

MANU/KE/2253/2023

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

WP (C) No. 19610 of 2022

**Decided On:** 07.08.2023

XXX and Ors. **Vs.** The Health Secretary, Director of Health Services and Ors.

**Hon'ble Judges/Coram:**

*V.G. Arun, J.*

**Counsels:**

*For Appellant/Petitioner/Plaintiff: T.P. Sajid, Safwan K., Shifa Latheef, Muhammed Haroon A.N. and Muhammed Musthafa K., Advs.*

*For Respondents/Defendant: P.S. Appu, GP and Indulekha Joseph, Amicus Curiae*

**JUDGMENT**

**V.G. Arun, J.**

**1.** The distraught parents of a child born with ambiguous genitalia are before this Court, seeking permission to conduct a genital reconstructive surgery for raising the child as a female. Their prayer is founded on the Karyotype Report-46XX, which is indicative of the child being a female. The child is 7 years old and has a uterus, ovaries and an oversized clitoris. The urinal and vaginal opening are one and the same and a short common channel from the opening splits and travels separately to the uterus and urinary bladder. This medical condition of the child is certified as 'Congenital Adrenal Hyperplasia'. The child is undergoing treatment and the doctors have advised genital reconstructive surgery. Although petitioners approached various experts, none of the doctors are prepared to conduct the surgery without orders from the competent court. Hence, the writ petition seeking the following reliefs;

"i) To issue a writ of mandamus or any other appropriate writ or order or direction directing the 1st respondent to consider and pass final orders on Ext.P6 representation forthwith or within such time as this Hon'ble Court may deem fit and proper in the interest of justice.

ii) To issue a writ of mandamus or any other appropriate writ or order directing the 2nd respondent to undergo the Genioplasty surgery of the petitioners daughter, namely, xxxx forthwith."

**2.** Adv.T.P.Sajid appearing for the petitioners contended that surgery is imperative as the child has started noticing the distinctive features. The possible social ostracization and the medical condition of the child are also projected as reasons for granting permission. Finally, it is submitted that the parents are best suited to decide the future of the child and delaying the decision will cause undue trauma to the child and hardship to the family.

**3.** Adv.P.S.Appu, the learned Government Pleader submitted that the medical board that had examined the child based on the direction of this Court had suggested the constitution of State Level Multidisciplinary Committees which are competent to take such a studied and legally sound decision in situations like the present.

**4.** Based on the arguments advanced and the relief sought, the vexing question which this Court is called upon to answer is regarding the right of the parents to decide the gender of their minor child, without the minor's consent and ignorant of the child's orientation.

**5.** Considering the complex issue involved, Adv.Indulekha Joseph was appointed as amicus curiae. To her credit, the amicus curiae submitted a detailed report, after consulting doctors in the relevant field and going through medico-legal journals. Erudite arguments were also advanced by the amicus curiae, referring to various points highlighted in the report.

**6.** In order to answer the question, it is essential to understand the medico-legal issues involved. 'Ambiguous genitalia' is a very rare condition identified in less than ten lakh persons from out of one hundred and thirty crores. This medical condition is called Congenital Adrenal Hyperplasia (CAH), which comes under a larger group called Disorders of Sex Development (DSD). If split up the meaning of the term 'Congenital' is present at birth, 'Adrenal' is related to adrenal glands and 'Hyperplasia' is hyper growth.

**7.** The condition of having both male and female reproductive organs is called Hermaphroditus. Mythology and history is replete with stories of transexual (hermaphrodite) gods and rulers. The word 'hermaphrodite' itself comes from the Greek names 'Hermes', known as messenger of Gods and 'Aphrodite', the Goddess of sexual love and beauty. According to Greek mythology, these two Gods parented Hermaphroditus, who at the age of 15 became half male and half female, when his body fused with the body of a nymph he had fallen in love with. Ardhanariswara is one such God in Indian mythology. The Pharaoh Hatshepsut, who ruled Egypt from 1479 to 1458 BC, had discovered himself to be a male as well as female due to his body having styled both as man and woman.

