**GENDER PARITY: BEYOND THE BINARY**

OutRight Action International[[1]](#footnote-1)

# **Introduction**

Gender-based discrimination is inherently linked to deep-rooted patriarchal and gender stereotypes and unequal power relations, manifesting in discriminatory attitudes, behaviors, norms, perceptions, customs and harmful practices targeting vulnerable members of society. In order to combat discrimination, International Human Rights Law includes several anti-discrimination clauses in treaties that are reaffirmed in international, regional and domestic spheres. This means that States and other stakeholders are bound by international, regional and domestic obligations to take measures necessary to prevent, diminish and eliminate patriarchal and gender stereotypes that cause or perpetuate substantive or de facto discrimination, and to adopt an intersectional approach to genuinely respond to the needs of those affected. Moreover, gender discrimination is only fully addressed when its solutions include lesbian, gay, bisexual, trans and intersex (hereinafter, “LGBTI”) persons, who are highly affected by gender and patriarchal stereotypes.

Gender parity strives to ensure an equal representation of genders at all levels. However, it is vital that it does so outside of binary terms, in order to include the individuals, cultures, and all of those which hold or recognize identities outside of a gender binary. Recognizing that gender parity must be inclusive enhances diversity, and can lead to the adoption of stronger, more sucessful policies owing to the unique and valued inputs of those who in the current system are too frequently overlooked due to biases and discrimination. In that sense, when working on the gender parity policies and blueprints, it is highly important to include LGBTI persons, from idealization to implementation, to guarantee that true inclusion is achieved and that the root causes of discrimination are addressed.

To modify social and cultural patterns of conduct with a view to preventing and eliminating discrimination in the public and private sphere, including in digital contexts, all stakeholders must make space for those who are mostly affected by patriarchal gender stereotypes, negative social norms, attitudes and behaviors and unequal power relations. LGBTI persons should not be left behind and should be substantively included in any measures to fulfill gender equality and end discrimination in the international, regional and domestic spheres.

# **Gender**

Gender encompasses social beliefs about appropriate behaviors and qualities of individuals based on their perceived sexual characteristics.[[2]](#footnote-2) Patriarchal norms, beliefs and expectations around gender form the stereotypes that underscore gender discrimination, and hence are condemned at the highest possible level.[[3]](#footnote-3) Gender stereotypes cause or perpetuate substantive or de facto discrimination by creating a false hierarchy among human beings. They affect all persons and create barriers to fulfill the rights to all to be free and equal.[[4]](#footnote-4)

Wrongful gender stereotypes also base themselves on the false premise that there are only two genders in the world, male and female. This is not true in all societies, and examples of other genders are present all around the globe, such as two-spirits, *muxe*, *fafafine*, among many others.[[5]](#footnote-5) The creation of a gender binary erases all those whose gender identities fall outside this order, such as intersex and nonbinary individuals, as well as those who transgress prescribed gender roles, including other members of the LGBTI community. Like other victims of patriarchy, LGBTI individuals suffer from gender-based violence and discrimination and in addition face human rights violations specific to their sexual and gender identities, such as conversion therapy, involuntary medical interventions and social stigmatization. Consequently, United Nations mechanisms and bodies have increasingly noted the importance of including LGBTI individuals in their work against gender-based discrimination. For instance, UN Women defines “gender” as:

“the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys... These attributes, opportunities and relationships are socially constructed and are learned through socialization processes. They are context/ time-specific and changeable... Gender is part of the broader socio-cultural context”.[[6]](#footnote-6)

Similarly, the Committee on the Elimination of Discrimination against Women (hereinafter “the Committee”) clarifies:

“The term “sex” here refers to biological differences between men and women. The term “gender” refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community”.[[7]](#footnote-7)

This definition is widely accepted in regional mechanisms, such as the Organization of the American States, which defines gender as ‘socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for those biological, hormonal, anatomical, and physiological characteristics on whose basis one is labeled at birth as differences’.[[8]](#footnote-8) Similarly, the Council of Europe defines gender as ‘the socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for women and men’,[[9]](#footnote-9) and the Southern African Development Community defines gender as ‘the roles, duties and responsibilities which are culturally or socially ascribed to women, men, girls and boys’.[[10]](#footnote-10) The Association of Southeast Asian Nations (“ASEAN”) affirms its commitment to gender-mainstreaming and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),[[11]](#footnote-11) hence indirectly endorsing the constructivist definition of gender embraced in International Human Rights Law.

