



## The Influence of Popular Conceptions of National and Constitutional Identity on the Position of Marginalized or Minority Groups Within a Nation State. A Legal, Empirical, and Comparative Analysis of Four Jurisdictions Through the Prism of Gender

La influencia de las concepciones populares de identidad nacional y constitucional en la posición de los grupos marginados o minoritarios dentro de un estado nación. Un análisis jurídico, empírico y comparativo de cuatro jurisdicciones a través del prisma de género

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### Abstract

What influence might popular conceptions of national and constitutional identity have on the position of marginalized or minority groups within that system? This article investigates whether there may be a relationship between the two, on the basis of a legal, empirical, and comparative analysis of four jurisdictions (Poland, Hungary, Uruguay and Argentina) through the prism of gender. The literature suggests the presence of populist rhetoric in the domestic politics of each state. However, they are distinct in potentially relevant ways, including differing regional human rights frameworks. The case studies demonstrate the potential for national and constitutional identity to function in an exclusionary manner; the apparent capacity of political parties to amplify this exclusionary potential by advancing highly traditional narratives of identity, or linking identity to contentious social issues; and the limited efficacy of human rights mechanisms in mitigating the impact of informal influences.

**Keywords:** *Constitutional identity; Minorities; Human rights; Gender.*

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### Resumen

¿Qué influencia podrían tener las concepciones populares de identidad nacional y constitucional sobre la posición de los grupos marginados o minoritarios dentro de ese sistema? Este artículo investiga si puede existir una relación entre ambos, a partir de un análisis jurídico, empírico y comparativo de cuatro jurisdicciones (Polonia, Hungría, Uruguay y Argentina) a través del prisma de género. La literatura sugiere la presencia de retórica populista en la política interna de cada estado. Sin embargo, se diferencian en aspectos potencialmente relevantes, incluidos diferentes marcos regionales de derechos humanos. Los estudios de caso demuestran el potencial de que la identidad nacional y constitucional funcione de manera excluyente; la aparente capacidad de los partidos políticos para amplificar este potencial excluyente al promover narrativas de identidad altamente tradicionales o vincular la identidad a cuestiones sociales polémicas; y la eficacia limitada de los mecanismos de derechos humanos para mitigar el impacto de influencias informales.

**Palabras clave:** *Identidad constitucional; Minorías; Derechos humanos; Género.*

## I. INTRODUCTION

This article is a research output from the Foundations project,<sup>1</sup> which interrogates the sociological, psychological, and legal dimensions of institutional authority (defined as relational and recursive). The research undertaken for this article contributes to further an understanding of the sociological dimension of institutional authority. This article, in particular, investigates whether and to what extent there may be a relationship between national and constitutional identity and ordinary people's attitudes to the rights and status of marginalized or minority groups (or out-groups).

The present research is based on a socio-legal comparative review of four case studies: Poland, Hungary, Uruguay, and Argentina. The countries were chosen because each has been characterized as experiencing a degree of populism in domestic political discourse. However, their experiences with this phenomenon differ in ways which are potentially relevant to the questions being examined.

After this introduction, a section on methodology follows. Subsequently, a theoretical framework section helps to situate the research in the extant literature on national and constitutional identity and comparative constitutionalism. The article then positions the study against the backdrop of the international human rights framework; it then examines and explains regional, legal and policy human rights frameworks that apply to each case study. This provides an overview of both the values which, in principle, may comprise constitutional and national identity in each country; and the mechanisms by which those values ought to be protected. This section also identifies a number of areas where there has been a divergence –sometimes expressed in nationalist or identitarian terms– between domestic and international systems. Significantly, international legal frameworks may have an important –if double-edged– role in the formation or evolution of national and constitutional identity. The values that are constitutionally espoused at national and international level may converge and promote a sense of normative or identitarian consensus; or may diverge and serve as a source of differentiation or division. Afterwards, the article reviews the results of the fieldwork conducted in the four

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<sup>1</sup> See for more information: <https://foundations.ac/>

countries, using focus group discussions as the research method of choice. Following the findings section, conclusions are drawn.

Using an inductive method in data collection and analysis, the article integrates an analysis of the relevant constitutional and human rights frameworks with a discussion on the results of fieldwork conducted in the four case studies. In so doing, our approach is consistent with Körtvélyesi and Majtényi's argument that "in order to understand and respond to the recent challenges to inclusive constitutional values, the understanding of constitutional identity needs to focus on global, regional, and local societal processes that shape the national identities of Member States."<sup>2</sup>

As this quotation shows, references to constitutional and national identity often appear alongside each other in the literature. This reflects not only their close conceptual proximity but also the fact that the social processes that shape them may not always be clearly demarcated (or, indeed, understood). However, it is important for the purposes of this article to be clear on the understanding of constitutional identity that informed the research design and analysis. The concept being employed here refers *not* to the master constitutional text (what might be called the capital-C Constitution) but rather to the *corpus* of ideas and values that are constitutive of – and, importantly, mutually recognized as being constitutive – of the state in question. The hypothesis of this small-c sense of constitutional identity is that persons who are internal to a state, and subject to its structures and rules, might be expected to associate it with certain values, principles, ideas, and norms. Critically, it might also be expected that there is a degree of commonality in the collective views, beliefs, and expectations of these individual persons. That does not mean that each individual must share each or all these beliefs. They may very well be cynical or disillusioned about the extent to which the state, in practice, embodies these values, takes account of these norms, or gives effect to these expectations. The point is, however, that these values, principles, ideas, and norms are recognized by persons as something which others associate with, or are expected to associate with, the state; and as something which is potentially distinctive from other states or systems.

This understanding of constitutional identity is distinguished from national identity by its focus on institutions, processes, and procedures; and from political identity by its emphasis on longer-term and less politically contingent aspects of the state. In other words, it relates to persons' views and expectations of their government generally, rather than their government presently.

## II. METHODOLOGY

This conception of constitutional identity informed the choice of focus group discussions (FGDs) as a means to obtain evidence about how citizens and long-term residents engaged with each other on questions related to values and issues that define their identity and themselves as an in-group or out-group in a given society. The specific issues that emerged from the fieldwork offered potential insights into the relative salience or impact of those issues in domestic political discourse or legal consciousness. The fieldwork allowed to evaluate the ways in which identity and values were understood by citizens and long-term residents in discussion with each other in these systems; the extent to which these concepts had inclusionary or exclusionary elements; whether there were variations between different types of groups; and the extent to which this correlated with either the applicable fundamental rights frameworks or domestic populist discourse.

The concept was also reflected in the inductive and general character of the questions asked during the FGDs. These were deliberately couched in general terms as being concerned

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<sup>2</sup> KÖRTVÉLYESI & MAJTÉNYI (2017), pp. 1732.

with state structures and processes generally, rather than with the persons or parties currently in power. They thus began with the most general questions such as “What is the best thing about your country?” and, depending upon the direction of discussions, became more specific about specific institutions. This was intended to maximize the possibility for participant-led discussions, thereby allowing the possibility for some insight into not just the presence but also the salience of certain themes within local discourse. In order to investigate the relevance (or not) of constitutional, legal and policy rights frameworks in shaping ordinary people’s understandings of their identity, specific questions were asked to this end (“Does the Constitution have any effect on your lives?”).

Responses and narratives employed by participants in FGDs allowed us to gauge, *inter alia*: i) which values ordinary people in each case study identified as characterizing their in-group and/or national/group identity; ii) which issues of concern ordinary people reported as a possible threat to the safety, integrity and authenticity of the in-group/national constituency; iii) which “othered” groups ordinary people identified as a possible threat to safety, integrity and authenticity of the in-group cohesiveness, culture and identity.

Over 80 focus group discussions were held between 2021 and 2022. Approximately 20 FGDs of 7-9 participants were held in each of the case studies. FGDs were held in a mixture of locations within each case study so as to ensure that the views expressed were representative of both urban and rural areas. Locations were also chosen by reference to voting patterns within each country, in order to capture the views of persons resident in both pro-incumbent and pro-opposition areas.