**8.** The terms 'gender' and 'sex' are often used interchangeably in casual conversation, but are actually two distinct concepts related to human identity and biology. Sex refers to the biological characteristics of a person, particularly in relation to their reproductive anatomy and chromosomal composition. Gender, on the other hand, is a social and cultural construct that encompasses the roles, behaviours, expectations and identities associated with being male-female or non-binary. In her article named 'The Five Sexes' published by the New York Academy of Sciences, the author; Anne Fausto-Sterling has opined that, inasmuch as hermaphrodite literally embody both sexes, they challenge the traditional beliefs about sexual differences and possess the irritating ability to live sometimes as one sex and sometimes the other, thus raising the spectre of homosexuality.

**9.** The problems faced by intersex infants and children was considered in the United Nations Convention on the Rights of the Children (UNCRC). The convention called upon the Member States to ensure non-discrimination against children because of intersex condition. Article 2 of the UNCRC stipulates that the States shall respect and ensure the rights in the convention without discrimination of any kind, irrespective of the child or his parents or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Even though gender identity is not explicitly mentioned in Article 2, the term 'other status' makes it possible to include grounds other than those mentioned. The rights of intersex children was explicitly acknowledged by the Committee in 2016 in General Comment No. 20, whereby, the Committee urged the States to repeal all laws criminalising or otherwise discriminating against individuals on the basis of their sexual orientation,

gender identity or intersex status and adopt laws prohibiting discrimination on those grounds. The Committee also called upon the States to take effective action to protect lesbian, gay, bisexual, transgender and intersex adolescents from all forms of violence, discrimination or bullying, by raising public awareness and implementing safety and support measures.

**10.** The Council of Europe and the European Union have also identified non-consensual gender-conforming interventions as violative of children's rights to bodily integrity and privacy. While female genital mutilation is an offence in the United Kingdom, countries like Austria, Denmark, Italy, Netherlands, Spain, Sweden etc have fixed 18 as the minimum age requirement for sex reassignment surgery. Croatia allows children to have sex reassignment surgery before the age of 18 if they have parental consent and Argentina's Senate has unanimously approved the Gender Identity law, making sex-change surgery a legal right. Only few countries have come forward with a legislation either regulating or permitting genital reconstruction/affirmation surgery and even with respect to those countries, the age of consent varies.

**11.** In India, the path breaking judgment in National Legal Services Authority v Union of India and Others [MANU/SC/0309/2014 : (2014) 5 SCC 438] (NALSA) opened up a space for challenging the gender binary straitjacket, by legally recognising and protecting gender variations. The Apex Court's erudite exposition on gender identity being contextually relevant, is extracted below;

"21. Gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may be born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre- and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity. Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category."

As observed by the Supreme Court, democracy requires its citizenry to respect and develop the free spirit of human beings, which is responsible for all progress in human history. If democracy is based on recognition of the individuality and dignity of man, the right of a human being to choose his/her sex or gender identity, which is one of the most basic aspects of self-determination, dignity and freedom has to be recognised. Conversely, intervention with an individual's right to choose sex or identity will

definitely be an intrusion into that person's privacy and an affront to his/her dignity and freedom.

**12.** To understand the concept of privacy in the context of individual choice, whether it be gender or sex, one should necessarily read the following scholarly elucidation in Justice K.S. Puttaswamy (Retd.) and Another v Union of India and Others [MANU/SC/1044/2017 : (2017) 10 SCC 1]

"297. What, then, does privacy postulate? Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concerns over which there is a legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt. Recognising a zone of privacy is but an acknowledgment that each individual must be entitled to chart and pursue the course of development of personality. Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy enables each individual to take crucial decisions which find expression in the human personality. It enables individuals to preserve their beliefs, thoughts, expressions, ideas, ideologies, preferences and choices against societal demands of homogeneity. Privacy is an intrinsic recognition of heterogeneity, of the right of the individual to be different and to stand against the tide of conformity in creating a zone of solitude. Privacy protects the individual from the searching glare of publicity in matters which are personal to his or her life. Privacy attaches to the person and not to the place where it is associated. Privacy constitutes the foundation of all liberty because it is in privacy that the individual can decide how liberty is best exercised. Individual dignity and privacy are inextricably linked in a pattern woven out of a thread of diversity into the fabric of a plural culture."

