

## AN OVERVIEW OF SEXUAL ORIENTATION AND GENDER IDENTITY: BALANCING THE CONTENDING RIGHTS\*

### Abstract:

All humans are born free and equal in both dignity and rights and same is recognized and protected under the regime of international law. Thus, any discrimination based on sexual orientation and gender identity is harshly prohibitive and should be generally frowned at. This article is an overview of sexual orientation and gender identity with a view to balancing the contending rights. The work further examines these issues and proffers solutions where necessary. However, discrimination on the basis of sexual orientation and gender identity has been on the increase despite the international legal framework prohibiting same. It is recommended that specific international legal framework prohibiting discrimination on the basis of sexual orientation be formulated and implementation mechanisms entrenched to guarantee the implementation. Recently at the 63<sup>rd</sup> session of the Human Rights Council, the issue of discrimination on the basis of sexual orientation and gender identity were properly discussed and deliberated upon. This research work offers an in-depth overview of the different types of sexual orientations and gender identity and the anti-discriminatory mechanisms.

**Keywords:** Sexual Orientation, Gender Identity, Human Rights, Implementation and SOGIE.

### 1. Introduction

Human Rights law generally frowns at and prohibits discrimination on the basis of sexual orientation and gender identity. Thus, such discrimination is prohibited in all the areas covered by human right laws which include but not limited to employment, housing, places of public accommodation and non-religious institutions.

It is an irreducible minimum that all persons, regardless of sexual orientation or gender identity, have access to all of the human rights outlined in the Universal Declaration of Human Rights (UDHR), which is replicated in the twin international covenants, to wit: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Every person has a sexual orientation<sup>1</sup> as well as a gender identity.<sup>2</sup> When someone's sexual orientation or gender identity differs from the norm, they are frequently considered as a justifiable target for abuse or discrimination. Millions of people worldwide suffer from execution, imprisonment, torture, violence, and discrimination due to their sexual orientation or

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<sup>1</sup> A person's sexual orientation is defined as their attraction to those who are either of the same gender as them (homosexual orientation), of a different gender (heterosexual orientation), or of both genders (bisexual orientation).

<sup>2</sup> Gender identity is an individual's experience of self-expression in relation to social constructs of masculinity or femininity (gender). A person might have a male or female gender identification while possessing the physiological traits of the opposing sex.

gender identity, and many states view this as a threat to the fundamental idea of the universality of human rights. In some parts of the world, there are laws criminalizing the activities of lesbians, gays, bisexual and transgender people (LGBT). The international community, the United Nations and the Amnesty International, amongst others, considers it a grave violation of human rights, including the right to privacy, the right to be free from discrimination, the right to freedom of expression, and the right to freedom of association, all of which are guaranteed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.

However, in many other jurisdictions, sexual orientation and gender identity (SOGI) laws have changed dramatically. Many countries have repealed laws that criminalized same-sex intimacy and the expressing different gender identities. Furthermore, an increasing number of governments are revising their laws to protect lesbian, gay, bisexual, and transgender (LGBT) people from discrimination. SOGI discrimination has been declared illegal by legal regimes at all levels—international, regional, national, and sub national - in circumstances ranging from employment and housing to marriage and parenting.<sup>3</sup>

The internationalization of SOGI rights is reflected in developments at the United Nations. The United Nations Office of the High Commissioner for Human Rights has prioritized combating SOGI discrimination, as seen by its "Free and Equal" campaign to promote SOGI rights.<sup>4</sup> Similarly, in 2016, the United Nations Human Rights Council adopted a landmark resolution that named the organization's first-ever Independent Expert on the prevention of violence and discrimination based on sexual orientation and gender identity.<sup>5</sup>

In the past, lesbians, gay men, and bisexual people did not demand any particular privileges. However, the fundamental civic, political, social, and economic rights were denied them either by the law or by custom. This led to lesbians, gays, and bisexuals to demand the right to be treated equally before the law after experiencing numerous infractions in many countries, including certain unique criminal provisions or practices based on their sexual orientation.

The right to be free from violence and harassment was typically denied by removing sexual orientation from laws, constitutional provisions, or their implementation. The right to be free from torture, cruel, inhuman or degrading treatment is violated by police tactics

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<sup>3</sup>D. McGoldrick, "The Development and Status of Sexual Orientation Discrimination under International Human Rights Law," 16 Human Rights Law Review 613 (2016).

<sup>4</sup>United Nations Human Rights Office, About UN Free & Equal, available at <[www.unfe.org/about](http://www.unfe.org/about)>, accessed on 22<sup>nd</sup> September, 2023.

