**Call for Inputs**

**Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity**

***Topic: Freedom of religion or belief and freedom from violence and discrimination based on sexual orientation and gender identity***

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**Deadline: 15 January 2023**

**Introduction**

The Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (IE SOGI), Mr. Victor Madrigal-Borloz, will dedicate his report to the 53rd session of the United Nations Human Rights Council to an exploration of the right to freedom of religion or belief (FoRB) in relation to sexual orientation and gender identity (SOGI). Taking as points of departure international human rights law, and a rights-based approach centred on indivisibility and interdependence, the IE SOGI will explore the legal, political, and ethical dynamics between the human rights of persons with diverse sexual orientations and gender identities and the human right to freedom of religion or belief, as well as the narratives surrounding the implementation of these sets of rights.

The report will examine long-established and emerging discourses driving perceived contradictions between FoRB and freedom from violence and discrimination based on SOGI, with reference to legal concepts such as conscientious objection, reasonable accommodation for religious beliefs, and anti-discrimination law and public policies. In understanding the connections and the apparent points of tensions between the two rights systems,[[1]](#footnote-2) the IE SOGI will analyse the potential for the two to limit one another, as well as synergies between the two frameworks. The goal is to provide legal and political narratives to shift away from zero-sum analysis and to reconcile the theoretical bases for due enjoyment of human rights by all persons. The report will put forward recommendations to States and other relevant stakeholders to fully comply with their obligations under international human rights law to protect and empower LGBT+ persons to pursue happiness, exercise and enjoy all their human rights, and choose how to contribute to society on an equal footing with everyone, including through effective participation in religious, cultural, social, and public life.

**Background**

With the legal recognition of, and pledges to protect, international human rights, State and non-State actors have recognized rights of personal religious freedom as well as institutional religious autonomy. Religious and spiritual narratives have also historically been used to promote, enable, and condone institutional and personal violence and discrimination against individuals based on sexual orientation or gender identity (real or presumed); repress sexual and gender diversity; and promote cisgendered and heteronormative norms of sexual orientation and gender identity. This has resulted in a variety of discriminatory normative constructions reinforced over time. As pointed out by the mandate of the United Nations Special Rapporteur on Freedom Religion or Belief (SR FoRB), the exercise of rights in this manner is antithetical to the very basis of the human rights system.[[2]](#footnote-3) These practices cannot be justified under the rubric of FoRB, or indeed any other human right, to circumvent and defeat the rights of marginalized populations.[[3]](#footnote-4)

Furthermore, the notion that religion – and thereby freedom of religion or belief, including the right to manifest such beliefs – is fundamentally antithetical to LGBT+ and gender-diverse persons and their human rights rests on essentialist assumptions about the unified substance of religious traditions across space and time. Exploratory evidence available to the mandate suggests that many anti-LGBT+ attitudes apparent in some strands of religious belief systems today are of relatively recent origin. Even within these religious traditions, many denominations today have embraced (or re-embraced) LGBT+ identities and consider freedom from violence and discrimination based on SOGI as an essential tenant of their faith.

Thus, a potential first step towards legally strengthening the human rights of LGBT+ individuals at the intersection with religious freedom is to unpack the notion of an inherent contradiction between FoRB, and freedom from violence and discrimination based on SOGI. The IE SOGI’s thematic report aims to introduce voices from LGBT-inclusive belief systems, indigenous communities, and LGBT+ communities of faith as key stakeholders. The IE SOGI also intends to open a space within human rights discourse and practice to better recognize and protect LGBT+ persons’ access to faith and spirituality, as persons free and equal in dignity and rights, and their access to spirituality in accordance with their own right to freedom of religion or belief.

**Call for Inputs**

The Independent Expert invites all interested States, civil society organisations, faith-based institutions, faith leaders, academics, international organisations, national human rights institutions, activists, corporations, and others, to provide written input to the following questions for his thematic report.

Respondents are requested to limit their comments to a maximum of 2,500 words. Additional supporting materials, such as reports, academic studies, and other types of background materials may be annexed to the submission.

1. What are the actual or perceived points of tension (if any) between the right to manifest one’s freedom of religion or belief, and freedom from violence and discrimination based on sexual orientation and gender identity? Are there any areas in which they are mutually exclusive?

