D5.2.5 Report on systematic explorative review of European national legislations related to the human rights protection of intersex people and their implementation

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Report on systematic explorative review of European national legislations related to the human rights protection of intersex people and their implementation

1. INTRODUCTION

"Intersex" is a term adopted by human rights defenders and human rights monitoring bodies to refer to people whose bodies do not fit the typical male or female medical and cultural binary standards. According to the Organisation Intersex International Europe (OII Europe), one of the main intersex activists' organizations in the European continent:

> Intersex individuals are born with sex characteristics (sexual anatomy, reproductive organs, hormonal structure and/or levels and/or chromosomal patterns) that do not fit the typical definition of male or female. The term "intersex" is an umbrella term for the spectrum of variations of sex characteristics that naturally occur within the human species. The term intersex acknowledges the fact that physically, sex is a spectrum and that people with variations of sex characteristics other than male or female exist.[1]

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[1] Dan Christian Ghattas, *Protecting Intersex People in Europe: A Toolkit for Law and Policymakers* (ILGA Europe, OII Europe 2019) 9.

While most intersex people are capable of living perfectly healthy lives, with only a few experiencing medical conditions that put their health at risk,[2] intersex people's bodies have been traditionally and systematically stigmatized, mythologized, othered and pathologized.[3] Despite attempts to change and update medical standards of treatment, intersex people, particularly young children and newborns, continue to be subjected to sex 'normalizing' surgeries or treatments that in most circumstances have no medical necessity, urgency nor benefit, yet are carried out purely for body-altering cosmetic reasons and with the main purpose of 'normalizing' or 'defining' the sex traits of the infant to accommodate medical and cultural standards of what a male or female body should look like.[4]

These surgeries constitute a problem when they are carried out without the consent of the patient, often a child, and as they can have severe long-lasting consequences such as chronic pain, life-long trauma, sterilization, genital insensitivity and or diminished or lost capacity for sexual pleasure.[5] Moreover, under current human rights standards they represent a violation to the right of respect for one's private life, bodily autonomy and integrity, the right to consent to medical treatments, to be free from medical experimentation and ill-treatment, and they hamper the right to the highest attainable standard of health.[6] An important issue to keep in mind as well is that intersex activist groups and human rights monitoring bodies alike have called for a children's rights perspective to be respected and taken into consideration when dealing with medical treatments, especially children's rights to

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[2] Parliamentary Assembly of the Council of Europe, Resolution 2191 (2017). Promoting the Human Rights of and Eliminating Discrimination against Intersex People (2017).

[3] Council of Europe Commisioner for Human Rights (CoE), *Human Rights and Intersex People. Issue Paper* (CoE 2015); United Nations and Office of the High Commissioner for Human Rights (OHCHR), *Background Note on Human Rights Violations against Intersex People* (OHCHR 2019); Robert Hupf, 'Allyship to the Intersex Community on Cosmetic, Non-Consensual Genital "Normalizing" Surgery' (2015) 22 William & Mary Journal of Race, Gender and Social Justice 73.

[4] CoE (n 3); OHCHR (n 3); Inter-American Commission on Human Rights (IACHR), *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas* (IACHR 2015).

[5] IACHR (n 4), para 186.

[6] Markus Bauer, Daniela Truffer and Daniela Crocetti, (2020) 'Intersex Human Rights' 24 International Journal of Human Rights 724.

development, to be free from violence, and their right to be heard regarding decisions that affect their lives according to their age and maturity to be respected, which means that simply the consent of parents or those with custody rights to invasive treatments is not always enough.[7]

While there are a number of other issues that hamper the rights of intersex people, the prohibition of intersex genital normalizing surgery and treatments (IGS) continues to be the main demand of intersex activist groups and human rights monitoring bodies that echo these demands and ask of governments to prohibit that these types of surgeries are carried out without control.[8] According to the European Union Agency for Fundamental Rights (FRA), 'normalization' surgeries are carried out on intersex children in at least 21 Member States of the European Union (EU)[9] and this is a situation reflected throughout the world.[10]Among the member states of the EU and the Council of Europe (CoE), only four countries have legislation that provides protections against these types of interventions during early childhood at the time of writing.[11]

This report examines the legal nuances in the way the legal schemes in Malta, Portugal, Iceland and Germany have regulated and prohibited the performance of medically unnecessary and non-urgent intersex 'normalizing' surgeries (IGS) and other medical treatments. Special emphasis is put in the way the different legislative bodies seem to

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[7] IGLYO, OII Europe and EPA, *Supporting your intersex child* (IGLYO, et al. 2018); Kavot Zillén, Jameson Garland and Santa Slokenberga, *The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties* (CoE 2017).

[8] Ernesto Zelayandia-Gonzalez, 'The Growing Visibility of Intersex Demands at the United Nations: A Review of the Treaty Bodies Concluding Observations' (2023) 12 Social Sciences 73.

[9] EU Agency for Fundamental Rights (FRA), *The Fundamental Rights Situation of Intersex People* (FRA 2015).

[10] CoE (n 3); OHCHR (n 3); IACHR (n 4).

[11] See: The law of Malta 2015 "on gender identity, gender expression, and sex characteristics" [The Gender Identity, Gender Expression and Sex Characteristics Act]; the gender identity law of Portugal (2018) [Lei n.º 38/2018, de 7 de agosto. Direito à autodeterminação da identidade de género e expressão de género e à proteção das características sexuais de cada pessoa]; the Icelandic Gender Autonomy Act 2019 [Kynrænt sjálfræði] and the German law "for the protection of children with variants of sex development" 2021 [Gesetz zum Schutz von Kindern mit Varianten der Geschlechtsentwicklung].

understand the underlying 'problem' with these surgeries and treatments as it provides for a more comprehensive analysis of the measures or 'solutions' that are put forward to stop such problem.[12] The main goal of this report is to compile the best practice elements present in the four legislations under analysis.

This report looks at specific sections or provisions in the laws under review to better understand how they aim to tackle challenges presented by activists and literature. This also means that legal schemes are not 'ranked' against each other even in the comparison section. It needs to be said that this report should be considered as a theoretical exercise, one that acknowledges the different nuances, context realities and difficulties of law and policy making processes across Europe and does not aim to provide a 'one size fits all' solution or essentialize the demands of intersex activists across the continent but rather to identify positive elements (and challenges) to consider in the law and policy making process.

For the writing of this report, the legislative schemes of Malta, Portugal, Iceland and Germany were selected for review as these constituted at the time of writing the only four jurisdictions where intersex genital surgeries are prohibited at the national level, since the writing of this report Greece and Spain[13] have introduced similar legislations. In the first part of this report, the elements pertaining to the rights of intersex people present in the four laws are highlighted followed by a commentary on the interesting, positive or problematic elements with the laws. A second part of this report provides a comparison of how these four different countries have decided to deal with similar issues and aims at putting the different legal drafting styles in conversation with one another.

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[12] Carol Bacchi and Susan Goodwin, *Poststructural Policy Analysis. A Guide to Practice* (Springer 2016).

[13] See: Greek Law No. 4958/2022 Government Gazette 142/A/21-7-2022 Reforms in medically assisted reproduction and other urgent regulations Articles 17 -20. [ΝΟΜΟΣ ΥΠ' ΑΡΙΘΜ. 4958/2022 ΦΕΚ 142/Α/21-7-2022 Μεταρρυθμίσεις στην ιατρικώς υποβοηθούμενη αναπαραγωγή και άλλες επείγουσες ρυθμίσεις.] and for Spain Law 4/2023, of 28 February [Ley 4/2023, de 28 de febrero, para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI].

As a limitation I would like to point out the difficulties in accessing information regarding the legal schemes themselves and their implementation practices. Legal scholarship on this field seems to be limited still. Likewise, I faced some limitations regarding language and legal jurisdiction knowledge. While the Maltese and the Icelandic law have official English translations, this is not the case for the German and Portuguese ones, so some matters may have a different translation or meaning in the local language. Similarly, some of the laws refer to other broader aspects of the domestic legal landscape, for example provision regarding the statutes of limitations, civil or family codes. In order to avoid falling into a rabbit's hole I decided not to pursue all the questions concerning references to other laws. Despite the limitations, the report aims at providing a review of the legal landscape regarding intersex human rights in Europe.

