

INTERSEX AND THE RIGHT TO IDENTITY: A DISCOURSE ON THE CIVIL RECORD OF INTERSEX CHILDREN

Roberta Tourinho Dantas Fraser¹, Isabel Maria Sampaio Oliveira Lima²

ABSTRACT:

Law interacts with intersex in humans from the perspective of gender identity, as a sub-aspect of the right to identity. Intersex is a condition affecting the growth and development of children. The diagnosis, sometimes delayed because of the need for specific exams, has a direct effect on gender and name definition, as reflected on a child's civil record. In this sense, the purpose of this article is to examine the intersex children's guarantee to the right to identity, from the perspective of the civil birth record as a human right. To this end, interviews were conducted with legal professionals working with childhood, family or public registry issues. The interviews generated opinions on the guarantee to the right to identity for these children, under the present Brazilian Law of Public Records. As a result, speeches converged on the anachronism in this law, as well as the need for legal changes to preserve the children's dignity. The intersex newborn's right to identity is a subject that demands interaction among various areas of knowledge and practice to effectively guarantee the best interests of the child.

Key words: intersex; rights of the child; public record; right to identity.

INTRODUCTION

This article aims to discuss the guarantee of intersex children's right to identity, from the perspective of the Civil Birth Registry as a human right, in view of the Brazilian Law of Public Records (LPR) currently in force¹.

Human intersex is an organic phenomenon resulting from an imbalance between the factors and events responsible for sexual determination and differentiation, which takes place when an individual's body presents ambiguities, anomalies or inconsistencies in the biological components of his or her sexual identity, i.e., in his or her sex chromosomal, hormonal and/or morphological sex².

This is a phenomenon of great complexity, and is considered a medical and social emergency at the birth of the child, due to the risks to, and impact on, that person's life. A multidisciplinary team is essential for the diagnosis, treatment and monitoring of these persons³. Given the implications of the diagnosis, whose repercussions transcend the purely biomedical aspects, the presence of

psychologists, social workers and legal professionals is a necessity.⁴

The defense of human rights for intersex children features, above all, two components: the right to health and the right to identity. These are priority hubs in the exercise of the dignity of children, in virtue of their particular condition as persons in development.⁵⁻⁷

Gender identity is one of the constitutive elements of human identity, presenting itself in Brazilian society through a person's designation as belonging to one of the two genders: male and female. Gender is a set of biopsychological characteristics that distinguish male from female. Currently, it is generally understood that the shaping of a person's gender identity is determined by a series of concatenated events, including both biological and psychosocial elements.^{8, 9}

The biological elements involve genetic, hormonal and morphological sex aspects from which result in a person's physical configuration. The genetic sex refers to the sex chromosome, where XX stands for female, and XY, for male. The

1 Bachelor of Law and Biology.

2 Human Rights, Right to Health and Family' Research Group Coordinator (CNPq/UCSal)Catholic University of Salvador.

Corresponding author: isabelmsol@gmail.com

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hormonal sex is determined through the gonads, testicles in men, and ovaries in women, as well as by other glands (pituitary and thyroid) responsible for male and female traits. The morphological sex refers to the appearance of internal and external genitals, whereby the presence of primary and secondary sex features must be analyzed to check for correspondences between them.¹⁰⁻¹²

As for the psychosocial elements, which determine the psychological and social genders respectively, are defined by certain factors such as: educational background, the impact generated by family and society, the person's behavior and his or her affirmation as belonging to a specific gender.¹³⁻¹⁵ Determination of gender using a person's genetic, hormonal and morphologic sex may be impaired if there is no psychological identification with the gender into which a person is categorized (psychological gender), or depending on the social acceptance of this person toward one of the genders (social gender).

The definition of gender identity in human beings includes a third element, besides the biological and psychosocial, which is of a civil, or legal, nature. Designated on the child's Birth Record, and based primarily on the morphological aspect of his or her external genitals, this element consists of a determination of gender based on the person's daily life and in their social relationships, and brings many legal implications.¹⁴

Therefore, the shaping of a person's gender identity is understood as the result of the integration of biological, psychosocial and civil elements. In this context, the intersex child may be understood as a person exhibiting disorders, abnormalities or inconsistencies in any of his or her sex chromosomal, hormonal and/or morphological sex, with subsequent ambiguities in his or her gender identity's biological component.

The topic of gender is part of the debate on human dignity, given that it is a person's strictly personal attribute, as Torres states:¹⁶

Since the promulgation of the 1988 Constitution, human dignity was already recognized by Brazilian society as a fundamental and guiding principle of the entire legal, political and social systems of our country. And gender, as a human attribute, should already have been submitted, back then, to protection in the context of human dignity. In addition, it must be also remembered that Brazil, in view of its rules and constitutional principles, is likewise compliant with Human Rights rules and principles, i.e., an international system of protection towards human beings, especially the most fragile and vulnerable among them.

