision-making. The theoretical and practical implications of the parent-child relationship were investigated from both a historical and contemporary perspective. It is clear that there have been significant developments in the content of parental responsibilities and rights. The reformation of parental responsibilities, in contrast to parental rights, has demonstrated the trend towards endorsing a child-centric approach in law. In light of this trend and recommendations made by the Committee on the Rights of the Child, parents are urged to consider all the effects that a decision can have on their child. Consequently, to promote their child's best interests, it will be necessary for parents to deliberate the short and long-term consequences of any decision taken.

As a result, it must be established what constitutes the best interests of the intersexed child. This chapter will examine the best interests of the child principle as a theoretical and practical principle in the decision-making process of sex alteration surgery of intersex infants. First, the best interests principle will be analysed, which analysis will include a discussion of the various concepts that are incorporated into this phrase. A specific focus will be placed on the applicability of this principle within the context of parental decision-making for intersex infants. The analysis will be directed towards the meaning that various international, domestic and so-called "soft law" documents attach to the phrase. Finally, the principle will be considered in light of other rights enshrined in the CRC and the South African Constitution, and how the best interests of the child are inextricably linked with such rights.

4 1 2 The best interests of the child: general remarks

The best interests principle is contained in Article 3(1) of the CRC and is phrased as follows: "[i]n 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". Within international human rights discourse, as well as family law, the best interests of the child principle

is an important, yet controversial legal standard.¹ It is essential to establish at the outset that to consider a child's best interests is to consider all the rights that they are entitled to.² Therefore, the rights that are contained in the CRC can be used as signposts by which a child's best interests can be identified.³ This principle underpins the very essence of the CRC, protecting and promoting the rights and interests of all children.⁴ The principle was first expressed in the 1924 Geneva Declaration on the Rights of the Child and thereafter in the 1959 United Nations Declaration on the Rights of the Child.⁵ Initially, at the time that the 1959 version was adopted by the General Assembly of the United Nations, the best interests principle was to be applied as a principle of compassion whenever laws and policies were specifically created to provide children with protection.⁶ When the CRC was officially adopted in 1989, the principle evolved into a compulsory guiding standard of interpretation in international law.⁷

There is no universal phrasing of the best interests principle that applies to all international documents; rather each has its own manner of formulation.⁸ Regardless, this principle has been recognised as the general standard to be applied when implementing children's rights and has been transposed throughout international and national legal frameworks, either implicitly or explicitly.⁹ It is a consideration that will

¹ P Dunne "Towards Trans and Intersex Equality: Conflict or Complementarity" in J M Scherpe A Dutta & T Helms *The Legal Status of Intersex Persons* (2018) 217 232.

² General Comment No 14 (2013) 9.

³ G van Bueren in *Introduction to Child Law in South Africa* 205. PA Raburu "The Self-Who Am I?: Children's Identity and Development through Early Childhood Education" (2015) 5 *Journal of Education and Social Research* 95.

⁴ The CRC was created because there was a tendency to conflate children's rights with adult's rights and therefore, the drafters were of the opinion that an international document must be drafted specifically with the interests of the child in mind. J Tobin "Judging the Judges: Are they Adopting the rights Approach in Matters Involving Children" (2009) 33 *Melb U L Rev* 579 585.

⁵ A Degol & S Dinku "Notes on the Principle 'best Interests of the Child': Meaning, History and Its Place Under Ethiopian Law" (2011) 5 *Mizan Law Review* 319 319.

⁶ L Mills "Failing Children: The courts' disregard of the best interests of the child in *Le Roux v Dey*" (2014) 131 *The South African Law Journal* 847 848.

⁷ 848.

⁸ All documents define it slightly differently for example see the CRC (Article 3), South African Constitution (section 28(2)), ACRWC (Article 4) and the Children's Act 1989 (section 1(England)). P Alston "The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights" (1994) 8 *Int'l J L & Fam* 1 12.

⁹ Many jurisdictions have adopted the best interests of the child principle into their domestic legislation or have incorporated it into their own Constitutions. Examples include the following: Australia (Family Law Act 1975), Finland (Child Welfare Act 471 of 2007), South Africa (Children's Act), England (Children Act 1989), Malta (Children and Young Persons (Care Orders) Regulations). However, it must be noted that Maltese legislation is not consistent with their usage of "best interests" and sometimes the term is downgraded to merely refer to the interests of the child. However, the case law in Malta favours the interests of the child when there is a conflict between the interests of parents and the interests of

always be taken into account when debating issues surrounding children's rights, regardless of the level of importance that is attached to it.¹⁰

4 2 The best interests of the child principle in international legal instruments

4 2 1 Article 3 of the CRC

Initially, the best interests doctrine had limited application, as it was predominately a way to ensure the interests of children were taken into account when their parents divorced.¹¹ This approach evolved, especially since the Committee of the Rights of the Child expressed that the fundamental purpose of Article 3 is to stress that children are unequivocally entitled to the comprehensive range of rights contained in the CRC.¹² The content of the best interests principle was therefore developed to give priority to all aspects – social, political and economic – of children's welfare, in any situation where a law, policy or choice may incidentally or purposefully affect their well-being.¹³ This principle is considered to be the most unique inclusion in the CRC, as there are not any specific duties or rules that must be adhered to when applying it. The only guidance given is that a child's best interests must be a primary consideration.¹⁴

There was much debate amongst the drafters of the CRC as to the formulation of the best interests principle. One of the recommendations in the revised Polish draft was to include the phrase "paramount importance" in the provision, but this was considered too broad.¹⁵ It was asserted by the drafters that such formulation would elevate children's rights excessively and make it easy to override any other competing interests that may arise.¹⁶ Consequently, the weaker formulation of "a primary

children: A M Mangion "The best interests of the child – March 12 2010" (12-03-2010) *Times Malta* <<https://timesofmalta.com/articles/view/the-best-interests-of-the-child-march-12-2010.297841>> (accessed 25-08-2020). Dunne "Towards Trans and Intersex Equality: Conflict or Complementarily" in *The Legal Status of Intersex Persons* 232-233.

¹⁰ There are various forms of severity with which this principle is applied and these varying degrees will be discussed below.

¹¹ Degol & Dinku (2011) *Mizan Law Review* 319-320.

¹² Mills (2014) *The South African Law Journal* 848.

¹³ Degol & Dinku (2011) *Mizan Law Review* 319.

¹⁴ J Zermatten "The Best Interests of the Child Principle: Literal Analysis and Function" 18 (2010) *International Journal of Children's Rights* 483 485. The term 'primary consideration' will be discussed in more detail below.

¹⁵ Others were of the opinion that "paramount importance" would be far more inclusive and offer better protection to children: Degol & Dinku (2011) *Mizan Law Review* 327.

¹⁶ Alston (1994) *Int'l J L & Fam* 12. This differs from South Africa's adoption of 'paramount importance' in both the Constitution and the Children's Act.

consideration”¹⁷ was included in the CRC. Alston agrees with this formulation because he argues that it was clearly the drafters' intention to favour an indefinite phrase rather than a definite article.¹⁸ A child's best interests should not always be the overriding factor, as other parties may have equal or superior interests in the matter.¹⁹ However, this formulation does not excuse authoritative bodies from attaching specific emphasis to the child's best interests in the final decision.²⁰ Despite this realisation, the Committee has emphasised that an adult's interpretation of a child's best interests cannot override or replace the obligation for them to respect all of the child's rights contained in the Convention.²¹

The Committee was initially criticised for their lack of guidance on how to interpret the principle.²² In a response to this criticism, the Committee, in their 14th General Comment, explained that the principle was a threefold concept:²³ (a) it is a rule of procedure,²⁴ (b) it is a substantive right²⁵ and (c) it is a fundamental legal principle of

¹⁷ It was initially proposed that the best interests of the child should be 'the' primary consideration only in matters affecting the welfare of the child. This proposal was rejected because the majority of delegates were of the opinion that it unfairly narrowed the scope of protection a child would be entitled to: Alston (1994) *Int'l J L & Fam* 12.

¹⁸ Although an indefinite article is being used in Article 3, there are other formulations in the CRC which provide varying standards. For instance, Article 21, which regulates adoption, has the strongest formulation of the best interests principle as parties have to “ensure that the best interests of the child shall be *the paramount consideration*”. Article 18(1), which regulates parental responsibilities and rights, also has a stricter formulation of the principle requires that parents and guardians have to take “*the best interests of the child [as] their basic concern*”. In other provisions in the CRC, the formulation of the best interest principle has a more neutral phrasing using words such as “necessary” (Art 9(1)), ‘if contrary’ (Art 9(3)), “unless it is considered...” (Art 37(c)) or “unless it is not considered...” (Art 40(2)(b)(iii)). Alston (1994) *Int'l J L & Fam* 12-13. An interesting observation is the incorporation of the phrase “paramount” in the wording of Article 23(2) of the Convention on the Rights of Persons with Disabilities which reads as follows “State parties shall ensure the rights and responsibilities of persons with disabilities... in national legislation”; in all cases the interests of the children shall be paramount”. It seems that in cases involving the adoption of children and those with disabilities, a higher standard is imposed, than in other circumstances in the CRC: Zermatten (2010) *International Journal of Children's Rights* 489-490.

¹⁹ Alston (1994) *Int'l J L & Fam* 12.

²⁰ Zermatten (2010) *International Journal of Children's Rights* 489.

²¹ General Comment No 14” (2013) 4. (Also available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 15 April 2020) para 4 & A Skelton “Too much of a good thing? Best interests of the child in South African jurisprudence” (2019) *De Jure Law Journal* 557 558.

²² Mills *Considering the best interest of the child* 64.

²³ “General Comment No 14” (2013) 4. (Also available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 15 April 2020) para 6.

²⁴ It is considered a procedural step as before a decision is made that has the potential to affect a child, an evaluation on the positive and negative impacts of the decision needs to be conducted. Furthermore, when a decision is made justification for that decision needs to be explained and how the best interests of the child were achieved in the final decision.

²⁵ Article 3(1) creates an inherent obligation on States to guarantee that the child's best interests will be taken into consideration in any matter concerning a child.

interpretation.²⁶ Although the Committee has since provided guidance on the intricacies of the principle, it is impossible to know for certain what the best interests of a child are in every situation.²⁷ Therefore, each situation's circumstances will have to be assessed by the decision maker through this rule of procedure on a case-by-case basis.²⁸

Article 3 also sets out the general obligations required by ratifying state parties and private bodies to enable the best interests principle to be recognised.²⁹ All organisations falling under the state's authority, as well as child-specific institutions, must adhere to the standard.³⁰ Consequently, when national, regional or municipal legislation is enacted by the state, the child's best interests need to be correctly balanced alongside other competing interests.³¹ However, despite the state's obligation to ensure compliance with this provision, they are not responsible for the final outcome.³²

One of the reasons why the state's involvement is so important is because a lack of procedure recognising the child's best interests will affect the decision-making capacity of parents. Although Article 3 does not explicitly mention the obligation on parents to make decisions that are in their child's best interests, when read in conjunction with Article 18 of the CRC, it is clear that the best interests of the child must always be a parent's fundamental concern.³³ Article 5 further strengthens this obligation on parents and the state, as they both have responsibilities, obligations and rights to provide for the child in a manner that is consistent with the child's evolving capacities.³⁴ It is submitted that it is impossible to separate the role of the state and the role of parents in the decision-making process when it is done in a child's best

²⁶ "General Comment No 14" (2013) 4. (Also available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 15 April 2020) & Zermatten (2010) *International Journal of Children's Rights* 485.

²⁷ 485.

²⁸ "General Comment No 14" (2013) 4. (Also available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 15 April 2020) para & 32 & Zermatten (2010) *International Journal of Children's Rights* 485.

²⁹ M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 29.

³⁰ 29.

³¹ Zermatten (2010) *International Journal of Children's Rights* 488.

³² 485.

³³ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 2 June 2020].

³⁴ A Moyo "Conceptualising the 'paramountcy principle': beyond the individualistic construction of the best interests of the child" (2012) 12 *African Human Rights Law Journal* 142 148.

interests. Parents depend on the procedure and guidelines set out by the state which will influence the ultimate decision.

4 2 2 Article 4 of the African Charter on the Rights and Welfare of the Child 1990³⁵

As well as having been incorporated into the CRC, the best interests principle has also been incorporated into the African Charter on the Rights and Welfare of the Child 1990 (“ACRWC”).³⁶ The rationale for drafting the ACRWC was to specifically accommodate the unique and explicit needs of the African child, catering to a different class of vulnerability.³⁷ Consequently, the focus of the ACRWC is to ensure that the African child receives the necessary protection and treatment that also considers the historical background and difference in the culture of the child. Arguably Article 4 of the ACRWC provides stronger protection than the CRC,³⁸ as it stipulates that “[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.” Many authors argue that the ACRWC imposes a higher standard of protection than the CRC as the ACRWC includes that the best interests of the child will be ‘the’ primary consideration, whereas the CRC only requires the best interests to be ‘a’ primary consideration.³⁹

This formulation, however, has been criticised: Moyo argues that in African society the concept of community is very important and often children are required to sacrifice for the good of the family.⁴⁰ Consequently, using the word ‘the’ rather than ‘a’, the ACRWC does not embrace the African custom of family as much as it should.⁴¹ However, it is submitted that this is precisely why this additional layer of protection has been integrated: children should not be expected to act as adults when they do not have the necessary capacity to do so.

³⁵ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at <<https://www.refworld.org/docid/3ae6b38c18.html>> [accessed 25 May 2020] & Degol & Dinku (2011) *Mizan Law Review* 319.

³⁶ South Africa is a party to both the CRC and the ACRWC and is consequently obliged to adhere to both standards set out therein.

³⁷ Degol & Dinku (2011) *Mizan Law Review* 329.

³⁸ Mills (2014) *The South African Law Journal* 848.

³⁹ Degol & Dinku (2011) *Mizan Law Review* 330 and Mills (2014) *The South African Law Journal* 848.

⁴⁰ 147

⁴¹ 147: Moyo also refers and seemingly supports Herring’s argument that an inclusive approach to welfare should be embraced rather than an individualistic version. This is because children’s rights should not be placed into a position that they are untouchable and parents should not be expected to make excessive sacrifices for their child in exchange for insignificant benefits.

4 3 The “best interests principle” in South African law

In South Africa, the best interests principle was initially developed through case law from the early 1900s and was only later formally adopted into legislation.⁴² When it was finally included in the Bill of Rights in the Constitution, it reached the status of a right. Prior to this, it was a principle that was only applied in custody disputes when the child’s welfare was a primary concern.⁴³ In addition to the formal integration, the South African Constitutional Court has continued to develop the content and meaning of best interests principle.⁴⁴ The South African courts, on multiple occasions, have confirmed that section 28(2) of the Constitution has extended the best interests application from the normal sphere of family law to all aspects involving children.⁴⁵

4 3 1 The Constitution of the Republic of South Africa, 1996 and interpretation of the best interests principle by the South African courts

The best interests principle was initially adopted as part of the Interim Constitution as a paramount consideration but only applied to matters which related directly to the rights contained in the children’s clause in the Constitution.⁴⁶ The final Constitution included a wider phrasing in section 28(2) which extended the best interests principle to every matter in which a child was involved in that it provides that “[a] child’s best interests are of paramount importance in every matter concerning the child”. Courts are obliged to consider section 28(2) alongside any other constitutional right in question when the case involves children and have indeed provided some useful interpretation and guidance as to the implementation of this right.⁴⁷ The South African courts have been instrumental in developing the best interests principle to the status that it has in South Africa today. From 1999 onwards the Constitutional Court has been

⁴² Skelton (2019) *De Jure Law Journal* 558 & *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) (*S v M*) para 13.

⁴³ Skelton (2019) *De Jure Law Journal* 558.

⁴⁴ E Bonthuys “The Best Interests of Children in the South African Constitution” (2006) 23 *International Journal of Law Policy and the Family* 23 23. Bonthuys comments on page 40 that in Roman Dutch law (on which South African common law was largely based), the custody of children was considered to be within the judge’s discretion but this discretion had to be exercised in a manner that would promote children’s best interests.

⁴⁵ Mills (2014) *The South African Law Journal* 856.

⁴⁶ Section 30(3) of the Constitution of the Republic of South Africa Act 200 of 1993.

⁴⁷ Skelton (2019) *De Jure Law Journal* 563.

engaging and developing the best interests principle, advancing an expansive interpretation,⁴⁸ resulting in the development of children's rights jurisprudence.

In *Minister of Welfare and Population Development v Fitzpatrick*⁴⁹ the court pronounced that section 28(2) is a stand-alone right and is not only a guiding principle. It strengthens all of the other rights of children contained in the Constitution and not only those contained in section 28(1).⁵⁰ The Constitutional Court developed this line of interpretation in *De Reuck v Director of Public Prosecutions* ("*De Reuck*").⁵¹ The court in *De Reuck* considered how to balance⁵² the best interests principle with other competing rights.⁵³ It was concluded that the principle is not all empowering, and does not mean that it will automatically trump any other competing rights.⁵⁴

The *Fitzpatrick* decision elaborates further on how the best interests of the child should be interpreted when reading together section 28(2) of the Constitution and section 7 of the Children's Act. The court held that the best interests principle was not given a comprehensive explanation, nor limited to only include specific circumstances.⁵⁵ This decision established that a rigid set of pre-determined principles will not accommodate the uniqueness of the individual circumstances of each child.⁵⁶

The court in *S v M*⁵⁷ referred to the interpretation given in the *Fitzpatrick* decision. Sachs commented that "the contextual nature and inherent flexibility" of section 28 is the source of its strength.⁵⁸ Sachs stated that a true child-centred approach requires an individualised examination of both the individual child and their unique situation. When viewed in this context, section 28(2) achieves this intention as the inherent flexibility of the provision enables such an interpretation.⁵⁹ Therefore, if one were to apply a pre-determined formula that is repeated *verbatim* in all decision-making processes involving children, for the purpose of certainty, such application would be

⁴⁸ Van der Merwe & Du Plessis (2004) 141.

⁴⁹ 2000 (3) SA 422 (CC).

⁵⁰ Skelton (2019) *De Jure Law Journal* 563.

⁵¹ 2004 (1) SA 406 (CC).

⁵² Section 36. This forms part of the limitation analysis exercised by South African courts, a court may find that at face value a particular type of law or conduct infringes a particular right. It is however possible for all rights to be limited and is necessary to weigh the different competing interests to determine whether the infringement is reasonable and justifiable in the circumstances.

⁵³ Skelton (2019) *De Jure Law Journal* 563.

⁵⁴ 563.

⁵⁵ Songa (2011) 44 *CILSA* 349.

⁵⁶ 349.

⁵⁷ 2008 3 SA 232 (CC).

⁵⁸ 2008 3 SA 232 (CC) para 24.

⁵⁹ Para 24.

contrary to the best interests of the child.⁶⁰ The Constitutional Court in this case observed that section 28(2) has elevated the best interests principle to the foremost point of concern in any matter regarding the child.⁶¹ Sachs J described the language used in section 28(2) as emphatic and comprehensive: law enforcement must be child sensitive and the common law, as well as legislation, must be developed in a manner that protects and advances the child's rights.⁶² The Constitutional Court also recognised that it is impossible for the law to completely isolate children from all hardships and difficulties.⁶³ However, it can create mechanisms to protect children and put measures in place that will enable opportunities for their productive and happy lives.⁶⁴

4 3 2 The South African Children's Act

Before South Africa's democratisation, the Child Care Act 74 of 1983 regulated matters such as adoption, child protection and care. However, it was a statute that differentiated between children based on race.⁶⁵ Over time, amendments were made to the existing Act in an attempt to bring it in line with the CRC, ACRWC and section 28(2) of the Constitution. These amendments were not sufficient in light of South Africa's democratisation. Finally, in 2007, the Children's Act was promulgated to give comprehensive protection to children's rights.⁶⁶ This Act statutorily defines the significant role that parents have in shaping and developing their children's best interests.⁶⁷ The Children's Act embodies the principles established by the CRC, by recognising that children are independent right holders and the parental role in the relationship is one of guidance and of rights promotion. This is clearly illustrated in chapter 3 of the Children's Act which codifies the position of parental responsibilities and rights in terms of the child's interests.⁶⁸ It is submitted that this word order was

⁶⁰ Para 24.

⁶¹ Mills (2014) *The South African Law Journal* 856.

⁶² *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA232 (CC) (*S v M*) para 15.

⁶³ Para 20.

⁶⁴ Para 20.

⁶⁵ A Dawes "The South African Children's Act" (2009) 21 *Journal of Child & Adolescent Mental Health* iii iii.

⁶⁶ Dawes (2009) *Journal of Child & Adolescent Mental Health* iii.

⁶⁷ Moyo (2012) *African Human Rights Law Journal* 167.

⁶⁸ M Bekink "'Child Divorce': A break from Parental Responsibilities and Rights due to the traditional socio-cultural practices and beliefs of the parents" (2012) 15 *PELJ* 178 194.

used intentionally by the legislature to emphasise to parents that their main concern is the responsibility that they have towards their children.⁶⁹

The interplay between parental responsibilities and rights and the best interests of the child can be found throughout the Children's Act, particularly in section 7. The provision states that both the attitude of parents towards their child and their parental responsibilities and rights with regard to that child, need to play an essential component in deciding their child's best interests.⁷⁰ Prior to the enactment of the Children's Act, South African courts had an uncodified set of guiding factors to take into consideration when determining the best interest principle.⁷¹ This is why section 7(1) is considered so valuable regarding the interpretation of a child's best interests, as there is a list comprising fourteen factors that the court must take into consideration but to which the court is not limited.⁷² The development of these factors provided much needed consistency to the manner in which the best interests principle should be applied in case law.⁷³ Throughout the Act, the obligation on parents as the holders of parental responsibilities and rights is emphasised.⁷⁴ The interplay between parental responsibility and a child's best interests is further clearly illustrated when reading section 6(5), 31(2)(a) and 31(2)(b)⁷⁵ of the Children's Act together. These provisions illustrate the balance that the Act attempts to establish between parental interests and children's rights by recognising that the child needs to form part of the decision-making process in matters in which they will be directly or indirectly affected.⁷⁶

4 4 Considering the best interests and rights of intersex children

4 4 1 Introduction

Despite the ubiquity of the best interests principle in child-centred decision-making, there has been limited analysis of the relationship that exists between this principle

⁶⁹ <https://www.mvlaw.co.za/Resources/Parental-Responsibilities-and-Rights-of-South-African-parents.pdf>

⁷⁰ Moyo (2012) *African Human Rights Law Journal* 167-168 & Sec 7(1)(b) of the Children's Act.

⁷¹ *McCall v McCall* 1994 3 SA p205-206.

⁷² Please refer to section 7(1) of a full and comprehensive list of the factors.

⁷³ *Songa* (2011) 44 *CILSA* 347. The criteria listed in this section should not be regarded as the only factors to be considered by a court as any relevant additional factors that may arise should also be considered: *Songa* (2011) 44 *CILSA* 348.

⁷⁴ Section 10 & 171.

⁷⁵ These provisions make reference to any major decisions involving the child.

⁷⁶ Moyo (2012) *African Human Rights Law Journal* 171.

and how it affects intersex children.⁷⁷ Intersex bodies have been systematically erased or suppressed to conform to customs and bodily binaries. It is therefore predictable that state authorities continually attempt to shield these practices and actions from the best interests principle review.⁷⁸ It is important that, when determining what the best interests of intersex children are, one must also take into consideration the everyday challenges that will be experienced by such children. Therefore, guidance needs to be drawn from the other rights to which all children are entitled.⁷⁹ A very broad overview of rights that may affect intersex children will be provided, with a specific focus on the content and the meaning of the right in question, as well as the obligations that parents have, to ensure that their children have access to these rights. Furthermore, these rights will be analysed from both an international and domestic perspective. It will also be necessary to consider the Yogyakarta Principles. These principles are a set of non-binding international standards which provide valuable insight in the best manner to promote the rights of gender variant persons and sexual minorities.⁸⁰ Furthermore, they explain how signatory state parties are encouraged to promote and protect the rights of individuals with varying sexual orientations, gender identities and those who have intersex status.⁸¹

4 4 2 The right to bodily integrity and autonomy

The right to bodily integrity refers to, *inter alia*, the inviolability of a human body to physical interference or removal of parts of the individual's body without the consent of the person concerned.⁸² An alternative phrasing of when an infringement of this right will occur is in instances where there have been "any penetration into a bodily

⁷⁷ Dunne "Towards Trans and Intersex Equality: Conflict or Complementarily" in *The Legal Status of Intersex Persons* 232-233.

⁷⁸ Dunne "Towards Trans and Intersex Equality: Conflict or Complementarily" in *The Legal Status of Intersex Persons* 233.

⁷⁹ Mills *Considering the best interest of the child* 74-75. The Committee commented in General Comment No 14 that the other rights in the CRC can be used as guidelines in order to determine what would be in a child's best interests: UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 3 July 2020] 9.