These 20 groups were further sub-divided into three categories. The number of groups undertaken for in each category was calculated by reference to the literature on FGDs which suggests that data saturation is likely to be reached at approximately 6-8 groups. The first, and largest sample, were groups comprised of a broadly representative sample of local citizens. Participants were selected by age, gender and voting records in the most recent general election. The second, and next largest sample, were women-only groups. These were recruited by reference to age and voting records in the most recent general election. The third, and smaller sample, comprised persons from minority groups. Importantly, the minority groups were chosen in each country on the basis that they potentially fell outside or were deliberately excluded by at least one conception of national identity that appears to exist in domestic political discourse. In Poland and Hungary, this led to the recruitment of participants from the LGBTI community. Both Hungary<sup>3</sup> and Poland<sup>4</sup> have increasingly shaped themselves as protectors of a variant of European values, whereby national identity formation has been at the expense of specific demographics. In Uruguay and Argentina, participants were immigrants from other Latin American countries and Afro-descendants. The FGDs were held in-person except for a small number that for logistical reasons needed to be held online. The table below summarizes the number, type, composition, and location of FGDs held in each country under study. It also shows the profile of participants who took part in the FGDs as disaggregated by gender, age, and voting record.

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<sup>3</sup> See for example: REUTERS (2019A).

<sup>4</sup> See: REUTERS (2019B).

Table 1: Focus group discussions- and research participants<sup>5</sup>-related details.

	Poland	Hungary	Argentina	Uruguay
<b>Focus group discussions (total n)</b>	20	20	20	23
Focus group participants (total n)	119	138	137	131
Demographically representative groups	10	9	9	14
Women-only groups	5	6	9	7
LGBTI-only groups	5	5	N/A	N/A
Migrants-only groups	N/A	N/A	2	N/A
Afro-descendants and indigenous peoples-only groups	N/A	N/A	N/A	2
Older persons-only groups	N/A	N/A	N/A	N/A
Urban vs rural location	N/A	14 urban vs 6 rural	14 vs 6	13 vs 6
Online vs offline modality	All offline	All offline	All offline	19 vs 4
<b>Research participants (total n)</b>	119	138	137	131
Voting: Pro-incumbent	33	41	49	51
Voting: Pro-opposition	55	64	68	60
Voting: Did not vote	31	33	9	11
Gender: Male	44	53	41	47
Gender: Female	75	85	96	84
Age: 18-30	34	19	39	34
Age: 31-40	29	35	29	16
Age: 41-50	27	33	30	21
Age: 51-60	16	30	23	29
Age: 60+	13	21	16	31

### III. THEORETICAL FRAMEWORK

The article builds on the growing literature on the sociological dimensions of constitutional governance.<sup>6</sup> It has been theorized that the symbolic and empirical elements of a constitution have functional value: as a symbolic statement of inclusivity;<sup>7</sup> as a source of political legitimacy; as a grammar of political disagreement that internalizes political conflict within the state;<sup>8</sup> as a functional differentiation of society;<sup>9</sup> or as an abstraction that de-politicizes the conduct of general public affairs.<sup>10</sup> However, while it is concerned with the sociological effects of constitutionalism, the constitutional literature has remained predominantly theoretical in character. Blokker has decried the tendency to draw conclusions from universalist assumptions of rational public reason.<sup>11</sup>

<sup>5</sup> When FGDs' participants are quoted in the text, the naming convention is the following: Letter of the country in question, number of FGD, specific FGD participant so e.g. P14H is the participant H in FGD 14 in Poland.

<sup>6</sup> See THORNHILL (2011); THORNHILL & BLOKKER (2017).

<sup>7</sup> ROSENFELD (1994).

<sup>8</sup> LOUGHLIN (2004).

<sup>9</sup> LUHMANN (2008); THORNHILL (2011).

<sup>10</sup> THORNHILL (2011).

<sup>11</sup> BLOKKER (2017a), p. 203.

The integrative potential of constitutional identity –understood as socio-cultural or constitutive identity of a national people or an in-group– has been discussed at some length in the recent literature on social imaginaries.<sup>12</sup> Comparatively less attention has been given to its converse effects: namely, the capacity for a proclamation of shared consensus to *exclude* as well as to integrate. A constitutional identity will often derive its socio-political force in part from being defined against something: whether that be a set of values, a past regime, or an identitarian out-group. To put it in blunt term: more often than not, where there is a “We”, there is also a “They.”

In this, constitutional identity has clear potential to operate as a form of “othering.” Applying the logic of Schmitt,<sup>13</sup> the constitution may assist in creating or defining a national identity for the state by differentiating it from others. Yet, it is important to bear in mind that these “others” may be variously located or defined. The “other” may be identified outside the borders of the state, whether as a rival nation or suspect international organization. Alternatively, the “other” may be capable of being found within state territory as, for example, a person who is not culturally or politically part of the anointed in-group. In this regard, much may depend on the components of constitutional identity. There is, plainly, greater exclusionary potential in conceptions of constitutional identity that emphasize fixed or immutable characteristics like ethnicity or historical origins. Similarly, constructions of identity that depend upon participation in cultural practices such as religious worship or belief can presumptively exclude non-participants. A prominent aspect, however, of the *liberal* constitutional project has been the assumption that constitutional identity –being increasingly defined and discussed in terms of abstract normative values rather than cultural heritage– would function as an inclusive force. From a different perspective, one should also acknowledge that constitutional identity can also be construed as an exclusionary project, to the extent that, for example, it seeks the promotion of certain values or the restriction of certain freedoms and balancing of rights (e.g. religious freedom and gender equality). The centrality of fundamental rights, and of the international human rights framework, to liberal constitutional thought should, in principle, mitigate the exclusionary potential of constitutional identity in two ways: internally, by adopting an identity that is accessible to all; and externally by fostering a shared consensus on values between different nation states.

The emergence of populism as a key societal trend has, though, cast doubt on this assumption. Scholars working in other fields have charted how components of national identity have been mobilized to encourage the proliferation of exclusionary understandings of the “People.” Osuna<sup>14</sup> has, for instance, described how the concept of the border has been employed to encourage more exclusionary conceptions of national identity.<sup>15</sup> Wojczewski has made a similar point in respect of foreign policy discourses that emphasize external actors as a threat.<sup>16</sup>

The literature has suggested that there is a distinction between populism as it occurs in Eastern Europe, on the one hand, and Latin America on the other. The former has been described as primarily right-wing, conservative, traditionalist, and authoritarian in both its rhetoric and conduct.<sup>17</sup> The latter, by contrast, shares an authoritarian impulse but has been described as primarily left-wing and socially inclusive.<sup>18</sup> However, in some Latin American countries, such as Brazil, El Salvador, Chile, Argentina and Uruguay, far right-wing movements have emerged,

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<sup>12</sup> TORRES & GUINIER (2012); LOUGHLIN (2015); BLOKKER (2017b).

<sup>13</sup> SCHMITT (2007).

<sup>14</sup> OSUNA (2022).

<sup>15</sup> MOFFITT (2016), pp. 17-25; OSTIGUY (2017).

<sup>16</sup> WOJCZEWSKI (2020).

<sup>17</sup> LENDVAI-BAINTON & SZELEWA (2021).

<sup>18</sup> SCHMITT (2007); WOODS (2014); HIGGINS (2017).

thereby changing the historical trend of populism in the region.<sup>19</sup> These differences may have some bearing on the kinds of national and constitutional identity that exists in each state, on the status or experience of minorities, and on the relative success of populist political parties in each.

Similarly, the emergence and influence of populism may be at different points of the political cycle in each state. Argentina's politics, for example, has been described by some as populist for decades.<sup>20</sup> Hungary and, more recently, Poland have incumbent governments which are often characterized as populist.<sup>21</sup> Comparatively, Uruguay has most recently witnessed the emergence on the domestic political scene of a new political party whose policies and rhetoric have been described by some as populist.<sup>22</sup> These differences in the salience and persistence of populist rhetoric may have some bearing on the status or experiences of minorities, on the nature of national and constitutional identity in each state, and on the potential existence of a relationship between long-term constitutional and national identity and short- or medium-term political discourse.

Against this backdrop, a constitutional and legal system in which fundamental rights are robustly promoted and enforced would seem less susceptible to exclusionary forces. Yet, it is also possible that the application of rights protection in specific contexts can serve as a point of contention that may be mobilized to advance alternative conceptions of national and constitutional identity. That may be especially so if the institution in question is an international one or one located outside the state.

Moreover, rights discourse has additional potential relevance given the suggestion in the literature that rights movements and marginalized groups may, somewhat counter-intuitively, be co-opted by nationalist parties, through the frameworks of "femonationalism" and "homo- or queer- nationalism." These frameworks employ the trope of the deviant "other," migrant or foreigner who presents a threat to both women and LGBTI individuals. Femonationalism posits a co-option of feminist causes by nationalist politics, usually at the cost of foreign nationals or migrants. However, it functions, in effect, as an exclusionary narrative.