<sup>5</sup> United Nations Human Rights Council, Resolution Adopted by the Human Rights Council on 30 June 2016, UN Doc.A/HRC/RES/32/2.

during investigations, or in the case of lesbians, gays, and bisexuals in prison. Even the right to life has been violated in some places where the death sentence was imposed for sodomy. The biases of judges and other law enforcement authorities frequently affected the right to a fair trial, and arbitrary arrests occurred in a number of nations with individuals accused of having a homo/bisexual identification. The right to privacy was also violated under sodomy laws, which applied to lesbians, gays, and bisexuals, even if they consented to intercourse in private.

There were several homophobic conditions in which LGBT people used to live in, hence they were denied their rights to free expression and association. Lesbians, gays, and bisexuals were even denied the freedom to practice their religion, particularly in the circumstances of religions that used to preach against these people. Lesbians, gays, and bisexuals have even been fired from jobs because of their sexual orientation, resulting in a violation of their economic rights. Many others were discriminated against in employment policies and procedures. Some governments even refused to grant them the right to a family. Additionally, adoption was not permitted for LGBT people.

In international human rights law, states are responsible for ensuring that all members of the LGBTI community have access to their rights without discrimination. It is argued that sexual orientation and gender identity of an individual are comparable to that person's race, caste, sex, religion, color, etc. Since everyone has the right to human dignity and equality, regardless of sexual orientation, everyone is entitled to these rights.

Despite these advancements, legal protections are still dispersed globally. LGBT people are still persecuted and lack legal protection in many nations.<sup>6</sup> Countries that do safeguard against SOGI discrimination do so to varied degrees and rely on a variety of legal grounds. Indeed, several conceptual debates have arisen during the course of legal development. This article examines how various legal institutions and commentators around the world have contributed to these issues. This paper, by distilling these discussions, provides as an overview for scholars interested in learning about comparative approaches to SOGI discrimination law.

## **2. Conceptual Clarification of Related Concepts**

**Sexual Orientations:** A person's sexual identity in respect to the gender to which they are attracted is referred to as their sexual orientation.<sup>7</sup> To that end, a person's sexual identity can be heterosexual if they are sexually attracted to the opposing sex, homosexual if they are sexually attracted to the same sex, or bisexual if they are sexually attracted to either

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<sup>6</sup> See, e.g., Vitit Muntarbhorn (as United Nations Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity), "Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity," UN Doc. A/72/172 (17 July 2017).

<sup>7</sup> Elizabethtown College, Sexuality, Gender, and Identity Definitions <https://www.etown.edu/campus-life/lgbtq/sexuality-gender-identity-definitions.aspx> accessed 26 September, 2023.

male or female. One's capability for intense emotional, affectionate, and sexual attraction to, and intimate sexual interactions with, people of a different gender, the same gender, or more than one gender is known as their sexual orientation. The word is similar to homosexual couples. Gay, lesbian, bisexual, pan-sexual, asexual, transgender, and androgynous people may be included in this. On the other part, 'same-sex marriage' refers to the institutionalized acknowledgment of such couples.<sup>8</sup>

**Gender Identity:** The term "gender identity" is employed to refer to each person's deeply felt personal and unique experience of gender, which may or may not correspond with the sex assigned at birth. Gender identity also refers to other expressions of gender, such as dress, speech, and mannerisms, as well as one's own sense of the body (which may involve, if freely chosen, altering one's bodily appearance or function). It generally refers to a person's unique identification of their gender, which may or may not match the sex that was assigned to them at birth. It is the perception of oneself as a "man or woman," neither of these, both, or another gender. Everyone, including those who have no gender identity, has one. For transgender persons, their gender identification and the sex they were assigned at birth (male or female) are not always the same.<sup>9</sup>

**SOGIE:** This refers to Sexual Orientation, Gender Identity, and Expression and include all individuals, not just those who identify as "LGBT" (lesbian, gay, bisexual, and transgender). It is now being included into numerous legal doctrines, in documents produced by the United Nations, and it is rising in popularity on social media. Its inclusion is what makes it useful. Individuals who identify as lesbian, gay, bisexual, or transgender are referred to as "LGBT" in particular. Since everyone has a sexual orientation and a gender identity, SOGIE describes traits that apply to all people, and not just people who identify as lesbian, gay, bisexual, or transgender that express their gender.

**LGBQ/GNCT** refers to Lesbian, Gay, Bisexual, Queer or Questioning/Gender Non-Conforming and Transgender. (Though this acronym acknowledges that sexual orientation is separate from gender identity and expression, it still limits the many variations of sexual orientations that exist.)<sup>10</sup>

**LGBTQI** refers to Lesbian, Gay, Bisexual, Transgender, Queer or Questioning and Intersex. (This acronym, and other variations, conflates sexual orientation and gender

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<sup>8</sup>United Nations General Assembly, '*Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights*' accessed 26 September, 2023.