2. LEGISLATION HIGHLIGHTS

2.1 Malta

Malta was the first country in the world to prohibit intersex genital 'normalizing' surgeries and treatments. The Maltese "Gender Identity, Gender Expression and Sex Characteristics Act"[14] was approved by the Maltese Parliament unanimously in April 2015 to make intersex genital surgeries that can be deferred and are carried out without the patient's consent mainly for social reasons unlawful. It was also the first one to extend nondiscrimination protections on the basis of one's sex characteristics.[15] While the law mainly deals with the procedures to recognize trans people's right to their gender identity and rectification of

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[14] Malta, Gender Identity, Gender Expression and Sex Characteristics Act. To provide for the recognition and registration of the gender of a person and to regulate the effects of such a change, as well as the recognition and protection of the sex characteristics of a person. ACT XI of 2015, as amended by Acts XX of 2015 and LVI of 2016 and XIII of 2018. <https://legislation.mt/eli/cap/540/eng/pdf> accessed September 15, 2022.

[15] ibid art 2.

identification documents, some provisions also speak to the rights of intersex people. Some of the elements included in the Maltese law to highlight are: The legal recognition of sex characteristics as a protected ground under the law, the right to bodily integrity and the prohibition of IGS, provision regarding health care treatments and the inclusion of monitoring mechanisms to follow up on the implementation of the law.

2.1.1 The legal recognition of one's sex characteristics and non-discrimination protections

The Maltese Gender Identity, Gender Expression and Sex Characteristics Act was probably the first in the world to provide a legal definition for the term "sex characteristics" and to include it as a protected ground against discrimination.[16] As per section 2 the term sex characteristics refers to: "the chromosomal, gonadal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia and/or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and, or structure". This terminology is much like the one included later in the Yogyakarta Principles +10.[17]

Sex characteristics are also recognized in the Maltese law as a protected ground against unlawful discrimination. Article 13 mandates the public service to ensure that unlawful discrimination and harassment, including those incidents that happen because of, or are driven by a person's sex characteristics are eliminated, and to ensure that its services must promote equality of opportunity to all, irrespective of sexual orientation, gender identity, gender expression **and sex characteristics.**[18] Likewise, Article 19 amends the existing

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[16] ibid art 2 and art 19.

[17] The Yogyakarta Principles Plus 10 - Additional Principles and State Obligation on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles (YP plus 10), 10 November 2017 <https://www.refworld.org/docid/5c5d4e2e4.html> accessed September 15, 2022.

[18] Malta (n 14), art 13.

Maltese Equality for Men and Women Act to include sex characteristics as a protected ground against discrimination along the lines of other grounds such as family responsibilities, sexual orientation, age, religion or belief, racial or ethnic origin, or gender identity and gender expression.[19]

2.1.2 The right to bodily integrity and prohibition of IGS

The Maltese law recognizes the right to bodily integrity and physical autonomy in article 3(1d), albeit it does not define them.[20] The law prohibits medical treatments and/or surgical interventions on the sex characteristics of minors unable to consent in circumstances where: a) these interventions lead to "sex assignment" and b) these interventions can be deferred until the person to be treated can provide informed consent.[21]

There are some circumstances that have been added to the law, which would make some of these surgeries and treatments legal if: a) "the minor gives informed consent through the person exercising parental authority or the tutor of the minor"[22] or b) ***if in exceptional circumstances****:* the minor does not, or cannot, give consent and the medical intervention is not driven by social factors, then interventions may be permissible where an agreement is reached between (i) the interdisciplinary team of experts and (ii) the persons exercising parental authority or the tutor of a minor who is still unable to consent.

A 2018 reform introduced sanctions within the body of the law. Article 14(2) established that medical practitioners or other professionals who breach the prohibition of IGS, if

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[19] ibid Article 19; ACT I of 2003, To promote equality for men and women, as amended by Legal Notice 427 of 2007; and Acts IV of 2009, IX of 2012, XVIII of 2014, and VII and XI of 2015, 9th December 2003, art 2.

[20] ibid art 3(1d).

[21] Malta (n 14), art 14(1).

[22] Malta (n 14), art 14(1), para 2.

convicted, can be liable to the punishment of imprisonment not exceeding five years, or to a fine between five thousand and twenty thousand euro.

2.1.3 Health services and intersex medical management

Section 14(4) mandates the creation of an interdisciplinary team appointed by the Minister responsible for equality for a period of three years. Under section 14(5), the composition of the team is left at the discretion of the Minister. Section 14(6) indicates that, when a minor expresses the decision for treatment with the consent of their parents and/or tutor, the medical professionals should: (a) ensure that the best interests of the child be the paramount consideration; and (b) give weight to the views of the minor having regard to the minor's age and maturity.[23]

Article 15 considers the right to psychosocial services and counselling, including peer counselling. The law states that: “All persons seeking psychosocial counselling, support and medical interventions relating to sex or gender should be given expert sensitive and individually tailored support by psychologists and medical practitioners or peer counselling. Such support should extend from the date of diagnosis or self-referral for as long as necessary.”[24]

2.1.4 Monitoring mechanisms regarding implementation of the law

In terms of monitoring mechanisms, Article 16 considers the creation of a “working group” that shall be appointed by the Minister of equalities after consulting the Minister responsible for health to: “review the current medical treatment protocols in line with current medical best practices and human rights standards and shall, within one year from the date of their appointment, issue a report with recommendations for revision of the current medical

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[23] ibid art 14.

[24] ibid art 15.

treatment protocols."[25] The working group should be formed by nine experts, amongst them, three experts in human rights issues, three psychosocial professionals and three medical experts. The Chairperson shall be a medical doctor with at least twelve years of experience.

2.1.5 Commentary

While the Maltese law has been praised by many and is considered as a golden standard in law and policy making processes in terms of legal protections based in sexual orientation, gender identity and expression and sex characteristics,[26] particularly for being the first one to ever recognize sex characteristics as a ground for protection, there are some fronts where the law seems to fall short. Regarding the prohibition of IGS, for example, while the addition of some of the driving factors behind IGS used to justify these surgeries, namely 'sex assignment',[27] is a welcomed development as it raises visibility to one of the main underlying influences behind these interventions,[28] there are also some legally ambiguous terms

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[25] ibid art 16.

[26] Fae Garland and Mitchell Travis, 'Legislating Intersex Equality: Building the Resilience of Intersex People through Law' (2018) 38 Legal Studies 587; OII Europe, 'OII-Europe applauds Malta's Gender Identity, Gender Expression and Sex Characteristics Act' (April 1, 2015) <https://www.oiieurope.org/press-release-oii-europe-applauds-maltas-gender-identity-gender-expression-and-sex-characteristics-act/> accessed September 15, 2022; TGEU, 'Malta Adopts Ground-breaking Trans and Intersex Law - TGEU Press Release' (April 1, 2015) <https://tgeu.org/malta-adopts-ground-breaking-trans-intersex-law/> accessed September 15, 2022.

[27] Sylvan Fraser, 'Constructing the Female Body: Using Female Genital Mutilation Law to Address Genital-Normalizing Surgery on Intersex Children in the United States' (2016) 9 International Journal of Human Rights in Healthcare 62; Markus Bauer, Daniela Truffer and Daniela Crocetti, 'Intersex Human Rights' (2020) 24 International Journal of Human Rights 724; Daniela Crocetti and others, '"You're Basically Calling Doctors Torturers": Stakeholder Framing Issues around Naming Intersex Rights Claims as Human Rights Abuses' (2020) 42 Sociology of Health & Illness 943; Elizabeth Reis, 'Divergence or Disorder?: The Politics of Naming Intersex' (2007) 50 Perspectives in Biology and Medicine 535; Francesca Romana Ammaturo, 'Intersexuality and the "Right to Bodily Integrity"' (2016) 25 Social & Legal Studies 591.

[28] In its press release on the law, OII Europe praised the law claiming "For the first time in history intersex individuals will no longer be forced to endure arbitrary surgical sex assignment based on sociological factors." For more information visit: OII Europe, 'Press Release: OII-Europe applauds Malta's Gender Identity, Gender Expression and Sex Characteristics Act' (April 1, 2015) <https://www.oiieurope.org/press-release-oii-europe-applauds-maltas-gender-identity-gender-expression-and-sex-characteristics-act/> accessed September 15, 2022; The Maltese Human Rights Directorate website similarly mentions prohibiting normalising surgeries. More information: Human Rights Directorate, 'Legal Gender Recognition and Bodily Integrity' (Government of

present in the law that open a window for very important questions as to how the law should be interpreted. For example, the Maltese law fails to define what it means in Article 14(3) when it refers to the "exceptional circumstances" that allow for medical treatment, including surgery, to be carried out without the consent of the minor.[29] A better definition or at least a protocol to better identify these "exceptional circumstances" would provide extra protections to intersex minor's bodily integrity. Similarly, the law prohibits unlawful medical interventions driven by "social factors", but falls short at providing a definition of what those social factors are, making this also a legally ambiguous term. Seemingly the goal of both framings is to provide an open ended list of circumstances in order to better protect children from medically unnecessary interventions, however, by not providing a clear definition or any other criteria as to how one would identify what should be considered as an exceptional circumstance or how to distinguish 'social factors' from '*not* social factors,' these aspects of the law are left in a gray undefined area. Ambiguity is such that for instance, Tanya Ní Mhuirthile has questioned whether "The wording of Article 14(1) of the legislation is such that it might be read such as to prohibit circumcision of neo-natal males."[30] Perhaps this is not a pressing problem or a relevant matter when it comes to the applicability of the Maltese law, after all circumcision does not have a sex assignment motivation behind it, and there are no reports that this practice is forbidden or even questioned in Malta, for now however, and by the way it stands, the legal ambiguity in the Maltese law could be interpreted by some to prohibit this religious practice, therefore clarifying both aspects can only make the provision stronger and more accurate. Moreover, scholars, particularly those involved in critical disability movements, mad studies and social diagnosis theory have pointed out that the whole process behind creating a diagnosis is full of sociological factors and structures

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Malta 2020) <https://humanrights.gov.mt/en/Pages/LGBTIQ%20Equality/Legal%20Provisions/Legal-Gender-Recognition-and-Bodily-Integrity.aspx>, accessed September 15, 2022.

