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## **8<sup>th</sup> International Conference on Gender & Women Studies 2021 (GWS2021)**

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## **The Universal Periodic Review beyond the binary Advancing the rights of persons with variations in sex characteristics**

Dr. Saskia Ravesloot

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### **Abstract**

*The United Nations (UN) Human Rights Council brings all 193 UN Members States together periodically to mutually assess their human rights records against the benchmark of The Universal Declaration of Human Rights (1948) and its core human rights treaties. The Universal Periodic Review (UPR) started in 2008 and is organised in cycles of four and a half years generating more than 81,000 recommendations addressed to the States under Review (SuR). As new rights emerge and human rights are no longer limited to women and men from a binary perspective, our interpretation of rights should also apply to persons with variations in sex characteristics (VSC). Notwithstanding this ideal universal fundamental principle, persons with VSC endure severe human rights violations, globally, as the right to the highest standard of health and the right to bodily integrity is denied. While literature focuses on the effectiveness of the UPR in promoting the rights of members of the LGBTIQ+ community, research rarely assesses UPR recommendations specifically in relation to the rights of persons with VSC. This study conducts critical discourse analysis on a set of 634 intersex related UPR recommendations archived in the UN Human Rights Index generated up to August 2021. The qualitative study focuses on; the nature; the content; and the provenance and destination of the recommendations. It finds that few recommendations focus on the rights of persons with VSC in an explicit way and even fewer address their medical conditions. The research also highlights that UPR-recommendations are less likely to be accepted by the SuR, when formulated in specific and legal terms. The article argues that UPR-recommendations are more successful in promoting the rights of persons with VSC, meaning being accepted by the SuR, when addressed to them specifically, while recommending gender normalising surgery.*

**Keywords:** *Intersex, LGBTI, Universal Periodic Review (UPR), human rights*

### **Introduction**

When new-borns are registered officially, few parents fail to answer the question, is it a girl or a boy? The opposite is true for those parents whose baby shows variations in sex characteristics (VSC) that go beyond the binary. While exact data are difficult to obtain it is estimated that the world population counts up to 1.7% of persons with VSC (Fausto-Sterling 2000), and these variations can cover more than 40 alterations, mainly genetically determined (Hiort 2013, p. 13). Children that do not fit into one of the binary categories, girls or boys, receive the label ‘intersex’. This term is often replaced by ‘inter\*’, since it exists independently of sexuality (De Sutter, 2015, p. 3). Inter\* persons are members of the LGBTIQ+ community and count as one of the specific target groups amongst others, Lesbian, Gay, Bisexual, Transgender and Queer or Questioning. Studies on the rights of the LGBTIQ+ community within the framework of the UPR have greatly multiplied in recent years. Considerable research attention has been directed toward the effectiveness of the UPR in promoting LGBTIQ+ rights (Koendjibiharie 2018, Dahl Schlanbusch 2013, Carroll 2013, Goldrick 2016, Cowell and Milon 2012, Etone 2017, Etone 2019, Ravesloot 2020). These studies have yielded a growing body of evidence that UPR recommendations related to LGBTIQ+ rights are less likely to be accepted by the SuR, and that the majority is formulated by the Western and allied countries (Dahl Schlanbusch 2013, p. 35-54). Moreover, research has shown that UPR-recommendations related to LGBTIQ+ rights are more often formulated in specific terms than other UPR-recommendations in general that target different groups (Dahl Schlanbusch 2013, p. 35-54). The literature on UPR and LGBTIQ+ rights or the rights of persons of diverse sexual orientation and gender identity (SOGI), shows an increase in the number of UPR recommendations promoting LGBTIQ+ rights (ARC 2016, p. 34). However, there has been little analysis of recommendations that address inter\* persons explicitly<sup>i</sup>, raising the question of whether their

rights are equally considered. This article argues that the promotion of their human rights risk evaporation with the use of the abbreviation 'LGBTIQ+' (Greenberg 2012, p. 4) or SOGI (Ghattas 2013, p. 8). Even if it is agreed that inter\* persons are members of the LGBTIQ+ community, the consideration of their specific rights remain blurry unless they are unambiguously spelled out in the recommendations.

This article reveals the importance of straightforward UPR recommendations where the rights of inter\* persons are at stake. Certainly, inter\* persons do face similar discriminations and human rights abuses as their peers from the LGBTIQ+ community, however, they also experience distinct human rights violations due to their VSC that go beyond the binary (FRA 2015, p. 3). This study investigates these issues, with specific attention on the right to physical integrity, given the consequences of non-consensual medical interventions experienced by inter\* persons. The most critical consequence is the practice of gender-normalising surgery, declared as a human rights violation by several human rights instruments.<sup>ii</sup> Notwithstanding the perfect physical condition of the child, their VSC are seen by doctors as something that must be corrected (Ghattas 2013, p. 10); biological anomalies call for rectification and medicine has the tools to identify sex more accurately and to fix natures' 'errors', subsequently (Horowicz 2017, p. 187). To address these human rights violations more adequately through the UPR, this article offers information about the type of recommendations presently requested to promote the rights of inter\* persons. The results are discussed in relation to possible implications for the drafters of UPR-recommendations on the one hand, and the promotion of the rights of inter\* persons on the other.

The paper is organised as follows. The first section defines the problem under consideration and addresses the concept of inter\*, the physical conditions of inter\* persons and the mainstream approach to correct their physical condition. Section 2 builds on the tension between the medical and legal approach to address inter\* issues. The article adopts a human rights-based approach to focus on the human rights violations experienced by inter\* persons, in particular gender-normalising surgery (GNS). In Section 3, the article proceeds with a brief overview of the method, the research outline and approach to find answers to the question: which UPR recommendations support abolishment of GNS? The results are discussed in greater detail in the next section. Finally, Section 5 concludes the article and summarises recommendations for future UPR cycles, to address the rights of inter\* persons.

### **Fitting intersex persons into the binary through gender-normalising surgery**

Inter\* is a blanket term (Dreger 2018, p. 55), an adjective (Monro et al 2017, p. 58), referring to a variety of innate bodily sex characteristics (OHCHR 2019, p. 2). As the Office of the High Commissioner of Human Rights (OHCHR) points out, 'Intersex persons are born with sex characteristics that do not meet medical and social norms for female or male bodies' (OHCHR 2015, p. 1). Persons with variations in sex characteristics (VSC) challenge medical norms, explaining the pathologization of their condition. From a medical perspective, inter\* persons are categorised as having Disorders of Sex Development (DSD) (Hughes et al 2006, p. 3) or developmental sex anomalies, implying a biological condition that deviates from the mainstream or that medical doctors distinguish as outliers from what counts as typically female or male (Dreger 2018, p. 55). An alternative moniker is differences of sexual development (dsd) (Carpenter 2020, p. 1) or inter\* condition. Yet, neither of these terms avoid medical references (OHCHR 2019, p. 3) and still relate to diagnostics of conditions that ought to be remedied (Carpenter 2020, p. 1). This is one of the reasons why many, yet not all (Bennecke et al 2020), contributors, inter\* persons and their advocates (Carpenter 2016, p. 75) reject these terms (Lundberg et al 2018, p. 196)<sup>iii</sup>; they not only pathologize and stigmatize, more importantly they encourage normalizing medical interventions (OHCHR 2019, p. 3).

Inter\* children trouble the minds of medics and parents. Both parties seek a solution and mutual agreement is compelled (Horowicz 2017, p. 188), when parents' expectations are met by doctors' medical authority (Horowicz 2017, p. 186-188). Often, doctors attribute a gender to the new-born through irreversible (Horowicz 2017, p. 202) normalising surgery or 'genital-normalising surgery' (GNS), with or without parental consent. Recent research led by the EU Agency for Fundamental Rights (FRA) reports that 62 % of inter\* 1,519 respondents across 30 countries have undergone surgical intervention to modify their sex characteristics without their, or their parents' consent (FRA 2020, p.



51). These medical interventions are mainly performed on perfectly healthy children (Ghattas 2013, p. 17) at an early age (Santos 2014, p. 124), accompanied by subsequent surgeries and hormonal administrations during adolescence (Ghattas 2013, p. 10). A study conducted in the UK reports that surgical practices include sterilisation, feminising and masculinising cosmetic surgical procedures on inter\* persons between 0 and 14 years (Monro et al 2017, p. 12). Remorse and regret is experienced by parents (Lorenzo et al, 2014) and intersex children (Horowicz 2017, p. 185-186), causing physical and psychological traumas (Agius 2015, p. 21, p. 47), impacting relationships within households. The sole purpose of such repeated (Monro et al 2017, p. 12) medical intervention is to fit the baby into one of the boxes offered by society (Horowicz 2017, p. 185), female or male, a girl or a boy (Ghattas 2013, p. 17). Hence, addressing intersex issues is rather a social than a medical problem (Horowicz 2017, p. 189). The tension between the two approaches is emphasised in the terminology used by medical staff on the one hand, referring to Disorders of Sex Development (DSD) and policymakers, on the other hand, using the more neutral term inter\* (Monro et al 2017, p. 58; Lundberg et al 2019, p. 354). A recent qualitative study questioning activists and policymakers in the UK, Switzerland and Italy, points at the importance of the replacement of pathologizing terms by more affirmative terms for various social movements and reforms (Monro et al 2017, p. 59). However, a patient survey conducted in Poland, Sweden, Germany, France, United Kingdom and the Netherlands, contested the negative connotation of DSD and found that the majority of participants shared a neutral or positive opinion about the term. While acknowledging that ‘disorder’ suggest a disease and ‘difference’ is the desired term, the study concluded that sensitivity to patients’ preference is crucial (Bennecke et al 2020, p. 6-8). Respect for patient’s preference should include their autonomy to decide on their gender, with or without GNS.

### **Fitting intersex persons into society through legal reform**

The current debate about legal reform in the area of inter\* focuses on the legal requirement to classify all human beings into two categories, women and men. This is often of importance for a series of rights; the right to gender identity, inheritance, marriage, conception and adoption of children to name a few (Horowicz 2017, p. 189). It is however also of importance in relation to birth registration, which is a prerequisite to enjoy other rights. Birth registration is of particular importance for inter\* children, since the legal provisions influence the decisions about gender-normalising surgery (GNS). Registration procedures differ from country to country and impact the urge for GNS (FRA 2015, p. 4). Where the number of days to register the child after birth is limited, parents have less time to reflect and feel the pressure to agree or disagree with the medical recommendations to practice surgery (FRA 2015, p. 4). In the UK births have to be registered within 42 days (Horowicz 2017, p. 190), while Bangladesh<sup>iv</sup> requests to register within 45 days and allows online registration and Botswana<sup>v</sup> provides for free birth registration within 60 days after birth. In The Netherlands and Germany, the law allows completion of registration without sex assignment, an approach that supports the child’s decision-making power, while at the same time still stressing the binary approach, since in the end a final answer is expected, whether the person identifies as a women or men (Horowicz 2017, p. 190). While the rights of inter\* persons is a contentious topic, only few countries have been able to address the rights of inter\* persons in a encompassing way. Malta, as one of the exceptions, has introduced a holistic approach by adopting in 2015 a ground-breaking law for trans and inter\* persons<sup>vi</sup>, ensuring the protection of the bodily integrity of inter\* children, by a ban on unnecessary surgery (Garland and Travis 2018, p. 588).

### **Method and materials**

The design of this study is based on a critical discourse analysis to assess two questions. Firstly, ‘To what extent do UPR recommendations address the promotion of the rights of inter\* persons?’ Secondly, ‘When addressing the rights of inter\* persons through UPR recommendations, are these effective?’ Koendjiharie defines effectiveness ‘in terms of the improvement of human rights including both accepting recommendations and implementing them’ (Koendjiharie 2018, p. 24). The scope of this study is confined to accepted recommendations. To answer the first question the most recent selection of 652 UPR recommendations were retrieved in August 2021 from the Universal Human Rights Index.<sup>vii</sup> These data were carefully chosen, using the research engine selecting ‘UPR’ and ‘Lesbian, gay, bisexual and transgender and intersex persons (LGBTI)’ as the concerned persons/groups, combined with the following descriptions: ‘intersex’, ‘variations in sex/sexual characteristics’, ‘LGBTI’ and ‘LGBTIQ’, while deleting the doubles. The answer to the second question required an analysis of the target group

and content of the recommendations. This has been conducted on the basis of a selection of 634 recommendations retrieved earlier in June 2021 from the same database, using identical selection categories. This selection allowed for further analysis using the ATLAS.ti application, facilitating the coding of each recommendation and creating multiple ‘document groups’, e.g. ‘supported’, ‘noted’ and ‘supported/noted’ and ‘SuR’ and ‘RecState’, respectively the State under Review receiving the recommendation and the recommending state. Analysis also referred to the regional grouping (Africa, Asia-Pacific, EEG, GRULAC and WEOG) to distinguish which countries receive and issue the recommendations.<sup>viii</sup> From the sample of 634 recommendations related to intersex (regardless of the terminology used), data were broken down into five groups, according to the measures they suggest; 1) education; 2) health; 3) policy; 4) legislation and 5) other. This subdivision allowed for additional statistical analysis.