The Brazilian legislation is silent about the specific condition of intersex. The Civil Record of Natural Persons Act (Law 6 015 / 73) provides that a record shall be made within 15 days of the child's birth, requiring that his or her name and gender be indicated therein. Under these terms, the law

imposes on families of intersex children a legal determination of remote compliance within two weeks.¹

With regard to academic and scientific studies on the situation of intersex persons, interest in the subject is still remains scarce and concentrated on the phenomenon's biomedical aspects.⁴ In their literature review on intersex in humans, Canguçu-Campinho, Bastos & Lima show that scientific articles on the subject belong predominantly to the field of medicine, followed by those dealing with psychological aspects, and some in the field of social sciences. The authors also point out the lack of publications in national scientific journals on the subject from the perspective of law or political activism.¹¹

Human identity, as an intrinsic dimension, is inherent to persons, and refers to their dignity. Considering the gap in the academic and scientific output concerning the socio-legal aspects of intersex, it follows that the subject has not yet been sufficiently discussed. Considering that the legislative silence concerning the civil record of intersex children directly compromises the fundamental principle of human dignity, this is an opportunity to investigate the matter.

The purpose of this article is to discuss the guarantee of the intersex children's right to identity, from the perspective of the civil birth record as a human right, and in light of the Law of Public Records currently in force.¹

METHODS

A qualitative strategy¹⁷ was adopted for this article, whose epistemological and methodological origin lies in the "Human Rights of the Intersex Child and Youth" macro research project, which was blended with the "Human Rights, Right to Health and to Family" Research Group (CNPq/UCSal). The data analyzed herein were gathered from this project, which has been developed by researchers of the aforementioned group in a special genetics outpatient clinic in a public hospital in Salvador, Bahia, since 2004.

This qualitative study aims to probe the present through intimacy, harmony or even communication with key social actors.¹⁸ The procedures performed in this research, in addition to the literature review and legislative survey on the topic, demanded 24 months of presence in the outpatient clinic to contextualize the phenomenon studied: it was a participatory observation through the follow-up in socio-legal help for intersex patients.

Throughout the investigation, it has been noted that the birth of intersex children presents a challenge regarding their civil registry as, for various reasons, the diagnosis for gender definition is slow. This circumstance, acknowledged as recidivist when sexual development disorders (SDD) are identified

in the newborn, produces an objective impediment to the implementation of the right to identity and dignity of the child.

The genetics outpatient clinic of a public hospital in Northeastern Brazil was selected as the venue for the initial data survey, as it was considered the only noteworthy such clinic in the region. 430 people are registered in this study. During the project period, a number of legal actions were taken to rectify the civil record of intersex children, given that the gender and name recorded just after the birth did not reflect the gender later diagnosed by the health team and accepted by their families.

These processes display the complexity of this issue, and require, among other steps, a special genetics and hormonal report when the child is still little, and a psychology report after the child's early childhood.

In addition to participatory observation, researches conducted semi-structured interviews with key informants, chosen among active professionals in law areas pertaining to the present topic, having previously devised guidelines and an informed consent sheet.

Three magistrates were interviewed in the capacity of key informants, and were active at the Family Court, the Public Records Court and at the Disciplinary Board of the Court of Appeals of the State of Bahia. The interview guidelines contained three fundamental questions, and the responses facilitated further probing of the topic.

The first stage involved questions concerning how to proceed, based on current Brazilian legislation, in cases pertaining to children with ambiguous genitalia, given the duty to enter them in the Civil Birth Record. Should we: (a) advocate their immediate Record registration, at the risk of subsequent rectification, given the diagnosis of a gender opposite that initially assigned; or (b) advocate the delay of the child's Civil Record, thus leaving the child subject to legal nonexistence and, consequently, without access to his or her rights during the diagnosis period?

Based on how the response was developed, it was then asked whether the current legislation concerning the Civil Birth Record (Law no. 6 015/73) defends the right to identity, and if it sufficiently protects the dignity of intersex children.

Lastly, for those who answered negatively to the previous question, researchers asked how Article 54 of the Law of Public Records, which determines the immediate identification of the name and gender of the person registered in the Civil Birth Record, should be interpreted in view of a genitally ambiguous child, so as to ensure the effectiveness of his or her right to identity and dignity. Mentioned also was whether or not there would be other means or more specific alternatives to meet the right to identity, and to ensure the dignity of intersex children, from the perspective of their Civil Record.

For better response individualization, and to maintain the anonymity of the key informants, the

interviewees are identified in this research as "Judge A", "Judge B" and "Judge C".