**13.** Certain provisions of the Transgender Persons (Protection of Rights) Act, 2019 ('the Act' for short), enacted in terms of the directions in NALSA (supra), also throws light on the issue under consideration. Section 2(i) of the Act defines 'person with the intersex variation' as a person who at birth shows variation in his or her primary sexual characteristics, external genitalia, chromosomes or hormones from normative standards of male or female body. The definition of transgender in Section 2(k) takes in persons with intersex variations also, thereby making the protections under the Act available to such persons. Section 4(2) of the Act guarantees the right to have a self perceived gender identity and Section 18(d) provides for imposition of penalty on persons harming, injuring or endangering the life, safety, health or well-being, whether mental or physical, of a transgender person. Thus it is beyond cavil that the right to choose gender is vested with the individual concerned and no one else, not even the court.

**14.** In the case at hand, as the parents are seeking permission on behalf of their minor child, the request would have been allowed under normal circumstances. But permission is being sought to conduct non-consensual sex affirmative surgery. The Karyotype-46XX report of chromosomal analysis is not sufficient for granting the permission, as the possibility of a child with Karyotype-46XX developing male like tendencies in adulthood cannot be ruled out. The article, 'Protecting the Rights of Children with Intersex Conditions from Non-consensual Gender Conforming Medical Interventions' published in Volume 27 of the Medical Law Review, highlights the severe evidentiary deficit of the therapeutic benefits of non-consensual intervention. According to the authors, surgical interventions are unnecessary and may result in irreversible mutilation of children's bodies. While on the subject, it is pertinent to note the following report of the World Health Organisation titled 'Sexual Health, Human Rights and the Law';

"3.4.9 Intersex people may face discrimination and stigma in the health system, in many cases being subjected to lack of quality of care, institutional violence and forced interventions throughout their lifetime (178, 262, 263).

**9 .** A major concern for intersex people is that so-called sex normalizing procedures are often undertaken during their infancy and childhood, to alter their bodies, particularly the sexual organs, to make them conform to gendered physical norms, including through repeated surgeries, hormonal interventions and other measures.

**10.** As a result, such children may be subjected to medically unnecessary, often irreversible, interventions that may have lifelong consequences for their physical and mental health, including irreversible termination of all or some of their reproductive and sexual capacity. Medical procedures may sometimes be justified in cases of conditions that pose a health risk or are considered life-threatening. Such procedures, however, are sometimes proposed on the basis of weak evidence, without discussing and considering alternative solutions.

**11.** Increasingly, concerns are being raised by intersex people, their caregivers, medical professionals and human rights bodies that these interventions often take place without the informed consent of the children involved and/or without even seeking the informed consent of their parents (178, 262, 264, 270-273). Parents often consent to medical intervention for their children in circumstances where full information is lacking and without any discussion of alternatives (263, 274).

**12.** According to human rights standards, intersex persons should be able to access health services on the same basis as others, free from coercion, The health and human rights concerns faced by intersex people may be similar to those faced by transgender people, and in other respects their concerns may be different. Human rights bodies and ethical and health professional organizations have recommended that free and informed consent should be ensured in medical interventions for people with intersex conditions, including full information, orally and in writing, on the suggested treatment, its justification and alternatives (178, 264, 275).

**1 3 .** These organizations have also recommended that medical and psychological professionals should be educated and trained about physical, biological and sexual diversity and integrity, and that they should properly inform patients and their parents of the consequences of surgical and other



medical interventions and provide additional support (91, 176, 264, 268, 271, 276). It has also been recommended that investigation should be undertaken into incidents of surgical and other medical treatment of intersex people without informed consent and that legal provisions should be adopted in order to provide remedies and redress to the victims of such treatment, including adequate compensation (91, 264)."

