

# Intersex People In Ecuador: Medical Violence, A Praxis That Transgresses The Human Right To Identity

César Humberto Sánchez Espinoza<sup>1</sup>, Abg. Paola Priscila Vallejo Cárdenas, Mgs.<sup>2</sup>, Abg. Ana Zamora Vázquez<sup>3</sup>

<sup>1</sup>Universidad Católica de Cuenca Cuenca-Ecuador, <https://orcid.org/0000-0002-6598-6822>, [chsancheze73@est.ucacue.edu.ec](mailto:chsancheze73@est.ucacue.edu.ec)

<sup>2</sup>Universidad Católica de Cuenca Cuenca-Ecuador, <https://orcid.org/0000-0001-9281-6979>, [pvallejoc@ucacue.edu.ec](mailto:pvallejoc@ucacue.edu.ec)

<sup>3</sup>Universidad Católica de Cuenca, Ecuador, <https://orcid.org/0000-0003-3196-1616>, [afzamorav@ucacue.edu.ec](mailto:afzamorav@ucacue.edu.ec)

## Abstract

Intersex persons are born with a unique combination at the chromosomal and gonadal level and by the appearance of their external genitalia, which does not conform to the traditional system of male or female sex determination within the registry system, leading parents and doctors coerced by a hetero-normative-medical need to perform surgical and hormonal practices coated as “medical emergencies”. This research is based on the study of the Human Right to Identity as a starting point to demonstrate the medical violence in the health systems in Ecuador through the authoritarian determination at the time of establishing the sex of intersex people; using a qualitative approach it was possible to analyze doctrinally and legally the need for the recognition of third sex. Applying the inductive-deductive, analytical-synthetic and comparative methods, a compendium of documentation was studied that strengthens the hypothesis raised about the responsibility of the State when guaranteeing the dignity of intersex persons. The research results show that this part of the population has been forced to renounce their identity, which should allow them to individualize themselves in a personal and collective way to develop their life project, a premise that has been violated by the hegemonic power of health professionals and the family. It is concluded by pointing out that the possible paths have already been designed by other countries in the world and that in the Ecuadorian legislation the jurisdictional tools such as the Action for Protection and the Action for Non-Compliance could be considered as a legal solution after the Advisory Opinion 24-17 of the Inter-American Court of Human Rights.

**Keywords:** Intersex, Identity, medical violence, Advisory Opinion, Constitutional Actions.

## Resumen

Las personas intersex nacen con una combinación única a nivel cromosómico, gonadal y por la apariencia de sus genitales externos, los cuales no se ajustan al sistema tradicional de determinación del sexo masculino o femenino dentro del ámbito

registral, llevando a padres y galenos coaccionados por una necesidad hetero-normativa-médica a ejercer practicas quirúrgicas y hormonales revestidas de “urgencias médicas”. La presente investigación se desprende del estudio en torno al Derecho Humano a la Identidad como punto de partida para demostrar

la violencia médica en los sistemas de salud en el Ecuador mediante la determinación autoritaria al momento de establecer el sexo de las personas intersex; utilizando un enfoque cualitativo se pudo analizar doctrinaria y jurídicamente la necesidad del reconocimiento de un tercer sexo; por medio de los métodos inductivo-deductivo, analítico-sintético y comparativo se estudió un compendio de documentación que afianza la hipótesis planteada en torno a la responsabilidad del Estado al momento de garantizar la dignidad de las personas intersex. La investigación ha demostrado como esta parte de la población ha sido obligada a renunciar a su identidad la cual debería permitir individualizarse de manera personal y colectiva para desarrollar su proyecto de vida, premisa que ha sido vulnerada por el poder hegemónico de los profesionales de la salud y la familia. Se concluye señalando que los posibles caminos ya lo han diseñado otros países del mundo y que en la legislación ecuatoriana las herramientas jurisdiccionales como la Acción de Protección y la Acción por Incumplimiento podrían considerarse como una solución jurídica tras la Opinión Consultiva 24-17 de la Corte Interamericana de Derechos Humanos.

**Palabras clave:** Intersex, Identidad, violencia médica, Opinión Consultiva, Acciones constitucionales.

## Introducción

The recognition of the rights of lesbian, gay, bisexual, transgender, intersex and queer people (hereinafter LGBTIQ+) in Ecuador has been limited by the governments in power and the different representatives of the other functions of the State, who have tried to impose from their positions the morality under which the rest of the population should coexist, resulting in waves of discrimination towards sex-gender diversities. One of the most common questions in the development of pregnancy and subsequent birth is the sex of the baby, which has been given a

hetero-normative and medical identity as if it were a definitive and perpetual determination in time, ignoring that not always the answer to the sex will be male or female.

Intersex people have a series of combinations, from the external appearance of the genitals, the gonads or the chromosomal level that are outside the traditionally established in the binary system, in terms of femininity and masculinity, thus raising questions about whether the system of sex determination is natural, binary and customary or is the result of duality and hierarchy that impose what is proper and determined for the sexes. This means that the emergence of intersex or non-binary sex destabilizes what has been imposed for several years within the traditional standards of medical sciences, which would fall like dominoes bringing as a consequence the respective reforms to an entire legal system and a naturalized system of social coexistence.

It is important to point out that Identity as a Human Right grants intersex persons the freedom to develop their life project or externalization of their image in society (dynamic identity), based on different personal characteristics such as physical, biological, sexual or registry identity (static identity), which rests in the hands of intersex persons, but not their parents or treating physicians, ensuring respect for the decision to adopt traditional sex when they feel ready or continue with that non-binary sex because they feel identified with it because being intersex is also a form of identity and not a disease, hence the urgent need for the creation of a third sex in the registration documents.

