

# Reports on Gender: The Law of Inclusion & Practices of Exclusion

Reports presented in 2021 at the 47th UN Human Rights Council and 76th UN General Assembly

## Introduction

There has been a steep rise in the use of platforms by extremist political leaders and religious groups to promote bigotry, dehumanize persons based on their sexual orientation or gender identity (SOGI), and foster stigma and intolerance among their constituencies. This trend is generated through orchestrated and well-resourced strategies that aim at negatively impacting the progressive recognition of human rights standards relating to gender equality and sexuality. The reports issued by the IESOGI in 2021 address this issue from two complementary angles.

**The first part, “Law of Inclusion”,** investigates how the concept of gender is enshrined in international human rights law (IHRL) and concludes that gender identity and expression are protected thereunder, and that gender-based approaches and intersectionality provide a sharp lens for analysing the root causes of violence and

discrimination based on SOGI. They enable the analysis of multiple asymmetries of power, deriving from how sex is understood within society, including those that feed violence and discrimination against women in all their diversity.

**The second part, “Practices of Exclusion”,** analyses backlash against the incorporation of gender frameworks in IHRL. It concludes that exclusionary narratives and actions related to gender and gender identity exploit preconceptions, stigma and prejudice, creating risks for the rights of all women (including lesbian, bisexual and trans women) and contributing to the perpetuation of violence and discrimination based on SOGI.

## PART 1

# The law of inclusion

The analysis of IHRL sources reveals a robust system in which gender is a term used to describe a socio-cultural construct that ascribes certain roles, behaviours, forms of expression, activities and attributes associated with biological sex characteristics. Under this definition, gender and sex do not substitute each other - they are autonomous concepts used to describe two different aspects of the human experience.

The concept of gender appeared in feminist writings to challenge the then-dominant position of biological determinism, investigating the relational aspects of femininity and masculinity. Therefore, gender is not a concept restricted to women. It concerns all human persons who live in gendered societies, because it creates a context that influences the development of their personal identities and social interactions.

As a social construct deeply embedded in society, gender is a determining factor for decision-making on social, economic and political inclusion and participation. Gendered identities will contribute to the creation of experiences of privilege that end up benefitting very few; for many, they contribute to experiences of marginalization, discrimination and violence. That is often the case for women and persons whose gender identity and/or expression do not fit squarely within the preconceptions attached to their sex assigned at birth. Strict gender norms are at the root of social inequality in all societies across the globe. Against this backdrop, the study of gender emerges as a necessary tool to address the oppression of female and non-normative gender identities and transform systems of violent masculinity.



## Gender Identity and Expression

Gender identity refers to 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 and other gender expressions, including dress, speech and mannerisms. Human experience in relation to gender identity and expression is both complex and rich. A wide range of gender identities and expressions exist in all regions of the world, as a result of long-established cultures and traditions that transcend concepts of gender considered as the norm in a particular place and time.

The notion that there is a gender norm, from which identities and expressions vary or depart, is based on a series of preconceptions that must be challenged if all humankind is to enjoy human rights. Those misconceptions include that it is a legitimate societal objective that persons adopt roles, forms of expression and behaviours that are considered entitlements or burdens according to sex assigned at birth. Only through acknowledging the stereotypes, power asymmetries, inequality and fundamental violence that lies as the foundation of this system does the State comply with its obligation to address the violence and discrimination that it fuels, with its harrowing impact on women and girls in every corner of the world, including lesbian, bisexual and trans women; on gay, bisexual and transpersons; on other gender diverse individuals; and on intersex persons.

## The Male and Female Binary

Cultures and countries from all over the globe recognize in cultural traditions, and also sometimes in law, genders that do not correspond with the male/female binary. Examples are Argentina, Australia, Bangladesh, Canada, Fiji, India, Indonesia, Mexico, Nepal, New Zealand, Pakistan, the Philippines, Samoa, Thailand, Tonga, and the United States of America - only these examples already comprise more than a third of the world's population.

