

INTERSEX PEOPLE IN ITALY  
BETWEEN SILENCE OF HARMFUL PRACTICES  
AND VIOLATION OF THE BEST INTERESTS  
OF THE CHILD

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**I. INTRODUCTION**

This study analyses selected issues surrounding legal protection of intersex persons in Italy – i.e. the persons who are biologically ‘in between’ male and female (Greenberg 2012). In particular, this research investigates whether the current practice of cosmetic surgeries aiming at *normalising* children’s genitalia and bodies infringe upon the best interests of the child. It is argued here that the application of the principle of equality in its ‘anti-subordination’ perspective could enhance legal recognition and protection of the rights of people who have intersex conditions. The anti-subordination perspective shows the tension that the law presents in dealing with sexualities and genders other than those falling into the dichotomy male-female. The intersex condition provides a rhetorical device for challenging traditional notions of sex, gender and sexual orientation that the law in Italy has not welcomed so far.<sup>1</sup>

In Italy intersex people are particularly vulnerable in the absence of a specific legal framework protecting their condition, and face a number of significant organisational, procedural, economic, emotional and psychological barriers in addressing access to justice. For instance in Italy, medical procedures impose cosmetic surgeries on intersex children to alter their genitalia, so that their bodies can conform to a perfect male or female body, leaving intersex people in a state of social and legal frailty.

Nevertheless the principle of equality in its traditional interpretation – i.e. as prohibition to discriminate and as a right to differ – seems unable to protect intersex children from harmful practises on their genitalia. The principle of antidiscrimination does not fully guarantee protection for people who have intersexual conditions because intersexuality is not recognised as a ground of discrimination. In addition, the protection of diversity stigmatises someone because

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<sup>1</sup> For instance, also in Italian legal feminist academia, the binary structure continues to be considered as strictly ‘necessary’. See Pitch (1998) significantly titled *Un diritto per due*, A right for two, with the pre-assumption of the gender dichotomy male/female.

he/she differs from the *norm* and from what is considered as the *normality*. On the contrary, the application of the *anti-subordination* approach could undermine power structures which privilege *body-conformativity* to the male-female dichotomy with the result to define as *other* and *inferior* everyone – such as intersex – whose body does not conform to the dichotomy (Pezzini, 2012).

Pezzini (2009) points out that the legal basis of an anti-subordination principle is to be found in the constitutional norms related to gender, or rather in gender-sensitive interpretation of the Italian Constitution. Indeed, a general reading of the Italian Constitution, and in particular of the norms regarding the work of women (art. 37), the family (art. 29, 30, 31) and political rights (art. 48), stresses the importance of transforming gender relations. It also foresees the end of women's subordination to men, reversing the 'direction' in the construction of gender relations. In fact, until the approval of the Italian Constitution in 1948,<sup>2</sup> gender relations had been characterised by discrimination against women and the subordination of women to men. This social order was considered *natural* and so it became *legalised*: gender differences produced by gender disparities were used as a justification for further inequalities introduced by the law itself (Pezzini, 2012).

Following Pezzini, I would propose a similar route concerning the position of intersex people in a binary system which states that every person must be either man or woman, either female or male, and thus, indirectly imposes early surgeries for 'normalising' the bodies which do not conform to the male/female standards. Instead of treating intersex as *inferior*, or as subject of welfare, health, charity public programs, the antisubordination principle could guarantee them as autonomous individuals with self-standing rights and freedom. The same principle could also undermine the power structure which defines a perfect body – i.e. a body perfectly conform to what is considered a male or female body –, as 'normal' and as a 'parameter', in order to define the *other* which is assumed to be *inferior*. Applying the anti-subordination perspective could overcome the dichotomy male-female, subvert the subordination of intersex persons to such dichotomy, and at the same time, recognise intersex condition as one of the variances of human being. As a consequence the law will grant intersex persons autonomous rights and freedoms and in particular the right to oppose to medical practices which harm their genitalia.

In addressing the barriers to access to justice for intersex children, the study offers an attempt to overcome the harmful practises, in order to guarantee the respect of intersex children and will conclude that a new reading of equality principle with a focus on anti-subordination seems to be able to guarantee the rights of intersex people (Pezzini, 2012).

<sup>2</sup> The Italian Constitution came into force on January 1<sup>st</sup> 1948.

The study is divided into two sections. The first section offers an analysis of the Italian scenario including medical practises and protocols regarding the surgeries performed on intersex children; the Italian academic debate, and the development of the Intersex movement. The second section looks at national and foreign good practices and proposes positive actions and developments which would enhance the rights of people with intersex condition.

## II. INTERSEX PEOPLE IN ITALY

In the Italian legal culture intersex children are considered as *abnormal*, and *different* because do not fall into the binary model of male and female. One of the consequences of the binary approach is that intersex born children undergo surgeries to *normalise* their body to fit into the male/female dichotomy. Given that their bodies are considered as having the need to be *repaired*, intersex children are assumed to be *inferior* when comparing to male or female children.

Notwithstanding the existence of invasive medical procedure to normalise intersex body and the lack of substantive legal framework protecting the rights of intersex people, the academic debate on such issues is limited in Italy. The academic interest regarding issues that intersex people face, has emerged only in the last five years<sup>3</sup> during which scholars have organised and delivered seminars,<sup>4</sup> conferences,<sup>5</sup> academic articles in a variety of disciplines,<sup>6</sup> as anthropology, (Crocetti, 2013, 2015) sociology, (Balocchi, 2012, 2015), philosophy (Bernini, 2010, 2014; Busi, 2005, 2009, 2012) and law (Lorenzetti, 2014; 2015; Giacomelli, 2014). However legal and empirical studies concerned with practices and effects of the normalising surgeries

<sup>3</sup> In 2006, an international medical conference on Intersex was held in Rome (Cola and Crocetti 2011).

<sup>4</sup> The Research Centre Politesse (Politics and Theories of Sexuality) of the Department of Philosophy, Education and Psychology, University of Verona organised many seminars between 2013 and 2015: "Intersex/dsd: biopolitics of gender, normalization and subjectivation" (literally, *Intersex/dsd: biopolitica del genere, patologizzazione, normalizzazione medica e processi di soggettivazione*), with Michela Balocchi and Beatrice Busi (9 October 2013) on the historical and sociological analysis of people with DSD/intersex conditions; "Male or female? Is sexual binarism a legal must?" (literally, *Maschio o Femmina? Il binarismo sessuale è davvero indispensabile al diritto?*), with Anna Lorenzetti, Alessandra Cordiano and Matteo Nicolini (6 December 2013) on the legal issues; "Intersex/DSD: medicalization and political subjectivation", (literally, *Intersex/dsd: medicalizzazione e soggettivazione politica*, with Elisa A.G. Arfini and Alessandro Comeni (14 February 2014) on critique of the abuse of intersexuality as a rhetorical device to explain the social construction of gender and on the intersex movement; "Intersex: International Developments" (5 May 2015) lecture of Morgan Carpenter (OIIL Australia).

<sup>5</sup> The first conference on Intersexuality was held in Florence on 24 September 2010 with the title "Intersexuality in the Italian Society" (literally, *L'Intersessualità nella Società Italiana*; in 2013 (16 November); in Bologna there was a conference on the "Medicalisation of gender body: intersexuality and DSD" (literally, *Medicalizzazione del corpo di genere: Intersessualità e DSD*); recently, in 2015 (1011 April) in Perugia, there was the first legal conference on the Intersex Issues (the title was "Intersexualism and the Law: equality, rights, protections", literally, *Intersessualismo e diritto: uguaglianza, diritti, tutele*) organised by the Association Avvocatura per i Diritti LGBTI – Rete Lenford.

<sup>6</sup> See Conference proceedings of the national seminar on "Intersexuality in the Italian Society" (literally, *L'Intersessualità nella Società Italiana*) (Balocchi 2015).

performed on children are still under-developed. Above all, the absence of further academic and public debate represents a strong barrier for intersex children which are confined into cultural and social invisibility.

#### *Medical Practises and Protocols*

In order to fully grasp the complexity of intersex issues, it is important to analyse the Italian procedures and medical protocols which provide *normalising* surgeries and which are emblematic of the unequal consideration that intersex people receive.