⁸⁰ <https://ijrcenter.org/thematic-research-guides/sexual-orientation-gender-identity/>

⁸¹ M O'Flaherty "The Yogyakarta Principles at Ten" (2015) 33 *Nordic Journal of Human Rights* 280 281.

⁸² S R Munzer "Examining Nontherapeutic Circumcision" 28 *Health Matrix: Journal of Law and Medicine* 28 (2018) 1. 8.

orifice, breaking of the skin, or alteration of a person's physical form".⁸³ The right to autonomy refers to the right to make one's own decisions, sometimes also referred to as the right to self-determination.⁸⁴ From a medical perspective, this right necessitates the ability to give or withhold consent prior to any procedure or alteration of one's body.⁸⁵

Section 7(1) of the Constitution confirms that both adults and children are rights bearers. As children are recognised as rights bearers, they are also entitled to the right to bodily integrity as contained in section 12 of the Constitution. The right to bodily and psychological integrity in South Africa is enshrined in terms of section 12(2)(a) and (b). Included in this right is having security to make decisions over one's body.⁸⁶ The freedom of choice which forms part of this right is also reinforced by many other constitutional rights, including the right to life, equality, dignity, privacy and reproductive choice.⁸⁷ South African courts have always placed much emphasis on protecting bodily and psychological integrity.⁸⁸ South African courts have urged that the right to bodily integrity and autonomy be interpreted broadly to include all instances in which the psychological or bodily integrity of an individual can potentially be harmed.⁸⁹ The courts have gone so far as to interpret the disclosure of HIV status without the consent of the individual as an "assault" on the psychological integrity of the person. This is regardless of whether the disclosure would be for public benefit.⁹⁰

Although children are equally entitled to the right to bodily integrity because of their limited capacity, they will be unable to always make their own decisions independently from their parents. Section 129 of the Children's Act allows children over the age of 12 with sufficient maturity and mental capacity to make decisions regarding their own

⁸³ Earp, B. D. (2019). The child's right to bodily integrity. In D. Edmonds (Ed.). *Ethics and the Contemporary World* (pp. 217-235) Abingdon and New York: Routledge. Author's copy available at https://www.researchgate.net/publication/326671234_The_child's_right_to_bodily_integrity

1.

⁸⁴ The CRC does not specifically make provision for the right to self-determination and autonomous decision-making; however, it does provide for the child's right to participate, which forms an essential component to decision-making capacity: Sandberg 527.

⁸⁵ M Buchner-Eveleigh "Is it a competent child's prerogative to refuse medical treatment? *De Jure Law Journal* (2019) 242 242.

⁸⁶ C Pickles 407.

⁸⁷ 408.

⁸⁸ See *NM v Smith* 2007 5 SA 250 CC para 40 & *Minister of Justice v Hofmeyr* 1993 2 All SA 232.

⁸⁹ *AB and Another v Minister of Social Development* 2017 3 SA 570 CC para 66.

⁹⁰ *NM v Smith* 2007 5 SA 250 CC para 40 & *AB and Another v Minister of Social Development* 2017 3 SA 570 CC para 69.

medical treatments.⁹¹ A legally incompetent child who does not satisfy the above requirements will rely on the person with parental responsibilities and rights to make the decision on their behalf.⁹² In all circumstances, the best interests of the child, regardless of the child's competence, need to be given priority.

According to Article 5 of the CRC, parents are responsible for giving direction and guidance to their child in a manner that will promote autonomous decision-making in the future. The concept of evolving capacities of a child must be considered in light of Article 12: The child's right to be heard.⁹³ Parents must bear in mind that infants and young children are pre-autonomous, however, they will have eventual autonomy.⁹⁴ Therefore, while they are pre-autonomous, parents have an obligation to respect the eventual autonomy that a child will have.⁹⁵ Parents have to exert a certain degree of caution in their decision-making regarding matters that potentially impact their child's bodily integrity. This will include considering their child's future and not make permanent decisions that are likely to be harmful.⁹⁶ In cases involving a pre-autonomous child, one needs to have a high degree of certainty regarding the consequences of the decision to be taken. In the majority of cases, it would be better for the bodily infringement to be delayed until such a time that the child can make their own independent decision.⁹⁷ This is particularly the case with socially driven body modifications that are not medically mandatory.⁹⁸ However, it is clear that in instances when intervention is needed to preserve future bodily autonomy or an individual's life, possible bodily infringement can be justified.⁹⁹

The right to bodily and mental integrity is also emphasised by the Yogyakarta Principles.¹⁰⁰ This principle maintains that all persons regardless of their sexual orientation, gender identity, or sex characteristics should not be subjected to medical

⁹¹ Buchner-Eveleigh 248.

⁹² See the discussion in Chapter 3 regarding medical treatment for children in South African law.

⁹³ See also the discussion of the right to be heard, as provided below.

⁹⁴ Earp, B. D. (2019). The child's right to bodily integrity. In D. Edmonds (Ed.). *Ethics and the Contemporary World* (pp. 217-235) Abingdon and New York: Routledge. Author's copy available at https://www.researchgate.net/publication/326671234_The_child's_right_to_bodily_integrity

3.

⁹⁵ Munzer *Health Matrix: Journal of Law and Medicine* (2018) 10.

⁹⁶ 10.

⁹⁷ Earp *The child's right to bodily integrity* 7.

⁹⁸ 6.

⁹⁹ 6.

¹⁰⁰ Principle 32.

procedures of an invasive nature without their own informed consent.¹⁰¹ The rights of gender-variant children are specifically included in this recognition. States are therefore compelled, especially considering the best interests of the child principle, to safeguard the evolving identity of a child and ensure their views are taken into account.¹⁰² Decisions should not be made based on pre-existing discriminatory perceptions in order to justify practices that will conflict with the child's integrity.¹⁰³

It was reported in 2010, by the American Society of Plastic Surgeons, that 219 000 cosmetic surgeries were performed on individuals between the ages of thirteen and nineteen years.¹⁰⁴ 'Imperfect' children globally are consistently referred for health procedures that are not medically necessary and are performed principally for cosmetic purposes or socially driven reasons. Procedures such as traditional body scarification or tattooing, male circumcision, female genital mutilation ("FGM"), breast implantations and other body modifications are often performed despite the absence of any life-threatening illness or physical function to restore.¹⁰⁵ Often parents will make the decision to alter or remove the stigmatised body part in question because of the social, cultural or aesthetic stigma attached.¹⁰⁶ To demonstrate the above, it is necessary to consider two examples, namely (a) otoplasty and (b) male circumcision.

An otoplasty is a purely cosmetic procedure. It involves a surgical operation performed on children which reduces the protuberance of their ears.¹⁰⁷ It will be executed for social purposes namely, to prevent bullying, stigmatisation and self-consciousness of the child.¹⁰⁸ Although the majority of surgeons will only consider performing the surgery if the child themselves has addressed concerns, it is not an uncommon request by parents.¹⁰⁹

A further example is male circumcision.¹¹⁰ As a common cultural and religious practice in most jurisdictions, parents routinely consent to their male child undergoing

¹⁰¹ Principle 32.

¹⁰² Principle 32 (D)&(E).

¹⁰³ Principle 32(E).

¹⁰⁴ A Ouellette "Body Modification and Adolescent Decision Making: Proceed with Caution" *Journal of Health Care Law & Policy* 15 (2012) 129 129-130.

¹⁰⁵ Earp *The child's right to bodily integrity* 6.

¹⁰⁶ 6.

¹⁰⁷ L K Shih-Ning Then "Cosmetic surgery on children Professional and legal obligations in Australia" *Australian Family Physician* 40 (2011) 513 514.

¹⁰⁸ Shih-Ning Then *Australian Family Physician* (2011) 514.

¹⁰⁹ 515.

¹¹⁰ This refers to the removal of the foreskin as well as the thin membrane which covers the head of the penis and the frenulum which runs to the under-surface of the foreskin: Munzer *Health Matrix* (2018) 2.

surgery for circumcision.¹¹¹ Circumcision, although still legal in South Africa¹¹² and many other countries, is increasingly being criticised. Arguably the practice, often performed without his consent, does permanent harm to the body of the child.¹¹³ The long-lasting consequences of circumcision include a decreased level of sexual satisfaction, permanent scarring and in some cases, it will be performed without adequate analgesia which will result in the procedure being incredibly painful.¹¹⁴

4 4 3 The right to identity

The right to identity has been implicitly recognised in numerous international documents, which include but are not limited to, the CRC (Article 7 and 8), the ECHR (Article 8), The Universal Declaration of Human Rights (Article 22 and 29) and the African Charter on Human and People Rights (“ACHPR”) (Article 4 the right to life and personal integrity). It has also been recognised domestically in section 28(1)(a) of the South African Constitution which states that all children have the right to a name and identity.

Although it is clear that the right to identity exists, it lacks a comprehensive and clear definition.¹¹⁵ Legal identity of a child is established at birth by means of a birth certificate. However, personal, social and cultural identity develops gradually as a child grows older.¹¹⁶ Consequently, developing an identity is a process that takes place throughout one’s life, from birth until adulthood. It involves a child going through constant changes and re-evaluation of different values and identifications over time, until they form their specific identity in adulthood.¹¹⁷ An individual’s identity comprises many different characteristics.¹¹⁸ Some of these characteristics, such as race, are not easily alterable, whereas others such as religion and culture, are learned and dictated to by the social setting into which the child is born.¹¹⁹ Despite having certain universal

¹¹¹ 3.

¹¹² Section 12(8) of the Children’s Act prohibits the circumcision of male children if they are under the age 16 unless 12(8)(a) it is for religious purposes or 12(8)(b) it is for medical reasons. Section 12(9) states that a child over the age of 16 can be circumcised if they have given consent, they have gone through counselling and it is in the prescribed manner.

¹¹³ K Möller “Ritual Male Circumcision and Parental Authority” (2017) 2

¹¹⁴ 5-6.

¹¹⁵ McCombs T & Gonzalez JS ‘Right to Identity’ (2007) International Human Rights Law Clinic 5.

¹¹⁶ Y Ronen “Redefining the Child’s Right to Identity” *International Journal of Law, Policy and the Family* 18 (2004) 147 149.

¹¹⁷ Ronen “*International Journal of Law, Policy and the Family* (2004) 150.

¹¹⁸ D Shelton “Preface on Identity” 49 (2006) *The Geo Wash Int’l L Rev* 1 3

¹¹⁹ Shelton (2006) *The Geo Wash Int’l L Rev* 3.

needs, each child is different. Hence, when considering the child's best interests, their own unique needs and characteristics need to be taken into account.¹²⁰ These identifying characteristics will include "sex, sexual orientation, national origin, religion and beliefs,¹²¹ cultural identity, [and] personality".¹²²

Gender identity forms an integral part of an individual's personality and self-concept.¹²³ According to the APA, gender identity refers to a person's inherent sense of self, which is integral to the individual in question.¹²⁴ In children, gender identity usually will begin to develop at approximately the age of three.¹²⁵ Typically gender stereotypes become stronger as children grow older. Although there is a tendency for them to initially regard these stereotypes as absolute rules, this will change as a child approaches adolescence.¹²⁶

Clearly, parents are one of the most influential role players in guiding a child's developing identity. This guidance should be exercised in a manner in which they gradually expose their children to the various characteristics that can form part of their eventual identity. Parents will also have to understand that their child may adopt certain characteristics that do not conform to the social perception of 'normal'. Children will draw encouragement from the environment around them and gender stereotyping

¹²⁰ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 7 July 2020] para 55.

¹²¹ Although consideration of religious and cultural beliefs and their preservation are important the Committee does say that any traditional or cultural practices which are inconsistent or incompatible with the rights in the Convention and do not support the best interests of the child will not be condoned: UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 26 October 2020]. Furthermore, this links with the right to health as Article 24(3) of the CRC stipulates that States are obliged to "take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children":

¹²² UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, available at: <https://www.refworld.org/docid/51a84b5e4.html> [accessed 7 July 2020] para 55 & Sandberg "Intersex Children and the UN Convention on the Rights of the Child" in *The Legal Status of Intersex Persons* (2018) 526.

¹²³ See chapter 2 for a description of gender identity & D Louw & A Louw *Child and Adolescent Development* (2nd ed) (2014) 195.

¹²⁴ American Psychological Association. (2015). Guidelines for Psychological Practice with Transgender and Gender Nonconforming People. *American Psychologist*, 70(9), 832-864. doi.org/10.1037/a0039906 (<https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf>).

¹²⁵ D Louw & A Louw *Child and Adolescent Development* (2nd ed) (2014) 200.

¹²⁶ Louw & Louw (2014) 197. Many of the different gender characteristics that have socially been attributed to males and females are actually gender stereotypes: 195.

in any form can be harmful as it can lead to discrimination.¹²⁷ This discrimination can be experienced externally in general society, but also internally, within the specific family. Often when children diverge from what society expects, there is the risk that they will be subjected to bullying and stigmatisation. This serves as an opportunity for parents to create a safe space for their child to grow and experiment with their developing gender identity.¹²⁸

Transgender and intersex individuals, as well as other gender non-conforming persons are most likely to experience social and economic marginalisation due to discrimination because of their gender expression or identity.¹²⁹ This was one of the primary reasons for the establishment of the Yogyakarta Principles, as LBGTIQA+ persons are often undermined and compromised in everyday discourse. Principle 31 of the Yogyakarta Principles recognises that everyone has the right to obtain legal recognition, which includes birth certificates and identity documentation. Yet, in the majority of jurisdictions, identity documents are inaccessible for most intersex and gender-variant persons unless they undergo surgery and are assigned a male or female sex.¹³⁰ Considering that a child's registered identity is their first involvement for citizenship, it dictates how the child will be viewed by society as well as the law.¹³¹ This is problematic as parents are therefore compelled into making an immediate decision regarding their child's sex so that they can have access to a birth certificate.

¹²⁷ Gender Equality Law Center "Gender Stereotyping" < <https://www.genderequalitylaw.org/gender-stereotyping> > (accessed .

¹²⁸ <https://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Identity-and-Gender-Confusion-In-Children.aspx>.

¹²⁹ <https://www.genderequalitylaw.org/gender-stereotyping>. See also the discussion on the right to equality below.

¹³⁰ For purposes of a child's birth record, his or her external genitals are used to determine the child's sex. This determination will dictate how social relationships and daily life will be defined: R T D Fraser & I M S O Lima "Intersex and the right to identity: a discourse on the civil record of intersex children" *Journal of Human Growth and Development* (2012) < http://pepsic.bvsalud.org/scielo.php?script=sci_arttext&pid=S0104-12822012000300012 > (accessed 08-07-2020).

¹³¹ R T D Fraser & I M S O Lima "Intersex and the right to identity: a discourse on the civil record of intersex children" *Journal of Human Growth and Development* (2012) < http://pepsic.bvsalud.org/scielo.php?script=sci_arttext&pid=S0104-12822012000300012 > (accessed 08-07-2020).

4 4 4 The right to equality

It is estimated that 63% of gender non-confirming persons and transgender individuals experience severe acts of discrimination because of their identity.¹³² This is despite equality and protection against discrimination being a principle entrenched in international law. In South Africa, the right to equality and non-discrimination on grounds of sex and gender is enshrined in section 9 of the Constitution. The right to equality is given particular status within South African society because of the country's history regarding inequality, racism and homophobia.¹³³ In the decision of *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* the principle of equality was defined as the right to be different and to be respected in spite of that difference.¹³⁴ This definition also includes the right that one has to not be marginalised, stigmatised or excluded for being different.¹³⁵ Consequently, in order for equality to be achieved amongst all persons, everyone must be able to express themselves fully without fear of prejudice.

Equality for all persons is recognised in Principle 2 of the original Yogyakarta Principles. The Yogyakarta Principles were established specifically as many parts of the world fail to acknowledge the LGBGTIQA+ community as equal members of society.¹³⁶ However, it was later commented that there were still many inequalities that were not being addressed within the original principles. Assignment of gender at birth, for example, continues to restrict the choices and personal development of children both legally and socially.¹³⁷ Principle 31 of the YP + 10 concerns the right to legal gender recognition and registration. This principle was established as an attempt to

¹³² One of the reasons for the establishment of the Yogyakarta Principles was because of the principle of equality. Many gender-variant persons were discriminated against on the basis of their gender identity and sexual orientation. Principle 2 of the Yogyakarta Principles entrenches the principle that all persons are free and equal before the law regardless of their gender or sex and are entitled to express themselves. They were created in response to the hostility and bias exhibited against persons with varying sexual orientations and gender identities: Child Rights International Network "Gender & Sexuality: Child Rights Extracts from the Yogyakarta Principles (19-09-2012)" <<https://archive.crin.org/en/library/publications/gender-sexuality-child-rights-extracts-yogyakarta-principles.html>> (accessed 29-06-2020).

¹³³ Human Rights Commission "Equality" (2016) <<https://www.sahrc.org.za/index.php/focus-areas/immigration-equality/equality>> (accessed 14-01-2021).

¹³⁴ 1 SA 524 (CC) 549B. See also C Pickles "Termination of Pregnancy rights and fetal interests in continued existence in South Africa: The Choice on termination of pregnancy Act 92 of 1996" *PER* 15 (2012) 403 405.

¹³⁵ 1 SA 524 (CC) 549C-D 405 & Pickles *PER* (2012) 405.

¹³⁶ https://outrightinternational.org/sites/default/files/Activists_Guide_Yogyakarta_Principles.pdf 21

¹³⁷ L Holzer Smashing the Binary? A new era of legal gender registration in the Yogyakarta Principles Plus 10 1 (2020) *International Journal of Gender, Sexuality and Law* 98 100.

promote legal and social equality for trans, non-binary and intersex persons.¹³⁸ Although this principle has been implemented in some jurisdictions, a holistic approach has not yet been adopted nor is it applied consistently.¹³⁹ This is a particular issue for children born intersexed as it limits parents' options for registration purposes.

This right is also strongly entrenched in Article 2 of the CRC, which holds that states will uphold and respect the rights in the CRC without any discrimination to either the child or their parents based on any recognised ground. The Committee on the Rights of the Child in 2013 established that this is not a passive right but instead requires a proactive approach by states to ensure that equal opportunities are available to all children under the Convention.¹⁴⁰ Gender identity was recognised by the Committee in 2013 as one of the prohibited grounds of discrimination, despite not being specifically included in Article 2.¹⁴¹ This inclusion recognises that gender-based discrimination because of social norms needs to be curtailed.¹⁴² Often harmful gender-conforming practices, such as FGM,¹⁴³ and arguably sex alteration surgery are directly linked to enforcing socially based gender roles.¹⁴⁴ The continued endorsement of this practice promotes the negative and discriminatory perception endorsed by certain social groups. The Committee stated that attention needs to be directed towards preventing such practices since these experiences often cause severe impacts on an individual's mental health, which in turn could lead to depression and suicide.¹⁴⁵

¹³⁸ Holzer *International Journal of Gender, Sexuality and Law* 100.

¹³⁹ Chapter 5 will discuss the application of this principle in more detail.

¹⁴⁰ UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, available at: <https://www.refworld.org/docid/51ef9e134.html> [accessed 06 November 2020]

¹⁴¹ Sandberg "Intersex Children and the UN Convention on the Rights of the Child" in *The Legal Status of Intersex Persons* (2018) 518 & UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, available at: <https://www.refworld.org/docid/51ef9e134.html> [accessed 8 July 2020]. The right to health is discussed in more detail below in section 4.5.

¹⁴² UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, available at: <https://www.refworld.org/docid/51ef9e134.html> [accessed 23 January 2021] para 9.

¹⁴³ Despite this practice being termed a human rights violation, it remains an entrenched form of gender inequality. FGM refers to any procedure that involves the total or partial removal of external female genitalia or any other injury to the female sex organs for non-medical reasons. This practice is exclusively applicable to girls and is usually performed in relation to marriage and inheritance purposes, safeguarding their virginity and regulating their sexuality. It is often performed for religious reasons: <<https://www.unicef.org/protection/female-genital-mutilation>> (accessed 06-11-2020).

¹⁴⁴ Sandberg "Intersex Children and the UN Convention on the Rights of the Child" in *The Legal Status of Intersex Persons* (2018) 518.

¹⁴⁵ 519.

4 4 5 The right to health

According to the WHO, “the enjoyment of the highest attainable standard of health” is one of the fundamental rights to which every human being is entitled no matter their age.¹⁴⁶ This right has been recognised in many international instruments which include, but are not limited to, the 1948 Universal Declaration of Human Rights (Article 25), the International Covenant on Economic, Social and Cultural Rights 1966 (“ICESCR”) (Article 7(b) and 10(3)), the International Convention on the Elimination of All Forms of Discrimination against Women of 1979 (“CEDAW”) (Article 11(1)(f)), the African Charter on Human and Peoples Rights of 1981 (Article 16), the ACRWC of 1990 (Article 14), CRC of 1989 (Article 24) and the Convention on the Rights of Persons with Disabilities of 2006 (“CRPD”) (Article 25).¹⁴⁷ In South Africa, the Constitution makes provision for the right to health in terms of section 27 and specifically enshrines the child’s right to health in section 28(1)(c). This sentiment is also expressed in principle 17 of the YP + 10 which states that all persons, regardless of their sex and gender identity, are entitled to the highest attainable standard of health.¹⁴⁸

The WHO has identified that the concept of ‘health’ cannot be limited to an absence of disease or infirmity but is a condition of “complete physical, mental and social well-being”.¹⁴⁹ The Committee in General Comment Number 15 recognised that the right to health is a right that needs to be made accessible throughout the child’s life.¹⁵⁰ The concept of a child’s health has been affected by many millennial challenges such as war, poverty, HIV/AIDS, and the understanding of mental health. This concept will

¹⁴⁶ General Comment No 15 stated that this notion refers to many aspects of the child’s identity including their biological, cultural and social conditions as well as the resources which are available: Committee on the Rights of the Child “General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)” CRC/C/GC/15 4 (“General Comment No 15 (2013) < <https://www.refworld.org/docid/51ef9e134.html>> para 23.UN General Assembly, *Entry into force of the constitution of the World Health Organization*, 17 November 1947, A/RES/131, available at: <https://www.refworld.org/docid/3b00f09554.html> [accessed 4 June 2020] the preamble.

¹⁴⁷ Mills *Considering the best interests* 77.

¹⁴⁸ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <https://www.refworld.org/docid/48244e602.html> [accessed 3 July 2020].

¹⁴⁹ World Health Organization “Mental health: strengthening our response” (30-03-2019) ><https://www.who.int/en/news-room/fact-sheets/detail/mental-health-strengthening-our-response>> (accessed 27-02-2021).

¹⁵⁰ Committee on the Rights of the Child “General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)” CRC/C/GC/15 4 (“General Comment No 15 (2013) < <https://www.refworld.org/docid/51ef9e134.html>>.

likely continue to evolve in the future as society progresses in embracing previously stigmatised social perceptions.¹⁵¹ For a comprehensive realisation of the right to health to be achieved, it cannot be undermined because of discrimination on any grounds.¹⁵²

Furthermore, Article 24(1) of the CRC¹⁵³ stipulates that states have an obligation to recognise the child's right to health and put appropriate measures in place to support it.¹⁵⁴ This would include ensuring that parents have the necessary channels and information to ensure that their children have access to the specific health care they require.¹⁵⁵ This should also include having support structures in place, which will enable parents to be informed regarding the various components of their child's unique health needs.¹⁵⁶ Section 10 of the Children's Act emphasises the right of a child to participate in matters which affect them.¹⁵⁷ This means that in relation to a child's right to health, the information should be relayed in a child-friendly way that would enable children to express their opinions pertaining to their own body.¹⁵⁸

Children too have the right to have access to information regarding their current health status and the causes and treatment thereof.¹⁵⁹ It would also include parents receiving the correct communication from medical practitioners and healthcare specialists to educate them in a manner which is sensitive to the given situation.

¹⁵¹ Committee on the Rights of the Child "General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)" CRC/C/GC/15 4 ("General Comment No 15 (2013) < <https://www.refworld.org/docid/51ef9e134.html>> (para 5).

¹⁵² Gender identity and sexual orientation are two grounds which constitute grounds of discrimination outlined in Art 2 of the CRC. Committee on the Rights of the Child "General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)" CRC/C/GC/15 4 ("General Comment No 15 (2013) < <https://www.refworld.org/docid/51ef9e134.html>>.

¹⁵³ "Recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health."

¹⁵⁴ World Health Organization "The Right to Health" Fact Sheet No 31 (2008) <<https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>>1.

¹⁵⁵ Children should have access to counselling and advice without parental consent so that professionals can make an unbiased determination on the child's best interests in regards to their mental health: Committee on the Rights of the Child "General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)" CRC/C/GC/15 4 ("General Comment No 15 (2013) < <https://www.refworld.org/docid/51ef9e134.html>> para 31.

¹⁵⁶ Article 24(2)(e) & (f) of the CRC.