Usually, intersex persons are subjected to irreversible surgical and hormonal interventions, either after the birth of the child or at the onset of puberty, which are unnecessary because the life of the infant or adolescent is not at risk, decision taken according to the Ethics Committees of each

health institution in Ecuador, which in good faith works by a geneticist and the person who attended the birth to give a sex to the infant, stipulating intersexuality as a pathology and applying the placebo effect of healing that is translated into irreversible surgeries, forced sterilization, medical examinations, photographs, exposure of genitals, constant visits to the operating room, recurrent use of dilation devices or administration of hormones that under the guise of “medical emergencies” seem to be an aesthetic procedure, only that in the latter there is the consent of the patient, while in the assignment of sex it is enough what the doctor or the parents say, this is how medical violence is configured violating other rights such as health, free development, integrity and the consequent prohibition of cruel and inhuman treatment, etc.

Thanks to the recognition of intersex identity and the possible creation of a third sex in the registration documents, countries around the world such as Nepal, Pakistan, India, Australia, New Zealand, Holland, Malta, Germany, Argentina, and Colombia, among others, have regulated in their legal systems by actions filed before the Courts or Tribunals. In Ecuador, the response is found in the Action of Protection and the Action for Non-Compliance after the Opinion 24-17 that includes on the sex-gender identities as they are constitutional tools to provide dignity to a small part of the population and with a view to a more just, egalitarian and inclusive society.

### **Generalities, meaning and interpretation of the Right to Identity of intersex persons**

The LGBTIQ+ population has survived intransigent waves of violence and discrimination that have violated their dignity and restricted their rights at the hands of conservative sectors, who articulated through police, social and legal repression have systematically violated the rights of this population group. The vindication in

Ecuador began in Cuenca when in 1997, after a massive arrest in a “clandestine” bar, which later generated the declaration of unconstitutionality of homosexuality as a crime in the criminal law, by 2019 the Constitutional Court resolved a consultation of norms giving way to equal marriage, however, antagonistically little or nothing has been developed for intersex people that time gave birth to them and forced them to renounce their identity.

Latin America stands out for its interculturality, governments have proudly wanted to portray each country as diverse, plurinational and intercultural in the eyes of the world; however, when it comes to that same diversity but gender-generic, the situation becomes uncomplimentary and even pejorative. It can be inferred that this diversity is selective, as it is desired a reordering of identity or continuing in a tight binary identity system.

It is convenient to specify that the intersex approach in this research does not have a view toward gender, sexual preferences or even a pathology, as determined by the Inter-American Commission on Human Rights (IACHR), which declared that “The binary systems of male/man and female/female exclude those people who cannot identify themselves within these two categories” (IACHR, 2015, p. 42). Briefly, imitating a model of how a man or woman should be physically, psychologically, and sexually, in their manners, performances and a series of traditional developments that have been coerced upon them.

As can be inferred intersex people are forced to sympathize with a hetero-normative-medical model. “The concepts male and female are understood as an operation, where male: penis and testicles, XY chromosomes, masculine and heterosexual; female: vagina, ovaries, uterus, XX chromosomes, feminine and heterosexual” (Robalino, 2017, p. 17). The rules are envisioned from an approach of external, heterosexual and

reproductive genitalia for the registration processes trying to avoid future “problems” for the child's development.

However, when such a sex operation is not configured as if it were something simple, discrimination and pathologization is the daily life of those people identified as intersex not by choice, but because they were born with such condition. “Each intersex person is born with a unique combination of factors such as the gonads, hormones or the reproductive system without these being able to determine a true sex” (Raíces, 2015, p. 17).

As for notions such as “hermaphrodite” or “intersex” lead to relate them to plants and animals or disease, intersex people do not literally possess penis and vagina, rather they are a combination of several factors and none of them similar with respect to each other “Chromosomal mosaics: XXY, XXO, configurations and locations of the gonads: coexistence of testicular and ovarian tissue, undescended testes; genitalia: penis too small or vagina too large” (Cabral & Benzur, 2005, p. 284).

It is required with this to exemplify Gabriel Martin, Spanish, born on July 12, 1971. Because of the exterior of his genitalia, his parents identified him as Patricia, the growth of breasts, hips or light voice was absent, and the facial hair and the coarse and thick voice identified that Gabriel had hypospadias instead of vagina, for the magazine Vanguardia, he said: “In my case what would happen is that there was a protein involved in the virilization process of the external genitalia, the formation of the penis, scrotum and so on” (Martin, 2019).

To illustrate the situation in Ecuador, the newspaper “El Expreso” of Guayaquil in November 2020 stated “Maria from the province of Tungurahua, at the hormonal level was a man, her genital physiognomy was female, in

adulthood she came to know her true condition” (Expreso, 2020). His condition was discovered thanks to a chromosomal test that was performed on him, newborns are classified as “ambiguous sex or genitalia” in medicine, that is “Atypical corporealities that are unclassifiable within the hegemonic organization of sexual difference” (Robalino, 2017, p. 20).

The Asley case in 2014 unleashed confusion in the Ministry of Health, as Asley's parents sued the doctor who performed a sex assignment on her without her consent, according to information provided by the UN “Nearly 1.7% of babies are born with sex characteristics that do not conform to typical definitions of the male and female sex. This makes being intersex as common as being a redhead!” United Nations Organization (UN, 2016).

In Ecuador, the Identity Law states that “The sex will be registered considering the biological condition of the newborn, as male or female, as determined by the health professional or the person who attended the birth” (Ley Orgánica de Gestión de la identidad y Datos civiles, 2016). From the above, it is discriminatory not to include sex for intersex people, it is emphasized that it is not an option if not a condition, so that they are forced to fit into a binary system: male or female, thus violating their right to their identity.

Dr. Ramón Ávila and Drs. Judith Salgado and Lola Valladares in their book “Gender in Law” are invited to find the answer to this hetero-normative-medical need, Francis Olsen answers 3 elements dualism, hierarchization and law asserting that “Our thinking is based on dualisms: male-female, active-passive, objective-subjective, where men have polarized with the active and rational part while women in the sentimental, irrational pole (...)” (Olsen, 2015, p. 18).