Invasive cosmetic surgeries on intersex children are still being performed in many Italian hospitals. For example, female infants who were born with a clitoris that is considered as 'too large' receive clitoral reduction surgery.<sup>7</sup> Similar interventions are performed on children born with penis which appears atypical or smaller 'than the norm'. In general, the surgeries on intersex children are performed following heteronormative rules:<sup>8</sup> the protocols used in Italy require that children should be raised as males and they would be able to engage in heterosexual activity as adults (for instance, by penetrating a female's vagina). Following the surgery, male (XY) children who have functional testicles often see their ability to reproduce destroyed, rather than having themselves be raised with a penis that is considered smaller than the norm. For female, the primary emphasis is placed on maintaining reproductive capacity.

The reason of early surgery is based on the assumption, not supported by evidence (Greenberg, 2012, 21), that irreparable emotional and psychological trauma will derive from the child's growing up with atypical genitalia. Another reason encouraging the surgeries, is the idea that *abnormal* bodies need to be *repaired* and the only tool considered as to achieve this is the surgery.<sup>9</sup> A further motivation

<sup>7</sup> Doctors would remove the clitoris or reduce it to a size that they considered acceptable, even though the surgery might diminish or destroy the person's ability to engage in satisfactory sex.

<sup>8</sup> Similarly, this happens in others countries (Greenberg 2012; Sytsma 2009; Callahan 2009). In fact, according to Greenberg (2012, 5), "Although most intersex conditions are no disabling, pose no physical risk and require no medical intervention, infants with an intersex condition are often subjected to invasive cosmetic surgeries to alter their genitalia so that their bodies conform to a binary sex norm".

<sup>9</sup> Recently, see an Information brochure on CAH, *Congenital Adrenal Hyperplasia, (I.S.C., Opuscolo informativo)* realised by an Association of parents and supported by one of the most important Italian Private Hospital (San Raffaele Hospital, Milan, Lombardy Region); many Italian famous medicine societies supported it: Italian Society of Pediatrics (SIP), Italian Society of Preventive and Sociale Pediatrics (SIPPS), Italian Society of Pediatrics, Endocrinology and Diabetology (SIEDP); Italian Society of Adolescence Medicine (SIMA). It stresses that medical therapy is not enough to correct the external genitalia anomalies. Therefore, it is necessary to undergo surgery in order to reduce the clitoris and to correct the aspect of the vagina. It also stresses that generally, surgery should be performed in the first year, to avoid that the child could be disturbed by confusing genitalia. It also refers to the eventual "revision" of surgery during puberty: thus, it implicitly admits that there are additional surgeries to be performed. The goal of the early surgery (or better surgeries) is twofold, on the one hand to correct the anatomic alteration (cosmetic aspect) and on the other to consent regular sexual intercourse (functional aspect); p. 16.

for *normalising* the body of the child is to ease the psychological discomfort of the parents and to enhance their ability to bond with their child. Because intersex children are considered *atypical* and in some way *abnormal*, their condition is hidden from society and their birth is shrouded in shame and secrecy. The parents are often not correctly informed and even when some information is provided, they are often advised not to tell their children of their intersex condition or medical history (Streuli et al, 2013; Greenberg, 2012; Sytsma, 2009; Callahan, 2009).

Although in Italy health is recognised as a fundamental right,<sup>10</sup> there are medical procedures which attempt to eliminate evidence of intersexuality by surgically altering infants so that they conform or blend into a medically created definition of 'normal' genitalia. This stresses a double paradox. First, the medical and surgical therapy does not resolve the *problem*, because the person remains intersex for the whole life. In fact, only the body and the external genitalia can be modified, but this does not (and will never) change the intersexual condition which cannot be totally eliminated (for instance for chromosomes). Secondly, according to some studies (Greenberg, 2012, 18), the person's health gets worse after the therapy. In fact, surgical interventions cause more physical and psychological trauma to intersex persons than letting them grow up with atypical genitalia. Also, surgery may lead (and usually leads) to irreversible harm on the bodies which are physically violated.

The studies on people subjected to early surgeries recognise not only the stigma and the psychological trauma, but also lifelong physical complications, without proof of any benefit to the child. For instance, these medical procedures often lead to a significant number of problems: they may result in infection, scarring, genital pain or discomfort, incontinence, and other severe physical complications; they also may render women incapable of experiencing an orgasm. Medical procedures performed on intersex children may also cause cosmetically unacceptable genitalia that create a sense of refuse in the person (Greenberg, 2012; Sytsma, 2009; Callahan, 2009). Finally, additional surgeries are often required for several years after the birth in order to conform the body to the natural growth and the person is forced to live a *pathologised life*. In fact, for the rest of their life intersex persons receive medical checks (or surgeries) and take in hormones which are not more naturally produced after the surgeries because of the ablation of glands and gonads. In addition, persons who take hormones suffer of changes of behaviour and temper, and psychological stress (Greenberg, 2012, 18).

Although the existence of a legislative proposal which suggests to perform surgeries only when it is strictly necessary to save the life of the child or when

<sup>10</sup> In the Italian Constitution, see art. 32. In the EU context, access to health and social services is considered as a fundamental right and a key element of the so-called European social model and of the national Welfare State model, as it is explicitly stated in several Member State constitutions and incorporated into the European Union Charter of Fundamental Rights (art. 35). We should also consider the United Nations Convention on the Rights of the Child.

there is an actual risk to the child's physical health,<sup>11</sup> still Italian law does not offer a comprehensive framework to protect intersex persons. Recently, a soft law instrument was introduced. The National Committee for the Bioethical issues approved the 'Guidelines for the treatment of child affected by the Disturb of Sex Difference.'<sup>12</sup> It states the moratorium for surgeries which are not urgent and the respect of integrity of the body of the child.

Case law is limited too. The most famous case involved a child whose parents argued that medically unnecessary cosmetic genital surgeries should be delayed until the child would reach the puberty. Considering the best interests of the child, the court named a guardian (literally in Italian, a *curatore speciale*) in order to decide which types of cosmetic genital surgeries could be performed. The idea of the court was that the best interests of the child suggests to perform genitalia surgery, while the approach of the parents was considered unlawful.<sup>13</sup>

An important barrier to access to justice for intersex people is linked to above mentioned surgeries. Medical services often do not keep records of surgeries performed on intersex individuals and on long-term effects that the surgeries have. For instance, records about early surgeries cannot be found because in the past surgeries performed without being recorded in medical registers. In addition, when records have been taken, the data are not available to be consulted. Therefore, intersex people who had surgeries do not have access to their medical records, and, as a consequence, it is difficult and very expensive to start lawsuits (Lugarà, 2015). All these elements represent significant barriers for intersex persons addressing the justice and place them in a subordinate position comparing to male/female persons.

#### *The Way to Assign the Sex and the Italian Legal Scenario*

The way in which sex is assigned in Italy raises particular concern because the procedure contributes to place intersex persons in a position of subordination comparing to male/female persons. In Italy, a medical attendant establishes the sex at the birth according to the external genitalia, and records it on the birth certificate which is then included in the civil registry. In general, when a child is born with a penis with prescribed size then the child is registered as male. When a child is born without the penis then is registered as female and no other biological factor is considered. The use of a sex marker other than the binary male/female indicators

<sup>11</sup> A.C. 246; A.S. 392; A.S. 405, proposal for amendment of law n. 164 of 1982 on sex reassignment, presented in the XVII legislature (*Norme in materia di modificazione dell'attribuzione di sesso, "Provisions on change of sex assignment"*). It requires the moratorium of surgeries, except in the cases where it is strictly necessary to save a child's life.

<sup>12</sup> National Committee of Bioethics, *The Disturbs of Sex Differentiation*, opinion of 25.2.2010, available from <http://www.governo.it/bioetica/pareri.html> (Comitato nazionale per la Bioetica, *I disturbi della differenziazione sessuale*). See Osella, in this book.