The prevalence of the binary and the repression of gender diversity are also directly linked to the history of colonialism and oppression. Some precolonial cultures were more open to the idea

of gender plurality before the establishment

of colonial and postcolonial formal legal systems. Recently, the scientific community has also collected evidence to support the conclusion that gender identity is not strictly a binary phenomenon.



### Gender in Human Rights Law and Jurisprudence

A broad understanding of gender allows for the systematic assessment of discrimination impacting persons because of their real or perceived sexual orientation or gender identity (SOGI), as evidenced by interpretations issued by United Nations Treaty Bodies: The Committee on Economic, Social and Cultural Rights (CESCR) has established that “the notion of the prohibited ground ‘sex’ has evolved considerably to cover not only physiological characteristics but also the social construction of gender stereotypes”.

- **The Working Group on Discrimination Against Women and Girls (WGDAGW) and the Committee on the Elimination of Discrimination against Women (CEDAW) have observed that women who do not conform to gender stereotypes, including LBT women, are particularly vulnerable to discrimination, violence and criminalization.**
- **The Committee on the Rights of Persons with Disabilities (CRPD) uses the phrase “all genders”, suggesting an understanding of gender as not binary.**
- **The Human Rights Committee, while analysing a State’s failure to allow change of sex on official documents, concluded that it was a form of discrimination because “the Government is failing to afford the author, and similarly situated individuals, equal protection under the law”.**

Recent case law also demonstrates how gender-based analytical tools are applicable and pertinent to the analysis of violence against trans persons. In *Vicky Hernández v. Honduras*, the Inter-American Commission for Human Rights (IACHR) found that the victim’s death occurred in a context of discrimination based on prejudice that included police violence against LGBTI persons, especially trans women sex workers. For the IACHR, the case presented not only the absence of capacity within the state sector but also resistance to investigating these forms of fatal violence against trans women.

In *Azul Rojas Marín v. Peru*, the Inter-American Court of Human Rights (IACtHR) characterized the case in which the victim was raped by State agents as a hate crime, because it “not only damaged the rights of Ms. Rojas Marín, but was also a message to the whole LGBTI community, a threat to the freedom and dignity of this entire social group”.

## Intersectionality

Grounds as a result of which people experience discrimination are seen to reinforce and worsen one another. Race and gender together inhibit black women's advancement to a degree that either factor separately might not. Understanding discrimination as intersectional allows us to link different issues within the arenas of sexuality, race and gender. In the limited contexts in

which statistical data exists, the situation revealed is deeply concerning: in a 2019 report, the Williams Institute documented that while 22% of LGBT persons in the United States live in poverty, the figure is 8.1% for white cis gay men, but 31.3% for black cis lesbian women, 38.5% for black trans persons, and 48.4% for Latino trans persons. In a 2018 report, the organisation ANTRA reported that 82% of the victims of killings of trans persons in Brazil identified as afro-descendants.

## PART 2

# Practices of exclusion

Opposition to the protection of gender, gender identity and expression under IHRL is often framed as resisting the imposition of so-called “gender-ideology,” a concept that is a symbolic vessel used to evoke a global conspiracy and deemed as a coordinated strategy aimed at destroying the political and social order. However, there is no single narrative of “gender ideology”. The concept has a malleable nature, used to push for a variety of restrictive ideas and policies and to oppose different inclusionary human rights approaches.

At its inception, the notion of “gender ideology” was created by religious leaders to halt advances regarding women's empowerment, as the proposals made during the Cairo and Beijing World Conferences (in 1994 and 1995, respectively) were seen as an alleged danger for family models deemed as traditional. At the time, the concept of a “gender agenda” also emerged, to reunite different topics of interest to conservative bases who wanted to offer resistance to sexual and reproductive rights, comprehensive sexuality education, and the rights of LGBT persons.

Today, narratives of “gender ideology” are employed in State and diplomatic spheres, in print and social media, at religious settings and events of conservative secular groups. They aim to challenge the recognition of gender under international law or the protection of the rights of trans and gender-diverse persons. All appear to have common traits, including vigorous social media messaging, simple and catchy slogans, the ability to leverage resources from their followers based on campaigns opposing social rights, and flexibility and adaptability to local contexts.