RESULTS

Regarding how to proceed in cases of children with ambiguous genitalia, given the duty to register them in a Civil Birth Record, there was a lack of consensus among the interviewees, both in their respective *modi operandi* and in the reason(s) for their choices. Among legal professionals, only one of the judges was in favor of the registration delay until a definitive diagnosis is obtained. The others were in favor of immediate registration.

"Judge A" was in favor of the Civil Record delay, pointing out the need for the Judiciary to take into account medical instructions, i.e., to register a child only when the opinion of the health team is definitive; Judges "B" and "C", on the other hand, were in favor of immediate registration, ratifying this legal obligation and the importance of this document in enforcing human rights.

Based on the statements of the key characters, it is possible to see how controversial this subject is, as well as its relevance in the discussion of Civil Records for intersex children, beginning with the lack of consensus among professionals on how to proceed under these circumstances: Immediate registration, or delayed?

DISCUSSION

Name and Denominations

To name a person, entity or phenomenon is a process of respect, and involves care. Each name has a background story, a meaning, and communicates a sense of belonging to context of family, culture and time. The name of a newborn conveys an impression of his or her parents or the people who accept this child. Despite the noun's capital letter, conferred by the author's psychoanalytic viewpoint, Douville stresses:

There is, in the Proper Name, something irreplaceable, given the indivisible otherness that appears and collects the epopee of an immemorial memory. There is a Proper Name when something of a link is established between a voice and a letter, when an affinity is at stake between a self, a body and the gift of a letter that does not come from anywhere. Untranslatable, except to make almost an insult or enfeeble ridicule out of it, the name, due to its literal fetters, is endowed for the trip, and perhaps even be applied exclusively to the trip, given that not only men migrate, but also words and letters are moved and transferred.¹⁹

Diagnostic accuracy also demands a name. Each person wishes to know the name of that which befalls him, to recognize in the name that which, although of a medical nature, does comprise a

definition that helps him cope with his condition. The families of intersex children experience this double expectation between naming a baby and knowing the name of his or her condition.

The complex phenomenon of intersex has been named disorder of sex development (DSD) and disorder of sex differentiation (DSD). There is as of yet no consensus in the scientific community as of yet regarding the proper term for the phenomenon. An attempt to adopt a definitive and general nomenclature to the intersex status occurred in 2005 at the Intersex Consensus Meeting held in Chicago (USA), albeit unsuccessfully.²⁰

However, the field of social sciences shows a preference for the adoption of the term "intersex", whereas in the biomedical field the nomenclature DSD is generally used. In this article we use the term "intersex", considering that this designation is more comprehensive for the humanities and social sciences areas.

In biomedical terms, the DSDs are classified into four major groups: female pseudohermaphroditism (the sex chromosome is 46 XX, in which the individual has ovaries, but the external genitalia is ambiguous); male pseudohermaphroditism (the sex chromosome is 46 XY, in which the individual has testicles, but the external genitalia is female or "ambiguous"); mixed gonadal-dysgenesis (the individual has gonads consisting solely of fibrous tissue, lacking hormonal function, being unable to produce gametes, and without structures to characterize them as ovaries or testes); and true hermaphroditism (individuals possessing both ovarian and testicular tissue, usually associated with internal and external genital ambiguity).²

Multidisciplinary Impacts and Appropriate Treatment

Attentive to the complexity of the phenomenon, the Brazilian Federal Council of Medicine (CFM) issued, in 2003, Resolution no. 1 664, providing for the proper conduct of the treatment of intersex persons. According to it, it is necessary to conduct early research, due to the possibility of intersex becoming biologically and socially urgent.³

Biological urgency occurs in life-threatening situations, such as cases of salt-wasting from congenital adrenal hyperplasia, which, if not treated immediately, can be fatal to the newborn. Social urgency, on the other hand, refers to the psychological and social impacts that the birth of an intersex child has on the family and on the patient him or herself, in addition to the serious turmoil it triggers in this person's life and well-being in cases where gender definition is mistaken, whether due to the appearance of secondary sexual features that are in opposition to the gender previously defined, or to the possibility of malignant degeneration of the gonads.²

Therefore, due to the risks and subsequent impacts on the individual's life, the CFM establishes

compulsory intervention by a multidisciplinary team for the final gender definition and adoption, under article 4 of Resolution no. 1 664 /2003:

Art. 4 - For the final definition and adoption of gender in patients with differentiation disorders, the existence of a multidisciplinary team with knowledge in the following areas is compulsory: general and/or pediatric practice, endocrinology, pediatric endocrinology, surgery, genetics, psychiatry, child psychiatry;
[...]

Paragraph 4 - At the discretion of the medical team, other professionals may be convened to treat cases.

