

INTERSEX LEGAL ACTIVISM. UNITED NATIONS ON THE HUMAN RIGHTS OF INTERSEX PEOPLE*

LUÍSA WINTER PEREIRA**

Abstract: For some years now, two intersex associations, *Brijuja Intersex* and *Stop Intersex Genital Mutilation*, have been coordinating the participation in evaluation processes of the rights of intersex people convened by the United Nations. This article will try to analyse the legal strategies of these two associations to obtain the condemnation of several states by the United Nations. The ultimate goal is to draw a common thread of life stories, functioning of medical devices, silencing by governmental authorities, and possibilities for intersex people's agency.

Keywords: Genital mutilation, intersex, sexual binarism, United Nations.

Summary: 1. INTRODUCTION. 2. SYSTEMIC VIOLENCE AGAINST INTERSEX PEOPLE. 3. UNITED NATIONS ON INTERSEX PEOPLE. 3.1. Committee on the Rights of the Child. 3.2. Committee on the Elimination of Discrimination against Women. 3.3. Committee against Torture. 3.4. Committee on the Rights of Persons with Disabilities. 3.5. Human Rights Committee. 4. CONCLUSIONS.

1. INTRODUCTION

On 3 August 2021, United States athlete Athing Mu won Olympic gold in the 800m at the Tokyo Olympic Games with a time of 1:55.21. At the previous Games, in Rio de Janeiro, the gold had been won by South African athlete Caster Semenya, with an almost equal time: 1:55.28. Caster Semenya achieved her best time in Paris in 2018, with a time of 1:54.25. However, she was unable to compete in Tokyo. Or, rather, she was forbidden to participate. The reason: she had higher levels of testosterone than the International Association of Athletics Federations' standards allowed.

The Court of Arbitration for Sport (CAS), in the case 2018/O/5794 *Mokgadi Caster Semenya v. International Association of Athletics Federations*,¹ took up the IAAF's thesis that, “for sporting purposes, individuals with 5-ARD are biologically indistinguishable from males without a DSD and have been shown to dominate in sport over ‘biological

* Article published as part of the Grant I+D+i (PID2019-107025RB-I00) *Ciudadanía sexuada e identidades no binarias: de la no discriminación a la integración ciudadana / Sexed citizenship and non-binary identities: from non discrimination to citizenship integration (Binalsex)*, funded by MCIN/AEI/10.13039/501100011033. This text has also been produced within the framework of the Vulnus project (INV-IGU159-2021).

** Research Personnel Training (PRE2020-095576) under contract in the BinaSex project (PID2019-107025RB-I00), attached to the Department of Constitutional Law of the University of Seville (lwinter@us.es).

¹ It can be consulted at https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf [Accessed: 23 November 2021].

females' who, the IAAF asserts, have no chance to win when competing against such 'biologically male' athletes" (paragraph 503 CAS 2018/O/5794). To justify Semenya's *sporting advantage over biological women*, the CAS relied on a study published in the *British Journal of Sport Medicine*, which concludes that the upper limit of 5 nanomoles of testosterone per litre of blood is reasonable and proportionate as the distinguishing mark of *the biological woman*. Semenya was left out of this definition.²

However, in August 2021, the same scientific team that had signed the study that served as the basis for the CAS decision published an article in the same journal rectifying this preliminary study (Bermon and Garnier 2021). They argued that this was an exploratory study and that a causal inference between testosterone levels and athletic performance was not proven. Over and above this rectification, moreover, and as I attempted to point out above, the difference in performance between Semenya and Athing Mu (a non-intersex woman) was minimal and actually favoured the latter, who beat the former's time in an Olympic competition.

What the now retracted study justifying the CAS's sentence did was to produce *the woman*: it universalised a normative ideal of woman as related to testosterone levels. Other studies, on alimentary matters, are clear on this: environmental and alimentary factors condition testosterone levels (see for example Lo et al. 2018, for alimentary factors; Magid et al. 2018, for environmental factors). This decision of the CAS and the difference it draws between *the biological woman* and the rest, which includes intersex women like Semenya, is about the reproduction of the myth of testosterone. As Katrina Karkazis and Rebeca Jordan-Young (2019) put it, it is about the production and imposition of an essence of femininity. It is even a strategy of racist colonisation (Karkazis and Jordan-Young 2018).

In this article I would like to argue, following the thread of this introduction, that violence against intersex people has been constructed on the basis of the production of an essence of what it is *to be a man and to be a woman*, and that this production has been imposed colonially on our bodies, as a kind of *local-globalised ontology*. To this end, in the following section I will briefly outline what this kind of violence against the intersex population consists of. In the third and most extensive section of this study, I will focus on the legal strategies that intersex activism has developed to denounce such systemic violence within the United Nations (UN). I will finish with some concluding reflections.

2. SYSTEMIC VIOLENCE AGAINST INTERSEX PEOPLE

In 2020, the European Union Agency for Fundamental Rights (FRA) published the report *A long way to go for LGBTI equality*,³ focusing on the European Union. An entire section was devoted to intersex people (Section 4). The data are chilling:

² For more information on the case, see Carpenter 2020.

³ It can be consulted at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf [Accessed: 21 November 2021].