Anti-trans narratives resonate with conservative platforms and are increasingly used strategically to energize and galvanize political bases. They usually normalize a false monolithic religious-cultural identity, frequently entrenching a climate of fear within public discourse, in order to achieve political, social and/or economic power. This strategy has already proved effective, being employed in successful national election campaigns around the world.

## Financing the anti-gender movement

A recent report concluded that the financial architecture behind a so-called global “anti-gender” movement is comprised of wealthy individuals, non-profit organizations, and religious institutions. Funding is funnelled through private donations, contributions through non-profit charitable foundations, and financial sponsorships of projects and events that coalesce around the defence of a “natural” order, including legal strategies to fight non-discrimination policies that include protection based on SOGI. The aggregate revenue of US-based organizations associated with the anti-gender movement from 2008 to 2017 was US\$6.2 billion; and at least \$1 billion was funnelled into countries across the globe. The report concluded that, globally, funding for the anti-gender movements at least triples the funding destined to projects and events that promote the human rights of LGBTI persons.<sup>1</sup>

<sup>1</sup> “Meet the Moment”, Global Philanthropy Project: <https://globalphilanthropyproject.org/meet-the-moment/>

## The alleged threat to the nation, family, and tradition

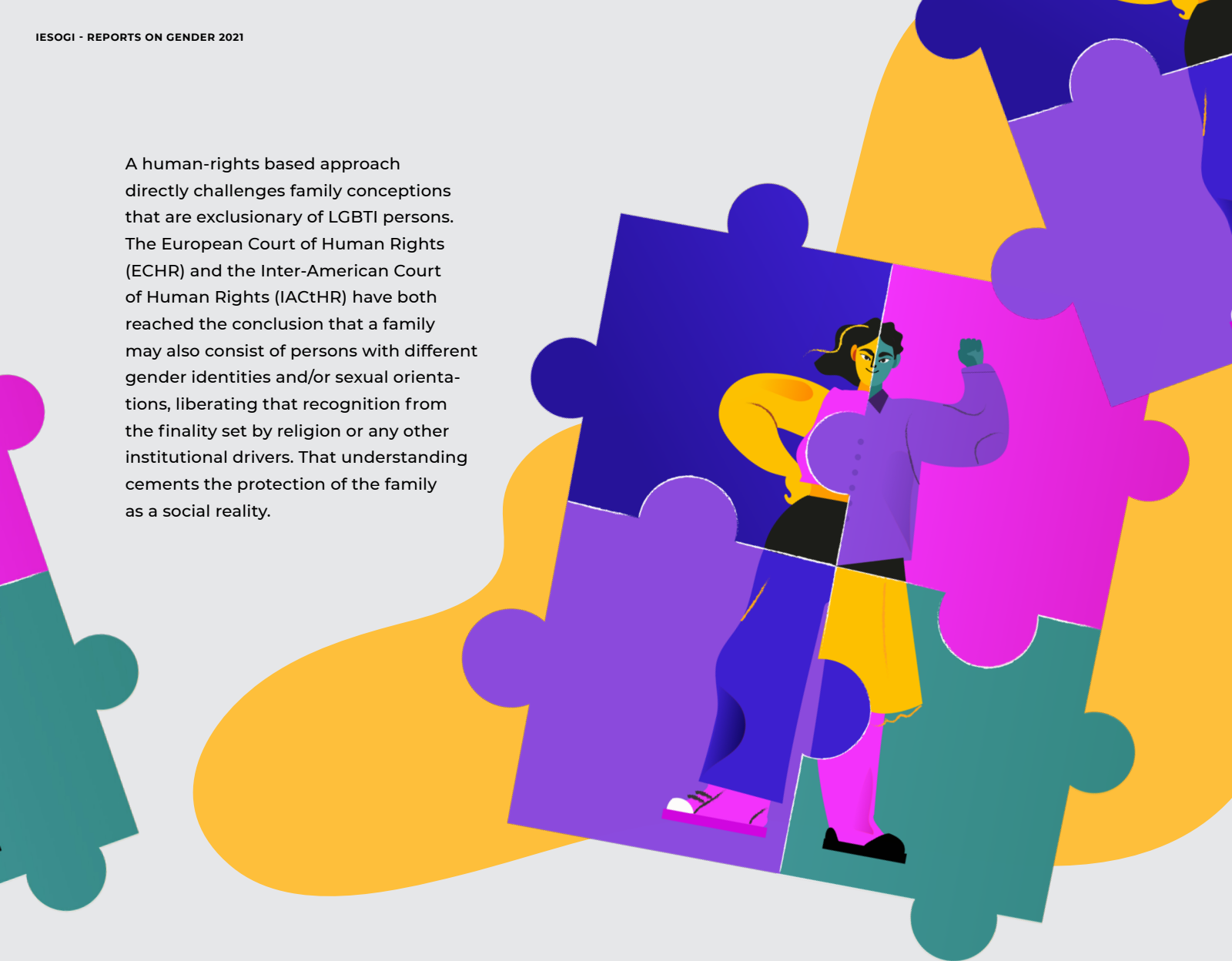
Anti-rights actors make strong parallels between the nation, family and tradition. Within this framing, the patriarchal and heteronormative family is depicted as the only model providing value to a country’s national heritage. “Gender ideology” is conversely framed as an attack on national identities and traditions, reinforcing the idea that diversity in SOGI is somehow harmful to society, and that LGBTI persons are disordered or anti-social. As a result, LGBTI persons become the “other”, the “foreign”, or even a threat to national cohesion, culture, and tradition.