The team's main purpose is not only to unveil the etiology of the phenomenon, but to obtain a rational definition on the gender best recommended for the child's upbringing. In view of the diagnosis implications, with repercussions extrapolating the purely biomedical aspects, the presence of psychologists, social workers and legal professionals has been interpreted as a necessity.¹³⁻¹⁵

The psychological monitoring of the intersex child and his or her family is crucial to managing the atmosphere of uncertainty and prejudice that stems from the birth of a baby that clashes with the cultural standards of normality. Feelings of guilt, anguish, fear, overprotection and anxiety permeate the family's core, shattering its dynamics. At the same time, the situation demands from the family an attitude capable of facing doubts, ensuring care and love, and accepting of the newborn.²¹⁻²

The child, in turn, in addition to undergoing medical treatment that may last his or her entire life-filled with regular exams and drug intake - may still face issues of self acceptance, sexuality and social prejudice, among other things. For this reason, in light of such situations, the psychological monitoring is necessary to increase the capacity of tolerance before conflicts and tensions and, consequently, to improve the quality of life of those involved.²²⁻²⁴

The purpose of the intervention by social workers on the team is to give the patient and family social and emotional support. Social Services is responsible for the research and understanding about the child's family unit and social network, about the family's degree of understanding about the diagnosis, how it might absorb the information and guidance received (or resist the new reality) in order to make them feel welcomed and supported by the team, who will properly intervene and explain about the problem and the prognostics.¹⁴

Lastly, the presence of legal professionals in the team is acknowledged as an essential element, along with Social Service professionals, to ensure the implementation of human rights - with an emphasis on the rights to health and identity - inherent to this segment of the population whose guarantee of full priority is set

forth by law, given these particular conditions of human development.^{4, 11, 23}

Concerning the guarantee of the right to identity, the activity of legal professionals is crucial, especially in intersex children's Civil Record rectification suits. Because the Law of Public Records (LPR) establishes that birth records must be made immediately, and must indicate the name and gender of the neonate, often the gender indicated by the child's family does not agree with that which is subsequently designated by the health team, which demands the filing of an action in court in order to correct the information in the child's Civil Record.²³

In this sense, the law interacts with "intersex", among other aspects, from the civil element that integrates the gender identity in human beings, which is designated at the time of the child's birth record. That is to say, the discussion on the subject of "intersex", under a legal frame, occurs when gender identity is considered a sub-aspect of human rights, strictly personal to identity and related intimately to the principle of human dignity.^{16, 23} And specifically in the present research, this interaction is built from the discussion on the intersex child's guarantee to the right to identity, from the perspective of the Civil Birth Record as a human right.

In the outpatient clinic where the survey was conducted, it has been found that a number of families, fearing writing a record stating the wrong gender, preferred to delay the registration of their children. This family measure is guided by expectations toward gender definition. However, the child's lack of a civil record is met with access restrictions to health services, the enjoyment of any insurance benefits, or use of air or intercity transportation.

The Right to Identity

The right to identity, which formally begins with a person's Civil Record of Birth, is a human right intimately connected to the principle of human dignity. It incorporates the roster of rights of personality, i.e., those rights whose objects are a person's physical, mental and moral attributes, his or her extensions and social projections.²⁴

The idea of personality is linked to the person, as it reveals the generic ability make binding amendments to his or her rights, duties and obligations. Currently, and representing a conquest of legal civilization, this ability is recognized in every human being, as provided for, and protected by, the Universal Declaration of Human Rights and by the American Convention on Human Rights.^{25, 26} From this perspective, personality is conceived as a point of support for each person's rights and duties, from where all other human rights radiate.²⁷

The rights of personality, which take into account the person's internal and external elements and social aspects, are essential to development, as their purpose is to safeguard his or her dignity.²⁷ In

fact, many fundamental rights, here understood as those human rights objectively provided for in a concrete legal order, are personality rights. Generally, these rights involve the right to life, identity, freedom, the body itself, physical well-being, the protection of intimacy, moral integrity, the protection of privacy, and everything else that deserves to be protected, supported and defended by the legal system.²⁸

Under Brazilian Constitutional Law, the right to identity is represented by the fundamental principle of human dignity (*item III, art. 1º, Brazilian Federal Constitution/1988*), because to affirm human identity, in terms of the possibility of possessing and expressing all the personal, unique, non-transferable and non-renounceable attributes and features, is to empower a person's dignity.^{6, 16, 23}

Regarding specific legislation, the *Brazilian Civil Code of 2002* was innovative in giving specific attention to the rights of personality in: *Title I - Of Natural Persons, Chapter II - Of the Rights of Personality, articles 11 to 21*. The code establishes rules that ensure the protection of personality rights, though never specified, except the right to physical integrity, the right to name and the protection of privacy.²⁹