“[A]lmost two thirds (62%) of intersex respondents felt discriminated against in at least one area of life because of being intersex in the 12 months before the survey; 62% of intersex respondents did not provide -and were not asked for- their or their parents’ consent before undergoing surgical intervention to modify their sex characteristics; Intersex respondents say that discrimination because of their sex characteristics, bullying and/or violence are the major problems they face in the country they live in; One in five intersex respondents (19%) faced hurdles when registering their civil status or gender in a public document. These include denials of service or ridicule by staff (41%)” (European Union Agency for Fundamental Rights 2020: 51).

Here, the FRA locates several foci of violence against intersex people: discrimination; unconsented medical interventions (especially surgery); harassment; registration obstacles; ridicule by state authorities. What do these data show us? We could distinguish between two types of violence: explicit and systemic. Explicit violence embraces instances of forceful interruptions our daily lives. If we see a person robbing another person in the street, we will immediately detect that something has happened, that our everyday life has been fractured. Harassment, mockery and discrimination of intersex people by individuals or institutions are instances of explicit violence. Systemic violence, on the other hand, is more subtle. It is not the kind of violence that fractures our daily lives, but the kind of violence that constitutes them. Systemic violence, according to Žižek (2008), is that which constitutes our legal system, our medical system, our educational system, our social system, and which, as such, we understand to be *normal*.⁴ Based on it, it is *normal* that two out of three intersex people in Europe have undergone medical procedures to construct a body sexually adapted to the binary norm. It is similarly *normal* for intersex people to face serious obstacles in having their intersexuality registered and acknowledged by administrations, as the FRA study indicates.

Let us return to sports to make this systemic violence visible. The Brazilian athlete Edinanci Fernandes da Silva, an intersex woman and judoka, had to undergo a clitoridectomy in order to continue competing (Lins França 2009). Why should a person’s *larger than normal clitoris* have to be reduced in order for them to compete in sports? This is the kind of systemic violence that governs intersex people’s bodies. It is based on a dividing line between the normal body and the pathological body. It follows that a body with XY chromosomes is a man’s body; as such, it must have a penis and testicles that appear to be masculine in shape and size, and generate testosterone at masculine levels, as well as maintain affective sexual relations with a body with XX chromosomes, that is with a woman’s body. In order to be thus, a woman’s body must in turn have ovaries and a vagina, and generate a certain maximum amount of testosterone considered to be in line with femininity, as well as maintain affective sexual relations with men. Together these features constitute what could be called a *narrative coherence of bodies* (García López

⁴ In a similar vein, see Barrère Unzueta’s concept of subordiscrimination in Barrère Unzueta and Morondo Taramundi (2011).

and Winter Pereira 2021). This narrative coherence of bodies imposes a coherent narrative between chromosomes, hormones, phenotype, genitalia, and gonads in the physiological sphere as if they were a uniform and universal whole. And this uniform and universal whole must, in turn, be coherent with a single narrative about gender identity and sexual orientation. Interruptions of that narrative coherence are placed on the side of pathology.

While historically intersex people were subjected to inquisitorial judicial processes that could result in a death sentence (García López 2015), it is during the nineteenth century that medical science picks up the baton from criminal law and the time of correction begins: homosexual and lesbian people are corrected because their sexual orientation is not consistent with the normative narrative; trans people are corrected because their identity is not consistent with the normative narrative; and intersex people are corrected because their bodily characteristics are not consistent with the normative narrative. I emphasise the locution *normative narrative* here because it refers to a construction about bodies that is presented as universal, neutral, objective, impartial, and yet is nothing more than a local-globalised ontology, a point of view that does not admit that it is a point of view. Those who do not conform to the universal subject it creates must be disciplined and fixed.

This is not a story exclusive to intersex people. The Cartesian subject of modernity has been imposed as *the subject*, so those who do not conform to that subject have been left on the other side of the abyssal line (Grosfoguel 2013). Think of the Declaration of the Rights of the Man and of the Citizen of France in 1789, or the Virginia Declaration of Rights of 1776 in what is now the United States. These two legal texts mark the time of rights and also the time of exclusions. Women and the non-white population in particular have been the subjects placed outside the normative subject and, therefore, lacking the legal guarantees to make their lives sustainable and worth living. Whereas women and the non-white population have gradually gained status as subjects and subjects of law, though not without brakes and limitations, law continues to reproduce its inclusion-exclusion logic: for some to be included, others must be excluded (Esposito 2011; García López and Winter Pereira, 2020). In this logic, intersex people are today what women were in 1789. They remain subjectivities outside the subject and the subject of law.

This is why the rights of intersex people become suspended at the doors of the operating room. When an intersex person, especially a child, has their body surgically *corrected/fixed* and *adjusted* to the norm, their rights to the free development of the personality, to privacy, or to physical and mental integrity remain outside the space of exception that is the operating room. Within that room, that body is regarded as a case of *Disorder of Sex Development* to which the medical protocol *Optimal Gender of Rearing* is applied. When a baby is born with genital or sex ambiguity, the aim is to produce a normatively sexed body (in shape and size) within its first 18 months of life (to avoid generating memories), in a process that is considered a psychosocial emergency (García Dauder et al. 2015). To this end, their ‘true’ sex is diagnosed based on what the intersex movement has ironically called the phallometer: on the measurements of the normative penis -minimum 2.5 cm (the normative clitoris being a maximum of 1 cm; see Fausto-Sterling 2000; Gregori Flor 2006), and it is fixed by means of irreversible surgical and hormonal treatments. Nor is it only about surgery: in addition to physical interventions

there are daily explorations of the genitals, hormonal experimentation, photographs, etc., often implying, as highlighted in an interview conducted by Amnesty International Spain in 2020⁵, isolating children from their family and tying them to their bed in the post-operative period.