Regarding hierarchization and law, “Dualisms rest on a hierarchical order, thinking is more important than feeling, reason over emotion (...). Law is identified with justice which, being a woman, is identified as male” (Olsen, 2015). As a result, people are subjected to a dualistic, sexualized and hierarchical society, which forces them from birth to comply with traditional guidelines, since a man cannot be effeminate, must be strong, rational and even insensitive, and if he is a woman, he must be soft, delicate, sentimental and in the best of both cases, heterosexual.

The violation of the human right to identity begins when the intersex person is separated from the mother's womb since it is a legal requirement *sine qua non* the sex of the live birth, an option that the doctors will have only two: The Code of Childhood provides for the right to identification of children and adolescents with paternal and maternal surnames that correspond, the State will guarantee the right to identity and identification” (Vicuña & Avila, 2021).

To perform surgical and non-surgical practices on intersex persons, physicians rely on the criteria of expert committees, who suggest to parents the sex of the person “In some cases, when their condition was recognized, parents were asked to make the decision for the sex that for them was dominant, subsequently they would have to conduct themselves according to the chosen sex” (Foucault, 2011, cited by Juan Sanchez, 2015) but they are neither doctors, committees, nor parents, the holders of the right to identity and take such attributions on the sex of the newborn person or interventions in intersex adolescents.

Identity as a right has a double dimension in an individual and global sense that develops based on what the holder of the right accepts, such standardizing practices can be dangerous “The

IACHR takes note of the harmful and devastating impact of these models to follow, intersex people are subjected to unnecessary surgeries and medical treatments, by the desire to reproduce the appearance of genitals of the assigned sex” (IACHR, 2015).

There is another approach that this research tries to support and visualize and that has been developed by some health professionals when mentioning “Health professionals are against any surgical intervention on children with supposedly atypical organs and for the right of intersex children to determine their own identity, once they can communicate their wishes and desires” (Raíces, 2015). Such interventions are not necessary unless there is a risk to the infant's life, otherwise, the need to provide a sex gender is not understood.

Jorge Raíces in his book “One body a thousand sexes”. Intersexuality develops as a proposal that States should create in their legislation the third non-binary sex or intersex, a solution that would put an end to all medical practices that violate the dignity of people born with the such condition since “Identity is a human right and the gateway to access other rights such as name, surname, nationality; it implies the recognition of the State, of society and oneself” (Gordillo, 2019, p. 156). Identity is similar to a collection of personal particularities of a citizen or citizens differentiating themselves from others, so identification is such a materialization of the characteristics of identity

This right can also be analyzed from two edges “Identity understood from two points: i) the truth of the person [the self] from an individual perspective; and, ii) the perception of other people [the other] about the self, from a collective view” (Castillo D., 2018, p. 18). It is closely related to the Constitution article 66 numeral 28 when determining the “Right to personal and collective identity that includes name, surname,

duly registered and chosen; preserve, develop, strengthen material and immaterial characteristics: nationality, family origin (...)" (CRE, 2008).

Indeed, the human right to identity has a double dimension, with the first identity called static or primary and the second called dynamic. The first one "refers to the physical, biological, or registry identification of a subject such as name, image, sex (...)" (Delgado, 2016, p. 15). Identity that has a personal character that enjoys an intimate or internal jurisdiction; therefore no one can question or violate it.

The second identity "Is the personal truth or life project, of each subject, which is manifested through the "social projection" of the person" (Delgado, 2016, p. 15), that is, the externalization towards society according to the life project, there can be as many life projects as people "And preserve, develop and strengthen the material and immaterial characteristics of identity, such as nationality, family origin, spiritual, cultural, religious manifestations (...)" (CRE, 2008).

The Ecuadorian Constitutional Court in Ruling No. 133-17-SEP-CC, has the same criterion "It is from the personal identity that the individual plans and builds a life project, that is, the fundamental freedom of realization in functions of identity options" (Ruling, 2017). The Court adds as a requirement the free development of personality to identity, Article 66 states that "It is recognized and guaranteed to persons: 5. The right to the free development of personality, without any limitations other than the rights of others" (CRE, 2008). Thanks to this article, the aim is then to plan and execute the life project.

Free development is nothing more than the externalization of negative freedom (how I feel, what I am, what I believe, what is my sex) in positive freedom (when I execute my negative

freedom: my identity, my religion, my sex which I define myself and I want to belong or not to belong to any) intersex people without further limitations may externalize their sex that allows them to individualize and differentiate themselves from the rest.

In addition, the Court adds "The obligation of respect is materialized in the non-adoption of illegitimate or arbitrary measures that aim to restrict the expression of personal identity, such a fact not only denigrates human dignity but also contravenes the democratic and plural State" (Judgment, 2017). All medical practices are referred to in this case as illegitimate or arbitrary measures, whether at birth, puberty or adulthood.

The International Conventions and Treaties chronologically start from 1948 "Art. 6.- Every human being has the right to recognition everywhere as a person before the law" (Universal Declaration of Human Rights, 1948). By 1959, Principle Three states that "The child has the right after birth to a name and a nationality" (Declaration of the Rights of the Child, 1959) which is identification.

For 1966 "Art. 24.1. Every child has the right without discrimination to such measures of protection as his condition requires by the family, society and the State, he shall be registered after birth as having a name, a surname, a nationality" (International Covenant on Civil and Political Rights, 1966). While article 8 of the (Convention on the Rights of the Child) "States undertake to respect the right of the child to present his or her identity: nationality, names, family (...) when the child is deprived of some of the elements of his or her identity, States shall provide assistance and protection".

In the case 1692-12-EP studied and resolved by the Constitutional Court which was called the "Satya Case" it was analyzed on "the best interests of children" which "Implies to

consider primarily their condition when decisions are made that may affect them” (Satya Case, 2018). In the specific case, was the nationality of the child Satya to which not wanting to be registered for having two mothers, likewise as for intersex people wrongly could be denied a sex assignment of which do not belong to any.

The reality and needs of intersex people are being hindered since “Freedom as non-domination defended by republicanism, to set limits to the rules, administrative and judicial decisions that unfairly impose on people the exercise of the right to self-determination and free development” (Jadan, 2018). Foundations that reinforce the idea that the decision of sex will be only of the person but not of the parents or doctors.