Furthermore, in the sphere of the rights of the child and adolescent, the protection due the right to identity is also explicitly provided for in the *Convention on the Rights of the Child*, which sets forth, in article no. 8, that it is the duty of the state to protect and, if necessary, to re-establish the fundamental aspects of a child's identity.⁷ In Brazil, under *articles 15 and 17 of the Statute of the Child and Adolescent*, each child is entitled to freedom, respect and dignity in his or her capacity as a human being in development, and as a subject of rights, to whom identity is essential to the full enjoyment of dignity.⁵

In addition to being a right, identity is a fundamental instrument for the human being's social and legal individualization, and can be understood as the public projection of one's personality.²⁷⁻⁸ The varied legal interests involved in human identity, include gender identity and name – at once essential attributes of a Civil Birth Record and concrete obstacles in records of intersex children.^{23, 30}

Gender is one of the main components of human identity, because it indicates a set of physical features that distinguish male from female. In this sense, the civil – or legal – gender, as designated on the child's birth record, is determined based on each person's civil life and the relations he or she maintains in society, with countless repercussions in the legal area.¹²

Because it is directly linked to gender, as one's first name being female or male is based on a person's gender, the legal name is the human being's defining element and identification factor in society, individualizing a person in social contexts and indicating his or her family origins. Expressly set forth by the *Brazilian Civil Code of 2002*, every person is entitled to a name.²⁹

The legal name, due to private and public factors, comprises at the same time rights and duties, and involves a subjective right and a social interest. Regarding the private factor, every human being has the right to have a name and to be identified in society through it. As for the public aspect, the *Law of Public Records* provides for the duty to give the child a name on his or her Birth Record.¹ That is to say, the legal name registration allows a person to be acknowledged not only in fact, but also before the legal world, guaranteeing access to his or her rights and duties.^{27, 30}

However, even though the child's gender and name are key elements in a person's identity, the duty, under *Law no. 6 015/73*, to indicate them immediately in his or her Civil Birth Record, is a barrier to many intersex children.

The Challenge Posed by the Civil Record of Intersex Children

Considering that a child's identity is his or her first involvement in citizenship and relational life, registration performed immediately after his or her birth is a right, provided for in the human rights domain, in the rights of the child sphere, and also by the Brazilian legal system.^{5, 6, 7, 25, 26, 29} The civil record of a natural person accounts for his or her civil condition, as it protects rights already set forth, and declares an individual a person¹.

Even though it protects the rights of personality, the *Brazilian Civil Code of 2002*, regarding the Civil Birth Record, is limited to determining the registration or amendments to the latter, leaving casuistry-based rules to specific legislation. In this case, the rule providing for civil birth registration is *Law No. 6 015/1973 (LPR)*, specifically under Title II, Chapter IV.

The LPR makes Civil Birth Records compulsory and sets a 15-day period for every birth occurring on Brazilian soil to be registered (*art. 50*). However, the law provides a few exceptions regarding the period of registration. The period is extended to three months if the birthplace is over thirty kilometers from the notary public's main office (*article 50*). If the birth took place aboard a ship or aircraft, the time limit for registration is of five days from the landing at the destination (*article 51*).

The law also indicates whose duty it is to declare the birth (*article 52*), even extending the registry to stillborns or infants who died during delivery (*article 53*). Under the LPR birth records shall contain the gender of the child, as well as the name and forename that are given to the child, among other elements (*article 54*).

However, the birth of intersex children often presents an objective limitation to the Civil Record of these individuals, as it is impossible to immediately define their gender, and, consequently, their forename. In Brazil, the legal gender is based solely on a person's morphological gender, and, in cases of children with ambiguous genitalia, it is no longer feasible to register them immediately, due

to the uncertainty surrounding the neonate's gender and name.

This situation is controversial among legal and health professionals alike, because if the family chooses to delay the child's registration in the civil record until the examinations and determinations by multidisciplinary team are concluded, this child will remain non-existent to the legal system, and, as a result, will not have his or her rights ensured.

On the other hand, by opting for the newborn's immediate registration, the family risks having to file suit to have the name and legal gender in the civil record corrected in cases where they do not correspond to the those defined through medical procedures, since the LPR does not provide for any first name or intersex-based, special rectification hypothesis, or any type of swifter procedure in these cases.

Therefore, the only means for record rectification, in these cases, is via the Judiciary, under the *Law no. 6 015/73*:

"Article 57. The subsequent change of name, only as an exception and through justification, after a hearing before the Prosecution Office, shall be permitted, following the ruling of the judge under whom falls the jurisdiction over the Record, therewith shelving the writ and having the changes published by the media, except in the case of article 110 of this law."

