Opinion on the Report Regarding Protection from Violence and Discrimination due to Sexual Orientation and Gender Identity in Relation to the Human Rights of Freedom of Expression, Association, and Assembly

# Protection of Sexual Orientation and “Gender Identity”: Balancing Rights

Amidst the ongoing global discourse on human rights, the protection of individuals based on their sexual orientation and “gender identity” (SOGI) remains a significant but also contentious issue, engaging various individuals and human rights organizations. While advocates rightly defend individuals' rights to free self-expression, concerns arise regarding the potential impact of these rights on societal values of freedom of expression, association, and assembly.

## A broad system of rights to protect everyone

At the heart of the debate lies a delicate balance between individual rights and the rights of society as a whole.

The rights enshrined under international treaties are vast and encompass a wide range of aspects, including civil, political, economic, social, and cultural rights. These treaties are binding on the states that have ratified them, and they have played a significant role in shaping the international human rights framework. Here's a brief overview of some of the key treaties and the rights they protect:

1. Universal Declaration of Human Rights (UDHR): The UDHR is a binding declaration adopted by the United Nations General Assembly in 1948. It sets out the fundamental rights and freedoms that all human beings are entitled to, regardless of their race, color, origin, sex, religion, political opinion, national or social origin, property, birth or other status.
2. International Covenant on Civil and Political Rights (ICCPR): The ICCPR is a binding treaty adopted by the UN General Assembly in 1966. It elaborates on the rights set out in the UDHR and provides for mechanisms to monitor and enforce compliance. The ICCPR protects a wide range of rights, including the right to life, freedom from torture, freedom of expression, freedom of assembly, and the right to a fair trial.
3. International Covenant on Economic, Social and Cultural Rights (ICESCR): The ICESCR is a binding treaty adopted by the UN General Assembly in 1966. It recognizes the right of everyone to an adequate standard of living, education, health care, and social security. The ICESCR also recognizes the right to work, to join trade unions, and to take part in cultural life.
4. European Convention on Human Rights (ECHR): The ECHR is a binding treaty adopted by the Council of Europe in 1950. It protects a wide range of rights, including the right to life, freedom from torture, freedom of expression, freedom of assembly, and the right to a fair trial. The ECHR has a unique feature in that it allows individuals to bring complaints against their own governments to the European Court of Human Rights.
5. American Convention on Human Rights (ACHR): The ACHR is a binding treaty adopted by the Organization of American States in 1969. It protects various rights, including the right to life, freedom from torture, freedom of expression, freedom of assembly, and the right to a fair trial. The ACHR also recognizes the right to participate in government and the right to property.
6. African Charter on Human and Peoples' Rights (ACHPR): The ACHPR is a binding treaty adopted by the African Union in 1981. It protects a wide range of rights, including the right to life, freedom from torture, freedom of expression, freedom of assembly, and the right to a fair trial. The ACHPR also recognizes the right to development and the right to a clean environment. On the other hand, society has the right to protect its particular values and traditions.

These are just a few of the many international treaties that protect human rights. The specific rights protected by each treaty will vary, but they all share the common goal of promoting and protecting the human rights of all people. Here are the key rights that are protected by these international treaties:

1. The right to life
2. The right to freedom from torture and cruel, inhuman or degrading treatment
3. The right to freedom from slavery and forced labor
4. The right to freedom from discrimination
5. The right to freedom of opinion and expression
6. The right to freedom of assembly and association
7. The right to freedom of movement
8. The right to privacy
9. The right to equal treatment before the law
10. The right to a fair trial
11. The right to freedom from arbitrary arrest and detention

The human rights system protects a whole range of rights and freedoms and prohibits discrimination, including discrimination based on sex. Although, the term “gender identity” does not appear in any basic act of international human rights law. “Gender identity”, insofar as it is understood in isolation from the biological criterion, is an ideological concept to which the human rights system should not succumb.

There is no doubt, that everyone deserves protection from violence and discrimination, regardless of their source. In democratic countries, there can be no question about it. However, two points should be noted.