In addition to such medical violence,⁶ there is also registry violence. With some exceptions (e.g., Germany), laws on civil registration normally establish that a person must be registered within a certain period of time (in Spain, it is 72 hours under the 2011 Civil Registration Act⁷) under one of the only two sexes available at the registry: male or female. The registration of a new-born's sex relies on a medical report that is in turn based on genitalia and its correspondence in shape and size with what has been normatively constructed as male and female genitalia (Greenberg 2012). A person's civil registration is thus based on *ius genitalis*.

The UN has acknowledged the existence of cases of intersex genital mutilation and torture (Carpenter 2022; Carpenter 2018). In the *Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (Méndez 2013), the UN recognised that this type of medical treatment, often non-consensual and sometimes based on flawed informed consent (Feder 2014), represents a case of child torture consented to and legalised by the states (Sandberg 2018), as shown in the FRA report cited above. Has this consideration of torture and genital mutilation by the UN been taken further? In the following section I would like to focus on how intersex activism is managing to make systemic violence visible through its intervention in consultation processes before international bodies.

3. UNITED NATIONS ON INTERSEX PEOPLE

The legal strategies that intersex activism is pursuing globally involve engaging in national contexts through reporting, in order to expose systemic human rights violations, particularly in the form of genital mutilation. In this regard, I will focus on the work carried out in recent years by two associations: *Brújula Intersexual* and *Stop Intersex Genital Mutilation*. The first is a Mexican association with a Latin American outreach. It was created in 2013 and involves intersex people, families, and allies. As highlighted on its website, “the initial objective remains the same to this day: to make intersex experiences visible. As a result, one of our core activities is to distribute information in Spanish on the right to bodily autonomy and integrity of intersex people”.⁸ The second is an association based in Switzerland and founded in 2007 with the aim of “to represent the interests

⁵. A few years earlier, Amnesty International published a relevant report entitled *First, do not harm: ensuring the rights of children born intersex* (2017). It is available at <https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/> [Accessed: 22 November 2021].

⁶. On the clinic and intersex people in the Spanish context, see Gregori Flor 2015; Fernández Garrido 2021.

⁷. In 2022, a draft law is being negotiated in Spain that recognises the right to free self-determination of the mention of sex in the civil registry. The United Nations resolutions that I will focus on in this paper reinforce the need for a legislative framework such as the one being proposed.

⁸. <https://brujulaintersexual.org/acerca-de/> [in Spanish in the original] [Accessed: 19 November 2021].

of intersex people and their relatives, raise awareness, and fight IGM [Intersex Genital Mutilation] practices and other human rights violations perpetrated on intersex people”.⁹ Both associations have been involved in five committees, which have produced a total of 49 reports: Committee against Torture (8 reports), Committee on the Right of the Child (17 reports), Committee on the Rights of Persons with Disabilities (8 reports), Committee on the Elimination of Discrimination against Women (12 reports), and Human Rights Committee (5 reports). These 49 reports have led to the United Nations’ reprimanding the genital mutilation of intersex persons in the 49 cases in which they have intervened.

Year	Countries reprimanded
2011	Germany
2015	Switzerland (2) ¹⁰ , Austria, Denmark, Hong Kong, Chile, Germany
2016	France (3), Ireland, United Kingdom, Nepal, New Zealand, South Africa, Chile, Italy, Uruguay, Switzerland, Netherlands
2017	Denmark, United Kingdom, Morocco, Germany, Ireland, Switzerland, Australia
2018	Netherlands, Spain, Argentina, Chile, Luxembourg, Mexico, Australia, New Zealand, Liechtenstein, Nepal
2019	United Kingdom, Belgium (2), Italy, Malta, Portugal, Australia (2), India, Mexico
2020	Austria, Portugal

Prepared by the author

According to the data, the following countries have been reprimanded by the UN for intersex genital mutilation a number of times that is indicated in brackets: Switzerland (4), France (3), Germany (3), United Kingdom (3), Ireland (2), Denmark (2), Netherlands (2), Italy (2), Belgium (2), Austria (2), Portugal (2), Spain (1), Luxembourg (1), Liechtenstein (1) and Malta (1) in Europe; Chile (3), Mexico (2), Uruguay (1) and Argentina (1) in Latin America; Nepal (2), Hong Kong (1) and India (1) in Asia; South Africa (1) and Morocco (1) in Africa; and Australia (4) and New Zealand (2) in Oceania. This makes a total of 26 states, mostly European, and 50 reprimands. As per committee, the number of reprimands issued by the UN stand as follows: Committee on the Rights of the Child 17; Committee on the Elimination of Discrimination against Women 12; Committee against Torture 8; Committee on the Rights of Persons with Disabilities 8; Human Rights Committee 5. I will henceforth focus on some of the cases handled by these Committees.

3.1. Committee on the Rights of the Child

Of all Committees under consideration, the Committee on the Rights of the Child (CRC) has undoubtedly been most active on intersex people. This might be related to the fact that intersex activism focuses mostly on the protection of the physical and mental integrity of children, as most vulnerable subjects and most often subjected to practices that violate human rights -most atrociously.