<sup>9</sup>Elizabethtown College, *op.cit* (Fn. 8).

<sup>10</sup> United Nations General Assembly, '*Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights*' accessed 26 September, 2023.

identity and expression and is being utilized here as a bridge to the above more accurate description LGBQ/GNCT.)<sup>11</sup>

Transgender: It refers to those who have gone through the process of transitioning (socially and/or medically) from living as one gender to living as another. The adjective transgender should nearly always be used. Many individuals find it offensive when used as a noun (e.g., 'she's a transgender'), or when used as a past-tense verb 'transgendered'.<sup>12</sup>

### 3. The Contending Rights at a Glance

#### 3.1 Right to Health

On May 17, 1990, the World Health Organization (WHO) in its General Assembly eliminated homosexuality from its list of illnesses. There was never a scientific cause for it to be classified as a mental disease. Outdated medical classifications that pathologize LGBTI people, particularly transgender and intersex adults, adolescents, and children, should be reformed, and states should take steps to ensure LGBTI people have access to health services, including gender-affirming health care for transgender people, that are based on informed consent and free of stigma, pathologization, and discrimination.<sup>13</sup> Accordingly, healthcare facilities, goods, and services must be available to all, particularly the most disadvantaged or marginalized segments of the society. The Covenant on Economic, Social and Cultural Rights proscribes any discrimination in access to health care and underlying determinants of health, as well as the means and entitlements for their procurement, on the grounds of sexual orientation.<sup>14</sup>

The ILO's HIV and AIDS Recommendation, 2010 (No. 200) is the first internationally sanctioned legal instrument aimed at strengthening the world of work's contribution to universal access to HIV prevention, treatment, care, and support. It includes provisions on potentially life-saving prevention programs as well as anti-discrimination measures at the national and workplace levels. The response to HIV and AIDS should be acknowledged as having a positive impact on the realization of gender equality, fundamental freedoms, and human rights for all, including workers, their families, and dependents.<sup>15</sup>

#### 3.2 Right to Education

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<sup>11</sup>*ibid.* (Fn. 11).

<sup>12</sup>*ibid.* (Fn. 12).

<sup>13</sup>Joint statements of international and regional human rights experts: "Pathologization – Being lesbian, gay, bisexual and/or trans is not an illness", 17 May 2016; "End violence and harmful medical practices on intersex children and adults", 24 October 2016.

<sup>14</sup>Committee on Economic, Social and Cultural Rights, General comment No. 14 (E/C.12/2000/4), 2000, art. 12.

<sup>15</sup> Committee on Economic, Social and Cultural Rights,(Principle general 3(a)).

States are obligated to ‘take effective action to protect all lesbian, gay, bisexual, transgender and intersex adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures.’<sup>16</sup>To guarantee that young people can live healthy lives, make wise decisions, and safeguard others and themselves from sexually transmitted diseases, the right to education includes the right to complete, accurate, and age-appropriate sexuality education.<sup>17</sup>States should not use child protection considerations to restrict access to or give adversely biased information on LGBTI matters.<sup>18</sup>

### **3.3 Right against Torture, Inhuman and Degrading Treatment**

In a general comment, the Committee against Torture recognized the special risk of torture posed by people of various sexual orientations and gender identities. The Committee recommended that, in order to ensure minority group protection, States Parties ensure that acts of violence and abuse against members of minority groups are thoroughly prosecuted and punished. When sexual abuse is committed by, at the behest of, or with the consent or complicity of public officials, it may be considered torture.<sup>19</sup>

The Committee against Torture, and the Group on Arbitrary Detention have all condemned the practice of subjecting transgender men and transgender women arrested on homosexuality-related charges to anal examinations in order to obtain physical evidence for prosecution. It has also been called ‘medically worthless’ by the World Health Organisation (WHO). According to the Special Rapporteur on Torture, such invasive forensic examination is intrusive and demeaning, with the potential to amount to torture or ill-treatment.<sup>20</sup>

The placement of LGBTI people ‘in solitary confinement or administrative segregation for ‘protection’ can constitute an infringement of the prohibition of torture and ill-treatment.’ Authorities have a responsibility to take reasonable measures to prevent and combat violence against LGBTI detainees by other detainees, without subjecting them to solitary confinement or other restrictions.<sup>21</sup>To avoid abuse of LGBTI individuals, the Committee Against Torture has proposed training and awareness-raising programs for police officers, border guards, and prison employees.<sup>22</sup>

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<sup>16</sup>Special Rapporteur on the Right to Education (E/CN.4/2006/45), 2006.