Anti-abortion campaigns have, for instance, been identified in the literature as an example of how gender-related subjects may be used as a strategic wedge issue to define understandings of domestic identity or culture. It is important to emphasize, however, there is no single narrative of "gender ideology." As Graff and Korolczuk explained, anti-genderism is not peculiar to Poland but is a transnational discourse that portrays some aspect of gender-relevant policy as a threat to traditional values; thereby associating the opponent, and its policies, with the social or cultural authority of national tradition.<sup>23</sup> In light of this, the question has been raised as to whether, and to what extent, there is a "connection between the rise of right-wing populism and anti-genderism?"<sup>24</sup> As Graff and Korolczuk posit, "These two ideologies converge not only in the promotion of a socially-conservative vision of gender relations, but also in the targeting of liberal elites as responsible for the economic and social decline of the population at large".<sup>25</sup> Similarly, the UN Independent Expert (IE) on sexual orientation and gender identity (SOGI) remarked:

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<sup>19</sup> KESTLER (2022).

<sup>20</sup> GRIGERA (2017).

<sup>21</sup> CSEHI & ZGUT (2021); SZABO (2020).

<sup>22</sup> YANES (2022).

<sup>23</sup> GRAFF & KOROLCZUK (2017), pp. 27-30.

<sup>24</sup> Newly elected President Javier Milei's 2023 presidential campaign in Argentina was an example of this connection. While he is often presented as an "ultra-liberal" or libertarian, his approach to gender issues is conservative. For more details, see: KESTLER (2022); and IGLESIAS & BANERJEE (2023).

<sup>25</sup> GRAFF & KOROLCZUK (2017), pp. 27-30.

“Anti-rights actors make strong parallels between the nation, family, and tradition. (...) 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. (...), LGBTI persons become the ‘other’, the ‘foreign’, or even a threat to national cohesion, culture, and tradition.”<sup>26</sup>

In light of this, the article uses *gender* as the organizing and analytical lens through which to address the research questions. This, in part, reflects its reported capacity to be employed in support of either inclusive (in Yuval-Davis’s terms<sup>27</sup>) or exclusionary<sup>28</sup> conceptions of constitutional identity. Indeed, Graff and Korolczuk have argued that gender is a site of growing and polarizing contestation for anti-establishment, anti-elite, right-wing “populist” parties and social movements globally.<sup>29</sup> It has been observed that 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 [SOGI] and foster stigma and intolerance among their constituencies”<sup>30</sup> As various scholars have noted, traditional conceptions of family occupy a central role at the heart of these populist political projects.<sup>31</sup> Gender as a concept can be symbolically correlated with traditional views, with the consequence that alternative understandings can be presented as an ahistorical or culturally alien global conspiracy. This “anti-genderism” characterizes “gender ideology” as an “existential threat,” while simultaneously “fetishising fertility.” This connection between nationalist and populist discourses and gender means it is particularly apposite to the questions being considered in this article.

The choice of gender as the article lens is also, in part, because the notion of gender is, itself, a flexible but often contested one that, accordingly, may provide insight into domestic culture and discourse around identity, rights, values and lived experiences. Again, this has been highlighted as an aspect of nationalist and populist discourse in Poland and Hungary (amongst other states). In both countries, conservative political parties have deployed classically populist and exclusionary narratives that characterize LGBTI persons or conduct as outside of, and in opposition to, domestic identity and values. Indeed, this rhetoric has depicted LGBTI groups or “ideology” as a direct threat to symbolic elements of the traditional family –most notably children. Against this backdrop, “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”<sup>32</sup> This is often also expressly and deliberately positioned as opposed to international human rights organizations, including those with human rights competences. “Opposition to the protection of gender, gender identity and expression under IHRL [*international human rights law*] is often framed as resisting the imposition of so-called ‘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”.<sup>33</sup>

<sup>26</sup> IE SOGI (2021), p. 5.

<sup>27</sup> YUVAL-DAVIS (1997).

<sup>28</sup> See, *inter alia*, the introduction to the debate on trans rights by PEARCE *et. al.* (2020).

<sup>29</sup> GRAFF & KOROLCZUK (2022).

<sup>30</sup> IE SOGI (2021), p. 1.

<sup>31</sup> See LENDVAL-BAINTON & SZELEWA (2021), pp. 559-572; GRAFF & KOROLCZUK (2022).

<sup>32</sup> IE SOGI (2021), p. 1.

<sup>33</sup> IE SOGI (2021), p. 4.



#### IV. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The international human rights framework, composed of treaty- and charter-based bodies as well as instruments and standards, is underpinned by the principles of equality and non-discrimination. There are a number of norms, instruments and mechanisms of relevance for women's rights, gender equality,<sup>34</sup> and the rights of LGBTI people.<sup>35</sup> Importantly, "[the work to address, and ultimately eradicate, violence and discrimination based on sexual orientation and gender identity is *not* [emphasis added] 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."<sup>36</sup> However, "[j]ust like the idea of women's equality was regarded as threatening conventional societal norms, so is perceived the introduction of the issue of non-discrimination based on [*SOGI*] in the UN."<sup>37</sup> What this has meant in practice is the difficulty of securing consensus on the content, definition and application of mechanisms for the prevention of discrimination on these grounds.

#### V. REGIONAL HUMAN RIGHTS AND APPLICABLE LEGAL AND POLICY FRAMEWORKS

##### 5.1. Europe

Gender-based discrimination (GBD) was amongst the first forms of discrimination prohibited by European instruments, starting with the Rome Treaty of 1957.<sup>38</sup> While this initial provision was limited to equal pay for equal work, the present framework on GBD has been expanded offering broader and more robust protection. Article 14 of the European Convention of Human Rights (ECHR) prohibits discrimination on grounds of sex, amongst other factors. While the application of Article 14 must be complementary with other rights granted under the ECHR,<sup>39</sup> the European Court of Human Rights (ECtHR) has applied Article 14 in an expansive manner, bringing domestic legislation under the ECHR where appropriate.<sup>40</sup> Protocol 12 to the ECHR prohibits discrimination by any public authority, thereby extending protection beyond the rights available under the ECHR itself. While the Court applies the doctrine of the margin of appreciation to accommodate differences in various cultures and legislative aims amongst its member states, it has adopted a strict approach to purported discrimination on the basis of sex.<sup>41</sup> While Article 14 was seen as a weak and formalistic guarantee,<sup>42</sup> it has been regarded by

<sup>34</sup> Norms and standards include: Universal Declaration of Human Rights (UDHR) (1948), International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), the Vienna Human Rights Declaration and Programme of Action (1993). The women's rights-focused instruments comprise the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979), the Optional Protocol to CEDAW (1999), the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962); the Beijing Declaration and Platform for Action (1995), and the Declaration on the Elimination of VAW (1993). Instruments include: the Committee on the Elimination of Discrimination against Women, the Working Group on discrimination against women and girls, the Special Rapporteur on violence against women, its causes and consequences; and the IE SOGI. All four countries considered in this article are State Parties to both CEDAW and its Optional Protocol.

<sup>35</sup> The Yogyakarta Principles (2006) are the key standards that guide the application of international human rights law in relation to SOGI. See <http://yogyakartaprinciples.org/principles-en/>.

<sup>36</sup> IE SOGI (2021), p. 8.

<sup>37</sup> YAHYAOU (2020), p. 80.

<sup>38</sup> EKLUND & KILPATRICK (2021), p. 10.

<sup>39</sup> *Marckx v. Belgium* (1979).

<sup>40</sup> *E.B. v. France* (2008).

<sup>41</sup> *Burghartz v. Switzerland* (1994); *Jurčić v. Croatia* (2021); *Markin v. Russia* (2012).