## Results

A series of analyses was performed to answer the question whether the UPR recommendations related to inter\* persons support the request from human rights defenders and inter\* activists to abolish GNS.

The first analysis examined the terminology used in UPR recommendations to depict inter\* persons and assessed whether they are addressed separately or combined with other target groups. Conflating the rights of diverse target groups (LGBTQI+) risks neglecting the specific rights and needs of intersex persons because these specific infringements – gender normalising surgery – do not translate as a particular concern for other groups. The findings show that the majority of recommendations speak about the rights of inter\* persons in parallel with the rights of lesbian, gay, bisexual and transgender persons. The first valid UPR recommendations referred to intersex and the abbreviation LGBTI in 2011, with only one mention from the United States of America addressed to Nepal, who supported the received recommendation.<sup>ix</sup> From then on UPR recommendations increased significantly, reaching its highest number in in 2019 with 148 UPR recommendations in that year, as illustrated in figure 1. Overall, the recommendations fell into four groups. Firstly, the majority of the UPR-recommendations refer to ‘intersex’ and while their number is limited at the start, it rises along the years (559 in total). Data shows, however, a slight decline in 2020, in favour of the use of other terminology (LGBTI, sex or sexual characteristics and LGBTIQ). Secondly, the reference to LGBTI as an abbreviation, disappears after 2016, to show up only again in 2020 (66 recommendations<sup>x</sup>). Thirdly, new terminology occurs in 2018; a total of 19 references to ‘sex or sexual characteristics’ are counted, as in the recommendations 112.19 addressed by Slovenia to Guatemala, who unfortunately refused to ‘Amend the Criminal Code to penalize hate crimes and crimes of social intolerance based on sexual orientation, gender identity and sexual characteristics’. Finally, the abbreviation of LGBTIQ has not (yet) been adopted by the international community: there are only eight of these recommendations. These data show us that while reference to intersex is the mainstream, merely 2.5% of the 559 intersex-related recommendations target intersex persons separately from the other group, i.e., lesbian, gay, bisexual and transgender persons. No references to DSD, nor dsd have been found.

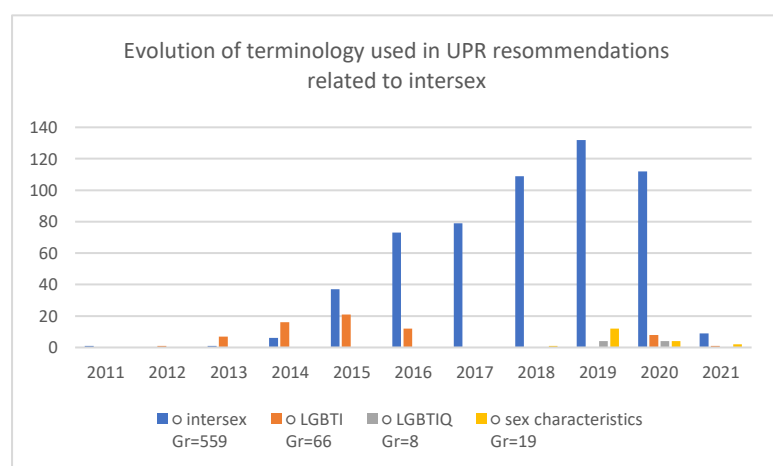


FIGURE 1 NUMBER OF UPR RECOMMENDATIONS MENTIONING ‘INTERSEX’

The second analysis yielded significant results about the content of the UPR recommendations related to intersex persons. It answered the question of whether they addressed the issue of gender-normalising surgery, which remains one of the main human rights violations experienced by inter\* persons. Interestingly, recommendations endorse more often legal, rather than medical measures. Almost half (45.27%) of the recommendations referred to measures that can be identified as legal. They urge for the adoption or enactment of new legislation or request the abolition, repeal, revoke or to decriminalise existing law. Almost one third of these recommendations encourage states to establish legislation combatting *discrimination*. This is shown in the recommendation 140.26 ‘Enact holistic anti-discrimination and equality legislation to comprehensively address the social discrimination faced by the lesbian, gay, bisexual, transgender and intersex community’, addressed in 2019, by Iceland to Fiji. Particularly noteworthy, is that almost all (45 out of 48) measures related to ‘decriminalisation’ tackle more than one issue, while including systematically a reference to same-sex relations or homosexuality. Only three recommendations focus on decriminalisation of *status* and *conduct*, as in recommendations ‘124.13 Decriminalize lesbian, gay, bisexual, transgender and intersex status and conduct’ received by Malawi from the United States of America in 2020. However, it is not clear what exactly is meant by decriminalising the status and conduct of intersex persons. With respect to the other themes involved, data indicate that only few recommendations advise SuR to take policy-related (7.26%), education-related (6.94%) or health-related (5.05%) measures to fight discrimination and address human rights abuses experienced by intersex persons. Deeper analysis of the health-related measures recommended by issuing states, highlight that only 13 out of the 634 address surgery, medical or normalising interventions or procedures. Among these recommendations, there are only two that explicitly focus on the situations of intersex children. An example is given by the recommendations issued by Australia in 2019 ‘125.208 Examine legal protections for intersex children from non-therapeutic medical procedures before they reach an age where they can consent’ and addressed to Chile, who ‘supported’ the recommendation. With regard to our question, whether intersex-related recommendations address GNS, the analysis shows that the vast majority of the recommendations are issued to encourage legal reform and only few recommendations address health-related issues. Moreover, only 2.05% of the 634 recommendations, urge for the abolishment of non-consensual medical interventions on inter\* persons.

The final assessment questions the effectiveness, in terms of accepted recommendations aiming at promoting the rights of inter\* persons and more precisely regarding the claim for a moratorium on GNS. The study finds that recommendations formulated in medical terms are more likely to be supported (accepted), while those issued in legal terms are mainly noted (rejected). Data reveal that more than half (66.14%) of all rejected recommendations fall under the category ‘Legal’ and that 72.82% of all recommendations requesting legal reform are rejected by the SuR; 32.45% by the Africa group, 26.32% by the GRULAC and the Asia-Pacific group, 7.18% by the WEOG and the remaining 5.74% by the EEG. As mentioned above, there are 48 recommendations related to ‘decriminalisation’. Remarkably, all of them are simply noted by the SuR, the stand-alone as well as the composite recommendations. Regarding the latter, only three regional groups are involved; Asia-Pacific (22.22%), Africa (37.78%) and GRULAC (40.00%). On the contrary, recommendations addressing policy-making, education or health are all more likely to be supported, respectively 76.09%, 70.45% and 68.75%. While scrutinising the 13 recommendations on GNS, analysis depicts that all except one<sup>xi</sup>, are issued by WEOG countries. The data further indicate that 8 are supported, of which 6 are stand-alone recommendations addressing GNS unambiguously. All four recommendations received by the GRULAC countries are supported, as for example in the recommendation 111.105 received by Costa Rica in 2019 from Malta: ‘Work towards ending protocols that aim to “normalize” intersex bodies through harmful and medical practices including non-consensual surgeries’. Those addressed to EEG countries are all noted (rejected). Most of the accepted recommendations related to GNS, are issued in 2019, while there is no pattern for the few rejected recommendations. It is worth emphasising that recommendations related to GNS, although particularly limited in number (13), are more likely to be accepted by the SuR. Interestingly, the eight accepted GNS recommendations have been issued by a limited number of countries; four by Malta, two by Spain and Australia, and one by Chile, Israel, Italy, Netherlands and Portugal, indicating that GNS is not yet a widespread concern.

## **Discussion**

The current study extends prior research by showing how UPR recommendations can be more effective in promoting the rights of inter\* persons and in particular in eradicating GNS. The results of this study provide support for the view that addressing the rights of intersex persons is a recent challenge, probably the newest kid on the block, with the words of Petchesky (2000, p. 81). Only a limited number of UPR-recommendations respond to the call from intersex activists and human rights defenders to abolish GNS, a human rights violation aimed at maintaining the foundations of our binary societies. Analysis revealed two distinct features expressing the intention to advance the rights of persons with VSC, indirectly supporting the effectiveness of UPR-recommendations, in terms of accepted recommendations.

A first factor relates to the terminology used and the number of target groups involved in the recommendations. In the absence of any recommendation using DSD or dsd and while the majority refers to inter\*, the debate about the terminology seems irrelevant in the context of the UPR. Moreover, the data support a shift in the debate, away from the medical perspective. The vast majority of the recommendations includes a reference to 'intersex', rather than any abbreviation (LGBTI, LGBTIQ, LGBTIQ+), presuming that their specific rights are considered. Nevertheless, only a few cases target inter\* persons separately; the majority combining inter\* persons with the other groups. Conflating different target groups, however, increases the risk that their unique concern -the abolition of GNS- is concealed by the different primary interests of lesbian, gay and transgender persons (Greenberg 2012, p. 4). While the primary concern of lesbian, gay and bisexual persons relate to their right to express their sexual orientation without any discrimination, transgender persons prioritise the respect for their right to determine their own sex, in addition to the eradication of discriminatory practices. Notwithstanding, this potential risk, not all inter\* persons agree that their rights should be treated distinctively. Greenberg differentiates two groups, a first group contemplating inter\* as an identity, while considering lesbian, gay, bisexual and transgender persons as allies in their fight against discrimination, and a second group disaffiliating themselves from the LGBT community, believing that their aim to abolish GNS is a stand-alone goal that applies only to their group. Considering the above, this article argues that to address the rights of inter\* persons, it is crucial to issue UPR recommendations that are explicitly targeting this group, individually from the other members of the LGBTI community.

A second factor regards the content of the recommendations, shedding more light on the effectiveness of UPR recommendations for inter\* persons. Overall, only a few number of recommendations address GNS, while a relatively high number of recommendations was found containing measures formulated in legal terms, of which a significant part relates to discrimination, as illustrated in the above mentioned recommendation addressed by Iceland to Fiji. Urging for legislation on discrimination is important for inter\* persons as well as the other members of the LGBTI community. Addressing discrimination is a shared concern, however, discrimination is experienced in an intersectional way by different target groups and individuals. Failing to address the specific needs and rights, for example the right to determine one's own sex, free prior and informed consent, physical integrity, and freedom from torture and harmful practices to name a few, perpetuates the harm done to inter\* persons. Moreover, enacting legislation eliminating discrimination can cover many aspects of human rights violations experienced by inter\* persons, it does not necessarily relates to GNS. It may be speculated that the drafters of the UPR recommendations did not have in mind the specific interest of inter\* persons separately from the interests of the other target groups. Additionally, the vast majority of the cases requiring decriminalisation showed composite recommendations. Most of them associated the promotion of the rights of the LGBTI community with measures to decriminalise same-sex relations. One might argue that lesbian, gay, bisexual and transgender persons are more concerned about same-sex relations than inter\* persons. This is not to say that, of course, inter\* persons are impartial towards the right to choose their partner and only interested in defending the abolition of GNS. Neither, is it argued that drafters totally omit issuing recommendations related to GNS, even though data reveal only 13 recommendations related to GNS. What is argued here on the basis of the data, is that drafters of UPR recommendations rather merge different measures into one aggregate recommendation, hence, increasing the risk of neglecting the specificities of each target group during implementation.