These definitions are limited in that they often are predicated around a gender binary. However, by defining gender as a mutable social category emanating from cultural norms, they also allow for categories of gender that are neither male, nor female, such as non-binary and intersex people. A more substantive definition is provided by the Yogyakarta Principles[[12]](#footnote-12), which defines gender identity as

each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.[[13]](#footnote-13)

The recognition that gender is a socio-cultural construct increasingly informs United Nations advocacy around eliminating gender discrimination. Firstly, state parties to the CEDAW are obligated to ensure the elimination of gender-based—and not merely sex-based—discrimination. This is clarified by the Committee in General Recommendation No. 28, which states that

“Although the Convention only refers to sex-based discrimination… the Convention covers gender-based discrimination against women...The application of the Convention to gender-based discrimination is made clear by the definition of discrimination contained in article 1. This definition points out that any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms is discrimination, even where discrimination was not intended. This would mean that identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face”.[[14]](#footnote-14)

It subsequently follows that interventions against discrimination must grapple with dynamic social norms and the lived experiences of those affected by patriarchal violence, and hence cannot neglect the position of the many individuals who exist outside the binary.

The Committee’s General Recommendations on the application of CEDAW increasingly have begun to incorporate the recognition of lesbian, bisexual, transgender and intersex individuals.[[15]](#footnote-15)  For instance, in General Recommendation No. 32, the Committee affirms that

“Discrimination against women based on sex and/or gender is often inextricably linked with and compounded by other factors that affect women, such as race, ethnicity, religion or belief, health, age, class, caste, *being* *lesbian, bisexual or transgender* and other status”.[[16]](#footnote-16)

On General Recommendation No. 33, the Committee states:

Discrimination against women, based on gender stereotypes, stigma, harmful and patriarchal cultural norms and gender-based violence, which affects women in particular, has an adverse impact on the ability of women to gain access to justice on an equal basis with men. In addition, discrimination against women is compounded by intersecting factors that affect some women to degrees or in ways that differ from those affecting men or other women. Grounds for intersecting or compounded discrimination may include …[those who] *identity as a lesbian, bisexual or transgender woman or intersex person*. These intersecting factors make it more difficult for women from those groups to gain access to justice.[[17]](#footnote-17)

The recognition of LGBTI individuals is not limited to specific areas, but widely informs the Committee’s approach to topics ranging from refugee law, to access to justice, to climate change.[[18]](#footnote-18) This indicates the recognition that substantive approaches to gender mainstreaming must actively include individuals that do not conform to the gender binary.

A rigid, two category model of gender is not only Eurocentric, negating the sociocultural frameworks of the many cultural groups who recognize genders beyond male and female and the International Covenant on Economic, Social and Cultural Rights (hereinafter “ICESCR”),[[19]](#footnote-19) but excludes the many who identify outside the binary, including but not limited to transgender and intersex persons. Recognizing the rights of those outside the binary is fundamental to the achievement of universal human rights. The preamble of the Universal Declaration of Human Rights remarks that “[a]ll human beings are born free and equal in dignity and rights.”[[20]](#footnote-20) Similarly, the Vienna Declaration states

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[[21]](#footnote-21)

There are numerous examples of gender-inclusive language and policies in various States’ domestic legal systems, as well as a number of States that explicitly recognize genders outside of a binary. Nepal is notable as having a clear and strong mandate handed down from its Supreme Court in 2007, where it states that

“If any legal provisions exist that restrict the people of [a] third gender from enjoying fundamental rights and other human rights provided by Part III of the Constitution and international conventions relating to the human rights which Nepal has already ratified and applied as national laws, with their own identity, such provisions shall be considered as arbitrary, unreasonable and discriminatory. Similarly, the action of the state that enforces such laws shall also be considered as arbitrary, unreasonable and discriminatory”.[[22]](#footnote-22)

This sets a national standard not only recognizing a third gender, but also applies to all laws already in place to ensure that past gendered policies become legally inclusive of all genders. Other nations, such as India, Australia, and Iceland, have passed legislations allowing for legal identification outside of a gender binary.

In tandem with international law, domestic policies acknowledging non-binary genders subsequently ensure that individuals and cultures that operate outside of a gender-binary have the same basic human rights afforded to all members of the global community, and thus should be recognized in international law and policy through the use of gender inclusive language and non-binary paradigms of gender parity.

# **Gender Parity**

As theSecretary-General of the United Nations, António Guterres has stated: *‘Gender parity at the United Nations is an urgent need – and a personal priority. It is a moral duty and an operational necessity.’[[23]](#footnote-23)*

To achieve gender parity, a group - whether it is a small-scale organization, a State, or the UN - must address the patriarchal constructions that create barriers and marginalized groups that do not live according to these constructions. The United Nations-wide Gender Parity Strategy has currently set targets for equal representation of women and men, highlighting specific areas including: leadership and accountability; senior management; recruitment and retention; and field operations. The Strategy emphasizes, ‘It is not simply about achieving quantitative goals, but about fostering an inclusive workplace, and transforming the institutional culture so that the Organization can fully deliver on its mandate’.[[24]](#footnote-24) This leaves ample scope for the inclusion of LGBTI persons within the implementation of this gender focused strategy.