<sup>42</sup> RADACIC (2008).

commentators as a more substantive equality right.<sup>43</sup> There is evidence of a similar approach being adopted in the application of Article 14 to trans rights, with the Court having found that surgery or sterilization were unnecessary when considering gender reassignment.<sup>44</sup>

While the ECHR addresses primarily civil and political rights, the European Social Charter (ESC) focuses on social and economic rights.<sup>45</sup> Article 4 of the ESC and the 1998 Protocol had prohibited discrimination based on sex regarding fair remuneration.<sup>46</sup> The revised ESC of 1996 broadens the scope of what comes under discrimination by mentioning equal remuneration in Article 20, but adding special protection in case of maternity in Article 8 and stating again in Article E, part V that all rights under the ESC are to be enjoyed without discrimination.<sup>47</sup>

Articles 21 and 23 of the Charter of Fundamental Rights (CFR)<sup>48</sup> of the European Union (EU) are relevant here with Article 21 prohibiting discrimination based on sex amongst other factors, while Article 23 addresses equality between women and men specifically.<sup>49</sup>

The Council of Europe (CoE) Convention on Preventing and Combating Violence Against Women and Domestic Violence<sup>50</sup> (hereafter: Istanbul Convention) seeks specifically to deal with gender-based violence (GBV) as a human rights violation. It also obliges signatories to prosecute a wide array of offenses under GBV. Article 4 par. 3 makes the Istanbul Convention applicable to all without discrimination based on sex, gender, sexual orientation or gender identity.<sup>51</sup> The Explanatory Report makes this all the more explicit by noting that Article 4 includes “(...) categories of individuals such as transgender or transsexual persons, cross-dressers, transvestites and other groups of persons that do not correspond to what society has established as belonging to ‘male’ or ‘female’ categories.”<sup>52</sup>

With the present structure in place, there have been calls for both conceptual and political rethinking of anti-discrimination measures. The most significant of these encourages the ECtHR to address stereotypes regarding gender as both underlying causes and manifestations of gender-based discrimination.<sup>53</sup> A directly actionable call has been made regarding formal recognition to the right to abortion in European instruments.<sup>54</sup>

Poland and Hungary have not signed and ratified all of the mentioned instruments (Table 2). In a move that resonates with similar announcements made by “anti-gender” governments and parties in other European countries, Poland has threatened to opt out of the Istanbul Convention.<sup>55</sup> Poland also sought to limit the application of the Charter of Fundamental Rights via Protocol 30, whereby the applicability of the Charter seemingly did not create justiciable rights

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<sup>43</sup> FREDMAN (2019).

<sup>44</sup> *Garçon and Nicot v. France* (2017).

<sup>45</sup> JELIĆ & SMITH (2022), p. 30.

<sup>46</sup> European Social Charter (Rev.) (1996), art. 4; Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (1995).

<sup>47</sup> European Social Charter (Rev.) (1996), arts. 8, 20 and E (V).

<sup>48</sup> Charter of Fundamental Rights of the EU (2000).

<sup>49</sup> Charter of Fundamental Rights of the EU (2000), arts. 21 and 23.

<sup>50</sup> CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011).

<sup>51</sup> CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence (2011), art. 4 (3).

<sup>52</sup> COUNCIL OF EUROPE (2011), par. 52 & 53.

<sup>53</sup> TIMMER (2011).

<sup>54</sup> See SÉJOURNÉ (2022).

<sup>55</sup> See EUROPEAN PARLIAMENT (2024).

in Poland if domestic law had not already provided such rights.<sup>56</sup> Nonetheless, this protocol was treated by the Grand Chamber of the ECtHR as only declaratory in nature.<sup>57</sup> While the Protocol was likely to hinder the European Court of Justice in Poland, other European instruments would make it possible for the Court to exercise jurisdiction on similar matters.<sup>58</sup>

The afore-cited instruments did not find resonance amongst FGD participants except for the Istanbul Convention. The latter was discussed twice in minority-only groups with a general agreement regarding the need for Hungary to ratify it. The only mention of these legal frameworks in demographically representative groups in Poland was critical of the government for being adversarial towards external instruments and institutions.

As P14H explained: “The reason why they [*the government*] don’t want to join the European Public Prosecutor’s Office is because it would not be beneficial for the government. We have this convention on domestic violence, we didn’t join that either.” Speaking to the irrelevance or lack of resonance of international legal frameworks and gender-related treaties in their country, P14G asked: “The Istanbul Convention? There are these inexplicable things.”

**Table 2:**

	Hungary	Poland
European Convention on Human Rights <sup>1</sup>	Ratified and in force.	Ratified and in force.
Protocol 12 to the ECHR <sup>1</sup>	Signed.	Not signed.
European Social Charter <sup>1</sup>	Ratified the revised version.	Ratified the 1961 Charter but signed the revised version.
Charter of Fundamental Rights of the European Union	Bound by the Charter.	Bound by the Charter with qualification.
Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence	Signed but did not ratify.	Ratified.

## 5.2. Latin America

The institutional development of the Inter-American system began in 1948 with the adoption of the Charter of the Organization of American States<sup>59</sup> (OAS) and culminated with the conclusion, in 1969, of the American Convention on Human Rights (hereafter: Pact of San José).<sup>60</sup> Over the years, several American States have adopted a series of international instruments that have become the basis of a regional system for promoting and protecting human rights. This normative system recognizes and defines these rights and creates bodies to ensure their observance.<sup>61</sup>

<sup>56</sup> See Protocol (No 30) of the Treaty on the Functioning of the European Union On the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (1957).

<sup>57</sup> *N. S. v. Secretary of State for the Home Department & M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* (2011).

<sup>58</sup> CRAIG & DE BURCA (2020), pp. 428-429.

<sup>59</sup> Charter of OAS (1948).

<sup>60</sup> American Convention on Human Rights (1978).

<sup>61</sup> I/ACOURT.H.R. (2019).

In terms of norms to combat GBV, the OAS approved in 1994 the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (VAW) (hereafter: Convention of Belém do Pará).<sup>62</sup> The latter entered into force in 1995, becoming the first human rights treaty specifically addressing the issue of VAW. In 2004, a Follow-up Mechanism to the Convention of Belém do Pará was created to continuously evaluate the effective application of the Convention.<sup>63</sup>

The Convention of Belém do Pará highlighted the magnitude and significance of VAW in Latin America and the States' responsibility to take tangible actions to prevent and eradicate it. The Convention established a system of rights aimed at guaranteeing a life free of violence for women and a system of obligations for States to respect and fulfil those rights and to act with due diligence to protect women against all forms of GBV.

The above-mentioned instruments did not find resonance amongst FGD participants in the two Latin American countries. Even when participants spoke about human rights in general, they did not mention any specific policies, norms or standards or international organizations' work in relation to migrants, gender or GBV. However, our analysis of FGDs reveals that participants were aware that these rights were recognized in law, but not implemented fully in practice. During the FGDs, participants mentioned that the Constitution was "fine" but that it was not enforced. They also mentioned that many rights were won during the last decades, such as access to abortion, same-sex marriage and retirement rights for "housewives." Many migrants in FGDs also mentioned that foreigners have the same rights as locals as they can vote, work and have free access to public services such as health and education. However, they did not anchor these rights in international treaties, but mentioned them as part of the Argentine legal framework.

While participants embraced the values of openness and non-discrimination in Argentinian FGDs, and the literature recognizes migration as a constitutive part of these countries,<sup>64</sup> the notion of "gender" is not evident or explicit in Argentina's constitution. Yet, the constitution is anchored in a robust and inclusive human rights framework. In fact, Argentina is one of the countries that implemented most of the international treaties on the subject, as can be evinced from Table 3 below.

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<sup>62</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1995).

<sup>63</sup> See <https://www.oas.org/en/mesecvi/>.

<sup>64</sup> MODOLO (2016); TAVERNELLI & CROSA POTTILLI (2013); MILLER (1993).

Table 3:

	Argentina	Uruguay
American Declaration of the Rights and Duties of Man	Ratified and in force.	Ratified and in force.
Charter of the Organization of American States	Ratified and in force.	Ratified and in force.
American Convention on Human Rights	Ratified and in force.	Ratified and in force.
Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women	Ratified and in force.	Ratified and in force.
Follow-up Mechanism to the “Convention of Belém do Pará”	Ratified and in force.	Ratified and in force.

## VI. NATIONAL LEGISLATION AND PRACTICES

### 6.1. Poland

The Constitution of Poland offers protection against discrimination between men and women in Article 33.<sup>65</sup> This guarantees general equality but makes specific mention of non-discrimination based on employment and compensation thereof. While Article 32 of the Constitution does not mention sex or gender as a prohibited category when mentioning anti-discrimination measures, it offers blanket protections that can be applied as protection against discrimination based on sex or gender. This had become relevant in cases regarding discrimination faced by transgender people.<sup>66</sup>

European treaty obligations and directives are incorporated under a broad ambit of domestic legislation, extending from labor rights to social protection and insurance.<sup>67</sup> The Labor Code and the Anti-Discrimination Law both prohibit discrimination based on sex directly.<sup>68</sup> The Polish language does not clearly distinguish between gender and sex, thereby allowing protection based on both.<sup>69</sup> However, there are complexities unique to the Polish language regarding how “sex” and “gender” are used.<sup>70</sup> Under the existing legislation, both the courts and the Commissioner for Human Rights can be approached based on the rights breached.<sup>71</sup> Interestingly, FGDs participants did not mention these domestic legislative frameworks in their responses and interactions.