<sup>17</sup>Committee on the Elimination of Discrimination against Women, General comment No.36 (CEDAW/C/GC/36), 2017.

<sup>18</sup>Report of the Special Rapporteur on the Right to Freedom of Opinion and Expression (A/69/335), 2014.

<sup>19</sup>Reports of the Special Rapporteur on Torture (A/HRC/7/3), 2008, and (A/HRC/31/57), 2016.

<sup>20</sup>Reports of the Special Rapporteur on torture (A/56/156), 2001; on communications (A/HRC/31/57/Add.1), 2016; (A/HRC/10/44/Add.4), 2009 ; (A/HRC/4/33/Add.1), 2007; (A/HRC/16/52/Add.1), 2011.

<sup>21</sup>Report of the Special Rapporteur on torture (A/HRC/31/57), 2016.

<sup>22</sup>Committee against Torture, Concluding observations on Costa Rica (CAT/C/CRI/CO/2), 2008.

All transgender detainees should be treated on the basis of their self-identified gender, including in the context of placement, dress and appearance, access to health services, search and other procedures, and decisions on allocation should be made on a case-by-case basis and in consultation with the detainee.<sup>23</sup>

### **3.4 Right against Discrimination.**

When states enact discriminatory policies that put women and LGBTI people in dangerous situations, they are contributing to violence against them.<sup>24</sup>

The following viewpoints on discrimination have been frequently adopted by UN treaty bodies and special procedures:

(i) International law prohibits the use of sexual orientation, gender identity, and sex characteristics as grounds for discrimination.

(ii) All treaty lists of banned grounds of discrimination include ‘sex,’ which the Human Rights Committee has defined to include sexual orientation, as well as ‘other status,’ which treaty bodies have construed to encompass sexual orientation and gender identity.

(iii) The right to be free from discrimination relates to the enjoyment of all civil, political, economic, social, and cultural rights, including the right to employment, to education, and to the best physical and mental health possible, including sexual and reproductive health.

Anti-discrimination legislation should include intersecting forms of discrimination, such as sex, gender, race, ethnicity, religion or belief, health, status, age, class, caste, sexual orientation, and gender identity, and policies and programs should be put in place to eliminate such occurrences.<sup>25</sup> States have a positive obligation to offer legal recognition to spouses and their children, regardless of sexual orientation, gender identity, or sex features. Civil unions and civil partnerships, as well as marriage, are all kinds of legal recognition.<sup>26</sup>

### **3.5 Right against Criminalization and Privacy**

In international law, states have an obligation to repeal laws that criminalize private, consensual sexual relationships between people of the same sex, laws that criminalize transgender people based on their gender identity or expression, and other laws that criminalize, prosecute, harass, and otherwise discriminate against people based on their actual or perceived sexual orientation and gender identity. The prohibition of consensual sexual or affective contacts between people of the same gender or sex violates a state's international law duties, particularly the obligations to protect equality, non-

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<sup>23</sup>General Assembly resolution 70/175 on the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 17 December 2015, Rule 7(a).

<sup>24</sup>Report of the Special Rapporteur on torture (A/HRC/31/57), 2016, para. 10.

<sup>25</sup>Committee on the Elimination of Discrimination against Women, General comment No. 28 (CEDAW/C/GC/28), 2010, para. 18.

<sup>26</sup>Report of the United Nations High Commissioner for Human Rights on discrimination and violence based on sexual orientation and gender identity (A/HRC/29/23), 2015

discrimination, and privacy. An individual's rights are violated even if the law in question is never enforced.<sup>27</sup> Arrest or detention on the basis of discriminating characteristics, such as sexual orientation or gender identity, is often arbitrary and forbidden by international law, even when based on national legislation.<sup>28</sup>

Discrimination based on sexual orientation occurs when same-sex and different-sex relationships require different ages for sexual consent.<sup>29</sup> As it contravenes the International Covenant on Civil and Political Rights (art. 6) and the Universal Declaration of Human Rights (art. 3), states should make sure that the death penalty is not used as a deterrent against consenting same-sex sexual encounters.<sup>30</sup> "The 'mere possibility' that [the death penalty] may be imposed threatens the accused for years and constitutes a form of cruel, inhuman, or degrading treatment or punishment." Its legal standing excuses vigilante groups' persecution and encourages abuse.<sup>31</sup>