The two above mentioned features, the target group and the content of the UPR recommendations, are impacting the effectiveness of UPR recommendation aimed at promoting the rights of inter\* persons. It may be assumed that in accepting these recommendations, SuR express their willingness to implement the recommendations received. It may also be speculated that the more SuR receive recommendations addressing the main concern of inter\* persons explicitly, i.e. the moratorium of GNS, the higher the probability that these are accepted. It is, however, interesting to note that there is no clear distinction between supported and noted recommendations addressing inter\* persons; both categories are equally distributed. In contrast, compared to recommendations referring to the abbreviations LGBTI, LGBTIQ or LGBTIQ+, there are more recommendations noted than supported. One possible explanation may be that there are many recommendations referring to decriminalisation; analysis resulted in pockets of noted (rejected) recommendations using this terminology. However, this result is equally valid for recommendations addressed to inter\* persons, not only for those using the abbreviation (LGBTI, LGBTIQ or LGBTIQ+). All recommendations requesting decriminalisation elicited negative response by the SuR. An alternative explanation may be that culture is a determining factor, which aligns with previous studies arguing that culture is a significant marker for rejecting recommendations addressing the LGBTI community (Koendjibiharie 2018). The current findings support earlier research that recommendations received by countries from the Africa group are more likely to be rejected (Carroll 2013, p. 55). It has been widely discussed that cultural relativism impacts the acceptance or rejection of UPR recommendations (Cowell and Milon 2012, Carroll 2013, Dahl Schlanbusch 2013, Koendjibiharie 2018). Santos highlights that the understanding of inter\* is culturally determined and that even the statistics related to inter\* are a culturally shaped phenomenon (Santos 2014, p. 126). This is also true for parents' choices (Monro et al 2021, p. 431), societies' understanding of the 'best interest of the child' (Monro et al 2017, p. 39), the taboos and related invisibility of inter\* people and issues (Monro et al 2021, p. 434), and the norms that reinforce sex binaries (Monro et al 2021, p. 433-434), to name a few aspects impacting the lives of inter\* persons. Findings showed that none of the GNS-related recommendations, was formulated by African, Asia-Pacific countries or countries from the EEG, suggesting the view that inter\* is more often a concern from the Northern hemisphere. The relatively limited variety of the issuing countries, Malta, Spain and Australia taking the lead in this process, might be caused by the fact that states do not recommend what they do not implement themselves (ILGA 2016, p. 37).

The findings of this study have possible implications for drafters of UPR recommendations. The results confirm the recommendation made by ILGA in 2016, stating that broad LGBTI recommendations 'may not always be useful or effective in addressing the issues that trans and intersex people face' (ILGA 2016, p. 43). Our findings highlight the value of recommendations that are overtly addressing inter\* persons. Drafting recommendations that target inter\* persons unambiguously, while tackling their primary goal to eradicate GNS, avoids confusion in the minds of the SuR, who has to decide whether or not to support or reject the received recommendation. In line with a second recommendation formulated by ILGA, in particular 'to increase the number of recommendations that specifically discuss issues relevant for trans and intersex people' (ILGA 2016, p. 44), the drafters of UPR recommendations can facilitate transparent decision-making by making their recommendations as explicit as possible.

### **Limitations of the study**

The following three limitations of the present study should be acknowledged. Firstly, while the primary goal of inter\* persons is to eradicate GNS, only a restricted number of related recommendations are observed in the database. However, it seems likely that this number will increase in the coming years, allowing for more substantial research on this specific topic. Secondly, this study merely scrutinises UPR recommendations, it does not involve analysis of their implementation. Such analysis could, however, verify the assumption made in this study that supporting recommendations increases their implementation. Thirdly, research on the rights of inter\* persons is contentious and should be addressed with respect to the persons involved. The topic is also culturally sensitive, which requests to an intercultural approach to pay tribute to diverse perspectives. Future research would benefit from focusing on the results of this study regarding the rights of inter\* persons, while addressing these limitations.

## **Conclusion**

This article has presented the results of an investigation into the effectiveness of UPR recommendations in promoting the rights of inter\* persons. The results reported in this article contribute to the existing research base in two ways. First, it aims to address inter\* persons unequivocally, whereas previous research addresses the rights of the LGBTI community as a whole, without singling out inter\* persons. Second, this analysis focuses on the primary goal of inter\* persons - the eradication of gender normalising surgery (GNS)- while other studies on UPR recommendations, rather avoid discerning the rights of inter\* persons independently from the rights of the other members of the LGBTI community. Relatively significant evidence has been provided concerning the predominance of recommendations using legal terms. It has been shown that most recommendations comprise measures aiming legal reform and only a few deal separately with the medical questions related to inter\* persons. Only 2.05% of the 634 recommendations, urge for the abolishment of non-consensual medical interventions on intersex persons. Findings also indicated that recommendations using legal terminology are less likely to be accepted than health-related recommendations. Overall, this article argues that notwithstanding the finding that very few health-related recommendations touch upon GNS, the rights of inter\* persons are best served with recommendations that target them unequivocally, while focusing on their primary concern, which is the abolition of GNS.

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## Shadowing Sarah: Redefining the Employment Landscape of Women with Intellectual Disabilities in Davao City

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### Abstract:

*Women with Down Syndrome face hardships in society's current employment structures due to the two-fold boundaries of patriarchy and stigma against intellectual disabilities. In response to this, the Davao Branch of the Down Syndrome Association of the Philippines (DSAPI), in partnership with several local companies in the city, has provided an internship-to-employment intervention program to help rehabilitate persons with disabilities into functioning members of the economic world. This comprehensive and exploratory case study follows Sarah, a 26-year-old woman with Down Syndrome, and her experience as a DSAPI Member and DSAPI Intern during the 6-month program told through themes of her Background, Internship, Intervention, and Results. This study illustrates the intervention program through a Conceptual Framework that follows the "place, train, maintain" approach and includes the Enrollment, Training, Internship, and Employment stages, building upon the themes of Sarah's lived experience. The study found that assessment of the intern's strengths and weaknesses in the first stage may encourage success in the latter stages but may pose an accessibility issue. The system is also unique in its advantage of having interns come from the same organization, assembling their own form of social integration. The study concludes that, with more research, and in collaboration with mainstream companies and national policies, effective interventions can be developed that assimilate women with intellectual disabilities into society as well-adjusted, productive, and contributing citizens.*

**Keywords:** women with disabilities, down syndrome, rehabilitation, employment system

### Introduction

Women with Disabilities are faced with hardships in today's economic landscape due to the two-fold and interconnected boundaries of gender and disability. PwD are commonly seen without gender, but gender actually intensifies the experience of disability for women. Having a disability further precipitates gender-based prejudice, and this double prejudice leads them to receive restricted access to education, employment, and autonomous living (Gurung 2011; Lamichhane and Watanabe 2015). (Haq 2003) emphasizes that access to employment for WwD is imperative for three main reasons: "(a) for economic independence and successful living, (b) for a sense of self-worth, dignity, and contribution to society, and (c) for integration into the mainstream non-disabled community" (p.77). The results of a census conducted by (Mina 2017) in the Philippines concluded that all employed WwD had low-quality jobs and were still living in poverty, probably due to low level of education, lack of employment opportunities within the community, low access to assistive devices and services, and lack of PwD-friendly facilities.

Intellectual Disability (ID) is defined in the Diagnostic Statistic Manual V as "a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains" (American Psychiatric Association 2013, p. 33). The "place, train, and maintain" approach is commonly used in assimilating people with ID into a supported employment system. This begins with profiling, which is explaining to the individual their work-related goals and assessing their strengths and weaknesses. The individual is then marketed to an employer, and the results of the profiling, such as the individual's support needs, are discussed. A key worker will then analyze the job and use systematic instruction techniques, which is breaking down each task into component parts and allowing the person to practice each micro-task until they master it (Ruscher 1993).

In order to facilitate the transition of individuals with ID into employment, (Nevala et al 2019) argue that companies and organizations can conduct personally tailored support services, occupational education, and digital solutions. They also underline the importance of a supportive environment, like job coaches, workplaces providing necessary accommodations, and showing appreciation for their work. (Jahoda et al 2007) found that supported employment allowed for greater job satisfaction than in sheltered employment, however, social integration did not seem to extend outside of work and work relationships were often not reciprocal. This suggests that even if individuals with ID can transition from sheltered work to the open labor market, and while supported work environments allow for some form of autonomy, other aspects of the workplace, such as relationships and social engagement, still posed as a barrier to individuals with ID. In this study, we will be dealing specifically with Down Syndrome (DS). Down Syndrome is the most commonly identified genetic form of intellectual disability that can lead to physical, mental, and functional abnormalities. It is the result of trisomy 21, wherein there are three rather than the normal two chromosome 21. It is characterized physically by a distinctive facial appearance that includes *“upslanting palpebral fissures with inner epicanthic folds, flatness of the bridge of the nose, midfacial hypoplasia, and a tendency to protrude the tongue”* (Epstein 1989, p. 43).

The Down Syndrome Association of the Philippines is a non-stock, non-profit organization, founded in 1991 that aims to initiate, develop, and support programs and projects concerning Down Syndrome. In 2019, the Davao Branch of DSAPI has partnered with Anflo Management and Investment Corporation (ANFLOCOR), the management and investment company of the ANFLO Group of companies, a Mindanao-based business conglomerate engaged in a diverse range of industries. Ma'am Lanie Vergara, Ph.D., the head of DSAPI Davao Branch, together with the ANFLOCOR board of trustees, developed an internship-to-employment intervention program following a supported employment system headed by DSAPI. This study follows Sarah, a 26-year-old member of DSAPI enrolled in this intervention program. Through Sarah's unique characteristic of being a woman with Intellectual Disability, specifically Down Syndrome, the researcher hopes to fill the research gap of showcasing employment outcomes for women with Intellectual Disabilities in Davao City and contribute to the literature on how intervention programs targeting supported employment can affect their autonomy and allow them to be assimilated into society as well-adjusted, productive, and contributing citizens. It is direct opposition to the stigma surrounding them and what they are capable of. This study hopes to foreshadow a trend in the governments and associations in other countries to give more concern to Women with Intellectual Disabilities and do its part in achieving the post-2015 sustainable development goal of building human capital for Women with Disabilities.

## Methods

Dealing with complex phenomena of an individual's distinctive societal position as a woman, as an individual with Intellectual Disability, and, further, an individual with Down Syndrome, the researcher felt that a qualitative method would be an appropriate tool. A Conceptual Framework is defined as a *“network of interlinked concepts that together provide a comprehensive understanding of a phenomenon or phenomena”* (Jabareen 2009, p. 51). The researcher opted to use a Conceptual Framework to comprehensively discuss the utility of the intervention program. The researcher felt like a Framework will be able to qualitatively illustrate how it can be applied to other contexts and raise awareness on the issues faced by existing rehabilitation programs. The framework was supplemented by a case study. Case Studies *“allow in-depth, multi-faceted explorations of complex issues in their real-life settings”* (Crowe et al 2011, p. 1) and are often used in exploring an event in its natural context. The researcher implemented the use of this second approach to provide a more intimate perspective of natural, rich, and real-life phenomena. Most studies focus only on either the evaluation of the rehabilitation programs or the employment outcomes of individuals with Intellectual Disabilities, this study will be able to provide an assessment of both.

The sampling method used was purposive sampling, as Sarah was assigned to the researcher based on the head of DSAPI's evaluation of her capabilities in dealing with individuals with Down Syndrome. For data collection, the researcher would conduct Sit-In Observations during Board

Meetings, Pre-interviews, and Post-Interviews. Post-discussions with the head of DSAPI and Sarah and her family were conducted online via instant messaging. In this study, “shadowing” is defined as monitoring their progress, ensuring that their tasks are being followed, simplifying instructions, encouraging social engagements among their colleagues. Because Sarah may lack the capacity to give her informed consent, permission for her voluntary participation in the study and the use of her real name and pictures for data collection and documentation were obtained from her mother and Ms. Lanie Vergara, Ph.D., the head of DSAPI.