¹⁵⁷ The right to be heard is discussed later in this chapter.

¹⁵⁸ Section 10 of the Children's Act & Children's Institute A guide to the Children's Act for Health Professionals (2010) available at: http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/publication/2010/Guide%20to%20the%20Children%27s%20Act%202010.pdf .

¹⁵⁹ Section 13(1) of the Children's Act. Victims of sex alteration surgery often lack access to their health records which perpetuates the secrecy surrounding intersex bodies: ISSA Submission to the Portfolio Committee on Social Development on children's Amendment Bill [B18-2020] 4.

Consequently, it is essential for all role players in the child's life to bear in mind that 'health' is not narrowly defined. It is submitted that a child's right to health is not limited to their physical health but also encompasses their psychological,¹⁶⁰ emotional and sexual health.¹⁶¹

Mental health is described by the WHO as "a state of well-being in which an individual realises his or her own abilities, can cope with the normal stresses of life, can work productively and is able to make a contribution to his or her community".¹⁶² According to the WHO, mental health conditions affect between 10-20% of adolescents globally, with most of these conditions remaining undiagnosed and untreated.¹⁶³ This will often lead to an increased risk of suicide. Suicide is the third leading cause of death in individuals aged 15-19 years old and discriminated groups are particularly predisposed to such measures.¹⁶⁴ Data suggests that LBGTIQA+ youth contemplate suicide at almost three times the rate of heterosexual and cisgender youth.¹⁶⁵ Research indicates that one of the reasons for increased suicide rates amongst sexual and gender minorities is the increased stigma, discrimination and harassment they experience because of their 'differences'.¹⁶⁶ Additionally, the lack of support from understanding adults and the lack of safe spaces increases the psychological burden experienced by these youth.¹⁶⁷

¹⁶⁰ According to WHO there is a tendency to disregard 'mental health' in public health. Mental ill health can have drastic effects as denial thereof leads to an individual's deprivation of dignity, autonomy and denial of an individual's legal capacity to make decisions: World Health Organization "Human rights and health" (29-12-2017) <<https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health>> (accessed 04 June 2020).

¹⁶¹ The Committee on the Rights of the Child confirms and adopts the approach of WHO and recognises that what child health means has developed significantly over the last 27 years. One of the most prevalent new health problems recognised by WHO is child mental health care. Committee on the Rights of the Child "General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)" CRC/C/GC/15 4 ("General Comment No 15 (2013) <<https://www.refworld.org/docid/51ef9e134.html>>.

¹⁶² World Health Organization "Mental health: strengthening our response" (30-03-2018) <<https://www.who.int/en/news-room/fact-sheets/detail/mental-health-strengthening-our-response> > (accessed 26-10-2020).

¹⁶³ World Health Organization "Adolescent mental health" (28-09-2020) <https://www.who.int/news-room/fact-sheets/detail/adolescent-mental-health> (accessed 26-10-2020).

¹⁶⁴ World Health Organization "Suicide" (02-09-2019) <<https://www.who.int/news-room/fact-sheets/detail/suicide>> (accessed 26-10-2020).

¹⁶⁵ The Trevor Project "Preventing Suicide Facts About Suicide" <<https://www.thetrevorproject.org/resources/preventing-suicide/facts-about-suicide/>> (accessed 26-10-2020).

¹⁶⁶ T Peter, T Edkins, R Watson, J Adei, Y Homma & E Saewyc "Trends in suicidality among sexual minority and heterosexual students in a Canadian population-based cohort study" *Psychol Sex Orientat Gend Divers* 4 (2017) available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5758336/>.

¹⁶⁷ C Wilson & L A Cariola "LBGTQI+ Youth and Mental Health: A Systematic Review of Qualitative Research" *Adolescent Research Review* 5 (2020) 187 188.

The WHO recently published a report on the content of the right to sexual health and determined that the right is not only limited to include aspects of reproductive health¹⁶⁸ but also includes the right to be free from sexual related violence and FGM.¹⁶⁹ The right to sexual health needs to be interpreted widely, as it includes a state of physical, emotional, mental and social health in regards to sexuality.¹⁷⁰ The right to sexual health becomes increasingly important as a child grows and matures, and they need to be allowed to have the freedom to take control of their own sexual and reproductive autonomy.¹⁷¹ This is a sentiment which is also expressed in the Yogyakarta Principles, confirming that the ability to make informed choices regarding medical treatments in relation to all aspects of one's health is essential to this right.¹⁷²

One component of sexual health is the right to reproduce. Transgender and intersex people are often victims of non-consensual sterilisation caused by sex alteration surgery, as their anatomy can be distorted to such an extent that their sexual and reproductive functioning is grossly impaired or impossible.¹⁷³ In the past, loss of fertility was seen as an inevitable but acceptable consequence of sex transitioning, as the need for 'legal certainty' within family law systems and for children to have 'assurance' about their biological origins, were regarded as more important.¹⁷⁴ In 2009, however, the Fifth World Congress on Family Law and Children's Rights adopted a set of ethical guidelines for regulating the challenges that would result when a child was born

¹⁶⁸ This includes one's ability to make decisions regarding fertility, sterilisation, being free from sexually transmitted diseases, access to contraceptives and abortion: World Health Organization "Sexual health, human rights and the law" <https://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pdf;jsessionid=85C7B42BC86BB6D49DE45B58580BDD6B?sequence=1> 1. One of the potential consequences of sex alteration surgery is that it can render the child sterile or take away sexual functioning or pleasure entirely: refer to Chapter 1 for a more detailed description.

¹⁶⁹ World Health Organization "Sexual health, human rights and the law" <https://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pdf;jsessionid=85C7B42BC86BB6D49DE45B58580BDD6B?sequence=1> 1.

¹⁷⁰ World Health Organization "Sexual health, human rights and the law" <https://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pdf;jsessionid=85C7B42BC86BB6D49DE45B58580BDD6B?sequence=1> 1.

¹⁷¹ Committee on the Rights of the Child "General Comment No 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24)" CRC/C/GC/15 4 ("General Comment No 15 (2013) < <https://www.refworld.org/docid/51ef9e134.html>> para 24.

¹⁷² Principle 17(E).

¹⁷³ S Rowlands & J-J Amy "Preserving the reproductive potential of transgender and intersex people" *The European Journal of Contraception & Reproductive Health Care* 23 (2018) 58 58.

¹⁷⁴ Rowlands & Amy *The European Journal of Contraception & Reproductive Health Care* (2018) 58 59.

intersex.¹⁷⁵ In these guidelines, it was specifically mentioned that attention needs to be directed towards preserving the reproductive capacity, sexual satisfaction and future sexual health options for intersex individuals.¹⁷⁶ This would involve allowing a child to participate in the decision-making process relating to their body and the consequences that would result.

4 4 6 The right to be heard and freedom of expression

Arguably, the best interests principle and the child's right to be heard cannot be separated from one another as they have complementary roles.¹⁷⁷ Whereas Article 3(1) of the CRC entrenches the child's best interests, Article 12 thereof provides for the manner in which the child's views are taken into consideration when assessing what will be in their best interests.¹⁷⁸ Before a decision concerning a child is made by any person, such a person has an obligation to actively engage the child in the matter and the circumstances thereof.¹⁷⁹

Article 12 is perhaps one of the most empowering rights for children. It illustrates that the CRC does not view them as victims of circumstance but recognises them as developing rights holders who are capable of being part of the decision-making process.¹⁸⁰ This provision does not presuppose that children will know what is in their best interests; in fact, the opposite is actually often the truth. However, part of the developmental process is providing children with the opportunity to have their opinions expressed.¹⁸¹

¹⁷⁵ L H Gillam, J K Hewitt & G L Warne "Ethical Principles for the Management of Infants with Disorders of Sex Development" *Hormone Research in Pediatrics* (2010) 1 1.

¹⁷⁶ Rowlands & Amy *The European Journal of Contraception & Reproductive Health Care* (2018) 58 59.

¹⁷⁷ In earlier drafts of the CRC, these two rights were combined, with the USA in 1981 submitting the following paragraph as part as the clause promoting the best interests of the child: "In all judicial or administrative proceedings affecting a child that has reached the age of reason, an opportunity for the views of the child to be heard as an independent party to the proceedings shall be provided, and those views shall be taken into consideration by the competent authorities.": MDA Freeman "Article 3 The Best Interests of the Child" in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans, M Verheyde & B Abramson (eds) *A Commentary on the United Nations Convention on the Rights of the Child* (2007) 50.

¹⁷⁸ General Comment No 14 (2013) 11.

¹⁷⁹ Sandberg 527.

¹⁸⁰ Mills *Considering the best interest of the child* 84.

¹⁸¹ 85.

In an attempt to guide state parties in their interpretation and give content to the right to be heard, the Committee drafted General Comment No 12.¹⁸² The Committee acknowledged that babies are entitled to have their best interests assessed in the same manner as older children, even if they are unable to express their views in the same way.¹⁸³ The Committee has also acknowledged that children are capable of expressing their views from a very early age.¹⁸⁴ Consequently, the Committee has discouraged setting age limitations on a child's right to be heard, as it supports the notion that it is not only verbal communication that must be taken into account.¹⁸⁵ Nonverbal methods should also be recognised as valid means of expression of views.¹⁸⁶ Therefore the child's views must always be considered, even if they do not appreciate the consequences of their decision.¹⁸⁷

Further, although Article 12 stipulates that children have the right for their views to be taken into account, it does not mean the voice of the child needs to be heard directly, as it can be expressed through a representative.¹⁸⁸ As the primary caretakers, parents are obliged to consider their infants' evolving capacities when making a decision concerning their best interests. A component of this obligation is that parents have to appropriately direct and guide their children, illustrating the relationship between Article 12 and 5 of the CRC. As previously discussed in chapter 3, a crucial factor of that direction and guidance on the part of parents is for them to realise that their children are their own independent person, and they have an independent right to be able to get to know their own bodies.¹⁸⁹

The child's right to be heard is also included in section 10 of the South African Children's Act but is phrased differently to the CRC, in that it refers to the child's right to participate.¹⁹⁰ This is noteworthy as, unlike the more general formulation in the CRC,

¹⁸² M Reyneke "Children's right to participate: Implications for school discipline" *De Jure* (2013) 206 209.

¹⁸³ General Comment No 14 (2013) 11.

¹⁸⁴ General comment No 12 para 14(b).

¹⁸⁵ Reyneke *De Jure* (2013) 211 and General Comment 12 para 21.

¹⁸⁶ Reyneke *De Jure* (2013) 211 and General Comment 12 para 21.

¹⁸⁷ General Comment No 7 (2005) para 14 & Sandberg 527.

¹⁸⁸ J Sloth-Nielsen "Seen and Heard? New Frontiers in Child Participation in Family Law Proceedings in South Africa" *Speculum Juris* 2 (2009) 1 2.

¹⁸⁹ Mills & Thompson (2020) *International Journal of Children's Rights* 558.

¹⁹⁰ Reyneke *De Jure* (2013) 208. Although section 10 of the Children's Act specifically refers to the child's right to participate, this is a sentiment that runs like a golden thread throughout the Act itself and is seen in various sections. These sections include but are not limited to s 31, 22(6)(a)(ii) and (b)(ii), s 28(3)(c), s 53, s 58, s 60 and s 61: Sloth-Nielsen *Speculum Juris* (2009) 5-6.

the Children's Act presupposes that children will be directly involved in matters affecting them.¹⁹¹ In section 10 of the Children's Act, significant attention is paid towards the maturity and age of the child. Reyneke, however, submits that the child's views should not be unduly limited.¹⁹² Furthermore, it is also important to recognise the child's right to participate in terms of section 31 of the Children's Act, which considers the significant decision-making capacity by the holder of parental responsibilities and rights.¹⁹³ This explicitly provides that in instances where a decision has the possibility of influencing significant change in the life of the child concerned, due consideration must be given to the opinions expressed by the child, taking their age and level of maturity into account.¹⁹⁴

Intersex infants are already more vulnerable than the average child and one of the assessments expressed by the Committee was that the views of marginalised children must be taken into account.¹⁹⁵ Intersex infants do not have the capacity to participate in the decision-making process surrounding their sex alteration surgery while they are in infancy. This matter relates to an intimate aspect of the child's identity and will have lasting consequences for the child. It is therefore essential – based on the recommendations by the Committee – that the child be included in the decision-making process when they reach an age at which they can actively communicate their own unique needs, especially because of the potential consequences that can result from these decisions.

4 5 Conclusion

This chapter discussed the content and meaning of the best interests principle in international law, as well as its application in South Africa's domestic law. It was revealed that, although there are differences between the formulation of the principle in international law and South African law, they have the same premise. Both formulations seek to promote the child's interests in all circumstances that concern the child, while still having regard for any other competing interests. Importantly, no matter the formulation, the principle aims to ensure that children are not just bypassed and

¹⁹¹ Sloth-Nielsen *Speculum Juris* (2009) 5.

¹⁹² Reyneke *De Jure* (2013) 211

¹⁹³ 213.

¹⁹⁴ 213

¹⁹⁵ Reyneke *De Jure* (2013) 209-210.

treated as unnecessary bystanders in situations that involve them. Rather it ensures that children, their rights and interests are made the central consideration in every matter that concerns them. The best interests of the child cannot be separated from the other rights contained in the CRC.

Children present a complex situation for lawmakers as, although they are vulnerable, they are also recognised as independent legal subjects who need to be respected in their own right. The best interests principle respects that children are independent persons who will be capable of making decisions in the future but at the same time recognises that protection needs to be afforded to them because of their vulnerability and inexperience. It is clear that the law does not seek to remove every obstacle out of the way for children or place them above adults in terms of rights protection. However, especially marginalised groups will often require additional protection. This will include involving a child in the decision-making process and allowing them to participate in their own development.

The state also plays an important role. In order to promote an intersex child's best interests, the state will have to make certain information available to parents so that they can make decisions that are in the best interests of their intersexed child. The most important consideration is that the child needs to develop their own path and identity: The parties concerned aim to enable the intersex child to ultimately achieve this.

The subsequent chapter will explore how various jurisdictions have approached intersex children's rights and what measures have been implemented to ensure that the child's best interests and other rights are supported. The positive and negative aspects of the various practices will be discussed in light of the measures adopted. This chapter will also consider the status of intersex rights in a global context and determine if there has been sufficient protection granted to this extremely susceptible group

CHAPTER 5: A COMPARATIVE PERSPECTIVE OF SEX ALTERATION SURGERY ON INTERSEX INFANTS

5 1 Introduction and general remarks

Chapter 4 considered the best interests of the intersexed child and how this overarching principle impacts all other rights that are entrenched in the CRC. Although international law has attempted to introduce regulatory measures in respect of issues of gender identity and sex for intersex and transgender individuals, many jurisdictions have not adopted laws that fully uphold these rights. The implementation and acknowledgement of intersex rights remain a relatively new legal issue. This is due to a continued endorsement of a culture of secrecy and social othering of intersex bodies. Consequently, parents of intersex infants are advised to choose a sex for their child that would satisfy the binary gender roles favoured by society. Therefore, the global majority of children born intersexed, have received surgery to alter their genitals. Some jurisdictions have recognised that such a procedure infringes upon many aspects of international law and violates children's rights to childhood. However, despite this recognition, a universal approach has not yet been adopted to address the issue of sex alteration surgery performed on intersex babies. It is therefore necessary to consider the piecemeal changes that certain jurisdictions have adopted towards the protection of intersex rights. Furthermore, it is also important to consider why these jurisdictions chose to adopt such procedures and whether they have been successfully realised within their jurisdiction.

5 2 Developments and best practices from selected jurisdictions

5 2 1 The United States of America

USA citizens can possess up to three different types of government-issued identity documentation that include a sex indicator.¹ This system is problematic as each government entity operates separately from the other and is regulated by different policies, statutes and regulations.² It presents a challenge for persons who identify as

¹ This documentation can include a state issued driver's license, a federally issued passport and a birth certificate that can be State, county or city issued depending on where the individual was born JA Greenberg "The Legal Status of Intersex Persons in the United States" in *The Legal Status of Intersex Persons* 339 339.

² 340.

intersex and non-binary as they may have one sex recorded on one official document, which may contradict the other on the second or third document. However, until there is a court ruling on the abandonment of the binary registration system by all federal and state departments, the position will remain the same and the confusion will continue.³

In 2007, the state of Oregon introduced landmark legislation, namely the Oregon Equality Act, to protect LGBTIQ+ persons from discrimination.⁴ This legislation prohibits discrimination on the basis of gender identity or sexual orientation in the areas of employment, public accommodation, housing and financial transactions, jury service, state institutions, foster parenting and public school education.⁵ In 2016, Oregon officially recognised non-binary gender identity for registration purposes.⁶ Since this advancement in Oregon, eleven other states⁷ have also introduced legislation to allow for selecting a third gender marker on an individual's birth certificate.⁸

³ 340.

⁴ Lambda Legal "The Oregon Equality Act Protection for lesbian, gay, bisexual and transgender people" <https://www.lambdalegal.org/sites/default/files/publications/downloads/fs_oregon-equality-act_0.pdf> (accessed 05-11-2020).

⁵ Lambda Legal "The Oregon Equality Act Protection for lesbian, gay, bisexual and transgender people".

⁶ Jamie Shupe was the first US citizen to be officially legally classified as having a non-binary gender identity: O'Hara "Why Can't the Nation's First Legally Non-Binary Person Get an I.D.?" <https://www.dailydot.com/irl/jamie-shupe-dana-zzyym-passport-state-department-gender/> (accessed 03-11-2020). Jamie did not receive a positive response from the US State Department when he applied for a passport with a non-binary gender marker, also not from the Army when he wanted to have his military card changed: Greenberg in "The Legal Status of Intersex Persons" (2018).

⁷ These states are Colorado, New Jersey, Utah, New Mexico, Illinois, Nevada, Rhode Island, California, Washington, Maine and Connecticut: J Milton "Non-binary people win vital legal recognition as Maine becomes 12th state to issue 'X' gender birth certificates" (20-07-2020) *Pink News* <<https://www.pinknews.co.uk/2020/07/20/maine-non-binary-birth-certificates-x-legal-recognition/>> (accessed 05-11-2020).

⁸ Soon after the Jamie Shupe decision, a California Supreme Court gave a very similar order to Sara Kelly Kennan. Kenna was born intersex and only discovered their true identity in later life. They subsequently requested and received a California court order stating that their sex was intersex. After receiving the order, they requested New York City to change their sex marker on their birth certificate to intersex. This was finally completed in 2016 and they were issued a new birth certificate: Greenberg in "The Legal Status of Intersex Persons" (2018) 341. As of July 2020, Maine allows parents to choose to register their child with a non-binary sex designation marker on their birth certificate. Persons who are under 18 can also apply to have their sex marker changed, with parental consent. Residents of Maine have been able to have access to an X gender designation on their state IDs and drivers licences since 2018 (from 2019 they no longer needed a medical practitioner consent to do so): G Stockford "Maine now offers non-binary option on birth certificates" (14-07-2020) *News Centre Maine* <<https://www.newscentermaine.com/article/news/local/maine-now-offers-nonbinary-option-on-birth-certificates/97-5324b15c-340e-4aa1-8450-bf7b0390bddb>> (accessed 05-11-2020). As of 2019 Maine also banned conversion therapy on minors making it the 17th State in the USA to do so: S Manzella "Maine Bans Conversion Therapy for Minors" (29-05-2020) *Newnownext* <<http://www.newnownext.com/maine-bans-conversion-therapy-for-minors/05/2019/>> (accessed 05-11-2020).

Currently, Dana Zzyym is the only person who has approached a federal court⁹ to challenge the binary sex classification system in the USA.¹⁰ They sued the US State Department after being denied a US passport because they refused to be restricted to choosing either the male or female option on the application form.¹¹ Dana identified as intersex and wanted an option that reflected their identity, therefore they wanted an “X” marker on their passport.¹² It was accepted by the State Department that Dana qualified for a passport but maintained that they were unable to use any sex designator other than male or female.¹³ Consequently, a sex discrimination suit was filed against the US Department of State as it was asserted that Dana’s right to due process and equal protection in terms of the Administrative Procedure Act¹⁴ was being violated.¹⁵ It was determined by the Colorado District Court that the actions on the part of the State Department were not rational and the court was not satisfied that the Department’s actions were not arbitrary in the instance.¹⁶ The District Court referred the matter back to the Department to either issue the passport with the X-designator marker or bring further evidence to the court to support their assertion that their decision for refusal was rational.¹⁷ In 2018, the Department was compelled to issue Dana a passport which accurately reflected their chosen identity.¹⁸

*MC v Amrhein*¹⁹ is the only case in the USA to be brought on behalf of an intersex child based on constitutional violations because of the performance of sex alteration surgery on them while in infancy.²⁰ The South Carolina Department of Social Services (“SCDSS”)²¹ had legal custody over MC at the time the surgery was performed, as he was in foster care.²² The medical practitioners involved with MC’s case said that it

⁹ *Zzyym v Kerry* 220 F.Supp.3d 1106 (D CO 2016).

¹⁰ Greenberg in “The Legal Status of Intersex Persons” (2018) 342.

¹¹ Newcombe (2017) *Law Lib J* 237.

¹² Greenberg in “The Legal Status of Intersex Persons” (2018) 342.

¹³ 342.

¹⁴ 5 USC §551 et seq.

¹⁵ M Sudai “Revisiting the Limits of Professional Autonomy: The Intersex Rights Movement’s Path to De-Medicalization” 41 *Harvard Journal of Law and Gender* (2018) 1 31.

¹⁶ 343.

¹⁷ 343.

¹⁸ Reuters “U.S. judge rules for Colorado intersex veteran denied passport” (20-09-2018) *NBC* <<https://www.nbcnews.com/feature/nbc-out/u-s-judge-rules-colorado-intersex-veteran-denied-passport-n911391>> (accessed 03-02-2021)

¹⁹ *M.C. ex rel. Crawford v. Amrhein*, 598 F. App’x 143, 147 (4th Cir. 2015).

²⁰ A Huddleston “Intersex Children In Foster Care: Can Government Elect Sex Assignment Surgery?” 22 (2014) *Journal of Law and Policy* 959.

²¹ His biological parents had relinquished their parental responsibilities and rights.

²² Huddleston (2014) *Journal of Law and Policy* 983.

would be possible to raise him as either male or female, as there was no dominant sex trait that presented clearly.²³ It was decided to assign him a female gender identity. After MC's adoptive parents saw his profile on the state adoption website in June 2006, they learned that he was intersexed and contacted the agency to prevent any surgery in an attempt to 'normalise' him.²⁴ They were too late in their attempt as surgery had been performed in mid-April 2006.²⁵ Initially, MC's adoptive parents raised him as a female but from a very early age, he began to express a male gender identity through his interests, mannerisms and forms of play.²⁶

MC's parents approach the court and submitted that when the SCDSS consented to the surgery, they violated his rights to bodily integrity, sexual autonomy and procreation.²⁷ It was further asserted that MC's rights to due process were violated under the fourteenth amendment as the SCDSS and physicians performed the surgery without applying for a hearing.²⁸ The case was initially heard in the District Court²⁹ which found that MC's right to procreate was negatively impacted by the SCDSS's decision and therefore survived summary judgment.³⁰ However, the matter was dismissed on grounds of qualified immunity.³¹ According to Schwartz, "[q]ualified immunity shields government officials from constitutional claims for monetary damages so long as the officials did not violate clearly established law."³² It was the opinion of the Fourth Circuit Court that there was no violation of MC's clearly established constitutional rights.³³ The matter was later settled in 2017 with monetary compensation of \$440,000 paid by the defendant to MC.³⁴ This settlement was a first,

²³ 985.

²⁴ 986-987.

²⁵ 987.

²⁶ 987.

²⁷ Hupf (2015) *Wm & Mary J Women & L* 10.

²⁸ Huddleston (2014) *Journal of Law and Policy* 983.

²⁹ The claim was filed in both the state and the federal court but only the state court's claim extended beyond the motion to dismiss: Lowry *Colombian Journal of Law and Social Problems* (2018) 335.

³⁰ A Akre "Hanging in the Balance: The Intersex Child, the Parent, and the State" (2016) 5 *Tennessee Journal of Race, Gender & Social Justice* 37 53.

³¹ 53.

³² "The Supreme Court has described the doctrine as incredibly strong – protecting "all but the plainly incompetent or those who knowingly violate the law": J C Schwartz "How Qualified Immunity Fails" 127 *The Yale Law Journal* (2017) 2 2.

³³ CG Carrera "The Role of International Human Right Law in Mediation Between the Rights of Parents and Their Children Born with Intersex Traits in the United States (2018) 24 *Wm & Mary J Women & L* 459 477.