#### 4. SOGI Discrimination as Human Rights Discrimination

##### 4.1 The United Nations Position

It is obvious that people cannot always rely on national governments and domestic legal and policy institutions to guarantee, enforce, and fulfill their fundamental human rights in a world where same-sex intimacy is prohibited in many nations and punishable by death in ten of them. In some nations, including Iran, Mauritania, Pakistan, Saudi Arabia, Sudan, the United Arab Emirates, Yemen, and certain regions of Africa, Somalia, and Chechnya, homosexuality and/or same-sex behavior are strictly criminalized and subject to jail term.<sup>32</sup> Due to inconsistent or nonexistent domestic laws against these types of human rights violations, the UN and other international forums are seeing an increase in the number of rights-based debates pertaining to sexual practices, identities, and relationships.<sup>33</sup>

The United Nations upholds and implements the express procedures of the international law and human rights framework. It is the main instrument for advancing worldwide

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<sup>27</sup>United Nations human rights experts have had this consistent position since the 1994 Human Rights Committee decision *Toonen v. Australia*.

<sup>28</sup>Human Rights Committee, general comment No. 35 (CCPR/C/GC/35), 2014.

<sup>29</sup>Concluding observations of the Committee on the Rights of the Child: on Chile (CRC/C/CHL/CO/3), 2007; Isle of Man, United Kingdom (CRC/C/15/Add.134), 2000; Austria (CCPR/C/79/Add.103), 1998

<sup>30</sup>Human Rights Council Resolution A/HRC/RES/36/17, 2017. Other treaty bodies and special procedures have reaffirmed this.

<sup>31</sup>Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/8/3/Add.3), 2008, para. 76.

<sup>32</sup>T. Padgett, 'The Most Homophobic Place on Earth?' *Times* (12 April 2006), available at <<http://www.time.com/time/world/article/0,8599,1182991,00.html>>, *Time* (Jamaica); E. Biryabarema, 'Uganda's Anti-gay Bill Returns to Parliament' Reuters (8 February 2012), online: Reuters (Uganda). Accessed 28<sup>th</sup> September, 2023.

<sup>33</sup> D. Richardson, *Rethinking Sexuality* (London: Sage Publications, 2000) at 114.



recognition and equal rights for LGBTI people in their lived conditions all around the world. Nonetheless, the UN is struggling to forward the required measures to strengthen and safeguard the rights enshrined in the applicable documents. A group of obstinate Member States has succeeded in refusing the adoption of a binding declaration or equivalent document to boost LGBTI human rights. Nevertheless, through the UN, some Member States have continuously and more frequently declared their official commitment to and support for LGBTI human rights through a variety of channels, including resolutions and recommendations. The Human Rights Committee, the forerunner of the UN Human Rights Council, determined in 1994 that Australia was in violation of international law as a UN member since its laws penalize consenting same-sex activity in private, whether or not those laws are ever enforced. In particular, the Committee determined that adult consensual sexual activity taking place in private is covered by the concept of "privacy" under the ICCPR and its Optional Protocol, and that arbitrary interference with that right is prohibited.<sup>34</sup>

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States are mandated to protect LGBTI individuals from discrimination and to take certain steps in response if discrimination occurs. To protect LGBTI individuals from violence and discrimination, no new human rights laws or regulations are required. States are bound by law to protect the human rights of LGBTI individuals. This is a well-established principle in international human rights law. It is based on the Universal Declaration of Human Rights and other international conventions on human rights.

#### **4.2 The European Union Position**

The EU treaties (such as the Treaty on the Functioning of the European Union, and the Treaty on the European Union), ban discrimination based on sexual orientation and uphold the concept of equality.<sup>36</sup>Discrimination on the basis of race, color, national

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<sup>34</sup> CCPR/C/50/D/488/1992.

<sup>35</sup> A/HRC/RES/17/19, 17 June 2011.

<sup>36</sup> Treaty on the Functioning of the European Union, article 10, and the Treaty on the European Union, articles 2 and 3.

origin, gender, age, or sexual orientation is expressly prohibited under the European Union's Charter of Fundamental Rights, which now has the same legal weight as the treaties.<sup>37</sup>The Framework on Employment Directive of EU law protects EU nationals against same-sex discrimination. This Directive, however, solely forbids discrimination in employment and occupation based on sexual orientation.<sup>38</sup> Other areas are governed by national law, which varies widely from nation to nation.