[29] Art 14(3) reads: "In exceptional circumstances treatment may be effected once agreement is reached between the interdisciplinary team and the persons exercising parental authority or tutor of the minor who is still unable to provide consent: Provided that medical intervention which is driven by social factors without the consent of the minor, will be in violation of this Act."

[30] Tanya Ní Mhuirthile, 'Malta' in Jens M. Scherpe, Anatol Dutta and Tobias Helms (eds), *The Legal Status of Intersex Persons* (Intersentia 2018) 361.

that frame such diagnosis.[31] As it will be addressed below, other legislations have not only included ways to identify troubling social and cultural factors that motivate unnecessary surgeries but also have added safeguards to medical procedures to better define and address concerns about medical necessity.

Another aspect that is unclear from the text of the law is the composition of the interdisciplinary team mentioned in article 14 and most of their functions. The law leaves its composition to the discretion of the Minister and does not define if this team should be understood as a medical team, a legal team, a psychosocial team, or if it is a true interdisciplinary team with a mixture of all the above.

The text of the law is also confusing regarding the functions and distinct responsibilities of the interdisciplinary team (article 14) and the working group (article 16). From the text of article 16 it can be inferred that when talking about the 'working group' the law talks about a national team of experts with the mandate of reviewing current medical practices and policies at the macro level. But the full role of the interdisciplinary team in article 14 is not clear as the text of the law only highlights that medical professionals are to make sure the best interests of the child as per human rights standards are secured "when the decision for treatment is being expressed by a minor with the consent of the persons exercising parental authority or the tutor" and to give weight to the child views according to their age and maturity.

While Article 16 states that the working group should have been appointed 3 months after entry into force of the act, yet it is unclear if such working group has been formed. The report

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[31] Tania M. Jenkins and Susan E. Short, 'Negotiating Intersex: A Case for Revising the Theory of Social Diagnosis' (2017) 175 Social Science and Medicine 91; Phil Brown and Stephen Zavestoski, 'Social Movements in Health: An Introduction' (2004) 26 Sociology of Health and Illness 679; Carol Thomas, 'How is disability understood? An examination of sociological approaches' (2004) 19 Disability & Society 569; Hannah Morgan, 'Mad Studies and disability studies' in Peter Beresford and Jasna Russo (eds), *The Routledge International Handbook of Mad Studies* (Routledge 2022).

mandated in article 16.6 that was supposed to "review the current medical treatment protocols in line with current medical best practices and human rights standards" was also not found in the course of this research.

Another point to highlight is that while the inclusion of peer counselling services in article 15 is a welcomed development, as it resonates with some of the demands of intersex activists,[32] the fact that the Maltese law fails to mention what kind of peer counselling intersex people can expect and who will provide such services is a missed opportunity. From the text of the law, it seems that the government relies on the existence of a strong network of intersex people's associations to provide such services. However, if peer services are to be provided by non-governmental associations the law fails to mention any form of support, funds, or compensation for their work. The state of the implementation of such services could not be found during the drafting of this report.

Most issues problematized in this section can be solved via secondary pieces of regulation, for example directives or protocols that regulate the composition of teams and working groups established in the law, and that provide for legal definitions for legally ambiguous terms. These set of issues do not necessarily need to be included in the law or need a legislative reform. However, when compared to other more recent pieces of legislations there are other issues that have not been included in the Maltese law and would make it stronger should a review or reform were to come. Other issues identified by activists, for example, periodical monitoring procedures of implementation, and procedural guarantees against statutes of limitation to access courts and litigation[33] would make it enough to call for a new the reform of the Maltese law.

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[32] Third International Intersex Forum, 'Malta Declaration. Public Statement by the Third International Intersex Forum' (2013).

[33] OHCHR (n 3); Morgan Carpenter, 'The OHCHR Background Note on Human Rights Violations against Intersex People' (2020) 28 Sexual and Reproductive Health Matters 1.

2.2 Portugal

In August 2018 Portugal became the second country in the world to approve a state-wide law aiming at protecting the sex characteristics of people. Commonly known as the Gender Identity law or *Lei da Identidade de Género*, Law n.º 38/2018 has amongst its aims protecting the "right to the protection of the sex characteristics of each person."[34] The proposal approved by the Portuguese Council of Ministers recalled in its motivation the Yogyakarta Principles[35] as source of inspiration and considered that the main aim of the law was to "make Portugal more respectful of the human rights of transexual and transgender people, as well as intersex people, establishing procedures that guarantee a better quality of life and greater inclusion of a social group that is often the target of discrimination, stigma and violence."[36] The law applies to both public and private institutions and public entities have also the mandate not only to implement the law and to refrain from unlawful actions but also to promote the right to the protection of one's sex characteristics.

2.2.1 The right to protection and non-discrimination based on one's sex characteristics

While the law does not provide a legal definition of the term "sex characteristics" the exposition of motives from the Portuguese Council of Ministers took inspiration from the terminology present in the Yogyakarta Principles[37] and the Yogyakarta Principles +10.[38]

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[34] Portugal, Lei n.º 38/2018, de 7 de Agosto. Direito à autodeterminação da identidade de género e expressão de género e à proteção das características sexuais de cada pessoa, Article 1. Own translation. <https://dre.pt/dre/detalhe/lei/38-2018-115933863> accessed September 15, 2022.

[35] The Yogyakarta Principles. Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (YP) 2007. <https://www.refworld.org/pdfid/48244e602.pdf> accessed September 15, 2022.

[36] Presidência do Conselho de Ministros. Proposta de Lei n.º 75/XIII. Exposição de Motivos. Own translation. <https://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063484d364c793968636d356c6443397a6158526c6379395953556c4a5447566e4c305276593356745a57353062334e4a626d6c6a6157463061585a684c7a526b597a5a684d7a42694c544931597a51744e445a6d4d5330344d5455774c546b784f545931597a4d344e54426b5969356b62324d3d&fich=4dc6a30b-25c4-46f1-8150-91965c3850db.doc&Inline=true> accessed September 15, 2022.

[37] YP (n 35).

[38] YP plus 10 (n 17).

Article 1 of the Portuguese law establishes the "right to the protection of the sex characteristics of each person."[39] and Article 4 considers that everyone "has the right to *maintain their primary and secondary sex characteristics.* [40] The law also includes nondiscrimination measures in Article 2 which prohibits any form of direct or indirect discrimination based on gender identity, gender expression or the *exercise* of one´s right to the protection of their sex characteristics.

2.2.2 Prohibition of IGS

Article 5 of the Portuguese law contains a prohibition on "treatments and surgical or pharmaceutical interventions or those of another nature that entail modifications at the level of the body and the sex characteristics of an intersex minor," and until the moment in which their gender identity manifests.[41] The only exceptions to this rule are: "situations of proven risk for the person's health."[42] The law also highlights the importance of allowing the free development of a person's gender identity.[43]

2.2.3 Teaching and education

The Portuguese law also considers educational policy measures oriented towards the protection of intersex pupils which serve as awareness raising tools to promote intersex people's rights. Article 12 states that "The State must guarantee the adoption of measures in the educational system, at all levels of education and study cycles, that **promote the exercise of the right to self-determination of gender identity and gender expression and the right to the protection of people's sex characteristics**, (…)."[44] To achieve this goal, the law recommends the government turns to: Measures to prevent and combat

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[39] Portugal (n 34), art 1. Own translation.
[40] ibid art 4. Own translation, emphasis added.
[41] ibid art 5. Own translation.
[42] ibid art. 5. Own translation.
[43] ibid art 2.
[44] ibid art 12. Own translation, emphasis added.

discrimination based on gender identity, gender expression and sex characteristics; mechanisms to detect and intervene in situations of risk that endanger the healthy development of children; creating the adequate conditions for the protection of gender identity, gender expression and sex characteristics against all forms of social exclusion and violence within the school context, ensuring respect for children's autonomy, privacy and self-determination; and appropriate training aimed at teachers and other professionals in the education system in the context of issues related to the issue of gender identity, gender expression and the diversity of the sex characteristics of children and young people.[45] Finally, all educational establishments, regardless of their public or private status, must guarantee the necessary conditions for children and young people to feel respected according to their gender identity and gender expression and their sex characteristics.[46]

2.2.4 Treatments and medical management

While the law does not specifically address health services pertaining intersex people, Article 11(2) mandates the Directorate-General for Health to draft an intervention model, guidelines and technical standards, to be implemented by health practitioners on issues related to gender identity, gender expression and people's sex characteristics within a maximum period of 270 days from the entry into force of the law.[47] No information was found however if such model exists.

