



Submission for the report of the independent expert on protection against violence and discrimination based on sexual orientation and gender identity on freedom of religion or belief and freedom from violence and discrimination based on sexual orientation and gender identity

Overall Considerations

1. Debates on the use of the terms “sexual orientation” and “gender identity” are often conducted with the assumption that these notions are clearly defined in science and law. In fact, there is no scientific consensus on how to define these as they are highly subjective and fluid categories; very few countries treat individuals that identify as LGBT as a discrete class of persons, and many proscribe homosexual conduct because of moral and public health concerns.¹

2. The increasing tension between religious freedom and the claims of advocates of new rights *based* on individual sexual preferences and subjective notions of gender identity springs from failure to appreciate the difference between, in the first instance, equality before the law, which applies to all generally applicable laws, policies and official government acts, and, in the second instance, special protections for certain categories of behavior in international human rights law (i.e. freedom of conscience and religion and the right to freely marry and found a family) which are clearly defined in international human rights instruments.

3. All human beings possess the same fundamental human rights by virtue of their inherent dignity and worth (UDHR, Preamble and Article 1), including the right to equal protection of the law without any discrimination (UDHR, Article 7). Individuals who identify as lesbian, gay, bisexual, transgender, queer, etc., are protected from violence and discrimination to the same extent as any individual under equal protection principle in human rights law. However, they

¹ See the Amicus Brief of Dr. Paul McHugh in the U.S. Supreme Court case of *Hollingsworth v. Perry* (containing a detailed discussion of the science relating to gender and sexuality in the context of U.S. law), available at: http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-144-12-307_merits-reversal-dpm.authcheckdam.pdf; See also LAWRENCE S. MAYER & PAUL R. MCHUGH, *SEXUALITY AND GENDER: FINDINGS FROM THE BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL SCIENCE* 104 (2016) (containing a detailed discussion of the science relating to gender and sexuality in relation to individual and public health), https://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf [<https://perma.cc/S2WE-TUWD>].

are not entitled to special protections *based* on their sexual preferences and subjective gender identity as such.

4. Sexual preferences and behaviors are not protected by international human rights law except in the context of the right of men and women to freely marry and found a family (UDHR, Article 16). The wide range of diverse laws regulating sexual mores and public health that exist in different countries and the widely held understanding of the family as the natural and fundamental group unit of society attest to this fact.²

5. Freedom of conscience and religion are among the highest principles of international human rights law (UDHR, Article 18). The International Covenant on Civil and Political Rights protects the freedom of thought, conscience and religion absolutely, including with regard to the right of parents to teach their children such beliefs. It only allows limits on the right to “manifest one's religion or beliefs” that are “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” (ICCPR, Article 18).

6. The questionnaire presented by the independent expert elevates “sexual orientation and gender identity” as fundamental human rights categories to the point of assuming that freedom of conscience and religion may be curtailed. This is erroneous as a matter of law.

7. The notions of “sexual orientation” and “gender identity” are not addressed by international human rights law. They were never included by UN member states in painstakingly negotiated international human rights treaties. To the extent that these notions exist subjectively in the conscience of individuals, they cannot be regulated or curtailed under ICCPR, article 18, but to the extent that they are manifested as behaviors, they are not specially protected as fundamental rights and freedoms under international human rights law in the same way as freedom of religion or the right to freely marry and found a family, which are expressly described and protected.

8. Basic principles of legal interpretation require human rights to be interpreted as broadly as possible, and oblige states to restrict human rights as little as possible and only for valid reasons.³ Applying an analysis based on ICCPR, article 18, any public manifestation of “sexual orientation and gender identity” may be curtailed by governments when it is necessary to protect “public safety, order, health, or morals or the fundamental rights and freedoms of

² The Universal Declaration of Human Rights (UDHR) defines the family as “the natural and fundamental group unit of society” and declares that it is “entitled to protection by society and the State” UDHR 16. The International Covenant on Civil and Political Rights (ICCPR 23), the International Covenant on Economic, Social, and Cultural Rights (ICESCR 10.1), and the Convention on the Rights of the Child (CRC, Preamble) reflect the UDHR verbatim in their provisions. These binding international norms have not gone unheeded. At least 111 countries have constitutional provisions that echo Article 16 of the UDHR. See World Family Declaration, available at <http://worldfamilydeclaration.org/WFD>.