The European Commission announced its first LGBTI policy for 2020–2025 in 2020.<sup>39</sup>

Other key players in the EU for LGBTI rights include:

(i) the European Union Fundamental Rights Agency (FRA), which monitors the situation of LGBTI people in the EU, and has collected data on LGBTI people through its EU-wide survey<sup>40</sup>

(ii) the European Parliament, elected directly by EU citizens, which regularly adopts reports, recommendations and resolutions on the situation of LGBTI people in the EU and worldwide.<sup>41</sup>

### **4.3 The Organization of American States Position**

The Organization of American States (OAS) and the Inter-American Commission on Human Rights (IACHR) have taken action to deal with trends in violence and other human rights violations affecting LGBTI people throughout the Americas.<sup>42</sup>

The OAS General Assembly passed nine resolutions on human rights, sexual orientation, gender identity, and sex traits between 2008 and 2021. These resolutions acknowledge and denounce violence and acts of prejudice against LGBTI people. They also urge States, the IACHR, and other organizations to take appropriate action to solve the issue. The IACHR established a Unit on the Rights of LGBTI Persons, whose rapporteurs are tasked with advising the IACHR on petitions and cases involving sexual orientation, gender identity, and gender expression, offering technical assistance to member States, writing reports on the rights of LGBTI people, and keeping track of human rights violations against LGBTI people in the Americas.<sup>43</sup>

The Inter-American Convention against All Forms of Discrimination and Intolerance was adopted by the OAS on June 5, 2013. The Convention requires States to eradicate,

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<sup>37</sup>European Union's Charter of Fundamental Rights (art. 21(1)).

<sup>38</sup>The Framework on Employment Directive of EU, article 1.

<sup>39</sup>European Parliament, Resolution of 14 February 2019 on the future of the LGBTI List of Actions (2019-2024).

<sup>40</sup>See for example, LGBTI Intergroup in the European Parliament, 'What has the European Parliament done for LGBTI rights in 2014-2019?', LGBTI Intergroup briefings Accessed 28<sup>th</sup> September, 2023

<sup>41</sup>*ibid.*

<sup>42</sup>The IACHR is an autonomous organ of the OAS

<sup>43</sup>IACHR, IACHR Creates Unit on the Rights of Lesbian, Gay, Bisexual, Trans, and Intersex Persons, Press release 115/11, 3 November 2011. Accessed 29<sup>th</sup> September, 2023.

outlaw, forbid, and punish all forms of discrimination and intolerance. The Convention specifically lists sexual orientation and gender identity and expression as one of the rights in the protected categories. This was followed by ratification of the said convention by two (of the 12 signatory States), the Convention became operational.

In 2017, the Inter-American Court of Human Rights was asked to rule on two issues concerning the acknowledgment of the right to gender identity: (i) the mechanism for processing requests for name changes based on gender identity, and (ii) the patrimonial rights of same-sex spouses. The court held as follows:<sup>44</sup>

(i) Concerning the right to gender identity: "States must respect and ensure to everyone the possibility of registering and/or changing, rectifying or amending their name and the other essential components of their identity such as the image, or the reference to sex or gender, without interference by the public authorities or by third parties;"

(ii) Concerning the patrimonial rights of same-sex marriages: "All the patrimonial rights derived from a protected family relationship between a same-sex couple must be protected, with no discrimination as regards to heterosexual couples, pursuant to the right to equality and non-discrimination."<sup>45</sup>

The IACHR has identified the primary challenges to the recognition of LGBTI people's human rights, examined them in light of the Inter-American human rights instruments, and made recommendations to OAS member states to ensure comprehensive protection for LGBTI people. This report was published in 2018.<sup>46</sup>

In reaction to the Covid-19 pandemic, the IACHR published special recommendations to OAS member states in 2020, encouraging them to protect the rights of LGBTI people, as well as other vulnerable populations, to wit:<sup>47</sup>

(i) Ensure that those who identify as LGBTI, particularly transgender people, who are trapped in a cycle of homelessness, isolation, and poverty, be taken into account when creating social assistance measures during the pandemic;

(ii) Adopting or strengthening health care policies and complaint procedures for LGBTI people, including kids and teenagers, that take into account prejudice, discrimination, and violence in their homes in the context of social distancing or quarantine;

(iii) Adopt or enhance policies to ensure that gender identity is recognized in hospitals, and ensure that medical treatments continue to be offered to transgender people;

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<sup>44</sup>IACHR, Advisory Opinion 24/2017 on gender identity, and equality and non-discrimination of same-sex couples, 2017.

<sup>45</sup>The Inter-American Convention against All Forms of Discrimination and Intolerance was adopted by the OAS on June 5, 2013, articles 1(1) and 24.

<sup>46</sup>IACHR, Advances and Challenges Towards the Recognition of the Rights of LGBTI Persons in the Americas, 2018.

<sup>47</sup>IACHR, The IACHR calls on States to guarantee the rights of LGBTI people in the response to the COVID-19 pandemic, Press release, 20 April 2020.