*Guarantees of rights and freedoms, the prohibition of discrimination, equal treatment and protection from violence are the subject of constitutional protection in the Republic of Poland, which covers all citizens, regardless of any factor. The Polish legislative system fully protects each kind of inalienable human right. In this regard, is worthy to be underlined that the concept of "gender" became controversial, when gender began to be defined in isolation from science. Moreover term "gender identity" does not exist in any binding international treaty and in the last years numerous states have consequently raised objections towards it. The only exception to this is the controversial Istanbul Convention, which raises numerous doubts among many States of Council of Europe which have not ratified it[[4]](#footnote-5). Poland did not accept the influence of the "gender" theory in its legal order and remained with the natural distinction between sexes through biological features. From a legislative perspective, although "sex" is not directly defined in Polish law, the provisions of the law leave no doubt that the legislator was concerned with biological sex (defined by the human karyotype).*

*Therefore, when addressing the problem of discrimination, it is necessary to define* ***what is meant by discrimination in such a way that ideas and expressions of a religious or non-religious nature that affirm the existence of only two biological sexes, (furthermore in accordance with the Polish legislation and international binding documents), are not misunderstood as acts of discrimination against single persons or point of tensions.***

1. Are there any ways in which the right to freedom of religion or belief, and freedom from violence and discrimination based on sexual orientation and gender identity are mutually reinforcing?

*In Poland all rights are equally applicable to everyone. Adopting a gender identity perspective in the legal system would introduce inequality and discrimination against people who do not share a non-scientific theory that there are more than two biological sexes. Referring to freedom from discrimination,* ***Polish legislation complies with all international agreements that are binding on Poland and the principle of non-discrimination contained therein.******In this context, it should be emphasized that all international obligations in the field of counteracting discrimination have been implemented by Poland****.* ***Since all Polish citizens are equal, thus it could be considered as inappropriate to grant special protection to particular groups upon their request****[[5]](#footnote-6).* *Moreover, the primary EU legislation does not explicitly refer to gender identity, gender expression or gender characteristics.*

*The full application of respect for fundamental human rights, freedom of expression and non-discrimination on the basis of binding international conventions already represent a point of reinforcement among human dignity, freedom of religion and freedom from* ***violence****. With regard to the issue of* ***discrimination*** *based on gender identity, the liquidity of the concept itself, the denial of the natural male/female difference, the non-binding nature of the term in the international sphere, and the lack of cross-party agreement among UN Member States on its meaning are elements that require to establish the boundaries between what are considered acts of discrimination and free and legitimate expressions of one's own idea or religion regarding the anthropological basis of sexual identity. In this context, it is necessary to distinguish between statements directed against specific persons and statements criticizing a particular ideological theory. Freedom of religion is one of the basic constitutional guarantees in Poland and may only be subject to limitations that are prescribed by law and “****necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others****”.* ***A similar right is found in regional human rights treaties and many constitutions.****Consequently, based on the wording of the question, it is not possible to draw a clear line between discrimination against persons and discrimination against mere ideas or theories on which there is no agreement, thus equating* ***internationally recognized and binding human rights****, such as freedom of religion and belief, with alleged emerging rights, which currently have no binding coverage and do not even find consensus in the international political and scientific community.*

1. Are there examples where gender and sexual diversity has been used in religious, traditional, or indigenous narratives or values in a manner which promotes the acceptance of LGBT+ individuals, or protects LGBT+ individuals from violence and discrimination? Has this informed any legal interventions or public policies?

*The principle of a democratic state ruled by law requires, inter alia, respect for the principles of democracy. Therefore, democratic tools, such as the legislative initiative, are used to inform legal interventions instead of religious narratives.*

1. What are the key trends or significant instances of discriminatory or abusive practices by individual providers of goods or services in the public sphere against LGBT+ and gender-diverse persons that rely on religious narratives?