³ Office of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights Handbook for National Human Rights Institutions*, p. 35 (“According to general principles of interpretation, human rights should be interpreted as broadly as possible and restrictions on rights should be interpreted as narrowly as possible”) available at: <https://www.ohchr.org/Documents/Publications/training12en.pdf>.

others.” The fundamental rights and freedoms that must be protected in the broadest possible sense in the context of an ICCPR 18 analysis include the right to freedom of religion and belief, the right to freely marry and found a family, the right of parents to direct the upbringing of their children, the right of children to know and be cared for by their mother and father, the right of individuals to manifest their religious beliefs in their workplace and in public life, and other fundamental rights and freedoms expressly recognized in international human rights law.

9. In the clash between the subjective self-identification or behaviors of an individual or group of individuals based on “sexual orientation” and “gender identity,” on the one hand, and the manifestation of religious belief by an individual or group, on the other, it is the latter that must be protected, because only the latter is expressly established in international human rights law as a fundamental right and freedom. Moreover, as was observed above, sexual preferences and behavior are not protected by international human rights law outside of the right to freely marry and found a family.

10. The following responses are provided to the questionnaire presented by the independent expert, in line with the legal principles outlined above.

RESPONSES TO QUESTIONNAIRE

QUESTION 1. There is an increasing tension between religious freedom, on one hand, and the treatment of unfettered sexual autonomy as a human right and special new gender protections based on subjective self-identification, on the other. This tension manifests itself especially in the following contexts: First, the rights of parents to direct the upbringing of their children in line with their religious and conscientious convictions, including their ability to teach children that same-sex sexual behavior is contrary to the moral law and that their biological sex is not a mere accident that can change based on subjective feelings or perceptions. Second, the right of communities to adopt laws to protect public health and morals in line with their religious and conscientious conviction, especially for children. Both of these rights are implicated in laws that are being adopted around the world to limit the exposure of children to pornography, homoerotic propaganda, or materials promoting a nonbinary or fluid concept of gender. Third, the right of the child to know and be cared for by his or her mother and father, which is related and complementary to the right of parents to direct the upbringing of their children in line with their religious convictions. Fourth, the rights of individuals and organizations to operate according to their religious convictions in public and private life, including the conviction that marriage is the union of a man and woman, that sexuality should be exclusively reserved for marriage, and that the family is the natural and fundamental group unit of society. This includes the possibility of expressing the view that same-sex sexual acts are immoral and that individuals experiencing gender dysphoria should be encouraged and helped to be comfortable with their biological sex and acting in accordance with such views.

QUESTION 2. To the extent that LGBT advocates for new rights insist on tolerance and mercy and against all forms of violence, they are compatible with many if not most religions, even if

they differ on sexual mores. The tension is made more difficult when advocates seek to impose and even coerce social acceptance by applying the label “hate speech” to any moral or religious objections to homosexuality and transgender ideology and practices, or by curtailing the rights summarily described in Question 1.

QUESTION 3. The Catholic Church has been one of the foremost promoters of tolerance and mercy regarding individuals who identify as lesbian, gay, bisexual, transgender, queer, etc., even as it has taught that behaviors associated with these identifications are immoral. This is sometimes expressed colloquially as “the Church loves the sinner but not the sin.” For example, in 2021, the Congregation for the Doctrine of the Faith, which is the highest doctrinal authority under the Holy Father Pope Francis, responded to an official question regarding blessings of homosexual unions with compassion and understanding.⁴ At the same time, Pope Francis recently expressed frustration with the promotion of gender ideology and controversial social policies through the UN system.⁵

QUESTION 4. It must be noted that not all practices that may be claimed as discriminatory or abusive by LGBT advocates are in fact violations of human rights. In the United States of America there are now several instances of artists, bakers, or wedding services providers who refuse to participate in celebrations of same-sex weddings or transgender “reveal” parties. Similarly, many parochial and private schools may have code of conducts or ethics policies for their teachers requiring them to agree to live by religious and moral codes that may exclude homosexual and transgender behavior. There are also instances where faith-based adoption agencies refuse to facilitate the adoption of children by individuals in a same-sex union or marriage. Moreover, there are increasing instances of medical professionals who object to participate in transgender-affirming medical procedures or treatments.