<sup>13</sup> Trib. min. Potenza, 29.7.1993, in *Riv. it. med. leg.*, 1996, 299, and in *Dir. fam. e pers.*, 1993, 1199.

is not allowed;<sup>14</sup> according to the Italian legal system, the child must be assigned to a male or female sex<sup>15</sup> also in the case of ambiguous genitalia; and the name must be clearly correspond to the sex.<sup>16</sup> In fact, in Italy there are male or female names, generally recognised with the final letter.<sup>17</sup>

Another issue linked to above mentioned aspect is whether intersex people may amend birth certificates reflecting the change of sex. In reality, rules allowing people with an intersex condition to amend the sex designation on the official registers are not found. Thus, the only alternative for intersex people is to rely on the law on transsexualism, which is a long, confused, complicated and uncertain process<sup>18</sup> paved by a significant number of intermediate steps (Lorenzetti, 2013; Cardaci in this book) and resulting in a procedural and an economic barrier for intersex children. In addition in a context where samesex unions are not legally recognised, a further issue that intersex people could face in Italy is whether one can establish a person's sex for purposes of marriage. But the complete absence of the public debate on intersexuality in Italy relegates this issue to invisibility.<sup>19</sup>

<sup>14</sup> However, in some Hospitals, the form to be filled considers two sexes (male or female), but includes three possibilities to describe sexual characters and genital (male sexual characters; female sexual characters; ambiguous sexual characters).

<sup>15</sup> See the Regulation governing the registration of civil status events: Decree of the President of the Republic, no. 396 of 3 November 2000 "Regulation to revise and simplify the civil status registration system, in accordance with Article 2(12) of Law n. 127 of 15 May 1997", available from: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2000-11-03;396!-vig>. The registrar records (Article 28 of D.P.R. n. 396/2000) any declaration of birth received by the registrar who draws up a formal document known as *atto di nascita* (birth certificate). In fact, D.P.R. no. 396 of 3 November 2000 (art. 30) asks the declaration of the sex (art. 29).

<sup>16</sup> According to the art. 35, no. 396 of 3 November 2000, child's forename must correspond to the sex.

<sup>17</sup> For instance, for the female names, the presumption is the finale 'a'; the male names usually end in 'o'. Some exception can be stressed, for example, for foreign names or for some names that can be used both for males and for females (Èlia, which is a female name; or Elia which is a male name; Andrea which can be only used as a male name, except in the case of foreign child which can use it for female). Both male and female names can also end in 'e' or even with a consonant.

<sup>18</sup> Transgender people may change sex according to the national law. Italy introduced regulation on sex reassignment surgery and recognition of gender reassignment in identity documents in 1982 (Law 164 of 1982 which states Provisions on sex assignment). This was amended in 2011 (with the legislative decree no. 150 of 2011) hence going against the declared goal of simplifying the procedure. Now the procedure to change sex is longer and more expensive, since it asks for a double judicial procedure. Law 164/82 does not expressly require a complete body change on primary sex characters and the sterilisation as necessary condition for gender reassignment. In fact the law provides that surgery must be authorised when [so, if] necessary (art. 3, former law 164/1982, now, art. 31, Legislative decree 150/2011). However, cases-law shows the opposite. Court of Appeal Bologna, 22.2.2013; Tribunal of Rome, 8.7.2014, n. 34.525; Tribunal of Vercelli, 12.12.2014, n. 159; Tribunal Catanzaro, 30.4.2014. *Contra* see Tribunal of Rovereto, 3.5.2013 and the recent Court of Cassation no. 15138/2015. The decisions are available in: [www.articolo29.it](http://www.articolo29.it). Judges often before granting an official new name and sex change require that the person who asks for gender reassignment should be permanently sterilised even when the transgender person is not will to do so. There is a pending question before the Constitutional Court (Tribunal Trento, ordinance 19.8.2014).

<sup>19</sup> Although in other countries the question is whether a person can marry a man or a woman, in Italy the weak debate on intersexuality and the non recognition of same-sex unions do not involve this issue.

*The Parental Decisions and the Infringement of the Best Interests of the Child:  
the Parental Consent and the Selected Abortion*

A significant barrier in addressing the justice for intersex person regards the parental decisions over the intersex child's body, in particular regarding the parental consent and the selected abortion. Overall when the surgery is not strictly necessary to save the life of the child, the decisions to perform early surgeries infringe upon the rights guaranteed by the Italian Constitution, including the right to life, to self determination, to health protection and to reproductive choice.

The consent of both parents is required to perform surgeries on intersex child. In order to avoid inappropriate decisions, parents should be provided complete information about their child's condition and offered appropriate professional counselling and support. Although a minority of parents (try to) decline or postpone surgery on their children with atypical genitalia, the practice shows that most parents still give consent to the surgery. The intersex child is not allowed to refuse harmful practices when parents consent to surgeries with the result to close the door to any future judicial actions against the hospital and the doctors who performed the surgery. Therefore, the intersex person who looks for redress needs to rely on the parents who gave the informed consent to the surgeries with the risk to weak familial ties and further emotional and psychological barriers.

The question is whether parents, in consultation with doctors, should have the legal power to consent to genital modification surgery on behalf of their children with an intersex condition. Another question is whether the parental consent is adequate to protect the child's best interests. The law presumes that parents will correctly weigh the potential benefits and risks of medical procedures and make decisions that are in the best interests of their children. However, complete deference to parental decision may infringe upon child's best interests. In fact, the parents cannot be in the best position to determine what treatment would be in their child's best interests because it can be difficult for them to separate their child's interests from their own interests in having a *perfect* child, with a *perfect* body. In addition, parents might be influenced by social norms and stereotypes which state the *necessity* to normalise the appearance of the body because a life with an intersex condition is not considered worth living.

Surgeries are performed even if parents could not consent every surgeries and doctors could not perform surgeries in the case of risk of permanent damages or without a real medical necessity for the child, even with the parental consent. These aspects represent concrete barriers in addressing access to justice for intersex children, because intersex children need first to address his/her parents who gave the consent with an emotional and psychological barrier and with the risk to weaken the familial links. The complete deference between the children's and their parents' decision on performing surgeries may create inequality for intersex children, that antisubordination principle could remove.



A related concern is found with regard to parental decisions about selected abortions which follow the prenatal diagnosis that discovers the intersex conditions of the foetus. Although such prenatal tests are in some cases used to identify conditions that may be treated in utero, often they are used as evidence for deciding to abort foetuses<sup>20</sup> that carry mutations associated with intersexuality syndromes.<sup>21</sup> Activists stress that selective abortions could be considered as a dangerous step toward eugenic because their primary effect is to select the perfect foetus and to avoid intersex children. Selective abortions will reduce the number of intersex people and their visibility and numeric presence in the society.<sup>22</sup> This is also highly problematic because the visibility of intersexual persons is crucial to overcoming a legacy of prejudice and social marginalisation.<sup>23</sup>

The fact that prenatal diagnosis is followed by selective abortion is highly problematic and it is driven by misinformation. In fact, medical professionals suggest that abortion in cases of 'foetal deformity' is due to the view that life with an intersex condition is not worth living. The mother who must take prenatal treatment and who decides to undergo an abortion could be mentally and emotionally vulnerable and could be influenced by social norms and stereotypes which state the importance of having a *perfect* child, with a *perfect* body, because a life with an intersex condition is not 'worth living'.

All the above medical practices confirm the unequal placement for intersex children in a hypothetical hierarchy where the parameter is the male/female body and the intersex children are considered as an exception. This inequality needs to be removed and the antisubordination reading of equality seems able to guarantee the full respect of intersex rights and freedoms.

#### *Intersex Movement*

A basic analysis of the Italian intersex movement is necessary in order to fully understand the context, even though a full discussion of the different approaches is beyond the scope of this paper.

While the LGBT movement has gained visibility and strength, the Italian intersex movement is actually unknown in the Italian social and political arena<sup>24</sup>

<sup>20</sup> In Italy, the abortion is allowed by the Law 194/1978 in cases of danger for the mother's physical and mental health.

<sup>21</sup> This is the opinion of the National Committee of Bioethics: <http://www.governo.it/bioetica/pareri.html>.