The UN Secretary General (SG) highlighted that: “In Poland, conservative opposition argued that the [*Istanbul*] Convention is a gateway to ‘leftist ideology’ that would create support for abortion and other liberal law.”<sup>72</sup> In 2021, various Special Procedures of the UN Human

<sup>65</sup> Constitution of the Republic of Poland (1997), art. 33.

<sup>66</sup> *X v. Poland* (2021); *Y v. Poland* (2022).

<sup>67</sup> See EUROPEAN COMMISSION (2021).

<sup>68</sup> [Act to implement some EU regulations concerning equal treatment \(2011\)](#).

<sup>69</sup> See EUROPEAN COMMISSION (2021).

<sup>70</sup> NOWOSAD-BAKALARCZYK (2020).

<sup>71</sup> See <https://bip.brpo.gov.pl/en/content/equal-treatment>.

<sup>72</sup> MADRIGAL BORLOZ (2021), par. 41.

Rights Council (HRC) expressed their dismay to Poland about a high number of “counties and municipalities that had passed resolutions declaring themselves free from so-called ‘LGBT ideology’, a public policy that appears to promote the idea that the human rights of LGBT persons are not protected under international and national law, issued in a context in which religious and political leaders had used deeply dehumanizing language to refer to LGBT persons (...).”<sup>73</sup>

### Hungary

The Fundamental Law of Hungary guarantees non-discrimination based on sex, explicitly stating in Article XV (3) that women and men have equal rights while providing for a more general anti-discrimination guarantee in Article XV (1).<sup>74</sup> Article L states that “Hungary shall protect the institution of marriage as the union of one man and one woman (...),” which excludes non-heterosexual couples from having families.<sup>75</sup>

In addition to the Fundamental Law, the Civil Code (2013),<sup>76</sup> the Labor Code (2012)<sup>77</sup> and the Equal Treatment and Promotion of Equal Opportunities Act (2003)<sup>78</sup> all provide for protection against discrimination based on sex. This is in addition to numerous European instruments that have been adopted into domestic law.<sup>79</sup> Redress against sex-based discrimination prohibited under the instruments discussed above might be sought either by approaching the judicial system or the Office of the Commissioner for Fundamental Rights.<sup>80</sup> While the Equal Treatment Act allows for a greater ambit of cases under it, the Kuria, the Supreme Court of Hungary, has been particular about a specific ground being identified by the claimant for the burden of proof to shift to the state.<sup>81</sup> In terms of sexual and reproductive health rights (SRHR), while the abortion laws in Hungary have not changed fundamentally since 1992, a provision came into force in 2021 that mandated that women seeking abortions must acknowledge the fetus’s definitive sign of life, usually a heartbeat.<sup>82</sup>

The UN SG noted that “the Hungarian parliament recently adopted a political declaration rejecting the (...) (Istanbul Convention) on the grounds that it defines gender as a social construct, and passed legislation that denies access to legal gender recognition for transgender and intersex persons and restricts information available to children and sexuality education.”<sup>83</sup> The SG also “expressed his concern to Hungary on the formulation of draft Bill T/13647, which enshrines the restrictive interpretation of family ties based on a marriage in which ‘the mother is a woman and the father is a man’.”<sup>84</sup> In 2021, “Hungary passed legislation that bans the dissemination of sexual education content in schools. (...) Anti-gender narratives create significant risk for the furtherance of the rights of women and can foster violence and discrimination based on sexual orientation and gender identity (...).”<sup>85</sup> This is done also “through

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<sup>73</sup> MADRIGAL BORLOZ (2021), par. 12.

<sup>74</sup> Fundamental Law of Hungary (amend.) (2012), arts. XV and XV (1).

<sup>75</sup> Fundamental Law of Hungary (amend.) (2012), art. L.

<sup>76</sup> Civil Code of Hungary (2013).

<sup>77</sup> Labor Code of Hungary (2012).

<sup>78</sup> Equal Treatment and the Promotion of Equal Opportunities Act (2003).

<sup>79</sup> See EUROPEAN COMMISSION (2019).

<sup>80</sup> See <https://www.ajbh.hu/>.

<sup>81</sup> *Mfv.I.10.371/2017* (2018).

<sup>82</sup> [\*Hungary tightens abortion access with listen to ‘foetal heartbeat’ rule \(2022\)\*](#).

<sup>83</sup> MADRIGAL BORLOZ (2021), par. 12.

<sup>84</sup> MADRIGAL BORLOZ (2021), par. 26.

<sup>85</sup> MADRIGAL BORLOZ (2021), par. 34 and 41.

the adoption of legislation and policies prohibiting the distribution of information on LGBT persons to children.”<sup>86</sup>

All five LGBTI-only groups discussed the Basic Law limiting marriage between a man and a woman as a point of exclusion, best evidenced by the exchange below. H04E noted: “And it [*the Basic Law*] should treat everybody equally, but I don’t think that exists in Hungary. We are experiencing the opposite.” H04A argued: “They [*The Basic Law*] interfere in my life. For example, when they talk about who is a man and a woman in the Basic Law.”

### 6.3. Uruguay

Uruguay has been a State Party to the American Convention since 1985<sup>87</sup> and is also a party to the Convention of Belém do Pará, in force there since 1996.<sup>88</sup> At the national level, the Domestic Work Law improved access to rights by domestic workers in the country.<sup>89</sup> Furthermore, “The Uruguayan law on gender identity includes compensation for the ill-treatment, imprisonment and torture that trans persons were subjected to under the dictatorship.”<sup>90</sup>

The current regulatory framework on GBV in Uruguay is quite comprehensive and includes a number of relevant laws.<sup>91</sup> Despite this, the UN Human Rights Committee (HRCt) urged Uruguay, “to take measures to allocate the necessary financial, technical and human resources for the prevention, protection, punishment and redress of violence against women (...).”<sup>92</sup>

### 6.4. Argentina

Article 75, paragraph 22 of the Argentine National Constitution<sup>93</sup> granted constitutional status to CEDAW.<sup>94</sup> Law 24.632 incorporated the Convention of Belém do Pará.<sup>95</sup> The Ministry of Women, Gender and Diversity is the governing body in Argentina responsible for designing public policies to implement legal provisions to prevent, punish and eradicate VAW.<sup>96</sup>

In 2021, Law 27.610 came into force, which regulates access to voluntary termination of pregnancy and post-abortion care.<sup>97</sup> The provisions of this law are of mandatory application throughout Argentina. Yet, in practice, access to safe and legal abortion is still a significant human rights issue and “one of the leading causes of maternal mortality and morbidity in the country.”<sup>98</sup>

<sup>86</sup> MADRIGAL BORLOZ (2021), par. 41.

<sup>87</sup> American Convention on Human Rights (1969).

<sup>88</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994).

<sup>89</sup> Law 18.065 (2006).

<sup>90</sup> Law 19.684 (2018).

<sup>91</sup> Law 17.514 (2002) on Domestic Violence, Law 19.580 (2018) on GBVAW, Law 19.538 (2017) on Acts of Discrimination and Femicide, Law 19.643 (2019) on Prevention and Combating of Trafficking in Persons.

<sup>92</sup> [UN Human Rights Committee Issues Findings on Hong Kong, Macao, Georgia, Ireland, Luxembourg and Uruguay \(2022\)](#).

<sup>93</sup> Constitution of the Argentine Nation (amend.) (1994).

<sup>94</sup> CEDAW (1979).

<sup>95</sup> Law 24.632 (1996).

<sup>96</sup> Law 26.485 (2009) of Integral Protection of Women.

<sup>97</sup> Law 27.610 (2021) on Access to Voluntary Interruption of Pregnancy.

<sup>98</sup> HRC U.N. (2020), par. 16.