**15.** The Madras High Court, while dealing with a writ petition pertaining to the non-registration of marriage between a male and a transwoman, made the following pertinent observations in *Arunkumar and Another v. Inspector General of Registration, Chennai and Others* [MANU/TN/1403/2019 : 2019 KHC 4479];

"21. Any intersex child is entitled to and must stay within the folds of its family. The running away from the family to the margins and beyond is a fatal journey that must be arrested. Time has come when they are brought back from the margins into the mainstream. This is because even though the transgender community is having its own social institutions, the stories we hear are horrendous. The parents must be encouraged to feel that the birth of an intersex child is not a matter of embarrassment or shame. It lies in the hands of the Government to launch a sustained awareness campaign in this regard. Recent Tamil Films such as "Peranbu" where Mamooty marries a transgender and "Super Delux" where Vijay Sethupathi plays the role of a transgender and is also a parent to the child he has fathered are encouraging trends.

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**24.** The second petitioner appears to have been an intersex person at birth. In the affidavit filed in support of this writ petition, it has been mentioned that she was assigned as a female at birth. But, in the school records, the second petitioner has been described as a male by name Manthiramoorthy. In the Aadhar Card, her gender has been mentioned as "T" (Third Gender). A person who is in the Third Category is entitled to remain beyond the duality of male/female or opt to identify oneself as male or female. It is entirely the choice of the individual concerned."

The above judgment prompted the Government of Tamil Nadu to issue an order banning sex reassignment surgeries on intersex infants and children. The relevant portion of G.O.(MS) No. 355 dated 13.08.2019 is extracted hereunder;

#### ABSTRACT

Writ Petitions-WP.(MD)No. 4125/2010 and 3220/2019-Filed by Arunkumar and Sreeja-Direction of Hon'ble Madural Bench of Madras High Court to ban sex reassignment surgeries on intersex infants and children-Orders-Issued.

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HEALTH AND FAMILY WELFARE (M-2) DEPARTMENT

G.O.(Ms) No. 355

Dated: 13.08.2019

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**5.** The Government after careful examination of all the above points and based on the opinions of the experts as forwarded by the Director of Medical Education, have decided to ban sex reassignment surgeries on intersex infants and children except on life-threatening situations and ordered accordingly. The life-threatening situation shall be decided by the Government based on the recommendation of the Director of Medical Education who shall form a committee comprising of 1) Paediatric Surgeon/Urologist 2) Endocrinologist 3) Social Worker/Psychology worker/intersex activist and 4) a Government representative not below the rank of Under Secretary to the Government. The Director of Medical Education shall take every step to ensure that the above exceptional clause of life-threatening situation shall not be misused in any way by anyone which shall affect the implementation of the ban on sex reassignment surgeries on intersex infants and children."

**16.** Recently, the High Court of Delhi had occasion to consider the prayer for conducting genital reconstructive surgery. During the course of hearing, the Delhi Commission for Protection of Child Rights was made to submit a report to the Government of NCT of Delhi on the issue of sex selective surgeries on intersex infants and children. The writ petition was later disposed of by directing the Government to take a decision on the recommendations of the Commission. Being of relevance, the recommendations of the Commission, as extracted in *Srishti Madurai Educational Research Foundation v. Government of NCT of Delhi and Others* [WP(C) No. 8967/2021 dated 27.07.2022], is quoted below;

"10. The Commission advises the respective departments to include within the Committee people who are intersex, or from a similar marginalised background to be a formal Bremen of the Committee. This step would ensure that the community is adequately represented, and their voices heard in the decision-making process.

**11.** After careful deliberation, the Commission is of the considered opinion that the Government of Delhi should declare a ban on medically unnecessary, sex-selective surgeries on intersex infants and children except in cases of life-threatening situations and advises the government accordingly."

**17.** On careful analysis of the relevant factors and consideration of the rights of the parents and the child, I find that, grant of permission for conducting genital reconstructive surgery would impinge the rights guaranteed under Articles 14, 19 and 21 of the Constitution of India and conduct of the surgery without consent would violate the child's dignity and privacy. Granting such permission may also result in severe emotional and psychological issues if, on attaining adolescence, the child develops orientation towards the gender, other than the one to which the child was converted through surgical intervention.

**18.** Although the petitioners have raised concern regarding the child's health, the medical records do not make out a case warranting immediate intervention. No doubt, there can be such intervention, if so recommended by a duly constituted medical board.