<sup>22</sup> This is the position of Alessandro Comeni (Collettivo Intersezioni) in his speech during the Final Conference on "LGBTI persons and Access to Justice", held in Bergamo on 22-23 May 2015.

<sup>23</sup> If fewer people with intersex conditions were born, and if it is easier to prevent them from being born, the social commitment to treatment and the protection against medical treatments may be weakened.

<sup>24</sup> According to Bernini (2015) the intersex activism movement is still in its infancy. It was not born in 2010 and no intersex activists were visible at that moment. No relevant studies were yet produced. For a general overview, see Cola and Crocetti 2011; Arfini and Crocetti 2015.

and is developing with a significant delay when compared to other intersex movements around the world. The limited visibility of the movement represents an additional barrier for intersex people as it confines intersex persons to subordination comparing to persons who match male/female dichotomy. The antisubordination reading of equality could overcome this hierarchy and guarantee the full respect of rights and freedom for intersex children.

In Italy, Intersex Associations are divided according to the different intersex syndromes<sup>25</sup> and they have established a strategy in overcoming the medical and surgical practices. Some associations have an approach which focuses on the intersex condition as a medical pathology. Thus, the intersex persons ask to be involved in medical choices while they do not refuse to be considered as medical cases. For instance, Klinefelter Association would like to form closer alliances with the medical community because challenging medical practices is considered counterproductive while forming alliances with physician could be an effective means for influencing medical practices.<sup>26</sup> Their idea is that activists and physicians can work together in order to formulate a better approach with a progress in patient-centred care and a more cautious approach to surgery, and to get rid of misleading language.

Other Italian intersex activists disagree with the idea that intersexuality is a pathology. According to international intersex associations which challenge medical models approaching intersexuality as a pathology,<sup>27</sup> intersexuality should not be classified as pathology but as a normal variance of the human beings.<sup>28</sup> As regard to the gender perspective, it is significant that the Italian intersex movement shows a very strictly binary approach. For instance, a Klinefelter Association stresses they

<sup>25</sup> There are some main associations: AISIA (Androgen Insensitivity Syndrome Italian Association, Associazione Italiana Sindrome da insensibilità agli androgeni). See <http://www.aisia.org/>. AISIA is a no profit association, born in 2006, and composed by parents, doctors, person involved and interested on that matter. I.S.C. Onlus Associazione Iperplasia Surrenale Congenita (The association of Congenital adrenal hyperplasia, CAH parents). No web site is available. As is well known, CAH is defined as an insensibility to androgens which results in feminine external physical development (phenotype) in a person with XY chromosomes ('male' genotype). Partial Androgen Insensitivity Syndrome (PAIS) can manifest in 'ambiguous' genitalia, but generally the female sex is assigned. This syndrome is also known as Adrenogenital Syndrome or 21Hydroxylase Deficiency. See Callahan 2009, 177.

For the Klinefelter condition: Italian Union of Klinefelter Syndrome (Unione italiana Sindrome di Klinefelter, UnItaSK, [www.unitask.it](http://www.unitask.it); <http://www.klinefelteraskis.it/>), The Klinefelter Syndrome Association (Associazione Sindrome Klinefelter ASKIS Onlus, <http://www.klinefelter-askis.it>, National association composed by families and doctors, which refuses the recognitions of this syndrome as a rare disease), and the Klinefelter club ([http://www.klinefelterclub.it/il\\_klinefelter\\_club.html](http://www.klinefelterclub.it/il_klinefelter_club.html), composed by doctors and clinicians).

There is a deep difference between the different intersex conditions. For instance, in the case where genitalia are surgically *corrected* as early as in infancy and babyhood and changed using hormone therapy later on. Between male or female intersex. For a general framework: Callahan 2009.

<sup>26</sup> See [www.unitask.it](http://www.unitask.it).

<sup>27</sup> See the Organization Intersex International (OII Intersex Network, <http://oiointernational.com>) and the Intersex Society of North America (ISNA), [www.isna.org](http://www.isna.org).

<sup>28</sup> See the web site of the Collettivo Intersexioni, [www.intersexioni.it](http://www.intersexioni.it).

are Klinefelter men, men as other ones;<sup>29</sup> while Morris Association emphasises the pain for not being mother.<sup>30</sup>

A turning point in the Italian intersex movement scenario was the foundation of the Collettivo Intersexioni,<sup>31</sup> established in 2013 aiming at promoting human rights of intersex people, and organising informative activities in order to overcome the invisibility and the stigma on Disorder of Sex Development (DSD), and to guarantee the self-determination of intersex people. As a true key milestone in the Italian movement, Collettivo Intersexioni is committed to end cosmetic genital surgeries for intersex infants; to stop the shame and secrecy surrounding the birth of a child with an intersex condition; and to develop appropriate support and counselling for people with an intersex condition and their families. Recently, Collettivo Intersexioni opened the first info point on intersexuality.<sup>32</sup> Considering the importance of the political involvement, the Collettivo has also campaigned for participation, consultation, and control, in order to put intersex issues on the political agenda, becoming in fact the leading representative group for intersex persons in Italy.

Although the primary focus and in general the approach of each group differ,<sup>33</sup> intersex activists share the common goal of eliminating harmful practices based on sex and gender stereotypes. They agree on the primary goal to eliminate or decrease the number of medically unnecessary cosmetic genital surgeries being performed on intersex children. They contest standard medical practices and seek to enhance the right to self-determination.

An important aspect to discuss with regards to the development of Intersex Movement in Italy is the use of Italian language when adopted to define intersex persons; in fact, there is the risk of using words and expressions which many intersex persons find offensive or feel distorting their identity. The issue on language is important because it represents a mirror and an evidence of the subordinate position of intersex persons; thus, the change of the way that language is used could represent a first step towards a more respectful approach for intersex people's rights and freedom.

Some people in the Italian intersex community want to abandon the term "Disorder of Sex Development" (also referred as DSD), and encourage the use of

<sup>29</sup> See, UnItaSK, [www.unitask.it](http://www.unitask.it).

<sup>30</sup> See also the positions of AISIA Association ([www.sindromedimorris.org](http://www.sindromedimorris.org)), on the pain for not being mothers.

<sup>31</sup> This is the position of the Collettivo Intersexioni, [www.intersexioni.it](http://www.intersexioni.it).

<sup>32</sup> Michela Balocchi and Alessandro Comeni opened in Florence (in the Ireos Association) the first intersex info point for intersex persons, their friends, their families.

<sup>33</sup> It is true that in Italy intersex people do not form a group at all. Considering intersex people as a 'collective' is questionable indeed, giving that this viewpoint ignores that they are themselves an heterogeneous 'group'. Nevertheless, this expression is used for descriptive purposes, bearing in mind its underlying contradictions.

the term 'intersex'. This position reflects the refuse of the medicalisation by using the term DSD; in addition, the term 'disorder' is considered inappropriate and pejorative, and 'intersex' persons do not want to be labelled disordered (Balocchi, 2015; Arfini and Crocetti, 2015). Some other people who want to support the move away from the expression of DSD, also oppose to the term intersex and have suggested to refer to the acronym "dsd" as to "differences or divergences in sex development" (literally: *differenze e divergenze* nello sviluppo sessuale) in order to differentiate from the DSD (which means Disorders or Disturbs of Sex Development, *Disordini o Disturbi dello Sviluppo Sessuale* and which is written with capital letter) (Greenberg, 2006, pp. 93; Balocchi, 2015; Arfini and Crocetti, 2015).

To define the condition, intersex activists prefer the word intersexuality (in Italian, *intersessualità*) because it describes the intersex as a form of identity and culture (Balocchi, 2015), or directly the English expression 'intersex' or *intersesso*. They also refuse to use the expression 'intersexualism' (in Italian, *intersessualismo*) which is considered as the effect of borrowing from transgender movement which introduced and uses the term transsexualism (in Italian, *transessualismo*). The issue over the way that Italian language is used shows the risk of using words and expressions which many intersex persons find offensive or feel distorts their identity, and of the importance to correctly refer to this condition.<sup>34</sup> Indirectly, the use of an incorrect language represents a barrier and creates an unequal position which the antisubordination principle could help to remove.