Still according to this rule, the person interested in the rectification shall request, via pleading, with reasons clearly stated and with documents and/or indicating witnesses, that the judge so rule, upon hearing the Prosecution Office and the parties concerned, within five days (*article 109*). However, because of the volume of cases on which the judge needs to rule, or even due to the volume of cases in which the state prosecutor must issue a legal opinion, among other reasons, in practice, the time required for a lawsuit to be concluded is ample.

In this sense, civil record rectification suits concerning intersex children becomes yet another point of tension for the family, as it is emotionally draining and time consuming, in adds to the complications already intrinsic to the phenomenon. Furthermore, during this period a violation occurs to the child's right to identity and dignity.

From this perspective, the reality of the birth of intersex children results in great strain, which calls for a deliberation on the current legal system: how to ensure the rights of the child with regard to his or her dignity? Is it by advocating for immediate birth registry, with rectification when the opposite gender is subsequently diagnosed? Or is it through a prioritized and simplified procedure regarding the analysis of record rectification processes? Or should it be done by defending the right to a temporary special record that lasts for a period sufficient for the effective diagnosis of the baby?

The Interviews

Many were the aspects and prospects indicated that can be prioritized when advocating one of the options currently available. Sometimes the child is the reference, as a subject of rights and person in a particular state of development, by which it is necessary that he or she exists legally, enjoying total priority, so that his or her legal condition may be ensured. Sometimes the family takes the spotlight, so their conflicts, tensions and constraints, in addition to all that is already intrinsic to the phenomenon, may be minimized, thus avoiding potential lawsuits. In other cases, the reference may be the need to access essential services (for which the civil record is crucial), or compliance with the legal provision itself, among other aspects.

Specifically in regard to the *Law of Public Records*, the majority position among interviewees was that this specific legislation, as it currently stands, is not enough to protect the intersex children's right to identity, which calls for a rethinking of the current legal system, so that it may guarantee and empower their full dignity. In truth, much has been said about the exclusive nature of the current legislation in relation to this social segment.

"Judge A" stated: "Why, it is undignified that a person who is still in need of medical care and attention, given time, will not yet have a record; As it is also undignified that this person has a record that is mistaken and final." "Judge A" stressed the opinion that there should be a "third alternative;" that society should have understood already that circumstances may differ, and are not restricted to an "either-or" female-or-male gender possibility, and if it has not done so, the principle of human dignity is compromised.

On the other hand, "Judge B" pondered that, despite mistakes and the need for changes in the current legislation so as to embrace particular circumstances, the *Law of Public Records* protects the dignity of intersex children by guaranteeing them, once they have been registered, all the rights inherent in the human being. Furthermore, "Judge B" stressed that, in these cases, the record can be rectified at any time, by means of a relatively simple lawsuit.

The position taken by "Judge C," however, was that the *LPR* is in perfect harmony with the rights to identity and dignity of intersex children, there being no form of exclusion by this law toward the segment of the population mentioned herein, because judges, in these cases, can solve the problem involving the temporary uncertainty of gender in a civil record by leaving this space blank, to be filled in subsequently, once a definitive diagnosis is provided.

A provisional solution adopted by "Judge B," for children with ambiguous genitalia, during the time said judge was active at the Court of Public Records, was to choose a specific notary public's

office in the region to take cases involving the civil records of these children. Among all public servants in that office, one, whom "Judge B" trusted, was selected and left in charge of these records. He had been instructed to either leave the gender field blank or use the gender chosen by the parents, so that, upon the final diagnosis made by the medical team, the information could be rectified in that very office, without the need of formalities such as record rectification actions.

"Judge B" explained this procedure took place for a time, but that it was not possible to be continued due to considerable rise in the number of cases at court over time, when a point was reached where it was no longer possible to separate those that were priority. Lastly, "Judge B" suggested that the subject involving the civil record of intersex children be brought to, and discussed by, the Disciplinary Board of the Court, so that this judicial body could issue a decision which would determine the proper course of action for that type of situation, because, from that point onward, any notary public would be able to follow that procedure without the need of a lawsuit to correct a record.

A few other alternatives were raised by the remaining interviewees, as an attempt to ensure the rights to the identity and dignity of intersex children regarding their civil record, among which are: 1) To accept a child's provisional record, where his or her name shall be stated as "Newborn," and his or her gender will be left blank, until a final definition of gender and name is provided; 2) To create a priority system for civil record rectification actions from intersex children; 3) To add a third gender in the *Civil Birth Record* for cases involving intersex persons.

Therefore, many are the ways leading to the protection of these children's right to identity. However, this research is not intended to consider which one best addresses the issue, but to highlight the problems involving the civil record of intersex children, so that the resulting debate may be the first step toward a change in the current paradigm, and so that legal science, along with the health sciences, may become additional pillars of support and protection of dignity for these children, rather than yet another obstacle.

