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Sexual Orientation and Gender Identity in International Law
24 July - 2 August

The emergence of intersex as a protected category in international law

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Overview

- I. Introduction
- II. The emergence of intersex in international law
- III. The protection granted to intersex in international law

I. Introduction

Caster, an intersex runner

Sibel, an intersex sex worker held in Turkey

I. Introduction

- *A*. What does intersex means?
- *B*. What concrete problems intersex are facing?
- *C*. Intersex and international law?

I. Introduction

- *A*. What does intersex means?
- *B*. What concrete problems intersex are facing?
- *C*. Intersex and international law?

A. What does “intersex” means?

- *1*. Definitions…

- *2*. …And controversies!

1. Definitions

Who are positively intersex people? :

- "Intersex people are born with physical sex characteristics that don't fit medical and social norms for female or male bodies"

  OII Australia <https://oii.org.au/18106/what-is-intersex/>

- "Intersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies"

  OHCHR, Fact Sheet, Intersex, 2015 <https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf>

Who are not intersex people?

- "It is to be distinguished from transsexuality, a phenomenon where someone has an evident sex, but feels as if he or she belongs to the other sex and is therefore ready to undergo a medical intervention altering his or her natural sex."

- "[Intersex] is a naturally occurring variation in humans and not a medical condition."

Council of Europe, Resolution 1952 (2013), Children's right to physical integrity, explanatory memorendum, § 4.9.

2. Controversies

- According to the council of Europe (resolution 1952 [2013]), "[Intersex] is a naturally occurring variation in humans and not a medical condition"
- Doctors disagree !
  - *Consensus statement on management of intersex disorders* (2005)
  - WHO, *International classification of disease* (ICD)

"Terms such as intersex [...] are particularly controversial. These terms are perceived as **potentially pejorative** by patients, and **can be confusing to practitioners and parents alike**.
The term "**disorders** of sex development" (DSD) is proposed, as defined by congenital conditions in which **development** of chromosomal, gonadal, or anatomical sex is atypical.""

- ICD-10: intersex = psychological and physical "disorder"
  - Ch. 5: Mental and behavioural disorders"
    "Gender dysphoria […] with a disorder of sex development"
  - Ch. 17: Congenital malformations, deformations and chromosomal abnormalities => Congenital malformations of genital organs
    Q56.0 Hermaphroditism, not elsewhere classified
    Q56.1 Male pseudohermaphroditism, not elsewhere classified
    Q56.2 Female pseudohermaphroditism, not elsewhere classified
- ICD-11: intersex = only physical "disorder"
  - Ch. 17 Conditions related to sexual health (Ch. 17)
    "Gender incongruence" and no mention of intersex
  - Ch. 20: Developmental anomalies => L2DA Malformative DSD
    LC1A1 Ovotesticular disorder of sex development
    LC1A2 46,XY gonadal dysgenesis
    LC73 Chimaera 46, XX, 46, XY, etc."
- International Working Group on Intersex Depathologization (IDepath)

B. What concrete problems intersex are facing?

- Health issues
  - Eugenics
  - "Normalizing" treatment
  - Access to daily care
- Segregated place and activities
  - Sports
  - Prisons
  - School
- Privacy and family issues
  - Pathologization of their identity and stigma
  - Identity documents (compulsory and limited sex/gender markers)
  - Access to sexual and reproductive rights

THE YOGYAKARTA PRINCIPLES

PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY

THE YOGYAKARTA PRINCIPLES plus 10

ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS TO COMPLEMENT THE YOGYAKARTA PRINCIPLES

As adopted on 10 November 2017, Geneva

II. The emergence of intersex in international law

"When I started as High Commissioner a year ago, I knew little about intersex people. I don't think I was alone in this: it reflects a general lack of awareness.

Too many people assume, without really thinking about it, that everyone can be fitted into two distinct and mutually exclusive categories: male or female."

Opening Remarks at the Expert meeting on ending human rights violations against intersex persons, 15 September 2015
http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16431

Zeid Ra'ad Al Hussein
United Nations
High Commissioner
for Human Rights
(2014-2018)

II. The emergence of intersex in international law

- *A*. When did it emerge?
- *B*. Where (in what instruments) did it emerge?