The antisubordination principle can be a perspective also in the reading of the issues on the possible alliance between the Italian intersex movement and other social movements, for instance LGBT movement. In fact, the antisubordination principle shows the importance and the need to re-think about the idea of a hierarchy between an element considered as superior (heterosexual or cisgender) and an element considered as inferior (homosexual and bisexual or transgender), and this causes the discrimination against LGBT persons. Given that overcoming the hierarchy stating the unequal position of some persons because of their sexual orientation and gender identity could certainly help in the full recognition of rights and freedom for intersex persons, the analysis of the relationship between intersex movement and other LGBT groups is important.

Some representatives of the Italian intersex movement feel closely allied to LGBT activists groups because of their common interest in challenging sex and gender heteronormativity – in this way helping to frame the arguments against early genital surgery. In fact, they believe that the societal and legal issues faced by people with intersex condition are similar to the issues confronting other sex and

<sup>34</sup> The distort effect of language is not something that is unique to intersex people. It concerns all the so called 'minority rights' debate and the gender issues.

gender nonconformists. Their idea is that 'intersex' is an identity, similar to gay, lesbian, and transsexual identities and joining the forces with LGBT organisations will offer support and enhance the rights of everybody (Arfini and Crocetti, 2015). In that direction, some LGBT organisations have added an 'I' to their acronym,<sup>35</sup> sometimes without truly incorporating intersex issues in their agenda.<sup>36</sup>

On the contrary, in the opinion of the author of this paper, some intersex persons want to distance somehow themselves from gay and lesbian groups. On the one hand some intersex persons share the idea that homophobia, transphobia, sexism are all aspects of a generalised cultural system of patriarchy, heterosexism and rigid binary sex and gender norms that inhibit the full equality of women, LGBT people and intersex people. On the other hand, some intersex activists also stress that the harms intersex persons suffer are not identical and cannot be easily subsumed under the same 'umbrella' of LGBT (Arfini and Crocetti, 2015). In particular, several intersex activists identify themselves as heterosexual – and want to be considered as such – and do not declare themselves as gender 'queer' or 'in between' between male and female. Consequently, some intersex activists argue that forming alliances with LGBT groups may hinder the urgency of ending the surgical mutilation of intersex children, which is the primary and shared goal.

With regards to actions and strategies that intersex movement may undertake, it has been suggested that intersex activists could adopt the legal arguments used by organisation fighting for sex and gender equality. In fact, gender stereotypes which are the base of gender discrimination can also be considered as the reason for performing early surgeries on intersex children (Greenberg, 2012). Thus, antisubordination principle could help in the re-definition of hierarchy which places intersex in a subordinate position comparing with the persons who perfectly match male and female characters.

However, in the opinion of the author of this paper, relying upon gender equality discourse creates the risk to miss the focus on the trauma and stigma that early genital surgeries cause, and hinder the primary goal to end the medical practices of surgically altering infants. In fact, the early surgeries harm the intersex bodies. The goal of ending early surgeries is very different from the cultural and social reasons which contribute to gender inequalities and must be treated separately. Some other activists believe that altering the current medical protocol for the treatment of infants with an intersex condition could be advanced in a better way by focusing on issues emphasised by disability rights advocates. In fact, the focus on the right to self determination, autonomy and bodily integrity could be a more effective tool to

<sup>35</sup> This is the case of *Avvocatura per i diritti LGBTI – Rete Lenford*, former called *Avvocatura per i diritti LGBT*.

<sup>36</sup> In fact, at the moment, the major Italian LGBT groups tend to focus a significant portion of their efforts and resources on legalising same-sex couples and protecting LGBT people from employment discrimination.

protect people with an intersex condition (Sytsma, 2006). However, there is a stigma in being considered as disabled, *abnormal* and needy to be helped and assisted.

Another chance to re-think about the hierarchy which places intersex in an unequal position and to enact the antisubordination principle, could be to follow the legal frameworks used by other social justice movements. From a practical perspective, this seems an end street closed because they are not so rooted and strong in Italy. From a theoretical perspective, the true question is whether and how the intersex movement can form alliances with other social movements and use similar legal strategies. This seems to be difficult, given that intersex activists believe that the primary goal of the movement should be to end the medical practices that cause irreparable physical harm and psychological trauma,<sup>37</sup> even if a full discussion on these topics is beyond the scope of this paper. However, addressing the development of Italian intersex movement, a key role could be to recognise the equality in its antisubordination dimension which could guarantee the stopping of early surgeries and the frailty of intersex persons before the law.

### III. SUGGESTIONS ON HOW TO PROTECT INTERSEX PEOPLE

Focusing on the barriers to access to justice, the paper turns now to the analysis of the different legal ways to protect the intersex condition.

Heading for this aim, many options seem to be feasible, following the path through of a legal reform, the empowerment of the role of the Regions, the implementation of the positive actions and good practices. Other attempts include implementing the protection of intersex condition, recognising intersex children as disable persons or considering the issue as a human right problem. Lastly, a further significant step to enhance protection for people with intersex conditions could be the enactment of the constitutional right to equality in the antidiscrimination dimension, as a right to difference or in an antisubordination perspective.

From a legal perspective, a first option in order to eliminate medical practices of early surgeries is to introduce legal reforms providing a complete moratorium on surgeries, except in the case of a safe-life treatment. A recent example of this approach is the law introduced in Malta which states that it is unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical interventions on the sex characteristics of a minor, when such treatment and/or intervention can be deferred until the treated person can give informed consent. The same law also provides that the sex assignment treatment and/or surgical intervention shall be conducted if the child gives informed consent through the person who exercises parental authority or the tutor of the minor. In exceptional circumstances, treatment may be performed once agreement is reached between

<sup>37</sup> A final and central question to be understood is whether intersex movement could really be considered as an identity movement comparing to the other identity movements.

an interdisciplinary team and the persons who exercise parental authority or the tutor of the minor who is still unable to provide consent. The law also provides that medical intervention, which is driven by social factors without the consent of the minor, must be considered as a violation of the law.<sup>38</sup>

Another approach is to recognise intersex as a third sex category.<sup>39</sup> Recently, some countries such as Germany, Australia (Ammaturo, in this book) have introduced this solution. However, this possibility hides the stigma of being considered as different and as 'other' from the M (male) or F (female).<sup>40</sup> In fact, the difference makes the intersex persons be seen as *inferior* comparing to those who are assumed to be the *parameter*, the *norm*.

Generally speaking, the introduction of a legal moratorium of early surgeries guarantees a protection against the harmful practices and interrupts the subordination of the intersex person comparing to male or female persons. Despite the legal reform that could be considered as the highway to protect intersex persons, it should be noted that such reform depends upon the Parliamentary approval. The actual political scenario in Italy shows that a legal reform protecting the rights of intersex persons is difficult to achieve. This limit suggests the turning to other ways as the interpretation of equality in its antisubordination dimension. In fact, this could immediately overcome the frailty of intersex persons and stop early surgeries without waiting the Parliamentary approval.

In the effort to overcome the vulnerability of intersex people, another issue that needs to be considered is the potential role that regional administrations can play. Generally speaking, the State is competent in the "determination of the basic standards of welfare related to those civil and social rights that must be guaranteed in the entire national territory." (art. 117) However, Regions have residual legislative power in all matters that are not expressly covered by State legislation and they are also expressly empowered to contrast gender discrimination by art. 117 (para. 7) of the Italian Constitution.

In particular, Regions hold some legislative power regarding health.<sup>41</sup> Following the example of specific legal statutes aiming at contrasting discrimination based on

<sup>38</sup> Malta approved the "Gender Identity, Gender Expression and Sex Characteristics Act" (Malta, 2015).

<sup>39</sup> This is the way followed in Germany and Australia.

<sup>40</sup> If fact, you are neither male or female, you are *other*.