Rights should be exercised and guaranteed as decided by each person “In the sense that rights should be feasible in the reality of all citizens but for this, the possibility of their exercise should be expanded to the needs of each person” (Lopez & Kala, 2018). With this, the State should protect children against violations by third parties: parents or doctors when “reassigning” sex to a born or starting with therapies against the holder without his consent, as mentioned by Castillo (2018), in the paper entitled “The legal guardianship that deserves the identity of the person; it refers to identity as a right that must be protected and that is enforceable, or opposable before third parties, with special emphasis on the State” (Castillo, 2018, p. 18).

In short, the strengthening of the human right to identity of intersex people is coerced by assigning a sex gender that does not belong to them, the State and Ecuadorian society fear changes and new ways of life and institutions “we have political institutions that require qualities that we do not have and even some we do not even appreciate; therefore, we could badly have

them” (Julio Trujillo, 2009, cited by Cesar Bravo, 2018, p. 8). “Being a right, the person must have sufficient power to choose for himself all those characteristics that affect him personally and in which in no way the prerogatives of a third party are compromised” (Lopez & Kala, 2018, p. 68).

As established in previous lines, intersex people are subjected to surgical interventions and treatments either at birth or at the onset of puberty to continue a hetero-normative-medical model, based on levels of sexual determination. The solution given to people who are born with the wrongly called atypical or ambiguous organs violates the right to an identity that constitutes the life project based on static or dynamic identity options, where the sole decision of the holder (intersex person) is the basis for adopting a traditional sex gender or otherwise the creation of a third sex gender which they feel identified.

### **Medical violence in the healthcare system as a way of “normalizing” the sex of people**

Medicine plays an important role in this research and in the development of the life project of intersex persons, given that medical violence takes the form of “medical urgency” thus violating a series of rights under the consent of parents and others without any prior consent of the person, giving health professionals the power to “normalize” the sex through procedures or treatments that are not very dignified.

It is essential to perceive the determination of sex, gametogenesis is the example par excellence, where the sperm that always contains the X chromosome, fertilizes the egg that will contain the X or Y chromosome, so that the zygote XX (female) or XY (male), however by not configuring such a premise is translated into a pathologizing if the sex is not binary “in the activist field it is desired to abolish categorizations, protocols and pathologizing

practices, such as the recognition of bodily and gender diversity” (Suess, 2014).

Another mechanism to punctuate sex is ultrasounds, which are performed from the eighteenth week of pregnancy and after birth to detect the presence of the uterus or testicles, since the karyotype test takes between 28 to 30 days, another is amniocentesis “The possibility of determining fetal sex through the Barr corpuscle in the cells of the amniotic fluid” (Gonzales Arias et al., 2014).

Mariana Córdoba, among her research interests, develops the theory of “Reductionism” based on the “Gender Identity Law” in Argentina that complements what was discussed in previous lines by Dr. Ramiro Avila and Drs. Judith Salgado and Lola Valladares where dualism, hierarchization and law reduce the sex of the person to the genital or gonadal, denying other levels or degrees of sexual determination.

Thus, the reductionism theory explains 4 types of levels “1. Genetic or chromosomal sex: XX or XY 2. Gonadal sex: ovaries or testicles 3. Genital sex: vagina, vulva, penis, prostate 4. Psychosexual or social sex: determined at puberty” (Cordoba, 2020). To assign sex, these 4 levels should act in synchrony with each other, however, the genital is the primordial one for doctors, if there are doubts, they turn to the gonadal, in the last case the chromosomal, but the psychosexual or social level is never taken into account.

“Doctors talk with their parents, with the ethics committees of the hospitals and based on protocols, they decide to opt for sex over the phenotypic characteristics: genital sex” (Cordoba, 2020). This practice is carried out through surgical interventions to configure an organ as similar as possible to a male or female one due to its external appearance, a practice that

is illogical since there is no consonance with the rest of the levels of sexual determination.

In Ecuador, the outlook is discouraging since in 2018 the Ministry of Public Health (MSP) issues the protocol called “Comprehensive Care for patients with disorders of sexual development”, a stereotype that is inconceivable to label “disorder” as if it were a pathology and that is discriminatory since “No one may be discriminated against for reasons of (...) or for any other distinction, personal or collective, temporary or permanent, which has the purpose or result of impairing or nullifying the recognition, enjoyment or exercise of rights” (CRE, 2008).

This protocol configures a multi and interdisciplinary team of different branches: neonatologist, pediatrician, geneticist, pediatric endocrinologist, imaging specialist, nurses, social workers, psychologists, professionals in bioethics, human rights, gender and diversity, etc., a group called “Committees of integral attention to patients with DSD”, who will have the difficult decision of granting a binary sex gender to intersex persons.

The Colombian Constitutional Court, since 1999, has developed that “Medical treatments to intersex people cannot be assimilated to aesthetic surgeries because they have to do with the very definition of sexual identity, affecting one of the most mysterious and profound aspects of human personality” (Decision SU-337/99, 1999).

Likewise, it has been pointed out that “The lack of correspondence between the mental identity of the plaintiff and his physiognomy could lead to a violation of his dignity in the understanding that it is possible to live in a manner consistent with his life project” (Decision T-876/12, 2012). The Court has developed the



fourth level that Córdoba indicates on psychosexual or social sex determination.

The IACHR has determined that the practice of sexual assignments is more common than it seems in America “Information has been received about the performance of sex assignment and genital operations without consent in intersex children and adults, most cases are irreversible in nature” (IACHR, 2015).

Similarly, another scenario develops in sex determination that does not have to do with surgical interventions, it is the case of adolescent or adult intersex persons “Bodies manufactured by surgical procedures and the use of synthetic hormones do not come to know in many cases or belatedly that they have been normalized, being their life produced in secret” (Diaz, 2017). The Ecuador protocol has determined 4 base criteria for the respective sex assignment:

“1. Patients raised and/or socialized as a male who presents during puberty or adolescence genital bleeding and development of mammary glands. 2. Patients raised and/or socialized as female during puberty or adolescence presenting progressive virilization or incomplete pubertal development” (MSP, 2018).