*Also in view of these assumptions, it is emphasized that any attitude or opinion or choice resulting from not promoting or conforming to gender ideology, declined, for example, in the acceptance of multiple genders or the extension of marriage beyond male-female couples, the adoption of children by same-sex couples, and the like, cannot be considered a form of discrimination or even an abusive practice in the public sphere when it is the expression of personal or religious convictions or ideas. In this regard, is worth to be recalled that Art. 32 sec. 1 of the Polish Constitution states that „All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities”. In accordance with paragraph 2, „No one shall be discriminated against in political, social or economic life for any reason whatsoever”. In light of this, as already mentioned in the above answer, protections against discrimination are already provided in Poland by the fundamental principles enshrined in the Constitution, therefore* ***there are no reasons why Polish law should further grant preferential protection to people on the basis of "sexual orientation", "gender identity" or any other features.***

1. Has the State adopted, in public policy, legislation or jurisprudence, norms purportedly based on protecting freedom of religion or belief that promote, enable and/or condone violence and discrimination against individuals based on sexual orientation or gender identity? If so, please give examples, with commentary as needed to explain context, scope, and application?

***Poland has fulfilled the obligations arising from EU law regarding counteracting discrimination as well as all international obligations in the field of counteracting discrimination have been implemented by Poland.*** *In EU law, the prohibition of discrimination is primarily provided for in Art. 10 of the Treaty on the Functioning of the European Union (TFEU): „In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. Article 10 of the TFEU sets out a general principle, the implementation of which should be implemented by acts of secondary law, enacted by the institutions of the European Union. As regards the prohibition of discrimination, pursuant to Art. 19 TFEU, such power has been entrusted to the Council, acting unanimously in accordance with a special legislative procedure and with the consent of the European Parliament. This matter is consequently the subject of numerous Council (and European Parliament and Council) directives. The prohibition of discrimination is also included in the Charter of Fundamental Rights of the European Union[[6]](#footnote-7). Pursuant to Art. 21 sec. 1 of the Charter: „Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited”. In accordance with the Protocol (No. 30), which is integral to the TFEU, on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom: „To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognized in the law or practices of Poland or of the United Kingdom” (art. 2)[[7]](#footnote-8). It follows that the prohibition of discrimination set out in Art. 21 (1) of the Charter does not have any effects that go beyond Polish national legislation, and its use may not lead to the emergence of a state contrary to the Polish national legal order, including - which is obvious in the case of any international agreement - the Constitution of the Republic of Poland.*

1. Has there been any legal challenge to these policies/provisions under any domestic, regional, or international human rights provisions? If so, state the outcome and rationale of the case. If not, provide your opinions as to why such a challenge has not yet been brought.
2. Are there any examples of State restrictions based on preventing violence and/or discrimination against LGBT+ persons that prohibit or limit practices undertaken in the name of the religion or spirituality, such as public accommodation non-discrimination protections? If so, have they been legally challenged on the basis of freedom of religion or belief? If yes, explain the outcome and rationale of the case(s).
3. What role (if any) has the concept of conscientious objection played in limiting the full enjoyment of the right to freedom from violence and discrimination on the basis of sexual orientation and gender identity?

*Freedom of religion and freedom of conscience are one of the basic constitutional guarantees in Poland. Worth mentioning, that the Charter of the United Nations includes religious freedom among the* ***human rights*** *and fundamental freedoms of all human beings. In Poland, the most important guarantee of freedom of conscience and religion is Article 25 paragraph 2 of the Constitution of the Republic of Poland which reads: 'Public authorities in the Republic of Poland shall maintain impartiality in matters of religious, philosophical and ideological convictions, ensuring freedom of expression in public life". The Act on Guarantees of Freedom of Conscience and Religion of 17 May 1989 guarantees* ***freedom of conscience*** *and* ***religion*** *to every citizen (Article 1(1)) and this provision applies accordingly to foreigners and stateless persons (Article 7).   
The detailed scope of rights and freedoms in religious matters are set out in Article 53(1) to (7) of the Constitution of the Republic of Poland. Under Art. 10 of the European Charter of Fundamental Rights “The right to conscientious objection is recognized, in accordance with the national laws governing the exercise of this right”.* *Consequently, the question posed is misleading as long as conscientious objection is not a mere abstract concept, or a simple faculty, but a constitutionally protected right subject to regulation. On the contrary, there have been cases in Poland where the non-acceptance of gender ideology has restricted the constitutional right to freedom of expression and religion of individuals. An example is the case involving an employee of the company Ikea. In 2019, this employee was fired because of his response on the company's Internet forum promoting the demands of the LGBT movement. The man expressed his negative opinion on this topic, referring to verses from the Holy Bible. The employee's statement led to the illegal termination of his employment contract and employees who liked the above-mentioned forum post were reprimanded. The decision of the Ikea authorities constituted a violation of the basic human right.*