³⁴ Mills & Thompson (2020) 565.

as never before had an intersex person been able to recover damages³⁵ for an unnecessary cosmetic procedure that had been performed on them while in infancy.³⁶

This case is unique as it is an example where parents of an intersex child recognised the harm that often results from these unnecessary surgeries. Lowry submits that MC's settlement actually paves the way for intersex activism as it illustrates that legal recourse is an actual possibility more than a far reaching 'hope'.³⁷

5 2 2 Canada

Since 2018, the Canadian state of Ontario has been allowing individuals who are born in the province to choose either a non-binary gender option or to remove the gender marker from their birth certificate: a global first.³⁸ The feedback on this policy has been positive as it allows an individual to remove the gender marker entirely if they wish.³⁹

In 2019, the Canadian Bar Association called for the Canadian government to amend section 268(3)⁴⁰ of the Criminal Code⁴¹ to prohibit medically unnecessary sex alteration surgeries on intersex infants.⁴² In the proposal, it was argued that in 1997 the first amendment to section 268 of the Criminal Code was made to define FGM as aggravated assault and that this should be extended further to prohibit sex alteration surgery.⁴³ There have been no advancements regarding this proposal as of yet.

³⁵ Compensation was awarded due to psychological damages, permanent impairment, pain and suffering, as well as medical expenses.

³⁶ Lowry *Colombian Journal of Law and Social Problems* (2018) 324.

³⁷ 355.

³⁸ A Jao "Gender 'X': Ontario issues its first 'nonbinary' birth certificate (09-05-2020) *NBC News* <<https://www.nbcnews.com/feature/nbc-out/gender-x-ontario-issues-its-first-ever-non-binary-birth-n872676>> (accessed 03-11-2020).

³⁹ Jao "Gender 'X': Ontario issues its first 'nonbinary' birth certificate (09-05-2020) *NBC News*.

⁴⁰ This provision reads as follows:

"For greater certainty, in this section, "wounds" or "maims" includes to excise, infibulate or mutilate, in whole or in part, the labia majora, labia minora or clitoris of a person, except where
 (a) a surgical procedure is performed, by a person duly qualified by provincial law to practise medicine, for the benefit of the physical health of the person or for the purpose of that person having normal reproductive functions or normal sexual appearance or function; or
 (b) the person is at least eighteen years of age and there is no resulting bodily harm."

⁴¹ The Canadian Bar Association (01-05-2019) *CBA* <<https://www.cba.org/CMSPages/GetFile.aspx?guid=da2fdb2a-11ec-4420-9121-842e93db093d>>.

⁴² The Canadian Bar Association (01-05-2019) *CBA*.

⁴³ The Canadian Bar Association (01-05-2019) *CBA*.

5 2 3 India

In 2014, the decision of *NALSA v Union of India* was handed down by the Supreme Court of India.⁴⁴ This case was the first to give legal recognition to non-binary gender identities – including transgender persons, as well as hijaras, enunch, kothis, aravanis, jogoppas and Shiv-Shakthis⁴⁵ – and promote the fundamental human rights of transgender persons in India.⁴⁶ The court recognised that accessible gender identification is essential for citizens to have access to civil rights.⁴⁷ It was submitted to the court that Articles 14 (equality before the law), 15 (prohibition of discrimination on grounds of religion, race, caste, sex or place of birth), 16 (equality of opportunity in matters of public employment), 19(1)(a) (protection of freedom of expression) and 21 (protection of life and personal liberty) of the Constitution of India⁴⁸ were being violated by not giving legal recognition to a third gender.⁴⁹ An extensive survey was conducted on the evolution of gender identity and sexual orientation in international and comparative law, international human rights law and domestic and regional law.⁵⁰ This resulted in the court finding that Articles 14, 15, 16, 19(1)(a) and 21 should be read in gender-neutral terms and third gender legal recognition was constitutionally imperative.⁵¹

Although it is undeniable that this judgment is a major step towards creating gender equality in India, the position of intersex persons remains problematic. This is due to a lack of clear guidance as to who qualifies as ‘transgender’ in terms of the decision.⁵² Further clarity has not yet been provided. Nevertheless, in 2019, in the Indian state of Tamil Nadu, a court ordered the local government to prohibit any unnecessary cosmetic surgeries on children that are born intersexed.⁵³ The judgment cited the *NALSA v Union of India* decision, the Maltese Gender Identity Gender Expression and

⁴⁴ Shah “The Legal Status of Intersex Persons in India” in *The Legal Status of Intersex Persons* 281.

⁴⁵ All these identities are grouped under the definition of transgender identities in India. For a more detailed discussion surrounding these identities, please see *NALSA v Union of India* (2014) 5 SCC 438, 109-110.

⁴⁶ <https://translaw.clpr.org.in/case-law/nalsa-third-gender-identity/>

⁴⁷ *NALSA v Union of India* (2014) 5 SCC 438, 116.

⁴⁸ The Constitution of India, 26 January 1950.

⁴⁹ “The Legal Status of Intersex Persons in India” in *The Legal Status of Intersex Persons* 284-285.

⁵⁰ 285.

⁵¹ 285.

⁵² 286.

⁵³ K Knight “Indian Court Decides in favour of informed consent rights for intersex people” (29-04-2019) *Human Rights Watch* <<https://www.hrw.org/news/2019/04/29/indian-court-decides-favor-informed-consent-rights-intersex-people>> (accessed 21-02-2021).

Sex Characteristics Act,⁵⁴ as well as WHO's criticism of intersex surgeries, as support for the decision.⁵⁵ The directive by the state government indicated that these surgeries will only be sanctioned when the life of the infant is threatened.⁵⁶ This necessity will be decided by a panel of experts established by the Directorate of Medical Education.⁵⁷ This Committee will comprise of: "a paediatric surgeon or urologist, an endocrinologist, a social worker or intersex activist and a government representative".⁵⁸ The Committee represents the various aspects of the child's health that can be affected by the procedure. Shankar observes that lawmakers, medical practitioners and especially parents will have to be gradually sensitised to it. He also opines that this implementation is a suitable initial step but that clear guidelines and further amendments will have to supplement the ruling in time.⁵⁹

5 2 4 Colombia⁶⁰

Colombian legislation has been relatively silent on matters concerning the various aspects of intersexuality. However, the Colombian Constitutional Court has been debating and pronouncing on the complexities surrounding intersexuality since 1995.⁶¹ The Colombian Constitutional Court gave the first ruling by any tribunal that upheld the rights of intersex children to grow up without being subjected to unnecessary cosmetic medical surgeries.⁶² Apart from focusing on the issue of non-consensual cosmetic surgery, the court also recognised that intersex persons are a

⁵⁴ See 2 7 below.

⁵⁵ Knight "Indian Court Decides in favour of informed consent rights for intersex people" (29-04-2019) *Human Rights Watch*. Interestingly it was observed by Gopi Shankar and intersex activist that in India medical procedures performed on animals have regulation but for intersex infants there is none.

⁵⁶ A Daksnamurthy "1st in India & Asia, and 2nd globally, Tamil Nadu bans sex-selective surgeries for infants" (31-08-2019) *The Print* <<https://theprint.in/features/lgbtq-india-asia-tamil-nadu-ban-sex-selective-surgeries-for-infants/284982/>> (accessed 21-02-2021)

⁵⁷ Daksnamurthy "1st in India & Asia, and 2nd globally, Tamil Nadu bans sex-selective surgeries for infants" (31-08-2019) *The Print*.

⁵⁸ Daksnamurthy "1st in India & Asia, and 2nd globally, Tamil Nadu bans sex-selective surgeries for infants" (31-08-2019) *The Print*.

⁵⁹ Daksnamurthy "1st in India & Asia, and 2nd globally, Tamil Nadu bans sex-selective surgeries for infants" (31-08-2019) *The Print*.

⁶⁰ Please note that this section will rely heavily on secondary sources as the court decisions themselves are not available in English and direct translations are unavailable.

⁶¹ R White "Preferred private Parts: Importing Intersex Autonomy for M.C. v. Aaronson" (2014) 37 *Fordham Int'l L J* 777 794.

⁶² *Intersex Initiative* "The Colombia Case: Intersex in the Global Human Rights Struggles" (undated) <<http://www.intersexinitiative.org/law/colombia.html#:~:text=The%20Colombia%20case%20is%20important,of%20global%20human%20rights%20movements.>> (accessed 13-08-2020).

minority, who are entitled to the same protection against discrimination under the law as any other marginalised group.⁶³

The Colombian Constitutional Court decided three main cases, each relating to a different aspect of the complexities surrounding intersex infants and minors. During the time that the first case, *Sentencia No. T-477/95 (Gonzalez)*, was decided in 1995, Dr Money's standards of care prescribed for intersex persons were being questioned.⁶⁴ In *Gonzalez*, the infant child was referred for non-consensual surgery⁶⁵ and was 'adequately' feminised to reflect the assigned female gender identity.⁶⁶ In his teenage years, the child learned of the operation that had been performed on him and sued the medical practitioner(s), as well as the hospital that performed the surgery, on the basis that his constitutional right to dignity and gender identity under the Colombian Constitution had been violated.⁶⁷ The court, in addressing the claim, stated that there was not an urgent threat to the life of the child when he was first referred to surgery, which therefore excluded competent clinicians from making the decision on their own.⁶⁸ In making this clear finding, the 'urgency' of performing 'normalizing treatments' was challenged and the first steps in preventing non-consensual 'gender normalising' surgeries were taken.⁶⁹ The court also held that the operation constituted a human rights violation on the basis of gender identity⁷⁰ and human dignity.⁷¹ Consequently,

⁶³ Intersex Society of North America "Colombia High Court Restricts Intersex Genital Mutilation" <<https://isna.org/node/181/>> (accessed 16-09-2020).

⁶⁴ R Rubio-Marin & S Osella "Between rights and pragmatism: Intersexuality before the Colombian Constitutional Court in JM Scherpe, A Dutta & T Helms "The Legal Status of Intersex Persons" (2018) 319 323. See chapter 2 above for a discussion of Dr Money's practices.

⁶⁵ There appear to be conflicting reports from different authors about the means in which the child 'acquired' surgery. Haas asserts that the child was accidentally castrated while being circumcised and therefore the medical practitioners subjected him to sex alteration surgery (Haas (2004) *Am J L & Med* 49), whereas Rubio-Martin and Osella state that a puppy had bitten off the genitalia of his young owner: (Rubio-Marin & Osella in J M Scherpe, A Dutta & T Helms "The Legal Status of Intersex Persons" (2018) 323).

⁶⁶ Rubio-Marin & Osella "Between rights and pragmatism: Intersexuality before the Colombian Constitutional Court" in *The Legal Status of Intersex Persons* (2018) 323.

⁶⁷ Haas (2004) *Am J L & Med* 49.

⁶⁸ Rubio-Marin & Osella "Between rights and pragmatism: Intersexuality before the Colombian Constitutional Court" in *The Legal Status of Intersex Persons* (2018) 323.

⁶⁹ 323.

⁷⁰ In the Colombian Constitution the right to identity has an even higher standard when it involves a child and therefore grants additional protection to the child's interests: 323. Furthermore, the Colombian Constitutional Court cited Art 8 of the CRC which specifically pertains to the obligation of the State to protect the identity of children. The court focused particularly on the aspect that when children have illegally been deprived of their identity, the State needs to invoke protection. When applying it to these circumstances, the court held that, by making the decision for the intersexed child, their right to identity is being deprived: White *Fordham Int'l L J* (2014) 797.

⁷¹ Haas (2004) *Am J L & Med* 49. The court acknowledged that parental consent for medical treatment for children is sometimes necessary, however, in cases concerning intersex children, parental consent

the court pronounced that doctors were prohibited from altering the sex of a patient without their informed consent, irrespective of the patient's age.⁷² This decision was revolutionary as it placed great emphasis on a person's right to self-determination with regard to gender identity.⁷³

A further two cases, *Sentencia No. SU-377/99* ("Ramos") and *Sentencia No. T-551/99* ("Cruz"), specifically involving the issue of proxy consent for intersex children, were heard by the Colombian Constitutional Court following the *Gonzalez* decision.⁷⁴ The *Ramos* decision involved an eight-year-old intersex child⁷⁵ who had been raised as female but it was only when the child turned three⁷⁶ that doctors realised that the child was intersexed.⁷⁷ The doctors recommended that the child should be referred for genital reconstruction. This approach was also supported by the child's mother as she wanted to continue to raise her child as female.⁷⁸ She feared that if surgery was postponed until a time when the child could provide her own consent, she would be psychologically scarred because she would not have grown up with a clear gender identity.⁷⁹ The mother also reasoned that the delay of this surgery would impair her daughter's right to equality, development of individual identity and would negate the special protection offered to children under Colombia's Constitution.⁸⁰

Upon deliberating whether a parent should be able to consent to such surgery on behalf of the child, the court considered the intimacy, as well as the severity⁸¹ of the

is not broadened to such an extent. The court explained that children are not property of their parents or society; sex is an essential component of an individual's identity and altering one's sex is a decision that can only be made by the individual themselves who are fully informed and knowledgeable on the intricacies of such a change: Rubio-Marin & Osella "Between rights and pragmatism: Intersexuality before the Colombian Constitutional Court" in *The Legal Status of Intersex Persons* (2018) 323.

⁷² Haas (2004) *Am J L & Med* 50.

⁷³ Rubio-Marin & Osella "Between rights and pragmatism: Intersexuality before the Colombian Constitutional Court" in *The Legal Status of Intersex Persons* (2018) 324.

⁷⁴ Hupf *William & Mary Journal of Women and the Law* (2015) 98.

⁷⁵ The child had pseudo-hermaphroditism: she was born with XY chromosomes but because she was unable to process male hormones, external male genitalia did not fully develop: Haas (2004) *Am J L & Med* 50.

⁷⁶ By the time that the matter had reached the Colombian Constitutional Court, the child in question was eight years old: 50.

⁷⁷ 50.

⁷⁸ 50.

⁷⁹ 51.

⁸⁰ Rubio-Marin & Osella "Between rights and pragmatism: Intersexuality before the Colombian Constitutional Court" in *The Legal Status of Intersex Persons* (2018) 325.

⁸¹ The Court considered significant amounts of expert testimony deliberating what surgery entailed, the effects, the benefits, as well as if surgery were to be performed, at what time it would be suitable (in this regard opinions differed significantly, with the majority finding it necessary to perform surgery early on as it would enable consistent development with a recognised gender identity): Rubio-Marin & Osella

procedure.⁸² This included negative effects that could ultimately result if the child were to reject their assigned sex in later life. The court also acknowledged evidence of the psychological harm that had resulted from such surgeries being performed in early childhood and ultimately concluded that no one but the individual themselves can consent to the surgery.⁸³ It was thereby concluded by the court that the rights of children contained in the CRC were violated by allowing parents to consent to ‘genital normalising-surgery’.⁸⁴ The Colombian Constitutional Court also relied on Article 18 of the CRC, confirming that states are to support parents in making decisions that are in the best interests of their child. The court recognised that sometimes parents can be influenced by their own prejudices, which in turn will lead them to making a quick decision without really considering their child’s best interests.⁸⁵ Ultimately, the court concluded that it was the state’s obligation to protect the child’s best interests and therefore pronounced that the parents did not have the right to consent to surgery on behalf of a child.⁸⁶ It is important to note that this decision was the first in which a court recognised how intersex ‘normalisation’ and gender identity are influenced by surrounding social and cultural factors.⁸⁷

A subsequent decision by the Colombian Constitutional Court, *Cruz*, was considered to be a far weaker decision compared to *Ramos* and *Gonzalez*.⁸⁸ In the trial court it was determined that *Cruz*’s parents were allowed to consent to sex alteration surgery on their child’s behalf, however, the court qualified that the consent had to be informed on part of the parents.⁸⁹ When the decision was brought before the Colombian Constitutional Court, *Cruz* had already undergone surgery; nevertheless, the court decided to pronounce on the matter as to set a precedent for the lower courts.⁹⁰ The court found that *Cruz*’s parents were misinformed regarding their child’s

“Between rights and pragmatism: Intersexuality before the Colombian Constitutional Court” in *The Legal Status of Intersex Persons* (2018) 325.

⁸² KO Semler “Let the Child Decide: Surgical Intervention After Parental Consent Should No Longer Be Considered the Best Option for Children with Intersex Conditions” (2010) 16 *Law School Student Scholarship* 1 21.

⁸³ Semler (2010) *Law School Student Scholarship* 21.

⁸⁴ White *Fordham Int’l L J* (2014) 798.

⁸⁵ 798-799.

⁸⁶ 798.

⁸⁷ Rubio-Marin & Osella “Between rights and pragmatism: Intersexuality before the Colombian Constitutional Court” in *The Legal Status of Intersex Persons* (2018) 325.

⁸⁸ Haas (2004) *Am J L & Med* 52.

⁸⁹ 52.

⁹⁰ 52.

intersex status, as they were made to believe that surgery was the only option available.⁹¹ As Cruz had already been victim to sex alteration surgery at the time this decision came to the court, it ordered that Cruz and her family receive support from an interdisciplinary team.⁹² Furthermore, the court also qualified that parents had the authority to choose sex alteration surgery if their child was under the age of five.⁹³ Although parents could make such a decision, the court held that they did not have unfettered discretion.⁹⁴ The court, therefore, stated that parents are only allowed to consent to sex alteration surgery if the medical community established a protocol that ensured the decision was in the child's own interests and not that of their parents.⁹⁵ This protocol includes the following criteria: (a) parent(s) must be comprehensively informed about the advantages and disadvantages of undergoing the procedure, (b) the consent for the procedure must be formalised in writing, and (c) the authorisation needs to be staggered and given over time (this is to ensure that parents consider the decision compressively and not make a rash decision).⁹⁶ While this decision differs from the previously established cases in Colombia, it complements a refreshing dynamic of interpretation towards intersex surgeries.

5 2 5 Germany

German law surrounding intersex rights is relatively piecemeal. For most of Germany's history, the rights of intersex persons were given very limited attention and it was only after the German Ethics Council published a proposal for a reformation of German family law in 2012, that increased public attention surrounding the issue was raised.⁹⁷ In a response to the increased awareness, in 2013 a provision was introduced in the *Personenstandsgesetz* ("PStG"),⁹⁸ which focused on the aspect of

⁹¹ White *Fordham Int'l L J* (2014) 801.

⁹² Haas (2004) *Am J L & Med* 53.

⁹³ It was the opinion of the Colombian Constitutional Court that by limiting a parent's capacity to consent to such treatment on their child's behalf, they would be encroaching on the realm of private family life. Furthermore, they also qualified that by prohibiting the surgery it would be as if they were subjecting the children to a social experiment: 53.

⁹⁴ The court was hesitant to give parents unconstrained discretion to consent to surgery for their intersex child. This was primarily because the court feared that parents would be apprehensive of their child's intersex status and discriminate against them because of this and therefore not make a decision that would be in their best interests: 53.

⁹⁵ 53.

⁹⁶ 53-54.

⁹⁷ T Helms "The 2013 German law: Analysis and Criticism" in J M Scherpe, A Dutta & T Helms *The Legal Status of Intersex Persons* (2018) 369 371.

⁹⁸ The German Civil Code section 22(3).

birth registration for intersex children.⁹⁹ Upon including this provision at this time, Germany became the only European country that allowed parents to leave the sex of the intersexed child blank on the birth certificate.¹⁰⁰ It was the opinion of lawmakers that, by introducing section 22(3) of the PStG and allowing parents to leave the sex¹⁰¹ box blank at birth, parents would not feel pressured into making an immediate decision regarding their child's sex.¹⁰² It was stated that the provision aimed to suggest that legally and socially intersex status was accepted by the German populace. There was, consequently, no need for parents and doctors to make immediate and long-lasting decisions regarding the child's identity.¹⁰³ This provision, however, did not provide for a third sex option such as 'intersex' or 'diverse'.¹⁰⁴

The 'blank box status' was heavily criticised. Intersex activists were disappointed with this new provision, as they argued that a 'blank box' undermines an intersex person's identity status.¹⁰⁵ Furthermore, it increased the likelihood that parents, in an attempt to avoid 'blank box status' for their child, would experience added urgency and would be more likely to refer their child for sex alteration surgery.¹⁰⁶ A further problem with the introduction of section 22(3) of the PStG provision was that it failed to accommodate those who only discover their intersex status later in life.¹⁰⁷

German officials stressed that the 'blank box' sex option did not mean that Germany was moving towards a non-binary system of recognition but was an attempt to allow intersex children to grow up and decide whether they identified as male or female later on in life.¹⁰⁸ Furthermore, parents of an intersexed child were not forced to select the

⁹⁹ Helms in *The Legal Status of Intersex Persons* (2018) 370.

¹⁰⁰ Hupf *William & Mary Journal of Women and the Law* (2015) 96.

¹⁰¹ Section 22(3) of the 2017 amendment reads as follows: "Kann das Kind weder dem weiblichen noch dem männlichen Geschlecht zugeordnet werden, so kann der Personenstandsfall auch ohne eine solche Angabe oder mit der Angabe „divers" in das Geburtenregister eingetragen werden." This broadly translates to: "If the child cannot be assigned to either the male or female gender, the civil status case can also be entered in the birth register without such an indication or with the indication 'diverse'".

¹⁰² Helms in *The Legal Status of Intersex Persons* (2018) 372.

¹⁰³ 372.

¹⁰⁴ H Botha "Beyond Sexual Binaries? The German Federal Constitutional Court and the Rights of Intersex People" (2018) 21 *PELJ* 1 3.

¹⁰⁵ J Nandi "Germany got it right by offering a third gender option on birth certificates" (10-11-2013) *The Guardian* <https://www.theguardian.com/commentisfree/2013/nov/10/germany-third-gender-birth-certificate> (accessed 19-08-2020).

¹⁰⁶ J Nandi "Germany got it right by offering a third gender option on birth certificates" (10-11-2013) *The Guardian* <https://www.theguardian.com/commentisfree/2013/nov/10/germany-third-gender-birth-certificate> (accessed 19-08-2020) & Helms in *The Legal Status of Intersex Persons* (2018) 372.

¹⁰⁷ 373.

¹⁰⁸ Hupf *William & Mary Journal of Women and the Law* (2015) 96 fn 184.

'blank box': if their child was born intersexed, it was optional, and the choice to register the child's predominate sex still existed.¹⁰⁹

It is unsurprising that in 2017, the constitutionality of section 22(3) of the PStG was challenged. The judgment¹¹⁰ concerned a female-assigned intersex person who identified as non-binary and challenged the existing position of birth registration law in Germany.¹¹¹ The complainant applied to the registration office to officially amend the sex that was assigned to her at birth to reflect an 'inter' or 'diverse' sex.¹¹² The complainant submitted that section 22(3) of the PStG only allowed for non-recognition of an individual's legal sex.¹¹³ Thus, the provision discriminated against the complainant on the basis of sex. The legal sex of men and women was given recognition, whereas intersex individuals were unable to have their sex formally acknowledged: they were only considered a "*nullum*".¹¹⁴ The German Constitutional Court agreed and held that the position of enforced binary sex and gender¹¹⁵ conflicted with the right to personal development¹¹⁶ and equality¹¹⁷ on the basis of sex.¹¹⁸

The German Government was given two proposals as to how to rectify the issue: (1) the introduction of a third sex option for official registration purposes; or (2) to remove the requirement for gender recognition entirely.¹¹⁹ The Government decided to include a 'diverse' gender marker alongside the male and female markers to accommodate for the inclusion. As a result, a German child can initially be registered as having an "unspecified", "indeterminate" or "undetermined" sex, which could be

¹⁰⁹ Helms in *The Legal Status of Intersex Persons* (2018) 372.

¹¹⁰ 1BvR 2019/16, judgment of 10 October 2017.

¹¹¹ Dunne *NILQ* (2019) 164.

¹¹² Botha (2018) *PELJ* 3.

¹¹³ P Dunn & J Mulder "Beyond the Binary: Towards a 'Third' Sex Category in Germany?" (2018) 19 *German Law Review* 627 629.

¹¹⁴ Dunne & Mulder *German Law Review* (2018) 629.

¹¹⁵ What was most interesting about the GCC judgement is the outright refusal to recognise sex as binary, it was Court's interpretation that discrimination on the grounds of sex must be read broadly to include discrimination against people who do not identify as either male or female: Botha (2018) *PELJ* 7.

¹¹⁶ As enshrined in article 2(1) of the German Constitution (*Grundgesetz*). Although not every aspect of personal identity is protected, the provision includes those aspects that are of crucial importance, such as relating to gender identity and sex registration (in the context of passports, insurance cards and applications to various social institutions): Dunne & Mulder (2018) *German Law Review* 630.

¹¹⁷ Article 3(3) of the German Constitution. S22(3) therefore states as individuals have to either be satisfied with an incorrect sex registration or one which states that they do not have a sex at all: 631.

¹¹⁸ Dunne *NILQ* (2019) 164-165.