The writ petition is hence disposed of with the following directions;

(i) The Government shall constitute a State Level Multidisciplinary Committee consisting of experts, which shall include a Pediatrician/ Pediatric Endocrinologist, Pediatric Surgeon and Child Psychiatrist/Child Psychologist.

(ii) The Committee thus constituted shall examine the petitioners' child within two months and decide whether the child is facing any life threatening situation by reason of the ambiguous genitalia. If so, permission can be granted for carrying out the surgery.

(iii) The Government shall issue an order regulating sex selective surgeries on infants and children within three months. Until such time, sex selective surgery shall be permitted only based on the opinion of the State Level Multidisciplinary Committee that the surgery is essential to save the life of the child/infant.

Having tried to understand the trials and tribulations of intersex persons to the extent possible, I take the liberty of extracting a few stanzas from the poem 'I'm fluid' by Sarah Crouse, which I believe, has encapsulated the intersex psyche beautifully;

"My gender can change at the flip of a switch

They say it's impossible

They say it's just a glitch

They ask if I'm male, female or non-binary

I'm all three I'll tell them finally

xxx

my gender is mine you will not correct it

you will not make me feel like a misfit

because I know who I am, what I am

there is no right answer to this exam

my gender is fluid

don't act like you're clueless

because I don't fit in a neat little box

I don't care if you think its a paradox

because you don't get a say

in who I am today

I'm not nonbinary

I'm not trans

I'm fluid"

I place on record my appreciation for the invaluable assistance rendered by Adv.Indulekha Joseph, the learned amicus curiae.



APPENDIX OF WP(C) 19610/2022

PETITIONER EXHIBITS

Exhibit P1	TRUE COPY OF THE CERTIFICATE BEARING NO. BMH/REIM/984/16 DATED 29.08.2016 ISSUED BY SENIOR CONSULTANT GYNECOLOGIST, BABY MEMORIAL HOSPITAL LTD., KOZHIKODE.
Exhibit P2	TRUE COPY OF THE CHROMOSOME ANALYSIS (KARYOTYPE) BLOOD REPORT DT. 22.08.2016 OF THE DAUGHTER OF THE PETITIONERS OF DR. LAL PATHLABS.
Exhibit P3	TRUE COPY OF THE BIRTH CERTIFICATE ISSUED BY KOZHIKODE CORPORATION TO PROVE THE DATE OF BIRTH OF THE CHILD AS 18.10.2016.
Exhibit P4	TRUE COPY OF THE MEDICAL RECORD BOOK OF THE CHILD.
Exhibit P5	TRUE COPY OF THE OUT PATIENT RECORD OF THE MINOR CHILD DATED 04.03.2022.
Exhibit P6	TRUE COPY OF THE REPRESENTATION DATED 1.6.2022 SUBMITTED BY THE PETITIONERS BEFORE THE 1ST RESPONDENT.
Exhibit P7	PHOTOGRAPHS SHOWING THE DAUGHTER OF THE PETITIONER.
Exhibit P8	TRUE COPY OF THE GROUP PHOTOGRAPH EVIDENCING THE SCHOOL OF THE PETITIONER'S DAUGHTER.
EXHIBIT AC1:-	A pictorial representation of Autosomal Recessive Inheritance Pattern
EXHIBIT AC2:-	A True Photocopy of the Indian Association of pediatric Surgeons Guidelines on the management of differences in sex development dated 05.04.2022
EXHIBIT AC3:-	A True copy of the English translation of the Gender Identity Law, 2012 of Argentina
EXHIBIT AC4:-	A True Copy of the Judgment rendered by the Hon'ble Madras High Court in Arunkumar and Another v. Inspector General of Registration, Chennai and Others (2019 KHC 4479)
EXHIBIT AC5:-	A True copy of the Transgender Persons (Protection Of Rights) Act, 2019 passed by the Parliament of India
EXHIBIT AC6:-	A True copy of the Transgender Persons (Protection of Rights) Rules, 2020 passed by the Government of India
EXHIBIT AC7:-	A True Photocopy of the G.O.(MS) No. 355 dated 13.08.2019 issued by the Government of Tamil Nadu

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