## Results

### Conceptual Framework

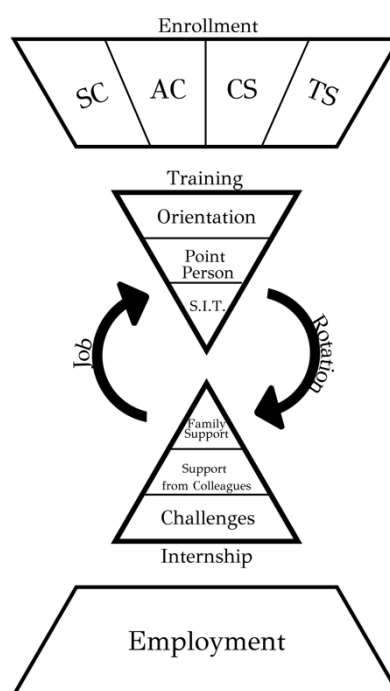


Figure 1: DSAPI's Internship-to-Employment System

The Conceptual Framework begins with the first stage of *Enrollment* and is under the “place” aspect of the “place, train, maintain” approach. Down Syndrome has different levels of severity, and their strengths and weaknesses must be assessed to enable success in the workplace. They have to be evaluated according to several factors: Social Capabilities, which includes their charisma and their ability to socialize and engage with their prospective colleagues. Academic Standing, which includes their educational attainment and their ability to read and write. Communication Skills, which refers to their ability to understand the concept and purpose of work and help them develop work-related goals. Lastly, Technical Skills, the ability to use a computer and other electronic devices and navigate social media processes like instant messaging or data entry.

The second stage is the *Training* stage and is under the appropriate “train” aspect of the approach. Once an intern is enrolled in the program, they are then marketed to the board of trustees, including the profiling done during the earlier stage, to be assigned to a workplace and a point person. An orientation is provided to the employees about the nature of Down Syndrome before they are introduced and a more detailed orientation is given to the assigned “Point Person”, which is someone in charge of training them and monitoring the rest of their internship. The point person trains them using systematic instruction techniques, which is breaking down a task into components and learning them in succession until an intern can perform the whole task. The third stage, still under the “train” aspect, is the actual *Internship* stage. This is when the supervision is lessened and DSAPI Interns are encouraged to take autonomy for the rest of their internship. During this stage, there is an emphasis on the importance of a

supportive environment, both from their colleagues and their family. Challenges would also arise during this stage, and during these circumstances, DSAPI employees are deployed to diffuse the situation.

The fourth and final stage, and is hopefully the outcome of this program, is the *Employment* stage. It's under the "maintain" aspect of the approach and is the conclusion of this supported employment system where the DSAPI interns graduate from their internship and are offered a job opportunity that includes actual monetary compensation. The *Enrollment* and the *Training* stages are in reverse triangles to represent filtering from the DSAPI Population to a smaller sample of interns, much like a funnel, and is followed by an upright triangle to represent the small sample being assimilated into the larger work population. There is an arrow circulating between the two smaller triangles of *Training* and *Internship* Stages to represent *Job Rotation*; some DSAPI Interns must undergo another internship at different positions in different companies before being offered a job position. As of the moment, the program has been paused due to the safety concerns brought about by the pandemic.

## Case Study

For the background, Sarah Angelick Gantala is a then 25-year-old high school graduate and the youngest of three children. In terms of early intervention, she was usually given one-on-one tutorials, which was how she managed to graduate High School. Their family is very closely-knit, and one of the primary sources of their closeness and support for each other is their involvement with the Church. Sarah also shows incredible signs of resilience, as her willingness and motivation to learn how to read pushed her to gain the said ability. Sarah is actually a part of the 0.5% of DSAPI Members in her Age Group that can read. Her unique set of skills made her learn typing and photocopying remarkably fast and she became an asset at the Pearl Farm Marina Front Desk, where she was assigned for her first 6-month internship, with Ma'am Syryll as her point person. She also relies on Predictive Text a lot, other than typing her own words, which means that the Predictive Text can actually be a useful tool in communicating for individuals with I.D. as it can complete their thoughts without much effort, though it does run the risk of being misinterpreted.

When Sarah is listening, it could be observed that she would only pick up the First and Last pieces of relayed information and would somehow get lost in the middle of what you're saying. On her second day, the researcher was informed (though was unable to observe) that she threw a pack of guests' passports to the floor. When asked, she says she didn't do it on purpose and that she was tired. She later calls out Ma'am Sy (the one who observed it happen) for telling Ma'am Lanie and having her reprimanded. Her later confession seems like her own version of "Work Gossip". After a week, Sarah has successfully combined her photocopying and typing skills into a routine; when the guests hand their IDs, she readily stands up to pick them up and photocopy, and after photocopying, she types the guest surnames without needing to be told. Overall, Sarah's performance on the researcher's last day Shadowing was the best she's ever had in the workplace yet. She had minimal unnecessary movements and distractions, and feedback from her point person confirmed that she has been gradually improving and her tasks of typing and counting guests have been perfected. At this point, she no longer needs to be accompanied or shadowed intensely.

For the first several days, the plan of action was to provide hands-on help, assistance, and immersive explanation, and after two weeks or so, after providing enough time for adjustment, one can let Sarah do more of the work, stay back and get feedback on the development of her skills while honing her independence. From Sarah's interactions with Ma'am Sy, it was observable that it helped whenever *instructions were simplified*, to use more conversational and concrete words rather than figurative sentences and to clarify any terms that might have two meanings. During her first day, she was particularly keen on dingling the bell, but her point person moved the bell away from her chair and she no longer dinged the bell after that. This tells us that *removing particular distractions* from her workstation proves to be an effective method as well. On one occasion when she was on duty when Ma'am Sy was out, her new point person, the one who took over the Front Desk, always used "Please" and "Thank You" and always introduced her to the guests, *providing positive affirmation* and positive

regard which I believe is beneficial to her development, increasing her motivation and enthusiasm with her tasks.

Whenever she became overwhelmed with the number of guests that were coming towards the Front Desk, to maintain productivity it was imperative that she was *given additional assistance*. Aside from lessening the steps in her work, it would be best to *give her some time to adjust* and get used to the influx of people and be constantly reminded by Ma'am Sy to continue doing her work in the proper manner. Apart from the need for minimal additional assistance, Sarah remains bright, enthusiastic, and motivated - a model employee that does her best at every task. After the internship at the Pearl Farm Front Desk, Sarah attended a second internship at the front desk of ANFLOCOR supervised by a new point person but has yet to be offered a paid job opportunity. Due to the pandemic, she has temporarily discontinued her OJT. She shows basic comprehension of the pandemic situation and even agreed to be vaccinated. Her family continues to be supportive; explaining the situation and ensuring she follows safety guidelines.

## Discussion

The Internship-to-Employment System illustrated by the Conceptual Framework, is the Down Syndrome Association of the Philippines, Incorporated's initiative to allow its members to participate in the labor force. Among the other supported employment systems discussed, it is unique in its application of the *Enrollment* stage, wherein it establishes a set of criteria with which their placement is appropriately based on. However, this may pose as an accessibility issue not in the physical sense as described by (Gurung 2011) but in the social, academic, and technical context. To deal with this, DSAPI can establish several workshops wherein interns can learn the skills necessary to succeed in the program, rather than choosing the members who already have these sets of skills. The exhaustive orientation provided to the employees, the family, and the point persons, is another unique aspect of the *Training* stage of the framework, ensuring the intern is properly introduced to the workplace rather than simply assigning a Key Person like the previous programs found in related literature. This coincides with the concern of (Nevala et al 2019) of having personally tailored support services, as the point person has to develop their own methods and strategies to motivate the intern's adjustment and productivity. The researcher believes a change in national labor policy, wherein training employees to be prepared for dealing with individuals with intellectual disabilities in the workplace, should be standard operating procedure included in Human Resource departments.

With regards to participating in the non-disabled community, their colleagues can provide a supportive environment but not to the extent of social integration. That being said, a distinctive advantage to the DSAPI system can be found in the *Internship* stage of the Framework, where interns can interact with their fellow DSAPI members and assemble their own form of social integration, which responds to the concern raised by (Jahoda et al 2007). In the *Internship* stage, we can also see the common tasks assigned to the DSAPI interns involve basic repetitive work, like housekeeping, bellhop-type work, or admin work, which was the issue raised by (Mina 2017) on most programs offering only low-quality jobs. However, the researcher believes this is because of the limited number of companies willing to partner with the organization and participate in the supported employment system, consequently providing limited occupational opportunities. DSAPI can collaborate with more companies that can provide professional jobs that involve more autonomy and decision-making.

Other concerns raised by (Nevala et al 2019) were only briefly discussed in the DSAPI System. For employing digital solutions, since only a small percentage of interns can read and write, and significantly less have the competence to use digital systems, it is difficult to employ digital solutions. Occupational education or being paid while being trained towards a specific vocation at the same time, is also a challenge to implement as a period of adjustment and training is an essential aspect of the Framework and to be compensated during this stage may not be financially attractive to partnered companies. In response to this issue, the internship program does allow for *Job Rotation*, wherein interns are exposed to various work environments, providing them with helpful job experience they may use in the future. Despite these current issues, in the final *Employment* stage of the program, the

supported employment system discussed was able to assimilate a significant number of its interns with Down Syndrome into an open labor market and the researcher believes a similar framework, once adjusted for cultural differences, can be applied to allow individuals with intellectual disabilities to gain employment opportunities, and in the future, gain the benefits of economic independence and a purposeful work environment.

Haq (Haq 2003) has articulated three reasons why WwD should be granted access to employment opportunities. In the Case Study, Sarah was not able to achieve economic independence, but has effectively contributed to society and has developed her own ways of being integrated into the mainstream non-disabled community. Despite not yet being offered a paying job opportunity, and quite possibly having difficulty achieving full economic independence on her own, her combination of an incredibly supportive family more than willing to financially and emotionally provide for her, as well as her personal efforts to obtain her academic attainment and develop her technical and digital skills, allow her to attain a relatively successful living.

Moreover, being enrolled as a DSAPI intern and being trained in three different companies in the city (Green Windows Hotel, Pearl Farm Marina, ANFLOCOR Lobby) is a testament that she has greatly contributed to her local community by pouring in her time, effort, and labor in multiple work environments. Her work exposure has also greatly promoted her self-worth and allow her to feel a sense of purpose and a reason to wake up in the morning, as evidenced by how fondly she recalls her occupational experiences and the skills she learned through them during her *Background* and how she managed to establish autonomy after the *Training* stage. Lastly, she is also able to integrate into the non-disabled community as demonstrated by how she can engage in her own form of “work gossip”, like the issue with the passports being thrown on the floor and blaming her point person for being reprimanded. The Case Study also proved that several strategies and interventions can be done to improve her relationship with her co-workers and her work performance.

## Conclusion

Literature has shown that women with disabilities struggle in today’s economic landscape due to the interconnected barriers of patriarchy and stigma against disability. The Down Syndrome Association of the Philippines responds to these issues with a unique Internship-to-Employment System of their own, illustrated by the Conceptual Framework. The system follows the “place, train, maintain” approach and is composed of the *Enrollment*, *Training*, *Internship*, and *Employment* stages. Assessment of the intern’s strengths and weaknesses in the first stage may encourage success in the latter stages but may pose an accessibility issue. The system is also unique in its advantage of having interns come from the same organization, assembling their own form of social integration. It also features *Job Rotation*, something not discussed in previous rehabilitation programs. The study recommends that changes be done to national labor policy that prepares employees to deal with Individuals with ID in the workplace.

Sarah is placed in the unique position of being a woman with Intellectual Disability, specifically Down Syndrome, and her experience in DSAPI’s Internship-To-Employment system allows insight into her employment outcomes, specifically themes surrounding her *Background*, *Internship*, *Intervention*, and *Results*. While she was unable to achieve full economic independence, she was able to greatly contribute to her local community through her work experience, and this also gives her a sense of purpose and promotes her self-worth. The results could be utilized to reframe what being integrated into the mainstream non-disabled community really means for individuals with ID. With more research, and in collaboration with mainstream companies and national policies, effective interventions can be developed that assimilate women with intellectual disabilities into society as well-adjusted, productive, and contributing citizens.