A. When did it emerge?

Chronological indicators

Before 2009	No occurrence of intersex as a protected category in international law
2009-2010	First occurrence of intersex
2011-2014	Gathering intersex issues with others
2015-today	First documents addressing intersex issues alone

Before 2009

Intersex is not a human rights issue in international law

- 2001, CoE, ECHR, *Goodwin v United Kingdom*

  "While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex, the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that **chromosomal anomalies** may arise naturally (for example, in cases of **intersex conditions** where the biological criteria at birth are not congruent) and in those cases, some **persons have to be assigned to one sex or the other** as seems most appropriate in the circumstances of the individual case."

- Yogyakarta principle, 2006, preamble (transnational law)

  "AWARE that historically people have experienced these human rights violations because they are or are perceived to be lesbian, gay or bisexual, because of their consensual sexual conduct with persons of the same gender or because they are or are perceived to be transsexual, transgender or **intersex**

2009-2010 Intersex starts to be a human rights issue

- European Union
- Council of Europe
- United Nations Organization

European Union

- Fundamental Right Agency, *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States, Part II – The social situation*, 2009

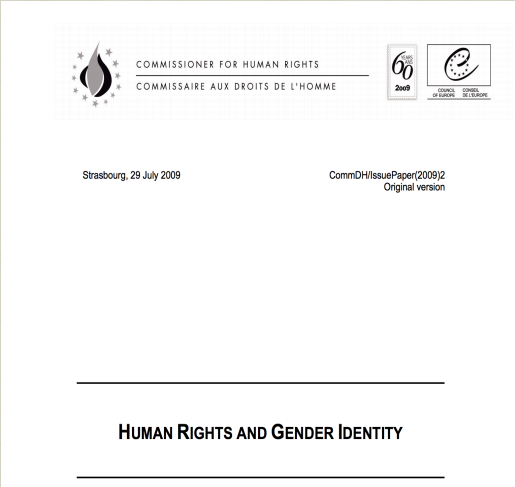
  "20. Member States should ensure all **rights to informed consent** are respected in regard to **procedures on intersex children**. Medical associations should ensure that their members are fully informed on current trends in ethics, therapy and care for intersexual persons."

- But:
  - In the *Summary of findings, trends, challenges and promising practices*, no signs of intersex…
  - In the 2010 update of this studies : "The position of intersex people is not specifically addressed in this report."

Council of Europe

- Commissioner for Human Rights. *Issue paper on human rights and gender identity*, 2009, p. 3 (introduction)

  "a relatively small number of people experience problems with being a member of the sex recorded at birth. This can also be so for intersex persons whose bodies incorporate both or certain aspects of both male and female physiology, and at times their genital anatomy"


COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME

Strasbourg, 29 July 2009

CommDH/IssuePaper(2009)2
Original version

HUMAN RIGHTS AND GENDER IDENTITY

- But
  - No other mention of intersex in that document
  - No mention of intersex in the PACE's resolution 1728 (2010), *Discrimination on the basis of sexual orientation and gender identity*

United Nations Organization

- Committee on Economic, Social and Cultural Rights, *General Comment n° 20*, E/C.12/GC/20, 2009, n° 32

  "Other status" as recognized in article 2, paragraph 2, includes sexual orientation. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or **intersex** often face serious human rights violations, such as harassment in schools or in the workplace.

- General assembly, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/64/272, 2009, para. 49

  "Health-care providers should strive to postpone non-emergency invasive and irreversible interventions until the child is sufficiently mature to provide informed consent. [Footnote 67 : **This is particularly problematic in the case of intersex genital surgery**, which is a painful and high-risk procedure with no proven medical benefits]

- But: no serious developments in these reports on intersex issues

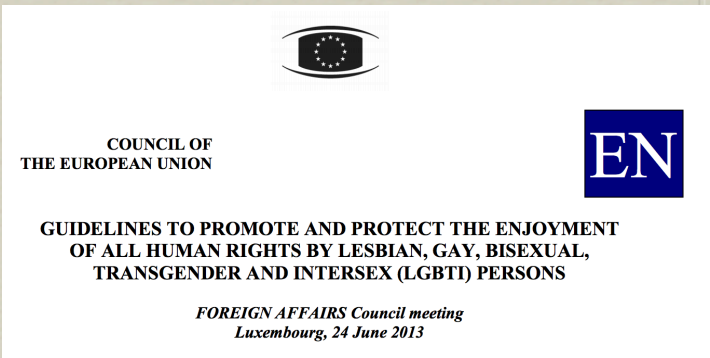
2011-2014

Gathering intersex issue with others

- European Union
- Council of Europe
- United Nations Organization

European Union

- Council of the European Union, *Guidelines to promote and protect the enjoyment of all human rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons*, June 2013,