(iv) Carry out campaigns to ensure the prevention and to combat homophobia, transphobia, and sexual orientation discrimination, with a focus on government health care and security officials who are in charge of health care and pandemic containment.

#### **4.4 The African Union Position**

The African Commission on Human and Peoples' Rights issued Resolution 275 in May 2014 on Protection against Violence and Other Human Rights Violations Against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity. The Resolution condemns the growing prevalence of violence and other human rights breaches, such as murder, rape, assault, arbitrary incarceration, and other forms of persecution of people based on their actual or perceived sexual orientation or gender identity. It calls on states to ensure that human rights defenders operate in an enabling environment free of stigma, reprisals, or criminal prosecution as a result of their work to promote human rights, including the rights of sexual minorities.

Following Resolution 275, the African Commission on Human and Peoples' Rights has addressed issues like sexual orientation and gender identity, which some may regard as 'controversial,' but which lie fully within the purview of human rights. Human rights organizations have devoted many years and significant resources to advocating at the Commission on behalf of LGBTI individuals living in some of the region's most challenging countries. A significant, if mostly unnoticed, result of these efforts was the Commission's mainstreaming of sexual orientation and gender identity in its work. It is particularly noteworthy that the Commission has addressed this issue, notably in its final observations and recommendations to African Charter member countries. It has clearly covered sexual orientation and gender identity in its soft law instruments, i.e. general remarks, resolutions, and guidelines, which are based on Resolution 275. A great instance is the Commission's 2017 general comment on torture, which states that anyone, regardless of gender, may suffer from sexual and gender-based violence (SGBV), which is equivalent to torture or cruel treatment. Lesbian, homosexual, bisexual, transgender, and intersex people are of equal concern in this regard, it is said. Even though these documents lack legal standing and are not enforceable, they are powerful in a lot of Africa in bringing up significant concerns and assisting nations in setting their own agendas for LGBTI human rights legislation.

## **5. Balancing the Contending Rights**

### **5.1 Gender-inclusive Peace and Security**

LGBTI persons endure hatred, discrimination, and even violence from state actors around the world whose job it is to uphold security, justice, and the rule of law.<sup>48</sup> Abuse by security and law enforcement personnel is frequently ignored. Global understanding of gender and security has changed as a result of the political and policy agenda known as Women, Peace and Security (WPS), which is supported by a number of UN Security Council Resolutions. It not only draws attention to the disparate and distinctive effects of conflict on women and girls, but also to the importance of involving them fully and equally in security and peace processes in order to achieve a lasting and widely recognized peace. Several years after the historic Resolution 1325, there is growing realization that not just sex but also sexual orientation and gender identity add levels of vulnerability for those living in any peacemaking and development context.

Exploitation and humiliation of LGBTI individuals is frequent in conflict and crisis settings, and it occurs at the hands of both conflict actors and civilians. It is fostered by a culture of impunity around such violence, which is aggravated by the fact that LGBTI individuals frequently lack family or community ties as well as economic security.

The UN Security Council has been hesitant to address this issue since it represents a human rights standpoint. Despite this, there has been a discernible, albeit sluggish, movement in recent years at both the international and national levels. In his 2019 World Peace Status Report, UN Secretary-General Ban Ki-moon urged UN peacekeeping missions to ‘continue to improve their monitoring and reporting of threats and violence against activists... with data dis-aggregated by, among other things, sexual orientation and gender identity.’ Several nations have now included LGBTI security needs in their WPS national action plans. LGBTI groups have joined the NGO Working Group on WPS, while more inclusive alliances of women's and LGBTI CSOs have formed a louder voice demanding for agency and protection for those who face discrimination because of their SOGIESC.

## 5.2 Family and Protection of Children

LGBTI children, their families and children in diverse families suffer from a number of issues and violations of their human rights.<sup>49</sup> For example:

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<sup>48</sup>For example, in Poland, a study showed more than 57 percent of LGBTI people distrust the policy, and only 4 percent of those who experienced homophobic violence reported it. Campaign Against Homophobia, Situation of LGBTI Persons in Poland, 2015-16 report.