The right to identity is a strictly personal fundamental right, closely connected to human dignity, to which every human being is entitled; and is protected by important legal instruments, such as the *Universal Declaration of Human Rights*, the *Convention on the Rights of the Child*, the *Federal Constitution of Brazil* and the *Brazilian Civil Code of 2002*. It begins with the *Civil Record of Birth*, which stands for one's legal status, thus ensuring rights already set forth under the law, and declaring a human being a person.

However, the *Brazilian Law of Public Records* becomes a legitimate barrier to the implementation of the intersex children's right to identity, as it provides for the immediate registration of newborns,

with their name and gender, thus lacking provisions for temporary gender uncertainty involving this segment of the population.

In this context, the families of intersex children are faced with two real options: to register their child without a definitive gender diagnosis, at the risk of a subsequent record rectification when the gender opposite that initially designated is diagnosed; or to delay their child's civil record, subjecting the child, however, to legal non-existence, and consequently, to the lack of access to his or her rights during the period of diagnosis.

The decision regarding whether to delay civil record registration, or risk subsequent rectification concerning name and legal gender, is at the center of much doubt and controversy, not only with patients and their families, but also with active legal professionals, among whom no unanimous

standpoint exists, yet another source of tension for the family and the child.

Medicine has been playing its role in research, examination and development of special treatment measures targeting this population segment, in order to minimize the impacts of the phenomenon and the time during which the child lacks gender definition. However, it is the duty of law, as a social science, to monitor and reflect the progress of society, which means, *in casu*, seeking tools to ensure the intersex children's right to identity.

This means rethinking the current legal system and creating practical solutions, especially because it concerns children – persons in a particular state of development, in need of protection and absolute priority, so that the dignity of intersex children, as a fundamental principle in the Brazilian legal system, shall be adequately protected by law.

REFERENCES

1. Brasil. Lei nº 6.015. Dispõe sobre os registros públicos e dá outras providências (31 de Dezembro de 1973) [acesso em 03 abr 2012]. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/L6015.htm.
2. Maciel-Guerra AT, Guerra Junior G. Classificação. In: Maciel-Guerra AT, Guerra Junior G. Menino ou Menina? Distúrbios da Diferenciação do Sexo. 2ª ed. Rio de Janeiro: Rubio; 2010. p. 89-95.
3. Conselho Federal de Medicina. Resolução n.º 1.664. Dispõe sobre as normas técnicas necessárias para o tratamento de pacientes portadores de anomalias de diferenciação sexual. Publicada no DOU n.º 90 de 13 maio 2003, Seção 1. p. 101-2 (12 de Maio de 2003).
4. Sales IG, Fraser RTD, Lima IMSO, Toralles MBP. Direitos Humanos de Jovens com Intersexo: Por um Serviço de Genética Médica Resolutivo. In: Reis V, organizadora. Juventudes do Nordeste do Brasil, da América Latina e do Caribe. v. 3. Brasília: FLACSO; 2009. p. 97-134.
5. Rossato LA, Lepore PE, Cunha RS. Estatuto da criança e do adolescente comentado. São Paulo: Editora Revista dos Tribunais; 2010.
6. Junior NN, Nery RMA. Constituição Federal comentada e legislação constitucional. São Paulo: Editora Revista dos Tribunais; 2006.
7. Organização das Nações Unidas (ONU). Convenção sobre os Direitos da Criança. Adotada e proclamada pela Resolução 1386 da Assembleia Geral das Nações Unidas (20 de novembro de 1989). Promulgada na República Federativa do Brasil com o Decreto nº 99.710/90 [acesso em 03 abr 2012]. Disponível em: http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D99710.htm.
8. Coelho LAL. Ator e Identidade. In: Bastos LC, Lopes LPM, organizadores. Estudos de Identidade: entre saberes e práticas. Rio de Janeiro: Rubio; 2010. p. 157-70.
9. Guerra Junior G, Maciel-Guerra AT. Avaliação Clínica e Laboratorial. In: Maciel-Guerra AT, Guerra Junior G. Menino ou Menina? Distúrbios da Diferenciação do Sexo. 2ª ed. Rio de Janeiro: Rubio; 2010. p. 315-21.
10. Santos MMR, Araújo TCCF. Estudos e Pesquisas sobre a Intersexualidade: Uma Análise Sistemática da Literatura Especializada. Psicologia: Reflexão e Crítica. 2008; 21(2): 267-74. <http://dx.doi.org/10.1590/S0102-79722008000200012> .
11. Canguçu-Campinho AKF, Bastos ACSB, Lima IMSO. O discurso biomédico e o da construção social na pesquisa sobre intersexualidade. Physis Revista de Saúde Coletiva. 2009; 19: 1145-64. <http://dx.doi.org/10.1590/S0103-73312009000400013>.
12. Choeri RCS. O Conceito de Identidade e a Resignação Sexual. Rio de Janeiro: Renovar; 2004.
13. Machado PS. O sexo dos anjos: um olhar sobre a anatomia e a produção do sexo (como se fosse) natural. Cadernos Pagu. 2005; 24: 249-81. <http://dx.doi.org/10.1590/S0104-83332005000100012>.
14. Bitterncourt ZZLC, Ceschini M. Aspectos Sociais. In: Maciel-Guerra AT, Guerra Junior G. Menino ou Menina? Distúrbios da Diferenciação do Sexo. 2ª ed. Rio de Janeiro: Rubio; 2010. p. 381-91.
15. Silva RBP, Suzigan LZC. Aspectos Psicológicos. In: Maciel-Guerra AT, Guerra Junior G. Menino ou Menina? Distúrbios da Diferenciação do Sexo. 2ª ed. Rio de Janeiro: Rubio; 2010. p. 374-9.