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[45] ibid Summary of the law text, own translation.

[46] ibid.

[47] ibid art 11.

2.2.5 NGO procedural rights

Article 16 recognizes the right of associations and NGOs that exist with the main goal to defend and promote the rights of trans and intersex people to legal standing and procedural legitimacy for the defense of such rights either in collective or individual procedures.

2.2.6 Commentary

Regarding protections against IGS, while Article 2 of the Portuguese law does not explicitly speak about bodily integrity, it does recognize people's right to have their sex characteristics protected. This framing could give sufficient protections for people with variations of sex characteristics but the fact that the law does not legally defines sex characteristics means this is left open to interpretation. Likewise, the reference and inclusion to the person's gender identity and *not* to their bodily autonomy and/or integrity in Article 5, where the main protection against IGS relies, seems to give primacy to the former making the latter rather invisible.[48] In this sense, it seems that the way IGS is problematized by the Portuguese lawmaker relies on the concern of conducting the 'wrong' type of surgery in the 'wrong' person or body, rather than conducting a surgery without the person's consent (prioritizing autonomy and bodily integrity). In fact, Article 5 makes no mention to the person's consent at all. The legislature *does* mention that treatments and interventions cannot be carried out until the person manifests their gender identity. This framing again implies that the legislature seems worried that surgeries will have the unwanted effect of assigning a wrong physiology or 'sex' on someone that will cause a disconnection with their gender identity, when it could give equal importance to the fact that this person might not want any kind of

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[48] Article 5 states that: "Except in situations of proven risk to their health, treatments and surgical or pharmaceutical interventions or those of another nature that entail modifications at the level of the body and the sex characteristics of an intersex minor, should not be performed until the moment in which their gender identity manifests." (Own translation) ["Salvo em situações de comprovado risco para a sua saúde, os tratamentos e as intervenções cirúrgicas, farmacológicas ou de outra natureza que impliquem modificações ao nível do corpo e das características sexuais da pessoa menor intersexo não devem ser realizados até ao momento em que se manifeste a sua identidade de género."]

surgery in the first place, regardless if their gender identity matches or not their physiology. OII Europe has spoken about risks of doctors and/or parents considering the gender identity of a child "manifested" already in order to green light surgeries as a situation of concern.[49]

The Portuguese law makes no reference to the underlying factors that often serve as a justification for IGS, other than factors that risks the person's health, this, I believe, is a missed opportunity. While it is perhaps not legally possible to list all the causes or justifications doctors or parents use to carry out IGS, a reference to the leading factors highlighted by activists,[50] with a '*numerus apertus*' that includes identified social factors, could provide possible victims of IGS with more elements to prove the damage made to them. For doctors, parents and others involved in decision making processes this would provide them with more elements to identify unnecessary treatments and surgical interventions.

Portugal includes nondiscrimination protections based on the right to the *protection* of one's sex characteristics. Because the law does not provide a definition on sex characteristics nor does it legally define what intersex means, the aspect of who is protected by the law falls into a large margin of interpretation which could either benefit people with variations of sex characteristics by including most variations or could limit the number of who is counted as an intersex person or what counts as a sex characteristic.

Finally, as stated above, the fact that article 16 recognizes procedural rights to associations and NGO can be seen as a positive element that resonates with intersex activists claims, as it gives associations the capacity to act on behalf of individuals.[51]

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[49] See: OII Europe, 'Portugal has taken an important step towards protecting intersex people's bodily integrity – but will it be enough?' (July 12, 2018) <https://www.facebook.com/480416118685282/posts/portugal-has-taken-an-important-step-towards-protecting-intersex-peoples-bodily-/2038977029495842/> accessed September 15, 2022.

[50] Ghattas (n 1).

[51] Third International Intersex Forum (n 32).

2.3 Iceland

In 2019 Iceland approved “The Gender Autonomy Act” (Kynrænt sjálfræði)[52] to give legal recognition to a series of rights of trans and intersex people. Despite initial reports that the law would include protections for intersex people, specifically a prohibition against IGS, this was not included in the version of the law that was ultimately approved which dealt primarily with trans gender identity recognition issues.[53] In December 2020, however, the Icelandic parliament approved a series of reforms to the gender autonomy act and a provision to prohibit IGS was finally codified in the law.[54]

2.3.1 Protecting physical integrity and sex characteristics

One of the main objectives of the Icelandic law as stated in Article 1 is to guard people’s right to their physical integrity as well as their right to self-define their gender and guarantee the legal recognition of people’s gender identity. Ever since the originally approved version of the law (2019), Article 2 provides a legal definition of “sex characteristics” and “physical integrity” that is much like the one used by activist groups and present in the Yogyakarta Principles plus 10.[55] As per article 2 physical integrity is defined as: “The absolute right to autonomy over one’s body and entitlement to respect for one’s right to life, security, freedom and human dignity.”[56] About sex characteristics, the same article considers these are:

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[52] Iceland, Act on Gender Autonomy No. 80/2019 as Adopted by Althingi on 18 June 2019 <https://www.government.is/library/04-Legislation/U%C3%9EM2019080051%20-%20L%C3%B6g%20um%20kynr%C3%A6nt%20sj%C3%A1lfr%C3%A6%C3%B0i%20(002)%20_loka.pdf> accessed September 15, 2022.

[53] Rachel Savage, ‘Iceland’s intersex children at risk as without new protection, activist says’ (Reuters, February 19, 2019); Ugla Stafanía Kristjönudóttir Jónsdóttir, ‘Making life better for trans people and intersex people in Iceland’ (Gay Iceland, January 6, 2021).

[54] Iceland, Act on Gender Autonomy No. 80/2019 as Amended by Act No. 159/2019, No. 152/2020 and No. 154/2020 <https://www.government.is/library/04-Legislation/Act%20on%20Gender%20Autonomy%20No%2080_2019.pdf> accessed September 15, 2022.

[55] YP plus 10 (n 17).

[56] Iceland (n 52), art 2.

"Biological traits related to gender, such as sex chromosomes, hormone function, gonads and genitals."[57]

After the 2020 reform to the law the term "*atypical* sex characteristics" was also included. These 'atypical' characteristics are defined as "sex characteristics that fall outside traditional definitions of sex characteristics as male or female, e.g. as regards functionality or appearance".[58] Article 3 recognizes the unrestricted right to physical integrity and autonomy concerning changes in one's sex characteristics and Article 11a extensively considers the dimensions and protection to the right to physical integrity and changes regarding atypical sex characteristics.

2.3.2 Prohibition of IGS

The 2020 reform saw the introduction of new protections to the *atypical* sex characteristics of children under the age of 16 and prohibits *permanent* changes to their sex characteristics. When speaking of permanent changes the Icelandic law includes surgical operations, medication, and other irreversible medical interventions.[59] Exceptions are included in the prohibition, and permanent changes to the sex characteristics of children under the age of 16 born with atypical sex characteristics may be considered lawful if these are: a) required for health reasons and b) are followed by a detailed assessment concerning the need and short and long term consequences of the proposed interventions.[60] When considering medical interventions, the law requires that the child is consulted to the extent possible according to their age, level of maturity and in all cases once the child has reached the age of 12.[61] The Icelandic law also considers that "[s]ocial, psychosocial and appearance related

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[57] Iceland (n 52), art 2. Icelandic language makes no difference between the concepts of sex/gender.
[58] Iceland (n 54), art 2(6).
[59] ibid art 11, para 2.
[60] ibid art 11, paras 2-3.
[61] ibid art 11a, para 3.

reasons”[62] shall not be regarded as health reasons. Treatments, including surgery, are exempted from the application of this law in the case of hypospadias as per article 11a paragraph 5 of the law, as well as “medication for micropenis”. There’s is no reasoning as to why this exclusion is present, albeit there is the compromise in Article 18 to review whether to maintain it or not.