<sup>49</sup>UNICEF, Eliminating Discrimination against Children and Parents Based on Sexual Orientation and/or Gender identity, Current Issues, No. 9, November 2014

- (i) Prevalence of school bullying results in underperformance, dropping out, mental health difficulties and high suicide rates;
- (ii) Violence in the family puts LGBTI youth at risk of homelessness;
- (iii) Banning information, and misrepresentation of LGBTI people through stigmatizing and pathologizing imagery, place LGBTI children at risk of abuse and violence and prevent them from developing a positive view about themselves;
- (iv) So-called “conversion therapies”, aimed at changing LGBTI children or those suspected to be LGBTI have devastating effects on their physical and mental well-being, throughout their childhood and adulthood;
- (v) Lack of safe, inclusive and appropriate health care for LGBTI children and children in diverse families is a barrier to attaining the highest attainable standard of health.<sup>50</sup>

The Convention on the Rights of the Child (CRC) protects the human rights of all children and sets up principles for their safeguarding. The international community now recognizes the universality of the CRC, as stated by UNICEF in 2014:

All children, irrespective of their actual or perceived sexual orientation or gender identity, have the right to a safe and healthy childhood that is free from discrimination. The same principle applies to all children irrespective of their parents’ sexual orientation or gender identity.

The protection of the ‘natural family’ is rhetoric increasingly used by conservative religious forces to advocate against LGBTI human rights and for discriminatory laws. As an MP, you can play a key role in “reclaiming” family values by reminding your parliamentary colleagues and the public of the value of family diversity and the duty of parliament to protect diverse family structures, including same-sex families.

### **5.3 Protection against Discrimination**

The principle of non-discrimination and equal treatment before the law is enshrined in the Universal Declaration of Human Rights, the International Bill of Human Rights, and most national legal systems and constitutions.<sup>51</sup> The adoption or the revision of anti-discrimination law presents a unique opportunity to mainstream the rights of LGBTI people and strengthen protection of their human rights, by bringing SOGIESC as a protected ground alongside others such as race, ethnicity, disability, etc., as demonstrated in South Africa and the Netherlands.<sup>52</sup> It is possible to adopt anti-discrimination law even while criminalization of same-sex activity persists. A recent example is the Barbados Employment (Prevention of Discrimination) Act 2020,<sup>53</sup> which prohibits discrimination

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<sup>50</sup>Convention on the Rights of the Child, article 24.

<sup>51</sup>International Bill of Human Rights, section 2.

<sup>52</sup>*ibid.*, section 6.

<sup>53</sup>[https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=110880](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=110880)

based on sexual orientation, even though the country still criminalizes same-sex activity through its Sexual Offences Act.<sup>54</sup>

## **6. Gender Mainstreaming and Inclusive Representation**

Gender mainstreaming was at the heart of the 1995 Beijing Platform for Action adopted at the Fourth World Conference on Women. It is an indispensable strategy in working towards gender equality. The UN Economic and Social Council defined ‘gender mainstreaming’ in 1997 as:

the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.

This operational definition of gender mainstreaming for the UN has tended to focus on one category of individuals: women, and within a binary construct ‘women and men.’ It has not generally included people who identify beyond the gender/sex binary or belong to other groups that are discriminated against on the basis of race, ethnicity, disability, sexual orientation, class, faith, etc. There are encouraging signs of change to this position. One example is Women, Peace and Security (WPS), a political and policy agenda underpinned by a series of UN Security Council Resolutions, which marks a shift in global understanding of gender and security, supported by the Secretary-General’s call for data on peacekeeping and security to be disaggregated by sexual orientation and gender identity. Gender mainstreaming remains a powerful tool by which to mainstream the needs of LGBTI people in legislation and policies. In parliaments, gender mainstreaming applies equally to (i) the outputs of parliamentary work (legislation, oversight) and (ii) changing the parliamentary culture and ways of working. Gender mainstreaming helps a parliament become an SDG 16 institution – inclusive in representing all people, effective in advancing the SDGs and accountable to all. MPs should ensure that all gender mainstreaming principles and processes, whether existing or proposed, are inclusive of women regardless of their SOGIESC.

## **7. Conclusion and Recommendation**

International law obligates countries to uphold what they have signed up to. Under the UN’s international rights framework, that means the protection and full enjoyment of human rights for all. Regional instruments are also significant, and potentially more politically persuasive vehicles for protecting LGBTI rights. For a government not to

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<sup>54</sup>Sexual Offences Act, Ch. 154, section 9.

uphold the provisions of these instruments, particularly under any pretext that purports to be of greater or higher authority in a local context, is disingenuous, politically self-serving and in violation of international law.

The UN treaty bodies, UPR and related processes are important levers to use and can have real effect if used wisely. Your support for the use of treaty enforcement mechanisms, as well as 'soft law' such as resolutions of regional bodies, can create powerful opportunities for debate leading to changes in public opinion and domestic law. One can initiate parliamentary questions, motions, resolutions and statements in support of legislative reform and repeal of antiquated laws that are inconsistent with human rights law. Besides, regional impetuses for reform can be important. Even if the legal and political processes are different, legislative progress in other countries can be influential, especially where there are common languages and juridical traditions. Thus, new jurisprudence can help build arguments in favour of a legislative project.