1. Has the scope and application of conscientious objection been sufficiently defined, limited, and/or regulated so as to strike a fair balance between manifestation of one’s freedom of religion or belief, and freedom from violence and discrimination based on SOGI? Where the doctrine is invoked to permit the withholding of goods or services to members of the LGBT+ community (such as in the context of sexual and reproductive healthcare, provision of marriage licences, access to consumer goods, etc.), do State laws provide alternative access to goods or services?

*As has been indicated above, in Poland all rights are equally applicable to everyone. As the Polish government precises in the response to the memorandum of the Commissioner for Human Rights of the Council of Europe[[8]](#footnote-9), the Polish criminal law has adequate and effective instruments for the protection of and response to criminal conduct based on discriminatory grounds, regardless of the minority criterion identifying the victim or group of victims, including criminal conduct on grounds of sexual orientation. The dignity and honor of human beings, their freedom, bodily integrity as well as mental and physical health are protected by a number of criminal law principles. In the context of comments related to the provisions of same-sex marriage licenses, is worthy to underline that neither the European nor the international laws require the States to introduce the so-called “same-sex marriage” into their domestic legal systems, as these matters fall within the exclusive competence of States. The explicit protection of marriage and family has been included into international treaties. For example, Article 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms expressly states that “Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.” Similar provisions are contained in the Universal Declaration of Human Rights (Article 16), the International Covenant on Civil and Political Rights (Article 23), the International Covenant on Economic, Social and Cultural Rights (Article 23). The above international treaties confirm that men and women of marriageable age have the right to marry and that the family is the fundamental unit of the society and shall be entitled to be protected by the State. Further, it should be noted that the European Court of Human Rights in the judgement of 16 July 2014 in the case of Hamalainen v. Finland (§§ 71 and 96) has noted that Article 12 of the Convention protects the traditional vision of marriage as a union of a male and female, and the regulations of those European States that have introduced same-sex marriage reflect their own vision of marriage and do not result from the interpretation of fundamental rights contained in the Convention (§ 38).*

*In view of the question posed, it should be strongly reiterated that the right to conscientious objection is an integral and indispensable element of the freedom of conscience, which is guaranteed both by the Polish Constitution and international agreements.*

1. Where State legislation or policy requires the reasonable accommodation of religious beliefs, practices, and/or institutions, are there instances where such laws or policies limit freedom from violence and discrimination against LGBT+ and gender-diverse persons? These may include but are not limited to exemptions from non-discrimination legislation, and/or accommodations within the workplace, educational institutions, healthcare-settings, the justice system, etc. Are there reports of violence, spiritual abuse, and/or other forms of discrimination against LGBT+ and gender-diverse persons because of these practices?

*The research of the Fundamental Rights Agency (FRA) carried out between May 27 and July 22, 2019 via the lgbtisurvey.eu platform on a sample of 139,799 residents of the European Union Member States, North Macedonia and Serbia, identifying themselves as belonging to the "LGBTI" group shows that Poland ranks among the last in Europe when it comes to the manifestations of intolerance towards their behavior registered by respondents. Poland is the country where ridicule, name-calling, teasing or threats are the least frequent due to belonging to "LGBTI" groups.*

***Poland is also below the EU-28 average when it comes to the level of unemployment among people identifying with "LGBTI" groups****. This means that homosexual inclinations or trans- or intersex disorders do not constitute a significant obstacle in finding employment in Poland.*

*Similar data are also reported with reference to* ***access to medical services with*** *results even lower than the ones of countries stereotypically perceived as "tolerant".*

*Therefore, it turns out that with regard to specific situations, Poland is one of the countries that provide the highest sense of security to people with homosexual inclinations or a disturbed “gender identity”.*