2.3.3 Treatment management, health care services and multidisciplinary teams

Article 9 seeks the creation of a “committee of experts on changes to the gender registration of children and permanent changes to atypical sex characteristics of children.” This committee of experts is given the responsibility to provide a decision pursuant to the change of the gender registration of a child[63] and permanent changes to the sex characteristics of a child.[64] The Prime Minister’s office is entitled with the responsibility to appoint this committee of experts to serve for a term of four years. Article 9 states that the committee shall be comprised of three members: a pediatrician, appointed by the Directorate of Health; a psychologist expert in the field of child psychology, appointed by the Icelandic Psychological Association, and a lawyer “with special knowledge in the field of children’s rights, appointed by the Minister responsible for human rights issues.” In providing an assessment on a case, the committee may obtain the opinion of other specialists as well. If an application for treatment entailing a change to sex characteristics is rejected by the Committee of experts, the right to appeal this decision is guaranteed as per article 14a. The appeal shall be directed towards the Directorate of Health.

A second “team of experts” is established in Article 12(1). Given that services for intersex people seem to be concentrated in Landspítali hospital in Reykjavík, Article 12(1) of the Icelandic law considers the formation of a group of experts in the field of “changes to sex

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[62] ibid art 11a, para 2.
[63] ibid art 5(3).
[64] ibid art 11a(6).

characteristics" who shall be appointed by the director or Chief Executive Officer (CEO) of that hospital. The law further considers that "the team shall be interdisciplinary and composed of professionals with relevant knowledge and experience. The team may call on other experts for consultations and collaboration in order, among other things, to secure knowledge of the social aspects of gender identity."[65] The main responsibility of this team is to "provide its clients, *18 years and older*, with information, counselling and treatment in accordance with the needs of each and every one. The team should also provide the relatives of clients with information and counselling."[66] The team of interdisciplinary experts at Landspítali hospital may adopt its own rules of procedure and the Minister responsible for health care services may lay more detailed provisions on the tasks for the team.

The 2020 reform to the Icelandic law saws the introduction of article 13a which also calls for a third team on issues concerning "atypical sex characteristics" to be created. This team shall also be appointed by the Landspítali hospital director or CEO. This team shall also be interdisciplinary and members can request the opinion of outside members as matters of consultation. The law further stipulates that the team provides children under the age of 16 born with *atypical* sex characteristics and their families with information, counselling and treatment in conformity with individual needs.[67] Likewise, the interdisciplinary team is expected to "guide its clients to appropriate peer-to-peer counselling of people with atypical sex characteristics and their representative associations."[68] The law also clarifies that the team provides services to intersex patients regardless if their sex characteristics have been permanently changed, or if no changes have taken place or have been postponed.

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[65] ibid art 12, para 1.

[66] ibid art 12, para 1. Emphasis added.

[67] ibid art 13a, para 2.

[68] ibid art 13a.

2.3.4 Recording and disclosure of health data

All the steps taken during the decision-making process concerning surgery and any other permanent changes to one's sex characteristics shall be recorded as per Article 11a paragraph 4. The law also encourages parents and legal guardians to disclose to their children any permanent changes made regarding their sex characteristics, albeit no sanctions are present in the law shall the parents or guardians fail to complain.[69]

2.3.5 Statute of limitation

Article 15 of the Icelandic law suspends the statute of limitations for IGS carried out before the age of 18 and considers that the limitation period for claims for damages shall start at this age, and allows for claims to be pursued via criminal sanctions and fines in accordance to Icelandic criminal law.

2.3.6 Monitoring and evaluation

A transitional provision was added to the law in order to establish a working group, which within the first three years of entry into force of the protections against IGS is expected to review its practical experience and develop research and knowledge and best practices in the field of human rights. The group is also expected to review whether hypospadias surgeries and medical treatments for micropenis cases should remain excluded from the ambit of the IGS prohibition or not.[70] This reviewing group "shall be comprised of a pediatric surgeon, a pediatric endocrinologist, a child psychologist, appointed by the Minister of Health, a representative of Intersex Iceland, a representative of Samtökin '78, the National Queer Association of Iceland, a sexologist appointed by the University Level Collaboration

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[69] ibid arts 14(4) and 15(3).

[70] ibid art 18.

Committee, an ethicist appointed by University of Iceland‘s Center for Ethics and two lawyers, one with expert knowledge of children's rights issues and the other with expert knowledge of human rights".[71] The group is due in 2023 but no information was found about its formation.

2.3.7 Commentary

Some of the most positive aspects of the Icelandic way of protecting intersex people's rights is that the law aims to protect both physical integrity, people's sex characteristics as well as their gender identity differentiating these aspects from each other, giving it a great intersectional perspective and equal standing. It is also positive that when naming medical reasons as a justification for carrying out these surgeries, the Icelandic law excludes "psychosocial and appearance related reasons."[72] Likewise, another welcomed development is that, as stated above, the Icelandic law mandates that intersex children and their guardians are provided with counselling and support from a team of experts on the issue of children born with *atypical* sex characteristics concerning the decision of carrying out surgeries. The team of experts is also encouraged to guide its clients to receive appropriate peer counselling from intersex persons.[73] Regarding intersex medical management provisions, both the interdisciplinary team of Article 9 and the team of experts of Article 13a seem to aim to have balanced views with perspectives that go beyond the clinical.

On the other hand, regarding the prohibition of IGS an important limitation in its ambit of protection comes from the fact that that hypospadias surgery and micropenis treatments are excluded from the scope of the law, albeit, there is a commitment to review this position in the future. This is a major limitation of the law.

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[71] ibid art 18.
[72] ibid art 11a, para 2, last sentence.
[73] ibid arts 11a(3) and 13a.

Also, the difference between the terms sex characteristics and '*atypical'* sex characteristics in the text of the Icelandic law is not fully clear. While the 2019 version of the "Gender Autonomy Act"[74] already included and defined the term "sex characteristics" in its text, using a definition not far from that of activist groups,[75] the updated version sees the inclusion of the term "atypical sex characteristics."[76] This inclusion seems troubling in different aspects, for one it adds nothing in terms of providing an actual definition but rather seems fixed in binary definitions of what is a typical or atypical male of female body. In this sense, the new definition leaves more questions than answers. Another aspect is that, classifying these other set of characteristics as *atypical* can also be perceived to have an 'othering,' if not pathologizing effect.

2.4 Germany

In 2021 the German Bundestag entered discussions of the law "on the protection of children with variants of sex development,"[77] The law was approved by the Bundestag in March 2021 and came into effect in May 2021. The German law contains a series of reforms to different pieces of legislation and is aimed at protecting intersex children, or as the German law calls them "*children with variants of sex development"* from unnecessary surgery and medical treatments. The most relevant change in terms of prohibiting IGS is present in Article 1 which modifies the German civil code.

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[74] Iceland (n 52), art 2.

[75] Ghattas (n 1) 9.

[76] Iceland (n 54), art 2.

[77] Germany, Gesetz zum Schutz von Kindern mit Varianten der Geschlechtsentwicklung, Vom 12. Mai 2021 <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/Bgbl_Varianten_der_Geschlechtsentwicklung.pdf;jsessionid=94CCC259C0936B2B4D88B6A643B28E50.1_cid334?__blob=publicationFile&v=3> accessed September 15, 2022.

2.4.1 Prohibition of IGS

Article 1(1) restricts parental and guardian custody rights to consent to or perform surgery and treatments to be carried out in a child with variants of sex development solely with the intention that their physical appearance fits that of the male of female bodily appearance. Article 1(2) indicates that parents only can give consent in cases where such intervention cannot be postponed until the child can make a self-determined decision. Article 1(3) indicates that the parental consent according to Art 1(2) requires the approval of the family court, unless the surgical intervention is deemed as necessary to avert a danger to the life or health of the child and cannot be postponed until the granting of the approval. This approval must be granted upon application of the parents if the planned intervention is in the best interest of the child. Art 1(3) also indicates that if the parents submit to the family court a supportive statement of an interdisciplinary commission, it should be presumed that the planned intervention is in the best interest of the child.

2.4.2 Health care services and interdisciplinary teams

Article 1, paragraph 4 articulates the composition of the interdisciplinary commission. The team must be comprised of at least the professional treating the child, at least another doctor, a mental health professional with qualifications in the treatment of children and adolescents and one person trained in ethics. The medical members of the interdisciplinary commission must have different specializations in the field of pediatrics, amongst them there must be a specialist in pediatrics and adolescent medicine with a focus on pediatric endocrinology. The second doctor in the commission must not be employed by the medical facility where the intervention is planned to be carried out. All committee members must have experience of dealing with children with variants of sex development and at the request of the parents, the commission should involve an advisor with a variant of sex development.