QUESTION 5. Legitimate regulation related to marriage and adoption based on religious convictions or a traditional view of marriage are consistent with human rights laws. The Universal Declaration of Human Rights and binding international instruments reserve singular protections for the family as the union of a man and a woman. Relations between individuals of the same sex and other social and legal arrangements that are neither equivalent nor analogous to the family are not entitled to the protections singularly reserved for the family in international law and policy.⁶

QUESTION 6. The European Court of Human Rights has said on multiple occasions that marriage is understood in the union between a man and a woman. *See HÄMÄLÄINEN v. FINLAND*, no. 37359/09, § 71, ECHR 2014; *SCHALK AND KOPF v. AUSTRIA*, no. 30141/04, § 101, ECHR

⁴ Responsum of the Congregation for the Doctrine of the Faith to a dubium regarding the blessing of the unions of persons of the same sex, 15.03.2021, available at:

<https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2021/03/15/210315b.html>.

⁵ Pope Francis Criticizes Western Sexual Agenda at the UN, Friday Fax (January 12, 2023), available at: https://c-fam.org/friday_fax/pope-francis-criticizes-western-sexual-agenda-at-the-un/.

⁶ For a more complete discussion of this, see THE FAMILY ARTICLES AND EXPLANATORY FOOTNOTES, available at: <https://civilsocietyforthefamily.org/>.

2010; *HÄMÄLÄINEN v. FINLAND*, § 96; *REES v. UK*, § 49; *REES v. UK*, § 49). It should be noted that the Court has elsewhere inconsistently applied the term “family” to relations between individuals of the same sex.

Conversely, the U.S. Supreme Court declared in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), that the U.S. Constitution requires same-sex marriage. Nevertheless, the Supreme Court decided in *Fulton v. Philadelphia*, 593 US _ (2021) that faith-based adoption agencies may set religious-based marriage criteria for adoption, excluding homosexual couples. Neither case considered human rights law as dispositive.

QUESTION 7. Some countries are adopting laws that require faith-based adoption agencies to allow same-sex couples to adopt children, without any accommodation for refusal. Recently, countries have begun to debate and adopt laws that would remove custodial rights from parents who refuse to allow their children to take on transgender identity, or access transgender hormonal treatment and sex change operations. These laws are still very novel, and legal challenges are still being evaluated in courts.

QUESTION 8. See responses to Question 4.

Of note, in 2020, the Special Rapporteur on Freedom of Religion and Belief circulated a report on the subject of religious freedom and gender, in which he cited the work of the human rights treaty bodies in insisting that laws protecting religious freedom not have the effect of denying health services including operations to affirm a patient’s transgender identity.⁷ Similarly, the independent expert preparing this report has previously characterized the teaching of the Catholic Church about the complementarity of the sexes can “foster violence and discrimination”, even suggesting complicity, is highly problematic.⁸ These opinions are deeply lamentable because of the considerations above in the general legal section.

QUESTION 9 and 10. The premise of these questions appears to be that religious and conscience rights may be curtailed whereas sexual orientation and gender identity-based rights may not. For the reasons laid out in the general legal section above this is erroneous as a matter of law.

QUESTION 11. GOOD PRACTICES. As noted above in Question 2, the Catholic Church has long-advocated a compassionate pastoral care for those who experience same sex-attraction or gender-dysphoria, including by condemning all forms of violence and social rejection, even as it has maintained moral teachings that characterize homosexual acts as morally wrong.⁹ There are several organizations that help individuals who experience same-sex attraction or gender

⁷ United Nations. Office of the High Commissioner for Human Rights. Freedom of religion or belief - Report of the Special Rapporteur on freedom of religion or belief. A/HRC/43/48, 2020.

⁸ Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, Practices of exclusion, UN Document No. A/76/152, paragraph 21.

⁹ See Catechism of the Catholic Church, sections 2357-2359.

dysphoria participate in the life of the Catholic Church in line with the Church's teachings; most notable among these is the organization Courage International.¹⁰

¹⁰ <https://couragerc.org/>