Argentina has been a pioneer in the recognition and promotion of the rights of LGBTI persons by passing Law 26.618, which incorporated equal marriage into legislation.<sup>99</sup> Law 26.743 established that everyone has the right to recognition of their gender identity and to dignified treatment based on respect for it.<sup>100</sup> Argentina is also among the countries that “recognize in cultural traditions, and sometimes also in law, genders that do not correspond with the male/female binary (see travesties)...”<sup>101</sup> Furthermore, “Law No. 27.499, known as the Micaela Law, establishes compulsory training on gender and gender-based violence for all persons working in the public service or in the executive, legislative or judicial branch of government. (...) Gender identity has been recognized in a number of judgments by the Supreme Court of Argentina.”<sup>102</sup>

In the FGDs, participants did not concentrate on the legal framework but on the social mobilization that allowed the discussion of the abortion law in Parliament. Regarding the implementation of the laws, some participants mentioned the need to train judges on gender and gender-based violence crimes. Finally, some expressed concern about the possible victory of right-wing parties and the repeal of the abortion law. Selected excerpts from FGDs illustrate these points. A01G, for instance, argued: “The government favours certain things like the abortion law, and it does it only because of the vote.” A01D concurred: “I think exactly the same.”

Another telling exchange on the lack of gender-sensitive training for judges was the following. A04F noted, “Perhaps more training, too, because I see that there are many conflicts with the decisions that the judges make, in cases, when there are rape of minors, I think it was a 12-year-old girl a few years ago, I think they did not accept that she could have an abortion or a thing like that and I say the interruption is already approved today in Argentina, I say training so that it is more up-to-date with the issues that are held in society.” A04B added, “The problem is the subordination of the judiciary to the political power in office, so they turn around if they change the political power, the mood of the judiciary changes and there may be a little more than (...).”

Forecasting the possible legislative changes following Javier Milei’s (at the time of FGDs, unpredicted and unpredictable) victory in the 2023 presidential elections, A08F noted: “There is a problem, because one thinks that if the libertarians win, they are going to reverse the abortion law, we shouldn’t be thinking that because the law has to be voted on by everyone, so let’s understand this thought that the party that rises, the party that decides, that’s how it is. Out of 100 points you have 90 who are in favor and that’s a lot, but Congress should be for 100 points, all on the same side.”

## VII. FINDINGS FROM FGDS

The transcripts from FGDs were recorded, transcribed, translated from their original language into English and then coded using thematic analysis with the aid of Nvivo qualitative analysis software. This analytical method was employed to identify units of meanings as expressed in the words and interactions by FGDs. The next stage was to group the same codes into categories and ultimately into themes of relevance for the Foundations project. Each theme was then read against secondary literature and the policy and normative framework in the jurisdiction, so as to contextualizing each case study’s findings.

### 7.1. Poland

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<sup>99</sup> Law 26.618 (2010) on Civil Marriage.

<sup>100</sup> Law 26.743 (2012) on Gender Identity.

<sup>101</sup> IE SOGI (2021), p. 3.

<sup>102</sup> IE SOGI (2021), p. 14.



FGD participants appeared to not be making the connection between constitutional identity and exclusion faced by certain demographics directly. Discussions were generally limited to specifics of the issues themselves. However, a trend of the (then) incumbent government led by Law and Justice to look to the Constitution was expressed by P15D:

“The Constitution became important nowadays, because of very specific conflicts emerging, such as the separation of powers, or marriage, equality, abortion, etc. The parties to these conflicts started referring to legal acts, so they have something to lean on (...). Hence, we go back to the Constitution, and we look for a provision that would prove we are right; not them. But it turns out that the Constitution can be interpreted differently. Which starts the disaster, when two sides of the conflict have different understanding of one and the same thing. This is where we would need very precise provisions of law, which would explain the Constitution and rule out any possibility of false interpretations.”

The concept of “family” was the single most discussed factor in national identity in Poland, being mentioned in all FGDs for a total of 162 times. The “Constitution” was discussed 407 times overall, but there was no significant overlap between the two.

The term “gender” was mentioned eight times in the FGDs. However, “othering” practices based on deviation from gender roles, ranging from violence faced by members of the LGBTI community to employment discrimination faced by women were discussed in almost all FGDs. With severe restriction to abortions introduced in Poland in 2020 and the subsequent death of a pregnant woman called Izabella,<sup>103</sup> “abortion” was a highly salient topic in the FGDs, with all but two FGDs discussing it. A majority of the discussants were willing to compromise to allow for what they saw as necessary abortions. Interestingly, one of the only two groups that did not discuss abortion had exclusively women participants and spent much of the time discussing what family and faith meant. While P05F was optimistic in stating that “the whole abortion deal united men and women and everyone”, P10F saw abortion and homosexuality as “just not good things.” There appeared to be consensus in FGDs regarding medical practitioners having been placed in a very difficult position of having to choose between the life of the mother and the fetus on occasion.

Poland ranks last amongst EU countries for protection of the LGBTI community.<sup>104</sup> Participants in LGBTI-only groups took exception to the Advisor of the Minister of Education’s comments regarding Poland needing more women with “maiden’s virtues.”<sup>105</sup> P08D and P08E voiced their concerns with this terminology. However, a sentiment supplementary to the comment by the Minister of Education was shared by P10A, who lamented how “equal opportunities” were being used to usurp old cultural values.

P01D was weary of the restrictions on the LGBTI community continuing to grow more stringent if not acted upon immediately, and P05F, who had previously voted for Law and Justice, sharing a similar sentiment. P04F related what she thought the existing situation was to history, expressing that soon LGBTI people would have to wear armbands like prior to the Second World War.

Participants appeared to find the Courts generally aloof and the Commissioner for Human Rights ineffective. This appeared to be irrespective of political affiliations, with P07E, a Law and Justice voter, noting that, “(...) with a woman who wants an abortion, the Ombudsman won’t help you with that.” In terms of international institutions, while some participants were clear that being part of the EU meant having to comply with the European institutions, others,

<sup>103</sup> See THE GUARDIAN (2021).

<sup>104</sup> <https://rainbow-europe.org/country-ranking#eu>.

<sup>105</sup> See RZECZPOSPOLITEJ (2021).

like P09C, felt less compelled, stating, “Let me put it this way. I do not like PiS [*the Law and Justice Party*]. But I don’t like it even more when someone from abroad is meddling here.”

## 7.2. Hungary

References were made to “family” as a key factor determining national identity, having been brought up in 19 of the 20 FGDs for a total of 77 times. The “Basic Law” itself was discussed in all FGDs for a total of 194 times. Almost all mentions of the Basic law in the LGBTI-only groups included a reference to “limitations on marriage based on sexuality”, while the other fifteen focus groups had limited mention of less than 15%.

The FGDs provide clear evidence of the salience within Hungary of a version of femonationalism. This was most clear during discussion of migration during which there were several references to immigrants as a potential risk to women. Interestingly, this was true even of participants who resisted the exclusionary narrative. It was perhaps illustrative of the prevalence of this issue that even these participants brought up the risk of rape as relevant to a discussion of migration, albeit with a view to rebuttal rather than reinforcement.

In discussions regarding gender issues, the paternalism and the need to protect women appeared strong. Hungarian economic policy targeted at larger families also was a topic in seven FGDs. All but those who were actual beneficiaries of the schemes felt overlooked by the state, especially if they had a single child or none.

The term “gender” was mentioned six times across these FGDs. Yet, this is not representative of the discussions across all but three focus groups, which discussed restrictions to do with gender change in Hungary. Concerns regarding the value of women only as mothers in the traditional family structure were shared when discussing welfare policies, allowing tax benefits to families with four or more children. Incidence of these discussions were twice as high in LGBTI- and women-only groups than they were in general groups.

Abortion was scarcely discussed, being referenced in only two groups. This was somewhat surprising given the recent changes to the regulation of abortions, which necessitate a pregnant woman to affirm that she has heard a sign of life from the fetus, usually a heartbeat, which a doctor must confirm.<sup>106</sup>

The Hungarian authorities have been openly hostile to LGBTI rights, with the parliament having banned the display of any material that may be deemed to show gender reassignment or promote homosexuality to minors in 2021.<sup>107</sup> That the Fundamental Law asserts that a father must be a man and a mother a woman was criticized in seven FGDs, all either LGBTI- or women-only groups. FGD2, a LGBTI-only group, added to this by discussing how they felt abandoned by the Commissioner for Fundamental Rights for not intervening and upholding what they saw as basic human rights. They also discussed implications of the Fundamental Law on safety. H04A and H04E were also cognizant of a larger “anti-gay propaganda” undertaken by Prime Minister Victor Orban. Some of the other groups provided evidence to support these concerns with H03E declaring unprompted that he was a Fidesz supporter and hated LGBTI people.