COUNCIL OF
THE EUROPEAN UNION

EN

GUIDELINES TO PROMOTE AND PROTECT THE ENJOYMENT OF ALL HUMAN RIGHTS BY LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX (LGBTI) PERSONS

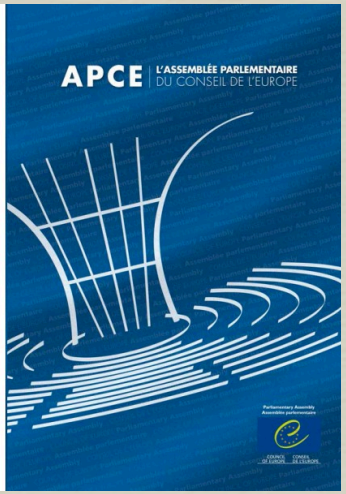
FOREIGN AFFAIRS Council meeting
Luxembourg, 24 June 2013

Annex 2 : Elements for analysis/checklist of the situation regarding LGBTI human rights issues: […]
4.4 Are there procedures in place to recognise a transgender or intersex person's **gender identity** in official documents?
4.5 Can a transgender or intersex person enjoy all of the rights of her/his new reassigned gender?

Council of Europe

- Parliamentary Assembly, *Children's right to physical integrity*, Resolution 1952 (2013), October 2013

  "7. The Assembly therefore calls on member States to:
  7.5.3. undertake further research to **increase knowledge about the specific situation of intersex people**, ensure that no-one is subjected to **unnecessary medical or surgical treatment** that is cosmetic rather than vital for health during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to persons concerned, and **provide families with** intersex children with **adequate counselling and support**;



United Nations Organization

- Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by Germany*, E/C.12/DEU/CO/5, July 2011, §26

  "The Committee urges the State party to step up measures, legislative or otherwise, on the identity and the health of **transsexual and inter-sex** (*sic*) persons with a view to ensuring that they are no longer discriminated against and that their personal integrity and sexual and reproductive health rights are respected. The Committee calls on the State party to fully consult transsexual and inter-sexed persons for this purpose."

- Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, Feb. 2013, para. 88

  "**§3. Lesbian, gay, bisexual, transgender and intersex persons**
  The Special Rapporteur calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital normalizing surgery, involuntary sterilization, unethical experimentation, medical display, "reparative therapies" or "conversion therapies", when enforced or administered without the free and informed consent of the person concerned."

2011-2014

Gathering intersex issue with others

- **The limits of merging intersex issues with other minorities**
  - It gives a partial view of intersex issue (see European Union guidelines)
  - Intersex are still invisible
    - CoE, Parliamentary Assembly, Resolution 1945 (2013) *Putting an end to coerced sterilisations and castrations* : not a word on intersex issues…
  - It can be counterproductive
    - CoE, Committee of Ministers, Reply to Recommendation 2023 (2013) on "Children's right to physical integrity" :

      "The Committee of Ministers notes that protection for children against the risks of non-medically justified operations and interventions is provided by existing international instruments. […] The Committee considers that, for the present, further standard-setting work is not required."

2015-today: First documents addressing intersex issues alone

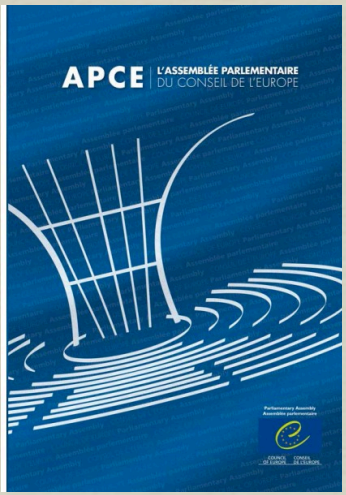
- **Reports**
  - European Union, Fundamental Rights Agency, *The fundamental rights situation of intersex people*, FRA Focus, April 2015

  - Council of Europe, Commissioner for Human Rights, *Human rights and intersex people*, Issue paper, 12 May 2015

  - United Nations Organization, High Commissioner for Human Rights, *Intersex*, Fact sheet, September 2015

2015-today: First documents addressing intersex issues alone

- **Parliamentary resolution**
  - CoE, Parliamentary assembly, *Promoting the human rights of and eliminating discrimination against intersex people*, resolution 2191 (2017)



  - EU, European Parliament, *The rights of intersex people*, resolution, 14 February 2019

2015-today: First documents addressing intersex issues alone

- **What are the consequences?**
  - Better awareness of Intersex issues

    EU, Fundamental Rights Agency, *Current migration situation in the EU: LGBTI asylum seekers*, March 2017

    "This report uses the term LGBTI throughout, even though the measure or policy in place may only concern some categories of persons included in this group. Virtually no information could be collected on intersex asylum seekers."

