

Boy or girl? Law, gender and being born intersex

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Girl, boy. Credit: Jack Wright

Boy or girl? This is one of the first questions all new parents are asked. In a small percentage of cases, the answer isn't straightforward: the child is intersex. In a highly gendered society, how does the law apply to people whose physiology doesn't fit the binary categories of male and female?

In England, Wales and Northern Ireland, the birth of a child must, by

law, be registered within 42 days of the baby being born. To register the birth, the parents (or parent) must provide various pieces of information including the sex of the baby. But what happens if the child has been born with a reproductive or sexual anatomy that doesn't match the typical definitions of female or male?

Since 2013, it has been possible for children born in Germany to be legally recorded on their birth certificate (and later in life) as 'indeterminate'. While this remains controversial, especially among intersex groups who see it adding to stigmatisation, it creates a legal [gender](#) status other than male or female.

Worldwide, a very small percentage of babies are born intersex – an umbrella term that covers a range of genetic variations that may be apparent at birth or emerge later in an individual's development. But, argues lawyer Dr Jens Scherpe, their relatively low number doesn't make these individuals any less important than those judged by society as 'normal' in terms of their physiology.

Scherpe carries out research within one of the most controversial and sensitive areas of family law – jurisprudence and gender. His introduction to the topic came when he was working at the Max Planck Institute in his native Germany and was asked to carry out research into nationality and change of legal gender for a case heard by the Constitutional Court. He began talking to transgender people and learning about their experiences.

"Once you meet people directly affected by laws which discriminate against them, you begin to feel differently and I've become a passionate advocate for change in the law in this area. I began to question the way in which we seek to categorise people and apply labels. What right does the state have to classify people as male or female in official documents such as birth certificates and passports – and do we actually need gender

categories?"

After completing a comparative project on the legal status of transgender people, Scherpe focused attention on the law as it relates to intersex people, a group whose voices are beginning to be heard more forcefully. Because intersex people are a minority and frequently face discrimination, they are often bracketed together with other groups as LGBTQI (lesbian, gay, bisexual, transgender, queer or questioning, and intersex). Each of these groups, however, is differently affected by the law as it applies to sex and gender.

With funding from the DAAD-University of Cambridge Research Hub for German Studies (see panel), Scherpe organised a workshop in 2016 on 'The Legal Status of Intersex Persons' as a forum to discuss some of the most pressing issues. It brought together participants from ten jurisdictions, including Germany which, as part of a wide-reaching human rights agenda, is making growing provision in the law for people who do not wish to be identified by the binary categories of male or female.

Germany has not been alone in making changes to the ways in which gender is recorded. Changes to the law have been mooted in several countries, including India and Nepal. In 2015, Malta took a lead in passing legislation allowing people to determine their own gender – and for parents, in certain cases, to postpone the marking of gender on a baby's birth certificate until the child's gender identity is confirmed.

While welcoming these changes, Scherpe says there is much more to be done to ensure that intersex individuals have the same rights, and are accorded the same respect, as the majority of the population.

One of the themes to emerge from the workshop is a growing concern that cosmetic (rather than medically necessary) surgery is carried out

almost routinely. Intersex pressure groups argue that the medicalisation of intersex leads to violations of [human rights](#) and that corrective surgery can have devastating consequences.

"Most people strongly condemn the practice of female genital mutilation," says Scherpe. "But children born with genitalia that don't match what society regards to be male or female are routinely 'corrected' by invasive surgery, agreed by parents who fear the stigma attached to having a different child and who believe that their child will be seriously disadvantaged. Would we operate on a child who had red hair because we'd prefer them to have brown or fair hair – or change a child's eye colour from brown to blue?"

At the core of this debate is the view, still held by many medical professionals, that intersex is a 'disorder' rather than a 'difference'. Much of the argument surrounding intersex, and the issues it raises in a gendered world, centres on the use of language and how we choose to define ourselves. There is, for example, widespread debate about the definitions of the terms sex and gender in the highly competitive environment of world athletics.

"Because they're so intertwined with sense of self, and can appear so threatening to our boy/girl view of the world, these questions are understandably super-sensitive. Even the terminology used will be perceived as discriminatory by some. And you can be certain of abuse from those who disagree with you for even investigating the issues concerned. But neither of those things should deter us from seeking to improve the law," says Scherpe.

Not being part of the communities he writes about may be seen to add credibility to his work; he has no self-interest in pursuing changes in the law relating to any of the groups he works with. On the other hand, his lack of personal experience of the extra challenges faced by minority

communities means that he needs to listen to a great many [people](#) to find out how their lives intersect with the law.

He adds: "What matters to me is that as a society we have a duty to ensure that all our members are provided with a legal framework, free from discrimination and stigmatisation, within which they can live happy and healthy lives."

Provided by University of Cambridge

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