16. Torres JHR. Dignidade sexual e proteção no sistema penal. *Rev. bras. crescimento desenvolv. hum.* [periódico online]. 2011 [acesso em 17 set 2011]; 21(2). Disponível em: http://www.revistasusp.sibi.usp.br/scielo.php?script=sci_arttext&pid=S0104-12822011000200001&lng=pt&nrm=isso.
17. Melucci A. *Por uma sociologia reflexiva – Pesquisa Qualitativa e Cultura*. Petrópolis: Vozes; 2005.
18. Demo P. *Metodologia do Conhecimento Científico*. São Paulo: Atlas; 2000.
19. Douville O. Para que serve o nome que carrego, quando minhas culturas se desmancham? *Agora (Rio J.)* [periódico online]. 2011 [acesso em 28 dez 2011]; 14(1). Disponível em: <http://dx.doi.org/10.1590/S1516-14982011000100003>.
20. Damiani D, Guerra-Junior G. As novas definições e classificações dos estados intersexuais: o que o Consenso de Chicago contribui para o estado da arte? *Arq Bras Endocrinol Metab.* 2007; 51(6). <http://dx.doi.org/10.1590/S0004-27302007000600018>
21. Canguçu-Campinho AKF. Aspectos da construção da maternidade em mulheres com filhos intersexuais [dissertação]. Salvador: Instituto de Saúde Coletiva da Universidade Federal da Bahia; 2008.
22. Spinola-Castro AM. A Importância dos Aspectos Éticos e Psicológicos na Abordagem do Intersexo. *Arq Bras Endocrinol Metab.* 2005; 49(1). <http://dx.doi.org/10.1590/S0004-27302005000100007>
23. Lima IMSO, Toralles MBP, Fraser RTD. Direitos da criança e distúrbios da diferenciação do sexo: além da família. In: Maciel-Guerra AT, Guerra Junior G. *Menino ou Menina? Distúrbios da Diferenciação do Sexo*. 2ª ed. Rio de Janeiro: Rubio; 2010. p. 479-498.
24. Gagliano OS, Pamplona Filho R. *Novo curso de direito civil*. v. 1. 2ª ed. São Paulo: Saraiva; 2002.
25. Organização das Nações Unidas (ONU). *Declaração Universal dos Direitos Humanos*. Adotada e proclamada pela Resolução 217 A (III) da Assembléia Geral das Nações Unidas em 10 de dezembro de 1948 [acesso em 03 abr 2012]. Disponível em: http://portal.mj.gov.br/sedh/ct/legis_intern/ddh_bib_inter_universal.htm.
26. Organização dos Estados Americanos (OEA). *Convenção Americana de Direitos Humanos*. Promulgada na República Federativa do Brasil através do Decreto nº 678 (22 de novembro de 1969) [acesso em 03 abr 2012]. Disponível em: http://www.planalto.gov.br/ccivil_03/decreto/D0678.htm.
27. Pereira CMS. *Instituições de Direito Civil*. v. 1. 20ª ed. Rio de Janeiro: Forense; 2004.
28. Elesbao EC. Os direitos da personalidade no novo Código Civil brasileiro. In: Castro AMO et al. *Pessoa, Gênero e Família: Uma Visão Integrada do Direito*. Porto Alegre: Livraria do Advogado; 2002. p. 9-34.
29. Brasil. Lei 10.406. Institui o Código Civil (10 de janeiro de 2002) [acesso em 03 abr 2012]. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/2002/L10406compilada.htm.
30. Vieira TR. *Nome e Sexo: mudanças no registro civil*. São Paulo: Editora Revista dos Tribunais; 2008.