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## Gender Neutral laws on Sexual Offences in India: An Intersectional Approach

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### Abstract

*In India, most laws relating to sexual offences are gender specific. For example, under criminal law only a man can be convicted for committing rape and the victim can only be a woman. This is further seen in the laws pertaining to stalking, adultery, voyeurism, and sexual harassment at workplace. Thus, binary classification of male and female continues to guide such offences on the predetermined understanding of the gender-based victim-perpetrator framework. In this schema, men and transgender community as victims are often overlooked. Despite recent attempts to bring gender neutrality, it is evident that there has been a historic denial on the part of scholarship and court decisions that such assaults even occur on the other genders. Many countries have adopted gender-neutral laws. Therefore, the paper attempts to assess if such laws are viable in Indian society. While criminal law and some special laws, will be elaborated, the paper will also study the aspect of gender neutrality from constitutional perspective that obligates the state not to discriminate on the basis of sex. It argues for a rights-based approach in defining sexual offences with a gender-neutral paradigm which seeks to address the harm caused rather than the associated notion that only a woman can be a victim of sexual offences. Through a comparative and intersectional approach, the paper addresses the concern as to why current laws refer only to binary classification as an identifier for victim-perpetrator framework and other markers like dominance, caste, class, religion have diminished relevance. Thus, the paper contributes to existing scholarship by analysing and critiquing the notion of gender specificity in sexual offences and advocating for gender neutrality in India.*

**Keywords:** Gender Neutrality; Sexual Offences; Intersectional Approach

### Introduction

Gender-neutral laws provide the definition of rape and other sexual offences recognising both male and female perpetrators. While there is no denial that historically, women have been the primary victims, there is a rise in sexual violence and discrimination against males and transgenders as well. Merry (2009) defined gender violence as “violence that depends on the gendered identities of the parties.” In India, most laws relating to sexual offences are gender specific. In this schema, men and transgender community as victims are often overlooked. For example, under criminal law only a man can be convicted for committing rape and the victim can only be a woman. This is further seen in the laws pertaining to stalking, adultery, voyeurism, and sexual harassment at workplace. Thus, binary classification of male and female continues to guide such offences on the predetermined understanding of the gender-based victim-perpetrator framework. In the recent years, there has been a lot of discussion on gender neutrality in laws relating sexual offences in countries which have reformed their laws to make them inclusive of all genders. With the changing society, sexual autonomy of men has also been infringed on several occasions. This is furthered by the fact that society and law has started accepting homosexuality as seen in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1. This calls for transforming the nature of law to a gender-neutral one. But, despite recent attempts to bring gender neutrality, it is evident that there has been very little discourse and court decisions that such sexual violence even occurs on the other genders. While the research acknowledges women victimization, it contemplates on gender neutrality of laws pertaining to sexual offences. This is to identify that the lack of laws in this specific area, creates a thriving environment for such victimisation. In fact, there is enough evidence that the act of sodomy particularly as a war crime has been prevalent (Sivakumaran 2007).



The paper has been divided into four parts. The paper provides an understanding of the development of such gender-neutral laws in India. However, before looking into the gender-neutral laws of India, it is pertinent to first have a look at position of other countries. While criminal law and some special laws, will be elaborated, the paper will also study the aspect of gender neutrality from constitutional perspective that obligates the state not to discriminate based on sex. It argues for a rights-based approach in defining sexual offences with a gender-neutral paradigm which seeks to address the harm caused rather than the associated notion that only a woman can be a victim of sexual offences. Thereafter, through a comparative and intersectional approach, the paper addresses the concern as to why current laws refer only to binary classification as an identifier for victim-perpetrator framework and other markers like dominance, caste, class, religion have diminished relevance. Thus, the paper contributes to existing scholarship by analysing and critiquing the notion of gender specificity in sexual offences and advocating for gender neutrality in India. The method of research is doctrinal analysis.

### **Method and Material**

The method used is largely descriptive qualitative research using literature review and case law analysis. The study uses primary legal sources including legislations and case law analysis to understand the current position of gender neutrality in India. This desk research builds upon a critical appraisal of the findings and conclusions derived from the secondary legal sources including books, journals, articles, and online sources. The review of existing literature on gender neutrality provides a critical understanding of the existing situation and the possibility of reforms. Such a methodology of using secondary sources is usually projected as a feminist methodological reflection. However, the paper uses an egalitarian model where all genders are reflected upon. It helps in putting the marginalised and as the core object and subject of research. The research is substantiated by using a comparative law analysis, whereby it places India in reference to other countries where gender sensitive legal and social initiatives have emerged in the recent years. The outcome of the analysis would be relevant for academicians, policymakers and other stakeholders who are involved in developing and implementing policies that are sensitive to all genders by adopting a rights-based inter-sectional analysis.

### **Position in other countries on Gender Neutrality in Sexual Offences**

Canada, all Australian states (Temkin 2002), the Republic of Ireland (*Criminal Law (Rape) (Amendment) Act 1990* section 4.), Finland (Baskerville 2012), England and Wales (*Sexual Offences Act, 1956; The Criminal and Justice and Public Order Act, 1994*, section 142), and the great majority of states in the United States have enacted gender-neutral legislation (Smith v. State, 409 So. 2d 455). However, such developments in the field of gender-neutral laws are not seen everywhere. Some countries have enacted laws wherein women have been recognised as perpetrators of rape (Baskerville 2012). There are other countries that have widened the definition and scope of sexual intercourse to include penetration of other body parts as well like the vagina, anus, or mouth (Searles 1987). It must be noted that these categories encompass attacks in which a woman is a perpetrator, and she forces a man, woman, or child. (Searles 1987). England, and Wales have included male victims within the realm of rape and its definition, however, women are not identified as the “primary perpetrators” (*Lord Baltimore’s Case*, 4 Burr 2179 (1768); *R v. Ram and Ram Cox* CC 609 (1893)). While the majority of the jurisdictions where reform has taken place in United States acknowledge that there can be rape between same sex people, Indiana limits it to heterosexuals alone. (*Indiana Code, 2004*, section 35).

Male rape was recognised for the first time in English law in 1994 and as early as 19<sup>th</sup> century in the United States. (Rumney 2007). China enacted a specific legislation prohibiting the rape of men in 1740. (Jiang 2000). In addition, other nations are moving towards a gender-neutral approach. In 2005, the charge of rape was expressly retained under section 128 of the Crimes Act 1961 as an exception to one of the proposed changes' goals, gender neutrality (Rumney 2007). Further, the Court of Appeal in *R. v. Chase* [1987] 2 SCR 293 held that the term ‘sexual’ must be restricted to assaults on the genitals, observing that, “to include as sexual an assault on parts of the body considered to have secondary sexual characteristics may result in absurd results when considering a man's beard.” The Supreme Court of Canada rejected this reasoning and observed that on consideration of facts and circumstances including the context, the attack was plainly sexual in character. (Rumney 2007).

### **Positioning gender neutrality in India**

Numerous arguments for and against gender neutrality in law have been advanced. Some have characterised it as a backlash against feminism, while others have maintained that acknowledging one gender's victimisation does not negate the rights of another. Sexual assault and any form of marginalisation and discrimination which has gender as its origin hinders the basic human rights such as the right to life and personal liberty. As mentioned, under international law jurisprudence, rape is viewed as an act of violence, not a crime against the community's honour. (Miller 2004) In India, Article 14 of the Indian Constitution recognises equality before the law and equal protection of the law as basic rights. Additionally, Article 15 forbids discrimination based on gender. While specific accommodations for marginalised groups may be made, it is maintained that males and transgender people cannot be denied their right to equality (*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1). This includes protection against violations of their sexual autonomy.

In addition to the Indian Constitution, the criminal law is likewise heavily weighted in favour of women's protection. Numerous attempts have been made in India to enact gender-neutral legislation, most notably rape law. Rape is understood and articulated as an offence that can only be committed by a man against a woman under section 375 of the Indian Penal Code, 1860. It is predicated on the premise that the offender must always be a man and the victim must always be a woman (Vibhute K 2001). The first unsuccessful effort occurred in 2000, at the advice of the Law Commission. (Sen 2010) Following that, a new bill was presented in 2012 to alter the penal code to make it gender neutral (Sen 2010). During the development of the bill, a parliamentary report asked for the opinion of the National Commission of Women in India. The commission immediately objected to gender neutrality suggesting that rape is a "gendered crime" that disproportionately affects women, and that such steps and attempts as to make it gender-neutral would tarnish the interest of the women (Kannabiran 2009). There was one exemption made under section 377 of the Indian Penal Code, 1860, which criminalises crimes against the natural order by penetration. This sodomy legislation was abused in India to target sexual minorities, even when permission was obtained. The Supreme Court decriminalised this clause in 2018 to the degree that it applied to consenting conduct. (Sen 2010)

The concept of gender neutrality is based on the assumption that all criminals, regardless of their gender, should be held to the same standard when it comes to the laws that they are punished under (Delpla 2014). The Indian Penal Code has been amended several times, however binary gender notions persist, which is an inadequate strategy. The transgender community, because of this focus on male and female binary notions, must hide their true identities in order to avoid becoming involved in sexual crimes. (Miller 2004). Gender specificity is in conflict with gender justice in criminal law, leading to the conclusion that the law is heterosexual. Harassment in the workplace should include both males and transgender persons since society has progressed alongside the rise of women in executive roles. Reference here must be made to *The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*, 2013.

The Law Commission of India's 172<sup>nd</sup> Report in paragraph 23 had proposed that the offence of rape be replaced by the entirely gender-neutral offence of 'sexual assault'. The reasoning given behind this suggestion was that there has been a rise in the number of sexual assaults on males particularly young boys and these may not be necessarily defined as rape. (The Law Commission of India, 2000 para. 23). Following that, children were once again protected against sexual assault, harassment, and pornography when perpetrated by a male by the Protection of Children from Sexual Offences Act, 2012. The Law Commission's proposals were never included into legislation until 2012, when the Criminal Law (Amendment) Bill, 2012 advocated for a gender-neutral definition of rape. The 167<sup>th</sup> report of the Parliamentary Standing Committee on this 2012 Bill makes no mention of the considerations that were taken into account by the Parliament for such a step but recognised that that public and state government reactions favoured, "making rape and sexual assault gender neutral only in terms of the victim, but male in terms of the offender." (The Law Commission of India, 2013). Feminists also objected, arguing that the shift was inappropriate since rape was to always be described as a crime that has its roots in patriarchy and male dominated Indian society and therefore, rape must remain a gendered crime, protecting women (Delpla 2014).

Even the 2013 report of the Justice J.S. Verma Committee, which was created after the horrific Nirbhaya gang rape case, advocated gender-neutral rape legislation (The Law Commission of India, 2013)/ At the very least, the committee recommended that some offences such as stalking, sexual

harassment, and voyeurism be gender neutral. The proposals were not adopted in their entirety, and the Criminal Law (Amendment) Act, 2013 was approved, maintaining the status quo on gender equality.

The legislature first passed the Criminal Law (Amendment) Ordinance, 2013 to establish an entirely gender-neutral definition of rape, which drew widespread condemnation. Because of the opposition, Criminal Law (Amendment) Act, 2013 confined itself to a definition of rape which was gender neutral (Miller 2004). Rape in a gang and rape by a person in a fiduciary position are included in the amended statute. Apart from conventional penetration, the concept of rape was also expanded to include oral and digital rape. The only component that was gender neutral was the fact that women can now be punished for assisting in gang rapes. However, each of the aforementioned offences was committed by a man. While the criminal law reforms were commendable, they were primarily reactive. The transgender community was likewise dissatisfied. Even the National Institute of Criminology and Forensic Science's forensic handbook for criminal investigators focuses only on female victims when discussing sexual offences.

A case in point is *Sudesh Jhaku vs. KC Jhaku* 1998 CriLJ 2428 in which the Delhi High Court had to decide if the definition of rape that was in existence before 2013 could be interpreted in such a way that it could include even the sexual activities that are non-penetrative. The court pointed that such an expansion would require an action by the legislature. However, it was stated by Justice Singh the court supports the formulation of a definition of rape that is gender neutral. The reasoning given by Justice Singh was that like women, those men who are sexually assaulted, should also be provided requisite legal assistance and protection. Therefore, he advocated that woman who are abusive towards men or women should be considered for punishments like traditional rapists. It is suggested that rape should be considered as a sexual assault as opposed to an offence that could only occur against the honour and reputation of a women. This would certainly make the law more egalitarian and remove the negative connotations attached to rape as an offence targeting women alone.