¹¹⁹ 165. This option would have been the one which was most favoured by intersex persons as it does not place any pressure on an individual in the interim or for future purposes.

acknowledged through an “X option” on certified documentation, rather than the “M” and “F” symbols generally used to represent ‘male’ or ‘female’.¹²⁰

This decision was also heavily criticised as it is only those who have a medically diagnosed intersex ‘condition’ who would be able to have access to this gender marker.¹²¹ To obtain a “diverse” gender marker, the person concerned will have to submit an application together with a medical certificate providing proof of their intersex variance.¹²² The absence of this certification will result in the applicant being excluded entirely from obtaining alternative gender recognition.¹²³

It is proposed that it would have been more favourable for the second recommendation to have been adopted. This approach would have been more inclusive as well as have allowed intersex persons not to be confined to a strict gender or sex category. In all likelihood, this would have had an effect on a parent’s decision-making regarding sex alteration surgery at birth. Not only would a child be able to develop their own gender identity in time and eventually choose their sex without many legal hurdles, but there would have been no form of differentiation to distinguish them from other children.

Despite Germany’s recognition of a supposedly inclusive ‘gender status’ for official documentation for intersexed persons, the country has remained predominately silent on any legal regulation relating to the performance of cosmetic non-essential surgeries for intersex infants.¹²⁴ To address the issues surrounding non-consensual surgery, the Federal Government intended to prohibit such operations.¹²⁵ There are some Parliamentarians who are currently promoting the passing of such law as an urgent matter, however, negotiations and developments are still in progress.¹²⁶ Furthermore, the German Medical Association (“GMA”) submitted in 2015 that the type of surgical intervention intersex infants routinely undergo, should actually require the patient’s

¹²⁰ Hupf (2015) *William & Mary Journal of Women and the Law* 95.

¹²¹ G Baars New German Intersex Law: Third Gender but not as we want it *Verfassungsblog* (24-08-2018) <<https://verfassungsblog.de/new-german-intersex-law-third-gender-but-not-as-we-want-it/>> (accessed 21-10-2020).

¹²² Dunne *NILQ* (2019) 165.

¹²³ 165.

¹²⁴ As is the case with many jurisdictions, the UN Committee against Torture recommended that Germany stops all non-essential, non-consensual, cosmetic procedures being performed on intersex persons: Dunne 168.

¹²⁵ T Meyer “The German Inter-Ministerial Working Group on Inter-and Transsexuality” in JM Scherpe, A Dutta & T Helms *The Legal Status of Intersex Persons* (2018) 383 387.

¹²⁶ Meyer in J M Scherpe, A Dutta & T Helms *The Legal Status of Intersex Persons* (2018) 387.

consent.¹²⁷ Despite this statement, the GMA allows for exceptions, as it is not certain how a child who has a so-called ‘open sex’ will develop, and parents¹²⁸ can grant consent of behalf of their child.¹²⁹ It has been argued that merely recognising intersex identity does not prevent surgical intervention, nor does it protect intersex bodies.¹³⁰ Proponents of the LGBTIQ+ rights in Germany’s parliament have criticised the German Government for their decision, explaining that attention should be directed towards preventing surgeries from being performed entirely.¹³¹

5 2 6 Australia

In 2015, a UN fact sheet indicated that initially there were only two countries, Malta and Australia, which had made any noticeable progress towards recognising the human rights of intersex persons.¹³² Intersex advocacy has been pronounced in Australia with one of the most well-known advocacy groups, Intersex Human Rights Australia (“IHRA”),¹³³ being instrumental in many of the submissions made to the United Nations to protect the rights of intersex persons.¹³⁴

One of these noticeable progressions was in the 2014 *Norrie* decision which recognised that sex was pluralistic.¹³⁵ Norrie was born biologically male and underwent surgery to alter her genitals. She applied to the NSW Registrar of Births, Deaths and Marriages (“NSW RBDM”) in 2009 for her sex to be registered as ‘non-specific’.¹³⁶ Despite initial approval by the Registrar, her application’s success was revoked as the Registrar stated that sex for purposes of registration was dualistic and therefore Norrie could not be registered as non-specific.¹³⁷ The High Court determined that the Registrar had the authority in terms of the NSW RBDM to record Norrie’s sex as non-specific.¹³⁸ This case was significant in Australian legal history as it affirmed

¹²⁷ 387.

¹²⁸ One suggestion is that parents can give consent but it needs to be sanctioned by a court order: 388.

¹²⁹ 387.

¹³⁰ Dunne *NILQ* (2019) 168.

¹³¹ 166.

¹³² M Carpenter “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities” in J M Scherpe, A Dutta & T Helms “The Legal Status of Intersex Persons” (2018) 445 445.

¹³³ IHRA was previously termed Organisation Intersex International Australia.

¹³⁴ Please refer to <https://ihra.org.au/19853/welcome/> (not sure how to reference properly) for more detail concerning their national and international achievements.

¹³⁵ *NSW Registrar of Births, Deaths, and Marriages v Norrie* [2014] HCA 11 (2 April 2014) para 9.

¹³⁶ Para 11.

¹³⁷ Para 20

¹³⁸ Paras 45-47.

that not all people will identify as male and female and therefore should not be classified as such.¹³⁹ This decision was limited to the NSW territory due to their federal system. However, the judgment did emerge in the face of increasing legal recognition of the differences between sex and gender.¹⁴⁰

A mechanism of protection recently introduced in Australian law is the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (“SDA Amendment Act”).¹⁴¹ The SDA Amendment Act makes it unlawful under federal law to discriminate indirectly or directly against any person because of their “sexual orientation, intersex status and gender identity”.¹⁴² Nevertheless, it is often argued that the majority of the efforts towards intersex protection is concentrated on the intersexed adult, and not the intersexed infant. Australian law surrounding birth registration and passport issuance has attempted to challenge the binary perception of sex and to be more inclusive to the intersex community. However, the complexity surrounding regulation in the different territories throughout the federal state of Australia has made this approach difficult to implement.¹⁴³ The first ‘X’ passport and blank sex marker birth certificate was issued to an intersexed adult in Victoria in the early 2000s.¹⁴⁴ Nevertheless, a holistic approach surrounding initial birth registration, remains problematic.

Initially, the only two Australian jurisdictions that were progressive with their birth registration laws were South Australia and the Australian Capital Territory (“ACT”). The South Australian position is that a child’s sex only needs to be registered if their sex is “determinable”.¹⁴⁵ It is unclear whether the registration is restricted to male or female or whether further registration categories are recognised.¹⁴⁶ The ACT goes

¹³⁹ Human Rights Law Centre “High Court recognises that “sex: in NSW may be other than male and female” (undated) *Human Rights Centre* <<https://www.hrlc.org.au/human-rights-case-summaries/high-court-recognises-that-sex-in-nsw-may-be-other-than-male-or-female>> (accessed 16-02-2021).

¹⁴⁰ Human Rights Law Centre “High Court recognises that “sex: in NSW may be other than male and female” (undated) *Human Rights Centre*.

¹⁴¹ This was an amendment to the Sex Discrimination Act 1984.

¹⁴² Australian Human Rights Commission “Sexual orientation gender identity & intersex status discrimination”

<<https://humanrights.gov.au/sites/default/files/Information%20sheet%20on%20new%20protections%20in%20the%20Sex%20Discrimination%20Act%20-%20FINAL.pdf>> (accessed 06-10-2020) 1.

¹⁴³ Fenton-Glynn “The Legal Status of Intersex Persons in Australia” in *The Legal Status of Intersex Persons* (2018) 244.

¹⁴⁴ M Carpenter “Identification Documents” (04-01-2019) *Intersex Human Rights Australia* <<https://ihra.org.au/identities/>> (accessed 12-09-2020).

¹⁴⁵ Fenton-Glynn “The Legal Status of Intersex Persons in Australia” in *The Legal Status of Intersex Persons* (2018) 244.

¹⁴⁶ 244.

further than South Australia by allowing a child's sex to be registered as male, female, indeterminate, "to be advised" or intersex.¹⁴⁷ Included in the ACT legislation is a six-month extension in the birth registration period.¹⁴⁸ This seeks to provide parents with the opportunity to have time to make an informed decision regarding the registration of their child's sex and not be pressured initially upon the child's birth. Tasmanian policy takes the above even further, when in 2019, they became the first state in Australia to make it optional to include gender on a birth certificate entirely.¹⁴⁹ Consequently, Tasmania provides an opt-in approach to gender registration on an individual's birth certificate and is the most diverse option available.¹⁵⁰ This development, however, has been received with criticism. Many citizens expressed disbelief, hostility, discomfort and anger towards the new inclusion.¹⁵¹ This is principally due to the rigid interpretation that society is cisgender and exploring sexual dimorphism is unnatural and should not be encouraged.¹⁵²

Recently in 2016, the case of *Re Carla (Medical procedure)*¹⁵³ was brought before the Family Court in Australia. This case concerned a child born with seventeen *beta hydroxysteroid dehydrogenase 3* deficiency, meaning she had the physical appearance of a girl but with male gonads that were not contained in a scrotum.¹⁵⁴ Her parents decided to raise her female and review the matter routinely as she got older.¹⁵⁵ By the time this decision came before the court, Carla had already undergone two reconstruction surgeries, a clitorrectomy and a labioplasty, aiming to feminise her external genitalia.¹⁵⁶ The matter before the court was in response to an application

¹⁴⁷ 244.

¹⁴⁸ 244.

¹⁴⁹ *BBC News* "Tasmania makes it optional to list gender on birth certificates" (10-04-2020) <<https://www.bbc.com/news/world-australia-47877998>> (accessed 12-09-2020). The bill was met with opposition and the Legislative Council received an e-petition which was signed by 422 Tasmanians who opposed the Bill hasty introduction: L Richardson-Self "There are only two genders - male and female ...". L Richardson-Self "An Analysis of Online Response to Tasmania Removing 'Gender' from Birth Certificates" *International Journal of Gender, Sexuality and Law* 1 (2020) 295-307.

¹⁵⁰ *Eternity News* "What the Tasmanian Birth Certificates Bill Really Says" (23-11-2020) <<https://www.eternitynews.com.au/australia/what-the-tasmanian-birth-certificates-bill-really-says/>> (accessed 21-10-2020).

¹⁵¹ Richardson-Self (2020) *International Journal of Gender, Sexuality and Law* 307-311.

¹⁵² 313.

¹⁵³ [2016] FamCA 7.

¹⁵⁴ [2016] FamCA 7 paras 1-2.

¹⁵⁵ B Richards & TM Pope "Stretching the Boundaries of Parental Responsibility and New Legal Guidelines for Determination of Brain Death" (2017) 14 *Bioethical Inquiry* 323-323.

¹⁵⁶ [2016] FamCA 7 para 16.

made by Carla's parents seeking to remove Carla's male gonads.¹⁵⁷ Carla's parents approached the court because of the *Re Lesley (Special Medical Procedure)* decision,¹⁵⁸ where the child had almost identical circumstances to those of Carla. Her parents believed that they needed the court to authorise their ability to grant consent of the removal of Carla's internal male gonads, which would render her permanently sterile, as this was the position established in *Lesley* because of the authoritative *Marion*¹⁵⁹ decision.¹⁶⁰

In *Marion*, the court held that in any matter where a child is to receive non-therapeutic treatment, parents did not have the power to consent to such treatment without court sanction.¹⁶¹ In the High Court, the majority of the court considered both the invasiveness of the decision, as well as the severity of the operation and the consequences if the incorrect decision were made.¹⁶² Furthermore, it was the opinion of the court that the common law granting a parent the power to consent to medical treatment on their child's behalf, undermines the child's capacities and ability to grow.¹⁶³ Consequently, it was determined that any non-therapeutic treatment would have to be authorised by a court or tribunal.¹⁶⁴

The court approved the application and allowed Carla's parents to consent to the surgery based on two factors. First it was asserted that Carla's gender identity was female,¹⁶⁵ based on her own mother's observations and that of a medical

¹⁵⁷ Richards & Pope (2017) *Bioethical Inquiry* 323.

¹⁵⁸ [2008] FamCA 1226.

¹⁵⁹ As discussed in Chapter 3 above.

¹⁶⁰ [2016] FamCA 7 para 7.

¹⁶¹ Stewart "Children and Medical Decision-Making in Australia Post-Gard: A possible Reformulation" in *Medical Decision-Making on Behalf of Young Children: A Comparative Perspective* 270. See also chapter 3 for a discussion of the *Marion* decision.

¹⁶² Stewart "Children and Medical Decision-Making in Australia Post-Gard: A possible Reformulation" in *Medical Decision-Making on Behalf of Young Children: A Comparative Perspective* 270.

¹⁶³ [2016] FamCA 7 para 42.

¹⁶⁴ It has been observed that the sterilization of intersexed infants/children is often based on weak evidence and is performed because the procreation potential of intersex persons is not valued as highly as those of others: *Intersex Human Rights Australia* "The Family Court case Re: Lesley (Special Medical Procedure) [2008] FamCA 1226" (28-07-2013) <https://ihra.org.au/23090/re-lesley-special-medical-procedure/> (accessed 21-02-2021). Judge Deane in the *Marion* decision, however commented that parents still had the power to consent to male circumcision as well as plastic surgery, even if it was only for cosmetic based reasons: Stewart C "Children and Medical Decision-Making in Australia Post-Gard: A possible Reformulation" in *Medical Decision-Making on Behalf of Young Children: A Comparative Perspective* 271.

¹⁶⁵ The evidence for this assentation was Carla's tendency to urinate sitting down, her preference for the female pronoun and her tendency to prefer stereotypically 'female' clothing and toys: Richards & Pope (2017) *Bioethical Inquiry* 324.

practitioner.¹⁶⁶ Secondly, the judge was persuaded by the 28% chance that Carla would be at risk for cancerous cell growth in her lifetime due to her sexual ambiguity.¹⁶⁷ In addition, the point was also raised that if Carla did not undergo the procedure before she approached puberty, there was a risk that her body would produce testosterone-like substances and she could develop masculine traits.¹⁶⁸

Forrest J in *Carla* departed from the *Lesley* decision¹⁶⁹ and was of the opinion that court sanction was not required because Carla's procedure was in his opinion a *therapeutic* procedure.¹⁷⁰ He reasoned that the medical treatment proposed was therapeutic because it was "necessary to appropriately and proportionally treat a genetic bodily malfunction that, untreated, poses real and not insubstantial risks to the child's physical and emotional health".¹⁷¹ Consequently, given that the procedure 'satisfied' the therapeutic requirements according to the principles set out in *Marion*, the court held that the decision fell within the scope of parental authority.¹⁷²

This decision has received much criticism from the intersex community as it has caused concern that gender-related treatment may now be considered to fall within the scope of parental authority in Australia.¹⁷³ In *Carla*, the focus was on intersex being viewed as a malady that needs to be 'fixed' in order for normality to be achieved.¹⁷⁴ It

¹⁶⁶ 324.

¹⁶⁷ 324. There was an alternative to the proposed surgery in that the gonads could be moved to the external abdominal cavity but there was a strong likelihood that the psychological consequences for Carla would be adverse: [2016] FamCA 7 para 20.

¹⁶⁸ Para 22. There was evidence that male puberty could be suppressed hormonally however it would result in her pubertal development being significantly delayed: para 24.

¹⁶⁹ This decision concerned a hospital petition to seek Court authorisation for a gonadectomy for an intersex child. The court concluded that the procedure filled the *Marion* case criteria and therefore did not fall within the ordinary scope of parental responsibilities and rights and was therefore a matter that had to be decided by a court. It was eventually concluded that the procedure would be in Lesley's best interests and the procedure was authorised: BJ Richards & T Wisdom "Re Carla: An error in judgement" (2019) 18 *QUT Law Review* 77 83.

¹⁷⁰ *Human Rights Law Centre* "Queensland Family Court approves sterilising surgery on 5 year old intersex child Re: Carla (Medical Procedure) [2016] FamCA7" (undated) <<https://www.hrlc.org.au/human-rights-case-summaries/2017/4/21/queensland-family-court-approves-sterilising-surgery-on-5-year-old-intersex-child#:~:text=In%20the%20case%20of%20Re,medical%20procedures%2C%20including%20a%20gonadectomy>> (accessed 20-02-2021).

¹⁷¹ [2016] FamCA 7 para 52.

¹⁷² *Human Rights Law Centre* "Queensland Family Court approves sterilising surgery on 5 year old intersex child Re: Carla (Medical Procedure) [2016] FamCA7" <<https://www.hrlc.org.au/human-rights-case-summaries/2017/4/21/queensland-family-court-approves-sterilising-surgery-on-5-year-old-intersex-child>>.

¹⁷³ *Human Rights Law Centre* <<https://www.hrlc.org.au/human-rights-case-summaries/2017/4/21/queensland-family-court-approves-sterilising-surgery-on-5-year-old-intersex-child>>.

¹⁷⁴ Richards & Wisdom (2019) *QUT Law Review* 90.

is submitted that there was a less intrusive way in which to preserve the child's reproductive functioning but Forrest J dismissed this option on the basis of psychological consequences that could be experienced by the child and did not elaborate further on his reasoning.¹⁷⁵ Arguably *Carla's* lifelong sterility was not weighed effectively against the psychological harm that could have resulted from monitoring her gonads externally.¹⁷⁶

Despite Australia's commitment towards advancing intersex rights, the majority of territories in Australia still require the child's sex to be registered at birth and do not provide an alternative option. Currently, there is no clear indication as to the status of decision-making in the context of intersex children but there should be a re-evaluation of the conclusion that was reached in *Carla*.¹⁷⁷ It is advised that the authority for decision-making in a medical context should be placed in the realm of the Family Court.¹⁷⁸

5 2 7 Malta

Although there have been some international efforts to address the issue of non-consensual surgeries,¹⁷⁹ Malta became the first country in the world to issue legislation that explicitly prohibits the practice of cosmetic, non-consensual surgery on intersex infants entirely.¹⁸⁰ The Gender Identity Gender Expression and Sex Characteristics

¹⁷⁵ Human Rights Law Centre <<https://www.hrlc.org.au/human-rights-case-summaries/2017/4/21/queensland-family-court-approves-sterilising-surgery-on-5-year-old-intersex-child>>.

¹⁷⁶ Human Rights Law Centre <<https://www.hrlc.org.au/human-rights-case-summaries/2017/4/21/queensland-family-court-approves-sterilising-surgery-on-5-year-old-intersex-child>>.

¹⁷⁷ Richards & T Wisdom "Re *Carla*: An error in judgement" QUT *Law Review* 90.

¹⁷⁸ 90.

¹⁷⁹ The Hong Kong Legislative Council in 2014, voted against the implementation of a gender identity statute which would have made sterilisation and hormone therapy compulsory: Dunne *The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation Doctor of Philosophy (Law)* 148. The Hong Kong Marriage (Amendment) Bill was rejected because it was determined that requiring a transgender individual to go through an entire sex reassignment surgery which could lead to forced sterilisation, could result in cruel, inhumane and degrading punishment: J L Chia "Inching Towards Equality: LGBT Rights and the Limitations of Law in Hong Kong" (2016) 22 *William & Mary Journal of Women and the Law* 303 322. Argentina, introduced the Gender Identity Act of 2011, which was the first Act that endorsed non-medicalised gender recognition. This meant that the Act did not require any physical intervention for the patient, nor was total or partial genital alteration, hormone treatment or any other kind of treatment required: P Dunne *The Conditions for Obtaining Legal Gender Recognition: A Human Rights Evaluation Doctor of Philosophy (Law)* 148.

¹⁸⁰ Hupf (2015) *William & Mary Journal of Women and the Law* 102. What makes this revolution by Malta even more remarkable is its religious context: Malta is known for being a conservative Catholic state, with Catholicism being recognised in their constitution as the state religion, and divorce only being legalised in 2011. Yet, despite the conservative nature usually adopted by Catholic states, the

Act (“GIGESCA”), is the first of its kind and illustrates how activism, combined with receptive government departments, can create a system that embraces all aspects of human personality.¹⁸¹ The revolutionary development of Maltese legislation has resulted in a ripple-effect for intersex rights in a global context. This is illustrated through some of the newer inclusions in the Yogyakarta Principles. The GIGESCA was a significant influence in the creation and inclusion of the term ‘sex characteristics’, as well as the incorporation of the principle on the right to bodily and mental integrity into the Yogyakarta Principles and the subsequent YP + 10.¹⁸² Accordingly, the GIGESCA is presently considered to be one of the most expansive and encompassing pieces of legislation towards recognising the issues surrounding legal gender, as it addresses many global issues with which intersex and transgender persons struggle.¹⁸³

The annual conference held by the International Lesbian, Gay, Bisexual, Trans and Intersex Association (“ILGA”) in Malta, brought intersex human rights to the forefront of Maltese political discussion in 2009.¹⁸⁴ Despite the legislation assuming that a child will later make a decision that will place them into the male-female gender binary, it nevertheless forces state institutions and parents to postpone such a decision until the

government has been promoting gender and sexuality reforms since 2013: M Hay “What will Malta’s new intersex law mean for the rest of the world” (08-04-2015) *Vice* <https://www.vice.com/en_us/article/exqn77/maltas-new-intersex-legislation-is-the-most-progressive-in-the-world-192> (accessed 08-08-2020).

¹⁸¹ J Leslie “A Red Letter Day as Malta Makes History!” (01-04-2020) *Organisation Intersex International in the United Kingdom* <<https://oiiuk.org/1027/a-red-letter-day-as-malta-makes-history/>> (accessed 06-08-2020).

¹⁸² M Carpenter “Intersex human rights, sexual orientation, gender identity, sex characteristics and the Yogyakarta principles plus 10” (2020) *Culture, Health & Sexuality* 1 8-9.

¹⁸³ The Act addresses the right to gender identity (Art 2 & 3), the process of formally recognising gender (Art 5, 7 & 8) and also guarantees the right to bodily integrity and physical autonomy (Art 14). It should be noted that the process for formal gender recognition under the GIGESCA is one of the most applicant friendly processes that exists and does not, for example, require proof of medical intervention. Article 4 of the GIGESCA outlines the process for citizens to amend their name and recorded gender to reflect their ‘self-determined identity’: The applicant has to complete a declaratory public deed which includes: (a) a clear and informed statement by the applicant that their gender identity is not a match to the one assigned to them at birth, (b) a copy of their birth certificate, (c) details of their gender particulars and (d) the name under which they want to be registered: T Ní Mhuirthile “The Legal Status of Intersex Persons in Malta” in J M Scherpe, A Dutta & T Helms *The Legal Status of Intersex Persons* (2018) 357 358-359.

¹⁸⁴ J Leslie “A Red Letter Day as Malta Makes History!” *Organisation Intersex International in the United Kingdom* (01-04-2020) < <https://oiiuk.org/1027/a-red-letter-day-as-malta-makes-history/>> (accessed 06-08-2020).

child is at an age at which they can make an informed decision for themselves regarding their body.¹⁸⁵

Article 14 of the GIGESCA focuses on the medicalised treatment of intersex minors.¹⁸⁶ The provision prohibits any medical practitioner from conducting unnecessary sex alteration procedures upon a minor if the treatment can be postponed until the individual is capable of giving independent informed consent.¹⁸⁷ However, the provision does afford an exception for minors who are capable of giving informed consent, to do so through their parent or guardian.¹⁸⁸ The only instance in which the surgery can be performed without the minor's consent is if an interdisciplinary team, together with the person(s) exercising parental authority or a tutor of the minor, all reach a mutual agreement on the matter and it is considered to be exceptional¹⁸⁹ circumstances.¹⁹⁰ Consequently, it is clear that the GIGSECA circumvents the issue of medical treatment made on the basis of social pressures by criminalising any such rationale in terms of Article 14(3). In this way, the rights of the infant are protected as the provision postpones any decisions until the child independently can make the conscious choice to undergo surgery to alter their sex.

However, despite this formal prohibition, a 2019 NGO report on intersex genital mutilation ("IGM") practices in Malta asserts that unnecessary sex alteration surgeries continue to be routinely practised.¹⁹¹ It appears that these practices are endorsed and facilitated by the state by means of the public healthcare system, as well as private institutions.¹⁹² Furthermore, the surgeries are currently being outsourced to various overseas jurisdictions where sex alteration surgery is not prohibited.¹⁹³ This is

¹⁸⁵ M Hay "What will Malta's new intersex law mean for the rest of the world" (08-04-2015) *Vice* <https://www.vice.com/en_us/article/exqn77/maltas-new-intersex-legislation-is-the-most-progressive-in-the-world-192> (accessed 08-08-2020).

¹⁸⁶ Ní Mhuirthile *The Legal Status of Intersex Persons in Malta* in "The Legal Status of Intersex Persons" (2018) 360.

¹⁸⁷ Article 14(1) of GIGESC.

¹⁸⁸ Article 14(1) of GIGESC.

¹⁸⁹ Arguably one could submit that such circumstances would include if it is medically necessary. Please refer to Chapter 3 for examples of medical necessity.

¹⁹⁰ Article 14(2) & Ní Mhuirthile *The Legal Status of Intersex Persons in Malta* in "The Legal Status of Intersex Persons" (2018) 361.