While perceptions that unfair or exclusionary practices occur were relatively widespread, there was little expectation of any remedial action from the domestic legal or human rights frameworks. The Courts were seen as inaccessible and where access was possible, time consuming. Only the participants in LGBTI-only FDGs were aware of the Office of the Commissioner for Fundamental Rights, with no more than one participant in the other FDGs

<sup>106</sup> See: DEUTSCHE WELLE (2022).

<sup>107</sup> See: BBC (2021).

being able to identify what the institution's function was or who was in charge. Irrespective of people's awareness, FGD participants appeared to have little faith in the institution given the dominance of the executive.

A similar lack of faith was evident in respect of international institutions with the EU and the European Courts being discussed only after prompts from the moderators. FGD participants were particularly concerned regarding the enforcement of decisions. There was also some skepticism regarding the intention of international courts.

All five LGBTI-only FGs made mention of the Basic Law as exclusionary, both when asked about Hungary as a country and asked about the Basic Law specifically. That the Basic Law itself is limiting regarding gender identity and that it is atypically amendable appears to have led to general distrust of the Basic Law itself and the Hungarian identity that it seeks to generate amongst those it excludes. This is perhaps most clear in language used when demographically representative groups or women-only groups. H17E, when discussing this law, noted, "It is discriminatory. We should not be discriminatory. Nor should the other side be allowed to advertise or allow gay people to adopt children. But I don't think you should put that kind of discrimination in a Constitution."

Not surprisingly, LGBTI participants were less keen to compromise with the Basic law that they felt was persecuting them. H02C said, "They say that marriage, for example, can only be between a man and a woman. I think it's terrible that in this century something like that can even be in a Basic Law." When subsequently asked if the Basic law had an impact on everyday life, H02E were equally unequivocal; "It has an effect on mine. Because I can't get married, or I can only get married to a man. And my problem is that it talks about marriage and also the church as if it's a good thing, but it's a hypocrisy (...)."

### 7.3. Uruguay

"National pride" was coded as the most prevalent national identity feature (85 references in 19 groups), followed by "family" with 67 mentions in 16 FGDs. The third one, also in line with participants engagement with the discussion topics in relation to other countries, was their identification as being a "small country", which was mentioned 59 times in 19 of the FGDs.

Gender-related issues were mentioned across all FGDs not as "stand-alone" items, but as part of a larger discussion. The term "gender" was mentioned in five instances across four FGDs (three women-only and one mixed group). Despite this, the impact of gender on various issues cut across a breadth of subjects. GBV against women was discussed across FGs, showing an underlying concern for women's rights. There were references to sentencing in cases of sexual assaults, in which participants believed that there was insufficient punishment for male offenders and that the answer from the authorities and politicians was dismissive of female victims. In the words of U04B, "I think that what is happening today is that we're losing the quality of the people, with people like Mrs. Bianchi [then Vice president, Graciela Bianchi] it is impossible to discuss any topic. Or when the prosecutor Zubía said that the woman that is raped doesn't die."

The topic of assault in particular and gender-based violence in general came up spontaneously in 13 FGDs, usually by female participants who were both outraged and concerned by the lack of political concern over their rights and safety. This was accompanied by a perception of this being a fairly prevalent issue nowadays: "Gender based violence... we see it daily on the TV, women and children are suffering. I won't go over the last events because they are monstrous. I wonder if in the past it didn't occur or what's the deal" (U02C). All the participants mentioning these issues complained about the lack of effective measures and the blame that society casts upon women.

Otherwise, most gender-related issues were discussed in terms of how Uruguayan society is more progressive than other countries, for instance in terms of its early support for divorce, women's voting rights, "equal marriage, abortion law and others (U05C)." Abortion was mentioned in six occasions in five FGDs (three mixed groups and two women-only), for the right and access to it were seemingly taken for granted and an indication of how far Uruguay has come in terms of progress, especially in comparison to other Latin American countries. Exchanges on human rights came up frequently, as a positive comparison with other countries. Discussions on economic, social, and cultural rights (like housing, education, and health) were centered on the fact that these rights need to be better guaranteed, as they impact on the equality most citizens identify in their constitution and see as one of their national values. This critique can be summarized in the words of U14D, "Our reality is that many people can't access their own rights, and that reflects in education, housing, health, labor rights. So, the regulatory framework is the constitution, which is then handled at the discretion of those who are the most benefited. It is made to equalize, but equality does not occur." FGD participants did not talk much about LGBTI rights or sexual and reproductive health rights, but they appeared to take these for granted, with only two participants expressing that society seems to be less inclusive than before with racial and trans discrimination being still a problem (U02D and U02G). U02D highlighted: "Nowadays, we are no longer an inclusive society (...), racial and trans discrimination still exists." U10A also identified the need for their society to better address the needs of minority groups.

From the FGDs analysis, rights appear to be constructed as a fundamental part of Uruguay's national identity. While concerns were raised about the lack of realization of specific rights, some preoccupation was also shared *vis-a-vis* the treatment of Afro-descendants and migration. Overall, however, FGD participants expressed pride at how inclusive a society Uruguay is. Perhaps not surprisingly, comments on abortion, LGBTI issues and women's rights were mostly made in women-only groups.

Aside from one comment possibly dismissive of expanding LGBTI rights and comments across four FGDs (all women-only bar one) that were critical of feminism as an ideology, the other views on gender-related issues were quite homogenous. Positions *in support of* protection of the LGBTI rights, SRHR and against discrimination were prevalent, in line with Uruguay's human rights obligations.

International Organizations (IOs) were mentioned in very few instances, when FG participants discussed a conflict between courts and the government. The large majority of FGD participants in Uruguay professed trust in their own institutions. This might relate to the general perception of Uruguay is doing better when compared to other countries, which was reflected in the way most FGDs responded to the questions and topics discussed. Participants saw themselves, their country, and their constitution as democratic, welcoming, respecting everyone's rights, including migrants. They did not consider that Uruguay lagged behind other countries in the region with regard to gender justice or protection of minority groups.

However, despite Uruguay's human rights progress, participants from four FGDs reflected that there is still work to do at an institutional level, and that more could be done to deliver enough protection to women and children when it comes to domestic violence and assault. Some participants also expressed their concern for the recent rise in popularity of populist, right-wing ideas, usually linked to the growth and support of the political party "Cabillo Abierto" (CA). This is a recently formed populist party,<sup>108</sup> filled with ex-members from other political parties; in their first presidential election in 2019, they won an unexpected 11%. CA presented themselves as different from other political parties, and an alternative that does not belong to the traditional elite. CA has an anti-abortion stance, referring to it as a "silent

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<sup>108</sup> See the work on populism in Latin America by LEVITSKY & LOXTON (2013).

Holocaust.”<sup>109</sup> Their perspective on gender-related matters expands to other areas of policy as well, as substitute Deputy Inés Monzillo argued that homicide should not be differentiated from femicide.<sup>110</sup>

Overall, FGD participants’ opinions mostly differed from the position of CA. Despite the fact that FGDs in Uruguay did not share CA’s views, FGD participants expressed concern that the party would continue to grow in popularity and warned that their discourse resonated with a large part of the population.

#### 7.4. Argentina

In terms of national identity, participants mentioned the importance of “family” (19 FGDs and 136 references), and “equality” in terms of access to rights (14 FGDs and 41 references) as well as being open, which is regarded as another important value in the Argentinian society.

When examining the political discourse in Argentina, FGD analysis shows the high political capital that GBV and other gender-related issues generate for parties that prioritize them. FGD participants’ perceptions tend to coincide with the prominent local political discourse in relation to GBV. This is seen as a key contemporary challenge, to be prioritized by the government. Several FGD participants referred to the lack of judicial training in sexual crimes, highlighting the tendency of judges to hand down sentences that are less harsh than what would be expected for these crimes. Participants also expressed their discomfort with instances of double standards, possible GBD and their dissatisfaction about the lack of protection and institutional responses to complaints of GBV.

Hinting at what are perceived to be the real reasons behind government-sponsored gender initiatives, A01G suggested that: “The government favors certain things like the abortion act because of the votes.” A02F added: “They [*the government*] are so far removed from reality, the abortion law arises from the demand of individual people and what (...) were they doing years before?”