The first two criteria used by physicians have common factors heterosexuality and the function of penetration “Masculinity is carefully reserved for those individuals of conforming to a penile stereotype of our culture, sending to femininity all who fail in this enterprise” (Cabral & Benzur, 2005). It is easier for physicians to mutilate a small penis to turn it into a clitoris since it is too small to serve its function of penetration.

Heterosexuality is a sexual orientation and should not be confused with the sex of persons, a current that seems to act coercively on the ethics committees, based on the assumption that heterosexuality in assigning a sex “is based on how big or small a man's penis can be for

penetration or how penetrative a vagina can be” (Lavigne, 2009). It would seem that the authorities find it difficult to foresee that after such assignments new interventions could well be performed because they are trans men or women, lesbian, or gay men, hence the importance of the decision of its holder.

3. “Karyotype 46, XY with suspected complete androgen insensitivity or gonadal dysgenesis” (MSP, 2018). Also known as Swyer syndrome “is a phenotypically female individual with primary amenorrhea, absence of secondary sexual characteristics and eunuchoid anthropometric proportions” (Protzel, Zegarra, & Rojas, 2005). Primary amenorrhea is the absence of menstruation until the age of 15 years and with male karyotype features.

4. “Karyotype 46, XX orienting to gonadal agenesis or dysgenesis” (MSP, 2018). Known as MRKHS syndrome (Mayer-Rokitansk-Küster-Hauser) “Affected women have an absent vagina or reduced to a pit in the introitus and absence or extreme hypoplasia of the uterus, or rudimentary horns located in the lateral walls of the pelvis” (Escobar et al., 2007). It is the absence of the vagina and uterus but with functional ovaries.

HCT or cross-hormone therapy “consists of achieving hormone levels appropriate to the self-perceived gender, as well as reducing the secondary characteristics of the birth sex” (Ruben et al., 2018, p. 309). There are body modifications of muscle mass, facial hair, breast development, clitoral growth, voice changes, etc., a response that would be of no use to intersex people as they do not try to resemble a man or woman, a process that is optimal for trans people.

It must be assumed that certain recommendations by the MSP are of little use in assuaging medical violence “Registration in the Civil Registry, suggests the family register the

patient with a name that can easily adapt to the binary or non-binary sex/gender decided by the person” (MSP, 2018). The solution is not a “proper” name for their condition, it is to provide them with dignity in the whole process of the life project.

In this regard, ethics committees are influenced by the criteria, ideologies, and idiosyncrasies of each of their members, which may be conservative, liberal, or progressive, it is undoubtedly a complex structure. “The dynamics established in the team that integrates the intersex clinic is strongly influenced by the personal characteristics of those who make it up” (Alcantara, 2009, p. 19).

It is then where the hegemonic power on the part of physicians arises, but first, it is necessary to analyze what concerns that “Research has been developed that has shown that, depending on the patient's expectations regarding the drug, it has greater or lesser effectiveness, as occurs, for example, for the influence of the price of drugs on such effectiveness” (Menéndez, 2020, p. 13). Also known as the placebo effect where the purpose of doctors is a cure or treatment necessary or not, they apply it, in the latter case unnecessary interventions towards intersex people.

Hegemonic power is characterized by its “biologism, pragmatism and individualism and by fulfilling not only curative and preventive functions but also normative, control and legitimization functions” (Menéndez, 2020). For the doctor's criterion is of great importance in the case of decisions on the sex of newborns by their parents or the decision of adolescents or intersex adults, criteria that may be erroneous because of that same power of control and legitimization of a traditional body.

This power configures a background that is part of medicine and law at the same time, the

obligation of the doctor to detail the sex of the live birth for the hope of the relatives and for the administrative sanctions that failure to do so entails. “This period is built by the force of the rules that regulate the deadlines for registration of the newborn in the Civil Registry (...) so that society can assume without too much noise the rule to constitute a citizen” (Lavigne, 2009).

It is also important to deal with informed consent, art. 362 “Health care as a public service will be provided through state, private and autonomous entities (...) and will guarantee informed consent, access to information and confidentiality of patient information” (CRE, 2008). The Constitutional Court has developed the sentence “Right to quality, safe and effective medicines” with a paper by Dr. Ramiro Ávila, where 3 principles are developed regarding consent.

The first of them reflects the need to prepare professionals regarding the right to informed consent of patients. Likewise, the second principle analyzes it from the humanistic and empathetic vision towards relatives and patients through the necessary time as active listening. Finally, the third principle advises that “Communication should be effective and comprehensive on the various aspects with the disease and treatment: emotional, social, economic, functional aimed at reducing the negative effects of the information” (Ruling No. 679-18-JP/20, 2018).

Intersex people never get to know the content of the information since they are too young to know it or the information delivered is erroneous (hegemonic), that is why education in sex-gender diversities for professionals and the consequent socialization to parents or representatives is important. “Access to information is violated when it is provided in a partial, incomplete, biased by interests outside the

will and need of the patient or wishes of the patient” (Judgment No. 679-18-JP/20, 2018).

Informed consent “Is a right of the persons suffering from a disease, and of the persons responsible for the patient when the patient could not give it to make a decision about the medicines, procedure or treatment to be followed” (Judgment No. 679-18-JP/20, 2018). It is the parents, in the case of infants, who make such decisions violating their intersex identity we carry the fear of ignorance because the first questions arise: what kind of clothes will he/she wear? Do I treat him/her as a boy or a girl? What name do we identify him/her with? How do I present him/her to society?

The Court also determines the principles of proportionality and futility in medical treatments or interventions. Proportionality is “Analyzing and weighing the positive and negative effects of treatments and medications on the lives of patients and their families” (Judgment No. 679-18-JP/20, 2018). Undoubtedly, it is negative to assign a sex gender without there being a danger to the life of the infant or adult as it would be negligent.