¹⁹¹ Intersex genital Mutilations Human Rights Violations of Children with Variations of Reproductive Anatomy NGO Report to the 3rd to 6th Report of Malta on the Convention on the Rights of the Child (CRC) (2019) https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MLT/INT_CRC_NGO_MLT_34709_E.pdf 7 (05-01-2021).

¹⁹² 7

¹⁹³ 11.

problematic considering that the current provisions of the GIGSEC do not criminalise such actions.¹⁹⁴ Intersex children in Malta therefore are still at risk for non-consensual surgeries despite the supposed comprehensive protection offered by the GIGSEC.

5.3 South Africa

Presently, South African law surrounding intersex status is piecemeal, despite the country's noteworthy involvement in intersex advocacy.¹⁹⁵ From a legislative perspective, partial, sporadic and in certain cases contradictory¹⁹⁶ protection is provided in the following pieces of legislation: The Births and Deaths Registration Act 51 of 1992 ("BDRA"), the Alteration of Sex Description and Sex Status Act, 49 of 2003 ("ASDSS"), the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 ("PEPUDA"), the Identification Act 68 of 1997 ("Identification Act") and the Constitution. Furthermore, there is an absence of case law surrounding intersex rights. Most cases focus on transgenderism and cases on the prevention of sex alteration surgeries or the complexities surrounding intersex children's rights have not yet reached the South African courts.¹⁹⁷

In 2005, an amendment was made to the PEPUDA to amend the definition of sex to also include the term 'intersex'. South Africa was the first country in the world to do so.¹⁹⁸ Consequently, intersex became a recognised prohibited ground of discrimination based on sex.¹⁹⁹ This inclusion is of particular significance as it was previously submitted by the Human Rights Commission ("HRC") that including intersex as a recognised prohibited ground of discrimination would ensure that one of the most vulnerable groups within South African society would receive equal protection.²⁰⁰

¹⁹⁴ 11.

¹⁹⁵ This includes South Africa's involvement in hosting a National Dialogue on the Protection and Promotion of the Human Rights of Intersex People, the co-sponsoring of the UN Human Rights Council's resolution on the Elimination of Discrimination against Women and Girls in Sport and their involvement in the establishment of the Yogyakarta Principles: ISSA Submissions to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020] 6-8.

¹⁹⁶ In some pieces of legislation, the word 'sex' is used, while in others 'gender'. This aspect is discussed in more detail below in this chapter and in chapter 6.

¹⁹⁷ See, for example, *W v W* 1976 (2) SA 308 (WLD) and *KOS and Others v Minister of Home Affairs* 2017 4 All SA 468 (WWC) ("KOS"). Both of these cases concerned the status of transgender persons and their right to recognition in South Africa.

¹⁹⁸ ISSA Submissions to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020] 3.

¹⁹⁹ Section 1.

²⁰⁰ South African Human Rights Commission Judicial Matters Amendment Bill, 2005 Submission to the Justice & Constitutional Development Portfolio Committee, National Assembly, in respect of section 15-Amendments to Act 4/2000 Definition of Intersex to be added to the Equality Act

Despite the amendment to the PEPUDA, very little was done to address the main issue faced by intersex persons, namely that of unnecessary cosmetic sex alteration surgery. A couple of recent proposals, however, have provided some acknowledgement, regulation and protection of intersex rights in South Africa, specifically concerning children. These advancements have the potential to alter the existing position of intersex rights significantly in South Africa law. Consequently, the recommended amendments to the Children's Act and the Identification Act will be discussed in more detail below.

5 3 1 Proposed amendments to the Children's Act

The South African Department of Social Development, in a briefing to the Committee on the Rights of the Child in 2016, acknowledged that intersex infants are routinely subjected to harmful practices.²⁰¹ At this briefing, the Department committed itself to a future prohibition of IGM²⁰² and furthered this commitment in 2020 by proposing to amend certain provisions of the Children's Act.²⁰³ The primary purpose of the Bill is to address the dangerous shortcomings that are currently underlying the child care and protection system in South Africa.²⁰⁴ One such area is identified in clause 6 of the Bill which aims to amend section 1(m) and 12(3) of the Children's Act. Currently, these provisions prohibit FGM.²⁰⁵ The proposal intends to extend and alter the definition of 'genital mutilation' in section 1(m) of the Children's Act to read as follows:

<<https://www.sahrc.org.za/home/21/files/22%20SAHRC%20Submission%20on%20Judicial%20Matters%20Amendment%20Bill%20Equality%20Act-Intersex%20%28Parl%29%20Feb%202005.pdf>> 3: Furthermore, the HRC asserted that because the issue of intersexuality does not form part of everyday discourse and is often misunderstood, it can often invoke discriminatory responses and this needs to be amended accordingly.

²⁰¹ C Collison "SA joins the global fight to stop unnecessary genital surgery on intersex babies" (27-10-2020) *Mail & Guardian* <<https://mg.co.za/article/2016-10-27-00-sa-joins-the-global-fight-to-stop-unnecessary-genital-surgery-on-intersex-babies/>> (accessed 15-09-2020).

²⁰² Chapter 6 will discuss why the term 'IGM' is more appropriate a term for the surgery intersex infants undergo based on the current realities.

²⁰³ The Children's Amendment Bill
<https://www.parliament.gov.za/storage/app/media/Bills/2020/B18_2020_Childrens_Amendment_Bill/B18_2020_Childrens_Amendment_Bill.pdf> (accessed 05-11-2020). (not entirely sure how to reference).

²⁰⁴ "Children's Amendment Bill Tabled" (02-09-2020) *Sabinet*
<https://legal.sabinet.co.za/articles/childrens-amendment-bill-tabled/>

²⁰⁵ ISSA Submission to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020] 10.

“genital mutilation’ means a procedure performed for non-medical reasons that has no health benefit and intentionally—

(a) causes injury to genitals;

(b) removes any part of the genitals; or

(c) alters genital organs;”²⁰⁶

and for section 12(3) to read in more general terms that “[g]enital mutilation of children is prohibited”.²⁰⁷

In its present format, the Children’s Act only prohibits the “genital mutilation or the circumcision of a female child”.²⁰⁸ In the proposed draft, the words “or circumcision” and “female” are removed. Both section 1(m) and 12(3) implies that by prohibiting genital mutilation in this format, IGM is, by extension, also prohibited.²⁰⁹

The provision clearly places a moratorium on parents’ ability to consent to surgery that removes or alters any part of their child’s genitals. As discussed in chapter 3, one of the responsibilities and rights that parents are entitled to, is to make medical decisions on their children’s behalf. This is a responsibility that has been established in both the common law and legislation. However, if these proposed amendments were to come into operation, parents would be legally prohibited from consenting to sex alteration surgery for their intersexed child.

The proposed amendment has the potential to increase the protection of children’s rights in South Africa. However, in its current formulation, it is somewhat problematic. Some of these concerns were expressed by the human rights group, Intersex South Africa (“ISSA”) in their submission to the Department of Social Development.²¹⁰ The ISSA asserts that in its current format there is the potential that people will look at the provision and only register its applicability in terms of FGM.²¹¹ It is asserted that although the definition in its current format is broad enough to include IGM, people

²⁰⁶ The Children’s Amendment Bill
<https://www.parliament.gov.za/storage/app/media/Bills/2020/B18_2020_Childrens_Amendment_Bill/B18_2020_Childrens_Amendment_Bill.pdf> (accessed 05-11-2020).

²⁰⁷ The Children’s Amendment Bill
<https://www.parliament.gov.za/storage/app/media/Bills/2020/B18_2020_Childrens_Amendment_Bill/B18_2020_Childrens_Amendment_Bill.pdf> (accessed 05-11-2020).

²⁰⁸ S 12(3).

²⁰⁹ The Children’s Amendment Bill
<https://www.parliament.gov.za/storage/app/media/Bills/2020/B18_2020_Childrens_Amendment_Bill/B18_2020_Childrens_Amendment_Bill.pdf> (accessed 05-11-2020). There has been a submission that this needs to be more clearly defined, which will be discussed below.

²¹⁰ The recommendations regarding amending this provision further will be discussed in Chapter 6.

²¹¹ ISSA Submission to the Portfolio Committee on Social Development on the Children’s Amendment Bill [B18-2020] 10.

potentially will not understand that is included because it is not specifically mentioned. Consequently, ISSA asserts that it would be beneficial for the specific practice to be mentioned in the Act so that there is clarity regarding the position.²¹² Arguably the argument raised by ISSA is valid. In an area of law which is dominated by terminology which is often misinterpreted, having a clear definition would provide clarity and guidance to the reader.

Additionally, the proposed definition in section 1(m) is problematic for another reason in that it uses the phrasing of “no health benefit”. In terms of the discussion on the right to health in chapter 4 of this thesis, it is clear that the interpretation of the word ‘health’ encompasses many different aspects of the human condition. As a result, ‘health’ is not and should not be limited to the physical health of a person only. It has a far broader interpretation and also refers to the mental, emotional, sexual, reproductive and physical health of a person. It is foreseeable that the provision has the potential to be abused as it could be argued that the surgery would be beneficial to the child’s mental and emotional health.²¹³

Despite altering section 1(m) and 12(3), the penalty for contravention of section 12(3) remains the same as in the current Act. The only difference is that the offender will be liable for such a penalty regardless of the victim’s sex, whereas previously a perpetrator would only be liable if the procedure was performed on a female child.²¹⁴ A person convicted of such an offence will be liable to a fine or imprisonment of either ten to twenty years, or both, depending on the circumstances.²¹⁵

5 3 2 Proposed amendments to the Identification Act

In terms of the law currently effective in South Africa, parents are obligated to register the sex of their child within 30 days of their date of birth, in accordance with the regulations set out in the BDRA.²¹⁶ This sex will then be considered the legal sex

²¹² 10.

²¹³ This will be discussed further in Chapter 6.

²¹⁴ It is submitted that because of the proposed word ‘children’, one can read that the sex or gender of the child is irrelevant. Furthermore, if the legislature wanted to make the provision strictly binary, it would have included the word ‘male’ into the provision, rather than excluding ‘female’ and making the provision gender and sex neutral.

²¹⁵ Section 305(5) and (6).

²¹⁶ When considering the BDRA, one also needs to take the Identification Act 68 of 1997 into consideration. The Identification Act requires a compressive record of various characteristics of all South African citizens to be documented in the population register. Part of the required information is an individual’s “gender” and identity number. This is further complicated by the lack of understanding

of the child for all intents and purposes.²¹⁷ Parents and medical practitioners generally will determine the child's sex by looking at the child's genitalia.²¹⁸ The intersexed individual can, only at a later stage, apply to amend their legal sex on their birth certificate.²¹⁹ Presently, South Africa only recognises the male and female sex for registration purposes.

However, this position may be changed in light of another proposed development that took place at the end of 2020. In a response to the global developments surrounding the regulation of personal information, the DHA published a new draft identity management policy.²²⁰ The New Draft acknowledges that both the Identification Act and the BDRA exclude recognition of intersexed children from the birth registration process.²²¹ The BDRA only provides for binary sex registration, with male and female being the only two available options.²²² In addition, the Identification Act is problematic for two reasons. First, the identification number that is used in South Africa is not gender neutral and is limited to only male and female identities.²²³ Second, the ID system does not differentiate between sex and gender, which, as has been previously established, are two distinct concepts.²²⁴

Accordingly, in response to these disparities, the DHA offered two proposed solutions. One of the proposed inclusions is that a third sex/gender category must be included to accommodate for persons who do not conform to the typical "male" and "female" binary.²²⁵ A further suggestion would be to alter the structure of the ID number to be more inclusive. An alternative proposal offered by the DHA is to grant a unique and unsystematic identity number, which is not based on any of an individual's

between the terms 'sex' and 'gender' in South African law, as was observed in the *KOS* decision: "the word '*gender*' is used in the Identification Act to the same effect as the express '*sex description*' is in the ASDSSA": *KOS and Others v Minister of Home Affairs* 2017 4 All SA 468 (WWC) paras 6-7 & fn10. This creates confusion as the discrepancies between the various pieces of legislation will continue to endorse stigma around concepts of 'sex', 'gender', 'intersex bodies' and 'transgenderism'.

²¹⁷ Section 9 of BDRA, Form B1-24 & Barratt A (ed) *Law of Persons and the Family* 2 ed (2018) 85.

²¹⁸ Barratt A (ed) *Law of Persons and the Family* 2 ed (2018) 85.

²¹⁹ Section 2(1) of the ASDSSA.

²²⁰ Staff Reporter "New ID system planned for South Africa- here's what you need to know" *BusinessTech* <<https://businesstech.co.za/news/technology/458640/new-id-system-planned-for-south-africa-heres-what-you-need-to-know/>> (accessed 14-01-2021).

²²¹ Department of Home Affairs Government Gazette Draft Official Identity Management Policy Public Consultation Version (22 December 2020) 51.

²²² 51.

²²³ 51.

²²⁴ 51.

²²⁵ Staff Reporter *BusinessTech* <<https://businesstech.co.za/news/technology/458640/new-id-system-planned-for-south-africa-heres-what-you-need-to-know/>>.

identifying features, such as their sex/gender or date of birth.²²⁶ Another suggestion is to keep the format of the ID number but include ‘intersex’ as a third sex category in conjunction to the current male and female options.²²⁷

All of these proposals have the potential to greatly impact the regulation of intersex rights in South Africa. It shows proactive engagement on part of the state in assisting parents to act in their intersexed child’s best interests.²²⁸

5 4 Conclusion

It is clear from the above analysis that many jurisdictions have started to recognise the necessity of addressing the issues surrounding intersex bodies. Some jurisdictions, such as Germany, Australia and Malta, have decided to implement legislation to address the issue of gender markers in an attempt to make intersex persons more accepted within legal and social society. Notwithstanding, the principle concern of the intersex community is to prevent unnecessary medical surgeries that attempt to make intersex bodies appear ‘normal’ without the individual’s own consent.²²⁹

Some jurisdictions such as Colombia, Germany, the USA and Australia continue to endorse a relatively piecemeal approach to intersex protection. Colombia is one of the few countries to have discussed the complexities surrounding intersex surgeries through court adjudication. It was the first time that it was recognised that sex alteration surgery infringes upon the right to identity, bodily integrity and dignity. Furthermore, Colombia recognised that parents need to be guided and directed in these types of situations, as they often feel pressured and uncertain in their own decision-making capacities. Unfortunately, Colombian case law and legislation have been relatively silent in recent years on matters surrounding sex alteration surgery. Only one jurisdiction, Malta, has properly addressed the main plight of intersex persons, namely the prohibition of sex alteration surgery on intersex children without their informed consent. Malta recognised that to contextualise an intersex child’s best interests,

²²⁶ Staff Reporter *BusinessTech* <<https://businesstech.co.za/news/technology/458640/new-id-system-planned-for-south-africa-heres-what-you-need-to-know/>>.

²²⁷ Department of Home Affairs Government Gazette Draft Official Identity Management Policy Public Consultation Version (22 December 2020) 56.

²²⁸ The implications of these proposals will be discussed in more detail in chapter 6.

²²⁹ *Astraea Lesbian Foundation for Justice* “Frequently asked questions about intersex issues” *Astraea Lesbian Foundation for Justice* <<https://www.astraeafoundation.org/frequently-asked-questions-intersex-issues/>> (accessed 22-10-2020).

legislation needs to be promulgated to guide parents to enable their child to actively participate in the decision-making process, while also giving the child the necessary freedom to develop their own gender identity and sex. Second, similar to what was proposed in Colombia's *Cruz* decision, Malta does not do away with parental consent entirely but rather restricts it by also requiring an interdisciplinary team to be involved in the decision-making process.

Chapter 6 will assess what methods that are currently being used to regulate the issues surrounding sex alteration surgery, should be applied in South Africa. These methods will also be considered in light of the developments that are taking place in South Africa with respect to intersex advocacy. Finally, it will be determined whether or not the decision-making process surrounding sex alteration surgery falls within the scope of parental responsibilities and rights.

CHAPTER 6: AN ANALYSIS OF PARENTAL CONSENT FOR SEX ALTERATION SURGERY FOR INTERSEXED INFANTS

6 1 Introduction

In chapter 5 the existing attempted methods of regulation of sex alteration surgery for intersex infants were described. This involved an analysis of a number of jurisdictions' legislative attempts and judicial pronouncements in respect of the protection of intersexed infants' rights. It appears that most of the attempted amendments are somewhat well-received on paper but in practice are not being effectively carried out nor implemented. It was concluded that there are a number of piecemeal and insufficient attempts that have been made to regulate sex alteration surgery, although no jurisdiction has established a faultless approach.

It also appears that the decision for sex alteration surgery continues to fall within the scope of parental responsibilities and rights in other jurisdictions, barring a few exceptions. This is often due to the lack of engagement with intersex infants' rights, as most attention is directed towards the rights of intersexed adults. The decision-making process in cases of intersex infants will never be simple or straightforward, no matter who the decision maker is. Parents will always play a crucial role in their child's upbringing and will be required to offer guidance and support throughout their life. However, they cannot do this alone and legislative and other measures will have to be implemented by the state to enable parents to have the necessary knowledge, skills and means in which to provide this guidance. Most importantly, however, is for any party involved in a decision involving a child is to remember that the child's best interests must be the primary concern in the matter and therefore actions that will support this notion, must always be endorsed.

South Africa has acknowledged the responsibility of parents as well as that of the state to make decisions that will promote the rights and interests of their children. However, until recently, South African law has been all but silent on offering guidance and legislative protection for persons displaying intersex characteristics. In the next chapter, the proposed methods of regulation and protection from other jurisdictions will be analysed. The current policies that are used, as well as those that are being proposed in South Africa, will be analysed and evaluated.

6 2 Assessing the past descriptors and treatment of intersex persons

Chapter 2 established that role of language cannot be ignored when discussing intersex rights. Due to pathologising medical tendencies, intersex persons have been treated differently and this has led to severe physical and mental harm.¹ From the outset, it is clear that intersex persons are treated differently because of being socially viewed as ‘abnormal’ and ‘defective’. Consequently, intersex persons have never been afforded the same status in society as someone who was born with a clear binary sex. Being intersexed has generally been shrouded in secrecy, which in turn creates another perception about this minority group.² Bosworth, a psychologist, noted that creating secrecy around a person’s differences often results in a person’s own sense of identity and worth being impaired and creating the belief that there is something wrong with them.³

In chapter 2 it was explained how intersexed persons have always been treated with misgiving and rejection. Subsequently, this also has been transferred into the language that is used to describe their bodies. This, in turn, has contributed to a lack of inclusive and accurate terminology being adopted into legislation to represent this group. This concern was expressed by ISSA in their submissions on the draft of the Children’s Bill. They submitted that currently there is a lack of intersex specific terminology in legislation. Consequently, ISSA recommended that terms such as “sex characteristics, intersex, IGM, medically unnecessary, endosex and full, free and informed consent” be included in the Children’s Act.⁴ It is submitted that including these terms will enhance the understanding surrounding intersex surgery and bodies.

One of the areas in which this is seen specifically is the terms currently being used to describe the surgery that intersexed infants are exposed to. Using descriptors such

¹ ISSA Submission to the Portfolio Committee on Social Development on the Children’s Amendment Bill [B18-2020].

² *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People* (2011) keynote address by the Deputy Minister of Justice and Constitutional Development the Hon JH Jeffery, MP at the *National Engagement on the Promotion and Protection of the Human Rights of Intersex Persons* at the Protea Hotel Parktonian, available at <<https://www.readkong.com/page/intersex-people-of-the-human-rights-of-national-dialogue-on-8712192?p=1>> (accessed 03-07-2020) 19.

³ *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People* (2011) keynote address by the Deputy Minister of Justice and Constitutional Development the Hon JH Jeffery, MP at the *National Engagement on the Promotion and Protection of the Human Rights of Intersex Persons* at the Protea Hotel Parktonian, available at <<https://www.readkong.com/page/intersex-people-of-the-human-rights-of-national-dialogue-on-8712192?p=1>> 2011(accessed 03-07-2020) 19.

⁴ ISSA Submission to the Portfolio Committee on Social Development on the Children’s Amendment Bill [B18-2020] 12.

as ‘gender reassignment’, ‘genital normalisation’ and ‘genital normalisation’ have increased the stigma surrounding non-binary bodies as well as perpetuated intolerance.

Using the term ‘normalisation’ gives the impression that the individual in their current state is imperfect and abnormal. In turn, this implication supports the social standard of normality, as well as the ideology that intersex persons’ bodies are irregular and need to be changed to satisfy the social expectation of binary sex. It also implies that in order to satisfy this perception, a process will have to be undertaken to rectify the flaw(s). However, annually when the number of persons who are born intersex are compared with those born with red hair, they are approximately the same.⁵ Yet, red-haired children are not considered abnormal and society does not dictate that they need to have their hair colour changed to be accepted. Furthermore, it is also problematic to use the term ‘(re)assignment’ as a part of the definition. By using this term, it implies that a person has to have either a male or female sex in order to be ‘whole’ or ‘complete’.

Chapter 2 also determined that ‘gender’ refers to a person’s personal identity and is influenced by the environment in which they develop, as it is closely associated with culture, religion and social expectation. Moreover, it is a conscious choice that an individual makes during their life, which sequentially displays the flexibility the term implies. One can have multiple gender identities throughout their lifetime and for various lengths of time. It is something which can be changed as it is something that a person can decide for themselves. Accordingly, one cannot undergo ‘gender’ reassignment or normalisation surgery, as ‘gender’ is not a biological physiognomy, but is rather psychological. In the new DIMP 2020, the DHA acknowledges that the terms ‘sex’ and ‘gender’ are not interchangeable and cannot be interpreted as such.⁶ Chapter 2 established that the delusion that sex and gender have the same meaning has contributed to the discrimination routinely faced by intersex persons.

⁵ *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People* (2011) keynote address by the Deputy Minister of Justice and Constitutional Development the Hon JH Jeffery, MP at the *National Engagement on the Promotion and Protection of the Human Rights of Intersex Persons* at the Protea Hotel Parktonian, available at <<https://www.readkong.com/page/intersex-people-of-the-human-rights-of-national-dialogue-on-8712192?p=1>> 2011 iii (accessed 02-06-2019).

⁶ Department of Home Affairs Government Gazette Draft Official Identity Management Policy Public Consultation Version (22 December 2020) 51. As discussed in chapter 5, the Australian *Norrie* decision also established that ‘sex’ and ‘gender’ are different and need to be treated as such.

Consequently, it is proposed that neither ‘gender reassignment’, nor ‘genital normalisation’ are appropriate terms to use to describe the surgery intersex infants undergo. It is recommended that sex alteration surgery is an accurate term to describe the procedure which an intersexed patient undergoes. As established in chapter 2, sex is biological and is limiting, it is not a choice. A person is born with a sex, it does not develop and evolve over time as it does not have a psychological component. A person’s physical sex traits are being changed through surgery. It is suggested that one of the reasons why the terms ‘gender reassignment’, ‘gender normalisation’ and ‘genital normalisation’ are used, is because it sounds less severe and more palatable than ‘sex alteration’. Perhaps parents may feel less hesitation about referring their child to surgery with this term because it does not blatantly convey the true intentions and ramifications of the surgery.

However, a new term that has been emerging in intersex rights discourse is ‘IGM’.⁷ In South Africa, the term has been used infrequently when discussing the non-consensual surgeries undergone by intersexed infants and young children. In ISSA’s submission on the Children’s Bill, they proposed the inclusion of IGM as a term for any procedure that involves the unnecessary and uninformed altering the sex characteristics of a child for the main purpose of satisfying social classifications.⁸ It is submitted that the introduction of this new term would be a beneficial alternative to use alongside the term ‘sex alteration surgery’. Although it was established in chapter 2 that ‘mutilation’ connotes violence, it is necessary for society to be exposed to the harsh reality that intersex infants experience. Often it is preferred to use a more neutral or forgiving term to describe something which will make one feel comfortable. It is submitted, however, that using the term IGM, reflects more accurately the severe reality of the surgery that intersex infants undergo.

⁷ D Krige “Fighting for the rights of intersex people” *Health-E News* (23-10-2019) <<https://health-e.org.za/2019/10/23/fighting-for-the-rights-of-intersex-people/>> (accessed 21-02-2021).
 , *National Dialogue on the Protection and Promotion of the Human Rights of Intersex People* (2011) keynote address by the Deputy Minister of Justice and Constitutional Development the Hon JH Jeffery, MP at the *National Engagement on the Promotion and Protection of the Human Rights of Intersex Persons* at the Protea Hotel Parktonian <<https://www.justice.gov.za/vg/lgbti/2018-NationalIntersexMeetingReport.pdf>> and ISSA’s ISSA Submission to the Portfolio Committee on Social Development on the Children’s Amendment Bill [B18-2020].

⁸ ISSA Submission to the Portfolio Committee on Social Development on the Children’s Amendment Bill [B18-2020] 11. Refer to chapter 2 for the full definition.