Importantly, FGD participants highlighted the role of civil society and citizen mobilization as the driving forces behind the visibility of the abortion issue. A18G, for instance, noted: “And we have seen them in recent events with the abortion law. And the demonstrations that were exciting.” Accordingly, politicians take an interest in an issue only when people mobilize massively in the streets. Even for participants who recognize the desirability of governmental action to highlight GBV, they expressed the view that the policies would not have any practical impact.

FDG participants mentioned that, in terms of gender equality and women’s rights, the challenge lies in the lack of institutional response to guarantee these rights in practice. There were no mentions of Ios in the FDGs. Only national institutions, such as the ministries in charge of implementing public policies or the courts in charge of sanctioning non-compliance, were mentioned. When constitutional identity was discussed in FGs, references to the values of openness and non-discrimination were mentioned by participants across all groups. For instance, A01E commented: “We [Argentiniens] are very warm.” A01F continued, “We don’t discriminate.” Along the same lines, A03F argued: “Argentina is a country of many opportunities, where one can go out and find different opportunities such as school and work. And where one can shape their projects that can be individual or family and can go out and look for that and carry out their project, obviously there are good times and complicated times but well you can

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<sup>109</sup> EL PAÍS (2020).

<sup>110</sup> EL OBSERVADOR (2020).

carry out long-term projects.” Finally, A11F underlined: “The one thing we have in this country is the freedom that, after all, we can speak because there are places where you can’t speak, they say you can, but at least here we have freedom, and it is fundamental.” In particular, women who participated in migrant-only FGDs underlined that Argentina was a country where people are open and inclusive and where they do not feel judged for who they are. To illustrate this, A07A compared it with Paraguay: “It is also a more open country than others. I am from Paraguay. Paraguay is a very sexist country, here [Argentina] they respect each one’s decision more, how you dress, how you speak, you can do what you want, and nobody judges you.”

During the FGDs, there were no mentions of LGBTI groups, which is consistent with the extant research claiming that Argentina is one of the countries where gender identity is not an exclusionary factor.<sup>111</sup>

### VIII. CONCLUSIONS

The power of exclusionary and polarizing identity discourses on human rights, gender, and migration in the four societies under study was evidenced in the FGDs. Without being prompted, FGD participants in Poland and Hungary often raised questions and issues relating to gender and gender “ideology,” GBV and discrimination (including in access to SRHR) and used them to show either progress or regress on the part of their governments. Similarly, in these two countries, migration was spontaneously raised in FGDs as a critical area to determine either failure or success in binary terms with migrants being depicted as either scapegoats or leeches in a given crisis. Interestingly, being in favor of protecting and/or expanding the human rights of LGBTI individuals did *not* equate with support for or solidarity with other marginalized groups such as migrants.

Many FGD participants in Poland and Hungary expressed a belief that outsiders pose a risk to their wellbeing, be this either physical, legal or financial. Thus, the FGDs challenged the often-assumed notion of solidarity amongst “othered” groups and individuals in a given society. The solidarity and commonality of intentions amongst differently marginalized groups- often used by right-wing and populist movements to depict a transnational, homogenous gender “ideology” and movement was *not* evidenced in FGDs across the European case studies. This lack of a shared positionality amongst people who are discriminated or marginalized on different grounds opens a whole set of questions that should be explored in future research on transnational and national solidarity movements.

Conversely, in the Latin American FGDs, progress on SRHR, women’s rights and the rights of LGBTI people was embraced. Comments vis-à-vis migrants (and immigration) were generally benevolent, as migrants are considered an integral part of both Argentinian and Uruguayan societies and a strength. Most of the demographically representative FGDs’ narratives reflected the integration of immigrants as part of these Latin American societies. Opinions expressed in minority only-FGDs also illustrated the open and inclusive reception of migrants in Argentina and Uruguay, as reflecting the constitutional identity and history of immigration in these countries. FGD participants also noted that these societies are committed to obtaining more rights for women, in line with their obligations under international human rights treaties. FGD participants called for improving the level of implementation of these rights (access to safe abortion and protection against GBV) in practice.

The mention of feminism attracted skepticism by few participants in Uruguay. These participants did not consider feminism to be a useful equality framework and did not believe in the efficacy of temporary special measures and funding related to them. The homogeneity of unity and solidarity on GBV and gender-related matters amongst marginalized groups in the two

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<sup>111</sup> See for instance: IPSOS (2023); ÁMBITO (2022).

Latin American case studies seems to be aligned with the positions of left-wing, “inclusive populist” parties in the region.

The results of the research conducted suggest that issues relating to human rights, gender and migration are perceived as relevant factors in conceptions of national identity; and that this is especially so where domestic political parties —and populist rhetoric— have emphasized such identity discourse.

This relationship was evident in both regions but —notably— appeared to operate in quite distinct ways. In Poland and Hungary, the data demonstrated a correlation between the prominence within domestic politics of a right-wing populism characterized by highly traditional identitarian rhetoric, and the salience in citizen-level discussions of human rights, gender, and migration as highly polarized and contentious issues. Conversely, the fieldwork conducted in Argentina and Uruguay showed a significant degree of citizen consensus on attitudes to human rights, gender, and migration. Moreover, this consensus largely tracked the positions and policies espoused by ruling parties —including those characterized as populist in the literature— on these issues. Notably, in this regard, there was limited evidence in these systems of the form of narrowly exclusionary conception of national and constitutional identity seen in the Polish and Hungarian contexts. Interestingly, the mention of “Constitution” across the four case studies did *not* generate responses or narratives relating to a “group identity” in nearly all FGDs.

There was also evidence across each of the case studies of a lack of faith or belief in the adequacy or effectiveness of national and international human rights frameworks. This was true to some extent even in Uruguay, where there was otherwise strong evidence of a broadly inclusive constitutional identity that embraces fundamental rights. This seems to be regarded as a distinctively Uruguayan characteristic in regional terms so that it does, to some extent, involve elements of an external “othering.” In general, however, international human rights frameworks were generally perceived as largely irrelevant (at best); or as an external threat to national sovereignty or culture (at worst). The latter was most evident in Poland and Hungary where even some opponents of the incumbent government expressed some skepticism about the validity or efficacy of intervention from European-level institutions. This points to a challenge for international human rights organizations, in how they construct and maintain their own legitimacy; and in how they respond to the potential for their actions to be mobilized by populist or nationalist domestic actors.

Overall, the research provides empirical evidence of the potential for national and constitutional identity to function in an exclusionary manner with adverse real-world consequences for marginalized groups. It also confirms the apparent capacity of political parties or rhetoric to amplify this exclusionary potential by advancing highly traditional narratives of identity or linking identity to contentious social issues. Finally, it indicates the limited efficacy of legal or human rights mechanisms in mitigating the impact of these more informal or extra-legal influences and suggests that they may, in some contexts, be used to exacerbate them.

In responding to whether identity discourses on gender, abortion and migration have become key battlegrounds for populist movements and political parties, our findings show that this is the case in the two regions but, one could argue, in opposite ways. In Hungary and Poland, right-wing populism succeeded in radicalizing and polarizing public perceptions and attitudes to gender, abortion, and migration; and, in turn, construct women who want to abort, LGBTI people, brown and black migrants, and Muslims as enemies of the country, religion and the “original” people.

Conversely, FGDs in Argentina and Uruguay demonstrate how, aside from a few outliers like *Cabildo Abierto* in Uruguay, public attitudes to gender, abortion and migration align well

with positions and policies espoused by ruling parties –including of populist nature.<sup>112</sup> In the framework of inclusive, left-wing populism, these political parties made inclusivity, gender equality and diversity as the benchmarks of national progress in a region where these issues are often politicized and polarized along binary positions (see e.g. the discourse on trans rights in Brazil<sup>113</sup>). While the article has possibly opened more questions than provided answers, the intersections between populism and identity discourses (on gender, abortion, and migration in particular) as well as the role played by civil society in polarizing or harmonizing societal positions further are worth further exploration of relevance for both law and policy.

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<sup>112</sup> As this article was written before the last presidential elections in Argentina and data was collected between 2021-2022, our findings are contextualized in that temporal frame. In light of Milei's presidential election in Argentina, the article can be seen as a harbinger of things to come reflecting on the lessons drawn from the political trajectories of Poland and Hungary.

<sup>113</sup> CAMPOS (2016).



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