This concept is also affirmed in CEDAW and its normative interpretations, which make it clear that interventions for gender equality must be substantive and outcomes-based rather than formal.[[25]](#footnote-25) Formal equality refers to equal legal treatment and requires that overtly discriminatory laws be replaced with gender neutral laws. However, this framework fails to grapple with the complex socio-cultural systems in which discrimination occurs. CEDAW therefore purports a ‘three-dimensional view of equality’, which empirically examines the cultural values, socio-political institutions and economic structures that shape discrimination.[[26]](#footnote-26)

As affirmed by the entire United Nations system, gender parity is a crucial aspect to achieving greater equality and represents an important stride to see equal representation in given roles. However, if it falls short when addressing root causes of inequality, it is impossible to achieve true gender equality and inclusion. Gender parity risks being tokenistic unless it also engages with the biases and systems of discrimination against gender identities that do not fall within the scope of patriarchal stereotypes.

Gender parity is a very important goal, however in its current form it leaves out significant portions of the global population who identify outside of a gender binary and are also affected by the barriers and difficulties created by the existing patriarchal structures. As detailed above gender is not binary, and thus true gender parity cannot be limited to achieving a 50/50 balance of men and women. The UN System-Wide Strategy on Gender Parity acknowledges that greater diversity improves systems, stating, ‘Greater diversity is directly correlated in both public and private sectors with significant gains in operational effectiveness and efficiency’.[[27]](#footnote-27) Expanding the definitions and institutional understanding of gender to the concept of gender parity is crucial for the well-being and empowerment of all genders. Gender parity must come at all levels - not simply as a tokenistic show of equality but as meaningful change that recognizes that maintaining patriarchal norms harms everyone in the global community.

Furthermore, there is a recognized universal right to participate in public affairs and to have equal access to public service, without restrictions:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country”.*[[28]](#footnote-28)*

A model of gender parity that excludes certain individuals from public participation on the basis of their sex and/or gender, namely based on their ability to fall within a binary system, clearly violates the spirit and purport of International Human Rights Law. Such an act of non-recognition also violates the duty of States to ‘recognize the right of everyone to the enjoyment of the highest attainable standard of mental health’ as prescribed in the ICESCR.[[29]](#footnote-29)

These rights, along with other universal rights discussed earlier in this document, make it clear that without systemic recognition and equality beyond patriarchal norms of a binary gender society, true gender parity cannot be achieved and those who exist outside of the patriarchal binary will be denied their basic human rights. International norms and universal rights again and again maintain that individuals within the global community have inherent and equal rights to participation in society, self-determination, the right to cultural identity, and other similar rights that are inalienable[[30]](#footnote-30) - leading to a basic truth that all people should share in the achievement of gender parity, have a place at the table and enjoy equal opportunity to reach any and all levels of private or public service, no matter their gender identity.

To reach the admirable goal of true gender parity, it is imperative that all stakeholders, including the United Nations and States, recognize that patriarchal stereotypes on gender must be broken. In order to do that, it is important to recognize that gender, both legally and culturally, exists outside of a binary and thus gender parity goals, regulations, and laws must be inclusive of all genders in language, content, and spirit.

# **Recommendations**

Gender has existed and continues to exist outside of a binary for individuals and cultures throughout the global community, and to exclude voices that do not fit into those stereotypes is incompatible with the goals of gender parity and of international human rights law. To fully address the issues of gender discrimination and gender inequality and to ensure the realization of gender parity, the inclusion of all who are affected by patriarchal norms and gender stereotypes is a necessity.

Contemporary understandings of gender must be taken into account when creating plans around gender parity, and it is absolutely crucial that the voices of all who face discrimination, bias, and unequal treatment due to patriarchal rules and stereotypes are included in any and all gender parity blueprints, decisions and goals.

All international stakeholders should adopt the following actions:

* Utilize non-gendered and inclusive language to ensure that no one is left behind in striving for goals of equality and empowerment.
* Create and implement policies that address the hurdles, blockages, biases, and other forms of discrimination that prevent the achievement of gender parity and equality.
* Apply a gender-mainstreaming approach embedding the rights of LGBTI persons, including intersex and nonbinary people into key decision-making organisms, and allows for their meaningful participation.
* Ensure that in the early stages of this process, LGBTI voices are included in the decision-making process
* Take all measures to allow for individuals who identify as neither male nor female to participate in public forums
* Take a culturally inclusive approach to policy and participation
* Create appropriate recourse mechanisms against individuals and groups seeking to be exclusionary in language, policy, and practices
* Implement the necessary interventions in institutions at all levels to advance the understanding that gender is non-binary
* Support civil society, including those led by non-binary and intersex people, through targeted and robust funding opportunities and capacity building training to ensure that communities furthest left behind are meaningfully included in all aspects of gender parity interventions.