<sup>41</sup> This is the so called 'concurring legislation' applied to health protection. Since 2001, a significant reform of Title V of the Constitution has introduced a new division of legislative powers among the State and the Regions. The State holds exclusive legislative powers in specified matters, while other matters are covered in the so called 'concurrent legislation' – Regions hold legislative power except in the case of certain fundamental principles which are reserved for state law in many significant matters (for instance, health protection). Thus, the power balance between the State and the Regions in such matters remains somewhat unclear.

sexual orientation and gender identity,<sup>42</sup> Regions have a variety of instruments to be adopted with the aim of enhancing the rights of intersex persons. These instruments may include approving a regional law protecting the intersex condition from discrimination, developing Health Guide Lines (for instance, through Regulation acts) in order to impose the moratorium of surgeries, and introducing trainings and protocols (D'Ippoliti and Schuster, 2011; Gusmano and Lorenzetti, 2014).

However, we have to bear in mind that in many cases, the different use of the margin of manoeuvre could lead (and usually leads) to deep differences among regional territories, also depending on the political orientation of each regional government.<sup>43</sup> This aspect could allow a different treatment for the intersex condition across the different Regions. In addition, the action of Regions could not re-define the hierarchy which shows an indirect comparison between the 'norm', i.e. the person who is male or female, and the intersex person. Thus, intersex would continue to be considered as 'different' and 'other', thus as *subordinated*. On the contrary, the reading of equality in its antisubordination perspective could undermine the power structure which defines a 'perfect body', i.e. a body perfectly conform of what is considered as a male or a female body, as *normal*, as the *parameter* in order to define the 'other' which is assumed to be *inferior*.

The national and regional legislative *vacuum* suggests that there is the need to verify the possibility of positive actions and promotional measures. A positive action could lead to the establishment of information services, following the example of the first (and unique) intersex info point opened in Florence.<sup>44</sup> A further positive measure could be represented by training activities for health and social professionals who have a fundamental role to fill the information gap. In fact, limited and inaccurate information is considered as one of the first causes for the surgery on intersex children and a correct information could also lead to reduction of selected abortions which follow the prenatal testing results. In a legislative *vacuum*, the role of positive actions and promotional measures could guarantee the bodily integrity and contrasting the early surgeries due to the misinformation.

<sup>42</sup> For instance, in 2004 the Region of Tuscany first enacted a regional law prohibiting discrimination on the ground of sexual orientation and gender identity in regard to employment, education, public services and housing (Law issued by the Region of Tuscany, on 15.11.2004, NBo. 63, Rules against discrimination on the grounds of sexual orientation and gender identity). Other regions such as Marche, Liguria and Emilia-Romagna have taken similar steps by recently enacting specific laws concerning protection from discrimination based on sexual orientation and gender identity (Marche Regional Law, 11.2.2010, n. 8; Liguria Regional Law 10.11.2009, n. 52).

In addition, a considerable number of regional statutes have been modified during the last five years, so that they expressly refer to sexual orientation and gender identity.

<sup>43</sup> In general, we may stress that the antidiscrimination law seems to be an arena for regional political debates.

<sup>44</sup> See the footnote no. 32 of this chapter.



However, other strategies are needed in order to undermine the hierarchy which defines a 'perfect body', a body 'perfectly conform' of what is considered male and female body, as *normal*, as a *parameter*, in order to define the 'other' which is assumed to be *inferior*. On the contrary, the antisubordination principle could guarantee a change in the approach and consequently guarantee the full respect of rights and freedoms for intersex children. One option – which has not been taken into account – concerns the possibility to extend the Italian legal framework<sup>45</sup> on disability to protect intersex persons. If bodies that fail to comport to the sex binary system are perceived as nonconforming, disabled, and in need of repair, or if they are considered as abnormal, they should also have the right to pretend the protection through disability law. This recognition could effectively advance the rights of people with an intersex condition.

However, intersex activists generally refuse this approach because it reinforces the stereotype of the intersex condition as something 'abnormal'. In fact, it does not guarantee the overcoming of the subordination between the 'norm' (male or female person) and the 'exception' (intersex persons) but in some way reinforces it with a paternalistic approach. The intersex person is needed to be protected not because this is a person's rights and freedom, but because the person is weak and is not included in the norm.

Another way to ensure the protection for people of intersex condition could be done through the recognition of human rights. In general, the international protocols and the practises trace strong barriers to the violation of intersex children's human rights, which is firstly listed in the Convention on the Rights of the Child adopted by the General Assembly of the United Nations in November 1989. For instance, if the best interests of the child is the primary consideration, surely unnecessary medical cosmetic genital surgeries should not be performed, or at least they should be delayed until the child is old enough to make the decision, which is usually after puberty. Also the General Comment No. 13 of the UN Committee on the right of the child to freedom from all forms of violence stresses the importance of combating unnecessary and unjustified surgeries on intersex babies. In the same direction, the recent Resolution of the Parliamentary Assembly of the Council of Europe<sup>46</sup> and the position of the Fundamental rights agency (FRA, 2015)<sup>47</sup> emphasise the importance to respect bodily integrity for the intersex children and to stop the early surgeries.

<sup>45</sup> In Italy, the disabled are protected in workplace (law no. 67 of 2006; legislative decree no. 216 of 2003), at school and in many other sectors (law 104 of 1992).

<sup>46</sup> See Article II of the Resolution 1952 (2013) of the Parliamentary Assembly of the Council of Europe, which calls for the respect of the physical integrity of children, including "early childhood medical interventions in the case of intersex children".

<sup>47</sup> This document stresses the connection with articles 1 (Human dignity), 3 (Right to integrity of the person), 7 (Respect for private and family life), 9 (Right to marry and right to found a family), 21 (Non-discrimination), 24 (The rights of the child) of the EU Charter of Fundamental Rights.

Although the International law tools could create strong boundary to the surgeries on children, in practice, the main problem is that these are mainly soft law instruments, with no direct effect on individuals. In addition, they do not focus on the personal condition and on the lives of intersex people, which have the immediate problem to stop the cosmetic surgeries. However, the antisubordination principle could overcome the frailty of this approach, thanks to the re-definition of the range of normality and of the full respect of rights and freedoms which needed to be guaranteed.

In a theoretical perspective, also the national constitutional framework calls for a strong protection of the intersex conditions, protecting fundamental rights. In fact, the Italian Constitution grants equal treatment to all citizens, who shall be able to enjoy the same rights irrespective of any personal condition.<sup>48</sup> At article 2, the Italian Constitution specifically grants protection to individuals. The duty to promote equality, based on social rights, and the protection against discrimination as a fundamental concern of the Italian Republic (art. 3) should also preserve the intersex condition. Although the Constitution does not expressly mention intersex condition, the protection of intersex condition may be well included in the 'personal condition' protected by article 3 and interpreted as including an "open formula" (Cerri, 1994). In addition, the notion of sex in article 3 can be interpreted as including persons who are not biologically male or female, according to the extensive interpretation of the notion of sex.<sup>49</sup>

Furthermore, the second section of article 3 of the Italian Constitution states: "It is the duty of the Republic to remove those economic and social obstacles which, limiting in fact the freedom and equality among citizens, hinder the full development of any human person and the integration of all workers in the political, economic, and social organization of the country" (the so called "principle of substantive equality"). Thus, the duty of the Republic should be to stop the unnecessary surgeries which are barriers to the full respect of the body and personality of intersex persons.

Another constitutional reference which can be considered is the recognition of the protection of health and fundamental right at art. 32 of the Italian Constitution. Considering that early surgeries have a strong impact on the person's physical and psychological well being, the constitutional protection of health could play a key role. Lastly, the implementation of international law which recognises the duty to

<sup>48</sup> Art. 3 states that all citizens "have equal social status and are equal before the law, without distinction of sex, race, language, religion, political opinion, and personal or social conditions" (the so called principle of formal equality).

<sup>49</sup> The interpretation follows the direct link between sex as a biological character, gender as its social construction and sexual orientation as the expression of an individual's sexual preferences (Pollicino, 2005; Montalti, 2007; Pezzini, 2012).

protect intersex condition and to consider the best interest of the child, is imposed also by the Constitution (art. 117, para. 1).

Therefore it can be sustained here that the Italian Constitutional framework calls for a protection for intersexuality and for a full recognition of the intersex' rights and freedoms. However, the actual situation and the medical practices of early surgeries show that until now it has been an inefficacious tool suggesting other ways of protection. Thus, the implementation of the theoretical framework for protecting intersexuality should consider the multifaceted character of constitutional equality in order to guarantee the protection of intersex people.