It was noted that such narratives have been successful because they appeal to anxieties about the future and the well-being of families: “the threat to children’s innocence is at the heart of anti-gender discourse, which is based on a ‘policy of fear.’ The proposal in the face of this moral panic is to offer the past as the best future: to return to societies where traditional gender roles placed women in a situation of inferiority. This proposal is based on offering a ‘safe’ alternative focused on the traditional family, the nation and religious values as opposed to individualism that - according to conservative groups - represents gender policies. This strategy has expanded internationally and regionally, so that similarities can be found in speeches, actors and aesthetics in several countries.”<sup>2</sup>

<sup>2</sup> Submission by Coalición LGTBTTTI y de trabajadoras sexuales con trabajo en la OEA.



A human-rights based approach directly challenges family conceptions that are exclusionary of LGBTI persons. The European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACtHR) have both reached the conclusion that a family may also consist of persons with different gender identities and/or sexual orientations, liberating that recognition from the finality set by religion or any other institutional drivers. That understanding cements the protection of the family as a social reality.



## The alleged threat to women

In 2018, when examining States' obligations to uphold the human rights of trans and gender-diverse persons, the mandate concluded that the right to self-determine one's gender is a fundamental part of a person's freedom and a cornerstone of the person's identity. Some submissions to this report argued against legal recognition of trans and gender diverse persons, alleging a risk of erasure of cisgender women's concerns, the integrity of gender-segregated spaces for women and the threat to the development of girls through sport.

The concerns raised overwhelmingly appear to rely on anecdotal evidence, some of which would relate to allegations of abuse, but most of which build on deeply discriminatory stereotypes of trans and gender diverse persons based on ideas of predatory determinism. They also appear to reproduce privileged and/or colonial

bias that disregards gender diversity around the world and to suggest a shift of onus from the State (the duty bearer) to communities and persons that, as evidence shows, are deeply disenfranchised (trans and gender diverse persons, the rights holders).