1. OutRight Action International, founded in 1990, is a leading international human rights organization dedicated to improving the lives of people who experience discrimination or abuse on the basis of their real or perceived sexual orientation, gender identity or expression. We are dedicated to strengthening the capacity of the LGBTIQ human rights movement worldwide to effectively conduct documentation of human rights violations against LGBTIQ people and engaging in advocacy for the recognition and promotion of the human rights of LGBTIQ people with partners around the globe. We work with the United Nations, regional human rights monitoring bodies and civil society partners. OutRight Action International holds consultative status at the United Nations as a recognized Non-Governmental Organization.

   This document was drafted by OutRight’s United Nations Team, Luíza Drummond Veado, Sahar Moazani, Sonya Cotton and Piper Styles. [↑](#footnote-ref-1)
2. UNICEF, Gender Glossary, Glossary of Terms and Concepts, 2017, available at: https://www.unicef.org/rosa/media/1761/file/Gender%20glossary%20of%20terms%20and%20concepts%20.pdf [↑](#footnote-ref-2)
3. E.g. CEDAW’s Article 5 (a) requires States Parties to take “all appropriate measures” to “modify the social and cultural patterns of conduct of men and women” in an effort to eliminate practices that “are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” [↑](#footnote-ref-3)
4. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). [↑](#footnote-ref-4)
5. Office of the United Nations High Commissioner for Human Rights, *Born Free and Equal*, 2012 HR/PUB/12/06. [↑](#footnote-ref-5)
6. UN Women, *Concepts and Definitions*, available at: <https://www.un.org/womenwatch/osagi/conceptsandefinitions.htm> [↑](#footnote-ref-6)
7. United Nations, Committee on the Elimination of Discrimination against Women – CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para. 5. [↑](#footnote-ref-7)
8. OAS, Permanent Council of the Organization of American States, Committee on Juridical and Political Affairs. Sexual orientation, gender identity and gender expression: key terms and standards. Study prepared by the Inter-American Commission on Human Rights, OEA/Ser.G. CP/CAJP/INF. 166/12. April 23, 2012, para. 14. [↑](#footnote-ref-8)
9. Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence,* article 3C. [↑](#footnote-ref-9)
10. Southern African Development Community, *Protocol on Gender and Development*,17 August 2008*,* art 2. [↑](#footnote-ref-10)
11. ASEAN Declaration on the Gender-Responsive Implementation of the ASEAN Community Vision 2025 and Sustainable Development Goals, preamble. [↑](#footnote-ref-11)
12. The Yogyakarta Principles (2006) are a set of principles that guide the application of international human rights law in relation to sexual orientation and gender identity. [↑](#footnote-ref-12)
13. *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, p. 6. [↑](#footnote-ref-13)
14. United Nations, Committee on the Elimination of Discrimination against Women – CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para. 5. [↑](#footnote-ref-14)
15. UN Committee on the Elimination of Discrimination Against Women (CEDAW),*General Recommendation No. 35 (2017) on Gender-based Violence Against Women, Updating General Recommendation No. 19*, 26 July 2017*,* CEDAW/C/GC/35, paras 12 and 29; UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 37 (2018) on the Gender-related Dimensions of Disaster Risk Reduction in the Context of Climate Change*, 13 March 2018, CEDAW/C/GC/37, paras 57(e); 68(f). [↑](#footnote-ref-15)
16. UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, para 6. [↑](#footnote-ref-16)
17. Para UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 33 on women’s access to justice,* 3 August 2015, CEDAW/C/GC/33, para 8. [↑](#footnote-ref-17)
18. Op cit notes 10, 11 and 12. [↑](#footnote-ref-18)
19. ‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, [↑](#footnote-ref-19)
20. UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). [↑](#footnote-ref-20)
21. UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, article 5. [↑](#footnote-ref-21)
22. Pant, Writ No. 917, at 282. [↑](#footnote-ref-22)
23. <https://www.un.org/gender/> [↑](#footnote-ref-23)
24. <https://reform.un.org/content/gender-parity-strategy> [↑](#footnote-ref-24)
25. United Nations, Committee on the Elimination of Discrimination against Women – CEDAW, General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para. 5. [↑](#footnote-ref-25)
26. https://asiapacific.unwomen.org/en/focus-areas/cedaw-human-rights/faq#whatiscedaw [↑](#footnote-ref-26)
27. <https://www.un.org/gender/sites/www.un.org.gender/files/gender_parity_strategy_october_2017.pdf> [↑](#footnote-ref-27)
28. Article 25 of the International Covenant on Civil Political Rights ICCPR [↑](#footnote-ref-28)
29. Article 12(1) of ICESCR. [↑](#footnote-ref-29)
30. “The Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind” (CEDAW) [↑](#footnote-ref-30)