Futility “is the submission to a treatment or intervention that has no positive effect on the disease and confronts the patient with adverse effects, in such a way that it can be considered as a waste of resources and time” (Judgment No. 679-18-JP/20, 2018). It is emphasized that being intersex does not constitute a pathology since intersex persons could well develop a normal life until they reach an age of maturity and decision on the sex, they wish to adopt whether it is male, female, binary or intersex.

Comprehensive care is “The right to care, to be cared for and to be cared for, which in this case, corresponds to the State” (Judgment No. 679-18-JP/20, 2018). The argument that destroys the hegemonic power and the very traditional

bases of medicine in curing pathologies, a range of new forms of medicine that seek to protect, care, prevent, etc., is opened.

The IACHR 2015 presents the report “Violence against LGBTI persons” for the constant violations of Human Rights “Irreversible surgeries of sex assignment and genital normalization, involuntary sterilization, excessive medical examinations, photographs and exposure of genitals, lack of access to medical information or medical records, delays in birth registration” (IACHR, 2015). Medical violence is any intervention from hormonal to surgical that is practiced on intersex people unnecessarily to establish a binary standard without danger to their lives.

The aggravating factor of these practices is that they are not performed only once “It is a series of visits to the operating room (which repeatedly expose children to the inherent risks of anesthesia and surgery during childhood) and the recurrent use of dilation devices or hormone administration” (IACHR, 2015). Certain actions, which could well constitute crimes, are inconceivable, the IACHR recommends 4 criteria to its States to eliminate all practices that violate the human rights of intersex persons:

1. Training of medical personnel to provide adequate treatment to intersex persons and their families.
2. Creation of multidisciplinary groups for support and counseling of families with intersex children.

National awareness-raising on the short- and long-term effects of “normalization” interventions for intersex children. Educational campaigns with the Ministry of Education to break down stereotypes, stigmas and invisibility surrounding intersex people. (CIDH, 2015).

Medical violence disguised as a “medical emergency” does nothing more than violate rights such as identity, health, freedom, equality, free

development, prohibition of torture, and cruel, inhuman or degrading treatment. Such interventions in newborns or intersex adults are unnecessary, therefore these practices are a reflection of a conservative, dualistic, sexuality, hierarchical and hegemonic society that seeks to follow a discriminatory, homophobic, misogynist and even sexist system.

Thanks to all of the above, it can be interpreted that although intersex people are a minority, it is the legal and moral duty of the experts in social sciences and even more of the jurists and academic experts to follow the example of the activism of the LGBTI population that has been invisible to follow an order and prototype that has been imposed on society as “normal” and everything that is outside of it, considered as flaws or flaws by a majority that approves it.

### **Comparative legislation on the advancement of registry statutes to allow for the recognition of non-binary or intersex sex.**

Fundamentally, the recognition of the third gender and its denomination has been a constant struggle of the LGBTIQ+ collective, leading it to conceptualize the people who belong to it as: intersex, non-specific, Hijras, eunuchs, X, O, and non-binary, which has varied according to the culture of the place and has been reflected in the different identification documents such as identity cards, birth records, marriage certificates, driver's licenses.

It is worth noting that in 2007 the activist Sunil Babu Pant appeared before the Supreme Court of Nepal and in a sentence ordered to establish the gender (O); “It was systematized that the identity documents contain a third gender, the terms to be used were “Other” or “Anya” (Palomares & Rozo, 2019). Such documents covered birth certificates; thus, Nepal

is considered the first country in the world to recognize a third gender.

Similarly, the case “Khaki vs. Rawalpindi” in 2009 is known by the Supreme Court of Pakistan where it commutes to update and demonstrate the number of eunuch population to end discrimination through the incorporation of the third sex “There were only columns for men and women now columns for eunuchs should be included, state confirming by medical evidence” (International Commission of Jurists, 2018).

Identically, the third gender “neutral” is approved for eunuchs and hijras. “They are men who act as women maintaining a third gender role that has been institutionalized through tradition (Rehan et al., 2009). The Supreme Court of India 2014 established this after the ruling in the case “National Legal Services Authority vs. Union of India and Others”, without requiring medical examinations or court decisions to access sex or gender neutrality.

The Australian Government in “Guidelines on the Recognition of Sex and Gender” has been clear in stating that binary sex is not necessary in identity-based identification documents. “It recognizes the right of people to identify themselves and at the same time be recognized with a sex different from the one they were born with, and this may not be strictly male or female, but reflected in their ID” (Australian Government, 2013). Premise supported a year later under the judgment T-622/14 where the sex “Intersex “intersex status has been created as a third possibility to exist in the public record” (Garcia & Garcia, 2017, p. 132).

Even, the New Zealand Parliament in 2021 rejects requirements such as medical tests or court rulings for access to “Intersex” sex change based on the right to self-identification within registration documents “According to the New

Zealand Ministry of Home Affairs: The sex of a child can be specified as undefined if it cannot be determined whether the child is male or female” (DW, 2017).

Also, the Netherlands and Malta within identification documents recognize intersex sex “Maltese society is progressive, in this respect: since 2015, the definition of a newborn's gender can be postponed until his or her identity is fully clarified. This, thanks to the Gender and Sex Identity and Gender and Sex Expression and Identity Act” (DW, 2017).

The Federal Republic of Germany 2013 had adopted to leave blank when people do not belong to the binary sex “it was allowed to leave empty the female or male sex boxes marked on the birth certificates of newborns, in the interest of giving the freedom for the person to assume his or her sexual identity during adulthood” (teleSURtv.net, 2018). In addition, in 2017 it includes the “diverse sex” in legal documents, since leaving it blank created discrimination “treating the person as a marginal data, and not as a being that is identified before the legal system” (Palomares & Rozo, 2019).

In the United States and Canada, the third sex is known as non-binary or fluid for the issuance of passports, on the contrary, States such as Arkansas, Maine and Minnesota are only allowed for driver's licenses, in Colorado, California, New York, Ohio and Washington opens the possibility of opting for intersex sex only under rulings of judges.