  - Development of a new concept: sex characteristics
    - CoE, Commissioner on human rights (2015) : "Sex characteristics should be included as a specific ground in equal treatment and hate crime legislation"
    - European Parliament "[d]eplores the lack of recognition of sex characteristics" in EU member States (2019 resolution)

B. Where did it emerge?

1st stage: limited support

- Concluding observations on the States periodic reports
- Reports by externals or special rapporteurs
  - CEDAW: Germany (2009), Costa Rica (2011),
  - CAT: Germany (2011), Switzerland, Austria, Denmark, Hong-Kong, China (2015)
  - CESCR: Germany (2011)
  - CRC: Switzerland, Chile (2015),
  - CRPD: Germany (2015),
  - 2013, E. Schneider for the SOGI Unit of the CoE, *An insight into respect for the rights of trans and intersex children in Europe*
  - 2009, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Right of everyone to the enjoyment of the highest attainable standard of physical and mental health* A/64/272
  - 2013, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53

http://stop.genitalmutilation.org
http://zwischengeschlecht.org/

B. Where did it emerge?

2nd stage: active support

- Reports by international organizations
  - December 2013, European Parliament, Committee on Civil Liberties, Justice and Home Affairs, ("Lunacek report"), *Report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity*
  - May 2014, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and World Health organization, *Eliminating forced, coercive and otherwise involuntary sterilization*.
  - April 2015, Fundamental Right Agency, *The fundamental rights situation of intersex people*
  - May 2015, Human Rights Council, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, Report of the Office of the United Nations High Commissioner for Human Rights, A/HRC/29/23
  - May 2015, Council of Europe Commissioner for Human Rights, *Human rights and intersex people*. Issue Paper
  - November 2015, Inter-American Commission on Human Rights, *Violencia contra Personas Lesbianas, Gay, Bisexuales, Trans e Intersex en América*

B. Where did it emerge?

2nd stage: active support

- Reports by international organizations
- Supporting or organizing NGO meetings and events
  - March 2014, Human Rights Council, Side Events to the The 25th Session, *Intersex People and Human Rights: Violations, Voices and Visions*
  - August 2015, Commissioner for Human Rights (CoE), Opening of the European Intersex Forum in Douarnenez (France)
  - September 2015, OHCHR (UN), Expert meeting on ending human rights violations against intersex persons
  - September 2015, European Parliament, LGBTI Intergroup Session, *Human rights of intersex people*
  - November 2017, African Commission on Human and People's Rights, Side event on the protection and promotion of the human rights of Intersex people

B. Where did it emerge?

2nd stage: active support

- Reports by international organizations
- Supporting or organizing NGO meetings and events
- Parliamentary work
  - October 2013, Parliamentary Assembly (CoE), Resolution 1952 (2013) and Recommendation 2023 (2013), *Children's right to physical integrity*
  - February 2017, European Parliament (EU), *Promoting gender equality in mental health and clinical research*, § 61
  - October 2017, Parliamentary Assembly (CoE), Resolution 2191 (2017), *Promoting the human rights of and eliminating discrimination against intersex people*
  - February 2019, European Parliament (EU), *The rights of intersex people*

B. Where did it emerge?

2nd stage: active support

- Reports by international organizations
- Supporting or organizing NGO meetings and events
- Parliamentary work
- Joint statement
  - May 2014, *Eliminating forced, coercive and otherwise involuntary sterilization*, UN interagency statement
  - 13 May 2015, *Discriminated and made vulnerable: Young LGBT and intersex people need recognition and protection of their rights International Day against Homophobia, Biphobia and Transphobia*
  - 26 October 2016, *End violence and harmful medical practices on intersex children and adults, UN and regional experts urge*

III. The protection granted to intersex in international law

III. The protection granted to intersex in international law

- *A*. Overview of the different international norms protecting intersex
- *B*. Insight on the norms related to the normalizing surgeries
- *C*. Dead angles?