### **The Indian Judiciary**

Regrettably, court judgments on Indian rape law have always viewed rape as an assault on a woman's body, but have also associated it with concepts of character, modesty, and chastity, as opposed to rape being an assault on an individual's liberty and physical integrity. (Delpla 2014). For instance, in *Rafiq v. State of Uttar Pradesh* AIR 1981 SC 559., it was determined that "*when a woman is ravished in rape, what is inflicted is not just physical damage, but a profound sensation of some deathless humiliation. ... rape for a woman is a life-threatening embarrassment and must be treated as the gravest violation of human dignity.*" Similar arguments were used in *Bharwada Hirjibhai v. State of Gujarat* AIR 1983 SC 753. and *State of M.P. v. Madanlal*, AIR 2015 SC 82 in which the woman's body was equated to a temple and rape was characterised as an assault on her reputation and purity. A more rational argument would be that rape is an assault on one's bodily integrity, not on one's honour. (Bartlett 1990)

A more humane approach was used in *Bodhisatwa v. Subhra Chakraborty* AIR 1995 SC 922, where the court said that rape is a "crime against fundamental human rights" and also violates the victim's most prized fundamental right, namely the right to life guaranteed by Article 21. *Railway Board v. Chandrima Das* AIR 2000 SC 111 used a similar logic. In contrast, instances involving sexual harassment at work, such as *Vishaka v. State of Rajasthan* (1997) 6 SCC 241, demonstrated that each episode of sexual harassment at work constitutes a violation of the basic rights, including the right to life and liberty, protected by Article 21 of the Indian Constitution. Additionally, the Preamble to the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 notes admirably that "*protection against sexual harassment... is an internationally recognised human right.*" In this light, the human rights argument would support the gender-neutral school of thought. Thus, rape and other types of sexual assault demand a debate that is more focused on the violation of the victims' physical integrity and right to a dignified existence, rather than on the victim's reputation. Once the injury is separated from the victim's female honour, the inference is that the offences become gender neutral in their comprehension.

This judgement of the Supreme Court in *Harsora v. Harsora* (2016) 10 SCC 165, is of significance since it deletes the phrase "adult male" from section 2(q) of the Protection of Women from Domestic Violence Act, 2005. The legislation is designed to protect women against domestic abuse

perpetrated by men against other men. To ensure the fairness of the judicial process, the main criterion is that complainants must be female. Section 2(q) further stipulates that only adult males or their female relations can file complaints. It might, however, be filed against the husband's family principally. This Act uses the term "respondent" in section 2 to refer to an adult male who is or was in a domestic relationship with the victim and against whom the victim has attempted to seek justice. Provided, however, that if a woman is abused by her husband's or male partner's family, she is permitted to file a claim as well. This judgement discusses whether or not Section 2(q) is lawful. This statement proved that domestic violence could happen to anybody, regardless of gender. Additionally, it is also well recognised that women may be abusive against other women with things like physical assault, emotional abuse, mental abuse, and economic abuse (Miller 2004). In a certain reality setting, even sexual abuse may be performed by one woman on another. In order to do this, Section 3 is dedicated to ensuring that all kinds of domestic abuse against women are prohibited. Domestic violence against married women was criminalised for the first time in India in 1983, with the enactment of Section 498A of the Indian Penal Code (IPC). This section applies only to the spouse and his relatives, acknowledging the gendered nature of the offence. A question that arose in the drafting of Section 2(q) was whether the term 'respondent' should be gender-neutral or should apply only to males. To help ensure uniformity, Section 2(q) was designed to state that both men and women can be classified as 'respondents.' While conceding that there is a "*microscopic distinction between male and female, adult and non-adult,*" the ruling acknowledges that, nevertheless, there is an absolute distinction between "male" and "female, and adult" and "non-adult." (*Harsora v. Harsora*, (2016) 10 SCC 165) This legal judgement acknowledges that the applicable act does not contain any restriction on the responder being male, but nonetheless disregards the fact that sexual harassment, stalking, voyeurism, and rape all have separate, gender-specific criminal statutes in India. While it cannot be denied that men are victims of domestic violence, according to the research, it is the majority of offenders of domestic violence that are men (Miller 2004).

### **Conclusion and Suggestions**

Males and transgender persons can also be victims of sexual assault and victimisation, and it is necessary to alter the laws to reflect this. This must be done not just for the Indian Penal Code, 1860, but also for other legislation, such as those addressing domestic violence and other family issues. We cannot continue to use Victorian-era definitions of crime in an era in which gendered behaviour is changing and homosexuality is recognised as a natural human sexual preference. There is an immediate need to engage in discussion on the need of integrating male and transgender sexual assault experiences in the legislation's development. As a result, legislators must direct the law commission to do research and assessments on victims of all types of sexual assault, regardless of gender. Additionally, gender sensitization training for the whole judicial system is necessary. While legal reform undoubtedly has a role to play, it is clear that it is only one of several essential social change tools for affecting broader societal attitudes and practises. There is a need for greater convergence between male and female sexual assault research in order to account for all victim types. Concerning the requirement of gender-neutral law, the rationale is based not only on Article 15, but also on the need to prevent jeopardising the value of consent in sexual autonomy and bodily integrity of different genders. By including males in the fight against sexual assault, we can reinforce the value of consent regardless of gender. The first step toward recognising male rape is to recast all existing laws in gender-neutral language, therefore reinforcing the idea that gender is no longer a determining element in determining legal wrongs. Additionally, the entire judicial system must be gender sensitive, and it is a sine qua non to update the legal tools employed by investigative authorities. A necessity to develop a framework in the Indian context that integrates the specialised processes and protections essential to handle the gendered aspects of sexual crimes and domestic violence without precluding any victim, regardless of gender, from obtaining legal justice. To address Indian culture's gender-based power imbalances, the State may consider setting alternative evidence standards in cases involving male defendants. Thus, Indian law has always had a binary view of gender. Regrettably, the majority of discussion about this topic occurs in the halls of various academic institutions and policy research organisations, rather than in Parliament or the courts. As such, it is both reasonable and important to examine, at the very least conceptually, the issue of gender neutrality in Indian rape legislation.

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## **The Hidden Pandemic**

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### **Introduction**

In March 2020, the World Health Organization declared Covid-19 as a pandemic and the world went into complete lockdown, halting daily lives and shutting down economic activities. During the multiple lockdowns the underprivileged faced some of the toughest problems. All across the globe marginalized communities faced the maximum brunt. India and the communities in India were no different. When the country went under strict curfews and lockdowns a large number of migrant labour moved across state borders to go back home as work came to a standstill and survival became a priority. India along with facing the virus also had to think about how to rehabilitate the marginalized communities and parts of the society that weren't really doing well both economically and socially. Some sections of the society came in the limelight specially those relating to the medical or the economic issues, but a few remained behind closed doors. India, like all the other countries, saw a sharp increase in sexual and domestic violence but sadly there was a more difficult struggle lurking in the shadows, continuing to spread its wings. The marginalized communities faced physical, sexual, economical and even mental problems. The worst hit among these marginalized communities were the sex workers, prostitutes and the girls who were trafficked into India from neighboring countries and sold as sexual commodities and were now out of work, shelter, food and most importantly their incomes.

These professions that were forgotten due to the attached stigma were neglected and treated with ignorance. The marginalized sex workers and prostitutes in not only particular red-light districts but also in general were damned by a double pandemic. The first one being the Corona virus and the second one being that of the stigmatized gaze they have to live with. Their profession which is solely based on human contact and with the laws of social distancing and the high rates of infection they lost their one and only source of income. Human transmission of the virus rendered these workers jobless and, in some cases, homeless.

The pandemic has given more way to and has exposed the inequality of the many rehabilitation systems and has led to revealing the fissures that are marginalizing the vulnerable. These criminalized and vulnerable workers have been affected quite adversely and their exclusion from the relief programs and the health services is disgraceful and exploitative. This being said it will be wrong not to mention the National Human Rights Commission's report dated October 7, 2020, which has some rehabilitation plans for sex workers. But the question that arises is how the NHRC and the other concerned authorities took almost 8 months since the first lockdown in the country to think about this community and the help they might require. Later in November 2020 a new advisory was issued for these workers which rendered them as informal workers and they were supposed to get help only on humanitarian grounds. However, even after being rehabilitated they still had to face the problems of being excluded and being ostracized by society.

This paper attempts to question the victimization and shame that marginalized communities like sex workers are subjected to even after being reinstated into the mainstream. It also looks at the impact of Covid pandemic on the lives of these communities. <sup>1</sup>

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<sup>1</sup> [https://factsanddetails.com/india/People\\_and\\_Life/sub7\\_3h/entry-4190.html](https://factsanddetails.com/india/People_and_Life/sub7_3h/entry-4190.html)

## **Methods and Materials**

The paper focuses mostly on the report by NHRC titled ‘Human Rights Advisory on Rights of Women in the Context of COVID-19’ and finds its resources from news articles, reports by NGOs and some interviews.

The parameters (violence, crime etc.) data and the statistics in this report and other articles were taken as a reference and a qualitative mapping to the status of these marginalized communities is being done because the data may be underreported or may be unreported. The data does not appear uniform as few states have a better process of reporting and registering complaints while others have a difficult one leading to lack of real data. In the case of latter, the importance of news reports cannot be undermined because they appear in conflict with NHRC. These news report provide an alternative window to ground reality. The news articles this paper takes reference from the Business Standard<sup>2</sup>, DNA India<sup>3</sup>, DW<sup>4</sup> and Hindustan Times<sup>5</sup>.

## **Discussion**

All nations in all times have mentally and in definition accepted a range of mainstream existence. Even though it may be erroneous yet it serves the system to maintain its order and value. But this same division becomes unfair to few people; those who do not follow the norms. It took years for societies to accept queer communities but they are looked down upon still, even worse are women who exist as sex worker. All countries have a group of women who involve in prostitution, rarely by choice, mostly by compulsion or force (as in poor countries). Few countries have legalized their profession but they are still considered ‘low’ denying them the dignity of freedom and respect. Worse are those countries who have attached morality issues to sex work. The label of ‘immoral’ is attached to them and they are always kept on the margins of the society. The society never questions, deliberately though, that why do they exist and who are their customers? Obvious answer would point out to those who claim to be in mainstream, apparently ‘moral’ and accepted life. Sex workers are perceived as threat to moral order yet they are needed else this work would have vanished long back. The consequence of this hypocrisy or the confusion is absolutely inhuman; denial of respect to sex workers and emanating from it is abuse by society, police and underworld often leading to violence. They often remain out of discussion and help schemes except from some NGOs but largely the situation remains same except for minor changes. This gap was exposed in contemporary times like never before in pandemic times.

In India, until 2014 there were more than 8 lakh sex workers. But it is said that unofficially the numbers might be higher than stated. By 2021, the exact number of workers cannot be stated but the approximate figure surely exceeds 8 lakhs. According to the United Nations and its multiple agencies it has been articulated that sex work as “a contractual arrangement where sexual services are negotiated between consenting adults.”<sup>6</sup> During the pandemic it was noted by sex worker led organizations that sex

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<sup>2</sup>[https://www.business-standard.com/article/current-affairs/covid-19-impact-sex-workers-fight-for-survival-in-age-of-social-distancing-120100500517\\_1.html](https://www.business-standard.com/article/current-affairs/covid-19-impact-sex-workers-fight-for-survival-in-age-of-social-distancing-120100500517_1.html)

<sup>3</sup><https://www.dnaindia.com/india/news-coronavirus-forcing-sex-workers-towards-debt-bondage-slavery-study-2860454>

<sup>4</sup><https://www.dw.com/en/sex-workers-in-india-find-new-ways-to-earn-amid-coronavirus-pandemic/a-54526927>

<sup>5</sup><https://www.hindustantimes.com/sex-and-relationships/national-human-rights-commission-s-u-turn-on-labour-rights-makes-india-s-sex-workers-suffer-a-setback/story-vbbpaWPRIzfuIrzqwVY0JJ.html>

<sup>6</sup> Review the Immoral Traffic (Prevention) Act, 1956 that de facto criminalizes sex work and ensure that measures to address trafficking in persons do not overshadow the need for effective measures to protect the



workers across the globe were going through hardships , loss of income and even an increased amount of discrimination followed by harassment because of the lens of criminalization of the profession. In response to the pandemic, governments came up with economic relief, made health related strategies and some even came up with contingency plans to support workers and all the other working citizens. In the initial months of the Pandemic the sex workers weren't included because of the way the profession is looked down upon. Even when prostitution is legal in India, the members of the community are excluded and deprived of the basic benefits that every citizen is entitled to. As sex work is not an industry the workers are not even eligible for any kind of labor protection or economical help through government funded aids. Talking about sex workers and prostitutes Elene Lam states “ ...sex workers , particularly migrant sex workers, have to put their health and safety at risk because they are excluded from accessing social and health services , and may not be able to stay at home, physically distance or stop work in order to survive<sup>7</sup>.”