⁹ <https://stopigm.org/about-us/about-the-ngo/> [Accessed: 19 November 2021].

¹⁰ This number indicates the number of UN interventions in that country in that year.

The CRC monitors the implementation of the 1989 Convention on the Rights of the Child. The States Parties must submit periodic reports on the implementation and development of the Convention: they must issue an initial report two years after joining the Convention and a follow-up report every five years. The CRC studies the reports, calling on the states' own governmental bodies, and makes concluding observations.

In the case at hand, i.e. violations of the rights of intersex children, the CRC bases its observations on Article 24.3 of the Convention on the Rights of the Child, according to which “States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children” in relation to General Comment 18 on non-discrimination. The countries analysed by the CRC since 2015 in relation to intersex children have been Switzerland, Chile, France, Ireland, United Kingdom, Nepal, New Zealand, South Africa, Denmark, Spain, Argentina, Belgium, Italy, Malta, Portugal, Australia, and Austria.

The first two interventions took place in 2015. The CRC studied the situation of intersex children in Switzerland and Chile. In the concluding observations on the Swiss case, published on 26 February 2015, the CRC dedicates paragraphs 42 and 43 to intersex persons:

“[W]hile welcoming the adoption of a new provision of criminal law prohibiting genital mutilation, the Committee is deeply concerned at: a) The significant number of girls living in the State party who are affected or threatened by genital mutilation; (b) Cases of medically unnecessary surgical and other procedures on intersex children, without their informed consent, which often entail irreversible consequences and can cause severe physical and psychological suffering, and the lack of redress and compensation in such cases” (CRC/C/CHE/CO/2-4 2015: 9).

For case b, concerning intersex children, CRC urged Switzerland,

“in line with the recommendations of the National Advisory Commission on Biomedical Ethics on ethical issues relating to intersexuality, [to] ensure that no one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to the children concerned, and provide families with intersex children with adequate counselling and support” (CRC/C/CHE/CO/2-4 2015: 9).

In this report, the CRC placed at the same level, for the first time, the genital mutilation suffered by girls and intersex genital mutilation, and declared them both to be cosmetic, non-consensual, medically unnecessary, and irreversible. To lead to this pronouncement, *Stop Intersex Genital Mutilation* submitted a report describing the non-consensual and medically unnecessary treatments (clitoroplasty, clithridectomy, vaginoplasty, gonadectomy, etc.), as well as their connection with the problems encountered at the Civil Registry, and the violations of international law that these

practices entailed: “[T]he surgeries and other harmful treatments intersex people endure in Switzerland cause severe physical and mental pain. Doctors perform the surgery for the discriminatory purpose of making a child fit into societal and cultural norms and beliefs, although there is plenty of evidence on the suffering this causes”.¹¹ The Swiss State was held responsible for these serious human rights violations.

Switzerland is not an isolated case. Far from it, we can find strong similarities on this issue with other countries, both in the reports submitted by intersex activists and the concluding observations by the CRC. Spain, for example, was reprimanded in 2018. The report follows the same structure: what are cases of intersexuality; what practices are carried out in these cases, based on those that are documented; what rights are violated by these practices; what obstacles do intersex people encounter in denouncing these violations; conclusions; and recommendations. The conclusions state:

“[T]hus Spain is in breach of its obligation to ‘take effective legislative, administrative, judicial or other measures’ to prevent harmful practices (Art. 24 para. 3 in conjunction with CRC/CEDAW Joint General Comment No. 18/31 on harmful practices), as well as of its obligations under Articles 2, 3, 6, 8, 12, 16, 19, 23, 24.1, 34, 36, and 37 of the Convention on the Rights of the Child. Also in Spain, victims of IGM practices encounter severe obstacles in the pursuit of their right to access to redress and justice, including fair and adequate compensation, and the means for as full rehabilitation as possible. Further the state party’s efforts on education and information regarding the human rights aspects of IGM practices in the training and education of medical personnel are grossly insufficient with respect to the treatment of intersex people”¹².

These human rights violations are given flesh and blood in the report. The first case reported concerns a girl born in 2001, who at 17 months of age underwent surgery for clitoral reduction, vaginoplasty, and labiaplasty. Seven months later, labiaplasty was performed again. From the age of two until the age of 12 the girl underwent periodic vaginal dilations with dildos/dilators of different sizes so that her vagina could be large enough to be penetrated in the future. The medications she was given, especially hydrocortisone, affected her health, causing Cushing syndrome, which led to overweight. Today, that surgically constructed girl identifies herself as a boy and stopped following the prescribed treatment at the age of 12. Their childhood was spent amidst hospitals, cures, relapses, and infections.

The recommendations presented in the intersex activists' report focus on the need to address the following points: prohibition of harmful practices against intersex people, i.e. unnecessary and non-consensual medical treatment, to guarantee the bodily integrity, autonomy and self-determination of children and their families; introduction

¹¹ The report presented by the activists in https://intersex.shadowreport.org/public/2014-CRC-Swiss-NGO-Zwischengeschlecht-Intersex-IGM_v2.pdf [Accessed: 18 November 2021]. The quote on page 26.