In 2021 the President of Argentina Alberto Fernandez under decree 476/2021 makes it possible for “national identity documents (DNI)” to use the letter “X” when citizens do not belong to a traditional sex gender. “The right to identity has a direct and indissoluble link with the right not to suffer discrimination, to health,

privacy and to realize one's life plan” (Fernandez, 2021).

The Colombian Constitutional Court in 2022 recognized for Dani Garcia as the “non-binary” sex in the identity card and urges them to “Include the non-binary category among the sex markers in the citizen identification scheme (...) so that non-binary people can opt for this category” (Colombian Constitutional Court, 2022).

European and Oceania countries were the pioneers in advances in terms of human rights of intersex people because it is enough to remember the history before the nineteenth century in France, Herculine Barbin developed as a woman, by coercion of doctors and the church adopted the name of Abel Barbin, her only sin was the secret of confession to her spiritual guide to trigger discrimination and later her suicide because she did not fit into a binary society, the main argument her genitals gave to penetrate and not to be penetrated.

Being intersex was medically and legally correct until before the 19th century, hence the denomination of “Hermaphrodites”, after what happened with Herculine Barbin, doctors and midwives had to make sure that the newborns fit perfectly within the binary sex that was established as a rule and not as a human principle “It is still thought that some of them insult the truth: a passive man, a virile woman, people of the same sex who love each other... may be willing to admit that this does not constitute a serious attack on the established order” (Foucault, 2007).

Most of the cases studied have a common stem, the various presentations of constitutional actions that have been analyzed and that with their subsequent ruling have given way to the recognition of the third sex according to the denomination that each culture and government

has given it, in Ecuador the possible path for the creation of the third sex could be found under the figure of the “action for non-compliance” and the “action of protection”.

When referring to the Action for Non-Compliance, it is said that the tutelage that tries to protect this action is divided into two groups: the first one is the use of norms that are in the legal system, requesting directly to the Constitutional Court to order an entity to comply with a certain norm; also the execution of norms, sentence or reports of “International Human Rights Organizations” the object is then the legal security.

Inclusively, the legal procedural relationship is made up of a triad: Constitutional Court, active legal standing (intersex persons) and passive legal standing (State or the Civil Registry) “The action for non-compliance shall proceed against any public authority and private natural or legal persons when they act or should act in the exercise of public functions, or provide public services” (LOGJCC, 2009).

One of the essential requirements is the prior claim that will have to be executed before the Civil Registry “For the non-compliance to be configured, the plaintiff will previously claim the compliance of the obligation to the person who must satisfy it” (LOGJCC, 2009). The claim is the request presented by the citizen to the competent entity, which must answer within 40 days, if it does not do so, the non-compliance will be configured, in the specific case, it must be supported with the application of the “Advisory Opinion 24-17” called “Gender Identity and Equality and Non-Discrimination to same-sex couples” of the Inter-American Court of Human Rights.

The fulfillment of the obligation, in this case, must be clear, express and enforceable, but first, it is necessary to describe the core of what is

stated in paragraph 148 of the Advisory Opinion from paragraphs 102 to 169, which states:

Similarly, the Committee on the Rights of the Child has noted that it condemned the imposition of 'treatments intended to change a person's sexual orientation and that intersex adolescents are subjected to surgical interventions or forced treatment. It urges States to eradicate such practices, to repeal all laws that criminalize or discriminate against persons based on their sexual orientation, gender identity or intersex status, and to adopt legislation prohibiting discrimination on these grounds (CIDH, 2017).

The Constitutional Court of Ecuador has already ruled in Ruling No. 36-15-AN/20 on what should be understood by clear, express and enforceable obligations:

**Clear:** “If the elements of it are determined or easily determinable. The obligation must be understandable, its content evident and not require extensive interpretations to identify it” (CCE, 2020). The active subject, passive subject and obligation are determined in the norm, the passive subject (Ecuadorian State) the active subject (intersex children and adolescents).

**Express:** “When it is drafted in precise and specific terms so as not to give rise to misunderstanding. The content of the obligation must be manifestly written in the law, the obligation must not be implied or the product of an indirect inference” (CCE, 2020). The Opinion is expressed in stating that it “Urges States to eradicate such practices, repeal all laws that criminalize or discriminate against persons based

on their sexual orientation, gender identity or intersex status” (CIDH, 2017).

**Requestable:** “As there is no time limit or condition pending verification” (CCE, 2020). That is to say that compliance can be demanded directly without being subject to time or conditions to execute such obligation, in the advisory opinion the obligation of the State to eradicate practices (medical violence) based on the identity of intersex persons.

The action for non-compliance is a constitutional guarantee that is presented directly before the Constitutional Court, the problem lies in the admission room since in art. 56 of the LOGJCC on the grounds for inadmissibility first paragraph states “If the action is filed to protect rights that can be guaranteed by another jurisdictional guarantee” (LOGJCC, 2009). The effectiveness of the action for non-compliance and its subsidiary nature calls into question whether the action for protection is another way, since it protects other rights more broadly, while the action for non-compliance specifically protects legal certainty.

The Action of Protection by Omission is one of the 5 jurisdictional guarantees of reparatory nature, where it protects all rights except those protected by other guarantees: the right to integrity (habeas corpus), right to the protection of personal data (habeas data), right to due process (extraordinary action of protection), etc., in this case, the violated right is the identity of intersex persons that are part of the catalog of rights that when violated can activate the action of protection.

Regarding the subject matter to be challenged, Article 41 of the LOGJCC states that such action shall proceed against “1. Any act or omission of a non-judicial public authority that violates or has violated rights, that impairs, diminishes or nullifies their enjoyment or

exercise” (LOGJCC, 2009). Omission coming from the Civil Registry by not wanting to include in the identification documents the non-binary sex for an intersex child.

Regarding the active legal standing, it would be the parents of the newborns who will have to file the action for protection as representatives of their intersex children and in the case of adolescents they could file directly so that a substantial legal relationship is established, in addition, there is no term for the judges of instance to hear it.