These sex workers , who mainly constitute of women , are being denied support and basic protection are also facing “...punitive crack-downs such as raids on their homes and workplaces and increased surveillance , arrests , fines and violence.”(Lam) The Pandemic is also adding to the intensifying stigma, racism , discrimination and policing in red light areas in order to maintain social distancing , lockdown and even accessing the personal demographics of those testing positive. Some of the workers , married or not, are the sole earning members of their families and sometimes they have children to feed as well all the while living in cramped houses and shared sanitary resources. Because of the attached stigmas which are a part of the profession , women who work as prostitutes hide it from their families in order to save themselves from becoming victims of violence. While every laborer or worker was being compensated or was being given health benefits, these women couldn't even raise a concern because of the fear of their families and from the fear of being ostracized.

The access that these workers get has been minimal from pre covid times. The reason for this being the lack of knowledge of their rights, to threats , from loopholes in the system to a lack of infrastructure to provide for the fulfillment of the needs of women. In the Indian context the added stigma and the morality of the profession act as a barrier to attaining any kind of justice. The pandemic made it worse.

With the advent of latest technology and the internet, some of these workers were able to manage some amount of money through virtual sex but the numbers under this category are meagre. To talk about these workers, it becomes important to look at interviews and personal anecdotes like Pinky's. Pinky, who is a sex worker in Mumbai's Kamathipura told India Spend that her medicine dosage for HIV/AIDS is priced at Rs 5000 per month but due to being out of work she can hardly sustain her health and she took her last dose in April 2020. Kapil Kajal in her article for India Spend writes that sex workers like Pinky had men coming to them for sex when they needed it but when they needed men to come to them nobody cared about whether they lived or died. Under the multiple schemes started by the Prime Minister , the one that included sex workers was the Prime Minister's Garib Kalyan Yojana which had a “ financial package to reduce the impact of COVID-19, Rs 500 per month” and the money would be transferred to women's accounts under the Jan Dhan scheme but none of the sex workers that were interviewed had a Jan Dhan account. Half of the sex workers in Maharashtra depend solely on sex work for their survival and do not even have any kind of insurance. Around 31% of sex workers living

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human rights of sex workers.” Report of the Special Rapporteur on violence against women, its causes and consequences, Mission to India, 1 April 2014

<sup>7</sup> Lam, Elene. “Pandemic Sex Workers' Resilience: COVID-19 Crisis Met with Rapid Responses by Sex Worker Communities.” *International Social Work*, vol. 63, no. 6, Nov. 2020, pp. 777–781, doi:10.1177/0020872820962202.

in Maharashtra, Tamil Nadu and Karnataka are financially insecure and this is in turn making them very vulnerable to poverty.<sup>8</sup>

Urmi Basu who is the founder of New Light a non-profit organization that works for children of sex workers said that with meagre savings the women have rents and bills to pay making them the worst affected during a crisis like the ongoing pandemic. According to the India Spend article, The National commission for Women in April 15 2020 wrote a letter to the governments of West Bengal, Maharashtra and Delhi asking them to provide sex workers with “basic necessities” and to encourage the ideas of community feeding by taking help from civil society organizations. The letter also said that proper measures should be taken for relocating if and when required to maintain social distance because these workers are forced and compelled to live in dilapidated and crammed accommodations.

But all of this was only implemented when the NHRC circulated the advisory and helped sex workers with rehabilitation and help. This advisory came 6 months since the start of the pandemic. According to the Advisory circulated on 7th October 2020 the steps proposed to rehabilitate and support sex workers were the following<sup>9</sup> :

- The state governments can provide assistance to sex workers specially mothers.
- Sex workers may be recognized as in formal workers and can be registered to get better work benefits.
- Temporary documents may be issued that enable sex workers to access welfare measures specially for those who do not even have ration cards.
- Migrant sex workers may be included in schemes and benefits for migrant workers.
- Recognize sex workers in non-traditional living environment as they may be susceptible to domestic violence.
- Ensure free testing and treatment for COVID-19 and provide soaps, sanitizers and masks to all sex workers.
- Ensure access to healthcare services specially for the prevention of HIV and other sexually transmitted diseases.

As the implementation began, a month later on 10th November 2020, a modification was released which stated:

- Sex workers on humanitarian grounds, maybe provided the benefits that informal workers are entitled to during the Covid 19 pandemic.
- Sex workers, who were forced to undertake reverse migration, may be provided the benefits meant for migrants for their survival.

The more interesting thing to note with the new rectified advisory is the usage of words like **maybe** changes the perspective with which we look at the rehabilitation measures. The original advisory has a definite helping measure but with the new corrections a sense of fear and doubt arises. The above data indicates a deeper malaise, that of the societal attitude. Caring for marginalized communities appears to be the core issue at hand that is normally not in the radar of agencies and people at large. That leads to a desperate situation that is the precursor of violence and abuse. Along with the attitude, it is imperative to note that not all states and union territories have collected data for the number of sex workers thus proving how marginalized these workers really are. However, it might be wrong to not

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<sup>8</sup> <https://www.indiaspend.com/sex-workers-high-risk-for-covid-19-seek-government-help/>

<sup>9</sup> According to section III B of the Human Rights Advisory on Rights of women in the context of Covid-19. Dated 7th October 2020. Published by the NHRC (National Human Rights Commission).

point out the facts about virtual and internet sex that some sex workers could avail of but the numbers remained low.

**Conclusion:**

These women may be marginalized but they are resilient and very resourceful. Communities that cater to the needs of sex workers globally set up aid funds and helped in procuring necessary resources and hosted campaigns. UN Women have dedicated a campaign called the Shadow Pandemic to spread awareness and to focus on the global increase in domestic violence amid the health crisis we all find ourselves in. These non-profit organizations also tied up with other health organizations and tried to help them with violence. This violence could be either state sanctioned or social. Though the pandemic shattered everyone's life to different extent, yet it provides us with a chance to improve upon the societal structure and lives. A deeper analysis of how we view and support marginalized communities even in a non-pandemic time is pertinent to restore human value to them. They are a part of our world and need to be integrated so when the crisis arises, they too get the basic human support in a dignified manner that is the right of each living being and as promised by the Constitution.

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## **Tribulations of Civilian Female Spouses Who Report Officer Perpetrated Violence: Examining Experiences of Female Survivors of Intimate Partner Violence and Access to Justice in Relationships Involving Male Police Officers.**

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### **Abstract**

*Civilian female survivors of intimate partner violence (IPV) who report officer perpetrated violence are usually faced with unique yet ignored challenges when they pursue Justice. These challenges result from the fact that the abusers are at the same time the vehicles through which justice is supposed to be delivered. The study employed a case study design using a qualitative approach in order to examine experiences of female survivors of IPV and access to Justice in Jinja Police barracks. Rational choice exchange theory was employed to explain bottlenecks encountered by civilian female spouses who experience officer perpetrated IPV and seek justice. Findings reveal several bottlenecks, including institutional, individual, socio-cultural and economic bottlenecks. Recommendations include Government to decentralize the Women Affairs Department in Police for easy access by female survivors of IPV, to integrate prevention and handling cases of gender-based violence in police training, officers to hand over guns to the officer in charge of firearms in the barracks before going to their homes, and police leadership to track, punish and later expel officers who persistently perpetrate IPV against their spouses.*

**Keywords:** *Intimate partner violence, Access to justice, Police*

### **Introduction and Background**

Intimate Partner Violence (IPV) is violence by a spouse or partner in an intimate relationship against the other spouse or partner in marriage or cohabitation (National Center for Injury Prevention and Control (NCIPC) 2015). IPV can be physical, economic, sexual or emotional. IPV is globally acknowledged as a basic human rights violation and a fundamental obstacle to the achievement of gender equality (Dobash and Dobash, 2012). IPV exists in all races, genders, social economic classes, ages, religious affiliations, and environmental background (Dobash and Dobash, 2012). UN Women estimates that 35 per cent of women worldwide have experienced either physical and or sexual intimate partner violence in their lifetime (UN women, 2012). Globally, a wife or a female partner is more commonly the victim of IPV and is more likely to be injured although the victim can also be a male partner (NCIPC, 2015).

Justice is the amount of fairness that people experience and perceive when they take steps to solve disputes and grievances as noted by Legal Aid Service Providers' Network (LASPNET, 2015). Access to justice is a basic principle of rule of law, and it emphasizes the right of equal access to justice for all, including members of vulnerable groups irrespective of sex, age, class, race, religion or creed (Robb-Jackson, 2012). In the absence of access to justice, people are unable to exercise their rights, have their voices heard, challenge discrimination or hold decision makers accountable (Robb-Jackson, 2012).

Before the 1970s, police saw domestic violence as private disputes rather than crimes, and consequently arrests and investigations were extremely rare (Lips, 2005). From ancient Greece to Rome and Europe, men could beat or kill their spouses with impunity, and as late as the 19<sup>th</sup> century, British law books stated that the husband could exercise his power over his wife by beating her, although the beating was not to be cruel and violent (Lips, 2005). Access to justice for female survivors of officer perpetrated IPV is particularly paramount because literature indicates that IPV is higher in police families than in ordinary families. For example, police and military in the United States of America (USA) use violence against their partners at far higher levels than what is in the general population (Goodmark, 2015). IPV is 2-4 times more common in police families than in ordinary families and that

at least 40% of police families will experience IPV compared to only 10% of American families in the general population (Breiding, 2015).

It is asserted that having one or more guns in a home puts a woman at a higher risk and makes her 7.1 times more likely to be murdered by her husband (Breiding, 2015). According to Goodmark, 2015, IPV against women is a systemic and structured problem that is created and facilitated by the way police trains its personnel because officers are trained to be stoic, hard, decisive, unemotional dominating and in control. These are the very skills used by abusive husbands. Female survivors fear to report officer perpetrated IPV because the abuser has a weapon, and the survivor is not sure whether police will arrest and punish him since he is a member of law enforcement (NCADV, 2016).

Perpetrators of IPV who belong to the law enforcement are rarely punished and when they are punished, the punishment is usually light. For instance, between 1990-1997, the Los Angeles Police Department (LAPD) in the United States of America (USA), investigated 227 cases of alleged domestic violence by officers, of which 91 were sustained. Of these 91 that were sustained only 4 resulted in a criminal conviction, and out of these 4 officers who were convicted on a criminal charge of domestic violence, one was suspended for 15 days, and another had his conviction expunged (National center for women and policing, 2013). Additionally, between 1998-1999, 23 domestic violence complaints were filed against Boston police employees, but none resulted in a criminal prosecution (National Center for Women and Policing 2013). One officer who received an official reprimand at LAPD had raped his girlfriend and in the same year he was reprimanded after he had inserted a 9-millimeter handgun into his girlfriend's vagina, but in both cases, the officer was not criminally charged (Goodmark, 2015).

### **Intimate Partner Violence and Access to Justice in Uganda**

In Uganda IPV against women is high, but access to justice by female survivors is critically constrained. Close to 70% of ever married women aged 15-49 have experienced some form of IPV (Uganda Bureau of Statistics (UBOS), 2013). Both physical and sexual violence are very high in Eastern region of Uganda, at a rate of 66% and 32.9% respectively (UDHS, 2011), a region where the study was carried out. The causes of IPV in Uganda are rooted in culture. For instance, unequal rights to control of resources within the home and payment of bride price which reinforces the belief that a husband has purchased his wife's labor, sexual services, and her perpetual obedience and consent (Kasente, 2011).

According to Holms (2015), Ugandan women face systematic societal, economic, and environmental barriers when pursuing justice, and they are usually weeded out at every stage of the justice seeking process and continue to suffer in silence. However, some women in Uganda have resorted to the informal justice system because resolution is often faster. However, the informal justice system is highly patriarchal, and it often entrenches gender discrimination because the clan leaders and heads of families are entirely men, and thus interpret issues of women through male perspectives (Holmes, 2015).

According to the constitution of Uganda, all citizens are equal before and under the law in all spheres (Constitution of Uganda, 1995). In all criminal matters that affect human rights, the police are usually the first entry point within the formal justice system in Uganda. However, evidence shows that officers too are perpetrators of IPV and access to justice by their victims is even more constrained due to the position that the abusers hold in society. For example, according to a previous study conducted in Nsambya police barracks, 91% of officers perpetrated Economic Violence against their spouses (Mbabazi, 2013).