¹² The report presented by the activists in <https://intersex.shadowreport.org/public/2017-CRC-Spain-NGO-Brujula-Zwischengeschlecht-Intersex-IGM.pdf> [Accessed: 18 November 2021]. The quote on page 15.

of legal measures to realise the principle of truth, justice, and reparation; and education and training on intersexuality for medical, psychological, and educational professionals. The CRC concluded that hospitals in Madrid, Barcelona and Malaga continue to perform genital mutilations on intersex children. Hence

“the Committee recommends that the State party prohibit unnecessary medical or surgical treatment from being performed on intersex children, when those procedures entail a risk of harm and can be safely deferred until the child can actively participate in decision-making. It also recommends that the State party ensure that intersex children and their families receive adequate counselling and support” (CRC/C/ESP/CO/5-6 2018: 7).

3.2. Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women (CEDAW) is responsible for monitoring the implementation of the 1979 Convention on the Elimination of All Forms of Discrimination against Women. As with the CRC, States Parties are required to submit periodic reports to which the CEDAW will respond with concluding observations.

CEDAW has pronounced itself about intersex women on the basis of Article 5 of its Convention¹³ in relation to General Recommendation 31, which is also closely related to General Recommendation 18. The countries analysed by CEDAW with regard to the rights of intersex women were: France, Switzerland, Netherlands, Germany, Ireland, Chile, Luxembourg, Mexico, Australia, New Zealand, Nepal, and Liechtenstein.

The CEDAW first commented on the situation of intersex women in July 2016 in relation to France. In paragraph 17, the CEDAW states how stereotypes reoccur in harmful practices. Specifically, it states:

“[T]he Committee welcomes the State party’s efforts to combat discriminatory gender stereotypes, including by promoting the sharing of household duties and parenting responsibilities, and to address the stereotyped portrayal of women in the media, including by regulating broadcasting licences and strengthening the role of the Audiovisual Superior Council. The Committee further welcomes legislative and other measures taken to combat harmful practices, including child and forced marriage, female genital mutilation and crimes in the name of so-called honour. However, the Committee is concerned that: [...] f) Medically unnecessary and irreversible surgery and other treatment is routinely performed on intersex children, as noted by the Committee on the Rights of the Child and by the Committee against Torture” (CEDAW/C/FRA/CO/7-8 2016: 5-6).

¹³ Article 5: “States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.

It is undoubtedly an important step for CEDAW to recognise that intersex women, especially girls, have their rights systematically violated due to their specific bodily features. Therefore, it recommends:

“[D]evelop and implement a rights-based health-care protocol for intersex children, ensuring that children and their parents are appropriately informed of all options; children are involved, to the greatest extent possible, in decision-making about medical interventions and their choices are respected; and no child is subjected to unnecessary surgery or treatment, as recommended recently by the Committee against Torture and the Committee on the Rights of the Child” (CEDAW/C/FRA/CO/7-8 2016: 6-7).

The Mexican case, decided in July 2018, is similar. In response to the activists' report¹⁴, the CEDAW includes intersexuality in the section on the legislative framework and discrimination against women, as an intersectional factor that is at the root of systemic violence:

“[T]he lack of effective mechanisms and the insufficient state-level budgetary allocations to implement and monitor the laws relating to gender equality and women's right to a life free of violence have failed to eliminate discrimination, notably intersecting forms of discrimination, in particular against indigenous women, Mexican women of African descent, migrant women, women with disabilities, lesbian, bisexual and transgender women and intersex persons” (CEDAW/C/MEX/CO/9 2018: 4).

This requires the adoption of a roadmap at all levels of government (federal, state, and local) to implement laws for the prevention and elimination of all de facto discrimination against women, with special emphasis on intersex women. Likewise, CEDAW is concerned about unnecessary medical treatment of intersex girls. Therefore, it recommends that

“[I]n the light of joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2014) on harmful practices, the Committee recommends that the State party adopt provisions explicitly prohibiting the performance of unnecessary surgical or other medical procedures on intersex children until they reach an age when they can give their free, prior and informed consent and provide families of intersex children with adequate counselling and support” (CEDAW/C/MEX/CO/9 2018: 7).

3.3. Committee against Torture

The Committee against Torture (CAT) is concerned with the analysis of how states implement the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. States Parties are required to submit periodic reports every four years, plus the initial report one year after accession.

¹⁴ It can be consulted at <https://intersex.shadowreport.org/public/2018-CEDAW-Mexico-NGO-Intersex-Brujula-StopIGM.pdf> [Accessed: 18 November 2021].

The CAT has analysed cases of torture of intersex persons on the basis of articles 2, 12, 14, and 16 of the Convention.¹⁵ It has so far studied the cases of Germany, Switzerland, Austria, Denmark, Hong Kong, France, Netherlands and United Kingdom. In 2011 it issued its first pronouncement on the matter, indeed the first pronouncement ever issued by the UN on intersex people, in a resolution on Germany. Based on a report submitted by intersex activists,¹⁶ the CAT concluded, in a section devoted exclusively to intersex people, that there were cases of genital mutilation leading to forced sterilisation. Such surgeries, it noted, are not justified on health grounds, but for purely cosmetic reasons and without the informed consent of the persons involved or their legal guardians. Furthermore, the CAT expressed concern about the absence of a legislative framework guaranteeing the integrity of people regardless of their sexual orientation and providing redress in the form of compensation. Therefore, it urged Germany to

“ensure the effective application of legal and medical standards following the best practices of granting informed consent to medical and surgical treatment of intersex people, including full information, orally and in writing, on the suggested treatment, its justification and alternatives; (b) Undertake investigation of incidents of surgical and other medical treatment of intersex people without effective consent and adopt legal provisions in order to provide redress to the victims of such treatment, including adequate compensation; (c) Educate and train medical and psychological professionals on the range of sexual, and related biological and physical, diversity; and (d) Properly inform patients and their parents of the consequences of unnecessary surgical and other medical interventions for intersex people” (CAT/C/DEU/CO/5 2011: 7).

