

# Reflective Paper on the article “The Medical Construction of Gender: Case Management of Intersexed Infants by Suzanne J. Kessler”

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**Abstract-** This reflective paper examines Suzanne J. Kessler’s seminal article, *The Medical Construction of Gender: Case Management of Intersexed Infants*, in the context of the Kerala High Court’s recent judgment regulating sex-selective surgeries. It explores the ethical, legal, and societal implications of gender assignment surgeries on intersex infants, emphasizing bodily autonomy, informed consent, and constitutional rights under Articles 14, 19, and 21. The paper juxtaposes medical justifications with intersex rights advocacy, ultimately advocating for regulation through multidisciplinary committees. The discussion promotes a rights-based, patient-centered approach, recognizing intersexuality as a natural biological variation rather than a condition requiring immediate surgical intervention.

## I. INTRODUCTION

The recent Kerala High court judgement regarding the regulation of sex-selective surgeries of intersex infants is the topic of discussion lately. The article “The Medical Construction of Gender: Case Management of Intersexed Infants” by Suzanne J. Kessler was released in 1990 and holds a gap of approximately 30 years to the judgement. In my reflective essay I wish to analyze the difference between the two and explore the common issue regarding the sex-selective surgery of intersex infants.

## II. ABOUT THE ARTICLE

*"The Medical Construction of Gender: Case Management of Intersexed Infants,"* by Suzanne J. Kessler, delves into the complex and often ethically challenging realm of intersexuality, as well as the ways in which the medical establishment has historically shaped the concept of gender. This article provides a poignant lens through which to examine the profound implications of medical interventions on the

lives of intersex infants, as well as to critically examine the intertwined notions of sex and gender.

Sex and gender, two terms that are frequently used interchangeably, have distinct meanings. Sex is commonly used to refer to the biological and physiological characteristics assigned at birth, such as chromosomal, genital, and hormonal characteristics. Gender, on the other hand, is a multifaceted concept with societal, cultural, and individual dimensions that reflect one's identity and expression in the context of masculinity, femininity, or a gender spectrum beyond the binary.

Kessler's research not only illuminates the medicalization of intersexuality, but it also raises fundamental questions about how society assigns gender based on physical characteristics, frequently at the expense of individual autonomy and well-being.

## III. WHAT IS INTERSEXUALITY?

Intersexuality refers to a wide range of natural variations in human biology that do not fit traditional binary definitions of male and female. Intersex people may have chromosomes, genitalia, hormone levels, or other sex-related characteristics that are neither male nor female. These variations can be observed at birth or later in life during puberty.

Intersexuality challenges the traditional binary understanding of gender and sex, which often categorized people as either male or female. Intersexuality, on the other hand, emphasises the complexity and diversity of human biology by demonstrating that there are sex characteristics other than the binary.

It is critical to understand that being intersex is not a medical condition or disorder. Intersexuality is a natural variation of human biology, and intersex people deserve respect, support, and the right to make informed decisions about their own bodies and identities just like anyone else.

#### IV. WHO ARE INTERSEX INFANTS?

Intersex infants are people born with sex differences that do not fit traditional definitions of male or female. Variations in genitalia, chromosomes, or hormone levels are examples of these variations. Intersex babies may have genitals that defy traditional binary expectations, such as ambiguous genitalia or a mix of male and female characteristics.

Medical treatment of intersex infants has been a controversy. Previously, some intersex infants were subjected to unnecessary surgeries to conform their bodies to binary gender norms, often without their consent. This practice has come under increasing scrutiny because it can cause physical and psychological harm.

The importance of recognising and respecting an individual's right to self-determination and bodily autonomy is emphasised by intersex rights activists. They advocate for informed consent and support for intersex people and their families so that they can make informed decisions about their bodies when the time comes.

#### V. Challenges with Sex-selective surgeries

In an order issued on Wednesday, the Delhi Commission for Protection of Child Rights (DCPCR) recommended that the Delhi government declare a ban on medically unnecessary, sex selective surgeries on intersex infants and children, except in life-threatening situations.

Sex-selective surgeries on intersex infants have raised serious ethical and human rights concerns. These procedures aim to change the appearance of intersex genitalia so that it conforms to binary notions of male or female anatomy. They do,

however, present a number of challenges and controversies:

##### *A. Consent*

These surgeries require informed consent from intersex infants. Decisions are typically made by parents and medical professionals, with little or no input or understanding from the child. This raises ethical issues regarding bodily autonomy and the right to control one's own body. Sex-selection by parents and medical professionals, in my opinion, violates article 21 of the intersex individual. According to Article 21 of the Indian Constitution, the right to gender self-identification is part of the right to dignity and individual autonomy.

##### *B. Consequences*

Many of these surgeries are permanent and can have long-term physical and **psychological consequences**. Individuals who have undergone such procedures may experience dissatisfaction with the results, sexual dysfunction, and emotional trauma in the future.

##### *C. Social Stigma*

These surgeries reinforce the notion that non-binary or atypical genitalia are undesirable or defective. This contributes to the shame and secrecy that surrounds intersexuality. People will continue to think of intersexuality as a disease and will not accept it as a natural phenomenon which will lead to bullying and discrimination of intersex individuals.