6 3 Analysing parental responsibilities and rights and the sex alteration decision-making process

Parents of intersex infants in most countries, including South Africa, continue to retain the right to refer their child for surgery as part of their parental responsibilities, due to their child's incapacity. In chapter 3 it was established that parental responsibilities and rights have undergone a noteworthy development in favour of responsibility, rather than authority or power. Chapter 3 and 4 also established that parents are the primary persons responsible for their children and their well-being. Accordingly, they have an obligation to guide their children and enable them to develop in a manner that promotes their best interests and developing identity.⁹ However, it is not a parent's responsibility alone, as chapter 3 also confirmed that the state is obliged to ensure that effective mechanisms are put in place to First, support parents and secondly, provide them with the necessary tools and guidelines to ensure that their child's best interests can be realised. Consequently, parents are limited in their ability to make decisions if they do have the requisite information. The lack of support and guidance by the state, in conjunction with a distortion of data by medical practitioners, result in parents making uninformed decisions that are not in their intersexed child's best interests.¹⁰

Over the past two decades and in many jurisdictions, the interpretation given to the content of parental responsibilities and rights has seen much change. Germany, England and Wales, Australia,¹¹ Colombia and South Africa have all reformed their legal position in respect of parental responsibilities and rights. This has been achieved by moving towards a child-orientated approach that focuses on ensuring that the child's interests are given priority in all matters involving the child.¹² Unlike its counterparts, Malta has maintained a strict paternalist approach to parental rights. It is unusual that, despite its rigid approach to parental rights, the country has the leading legislation in the world regarding sex alteration surgery for intersexed infants.

⁹ Article 5 of the CRC.

¹⁰ Benson (2005) *Cardozo J L & Gender* 37.

¹¹ The Australian legal position on parental responsibility, as explained in Chapter 3, introduces an additional layer of protection through a provision in the Family Law Reform Act. By formally prohibiting parents' power of consent in certain matters, like sterilisation, but rather giving authority to the court, either in full or partial, impartial decision-making is enabled. Furthermore, this is comparable to jurisdictions like Malta, India and Colombia that have required intersex surgeries to be referred to the court or sanctioned by a panel of experts.

¹² Chapter 3 of this thesis.

Arguably, one could interpret this as an acknowledgement by the Maltese government that children, although under the authority of their parents, are still independent human beings who have their own rights.

It is clear that many aspects of a child's life do fall within the scope of parental decision-making. However, as society develops, so does the law in response, *inter alia*, to address past inequalities. It is submitted that in this regard too, the law needs to develop. In chapter 3, the increasing recognition of the unlawfulness of parental corporal punishment was used as a valuable example to demonstrate how many jurisdictions have responded to the emphasis being placed on parental responsibility rather than authority. It was recognised that subjecting children to corporal punishment has the potential to impact negatively upon their health.¹³ From a South African perspective, it was considered unreasonable in light of the development in children's rights to give parents complete power over their children. Parents are not their children's masters but rather their guides who are responsible for encouraging them.¹⁴ It is submitted that in light of the movement away from corporal punishment, a similar argument can be made for surgeries upon intersex children.

When an intersexed child is born, they will often be viewed with disappointment and anxiety by their parents because they do not exhibit clear biological sex characteristics. 'Family distress' and a parent's desire for their child to be able to grow up to have normal sexual relations are believed to be a prevailing reason for parents consenting to sex alteration surgery.¹⁵ This fear that parents experience will be supplemented by the attitude of medical practitioners towards their intersexed child.¹⁶ Chapter 2 established that surgical alteration remains the standard treatment model for intersex infants recommended by medical practitioners.¹⁷ Although infants lack capacity, chapters 3 and 4 established that this does not mean perpetual incapacity for the child. This supports the notion that infants should not be treated as passive

¹³ Chapter 3.

¹⁴ Chapter 3; 2019 ZACC 34 para 8.

¹⁵ M Webster "Lawsuit for unconstitutional sex assignment surgery to proceed in US federal court" (22-08-2013) HRLC <<https://www.hrlc.org.au/human-rights-case-summaries/lawsuit-for-unconstitutional-sex-assignment-surgery-to-proceed-in-us-federal-court>>.

¹⁶ Chapter 2.

¹⁷ Benson (2005) *Cardozo J L & Gender* 37. The USA decision of *M.C. v. Aaronson* the position was slightly different as at the time the surgery was performed MC was in State care: Southern Poverty Law Centre "M.C.V. Aaronson" <<https://www.splcenter.org/seeking-justice/case-docket/mc-v-aaronson>> (accessed 21-07-2020). See chapter 5 for a detailed analysis of the *MC V Aaronson* case.

recipients of care and guidance.¹⁸ They need to be involved regardless of whether they understand the full implications of the decision.¹⁹ Alternatively, peremptory measures should be put in place until the child is of a sufficient level of maturity. The CRC encourages the value of respecting a child's own personal view. Therefore, when parents expropriate the child's future right(s) to make a decision regarding their body, this undermines the CRC-endorsed principle of autonomy.²⁰ It also illustrates that there are certain instances in which a parent's capacity should be limited by the state.

Chapter 3 further described three situations in which a parent's medical decision-making for their child will be limited: These are when a Jehovah's Witness's child requires a blood transfusion, sterilisation, and abortion. It is submitted that these situations are similar to the decision involved when referring an intersexed child to surgery. It is proposed that, like blood transfusion cases involving children, intersex cases present a similarly complex issue. In both of these instances, social and often cultural factors will influence parents in making a decision, rather than considering the child's best interests. The law dictates that parents are not allowed to withhold consent when treatment will save the child's life as this is detrimental to their best interests and their health.²¹ In these instances, a limitation is placed on a parent's refusal of consent. Intersex infants are arguably just as vulnerable, and although their physical health may not always be at risk, their mental, emotional and psychological health may be severely impacted in later life. This will especially be the case as they grow older and do not identify with the gender that they were given but have been expected to develop according to that assignment.

In comparison to the issue discussed above, abortion prohibits the ability of any other person to consent to the procedure other than the patient. Abortion rights are centred on the right to bodily integrity and autonomy.²² As with abortion, sex alteration surgery is a very intimate, invasive and often distressing procedure. Parents, by forcing their still-developing child to undergo surgery that will permanently alter their physiology, violate their child's right to bodily integrity. Sex alteration will have a lasting

¹⁸ General Comment No. 7, Implementing child rights in early childhood, 20.09.2006, CRC/C/GC/7/Rev.1, para. 16 and JM Scherpe *et al* (2018) 527.

¹⁹ General Comment No. 7, Implementing child rights in early childhood, 20.09.2006, CRC/C/GC/7/Rev.1, para. 16 and JM Scherpe *et al* (2018) 527.

²⁰ Sandberg "Intersex Children and the UN Convention on the rights of the Child" in *The Legal Status of Intersex Persons* 527.

²¹ Chapter 3; s 129 of the Children's Act and McQuoid-Mason (2005) *SAMJ* 29.

²² Chapters 3 and 4.

impact on a child's life. Furthermore, no surgery is without risks and permanent consequences. However, when surgery has the ability to limit an individual's sexual and reproductive choices, it must be treated with significant caution as illustrated by the position of sterilisation and abortion. This is one of the similarities between sex alteration surgery and an abortion procedure as both are deeply personal,²³ with consequences exclusive to the individual. It is a matter of choice that should not be decided for the individual but at the very least in consultation with the person concerned. It is therefore surprising that the degree of regulation and protection for the two procedures are not equal.

It is clear from chapter 3 that parental responsibilities and rights are limited in cases involving the sterilisation of children. The preamble of the Sterilisation Act states that just because an individual is incapable of giving consent, it does not mean that they should automatically lose their constitutional rights. The right to bodily integrity, which includes reproductive decision-making, is one of the most personal rights enshrined in the Constitution. Often one of the risks of sex alteration surgery is that the intersex child could be sterilised in the process.²⁴ Therefore, the impact of surgery upon the child's bodily integrity is two-fold as the right to procreate will be violated, as well as their reproductive capacity.²⁵

Autonomy and autonomous decision-making are deeply entrenched in the CRC as well as South African law. Chapter 4 explained how many of these rights to which children are entitled, are not effected in the case of intersex infants. Yet in other areas of the law, such as sterilisation and abortion, the intimacy of the act coupled with the severe consequences immediately imply strict regulation to preserve the bodily integrity of the individual concerned. It is clear that the consequential harm to which surgically 'rectified' intersexed children are exposed, is two-fold. First, there is the

²³ The right to terminate a pregnancy is described as "fundamentally and primarily" a woman's decision. The reasons for this statement are because the consequence of the decision will shape the woman's entire future personal and family life. Furthermore, this right exists at the very heart of a woman's fundamental human rights including: Equality, privacy, physical and psychological integrity and prevention against discrimination: United Nations Human Rights Special Procedures "Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends" (2017) OHCHR <<https://www.ohchr.org/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf>> 1-2.

²⁴ A Kennedy "Fixed at birth: Medical and Legal Erasures of Intersex Variations" (2016) 39 UNSW Law Journal 813 833.

²⁵ This will be discussed again in chapter 4 with regards to the child's best interests and rights to health.

psychological risk of injury to the child's nascent identity.²⁶ Secondly, there is irreversible physical harm to the child's bodily integrity²⁷ as their bodies will be permanently altered in various ways to conform to either the 'typical' male or female body.²⁸ It is submitted that it is logical for such an intimate procedure to be postponed until a child is at an age at which they can actively participate and their free and informed consent can be obtained.²⁹ Furthermore, as sterilisation is recognised to be such an invasive procedure, cases involving incapacitated persons have to be examined by a panel of experts.³⁰

Clearly, South African law recognises instances where consent, regardless of age, must be given by the individual themselves. It also acknowledges that there are instances in which parents will not make a decision that is in their developing child's best interests, because they are influenced by other factors.

If an intersexed child were to only find out about their intersexed identity in puberty or later childhood – which is often the case³¹ – because their parents have hidden it from them, it will have seriously detrimental effects on the child's identity, health and relationship with their family. This can also have serious health disadvantages on an emotional, physical and psychological level. This includes access to all medical records relating to past surgeries that altered their sex characteristics.

Having an intersexed child will undoubtedly present challenges. Parents of intersexed children will experience social pressures, confusion and fear. However, although parents play a very important role, they do not have the right to dictate the

²⁶ Ouellette (2010) *Ind LJ* 973. See the discussion in chapter 4 for the analysis on the child's right to identity, health and bodily and psychological autonomy in light of the best interests of the child principle.

²⁷ This is discussed in more detail in Chapter 4. where the right to bodily and psychological integrity will be examined in light of the best interests of the child principle.

²⁸ Ouellette (2010) *Ind LJ* 973.

²⁹ ISSA Submission to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020] 13.

³⁰ Chapter 3; Boezaart (2009) 12 and s 3(2) read in conjunction to s 2(3)(b). Section 3(1)(a), (b) and (c) of the act.

³¹ Crystal Hendricks, a member of ISSA, only discovered her intersex status after visiting a private gynaecologist. Upon investigating the procedure and asking Tygerberg Hospital for her records, nothing could be found on the invasive procedure performed on her while in infancy: ISSA Submission to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020] 4. Another example is Cat from Massachusetts in the USA. She was born with proximal hypospadias and underwent unsuccessful surgery while infancy. In an attempt to rectify the issues resulting for the first attempt she again underwent surgery at 17 which resulted in more physical issues. It was only a few years later that she discovered the term 'intersex' and what it meant: H Lindahl "9 Young people on how they found out they are intersex" (25-10-2019) *Teen Vogue* <<https://www.teenvogue.com/gallery/young-people-on-how-they-found-out-they-are-intersex>> (accessed 08-02-2021).

terms of their child's existence. They have the responsibility to guide them in a manner that promotes their best interests. If they support their child and communicate openly about all aspects of their identity, it will empower the child's own decision-making capacity and their transition into adulthood.

Currently, the intersexed child's best interests are not being effected by enabling the capacity to consent to sex alteration surgery to fall within parental responsibilities and rights. It is established that children cannot be undermined solely because of their lack of current capacity. It is therefore the role of the state to implement measures which will educate, guide and inform parents as to the best interests of their intersexed child. South Africa, especially as a consenting member to the Yogyakarta Principles, has not been achieving this. In light of this fact, it is submitted that currently states are failing to introduce legislation which comprehensively defines a parent's role in the decision-making process of sex alteration. Furthermore, presently intersexed children's rights to health, identity, equality, autonomy and to be heard are also being given violated by allowing parents to consent to surgery on their behalf.

6 4 An analysis of various jurisdictions and South Africa's protective measures in regulating intersex rights

Chapter 5 illustrated that although there have been attempts to be more accommodating towards intersex persons very little has been done to prohibit IGM on intersexed infants. There remains no global consensus on how to approach regulating the performance of sex alteration surgery on intersexed infants. This problem is perpetuated further by a lack of engagement with members of the intersexed community by government departments on their experiences of IGM.³²

6 4 1 Germany

Germany has predominately directed its attention towards the legal status of adult intersex persons as well as issues of registration. As submitted in chapter 5, one of the reasons for the introduction of the 2013 and subsequent 2017 provision in the PStG in Germany, was to relieve the pressure experienced by parents to choose an official documented sex when their child is born intersex. Arguably the 2017 provision

³² ISSA Submission to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020].

can at least be considered an acceptable preliminary step, as it does make the legal and civil status less daunting and exclusive for intersex persons. Yet, despite the 2017 attempt by the German Government, the amendment has been criticised by some LBGTIQA+ advocates.

LBGTIQA+ advocates submitted that by requiring medical documentation to be presented to confirm intersex status, it undermines what encompasses gender status.³³ Gender status does not consist merely of physical attributes but also reflect emotional and mental features.³⁴ Therefore, it is submitted that legislation should provide those whose identity is neither male nor female, psychosocially and emotionally, the opportunity to also have access to official identity status without the submission of medical proof.³⁵ A further argument submitted by intersex advocates is that it will require intersex persons who have had a traumatic history of intrusive medical examination to submit to examination again before they can alter their legal gender status.³⁶ This will cause them to have to confront previous traumas which in turn can perpetuate already existing mental and emotional health issues. In 2018, a new draft Bill was proposed by the German Federal Ministry of Interior, for Building and Community, to address the concerns on legal sex registration position in Germany.³⁷ One such concern was an explicit commitment by the German government to clarify in law that genital surgery on a child was only allowed if it was required to save the child's life.³⁸ However, this was not reflected in the current Bill.³⁹

³³ D Ornstein & J B Glassberg "Germany Rings in 2019 by Adopting Intersex Gender Status" (08-01-2019) *The National Law Review* <<https://www.natlawreview.com/article/germany-rings-2019-adopting-intersex-gender-status>> (accessed 07-02-2021).

³⁴ Ornstein & Glassberg "Germany Rings in 2019 by Adopting Intersex Gender Status" (08-01-2019) *The National Law Review*.

³⁵ Ornstein & Glassberg "Germany Rings in 2019 by Adopting Intersex Gender Status" (08-01-2019) *The National Law Review*.

³⁶ G Baars "New German Intersex Law: Third Gender but not as we want it" *VerfBlog* (24-08-2018) <<https://verfassungsblog.de/new-german-intersex-law-third-gender-but-not-as-we-want-it/>> (accessed 12-02-2021).

³⁷ *Organisation Intersex International Europe* "New draft bill in Germany fails to protect intersex people" (20-08-2018) <https://oiiieurope.org/new-draft-bill-in-germany-fails-to-protect-intersex-people/> (accessed 12-02-2021).

³⁸ Baars "New German Intersex Law: Third Gender but not as we want it" (24-08-2018) *VerfBlog*.

³⁹ Baars "New German Intersex Law: Third Gender but not as we want it" (24-08-2018) *VerfBlog*.

Furthermore, new medical guidelines⁴⁰ issued in response to IGM in Germany have emphasised that surgery should only be performed in times of medical necessity.⁴¹ These guidelines represent, at least theoretically, a response towards implementing social and medical changes to stop these surgeries. These guidelines propose that parents of intersexed children should be referred for counselling.⁴² Parents will often be the parties that will initially experience the most distress when discovering their child is intersexed. Counselling will be beneficial to assist them to have emotional support and access to information about their child's sex status. This is a constructive approach to be incorporated into legislation as an obligatory measure to be implemented in cases pertaining to intersex surgeries.

What German lawmakers have failed to recognise, is that implementing an inclusive registration system will not prevent sex alteration surgeries from being performed. Arguably as long as the treatment itself remains legalised, sex alteration surgeries will continue to be performed. IGM – intersex persons' main concern – continues to be ignored and excluded from German lawmakers' attention. The intersex community has explained that there is a fear that the narrowed availability of a third option will make parents more likely to choose for their child to undergo surgery.⁴³ Parents will feel pressured to make this choice because they want to avoid making their child's intersex status public knowledge.⁴⁴ The amendment may have the opposite effect than intended and will actually result in more cases of IGM being performed.

6 4 2 Colombia

Colombia is one of the only jurisdictions to have case law that assesses the rights of intersexed infants. This is a departure from all other jurisdictions that predominately focus on policy formulation and intersexed and non-binary adults' rights and interests. The CCC had three opportunities in which to develop the legal position of intersex children and non-consensual surgery. The first two cases (*Gonzalez and Ramos*) were promising as the impression created by the CCC was one of genuine interest in

⁴⁰ AWMF "Varianten der Geschlechtsentwicklung" (2016) AWMF Online https://www.awmf.org/uploads/tx_szleitlinien/174-001I_S2k_Geschlechtsentwicklung-Varianten_2016-08_01.pdf (20-02-2021).

⁴¹ LM Danon "Comparing contemporary medical treatment practices aimed at intersex/DSD bodies in Israel and Germany" 41 *Sociology of Health & Illness* (2019) 143 154.

⁴² Danon *Sociology of Health & Illness* (2019) 143.

⁴³ Baars "New German Intersex Law: Third Gender but not as we want it" (24-08-2018) *VerfBlog*.

⁴⁴ Baars "New German Intersex Law: Third Gender but not as we want it" (24-08-2018) *VerfBlog*.

preserving the bodily autonomy and identity of the intersex child. These two decisions placed an absolute prohibition on parental consent in all instances involving the performance of surgery on an intersexed child.

The *Cruz* decision departed from an absolute exclusion on sex alteration for intersexed infants, alerting the precedent set by the *Gonzalez* and *Ramos* cases. It is submitted that the court took a progressive approach as it recognised that generally in medical decision-making processes, parents can consent to medical procedures on behalf of their child. However, the court also recognised that children have the right to make decisions regarding their bodies. Arguably the court's decision to allow parents to consent to sex alteration surgery if their child is under the age of five and it satisfies the medical protocol is progressive and dynamic.⁴⁵ Furthermore, as discussed in chapter 5, the criteria established by the court does seek to ensure that parents have been supplied with the necessary information and time to understand the reality of their child's intersexed status. Additionally, as parental consent for the procedure has to be provided in writing, an additional layer of protection is provided as it formalises the decisions and the consequences flowing therefrom. It is submitted that it is a valuable attempt by courts to acknowledge parental responsibilities and rights of parents but still ensure that it is ultimately the child's best interests that are the foremost priority. The CCC remains one of the only courts in the world to have confronted not only the medical concerns often experienced by intersex persons but the human rights issues that accompany them.⁴⁶

Despite its progressive case law, Colombia is lacking any existing legislation prohibiting the performance of surgeries on intersex infants. The country also has not amended its birth registration system in an attempt to accommodate intersex persons.⁴⁷ However, there has been a CCC ruling which stated that an intersexed person does not have to register as one of the binary sexes in order to receive citizenship and the benefits that flow therefrom.⁴⁸

⁴⁵ Haas (2004) *Am J L & Med* 53.

⁴⁶ Rubio-Marin & Osella "Between rights and pragmatism: Intersexuality before the Colombian Constitutional Court" in *The Legal Status of Intersex Persons* (2018) 336.

⁴⁷ 335.

⁴⁸ 335.

6 4 3 Australia

The dominant focus of intersex rights in Australia has been on intersex adults. While this does contribute to the position on intersex regulation generally, there has been a lack of attention directed towards the rights of intersex infants. Australia, like Germany, the USA and Canada, and to an extent Malta, has expanded the sex options on their registration system in an attempt to accommodate intersex persons. However, due to Australia's federal system, a holistic approach has not yet been achieved.⁴⁹ Furthermore, having different requirements in the various territories has also contributed to a degree of ambiguity for intersex persons as in only some territories the option to register as another sex exists. This stance discriminates against intersex persons, as the ability to register is dependent on the territory in which a person lives. Consequently, intersex persons in one territory will be treated differently to those in another. Arguably this position is in contravention of the SDA Amendment Act, as intersex persons are not all treated equally for registration purposes.

Similar to the position in Colombia, Australian case law has also provided valuable insight into the status of intersex children and the concerns surrounding intersex surgeries. Unfortunately, the Australian *Re Carla (Medical procedure)* decision negates the proposal that sex alteration surgery does not form part of parental responsibilities and rights. *Carla* departed from the precedent established in the *Marion* decision. It was established in chapters 3 and 5 from *Marion* that parents are prohibited from consenting to non-therapeutic sterilisation on behalf of their child. Moreover, this case also established that the purpose of parental authority in the context for medical decision-making is to advance the welfare of the child. It is limited to only this instance. In *Carla*, the focus was on intersex being viewed as a malady that needs to be 'fixed' in order for normality to be achieved.⁵⁰ It is submitted that there was a less intrusive way in which to preserve the child's reproductive functioning but Forrest J dismissed this option based on psychological consequences that could be experienced by the child and did not elaborate further on his reasoning.⁵¹ Arguably

⁴⁹ This position is very similar to that in the USA which has also proved to be problematic. In Chapter 5 the *Zzyym* decision was discussed. This decision was brought before the federal court in an attempt to introduce one system of registration across the entire USA. This would be preferable than having a different across each State. Unfortunately, this has not yet been implemented in the USA. Therefore, the arguments made regarding the Australian registration position can also be applied to the USA.

⁵⁰ Richards & Wisdom *QUT Law Review* 90.

⁵¹ *Human Rights Law Centre "Queensland Family Court approves sterilising surgery on 5 year old intersex child Re: Carla (Medical Procedure) [2016] FamCA7"* <https://www.hrlc.org.au/human-rights->

Carla's lifelong sterility was not weighed effectively against the psychological harm that could have resulted from monitoring her gonads externally.⁵² Unfortunately, this decision departed from the admirable precedent established by *Marion*, as the stability that was created has been lost. Consequently, a degree of ambiguity has been introduced into the Australian position on sex alteration surgery.

It is submitted that, although Australia was initially considered one of the countries that were at the forefront of intersex rights, this is arguably no longer the reality. As established in chapter 5, despite the culture of advocacy in Australia surrounding intersex rights being very pronounced, the implementation of intersex rights remains convoluted. It is suggested that in light of this discussion and the evidence supplied in chapter 5, that intersex infants' rights continue to be ignored in Australian law.

6 4 4 The United States of America and India

As submitted in chapter 5, a valuable case that had emerged in recent USA precedent involving parental responsibilities and rights for intersexed children is the *MC v Amrhein* decision. It was the first example of a decision in which parents argued against sex alteration surgery for their child. Arguably MC's parents recognised that it was contrary to his best interests as his right to exercise jurisdiction over his own body was removed. He was unable to exercise his own free will and have his views taken into account. Furthermore, they recognised that his ability to partake in family life in the future would be unfeasible as his ability to procreate was no longer possible. This case presents an excellent example of parents exercising their parental responsibilities and rights in a manner that promotes their child's best interests. After MC's mother saw his profile on the state adoption website, she immediately attempted to have the surgery suspended.⁵³ She did this on the premise of being exposed to the

case-summaries/2017/4/21/queensland-family-court-approves-sterilising-surgery-on-5-year-old-intersex-child#:~:text=In%20the%20case%20of%20Re,medical%20procedures%2C%20including%20a%20gonadectomy (accessed 08-01-2020).

⁵² *Human Rights Law Centre* "Queensland Family Court approves sterilising surgery on 5 year old intersex child Re: Carla (Medical Procedure) [2016] FamCA7" <<https://www.hrlc.org.au/human-rights-case-summaries/2017/4/21/queensland-family-court-approves-sterilising-surgery-on-5-year-old-intersex-child#:~:text=In%20the%20case%20of%20Re,medical%20procedures%2C%20including%20a%20gonadectomy>> (accessed 08-01-2020).

⁵³ T Smith & D Dykes "Hospitals, South Caroline sued over child's sex surgery" (15-05-2013) *USA Today* <<https://www.usatoday.com/story/news/nation/2013/05/15/child-sex-assignment-surgery/2161941/>> (accessed 08-01-2020).

harmful consequences that could result from the surgery, having it being inflicted on a childhood.⁵⁴ It was established in chapter 3 that parents are supposed to be their children's greatest advocates. This case demonstrates a parent approaching the intersex status of their child by embodying this very sentiment. MC's parents did not consider what would be the easiest decision for their child to be accepted into society but considered what would be in their child's best interests. This case also discloses the difference that knowledge and exposure to being intersex can have on parental decision-making. MC's mother made the decision she did because of seeing the consequences that non-consensual surgery had on her childhood friend.