Firstly, what is a human right derives from the treaties, and the list cannot be arbitrarily extended or interpretated. Secondly, human rights are not equal. Some human rights are more important than others[[1]](#footnote-1). For example, the right to life is considered to be more important than the right to property. This is because the right to life is essential for the enjoyment of all other rights. Human rights are gradable[[2]](#footnote-2).

* 1. Freedom of assembly

According to the author of the report, the right to freedom of assembly can be used to organize gatherings that promote views unfavorable towards certain individuals based on their SOGI, and going further, this can create an atmosphere of fear and intimidation, making it difficult for LGBTQ+ individuals to function in society.

In this regard, it should be noted that it is difficult to comment on such a generally stated thesis. In the event that a given gathering in its conception or motives is inconsistent with Polish law, the competent authority shall issue a decision to ban the gathering[[3]](#footnote-3). Moreover, the assembly may be dissolved at any time if it is found to violate the law[[4]](#footnote-4). Apart from that, if the law is broken at a given gathering, such as through incitement to commit a crime or defamation/insult, the perpetrator is subject to criminal liability under the relevant provisions of the Criminal Code, including, among others, articles 212 or 216.

* 1. The freedom of association

Freedom of association is grounded in the polish Constitution[[5]](#footnote-5) according to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. According to the Law on Associations citizens exercise the right of association in accordance with the provisions of the Constitution and the legal order set forth in legal acts[[6]](#footnote-6).

Under the Polish Constitution[[7]](#footnote-7), associations whose purpose or activities are contrary to the Constitution or the laws are prohibited. Refusal to register or prohibition of such an association is ruled on by the court. Accordingly, if there is an association whose activities would be contrary to the human rights system, it could be dissolved by the court.

* 1. Freedom of expression

Freedom of expression for everyone remains among the most fundamental rights in Poland.

According to Article 54 of the Constitution, everyone is guaranteed the freedom to express his or her views and to obtain and disseminate information. Moreover, preventive censorship of social media and press licensing are prohibited.

The Constitutional Court interpreting Article 54 of the Constitution, pointed out, that the word “view” used in its content, according to the position adopted in the jurisprudence of the Constitutional Court and the doctrine, should be interpreted as broadly as possible, not only as an expression of personal judgments about facts, but also conjectures and opinions[[8]](#footnote-8). According to the Court, Article 54 (1) of the Constitution protects all lawful forms of expression that allow an individual to externalize and expose his own position, while living in a society in which freedom of speech is protected teaches tolerance for different opinions and behavior different from our own, which is essential for the normal functioning of a pluralistic society[[9]](#footnote-9).

* 1. Protection from discrimination and violence based on sexual orientation or “gender identity”

Protection against violence (both verbal and physical) on the territory of Poland has a very broad scope, as it is enjoyed by every person, regardless of their individual characteristics, such as sexual orientation, sex, religion or political views, for example.

Most of the provisions guaranteeing such protection can be found in the Criminal Code, which criminalizes insult[[10]](#footnote-10), defamation[[11]](#footnote-11), violation of bodily integrity[[12]](#footnote-12), or battery[[13]](#footnote-13), among others. What's more, regardless of the criminal law, the provisions of the Civil Code guarantee broad protection of personal rights[[14]](#footnote-14), the catalog of which is open and includes, for instance, the protection of one's good name or honor.

As mentioned above, the concept of “gender identity,” insofar as it is interpreted beyond biological criteria, is an ideological concept that does not appear in the Polish and international legal system. In Polish legal system, there is no basis for distinguishing more than two sexes, which are considered equal. Already at the constitutional level, the Polish legislator indicates the prohibition of discrimination and equality of all before the law, regardless of sex: “A woman and a man in the Republic of Poland have equal rights in family, political, social and economic life” and paragraph 2 of the indicated article states: “A woman and a man have, in particular, equal rights to education, employment and promotion, to equal remuneration for work of equal value, to social security, and to hold positions, perform functions and obtain public dignities and decorations.”[[15]](#footnote-15)

Moreover, article 32 states that “Everyone is equal before the law. Everyone has the right to equal treatment by public authorities and no one shall be discriminated against in political, social or economic **life for any reason**”. Thus, it is already prohibited on constitutional grounds to discriminate against a person on any basis.