The objective of this paper was to explore factors affecting access to justice by civilian female survivors who report officer perpetrated IPV. This paper is part of a PhD study that assessed Experiences of female survivors of IPV and access to justice in police families. The study employed Rational Choice Exchange Theory which proposes that human beings are rational and make decisions to commit crimes after weighing the potential costs and benefits. This theory helped the researcher to establish what officers considered before perpetrating IPV and before helping or denying survivors'

access to justice. The theory also helped to establish what survivors considered before making the choice to report or keep silent.

## **Materials and Methods**

### **Sampling procedure**

The study was carried out in Jinja police barracks, Jinja district in eastern Uganda. The study employed a qualitative approach in order to gain insight into survivors' experiences, feelings, and perceptions. Data collection methods included individual interviews, key informant interviews, and focus group discussions (FGDs). The study included 31 in-depth interviews (25 female survivors of IPV and 6 male survivors), 12 key informants (6 men and 6 women) and 6 Focus group discussions (FGDs), (3 for women and 3 for men) with each FGD comprising of 8 participants.

All participants in the study were purposively selected. Due to the sensitivity of the study, snowball method was used to select female survivors of IPV. Female survivors' age ranged from 20-60 years with the majority, 10 (45%) between 31-40 years. Seven participants (28%) were between 20-25, while five participants (20%) were between 41- 50 years of age. Four participants 4 (16%) were in their 20s and only 1 (4%) was above 50 years. Majority of the women completed primary school level of education 56% (14), while 24% (6) dropped out of school before completing primary school level. Those who completed secondary school level, were 12% (3) and 4% (1) had a diploma certificate. Participants marital status included 56% (14) cohabiting, 40% (10) customarily married and 4% (1) married in church.

### **Data Analysis**

The study employed thematic analysis in order to get an in-depth understanding of the meanings and norms that underlie participants' answers. Inductive coding was used and it involved systematic step by step process that started with a close reading of the text individually and coming up with codes that reflected the meaning of the participant. The research team then shared the individually developed codes and came up with agreeable codes. Each researcher independently identified emerging themes and together as a team came up with agreeable themes. Related themes were later combined and discussed under a higher order heading.

## **Findings**

### **Introduction**

The section presents and discusses factors that affect access to justice by female survivors of IPV in relationships involving male police officers. These bottlenecks have been discussed under four themes: namely, Institutional, Individual, Socio-cultural and Economic factors.

#### **1. Institutional Factors**

##### **(i) Alien Referral Pathways to Justice**

Despite being civilians that had got used to the local council system (LC) as the starting point for seeking justice in Uganda, upon becoming spouses of police officers, women were supposed to seek justice through the system that their husbands used. Women found this system alien and intimidating to them since it was only managed by police officers, and they were the only strangers (civilians). Women were supposed to report IPV to the barracks administrators and when they failed to handle the matter, it was referred to Child and Family Protection Unit (CFPU) in Jinja town, and all actors were men and women in uniform. The alien referral pathways to Justice were a bottleneck to women's access to justice because civilian women found it unfamiliar and at times hostile. Consequently, some women were forced to resort to silence whenever they experienced IPV. These findings resonate those of Goodmark (2015) who argues that when spouses of police officers opt to seek protection from the state, it requires

them to turn to a legal system that is hostile and foreign to them, but is the abusers' daily working environment, occupied by acquaintances and co-workers.

**(ii) Abuser's Possession of a Weapon**

Although officers had been asked to keep their guns in the armory after work, many still went with their guns to their houses. Both men and women pointed out that women feared to report IPV because they feared that their husbands might shoot them. One participant shared her experience as thus:

*"I withdrew the case because he is armed. He used to come with his gun and threaten me. He would tell me that if anything happened to his job, he would shoot me. So, I feared and withdrew the case" (interview with female survivor of IPV).*

Officers' possession of firearms in a domestic environment risked lives of women and it critically curtailed their access to justice. When women weighed the consequences of reporting IPV and found them costly, they withdrew cases against their abusers or remained silent. According to Goodmark (2015), the symbol of his profession, most notably the gun constantly reminds her intimate partner that he has the power to cause enormous bodily harm. Police management's failure to ensure that officers do not go to their homes with firearms reflects Government's failure to give protection to female survivors of IPV.

**(iii) Failure to Decentralize the Women Affairs Department**

There were some cases that could only be handled at Police headquarter in Naguru-Kampala, which is about 79 Km away from Jinja town. Matters regarding officers' failure to pay school fees and provide food for family were often referred to police headquarters. Many women gave up along the way due to transport costs and other expenses involved. Government's failure to decentralize the women affairs department in police demonstrates its laxity on matters affecting women and it is denial of justice to women. Most services in Uganda have been decentralized in order to bring services nearer to the people. Devolution as an aspect of decentralization which emphasizes transfer of powers and functions from central offices to local units should be implemented (The republic of Uganda Vision 2025, 1998).

**(iv) Laxity by Police officers on officer perpetrated IPV**

Findings indicate that most female survivors of IPV had lost trust in police due to the laxity that officers displayed while handling IPV perpetrated by fellow police officers. During discussions with women, they referred to police officers as 'toothless snakes' that could not bite when it came IPV involving fellow officers. Findings show that officers' behavior was out of the need to keep fellow police officers' files clean and also for purposes of avoiding conflicts with colleagues. When abusers are not punished for their crimes, IPV is bound to increase in police families due to the illegal immunity that abusers were accorded. In a related study, it was found out that arresting and punishing domestic violence offenders using the formal justice system, was consistently related to reduced subsequent violence (Jordan, 2004).

**(v) Light Punishments for Police officers who Perpetrate IPV**

Women stated that officers were given light punishments compared to the damage caused to their spouses. Such included "open suspension" whereby the officer is suspended, but he decides when to report back for duty. This was seen as a reward rather than a punishment, since the abuser used it as an opportunity to rest. Another form of punishment that was light and at times rewarding to the offenders was transfers. According to female survivors of IPV, some officers were transferred to even better places, which became a reward. However, when their abusers were transferred to remote places, women would have to go with them, and bear the burdens of living in remote places such as fetching water and firewood from distant places. According to Jordan (2004), women are less likely to contact law enforcement when the offender is known by police and are less likely to make an arrest.



## **2. Individual Factors that affect women's access to justice**

### **(i) Fear of Sexual Harassment**

Findings revealed that some male officers sexually exploited the women who reported IPV to them in exchange for officers' services. Male officers did not want their wives to report IPV to CFPU because they did not trust the male officers that interacted with their wives. In addition, women revealed that some female officers at CFPU whom they reported IPV to, had fallen in love with their husbands and this behavior had caused more harm than good to families. Such behaviors did not only reflected lack of professionalism among officers, but also lack of commitment to help women realize their human rights.

### **(ii) Fear of Impromptu Separation**

Findings from female survivors of IPV revealed that officers used impromptu separation as a tactic to escape the arm of the law. Some officers who were summoned by the OC-CFPU sent wives back to their parents immediately so that there would be no follow up on those cases. Women were sent far away, and husbands only allowed them back on a condition that they would never again report the officer to CFPU. Consequently, women's earlier efforts to access justice would be rendered futile and their access to justice curtailed. Such experiences scared other women who experienced IPV and wanted to pursue justice.

### **(iii) Intimidation of women**

Women revealed that some husbands after beating their wives connived with their colleagues at CFPU and requested them to intimidate their wives in case they showed up to report IPV. These officers threatened women and sent them back to the barracks before they entered the office to report IPV. Some officers further threatened these women after work from the barracks until they gave up on reporting. These threats were mainly intended to stop the female survivors of IPV from opening up cases against their abusers since such cases tainted the files of the officers and were likely to affect officers' promotions. To this effect, officers felt that they had a duty to protect each other from these repercussions. According to Goodmark (2015), because of the place police officers hold within the criminal justice system, access to the formal justice system is extremely limited for their spouses, moreover, by virtue of their training, officers learn a range of behaviors that they can use to control, intimidate, and isolate their partners.

## **3. Socio-Cultural factors that affect women's access to Justice**

### **• Silence on IPV Matters**

Findings indicate that women believed that IPV especially sexual violence was private and thus did not have to be reported to police. Women believed that it was embarrassing for a woman to reveal what goes on between herself and her husband as stated:

*“If the issue is to do with marital rape, we simply keep quiet. How will you begin talking about sexual matters in public? Are you not his wife? Even fellow women will advise you not to report such” (interview with female survivor of IPV).*

Culturally, women are trained not to wash their dirty linen in public, and as a result, women have to endure IPV and most perceive it as part of marriage and expect it to happen.

### **• Fear of Divorce**

Some women did not report IPV due to fear that it could result into divorce. Findings reveal that culturally, divorced women had no respect in society and were usually despised together with their mothers because it is assumed that she did not prepare her well enough to withstand marriage and its challenge. However, lack of financial independence reinforced this fear since most women

depended on husbands economically. Some women feared that divorce would separate them from their children, and thus had to guard against it by not reporting IPV to authorities.

- **Fear of retaliation**

Women feared retaliation from relatives, friends and his fellow police officers. Some women had reported IPV, and their husbands were detained in police cells, but went back pleading for their release because they felt that both their marriage and individual safety would be at risk in case the husband was finally charged and imprisoned. Women also feared retaliation from the armed abuser when he finally came back from the prison. It is argued that firearms are usually used by officers to terrorize and control survivors of IPV (NCADV, 2016).

### **Conclusion and policy recommendations**

The arm of the law was too short to reach civilian female survivors of officer perpetrated IPV. Instead of using the law to help female survivors to access justice, instead officers protected the perpetrators of IPV who were members of law enforcement. Officers' need to protect fellow officers against facing the law and keeping each other's files 'clean', overshadowed the need to carry out their mandate of promoting law and order in society. This disrespect of the law was a big setback to women's struggle for equality, equity and enjoyment of human rights more especially access to justice. The study recommends that Government should integrate prevention of IPV and handling cases of gender- based violence in police training, ensure that officers' hand over guns before going to their homes, decentralize the women affairs department and police leadership should track, punish and later expel officers who persistently perpetrate IPV against spouses.

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<sup>i</sup> Some recent publications address specifically the rights of inter\* persons, for example; European Union Agency for Fundamental Rights (FRA), ‘A long way to go for LGBTI equality’ 2020; ILGA Europe, ‘Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia’ 2021.

<sup>ii</sup> Parliamentary Assembly of the Council of Europe, ‘Resolution 1952 on a child’s right to physical integrity’ (2013) and ‘Resolution 2191 Promoting the human rights of and eliminating discrimination against intersex people’ (2017) ; ILO, OHCHR, UNAIDS Secretariat, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP and WHO, ‘ Joint UN statement on Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people’ (2015).

<sup>iii</sup> This study reported that none of the samples preferred the term DSD, while participants without experience with inter\* supported ‘intersex’ and participants with experience with intersex rejected the term.

<sup>iv</sup> UNICEF, ‘Timely and accessible birth registration’, see <https://www.unicef.org/bangladesh/en/timely-and-accessible-birth-registration>

<sup>v</sup> <https://www.gov.bw/civil-registration/birth-registration>

<sup>vi</sup> Gender Identity, Gender Expression and Sex Characteristics Act (GIGESC Bill), see [https://tgeu.org/wp-content/uploads/2015/04/Malta\\_GIGESC\\_trans\\_law\\_2015.pdf](https://tgeu.org/wp-content/uploads/2015/04/Malta_GIGESC_trans_law_2015.pdf)

<sup>vii</sup> <https://uhri.ohchr.org/en/search-human-rights-recommendations>

<sup>viii</sup> Group of African States (53 Member States); Group of Asian States (53 Member States); Group of Eastern European States, EEG (23 Member States); Group of Latin American and Caribbean States, GRULAC (33 Member States); Western European and Other States Group, WEOG (28 Member States + USA), <https://www.un.org/en/model-united-nations/groups-member-states>.

<sup>ix</sup> UPR recommendations 106.5 ‘Enact legislation to ensure members of the lesbian, gay bisexual, transgender and intersex (LGBTI) community citizenship rights, consistent with the equal rights enumerated in the Nepali Supreme Court’s 2008 decision’.

<sup>x</sup> Including two recommendations on LGBTI+.

<sup>xi</sup> One recommendation in relation to gender-normalising surgery is formulated by Chili and accepted by New Zealand ‘122.102 Consider putting an end to non-consensual medical procedures which affect intersex persons’.