Surprisingly another jurisdiction that has been expanding its jurisprudence on intersex infants' rights is India. This jurisdiction too started to increase its acceptance of gender variance within its registration system.⁵⁵ However, the most significant advancement was seen in an Indian Court in Tamil Nadu. This court made a ruling which placed a complete moratorium on intersex surgeries unless the child's life was endangered and this confirmed by a panel of experts.⁵⁶ The court excluded parental involvement in the decision-making process for surgical intervention of their intersexed child entirely.⁵⁷ This is a significant departure from the approach followed in other jurisdictions such as Malta and Colombia in which parental involvement is still allowed to a certain degree or in conjunction with expert opinions.

6 4 5 Malta

It is submitted that the approach that has been adopted in Malta regarding sex alteration surgery is currently the most comprehensive protection that is offered to intersexed infants worldwide. The GIGSEC focuses on the child's best interests and supports the child's right to participate in the decision-making process.⁵⁸ It also emphasises that a parent's guiding capacity in the decision-making process, as

⁵⁴ Smith & Dykes "Hospitals, South Caroline sued over child's sex surgery" *USA Today*.

⁵⁵ See chapter 5 in this regard.

⁵⁶ A Daksnamurthy "1st in India & Asia, and 2nd globally, Tamil Nadu bans sex-selective surgeries for infants" (31-08-2019) *The Print* <<https://theprint.in/features/lgbtq-india-asia-tamil-nadu-ban-sex-selective-surgeries-for-infants/284982/>> (accessed 21-02-2021). Please refer to chapter 5.

⁵⁷ Daksnamurthy "1st in India & Asia, and 2nd globally, Tamil Nadu bans sex-selective surgeries for infants" (31-08-2019) *The Print*.

⁵⁸ Article 12 of the CRC.

opposed to dictating a personal aspect of their child's autonomy, is essential.⁵⁹ This is a departure from the traditional approach to parental responsibilities and rights.⁶⁰ Typically, in matters that are not intersex-surgery related, parents' responsibilities and rights in Malta include making the decision for the child alone and not engaging them in the decision-making process. Furthermore, this also differs from the general position that is applied to infants, in which often lawmakers only see the infant's incapacity at the time in which the decision needs to be made in comparison to their potential decision-making capacity.

The GIGESCA recognises the challenges that intersexed individuals face in respect of the recognition of legal gender and sex.⁶¹ It allows persons to dispute the sex⁶² that a child was assigned at birth, whereas previously there was no such mechanism.⁶³ Article 18 provides for the delayed registration of sex on birth certificates.⁶⁴ This provision mandates the inclusion of a sex-neutral X to be used on all official documentation, in contrast to the general male and female binary options.⁶⁵ The open acceptance of sex variation embodied by Malta's legislation also recognises the sex variations used by other jurisdictions for official purposes.⁶⁶ This is achieved through Article 9(2) of the GIGSECA, which recognises any other variation of sex determination besides male or female, as well as the absence of a marker entirely that has been recognised by any other jurisdiction. Although the Act does not do away with sex markers entirely, it does recognise that these markers are not essential to navigate legal existence.⁶⁷ Consequently, the GIGSECA provides adequate protection for intersex infants for purposes of sex alteration surgery, as it criminalises the procedure. Furthermore, introducing delayed sex registration enables parents to make decisions that will be in the best interests of their child.

⁵⁹ Article 5 of the CRC. In Malta as well as limited other jurisdictions, trans minors over the age of 16 are able to apply for gender recognition without parental consent. This development satisfies the evolving capacity requirement of Art 5 of the CRC: Dunne 284.

⁶⁰ As discussed in chapter 3 above.

⁶¹ NMhuirthile "The Legal Status of Intersex Persons in Malta" in *The Legal Status of Intersex Persons* 364.

⁶² Sources uses gender, it is submitted that it more appropriate to use the term sex.

⁶³ Mhuirthile "The Legal Status of Intersex Persons in Malta" in *The Legal Status of Intersex Persons* 363.

⁶⁴ 364.

⁶⁵ Hupf *William & Mary Journal of Women and the Law* (2015) 103.

⁶⁶ Mhuirthile "The Legal Status of Intersex Persons in Malta" in *The Legal Status of Intersex Persons* 364.

364.

Notwithstanding the definite benefits of the GIGSECA, a problematic element in the legislation is that it still presupposes that an intersexed child will choose to identify as either male or female upon attaining majority. The position today remains that a binary system of gender is still endorsed within Malta by not recognising intersex as an independent sex. This aspect will undermine the rights of the intersex child in later life.

Despite the GIGSECA being initially well-received and often considered the benchmark of intersexed infants' rights-based legislation, recent criticism has been revealed. A 2019 NGO report on IGM practices in Malta asserts that unnecessary sex alteration surgeries continue to be routinely practised.⁶⁸ It appears that these practices are endorsed and facilitated by the state by means of the public healthcare system, as well as private institutions.⁶⁹ Furthermore, some surgeries are being outsourced to various overseas jurisdictions where sex alteration surgery is not prohibited.⁷⁰ Since the current provisions of the GIGSEC do not criminalise such actions, intersex children in Malta are still at risk of non-consensual surgeries despite the supposed comprehensive protection offered by the GIGSEC.⁷¹ However, regardless of this criticism, the GIGSEC offers the most comprehensive legislative protection to intersexed infants to date. In fact, the ISSA, in their submission on the South African Children's Amendment Bill, based their recommendations on the GIGSEC, as they recognise it as an example of 'best practice' in respect of protecting intersexed persons' rights.⁷²

⁶⁸ Intersex genital Mutilations Human Rights Violations of Children with Variations of Reproductive Anatomy NGO Report to the 3rd to 6th Report of Malta on the Convention on the Rights of the Child (CRC) (2019) https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MLT/INT_CRC_NGO_MLT_34709_E.pdf 7 (accessed 05-01-2021).

⁶⁹ Intersex genital Mutilations Human Rights Violations of Children with Variations of Reproductive Anatomy NGO Report to the 3rd to 6th Report of Malta on the Convention on the Rights of the Child (CRC) (2019) https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MLT/INT_CRC_NGO_MLT_34709_E.pdf 7 (accessed 05-01-2021).

⁷⁰ Intersex genital Mutilations Human Rights Violations of Children with Variations of Reproductive Anatomy NGO Report to the 3rd to 6th Report of Malta on the Convention on the Rights of the Child (CRC) (2019) https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MLT/INT_CRC_NGO_MLT_34709_E.pdf 11 (accessed 05-01-2021).

⁷¹ Intersex genital Mutilations Human Rights Violations of Children with Variations of Reproductive Anatomy NGO Report to the 3rd to 6th Report of Malta on the Convention on the Rights of the Child (CRC) (2019) https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/MLT/INT_CRC_NGO_MLT_34709_E.pdf 11 (accessed 05-01-2021).

⁷² ISSA submission to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020] 10.

6 4 6 South Africa

It appears that the trend in intersex rights established by other jurisdictions is sporadically altering registration systems to accommodate intersex persons. Countries such as Germany, Canada, certain USA states and Australian territories have all in some way reformed their registration system to accommodate for persons who do not conform to the binary sex system. This has been done with varying degrees of success. Although it is undoubtedly a favourable advancement, it is not the one that should be taken first. This is because the most problematic issue remains a lack of regulation regarding the non-consensual surgeries performed on intersexed infants.

The definition of 'intersex' provided in South African legislation is found in two separate pieces of legislation. section 1 of the Alteration of Sex Description and Sex Status Act and section 16(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act. Both these pieces of legislation use the same definition, namely a "congenital sexual differentiation which is atypical, to whatever degree". This definition is very rudimentary and does not reflect the complexities involved in being born intersex.

The proposals included in the Children's Amendment Bill and the DHA's new draft identity management policy ("DIMP") have the potential to significantly influence the position of intersex children's rights in South Africa. As previously established, if the amendments to the Children's Act were to come into operation, parents would be prohibited from having the right to decide to send their child for sex alteration surgery.

The DIMP recognises that it is problematic that South Africa does not fully accommodate intersexed persons. It proposes either the inclusion of a third sex category of 'intersex' or the creation of a new identity number that has a gender-neutral sex marker.⁷³ Bearing in mind the above discussion, it is submitted that an additional amendment should be added to the BDRA – similar to the position in Malta – to allow for delayed registration of birth. It is suggested that in light of the responses in other jurisdictions, it might be advisable for the DHA to consider Ontario's approach in Canada for the BRDA.⁷⁴ Allowing persons to have an opt-in approach to having a

⁷³ Department of Home Affairs Government Gazette Draft Official Identity Management Policy Public Consultation Version (22 December 2020) 56.

⁷⁴ Refer to chapter 5 of this thesis.

gender marker on their birth certificate has so far been positively received.⁷⁵ It is also in line with the German Constitutional Court's suggestion of removing the gender marker entirely: the option most favoured by the intersexed community but not yet implemented elsewhere.

ISSA also commented on some additional measures that would be advisable to implement for intersex in respect of birth registration. They advise that in the case of an intersexed child, their sex registration must not be dependent on any degree of surgical alteration.⁷⁶ Furthermore, in instances where a child's intersexed status is only discovered later, the procedures in section 7 of the BDRA must be made available to modify the original sex assignment.⁷⁷

It is clear from the evidence established in chapter 5 that merely creating another sex category for registration purposes alone would not be sufficient. Furthermore, most jurisdictions have altered their registration system to varying degrees of success but have not made the performance of intersex genital surgery illegal. It is indisputable that South Africa would certainly be advancing intersex rights by amending its ID and registration system, but this alone will be inadequate for the protection of intersexed infants' rights. Consequently, the amendment to the Children's Act is necessary to include a prohibition on intersex genital surgeries.

The proposed amendments to the Children's Amendment Bill theoretically have a vastly beneficial influence on intersexed rights in South Africa. In chapter 5 the problematic wording of the phrase 'no health benefit' was highlighted. In its current phrasing, the provision can allow parents to argue that sex alteration surgery would be in their intersexed child's best interests for mental health reasons. This observation is submitted because the underlying reason for parents consenting to sex alteration surgery for their intersexed child is to prevent bullying and stigmatisation as they grow up.⁷⁸ In addition, medical practitioners repeatedly stress to parents the psychological

⁷⁵ A Jao "Gender 'X': Ontario issues its first 'nonbinary' birth certificate *NBC News* (09-05-2020) *NBC* <<https://www.nbcnews.com/feature/nbc-out/gender-x-ontario-issues-its-first-ever-non-binary-birth-n872676>> (accessed 03-11-2020).

⁷⁶ ISSA Submission to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020] 13.

⁷⁷ 13.

⁷⁸ Human Rights Law Centre "Lawsuit for unconstitutional sex assignment surgery to proceed in US federal court *M.C. v Aaronson* [2012] (22 August 2013) <<https://www.hrlc.org.au/human-rights-case-summaries/lawsuit-for-unconstitutional-sex-assignment-surgery-to-proceed-in-us-federal-court>> (accessed 21-02-2021).

and psychosocial consequences that could result when a child does not grow up with a definite sex.⁷⁹ This was illustrated in chapter 2 which exposed the rationale behind the traditional paternalistic treatment model, which was seen as the main treatment model to follow for treating intersex infants. It proposed that having intersex characteristics could constitute a psychological emergency and in order to rectify this, surgical intervention was necessary to prevent gender dysphoria.⁸⁰

It will be very easy for parties to argue that the surgery was performed for the mental and psychological health of the intersexed child concerned. Therefore, an additional explanation of the context of ‘health’ would have to be discussed in light of the proposed definition. In its current formulation, it will be very easy to manipulate the provision to suit the objectives of parties that are partial to sex alteration surgery being performed.

ISSA raised further concerns in their written submissions on the draft Bill. Although the new amendment implies that IGM will be prohibited, it does not specifically express it. It is submitted that due to South Africa’s undertaking to prevent sex alteration surgeries from being performed on intersex infants, it would be beneficial to have a specific subsection included in section 12(3) that addresses IGM. This includes unambiguously prohibiting IGM as well expressly stating the circumstances under which it would constitute IGM. The most important recommendations for legislative reform, for purposes of this thesis, are stated in paragraphs 45 and 49 respectively of the ISSA submission:

“45: It is prohibited to consent on behalf of a child to medically unnecessary procedures to alter the sex characteristics of any child as a representative or third party, including the parent(s) of a child”.⁸¹

and

“49: If the age or maturity of an adolescent makes it impossible to obtain their full, free and informed consent, any medically unnecessary alteration of their sex characteristics shall be postponed until this requirement can be dually met”.⁸²

⁷⁹ Garland & Diamond “Evidence-based reviews of medical interventions relative to the gender status of children with intersex conditions and differences of sex development” in *The Legal Status of Intersex Persons* (2018) 85; refer to chapter 3 and 2 respectively for a detailed discussion of the treatment of intersex persons.

⁸⁰ Chapter 2 of this thesis – see especially, the rationale provided for Dr Money’s Optimal Gender Theory.

⁸¹ ISSA Submission to the Portfolio Committee on Social Development on the Children’s Amendment Bill [B18-2020] 12.

⁸² 13.

Arguably, the inclusion of these two provisions would go far to prevent IGM from taking place in South Africa. They also make it clear that the decision does not fall within the ambit of parental responsibilities and rights but that it is a decision that can only be made by the child themselves.

ISSA also made other submissions regarding provisions that should be included in the Children's Act. These submissions were principally directed towards preventing unnecessary and unauthorised medical treatments of intersex children.⁸³ The role of intersex education for parents, medical practitioners, care providers, educators, peers and intersex persons themselves was also emphasised. It is proposed that implementing an education strategy would assist in decreasing the social pressures and stigma surrounding intersex bodies in society.⁸⁴ Finally, procedures must be put in place which will enable intersex persons to have open access to all their medical documentation, as in the past this was kept secret.⁸⁵ It is submitted that this secrecy and later discovery of intersex status has contributed to severe mental and emotional trauma experienced by intersex persons.

Considering the above discussion, as well as the information provided in chapter 5, it may be beneficial for South Africa to have a separate piece of legislation that specifically addresses IGM, like the Maltese GIGSEC Act.⁸⁶ Alternatively, it may be worth considering altering the Alteration of Sex Description and Sex Status to have specific provisions that address the rights of intersex persons, including infants. This would include a detailed formulation of the prohibitions and sanctions surrounding surgeries on intersexed children. There will be some circumstances in which the performance of sex alteration surgery may be necessary. Therefore, it is submitted that it would be appropriate to adopt either the approach implemented by the Indian court of Tamil Nadu or the one established in Article 14 of the GIGSEC. It is advisable that a panel should be established consisting of an interdisciplinary team, and that they, together with the parents of the child, should discuss the necessity of the surgery and determine whether it will be in the intersexed child's best interests. The panel

⁸³ 9.

⁸⁴ 9.

⁸⁵ 9.

⁸⁶ This was also a proposal submitted by the ISSA in their draft on the Children's Bill: ISSA's submission to the Portfolio Committee on Social Development on the Children's Amendment Bill [B18-2020] 9.

should include, for example, a paediatric surgeon, a social worker, an intersex activist/expert, a psychologist (preferably someone who is an expert in the fields of sex and gender) and a psychiatrist. Having such an expansive panel will ensure that all aspects of an intersexed child's health and well-being will be taken into consideration. The findings of this Committee should be brought before the relevant High Court – in its capacity as upper guardian of minors – to make a final ruling.

6 6 Conclusion

It is clear from the above-mentioned discussion that intersex infants' rights are not being comprehensively protected. Despite some jurisdictions undertaking to place a prohibition on IGM surgery, very few have done so. Those that have, often have not implemented the policies in a manner that effectively prevents the surgery from being performed. It appears that the attention directed towards intersex rights remains focused on those of intersexed adults and not children. As has been established in chapters 3 and 4, children are in a more vulnerable position than adults. Being intersexed makes them even more so and therefore foremost attention should be directed towards preventative measures.

Furthermore, this is especially true as most jurisdictions still allow parents a certain degree of discretion to refer their intersexed child for surgery. Few countries have put measures in place that make it compulsory for external and neutral parties to at least be involved in the decision-making process. It has been established that it will be beneficial for the decision to be taken by a Committee of experts on various aspects of the child's well-being, rather than letting it form part of a parent's exclusive discretion. Clearly, despite a universal shift from parental authority to parental responsibility, the primary decision makers for purposes of intersex surgery remain the child's parents. Therefore, in the current format, intersexed children's best interests are not being effectively realised by their parents or the state.

The proposed amendments to the Children's Act and Identification Act in South Africa have the potential to be beneficial and are an improvement to the current position. Nevertheless, it still does not provide the protection that is desperately needed. This is predominately because the proposed regulation is not comprehensive enough in its current format to address the wide range of issues surrounding intersex children. This is particularly apparent when comparing the measures implemented in

other jurisdictions. Maltese legislation, which is considered to provide the most comprehensive intersex rights protection in the world, still fails to prevent illicit surgeries from being performed. Medical practitioners in Malta continue to outsource the surgeries to clinics in neighbouring jurisdictions and the GIGSECA does not assign a penalty to such practice. This illustrates the danger that can result when legislation is not comprehensively drafted.

Clearly, in order to effectively address the issue of intersex surgery, it is submitted that an international strategy will have to be developed. From a South African perspective, there is potential in the current proposals to protect intersex infants. However, the proposals' current formulation can be manipulated and abused, and it does not explicitly prohibit IGM or parental intervention in the decision-making process but only implicitly. Furthermore, South Africa, both legislatively and in terms of case law, has always directed its focus towards the child's interests. A parent of an intersexed child postponing surgery and encouraging their child to explore various aspects of their sex and gender identity, will be acting in their best interests. A recommendation will be made in the final chapter of this thesis regarding the development of a piece of legislation that clearly separates parental responsibilities and rights from the decision-making process regarding IGM.

CHAPTER 7: CONCLUSION AND RECOMMENDATIONS

7 1 Introduction

Chapters 2 to 4 of this thesis focussed on explaining the foundational issues of parental rights and responsibilities, children's rights, their best interests and issues surrounding intersex rights. The first part of this thesis concentrated on the impact of terminology, language and how past descriptors continue to be transmuted into modern texts. It was established that this is acutely pertinent when recording the experiences of marginalised groups. It was explained how intersex persons have always been treated with misgiving and rejection and this was transmitted into the language used to describe their bodies. Furthermore, a lack of recognition for intersex rights has resulted in a lack of comprehensive terminology surrounding issues sensitive to this group. In turn, terms such as "sex" and "gender" and "intersex" and "transgender" have often been confused and interpreted to be equivalent to the other. This misperception has resulted in the non-consensual surgery that intersex infants undergo being incorrectly termed and perpetuating a culture of discrimination, but also diminishing the serious violation that occurs because of this procedure. In addition, the general public is unaware of the harsh reality of IGM. This misuse of terminology and historical stigma has made regulation of intersex matters difficult, especially in South Africa. Furthermore, the terms "sex" and "gender" are also often used to represent the same idea in legislation, even though the particular term is not appropriately used in the context. In consequence, parents are generally introduced to paradoxical, incorrect and discriminatory terminology when first confronted with the reality of their child being intersexed.

Parents, by virtue of their relation to their child, are *de facto* the holders of parental responsibilities and rights in terms of that child. Parental rights have changed pointedly from the emphasis being moved from authority to responsibilities. This was buttressed by the introduction of the CRC and the continual guidance from the Committee. This shift is noticeable in many jurisdictions, namely Colombia, Australia and South Africa through the induction of "parental responsibilities" into national legislation. Others such as England and Wales, Germany and, to a very limited extent, Malta have elaborated on the interpretation of parental responsibilities and rights within their own domestic system to ensure that it gives content to the transforming shift initiated by the CRC.

Furthermore, chapter 3 also focussed on parental responsibilities in the context of medical decision-making. It is submitted that despite medical decision-making falling within the scope of parental responsibilities and rights, there are instances in which a parent's consent will not be sufficient. Arguably these areas are very limited and will generally be in instances where medical practitioners believe that parents are not acting in their child's best interests. It is therefore surprising that, despite the development in recognising parental responsibilities, "sex alteration surgery" or IGM continues to fall within the scope of parental responsibilities and rights.

The overarching question in this thesis was whether the decision to proceed with sex alteration surgery falls within the scope of parental responsibilities and rights. It is submitted that this thesis explored the international framework surrounding parental responsibilities and rights and how they are staunchly interrelated to acting in the best interests of the child. Furthermore, it was also established that, although parents are the primary caregivers and holders of these rights and responsibilities, they are not alone responsible for executing them.

It is submitted that proxy consent-based sex alteration surgery is a global problem, not just a South African one. The main focus should be directed at prohibiting sex alteration surgery. It is asserted that, until that is done, the practice itself will continue. At present, Malta is the only jurisdiction to have introduced legislation that expressly criminalises IGM throughout the whole country. It is submitted that this legislation provides an extremely valuable example of the type of regulation that could be implemented in South Africa. Furthermore, despite Malta prohibiting the surgery, it recognises the importance of parental participation in the ongoing decision-making process but this will have to occur together with an interdisciplinary team of experts. The recently proposed amendments to South African law were also explored. It was affirmed that these amendments have the potential to be beneficial however, they do require expansion and elaboration. The proposed amendments to the Children's Act, even if brought into effect in its current format, imply that parental responsibilities and rights do not include proxy consent for intersexed children. With some alteration, however, there is the potential for South Africa to become one of the leading countries in providing protection to intersex persons.

7 2 Recommendations

It is important to state that, although sex alteration surgery is currently falling within parental responsibilities and rights, it should not. It has been established that it is not in an intersexed child's best interests to undergo this type of surgery as the harm that is suffered, is severe and occurs on many different levels. Thus, in response to this statement, legislation which will comprehensively protect intersex rights must be implemented.

The proposed amendments to the Children's Act provide a foundation but currently do not provide sufficient protection. Therefore, the amendments to the Children's Act should be expounded. Some of these amendments would be to provide for the following:

- 1) An express provision clearly stating that any type of surgery that is performed on an intersex infant/child and is non-consensual, cosmetic and unnecessary is prohibited. This provision must make it clear that this type of surgery does not fall within the ambit of parental responsibilities and rights and therefore proxy consent will not be accepted.
- 2) Furthermore, an expansive list of intersex sensitive terms like those specified in chapter 6 should be included to explain unfamiliar terms to the reader.
- 3) A further provision to be included should be the clear indication that medical practitioners must refer the parents of the intersex child for counselling and support. This will also require medical practitioners to familiarise themselves with the various options for intersex children and not refer them immediately to surgical rectification.
- 4) In these instances, it is proposed that South Africa follows in the steps of Malta and India to have the situation reviewed by an expert panel. This panel should consist of experts who have specialist knowledge in the various health and social aspects that can be affected by sex alteration surgery.

It is proposed in light of the evidence established by this thesis that, due to the many complexities that arise during the intersex decision-making process, it is advisable to implement a piece of legislation, like the Maltese GIGSECA. This act would place a complete moratorium on all unnecessary, non-consensual, non-medical surgeries on

children with ambiguous sex characteristics. It is appreciated that there will be instances where it may be necessary to refer an intersexed child for surgery. The reason that a separate piece of legislation is advised, is that it will possibly avoid confusion of the issues and misapplication of the law. It will also empower intersex persons as it will indicate that the South African government recognises their specific needs.

Finally, the proposal for a variety of gender markers for registration purposes can be beneficial but this proposal has been received differently all over the world. It is certain that only having a “male” and “female” registration option is limiting and will not be sufficient to realise the rights of intersex infants. It is therefore proposed that further investigation be conducted into the option provided by the German Constitutional Court but rejected by the German Government and to exclude “gender” and “sex” from the registration system entirely.

7 3 Final conclusion

Although parents are generally the primary decision makers in their children’s lives, they are conferred this role because it is believed that they will act in their children’s best interests. This, however, will not always be the case as sometimes parents are influenced by other factors which will result in a decision being taken that it is not in the best interests of their child. Parents of intersex children are going to be placed in a very delicate position as it is part of human nature to want to be accepted as a “normal” member of society. Parents want the best for their children, and this often translates to them making their child’s life as easy as possible and removing many obstacles and difficulties. Therefore, it is submitted that the perception that parents are acting in the best interests of their child, in comparison to what is actually in their best interests, are two different notions.

Unfortunately, intersex children are going to face many challenges, regardless of whether they undergo surgery to alter their sex characteristics or not. However, this decision should be their own to make with appropriate direction and guidance at a point where they are mature enough to do so. Until they reach that point, parents – as primary caregivers – have to provide encouragement, guidance and support through the difficulties that their intersexed child will face, since this is their parental responsibility.

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