##### *D. Perpetuate Inequality*

These surgeries are frequently performed to conform to gender binary societal and cultural norms. They perpetuate the notion that only male or female identities are valid, while ignoring gender diversity. This is one of the most vexing challenges I face, especially in a country like India, where female feticide and male inclination are prevalent. Due to societal and patriarchal thinking, parents will frequently select the gender as male even if it does not match the infant's genitalia.

#### VI. NECESSITY OF THE SEX-SELECTIVE SURGERY

Even though there are multiple reasons why there should not be a sex-selective surgery on intersex

infants but there are few reasons why it is necessary to do a sex-selective surgery:

1. As discussed in my Gender & Society class, sex-selective surgery is a two-step process, the first being surgery and the second being therapy. Therapy is required for the development of secondary sex characteristics such as the development of breasts or beards or the distribution of fat tissues, among other things. If there is no sex-selective surgery at birth, there may be a problem developing secondary sex characteristics.
2. Proponents argue that surgeries can facilitate medical care for intersex infants, lowering the risk of complications later in life. Surgical procedures may be performed, for example, to ensure that a child can urinate or has normal reproductive functions.
3. Some surgeries are done in order to reduce the need for future interventions as the child grows older.

#### VII. PETITION AND ARGUMENTS

In a petition brought by the parents of a child born with ambiguous genitalia seeking permission to conduct genital reconstructive surgery for the purpose of raising the child as a female, V.G. Arun, J. opined that permission to conduct genital reconstructive surgery without the child's consent would infringe upon the articles 14, 19 and 21 of the Indian constitution and violate the child's dignity and privacy, and directed the State government to issue an order for regulation.

The Court referred to Anne Fausto-Sterling's article 'The Five Sexes'. It also alluded to the issues confronting intersex infants and children as discussed in the United Nations Convention on the Rights of the Child ('UNCRC') and the identification of non-consensual gender conforming interventions by the Council of Europe and the European Union as infringing on children's rights to bodily integrity and privacy.

The Court regarded National Legal Services Authority v. Union of India, (2014) 5 SCC 438 as a landmark decision that paved the way for challenging gender-binary shackles through legal recognition and protection of gender variations. The Court also

referred to K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1, when discussing privacy in the context of an individual's choice. Regarding the issue of consideration, the Court also cited various provisions of the Transgender Persons (Protection of Rights) Act, 2019. The Court concluded that the right to choose gender belongs solely to the individual concerned.

#### VII. KERALA HIGH COURT JUDGEMENT

The Court reasoned that granting permission to perform genital reconstructive surgery without the child's consent would violate the child's dignity and privacy, as guaranteed by Articles 14, 19, and 21 of the Indian Constitution.

As a result, the Court ordered the government to form a State Level Multidisciplinary Committee composed of experts such as a Paediatrician/Paediatric Endocrinologist, a Paediatric Surgeon, and a Child Psychiatrist/Child Psychologist. The Court ordered that the Committee be formed within two months to examine the child and determine whether the child was in a life-threatening situation due to ambiguous genitalia and whether permission could be granted for such surgery. The Court also ordered the government to issue an order within three months to regulate sex-selective surgeries on infants and children. Until that time, the Court restricted sex selective surgery to be permitted only if a State Level Multidisciplinary Committee deemed it necessary for saving the child's/infant's life.

#### VII. SUGGESTION

Here is my suggestion: If an intersex person is born, the first step should be a thorough examination of potential risks and health issues. If it is necessary to choose a sex to keep the infant alive, the surgery should be carried out with the consent of both the committee and the parents. In the presence of the parents and a government-appointed individual, the committee should include professionals from all fields of gender studies, psychology, and medical sciences. If, on the other hand, the doctors say that the intersex infant can live a long and healthy life without surgery, the parents will have no say, and the infant will be able to choose whichever gender they want once they turn 18. This way the article 14, 19 and 21

of the Indian constitution will not be violated and intersex individuals can select their own sex.

## VII. CONCLUSION

Regulation of sex-selective surgery, in my opinion, was a necessary step to be taken by the government in light of the issues mentioned above, and appointing a committee for sex-selection does address the problem of gender biases in a country like India. However, while researching, I came across some information about the need for sex-selective surgery. Intersex infants are not required to have surgery at birth, and in most cases, surgery is not life or death. Many medical experts advocate for a more patient-centered and informed-consent-based approach that allows people to make decisions about their own bodies when they are able.

Intersex infant surgery is a complex decision that should be based on a thorough evaluation of the individual's medical needs, potential risks, and the principles of bodily autonomy and informed consent. In some cases, surgery may be medically necessary to address specific health issues, but it is not required for all intersex infants.

## APPENDIX

This paper is a reflective analysis of Suzanne J. Kessler's 1990 article "*The Medical Construction of Gender: Case Management of Intersexed Infants*", with reference to recent legal and ethical developments in India, particularly the Kerala High Court judgment on sex-selective surgeries. Supporting materials include lecture notes from the Gender & Society course, relevant legal provisions under the Indian Constitution (Articles 14, 19, and 21), and contemporary medical and human rights resources on intersexuality. All references used are listed in the bibliography. No personal data or identifiable case studies were included in this analysis.

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