Eight years later, in the United Kingdom (UK) case CAT/C/GBR/CO/6, CAT insists on the lack of a legislative framework to guarantee the lives of intersex people, as well as redress for those who have suffered genital mutilation and other unnecessary medical treatment. Therefore, it recommends the UK to ensure that

¹⁵ Article 2: “1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” Article 12: “Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

Article 14: “1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.”

Article 16: “1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.”

¹⁶ It can be consulted at https://intersex.shadowreport.org/public/Association_of_Intersexed_People-Shadow_Report_CAT_2011.pdf [Accessed: 20 November 2021].

“[T]he parents or guardians of intersex children receive impartial counselling services and psychological and social support, including information on the possibility of deferring any decision on unnecessary treatment until they can be carried out with the full, free and informed consent of the person concerned; (b) Persons who have been subjected to such procedures without their consent and resulting in severe pain and suffering obtain redress, including the means for rehabilitation” (CAT/C/GBR/CO/6 2019: 14).

3.4. Committee on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities (CRPD) focuses on the 2006 Convention on the Rights of Persons with Disabilities. States Parties to this Convention are required to submit a comprehensive report on the measures taken to comply with it within two years after accession.

With regard to intersex persons, the CRPD applies articles 16 and 17 of the Convention¹⁷ relating to exploitation, abuse, and violence, as well as integrity of the person. The states reprimanded have been Chile, Germany, Italy, Uruguay, United Kingdom, Morocco, India, and Australia. The resolutions issued by this Committee raise the need to protect the integrity of intersex persons, as “children are subjected to irreversible surgery for intersex variation and other medical treatments without their free and informed consent” (CRPD/C/ITA/CO/1 2016: 5). The CRPD recommends that States Parties ensure that no one is subjected to non-consensual medical or surgical treatment during infancy or childhood, thus guaranteeing the bodily integrity, autonomy and self-determination of children, by providing their families with appropriate counselling and support (CRPD/C/ITA/CO/1 2016: 6). In other cases, concerning for example Chile, the

¹⁷ Article 16: “1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects. 2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive. 3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities. 4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs. 5. States Parties shall put in place effective legislation and policies, including women and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.”

Article 17: “Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.”

CRPD also proposes preventing forced sterilisations (CRPD/C/CHL/CO/1 2016: 6), or, in the case of Morocco, the prohibition and criminalisation of non-consensual medical treatment of intersex persons (CRPD/C/MAR/CO/1 2017: 7).

Moreover, in its October 2019 report, concerning India, the CRPD denounces the 'mercy killings' of intersex children with disabilities: "[T]he Committee is concerned about the deaths of children with disabilities in institutions, and information about 'mercy killings' of intersex children with disabilities" (CRPD/C/IND/CO/1 2019: 6). It also raises concerns about the non-registration of underaged intersex persons, thus increasing the risk of neglect (CRPD/C/IND/CO/1 2019: 10).

3.5. Human Rights Committee

The Human Rights Committee (HRC) monitors the implementation of the 1966 International Covenant on Civil and Political Rights. States Parties are required to submit an initial report within one year of their joining the Covenant and then further reports whenever the HRC requests them, which normally happens every four years.

The HRC's observations on the situation of the rights of intersex people were based on articles 2, 3, 7, 24 and 26 of the Covenant¹⁸ concerning cruel, inhuman and degrading treatment, harmful practices and non-consensual medical or scientific experimentation. The countries studied were Switzerland, Australia, Belgium, Mexico, and Portugal.

¹⁸ Article 2: "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. 3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

Article 3: "The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 24: "1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality."

Article 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

This is the Committee that has developed the fewest resolutions on intersex people since 2017, when it published the first one. The 2020 report on Portugal stands out here. Despite the fact that Portugal legally guarantees the rights of LGBTBI people since 2018 (Law 38/2018 of 7 August), the HRC notes that “children born with intersex traits are sometimes subjected to invasive and irreversible medical procedures aimed at assigning them with a sex, that such actions are often based on a stereotyped vision of gender roles and that they are carried out before the persons in question are of an age to give their free and informed consent” (CCPR/C/PRT/CO/5 2020: 4).

4. CONCLUSIONS

The 49 Committee resolutions under analysis, of which only a small sample has been highlighted here, all point to the need for legal frameworks that guarantee the lives and integrity of intersex people, especially children. The vast majority of Committee reports are strongly critical of serious violations of the lives of intersex people, denouncing medical practices and administrative limitations that directly violate human rights. These reports, however, fail to address the need to eradicate a binary system, as the source for the perceived need to pigeonhole intersex people into bodily normativity, into a narrative of body coherence. Silence on this issue seems surprising. It might be that the reports did not appear to be the right space to include such a critique. Notwithstanding this silence, the pronouncements of the Committees, although merely aesthetic and without practical consequence for the States Parties, do represent an interesting legal strategy.