Moving to European sources, the EU anti-discrimination perspective does not include the intersex condition, which shows that it has deficiency in the protection of individual. The main difficulty is that the European Community law was (and in part still is) characterised by the economic goal of avoiding social dumping (Bell, 2002; Ellis, 2005). Only in recent times, with the Charter of Nice (2000) and with the Lisbon Treaty (which came into force in 2009), the European legal framework started to consider the social dimension of equality as a general principle, and also incorporate the concept of individual dignity.<sup>50</sup>

It may therefore be interesting to interpret the intersex condition, in connection with the analysis of the equality principle, not only from an anti-discrimination perspective but also on the grounds of diversity (Niccolai, 2007; Ruggiu, 2009 and 2010). Such perspective could be referred to as the gendered "dilemma of difference" (Minow, 1984: 1990; Morondo Taramundi, 2004) and as social rights which widen the range of what it considered as 'the norm' and 'normal'. An interpretation of equality as a consideration of diversity could allow for protective measures, which will reduce or remove any negative impact (through the protection of intersex people as 'particularly vulnerable individuals') and at the same time could limit patterns of social exclusion (Repetto, 2010, pp. 149). It also could legitimate a specific treatment, according to the specific situation and promotional measures that recognise the specificity (as is the case with measures, which emphasise the recognition of identity) and be founded on a multidimensional view of society (measures which emphasise specificity) (Gianformaggio, 1997, 2005).

However, the protection of diversity shows a frail element because by protecting diversity it stigmatises something or someone considered as 'different' and 'other' from the *norm*. Thus, the analysis turns to the research of a different interpretation of the theoretical framework which could guarantee the full enjoyment of rights and freedoms for intersex children. Therefore, the interpretation of equality in

<sup>50</sup> In fact, the jurisprudential attitude of the European Court of Justice had already severely affected the legislator's work, forging new notions of discrimination (such as the notion of indirect discrimination) and moreover steering towards social meaning the interpretation of the original rule in art. 119 of the Treaty.

the antisubordination perspective can be proposed in order to guarantee a full protection of intersex condition. In fact, this new pattern could overcome the limits of the other ways of protecting intersex persons, and it changes the symbolic horizon which defines some person (male or female) as the norm, the standard, the parameter, and the exception (intersex persons) as inferior.

This change in perspective goes beyond the issue of anti-discrimination policy, which is itself a sphere where gender hierarchy is expressed and performed.<sup>51</sup> This change in perspective also goes beyond the issue of the protection of diversity, which risks to stigmatise what (or who) is considered as the exception to the norm (Pezzini, 2012).

Following the antisubordination principle, the gender binary system defines but at the same time requires and prescribes that every person must be either man or woman. The revision of the gender binary system could help in considering intersexuality as a normal variance of human being and not only an exception to the 'normal' dichotomy male/female.

#### IV. CONCLUSION

In addressing the barriers to access to justice for intersex children, the paper analysed the Italian scenario, in particular the medical practices and protocols on intersex children which allow the surgeries on them; then, it analysed the Italian academic debate, the situation of the Intersex movement, and the Italian legal framework.

Regarding the barriers that intersex people face, at first sight, organisational barriers can be stressed, because of the institutional and social invisibility and of the weakness of the Italian intersex movement, which did not promote any judicial cases. One procedural barrier is that the procedure to assign the sex according to sexual dichotomy and to use the legal tools for transsexual condition (Law no. 164 of 1982) is long, confused and uncertain (Cardaci in this book). In addition, there is a lack of legal and medical evidences of the surgeries. Medical services are rarely transparent about the statistics of operations performed on intersex individuals and on their long-term effects and feedbacks. In addition, medical records are not available even to the intersex persons who received the treatments.

Procedural barriers bring economic barriers because in Italy the judicial proceedings are long and rather expensive (Lugarà, 2015). The last barrier is the emotional and psychological one. In fact, the intersex person who hope to access justice need to address his/her parents in order to gain their (informed) consent for

<sup>51</sup> In fact, the anti-discrimination perspective confirms and legitimates a comparative process which identifies the masculine as the universal benchmark and stigmatises the feminine as different, 'other' and implicitly *inferior* (Pezzini, 2009; Barrère Unzueta, 2004).

the surgeries. In these cases, the judicial way could involve the risk to weaken the familial links and compromise the well-being.

Given this scenario, this study has offered an attempt to overcome the harmful practises, in order to guarantee the respect of intersex children. Many ways seem feasible, for example, a legal reform, following the recent Maltese law; the action of Regions; the possibility of positive actions and good practices; the protection through disability law or through the recognition of human rights; the enhancement of the Italian constitutional framework and the recognition of an antidiscrimination principle and of a right to differ. Finally, a new reading of equality principle based on anti-subordination discourse seems to be able to guarantee rights to intersex people in a way that undermines power structures which conceptualise intersex persons as the others and inferior only because not conforming to the binary male/female dichotomy (Pezzini, 2012).

Wrapping up the scenario analysed, we may draw some general consideration.

A number of changes to current practices must be encouraged and a more cautious approach should be introduced in order to avoid or postpone surgical intervention. Only the affected children, when they reach an age at which they are able to appropriately assess the risks and benefits, should have the power to decide whether they want to undergo surgery. In general, cosmetic genital surgeries should not be performed on children until they are able to meaningfully participate in the decision-making. The potential risks of psychological harm should be recognised as more detrimental than that of the potential risks of surgery.

Some of the suggested solutions – implementation of good practices, actions taken by the Regions – lay bare the substantial limit of relying on the legislators' discretion, who in turn might remain silent and thus leave intersex people in a state of frailty (social as well as juridical).

On the contrary, the theoretical framework suggested in this paper for protecting intersex persons' equality through the application of the antisubordination discourse could remove the barriers in addressing justice, thus granting the full respect of rights and freedoms for intersex persons, and could guarantee the overcoming of the limits of the suggested solutions and turn to an unquestioning consideration of intersexed bodies as a normal variance of human being.

#### *References:*

- Agius, S. and Tobler, C. (2011) *Trans and Intersex People: Discrimination on the Grounds of Sex, Gender Identity and Gender Expression*, Luxembourg, European Union.
- Arfini, E.A. and Crocetti, D. (2015) "I movimenti intersex/DSD in Italia: stili di militanza e biomedicalizzazione del binarismo di genere," in Prearo, M., ed., *Politiche dell'orgoglio. Sessualità, soggettività e movimenti sociali*, ETS.
- Balocchi, M. (2012) "Intersex. Dall'ermafroditismo ai 'Disturbi dello sviluppo sessuale'," 29 *Zapruder*, pp. 76-84.