Other scholars may assure that the presentation of the “Action of Protection” before the judges of instance could be declared inadmissible because the claim would be the declaration of a right “Under the conception of the Constitutional State of Rights and Justice, the constitutional rights are not declared but protected given that they pre-exist, the only thing that is declared in the actions are the violations that occur to the constitutional rights” (Decision No. 102-13-SEP-CC, 2013). Where it can be seen that the ordinary justice system exists for the declaration of rights but not the constitutional justice system.

However, the open clause found in Article 11.7 of the Constitution states that “The recognition of the rights and guarantees established in the Constitution and the International Human Rights Instruments does not exclude those derived from the dignity of persons (...)” (CRE, 2008). Indeed, it is possible to request the protection of rights that are not recognized in the SRA or in the International Treaties, such as the right to intersex identity, which is indispensable for the full development and execution of the life project.

In an accessory way, the sentence of the equal marriage of Dr. Ramiro Avila, reminds that it was not necessary an amendment or constitutional reform to article 67 of marriage in Ecuador, it is enough the control of conventionality to refer to the Advisory Opinion

24-17, that is to say, the norm in question is not prohibitive, it is still permissive, so when reading the content of article 67, it is mandatory to read the Advisory Opinion as part of this integral of the same based on the identity of the intersex.

With all of the above, it could be established that since Ecuador is a “Constitutional State of Rights” and the Magna Carta is the main instrument for the guarantee of Human Rights, whose purpose is to protect and promote the dignity of persons, it can be considered in this case that intersex persons could resort to the mechanisms that both the CRE and the LOGJCC recognize to comply with these rights.

Activist groups, parents, siblings, friends and society, in general, should activate the different legal channels that are within our reach to purge all kinds of torture, mutilations and degrading treatment suffered by this minority group and that undoubtedly places this human being as a second category condemning him/her to systematic discrimination.

## **DISCUSSION**

From what is mentioned in the document, it is clear that diversity is synonymous with strength, courage, tolerance, unity, art and life in a chaotic, totalitarian, discriminatory and monotonous world. The key begins with Inclusive Education, which does not seek to create special programs or centers, but rather to include everyone in regular programs or schools according to the needs of each student and to deconstruct in the new generations that gender diversity is not a disease or disorder, hence the need to improve education without discrimination at all levels, which is translated into people who respect and coexist with the LGBTIQ+ community.

Likewise, it is important to establish a precedent for new professionals in different areas to develop, research and socialize the problems of minority groups and especially intersex people

who have been invisibilized and categorized by the fateful policies of governments as second-class citizens or as pathology easy to eliminate, the possible solutions should always be aimed at human dignity and human rights because being gay, lesbian, trans, intersex or queer does not make them fewer people or less human.

For this reason, it is the duty and moral responsibility of law and medicine professionals to join the causes and social struggles for the vindication of rights and thus, achieve a more just, egalitarian and inclusive State, forgetting practices that transmute the principles and ideals in closed and cold rules that monopolize the truth and dignity treating it as a power to be granted to a certain group of society (heterosexual), the purpose should always be to live in community under a vision of diversity to sustain the Good Living, premises that can be executed through the creation of the third non-binary or intersex sex and around the same public policies in health, education, labor, social security on a new form of vision, deconstructing the traditional binary system for a new inclusive and dignified system for all.

## **CONCLUSIONS**

Identity as a Human Right is the faculty of every person to individualize in a personal and collective way within society, enjoying in a first moment the internal identification, be it a physical, biological, sexual, registry, etc., so that in a second dimension it can be externalized through the life project that goes hand in hand with the “free development of personality” where the interest of third parties cannot intervene. However, the hetero-normative-medical model has prevented intersex persons from exercising the aforementioned right, since, at the chromosomal, gonadal and genital level, the latter are not part of the binary sex: male or female and, illegitimately, doctors, parents and public officials force people to renounce their intersex



identity to give them a traditional sex identity through interventions and undignified treatments.

Medical violence has been dressed as “medical urgency” within the ethics committees of the houses of health, professionals who not only belong to the area of health but of different branches, that is to say, a multi and interdisciplinary team loaded with a hegemonic power that as if it were a pleasure the sexuality of people, approve the realization of surgical or hormonal interventions to configure a reproductive organ as similar to a male or female with the function of penetration forgetting the future generic sex characteristics that people can adopt or identify themselves. The protocols in Ecuador have not helped significantly since the fact of naming it as “Disorders of Sexual Development” (DSD) constitutes clear discrimination guidelines as if it were a pathology being studied, a premise that undermines or annuls the recognition, enjoyment or exercise of the right to “Identity” and “free development of personality”. Therefore, these interventions could not be handled as if they were aesthetic processes, without the consent of children, adolescents or intersex adults, constituting an unnecessary practice to establish a binary standard without endangering the life of the intersex person.

The creation and regularization of the third sex within the legislation begins in 2007 in Nepal where the identity documents including birth certificates should contain the sex “O” for people who did not belong to either male or female sex, depending on the geographical location and culture of the place was attributed different conceptualizations as intersex, non-specific, eunuch, hijras, non-binary, etc., Countries such as Pakistan, India, Australia, New Zealand, Malta, Holland, Germany, United States and Canada already recognize the third sex in the identity documents, in LATAM Argentina has expressed it with the sex “X” in the ID cards and by 2022 the Constitutional Court of Colombia

recognized the non-binary sex in the identity cards.

The recognition of intersex identity has been based on the presentation of constitutional actions before the Courts or Tribunals, in Ecuador, the jurisdictional guarantees provide two paths: the “Action for Non-compliance” protecting the legal security orders the compliance of sentences or reports that come from International Human Rights Organizations, the Advisory Opinion 24-17 of the IACHR contains an “obligation to make clear, express and enforceable” to eradicate all surgical intervention or forced treatments that criminalize intersex people. The Protection Action is the second way to protect the Human Right to Intersex Identity when the Civil Registry refuses to include in the identification documents such conditions, however, the open clause of dignity recognizes that the Rights are embodied in the Constitution, International Treaties and “any other right that arises from the dignity of individuals, communities, peoples and nationalities” (CRE, 2008).

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