Nonetheless, the impact of anti-gender narratives in public policy is already taxing trans communities around the world, and the rising number of extraordinary, unjustified and arbitrary legal measures aiming to limit the social integration of trans persons is of great concern. From a rights-based perspective, there is no justification to defend a system of oppression to the detriment of the individual; on the contrary, there is a moral imperative to defend the individual's freedom from violence and discrimination. States have before them an urgent duty to establish legal gender recognition based on self-determination - while they fail to do so, they continue to enable much human rights abuse around the world. **Read more about Legal Gender Recognition [here](#).**



## The alleged threat to children

Some claim that gender-affirming care for children and youth is harmful to their mental health, that it is a result of external indoctrination, that it should always be considered as forced intervention or that “gender dysphoria” resolves itself before adulthood. None of these arguments is supported by scientific evidence.

Firstly, existing data already supports the concept that gender identity is not strictly a binary phenomenon. More fundamentally, presenting diverse gender identities as a form of mental health disorder is a form of pathologisation and inconsistent with the 11th revision of the International Classification of Diseases published by the World Health Organization in 2019. Additionally, recent medical evidence has concluded that “those who received treatment with pubertal suppression, when compared with those who wanted pubertal suppression but did not receive it, had lower odds of lifetime suicidal ideation.”<sup>3</sup>

When States deny children the agency to consent to gender recognition treatments, they heighten the risk

of persecution, abuse, violence, and discrimination. States must always take the best interests of the child as a primary consideration and respect the child’s right to express views in accordance with age and maturity, recognizing their autonomy and decisional power. In support of that view, the Committee on the Rights of the Child emphasizes in General Comment No. 20 “the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy”.

Certain submissions also claimed that comprehensive sexual education constitutes a violation of children’s rights. Many of them repeated a list of its supposed harms, including that it sexualizes children, “normalizes” and “promotes” sexual pleasure and non-procreative sex acts, and undermines parental rights. However, there was no credible evidence to support any of these claims, while the health benefits of comprehensive sexual education are well documented. Gender and sexuality education is also a fundamental tool to protect gender diverse youth from bullying and prevent them from dropping out of school. Limited education and cultural taboos are among the main factors that preclude LGBTI persons from achieving social mobility and increase their vulnerability to violence.



<sup>3</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7073269/>.

## Is gender a threat to sex?

The biological reality of sex characteristics must not be conflated with the social construct of gender. Human beings have sex characteristics, which are biological features; these are indeed a physical reality. While powerful, roles, behaviours, forms of expression, activities and attributes assigned to this biological reality by dominating social forces are constructs. Individuals must be able to ignore, shatter or subvert these constructs as an exercise of freedom.

In that sense, freedom of women from biological determinism (and, therefore, the respect to their bodily autonomy and sexual and reproductive rights), is conceptually

akin to the freedom of trans and gender-diverse persons from policing of their gender identity and expression (and, therefore, the respect to their right of self-determination and legal recognition) and to the freedom of intersex persons from physical interventions without their consent (and, therefore, the respect to their bodily integrity).

The male/female binary has been an ordering principle for socio-economic, cultural, civil and political life within States for a long time. Although it lies at the base of most injustice, it has also shaped the development of IHRL and helped frame important achievements related to gender equality. It created the language through which women can enjoy inalienable rights. As such, sex and gender will remain indispensable points of entry for discrimination analysis. The understanding of gender as a suprabiological phenomenon with social implications will not curtail any of these invaluable achievements; it rather aims at expanding that scope of protection to encompass all those who are negatively affected by the patriarchal order.

The work to address, and ultimately eradicate, violence and discrimination based on sexual orientation and gender identity is not in opposition to the human rights of women; to the contrary, these areas of concern largely overlap and conceptually, socioeconomically, politically and legally reinforce each other.




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The reports **“The Law of inclusion”** and **“Practices of exclusion”** were the result of a deliberate design that aims at describing two paths that the international community has before it at this time. The first describes an inclusionary approach that results from the best features of IHRL as a tool that is constantly optimizing its capacity to redress injustice and inequality invisible to previous generations or deliberately made invisible by their actions. The second leads to the defense of the very orders in which most of the injustice that exists in the world today has been built. Practices of exclusion tend to exploit preconceptions, stigma and prejudice to create an atmosphere of panic and moral concern, perpetuating violence and discrimination - mostly against women and LGBTI persons.

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