In this regard, in October 2021 Austria, on behalf of 53 states, requested the UN Human Rights Council to urgently protect intersex people in their autonomy and right to health. They called for a ban on non-consensual medical practices, as well as on violence and discrimination based on sex characteristics. The list of signatory states includes many of those that have been reprimanded by the United Nations.¹⁹ Among them we find, for example, the Spanish state, currently immersed in the attempt to approve a legislative framework for LGBTBI+ people, which ironically pays scant attention to the rights of intersex people.

To conclude this paper, I would just like to consider to what extent the resolutions of the United Nations Committees analysed here and the work carried out by intersex activists can be framed as *soft law*. By this I understand law that is not constructed vertically or hierarchically, but rather through horizontal, participatory, consensual and deliberative creation (Mercado Pacheco 2012). In this soft law framework, intersex activists become constituent agents that question the strict formulas of regulation (Rubio Castro 2014). These resolutions of the UN Committees on intersex people could even be understood as guides to the interpretation and application of hard law. They could be understood, in short, as a legislative technique that is apt to address such complex realities as those conveyed by the systemic violence of sexual binarism.

¹⁹ The news is available on the Austrian government's website: <https://www.bmeia.gv.at/oev-genf/speeches/alle/2021/10/united-nations-human-rights-council-48th-session-joint-statement-on-the-human-rights-of-intersex-persons/> [Accessed: 23 November 2021].

REFERENCES

- AMNESTY INTERNATIONAL (2017). *First, do not harm. Ensuring the rights of children born intersex*. Available at: <https://www.amnesty.org/en/latest/campaigns/2017/05/intersex-rights/>. [Accessed: 23 November 2021].
- AMNESTY INTERNATIONAL (2020). *Interview with Iolanda Melero*. Available at: <https://www.es.amnesty.org/en-que-estamos/blog/historia/articulo/muchos-medicos-nos-intentan-ajustar-a-ese-convencionalismo-hombre-mujer-para-poder-decir-ya-esta-todo-arreglado/>. [Accessed: 23 November 2021].
- BARRÈRE UNZUETA, M^a ÁNGELES, MORONDO TARAMUNDI, DOLORES (2011). “Subordiscriminación y discriminación interseccional: elementos para una teoría del derecho antidiscriminatorio”. *Anales de la Cátedra Francisco Suárez*, 45, pp. 15-42.
- BERMON STÉPHANE, GARNIER PIERRE-YVES. (2021). “Correction: Serum androgen levels and their relation to performance in track and field: mass spectrometry results from 2127 observations in male and female elite athletes”. *British Journal of Sports Medicine*, 55:e7. <https://doi.org/10.1136/bjsports-2017-097792corr1>
- CARPENTER, MORGAN (2018). “The ‘Normalisation’ of Intersex Bodies and ‘Othering’ of Intersex Identities”. In Jens M. Scherpe, Anatol Dutta, Tobias Helms (Eds), *The Legal Status of Intersex Persons*. Cambridge: Intersentia, pp. 445-514. <https://doi.org/10.1017/9781780687704.028>
- CARPENTER, MORGAN (2020). “Caster Semenya’s Life and Achievements Are Cause for Celebration, Respect and Inclusion; Her Exclusion Is Consequential”. *Journal of Medical Ethics* 46 (9), pp. 593-4. <https://doi.org/10.1136/medethics-2020-106506>
- CARPENTER, MORGAN (2022). “Global Intersex, an Afterword: Global Medicine, Connected Communities, and Universal Human Rights”. In Megan Walker (Ed), *Interdisciplinary and Global Perspectives on Intersex*. London: Palgrave Macmillan, pp. 263-280. https://doi.org/10.1007/978-3-030-91475-2_15
- COMMITTEE ON THE RIGHTS OF THE CHILD (2015). *Concluding observations on the combined second to fourth periodic reports of Switzerland*. CRC/C/CHE/CO/2-4.
- COMMITTEE ON THE RIGHTS OF THE CHILD (2018). *Concluding observations on the combined fifth and sixth periodic reports of Spain*. CRC/C/ESP/CO/5-6.
- COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (2016). *Concluding observations on the combined seventh and eighth periodic reports of France*. CEDAW/C/FRA/CO/7-8.
- COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (2018). *Concluding observations on the ninth periodic report of Mexico*. CEDAW/C/MEX/CO/9.
- COMMITTEE AGAINST TORTURE (2011). *Consideration of reports submitted by States Parties under article 19 of the Convention*. CAT/C/DEU/CO/5.
- COMMITTEE AGAINST TORTURE (2019). *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*. CAT/C/GBR/CO/6.

- COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES (2016). *Concluding observations on the initial report of Italy*. CRPD/C/ITA/CO/1.
- COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES (2016). *Concluding observations on the initial report of Chile*. CRPD/C/CHL/CO/1.
- COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES (2017). *Concluding observations on the initial report of Morocco*. CRPD/C/MAR/CO/1.
- COMMITTEE ON THE RIGHTS OF PERSONS WITH DISABILITIES (2019). *Concluding observations on the initial report of India*. CRPD/C/IND/CO/1.
- COURT OF ARBITRATION FOR SPORT (2018). *Mogkadi Caster Semenya v. International Association of Athletics Federations*. CAS 2018/O/5794. Available at: https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf [Accessed: 23 November 2021].
- ESPOSITO, ROBERTO (2011). *El dispositivo de la persona*. Buenos Aires: Amorrortu.
- EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (2020). *A long way to go for LGBTI equality*. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-lgbti-equality-1_en.pdf. [Accessed: 23 November 2021].
- FAUSTO-STERLING, ANNE (2000). *Sexing the Body: Gender Politics and the Construction of Sexuality*. New York: Basic Books.
- FEDER, ELLEN (2014). *Making sense of Intersex. Changing Ethical Perspectives in Biomedicine*. Indiana: Indiana University Press.
- FERNÁNDEZ GARRIDO, SAM (2021). *La clínica intersexual como 'zona de contacto'. Binarismo sexual, saberes expertos y otras artesanías biológicas en la clínica española contemporánea*. Doctoral thesis. University of Granada.
- GARCÍA DAUDER, S. et al. (2015). "Usos de lo psicosocial en la investigación y tratamiento de las intersexualidades/DSD". *Universitas Psychologica*, 14(5), pp. 1649-1666. <https://doi.org/10.11144/Javeriana.upsy14-5.piti>
- GARCÍA LÓPEZ, DANIEL J. (2015). *Sobre el derecho de los hermafroditas*. Tenerife: Melusina.
- GARCÍA LÓPEZ, DANIEL J., WINTER PEREIRA, LUÍSA (2020). "Emancipación, descolonización y uso del derecho". *Anduli*, 20, pp. 253-268. <https://doi.org/10.12795/anduli.2021.i20.14>
- GARCÍA LÓPEZ, DANIEL J., WINTER PEREIRA, LUÍSA (2021). "Vigilar y corregir". *Periódicus*, 16(1), pp. 51-73. <https://doi.org/10.9771/peri.v1i16.42990>
- GREENBERG, JULIE A. (2012). *Intersexuality and the Law. Why Sex Matters*. New York: New York University Press. <https://doi.org/10.18574/nyu/9780814731895.001.0001>
- GREGORI FLOR, NURIA (2006). "Los cuerpos ficticios de la biomedicina. El proceso de construcción del género en los protocolos médicos de asignación de sexo en bebés intersexuales". *AIBR*, 1, pp. 103-124. <https://doi.org/10.11156/aibr.010108>
- GREGORI FLOR, NURIA (2015). *Encuentros y des-encuentros en torno a las intersexualidades/DSD. Narrativas, procesos y emergencias*. Doctoral thesis. University of Valencia.

- GROSFUGUEL, RAMÓN (2013). “Racismo/sexismo epistémico, universidades occidentalizadas y los cuatro genocidios/epistemicidios del largo siglo XVI”. *Tabula rasa*, 19, pp. 31-58. <https://doi.org/10.25058/20112742.153>
- HUMAN RIGHTS COMMITTEE (2020). *Concluding observations on the fifth periodic report of Portugal*. CCPR/C/PRT/CO/5.
- JORDAN-YOUNG, REBECA, KARKAZIS, KATRINA (2019). *Testosterone: An Unauthorized Biography*. Cambridge (MA): Harvard University Press. <https://doi.org/10.4159/9780674242647>
- KARKAZIS, KATRINA, JORDAN-YOUNG, REBECA (2018). “The Powers of Testosterone: Obscuring Race and Regional Bias in the Regulation of Women Athletes”. *Feminist Formations*, 30(2), pp. 1-39. <https://doi.org/10.1353/ff.2018.0017>
- LINS FRANÇA, ISADORA (2009). “Ahora, es toda una mujer: un análisis del caso de Edinanci Fernandez da Silva en los medios latinoamericanos”. In Mauro Cabral (Ed), *Interdicciones*, Córdoba (Argentina): Ed. Arranés, pp. 31-50.
- LO, ERIC M. et al. (2018). “Alternatives to Testosterone Therapy: A Review”. *Sexual Medicine Reviews*, 6(1), pp. 106-113. <https://doi.org/10.1016/j.sxmr.2017.09.004>
- MAGID, KESSON et al. (2018). “Childhood ecology influences salivary testosterone, pubertal age and stature of Bangladeshi UK migrant men”, *Nature* 2, pp. 1146-1154. <https://doi.org/10.1038/s41559-018-0567-6>
- MÉNDEZ. JUAN E. (2013). *Report of the special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*. Geneva: United Nations Human Rights Council.
- MERCADO PACHECO, PEDRO (2012). “Experimentalismo democrático, nuevas formas de regulación y legitimación del derecho”. *Anales de la cátedra Francisco Suárez*, 46, pp. 37-68.
- RUBIO CASTRO, ANA (2014). “Los efectos jurídicos del soft law en materia de igualdad efectiva. La experiencia española”. *Anuario de Filosofía del Derecho*, XXX, pp. 37-68.
- SANDBERG, KIRSTEN (2018). “Intersex Children and the UN Convention on the Rights of the Child”. In Jens M. Scherpe, Anatol Dutta, Tobias Helms (Eds), *The Legal Status of Intersex Persons*. Ed. Intersentia, pp. 515-535. <https://doi.org/10.1017/9781780687704.029>
- ŽIŽEK, SLAVOJ (2008). *Violence: Six Sideways Reflections*. London: Profile Books.

Received: November, 30th 2021

Accepted: March, 29th 2022