A. Overview of the different international norms protecting intersex

1. Hard law : general provision as in the *ICCPR*

- Art. 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation";
- Art. 16: "Everyone shall have the right to recognition everywhere as a person before the law."
- Art. 18: "No one shall be subject to coercion which would impair his freedom to have or to adopt a […] belief of his choice."
- Art. 24: "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."
- Art. 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. "

A. Overview of the different international norms protecting intersex

2. Soft law: specific provisions produced by international organizations

- Intersex' bodily integrity and self determination
- Access to counseling, support and medical records
- Educating professionals working with intersex and raising general awareness
- Investigation, access to justice redress and compensation for intersex victims
- Fight against discrimination based on sex characteristics
- Participation of intersex NGO in intersex policies and studies
- Protecting intersex' rights regarding their gender identity (including depathologisation)
- Funding intersex studies and intersex NGO's

(Yogyakarta plus 10 principles)

B. Insight on the norms related to normalizing surgeries

2009 "Member States should ensure all rights to informed consent are respected in regard to procedures on intersex children."

FRA, *Homophobia and discrimination on Grounds of SOGI in the EU Member States*

"Health-care providers should strive to postpone non-emergency invasive and irreversible interventions"

UN, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

2011 "The Committee urges the State party to step up measures […] on […] the health […] of inter-sex persons with a view to ensuring […] that their personal integrity […] and reproductive health rights are respected."

UN, CECSCR, Consideration of reports submitted by Germany

2011 "The Committee recommends that the State party: (a) Ensure the effective application of legal and medical standards following the best practices of granting informed consent to medical and surgical treatment of intersex people, including full information, orally and in writing, on the suggested ; […] (d) Properly inform patients and their parents of the consequences of unnecessary surgical and other medical interventions for intersex people."

Committee against Torture, Concluding observations, Germany

B. Insight on the norms related to normalizing surgeries

2013 "The Special Rapporteur calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital normalizing surgery […] when enforced or administered without the free and informed consent of the person concerned. He also calls upon them to outlaw forced or coerced sterilization in all circumstances"

UN, Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishmen

2014 "Suggestions: […] In the absence of medical necessity, when the physical well-being of a person with an intersex condition is in danger, if possible, postpone treatment that results in sterilization until the person is sufficiently mature to participate in informed decision-making and consent."

OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF & WHO, *Eliminating forced, coercive and otherwise involuntary sterilization*,

2015 (April) "EU Member States should avoid 'sex-normalising' medical treatments on intersex people without their free and informed consent"

FRA, *The fundamental rights situation of intersex people*

B. Insight on the norms related to normalizing surgeries

2015 (May) "The High Commissioner recommends that States address violence by: […] (h) Prohibiting medically unnecessary procedures on intersex children

OHCHR, *Discrimination and violence against individuals based on their sexual orientation and gender identity*

2016 "States must, as a matter of urgency, prohibit medically unnecessary surgery and procedures on intersex children"

Joint Statement on Intersex Awareness day, *End violence and harmful medical practices on intersex children and adults*

2017 (Feb) Calls on the Member States to prevent, ban and prosecute […] genital mutilation affecting intersex persons

European Parliament, *Resolution on promoting gender equality in mental health and clinical research*

2017 (Oct.) "the Assembly calls on Council of Europe member States to […] prohibit medically unnecessary sex-"normalizing" surgery, sterilization and other treatments practiced on intersex children without their informed consent"

CoE, Parliamentary Assembly, resolution 2191 (2017), *Promoting the human rights of and eliminating discrimination against intersex people*

B. Insight on the norms related to normalizing surgeries

Summary of the evolution

B. Insight on the norms related to normalizing surgeries

Summary of the evolution

2009 "**should strive to postpone** non-emergency invasive and irreversible interventions"

"**ensuring** […] their **personal integrity** […] and reproductive health rights"

2011 "Properly **inform** patients and their parents"

2013 "**calls upon** all States to **repeal** any law allowing intrusive and irreversible treatments, including forced genital normalizing surgery"

2014 "**if possible**, **postpone** treatment that results in sterilization"

2015 "States **should** avoid 'sex-normalising' medical treatments"
"**recommends** [p]**rohibiting** medically unnecessary procedures "

2016 "States **must**, as a matter of **urgency**, **prohibit** medically unnecessary surgery"

2017 "**calls** to **prevent**, **ban** and **prosecute** […] **genital mutilation** affecting intersex persons"

"**Calls** to **prohibit** medically unnecessary **sex-"normalizing" surgery**"

C. Dead angles?

- Vulnerable group of intersex
  - Migrants
  - Detained persons
  - Fetus
- Unaddressed questions related to binary sexed rule
  - Prison, toilets, sports (though: A/HRC/40/L.10/Rev.1)
  - Marriage, medically assisted reproduction