- Balocchi, M. (2015) *L'intersessualità nella società italiana*, Regione Toscana (Tuscany Region), Consiglio Regionale (Regional Council), Conference proceedings, 24 September 2010.
- Bell, M. (2002) *Anti-discrimination law and the European Union*. Oxford: Oxford University Press.
- Bernini, L. (2010) *Maschio e femmina Dio li credè!? Il sabotaggio transmodernista del binarismo sessuale*, Il Dito e la Luna.
- Bernini, L. (2015) "Eterosessualità obbligatoria ed esistenza intersex," available from <http://www.intersexioni.it/eterosessualita-obbligatoria-ed-esistenza-intersex/>.
- Busi, B. (2005) "La nuda vita degli ermafroditi", 6 *Zapruder*, pp. 61-65.
- Busi, B. (2009) "Semenya, i sessi infiniti," available from: <http://www.intersexioni.it/semenya-i-sessi-infiniti/>.
- Busi, B. (2012) "Modificazioni. Mgf, intersex, trans e produzione del sesso," in S. Marchetti, J.M.H. Mascat and V. Perilli, eds., *Femministe a parole. Grovigli da districare*, Ediesse, pp. 177-182.
- Cerri, A. (1994) "Uguaglianza (principio costituzionale di)," in *Enciclopedia giuridica*, Treccani.
- Chase, C. (1997) *Special Issue on Intersexuality. Chrysalis: Journal of Transgressive Gender Identities*, Fall/Winter, 2/5, pp. 1-57.
- Cola, M., Crocetti, D. (2011) "Negotiating Normality: Experiences from Three Italian Patient Support Groups," 99(1) *Kroeber Anthropological Society*, pp. 214-236.
- Creighton, S.M. (2006) "Adult Outcomes of Feminizing Surgery," in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 207-214.
- Crocetti, D. (2010) "From Hermaphroditism, to Intersex and Disorders of Sex Development (DSD): Shifting Terminology and Shifting Meaning," in M. Mazzotti and G. Pancaldi, ed., *Impure Cultures. Interfacing Science, Technology, and Humanities*, CIS, University of Bologna, pp. 57-86.
- Crocetti, D. (2013) *L'invisibile intersex. Storie di corpi medicalizzati*, ETS.
- D'Ippoliti, C. and Schuster, A. (2011) *Disorientamenti. Discriminazione ed esclusione sociale delle persone LGBT in Italia*, Armando editore.
- Diamond, V. M. and Glenn Beh, H. (2006) "The Right to be Wrong. Sex and Gender Decisions," in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 103-113.
- Diamond, M., Garland, J. (2014) "Evidence Regarding Cosmetic and Medically Unnecessary Surgery on Infants," 10 *Journal of Pediatric Urology*, pp. 2-7.
- Diamond, M., Sigmundson H.K. (1997) "Management of Intersexuality: Guidelines for Dealing with Individuals with Ambiguous Genitalia", available from: <http://www.hawaii.edu/PCSS/biblio/articles/1961to1999/1997-management-of-intersexuality.html>.

- Domurat Dreger, A. (2006) "Intersex and Human Rights. The Long View," in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 73-86.
- Dreger, A., et al. (2005) "Changing the Nomenclature/Taxonomy for Intersex: A Scientific and Clinical Rationale," 18 *Journal of Pediatric Endocrinology and Metabolism*, pp. 729-733.
- Ellis, E. (2005) *EU Antidiscrimination Law*, Oxford University Press.
- Feder, E.K. (2014) *Making Sense of Intersex. Changing Ethical Perspectives in Biomedicine*, Indiana University Press.
- FRA, Fundamental Rights Agency (2011) The Fundamental Rights Situation of Intersex People, available from: <http://fra.europa.eu/sites/default/files/fra-2015-focus-04-intersex.pdf>.
- "Gender Identity, Gender Expression and Sex Characteristics Act" (GIGESC ACT No. XI of 2015, 14.04.2015, disponibile all'indirizzo <http://www.parlament.mt/billdetails?bid=494&l=1&legcat=13>).
- Ghattas, D.C. (2013) *Human Rights between the Sexes. A Preliminary Study on the Life Situations of Inter\* individuals*, Heinrich Böll Foundation, available from: [www.boell.de](http://www.boell.de).
- Gianformaggio, L. (1997) "L'eguaglianza e le norme," in L. Gianformaggio and M. Jori, eds., *Scritti per Uberto Scarpelli*, Giuffrè, pp. 373-406.
- Gianformaggio, L. (2005) *Eguaglianza, donne e diritto*, il Mulino.
- Gusmano, B. and Lorenzetti, A. (2014) *Lavoro, orientamento sessuale e identità di genere*, Armando Editore.
- Greenberg, J.A. (2006) "International Legal Developments Protecting the Autonomy Rights of Sexual Minorities. Who Should Determine the Appropriate Treatment for an Intersex Infant?" in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 87-101.
- Greenberg, J.A. (2012) *Intersexuality and the Law: Why Sex Matters*, New York University Press.
- Hester, J.D. (2006) "Intersex and the Rhetorics of Healing," in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 47-71.
- Howe, E.G. (2006) "Advances in Treating (or not Treating) Intersexed Persons: Understanding Resistance to Change," in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 115-137.
- Hughes, I.A. (2008) "Disorders of Sex Development: A New Definition and Classification," in 22 *Best Practice & Research Clinical Endocrinology & Metabolism*, pp. 119-134.
- Intersex Society of North America (2006) *Clinical Guidelines for the Management of Disorders of Sex Development in Childhood*, available from: <http://www.dsdguidelines.org/htdocs/clinical/index.html>.

- Kemp, S.F. (2006) "The Role of Genes and Hormones in Sexual Differentiation," in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 1-16.
- Kessler, J.S. (1996) "La costruzione medica del genere: il caso dei bambini intersessuati," in S. Piccone Stella and C. Saraceno, eds., *Genere. La costruzione sociale del femminile e del maschile*, Bologna, pp. 95-117.
- Lee, PA, et al. (2006) "Consensus Statement on Management of Intersex Disorders," 118 *Pediatrics*, pp. 488 -500.
- Liao, L.-M. (2006) "Psychology and Clinical Management of Vaginal Hypoplasia," in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 225-240.
- Lorenzetti, A. (2013) *Diritti in transito. La condizione giuridica delle persone transessuali*, FrancoAngeli.
- Lugarà, R. (2015) "Dis-eguaglianza e obblighi contributivi: il caso del contributo unificato nel processo amministrativo," in *La Dis-eguaglianza e Stato costituzionale*, Conference proceedings, Campobasso, Italy, 19-20 June 2015, in press.
- Money, J. (1956) "Hermaphroditism: Recommendations Concerning Case Management," 4 *Journal of Clinical Endocrinology and Metabolism*, pp. 547-556.
- Morondo Taramundi, D. (2004) *Il dilemma della differenza nella teoria femminista del diritto*, Esa.
- Murphy, T.F. (2006) "Experiments in Gender: Ethics at the Boundaries of Clinical Practice and Research," in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 139-151.
- Niccolai, S. (2007) "Differenze come cose o come valutazioni," in F. Cerrone and M. Volpi, eds., *Sergio Panunzio. Profilo intellettuale di un giurista*, Jovene, pp. 475-531.
- Pezzini, B. (2009) "L'uguaglianza uomo-donna come principio anti-discriminatorio e come principio anti-subordinazione," in G. Brunelli, A. Pugiotto and P. Veronesi, eds., *Scritti in onore di Lorenza Carlassare. Il diritto costituzionale come regola e limite al potere*, Jovene, pp. 1141-1176.
- Pezzini, B. (2012) "Costruzione del genere e Costituzione," in B. Pezzini, ed., *La costruzione del genere. Norme e regole*, Sestante, pp. 15-73.
- Pitch, T. (1998) *Un diritto per due*, Saggiatore.
- Pollicino, O. (2005) *Discriminazione sulla base del sesso e trattamento preferenziale nel diritto comunitario*, Giuffrè.
- Ruggiu, I. (2009) "Effettività del diritto e protezione delle minoranze. Per un principio costituzionale della diversità," 1 *Polemos*, pp. 27-40.
- Ruggiu, I. (2010) "Diversity as a Public Good? Cultural Identity in Legal Narratives," in S. Niccolai and I. Ruggiu, eds., *Dignity in Change. Exploring the Constitutional Potential of EU Gender and Anti-discrimination Law*, European Press Academic Publishing, pp. 151-184.
- Ruggiu, I. (2012) *Il giudice antropologo*, FrancoAngeli.



- Schober, J. (2006) "Ethics and Futuristic Scientific Development Concerning Genitoplasty," in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 311-317.
- Schneider, E. (2015) *An Insight into Respect for the Rights of Trans and Intersex Children in Europe*, Consiglio d'Europa, available from: [www.coe.int](http://www.coe.int).
- Streuli, J.C., et al. (2013) "Shaping Parents: Impact of Contrasting Professional Counselling on Parents' Decision Making for Children with Disorders of Sex Development," 10 *The Journal of Sexual Medicine*, pp. 1953-60.
- Sytsma, S.E. (2006) "The Ethics of Using Dexamethasone to Prevent Virilisation of Female Fetuses," in S.E. Sytsma, ed., *Ethics and the Intersex*, Springer, pp. 241-258.
- Tamar-Mattis, A. (2006) "Exceptions to the Rule: Curing the Laws Failure to Protect Intersex Infants," 21 *Berkley Journal of Gender, Law & Justice*, pp. 59-110.