According to Art 1(5), the interdisciplinary commission has the mandate of providing a position statement on the necessity of surgery in the case established in Art 1(2).[78] This statement is required to have the following elements: "1. the designation of the members of the commission and information on their qualifications, 2. the age of the child and whether and what variant of sex development they have, 3. the planned intervention and which indication exists for it, 4. a reasoning as to why the commission supports the intervention taking into account the best interest of the child, and to what extent the intervention corresponds to the best interest of the child, in particular which risks are related to the intervention, another treatment or refraining from intervention until a self-determined decision of the child, 5. whether and which members of the commission have conducted a conversation with the parents and the child and if and by which members of the commission the parents and the child have been informed and advised on how to deal with variants of sex development, 6. if a counselling of the parents and the child has been conducted by an advisor with a variant of sex development, 7. the extent to which the child is capable of forming and expressing an opinion and whether the planned intervention corresponds to their will, and 8. if the advisor with a variant of sex development involved supports the favorable position statement."[79] Finally, Art 1(6) requires the medical records of a person who has received treatment because of their sex characteristics to be kept until that person turns 48 years old.

2.4.3 Monitoring and evaluation

Article 6 orders the federal government to monitor the effectiveness of articles 1 and 3 of the German law, concerning the limitations to parental rights and family court procedures. After five years from the time the law enters into force, the Federal Government is to submit a report to the German Bundestag. The Federal Government should also review if an extension

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[78] Surgical intervention on the sex characteristics of the child that cannot be postponed until the child can take a self-determined decision.

[79] ibid art 1(5). Own translation.

of the regulations is recommended regarding: “1. Extension of the family court approval procedure to other types of treatment or to other groups of children, 2. Introduction of a procedure to verify the child’s capacity to give consent, 3. Introduction of prerequisites for the treatment of children with variants of sex development capable of giving consent, 4. Introduction of an obligation to seek independent counselling on dealing with variants of sex development and 5. Introduction of a regulation on the costs of the position statement of the interdisciplinary commission.”[80]

2.4.5 Commentary

According to a review of the draft law contributed by OII Europe, the German law makes unlawful surgeries that are solely performed for the reason of altering the child’s body into a more normative appearance without fully informed consent. In this sense “The law provides a first, yet non-comprehensive, framework to protect intersex children from non-vital, non-emergency medical interventions.”[81] Only two exceptions are made to the general prohibition in the German law: parents can give consent in name of the child, upon the required approval of a family court, if the surgical intervention “cannot be postponed until the child has made a self-determined decision”, however the family court approval is not required if “the surgical intervention is necessary to avert a danger to the life or health of the child and cannot be postponed until approval has been granted.”[82] It is not quite clear what reasons other than preserving the life or health of the child could be understand as reasons that “cannot be postponed”.

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[80] ibid art 6. Own translation.

[81] OII Europe, ‘A good first step: Germany adopts law banning IGM. But there is still room for improvement’ <https://oiieurope.org/a-good-first-step-germany-adopts-law-banning-igm/> accessed September 15, 2022.

[82] Germany (n 77), arts 1(2) and 1(3). Own translation.

As a positive development the changes to the German legal framework aiming to protect children's sex characteristics and development reiterate the importance of keeping the principle of the best interest of the child centred at all times.

Regarding medical management, some questions remain. For one, the German law does not specify the function of the interdisciplinary committee other than providing a position statement on why the Commission supports the intervention, and whether, in its view, it corresponds with the best interests of the child. The law does not mention what kind of periodic health services are provided to intersex people or who is in charge of providing them. Finally, the law requires the medical records of a person who has received treatment because of their sex characteristics to be kept until that person turns 48 years old. While this period of time could be expanded further, this is a good development that will give more people the possibility of accessing their records for a longer period of time.

3. LEGAL SCHEMES IN DIALOGUE

3.1 Definitions and scope of protections

There are some interesting findings regarding the definitions used in the laws under review and how these definitions are given a legal meaning in order to grant or recognize protection of rights. The one that stands out perhaps is the emergence of the term 'sex characteristics' as a legal ground for protections much similar to race, gender, age, sexual orientation amongst others. The Maltese law, for example, includes a definition of sex characteristics and recognizes protections on this protected ground, including nondiscrimination via the reform of their equality act. Likewise, it recognizes the right to bodily integrity albeit it does not provide a definition.[83] Portugal does not provide a legal definition of what sex characteristics

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[83] Malta (n 14).

are, however, the term is included in the law as it does recognize the "right to the protection of the sex characteristics of each person."[84]

Iceland defines sex characteristics and 'atypical' sex characteristics, grants protections based on sex characteristics and recognizes the right to physical integrity as well.[85] The Icelandic framing of sex characteristics stands out because it makes a differentiation between sex characteristics that are considered typical and those that are viewed as *atypical.* If sex characteristics emerged as a term that is supposed to be relatable to everyone or universal, meaning that 'all human beings have sex characteristics,'[86] the differentiation made in the Icelandic law seems unnecessary. The German law does not provide a definition of either sex characteristics or bodily integrity, consequently it says nothing regarding the right to bodily integrity nor explicit protections to one's sex characteristics. While the German law uses the term "variants of sex development" to refer to intersex variations, it falls short to give legal meaning to this ambiguous term, the law therefore further creates a gray area making its ambit of protection unclear. This critique was also made by OII Europe to an earlier version of the law. [87]

A common potential problem with the legislative schemes examined in this report is the repeated use of legally ambiguous language. In the absence of precise definitions of terms such as 'intersex', 'sex characteristics' and 'sex development' it is unclear who can come within the ambit of the legislative protections and who is excluded therefrom. Therefore, the line in the sand of who is and who is not protected remains unclear. Iceland, for example, does try to give legal meaning to the terms sex characteristics and atypical sex characteristics, but as stated before the terms continue to be confusing. The Maltese

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[84] Portugal (n 34), art 1. Own translation.
[85] Iceland (n 54), art 1.
[86] Ghattas (n 1) 21; Morgan Carpenter, 'Intersex Human Rights, Sexual Orientation, Gender Identity, Sex Characteristics and the Yogyakarta Principles plus 10' (2020) 23 Culture, Health and Sexuality 516.
[87] OII Europe (n 81).

provision focuses on the purpose and effects of interventions ("sex assignment treatment and/or surgical intervention on the sex characteristics") rather than the people subjected to the interventions. Therefore, the Maltese provision is applicable to all children who are unable to consent. It also provides a clear legal definition of "sex characteristics."[88]

A common fear found in literature points to the fact that a badly designed provision to protect intersex children from IGS could have the unwanted effect of limiting gender affirming treatments for trans youth.[89] This did not seem to be an issue in the laws examined. All of the laws, with the exception of Germany, extensively consider trans rights. And more importantly, by keeping the child's capacity to consent and self-determine decision concerning their bodies centered, the Maltese, Portuguese and Icelandic legal schemes keep the right of both intersex children and trans children and youth safe from forced procedures.

Because terms such as 'intersex', 'sex characteristics', 'sex development' and even 'bodily integrity' are still open to interpretation, it seems to constitute a good legal practice to include a definition in the law, this helps better define the scope of its application and to define what is the matter that the law primarily aims to target. If left undefined ambiguous terms might serve to exclude a number of people from legal protections. On the other hand, there are also explicit yet unreasoned exclusions such as the case of hypospadias or micropenis cases being left out of the scope of protection of the Icelandic law.

3.2 Ban on surgery, scope of protection and exceptions

Regarding the ban on abusive medical treatments and surgical interventions, all the laws under review ban the performance of medical treatments and surgical interventions, where

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[88] Malta (n 14), art 2.

[89] Marijke Naezer and others, '"We Just Want the Best for This Child": Contestations of Intersex/DSD and Transgender Healthcare Interventions' (2021) 30 Journal of Gender Studies 830.

a child cannot consent, and interventions are not deemed as urgent to preserve the child's life or health.

Three of the laws also make reference to the socio-cultural underlying factors that may drive doctors' and/or parents' decisions to carry out or allow for such interventions. Iceland for example prohibits IGS on the basis of "[s]ocial, psychosocial and appearance-related reasons."[90] Similarly, Germany limits them if they have the intention or effect of modifying the bodily appearance of the child[91] so it becomes in accordance with the male or female physiology. As mentioned before Malta makes "any sex assigning treatment and, or surgical intervention on the sex characteristics of a minor"[92] unlawful in cases where the treated person cannot provide consent and the intervention can be deferred.[93]

All laws examined consider exceptional circumstances where IGS is deemed as legal. Portugal, Iceland and Germany consider health related reasons as valid motives for allowing IGS. Malta also considers exceptions, however Malta stands out in that it does not mention the health or life of the child as factors to decide on the necessity of surgery or treatments but rather bans under all circumstances interventions driven by social factors without the consent of the child.[94] The Maltese law considers that "(3) In exceptional circumstances treatment may be effected once agreement is reached between the interdisciplinary team and the persons exercising parental authority or tutor of the minor who is still unable to provide consent."[95] However, it fails to mention what these exceptional circumstances are or what criteria to use to determine that. What it is clear however is that interventions driven by social factors without the consent of the child will be in violation of the law.