1. Good Practices:
   1. Provide any examples of good practice – at the international, national or local level – where State and non-State actors (including faith leaders, groups and organisations, international organisations, civil society organisations, and the UN human rights system) have taken effective measures to protect and promote freedom of religion or belief of LGBT+ and gender-diverse persons, and made efforts to prevent, mitigate and respond to any violence and/or discrimination justified in the name of religion.
   2. Provide any examples of measures by State or non-State actors to ensure effective participation of people with diverse gender identities and sexual orientations in religious, cultural, social, and public life. Please provide relevant examples where LGBT+ people have asserted their individual or collective rights to access (or establish) religious or spiritual frameworks and institutions.

Responses to the questions above can be submitted in **English, French or Spanish**, and **in Word format**.

**If you wish your submissions to be kept confidential, you are kindly required to make an explicit request in your submission. Otherwise, information may be published online,[[9]](#footnote-10) and may be referenced in the report.**

The Independent Expert would be particularly grateful to receive the information requested at your earliest convenience, and preferably by **15 January 2023**. Kindly note that, given the planning process for the drafting of the report, the Independent Expert may not be able to take inputs received after the deadline into consideration. Responses may be addressed to the Independent Expert at the Office of the UN High Commissioner for Human Rights and should be submitted by email (hrc-ie-sogi@un.org), with the heading “Submission to the report on FoRB and SOGI.”

For any further question or clarification, please do not hesitate to contact the Independent Expert through the Office of the United Nations High Commissioner for Human Rights at [hrc-ie-sogi@un.org](mailto:hrc-ie-sogi@un.org).

1. Freedom from violence and discrimination based on SOGI is used in this document as a set of conditions derived from various cross-cutting human rights values and obligations, including freedom from torture and other cruel, inhuman, or degrading treatment, right to privacy, right to freedom of expression, right to health, and human dignity. [↑](#footnote-ref-2)
2. A/HRC/43/48, paras. 43-52. [↑](#footnote-ref-3)
3. A/HRC/43/48; par. 39. [↑](#footnote-ref-4)
4. Armenia, Azerbaijan, Bulgaria, Czech Republic, Lithuania, Latvia, Moldova, Slovakia, Hungary. It is worth noting that on March 29, 2019, the Slovak parliament, by a vast majority of 101 out of 132 deputies, passed a declaration calling on the government to reject the ratification of the Istanbul Convention and on February 25, 2020, by a majority of 95 out of 107 deputies, finally rejected the application for ratification of the Istanbul Convention, while on May 5, 2020, the Hungarian parliament adopted a declaration of refusal to ratify the Convention by a majority of 115 out of 153 deputies. Both states found the Convention inconsistent with applicable law and fundamental values. With effect of 1 July 2021, moreover, Turkey withdrew from the Istanbul Convention. [↑](#footnote-ref-5)
5. The comments of the Government of the Republic of Poland to the Commissioner for Human Rights of the Council of Europe’s Memorandum on the stigmatisation of LGBTI people in Poland, 28.10.2020, <https://rm.coe.int/commdh-govrep-2020-11-en/1680a091dc> (accesss: 21.12.2021). [↑](#footnote-ref-6)
6. Text in the official journal: Dz. Urz. UE C Nr 2007.303.1 z dnia 14 grudnia 2007 r. [↑](#footnote-ref-7)
7. In addition, Poland submitted additional reservations in the form of unilateral declarations (No. 61 and 62) – see details: T. Sieniow, [w:] *Prawo Unii Europejskiej z uwzględnieniem Traktatu z Lizbony*, [red.] A. Kuś, Lublin 2010, p. 315-316. [↑](#footnote-ref-8)
8. The comments of the Government of the Republic of Poland to the Commissioner for Human Rights of the Council of Europe’s Memorandum on the stigmatisation of LGBTI people in Poland, 28.10.2020, <https://rm.coe.int/commdh-govrep-2020-11-en/1680a091dc> (accesss: 21.12.2022). [↑](#footnote-ref-9)
9. Submissions may be published on the Web page of the respective thematic report, at: <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/annual-thematic-reports>. [↑](#footnote-ref-10)