Indeed, there are many acts in force expressing the prohibition of discrimination, whose addresses are both public and private entities. E.g., the Labor Code contains an exemplary list of legally protected characteristics, including: sex, age, disability, race, religion, nationality, political beliefs, trade union membership, ethnicity, religion, sexual orientation[[16]](#footnote-16). The national legislator has introduced an open catalog of prohibited grounds for unequal treatment in employment, unlike the EU legislator. In fulfilling its obligation to implement EU anti-discrimination directives, it thus raised the protective standard compared to the EU's prohibition of discrimination in the area of employment.

The Equal Treatment Act prohibits discrimination on the basis of sex race, ethnicity, nationality, religion, creed, worldview, disability, age or sexual orientation in the sphere of broadly defined professional activity (with regard to labor employment - to the extent not regulated by the Labor Code) and in the sphere of social security, health care, education and higher education, as well as access to goods and services offered to the public[[17]](#footnote-17).

1. Remarks

It is worth noting that homosexuality has never been penalized in Poland, unlike many other countries, including European. Sexual contacts between people of the same sex were legal since Poland regained its independence and control over the laws of its territory[[18]](#footnote-18). This is because until 1932, Poland did not have its own Criminal Code, but used one that was still imposed from the periods of partition (until 1918, Poland was under partition, and therefore actively occupied by Prussia, Austria-Hungary and Russia, which criminalized homosexuality in their laws).

Fostering open and constructive dialogue between people and communities with different views on SOGI is crucial to bridging divides and promoting mutual understanding. This may include engaging in difficult conversations and seeking common ground. However, this should not and must not mean interfering with the rights of people with different views or restricting their rights, including to promote professed values. While trying to convey and protect one's values, one should not discredit the values of others. Working together, we can create a world in which all people are treated with dignity and respect, regardless of their views, faith, beliefs, sexual orientation or sex.

1. J. Rawls *The Priority of Right and Ideas of the Good*, Philosophy & Public Affairs Vol. 17, No. 4 (1988) [↑](#footnote-ref-1)
2. J. Griffin *On human rights*, New York: Oxford University Press (2008), ISBN(s): 9780199238781 0199573107 7544753891 [↑](#footnote-ref-2)
3. Article 7, Act of July 24, 2015. - Law on Assemblies. [↑](#footnote-ref-3)
4. Article 14, Act of July 24, 2015. – Law on Assemblies. [↑](#footnote-ref-4)
5. Constitution of the Republic of Poland of April 2, 1997. [↑](#footnote-ref-5)
6. Article 1, Act of April 7, 1989. - Law on Associations. [↑](#footnote-ref-6)
7. Article 58, Constitution of the Republic of Poland of April 2, 1997. [↑](#footnote-ref-7)
8. Judgment of May 12, 2008 ref. SK 43/05, [↑](#footnote-ref-8)
9. Ibidem. [↑](#footnote-ref-9)
10. Article 212, Act of June 6, 1997. - Criminal Code. [↑](#footnote-ref-10)
11. Article 216, Act of June 6, 1997 - Criminal Code. [↑](#footnote-ref-11)
12. Article 217 and 217a, Act of June 6, 1997 - Criminal Code. [↑](#footnote-ref-12)
13. Article 158, Act of June 6, 1997 - Criminal Code. [↑](#footnote-ref-13)
14. Article 23, Act of April 23, 1964 - Civil Code. [↑](#footnote-ref-14)
15. Article 33, Constitution of the Republic of Poland of April 2, 1997. [↑](#footnote-ref-15)
16. Article 18 (3a), Act of June 26, 1974 - Labor Code. [↑](#footnote-ref-16)
17. Act of December 3, 2010 on the implementation of certain provisions of the European Union on equal treatment. [↑](#footnote-ref-17)
18. Decree of the President of the Republic of 11 July 1932. - Criminal Code. [↑](#footnote-ref-18)