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[90] Iceland (n 54), art 11a, para 2.
[91] Germany (n 77), art 1(2) ("das körperliche Erscheinungsbild des Kindes").
[92] Malta (n 14), art 14(1).
[93] ibid art 14(1).
[94] ibid art 14(2).
[95] ibid art 14(3).

In terms of scope of limitations, the Icelandic law has the effect of being limited to children *born with atypical sex characteristics* until the age of 16,[96] and as previously stated, the case of hypospadias or micropenis cases being left out of the scope of protection of the Icelandic law. Portugal does not admit an age requirement but rather limits its scope of application to "intersex minors" until the moment "they manifest their gender identity."[97] Germany limits its scope of protection to *children with variants of sex development* until they are able to consent, no specific age is mentioned.[98]

3.3 Nondiscrimination protections and affirmative action measures

Both Malta and Portugal include nondiscrimination protections based on one's sex characteristics.[99] While the Maltese law reforms the Maltese Equality for Men and Women Act and brings sex characteristics to the same standing as other protected grounds such as race or gender; the Portuguese law includes nondiscrimination protections based on the right to *the protection* of one's sex characteristics. This framing is unusual as it suggests that the person needs to exercise or invoke their right to *protection* first (and prove it) in order to claim antidiscrimination protections. Nonetheless regardless of how implementation works, the inclusion of antidiscrimination protections based on sex characteristics seems like an important step in the right direction. Only the Portuguese law includes explicitly affirmative measures, in this case, in the form of educational policy reforms oriented towards awareness raising of intersex people's rights.[100] Both the Icelandic law and the German law fall short in terms of nondiscrimination protections as they do not include any provisions to protect intersex people and people with variations of sex characteristics from discrimination.

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[96] Iceland (n 54), art 11a.
[97] Portugal (n 34), art 5.
[98] Germany (n 77), art 1.
[99] Malta (n 14) art 13; Portugal (n 34), art 2.
[100] Portugal (n 34), art 12.

3.4 Provision of health services

Malta, Portugal and Iceland recognize the right to health or health care services for intersex people. Germany fails to address this issue in any explicit way, however this should not be surprising as the law mainly focuses on reforms to the civil code.[101] While Malta and Portugal mention the right to health of intersex children, these laws do not go into details as to how this right is to be secured. The language in the Maltese law refers to psychosocial counselling, support and medical interventions relating to sex or gender,[102] however also falls short to assign responsibilities as to who or what institution is mainly responsible for intersex health services, with further online research I was not able to determine this. Likewise, the Portuguese law limits itself to ordering the Directorate-General for Health to define an intervention model through guidelines and according to technical standards, to be implemented by the health professionals in relation to issues about gender identity, gender expression and sex characteristics. This was supposed to happen within a maximum of 270 days after the entry into force of the law, however no information was found about these guidelines or their implementation.[103]

The Icelandic law extensively refers to different forms of treatment and care that it aims to secure, and makes references to explicitly satisfying the health care needs of intersex people. The law considers the formation of two specialized teams at Landspítali hospital in Reykjavík for intersex people's care. The first one, the Landspítali Team "on Gender Identity and Changes to Sex Characteristics," is charge of providing clients, 18 years and older, with information, counselling and treatment in accordance with the needs of each and every one. There is also a second team "on the issue of children born with atypical sex characteristics" which is to provide children under the age of 16 born with "atypical sex characteristics" and

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[101] Needs to be noted that the fact health care services are not explicitly included in the German law does not mean these services are none existent or not provided to people with variations of sex characteristics.
[102] Malta (n 14), art 15.
[103] Portugal (n 34), art 11(2).

their families with information, counselling and treatment in conformity with their individual needs.[104] It is unclear why is there a gap between 16 and 18 years of age.

The Maltese law also considers the creation of a specialized team to be involved in the provision of health care services for intersex persons. As stated before, art. 14 considers the creation of an "interdisciplinary team" appointed by the Minister responsible for equality, however most of its functions are not addressed in the text of the law.

In the recent bibliography, the functions of multidisciplinary, interdisciplinary, and transdisciplinary teams in intersex-related health care are discussed.[105] A scoping review that looked into the work of 12 specialized teams involved in health treatments for intersex people found that the prevalent approach in most teams seems to be of a multidisciplinary rather than interdisciplinary nature, meaning "collaboration in which different care providers work simultaneously but separately."[106] The authors of the scoping review also criticize that there is a dominance of endocrinologists, urologists and surgeons over other health care experts, including psychological care in the teams examined. This is something to watch for in the process of law and policy making, if the goal is the true inclusion of interdisciplinary approaches to intersex health care services.

Peer counselling services are only explicitly mentioned in the cases of Malta and Iceland.[107] Both laws however could be further developed as to how and who will be providing such counselling services. For instance, if intersex people's organizations are to be involved, a role with decision making powers and designing such policies should be guaranteed. Also matters of compensation for such services and funds or grants would need to be secured.

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[104] Iceland (n 54), arts 12 and 13a.

[105] Sarah M Creighton and others, 'Childhood Surgery for Ambiguous Genitalia: Glimpses of Practice Changes or More of the Same?' (2014) 5 Psychology and Sexuality 34; Martine Cools and others, 'Caring for Individuals with a Difference of Sex Development (DSD): A Consensus Statement' (2018) 14 Nature Reviews Endocrinology 7 415; Martin Gramc, Jürg Streuli and Eva De Clercq, 'Original Research: Multidisciplinary Teams Caring for People with Variations of Sex Characteristics: A Scoping Review' (2021) 5 BMJ Paediatrics Open.

[106] Gramc, Streuli and De Clercq (n 105) 8.

[107] Malta (n 14), art 15(1); Iceland (n 54), art 13a.

3.5 Safeguards against unlawful treatments

All the laws under review, except for Portugal, explicitly state ways to monitor and make sure that only lawful, urgent and necessary surgeries and treatments are carried out. While some go into more details than others, the addition of safeguards in the form of detailed reports for example and independent reviewing bodies can be seen as a positive development.

The Maltese law, for instance, considers the creation of an interdisciplinary team appointed by the Minister responsible for equality to overview medical treatments of intersex children and to make sure the best interests of the child are respected and that the child's views are taken into consideration considering their age and maturity.[108] Furthermore a 2018 reform introduced criminal sanctions for those that break the law and perform unlawful treatments or surgeries.[109]

The Icelandic law establishes the creation of a "committee of experts on changes to the gender registration of children and permanent changes to atypical sex characteristics of children."[110] The committee is given the responsibility to provide a decision pursuant to the change of the gender registration of a child[111] and permanent changes to the sex characteristics of a child.[112] The fact that the committee shall be comprised of three members: a pediatrician, a psychologist with child psychology as a field of expertise and a children rights lawyer can be seen as a positive development as it provides a more balanced view on the issue, however this needs to be monitored closely. The fact that this team is an independent team from the one that carries out direct health care services (the team on "atypical sex characteristics") might bring a more 'independent' and comprehensive view.

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[108] Malta (n 14), art 16.
[109] ibid art 14(2).
[110] Iceland (n 54), art 9.
[111] ibid art 5(3).
[112] ibid art 11a(6).

The inclusion of a child rights lawyer can be seen as a step towards having a sort of *ad litem* advocate for the child who considers views other than the ones from doctors. Likewise, this could be useful in the case parents appeal the decision to not carry out surgeries in terms of article 14(a).

The German model considers safeguards in a different way. Considering parental rights are limited regarding IGS, the parents can only consent to a surgical intervention on the sex characteristics of the child if this intervention cannot be postponed until the child can make a self-determined decision, and this consent requires the approval of the family court. This approval of the family court, however, is not necessary where surgical intervention is deemed as necessary to avert a danger to the life or health of the child. The German law also requires the formation of an interdisciplinary commission that has the role of elaborating a supporting statement for a surgical intervention in the case this intervention cannot be postponed until the child can make a self-determined decision, to be presented to the family court. As stated before it is not quite clear what reasons other than preserving the life or health of the child could be understood as reasons that "cannot be postponed," giving room for the family court decision to be necessary. The text of the law is not clear regarding who is the ultimate authority which decides on the aspect of medical necessity, this is a problem if it could be used to circumvent the ordinary procedure before the family court. Lastly, the composition of the interdisciplinary commission in Germany seems to provide a balanced view of medical, social and ethical perspectives as it requires the team to be comprised of at least the professional treating the child, at least another doctor, a mental health professional with qualifications in the treatment of children and adolescents and one person trained in ethics,[113] and if requested, an advisor with a variant of sex development.[114]

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[113] Germany (n 77), art 1(4).

[114] ibid art 1(4).

Both Iceland and Germany also set into place a system that requires detail reports before invasive treatments can be allowed.[115] These reports include information on the opportunity of parents and guardians of intersex children to ask questions and receive counselling services, including peer counselling. This overall can be seen as a positive development that is oriented towards families to be part of an informed consent process in cases where it is considered that a medical intervention is necessary for health reasons[116] or cannot be postponed until the child can make a self-determined decision.[117] This is not explicit in other laws.

All of the legal schemes examined make references to the best interest of the child principle. In particular, the Icelandic and the German legal frameworks also reiterate the importance of keeping the principle of the best interest of the child centred at all times. Germany, for example, demands a reasoned decision as to why surgical interventions that cannot be postponed are approved for intersex children, and that this decision takes into account the best interests of the child.[118] Iceland's law states in Article 11a that "[p]ermanent changes to the sex characteristics of a child under the age of 16 born with atypical sex characteristics shall only be made in conformity with the will of the child and its level of gender identity, and always with the best interests of the child in mind."[119]

On this point one needs to be mindful, however, that the best interest of the child can be an ambiguous term subjected to culturally biased interpretations of what is best for children.[120] In the case of intersex children, scholars have pointed out that "[i]n intersex/DSD care, those who defend early interventions often consider intersex bodies as problematic, while those

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[115] Iceland (n 54), art 11a; Germany (n 77), art. 1(5).
[116] Iceland (n 54), art 11a, para 2.
[117] Germany (n 77), art 1(2).
[118] Germany (n 77), art 1(5.4).
[119] Iceland (n 54), art 11a.
[120] Bruce Macdougall, 'The Legally Queer Child' (2004) 49 McGill Law Journal 1057–91; Pieter Cannoot, 'Do Parents Really Know Best? Informed Consent to Sex Assigning and "Normalising" Treatment of Minors with Variations of Sex Characteristics' (2020) 23 Culture, Health and Sexuality 564.

who challenge these interventions often consider intersex bodies as 'natural variations' that deserve protection against health care interventions".[121] This paradox perhaps highlights why children's rights, like all human rights, need to be understood as linked and interconnected. In the case of the German law, the lawmaker makes sure to add different safeguards to protect the rights of children that go beyond the "best interest of the child" that is centered in an adult / third party perspective. In this sense, the German law also demands that the extent to which the child is capable of forming and expressing an opinion, and whether the planned intervention corresponds to the child's will to be included in the report decision concerning surgeries that cannot be postponed,[122] which adds another layer of safeguards for the effective protection of the child's rights.

Only the Portuguese law fails to specify any safeguards that guarantee the ban on unconsented treatments is respected. The Portuguese law considers that IGS is allowed in "situations of proven risk for their health."[123] However there is no mention of who carries out this evaluation or what kind of criteria they are to use. There is no elaboration on how the reviewing process for the exceptions to the general ban would work.

3.6 Procedural rights for justice and restitution

Out of the laws under review, only the Portuguese law explicitly recognizes procedural rights to associations and NGOs invested in securing the rights of intersex people.[124] This is an interesting aspect that is not present in the other laws reviewed in this report and a positive element as some jurisdictions do not provide organizations but rather individuals with legal standing to rights claims. Likewise in many jurisdictions, collective actions are not legally possible. The Portuguese law considers and gives green light to both situations. It would be

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[121] Naezer and others (n 89) 9.
[122] Germany (n 77), art 1(5.7).
[123] Portugal (n 34), art 5. Own translation.
[124] Portugal (n 34), art 16.

interesting to analize how this provision interacts with the rest of the legal system in Portugal.

Regarding other procedural aspects, only the Icelandic law considers the extension of the general statute of limitations for cases of IGS,[125] this is something innovative that is not present in other legislations under this review and seems like a positive approach as it would provide people with the opportunity to submit criminal claims, starting at the age of 18. Intersex activists have highlighted that statutes of limitation when bringing criminal or civil lawsuits represent an important barrier when seeking justice for intersex people.[126] There is a caveat however with the Icelandic provision in that usually, legal systems do not allow for the law to work in retrospect, as per due process limitations, so while this provision is beneficial to intersex people born after the entry into force of the Icelandic law or whose medical procedures happen after that date, it does little to provide justice or redress to those who have suffered from IGS already.

3.7 Monitoring and evaluation on the functioning of the law

The Maltese, Icelandic and German laws consider mechanisms of supervision regarding very specific aspects of their legal schemes. The Icelandic law explicitly considers a monitoring mechanism to supervise its own functioning by ordering the creation of a working group to review practical experiences and develop research, knowledge and best practices in the field of human rights.[127] The group is also to review whether hypospadias surgeries and medical treatments for micropenis cases should remain excluded from the ambit of the IGS prohibition or not. It also can be seen as a positive development that the reviewing group includes experts from civil society with lived experience, academia and human rights perspectives as well as medical perspectives. The Maltese law considers the creation of a

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[125] Iceland (n 54), art 15(3).

[126] Ghattas (n 1).

[127] Iceland (n 54), art 18, para 1.

'working group' to review that medical treatment protocols are in line with human rights standards. However, there is no wording that the law itself will be subjected to review or for verification of its implementation and functioning.[128] Likewise, the German law also orders the Federal government to monitor the implementation of certain aspects of the law.[129] In general terms it would be useful to have monitoring and review mechanisms in all of the laws as it would facilitate follow up on implementation and possibly suggesting changes to adapt with implementation challenges. In Ireland for example reviewing processes have been included in both the Gender Recognition Act and the Abortion Act.[130]

4. CONCLUSIONS

With this document I intended to show the main legal schemes four EU member states have adopted in order to guarantee and protect the rights of intersex people. Malta having been the first country in the world to recognize legal protections for people with variations of sex characteristics had the very difficult task of starting from cero and its legislation while not flawless can be seen a pioneer in intersex law and policy making. The legal recognition of sex characteristics as a ground of protection, the expansion of nondiscrimination protections on that ground and of course the legal restrictions on IGS are some of the most important elements that the Maltese legislature prioritized in its legal framework.

After Malta other states had the opportunity to follow its footprint, however the examination of the intersex laws carried out here, seems to indicate that while other legal schemes may have had inspiration by the Maltese experience, the result of the processes in other countries are different enough and seem to have been designed and developed following local needs and priorities. All the provisions examined here are different enough to reach this

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[128] Malta (n 14), art 16.

[129] Germany (n 77), art 6.

[130] Ireland, Gender Recognition Act 2015 (Act 25 of 2015), s 7; Ireland, Health (Regulation of Termination of Pregnancy) Act 2018 (Act 31 of 2018), s 7.

conclusion. While they all had the same goal, restrict IGS, all took different, yet similar paths to achieve this goal.

The passing of time, development of ideas, visibility of main concerns and better understandings of intersex people's demands and the issues they face is notable when reviewing more recent laws. The Icelandic model seems to be the most comprehensive model so far including legal definitions, limitations on IGS, safeguards to verify the lawfulness of intersex treatments, developing the firsts steps towards health services and recognizing the possibility of starting criminal claims and a moratorium on statutes of limitation. A great flaw however is regarding the scope of protection as if explicitly excludes hypospadias and micropenis cases, this is a major flaw in the reach and impact of the law. As stated above the German model while intended to produce similar results as the other laws is framed as a restriction on parental rights rather than a protection for the rights of bodily autonomy and bodily integrity which is an interested deviation from the other legal schemes, perhaps influenced by cultural or legal traditions.

Regarding the implementation of these laws, it is still early to review how the most recent ones at the time of writing the report, Iceland and Germany, have functioned, however both laws include some kind of monitoring mechanism, and it would be valuable to keep an eye on them in the future. In the cases of Malta and Portugal, no information was found on how the laws have functioned since entering into force, which makes an opportunity for research in the future or perhaps reporting mechanisms to be included in future reforms to these laws.

As a general conclusion this report wants to highlight how important it is for law and policy makers to look at other examples of intersex legal design when drafting law and policy, however paramount importance needs to be given to the demands of local activists and so that they address the specific needs of the people the laws will impact the most. In order to achieve this, it is recommended that intersex activists, human rights defenders and civil society organizations have an active role in the design of law and policy.

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