

Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the right to privacy; the Special Rapporteur on freedom of religion or belief; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; and the Working Group on discrimination against women and girls

REFERENCE:
OL HUN 3/2020

15 December 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the right to privacy; Special Rapporteur on freedom of religion or belief; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 42/16, 37/2, 40/10, 41/18 and 41/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **proposed bills restricting the notion of family to opposite-sex couples; excluding same-sex couples, single persons and non-married opposite-sex couples from adoption; and restricting children's identity to their sex assigned at birth and ensuring an upbringing that "reflects the values based on Hungary's constitutional identity and Christian culture"**.

We would also recall our letter (OL HUN 1/2020), sent on 14 April 2020, concerning a bill that made it impossible for trans and gender diverse people to legally change their sex/gender. We regret that to date we have not received any reply to this communication, which raised substantial concerns in relation to respect of the human rights of trans and otherwise gender diverse persons.

According to the information received:

On 3 November 2020, the Hungarian Government declared a state of emergency for the second time to stem a surge in COVID-19 infections and, on 10 November, the Parliament adopted the Second Authorisation Act.

Only hours after this adoption, the Hungarian Government proposed two bills that raise significant concerns about the human rights of lesbian, gay, bisexual, trans and gender diverse ("LGBT") persons: (i) the Draft Bill T/13647: the Ninth Amendment to the Fundamental Law (the country's constitution adopted in 2011), and (ii) the Draft Bill T/13648: an extensive omnibus bill that covers a range of areas.

(i) *Draft Bill T/13647: the Ninth Amendment to the Fundamental Law*

The draft amendment to the Fundamental Law proposes adding two passages related to same-sex couples as well as trans and gender-diverse children.

First, Article 1 of the Ninth Amendment aims to add the following underlined passage to Article (L) of the Fundamental Law, which enshrines a restrictive interpretation of a family and marriage, by stating that family ties must be based on marriage, where “the mother is a woman and the father is a man”:

Hungary shall protect the institution of marriage, understood to be the conjugal union of a man and a woman based on their independent consent; Hungary shall also protect the institution of the family, which it recognises as the basis for the survival of the nation. Family ties shall be based on marriage and the relationship between parents and children. The mother shall be a woman, the father shall be a man.

Second, Article 3 of the Ninth Amendment proposes to add the following underlined passage to Article XVI (1) of the Fundamental Law, which restricts children’s gender identity to their sex assigned at birth:

Every child shall have the right to the protection and care necessary for his or her proper physical, intellectual, and moral development. Hungary shall protect the children’s right to an identity corresponding to his or her sex at birth and ensures an upbringing for them that reflects the values based on Hungary’s constitutional identity and Christian culture.

According to the explanatory note of the bill, “new, modern ideological processes prevalent in the Western world” endanger constitutional children’s right to protection and care; therefore, legislators must act to “safeguard the child’s identity that exists unchangeably from birth” as part of protecting their right to dignity. It further explains that “sex at birth is an attribute that cannot be changed: People are born either male or female,” using language that appears to coincide with a governmental campaign outlawing trans and gender diverse persons’ identities.

(ii) *Draft Bill T/13648: an extensive omnibus bill*

From the information available, Draft Bill T/13648 sets out that only married couples should be allowed to adopt children. Any exceptions can only be granted on a case-by-case basis by the Minister for Family Affairs. Therefore, since same-sex couples in Hungary cannot enter into marriage, and the Ninth Amendment would apparently underline the restriction to their right to do so, the bill would have the effect of making it impossible for same-sex couples to adopt children. Also, the bill would exclude single persons and non-married opposite-sex couples from adoption.

On 17 and 18 November 2020, the Hungarian Parliament discussed the proposed amendments. According to information at our disposal, the final adoption is expected to take place by mid-December 2020.

On 19 May 2020, the Parliament passed a law making it impossible for trans and gender diverse people to legally change their sex/gender, despite the concerns we expressed in our letter OL HUN 1/2020.

No abuse of emergency measures to suppress human rights

First, we would like to remind your Excellency's Government of our letter (OL HUN 1/2020) and reiterate that emergency declarations based on public health concerns, even in the current challenging context of the COVID-19 pandemic, should not be used as a basis to discriminate against persons, communities or populations. As stated by the United Nations High Commissioner for Human Rights, "measures to contain and combat the spread of COVID-19 should always be carried out in strict accordance with human rights standards and in a way that is necessary and proportionate to the evaluated risk".¹

Same-sex couples' right to found a family

Also, we wish to express our concern that limiting the notion of family and marriage to heterosexual couples would give rise to discrimination against same-sex couples and exacerbate stigma and discrimination against diverse families.

The principles of equality and non-discrimination are part of the foundations of the rule of law and human rights. Under articles 1 and 2 of the Universal Declaration of Human Rights ("UDHR"), "[a]ll human beings are born free and equal in dignity and rights", and "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". This principle is reaffirmed by other human rights treaties, including Article 2 (1) of the International Covenant on Civil and Political Rights ("ICCPR"), ratified by Hungary on 17 January 1974, and Article 2 (2) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), ratified by Hungary on 17 January 1974.

Pursuant to Article 26 of the ICCPR, States have a positive obligation to ensure that all persons are equal before the law and are entitled without discrimination on any grounds, including sexual orientation, to the equal protection of the law (*See*, for instance, *Toonen v. Australia*, CCPR/C/50/D/488/1992, para. 8.7). In this connection, couples, regardless of sexual orientation or gender identity, should be provided legal recognition. Regardless of the form of relationship recognition, States are obliged to address discrimination in this area by, *inter alia*, ensuring that benefits traditionally accorded to married partners are accorded on a non-discriminatory basis (*See*, for instance, *Young v Australia*, Merits, Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000).

In this vein, we would like to recall the Concluding Observations of 9 May 2018 of the Human Rights Committee, in which it expressed its concern that the ban on discrimination in the Fundamental Law does not explicitly list sexual orientation and gender identity among the grounds of discrimination, and that its restrictive definition of family may give rise to discrimination, since it does not cover certain types of family arrangements, including same-sex couples (CCPR/C/HUN/CO/6, para. 20). In light of

¹ Press release by the United Nations High Commissioner for Human Rights "Coronavirus: Human rights need to be front and centre in response, says Bachelet" (March 2020), available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25668&LangID=E>.

this, the Committee recommended that Hungary (i) prohibit discrimination on all grounds, including sexual orientation and gender identity, and in all spheres and sectors, including marriage and family arrangements, and (ii) take the necessary measures to curb discrimination against LGBT persons with regard to family arrangements (*Ibid.*, paras. 20 (a) and (c)).

The Committee on Economic, Social and Cultural Rights has called on States to ensure that individuals in same-sex unions are entitled to equal enjoyment of their economic, social and cultural rights, and same-sex couples have access to advantages now reserved for married couples (E/C.12/MKD/CO/2-4, paras. 25-26 and E/C.12/ITA/CO/5, para. 17. Also, *see* E/C.12/BGR/CO/4-5, para. 17).

Also, the United Nations High Commissioner for Human Rights recommends to States to address discrimination by providing legal recognition to same-sex couples and their children, ensuring that benefits traditionally accorded married partners are accorded on a non-discriminatory basis (A/HRC/29/23, para. 79 (h)).

Further, the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity reveal that under international human rights law, everyone has the right to found a family regardless of sexual orientation or gender identity and families exist in diverse forms (Principle 24 – the right to found a family). In light of this, states shall found a family, including through access to adoption, without discrimination on the basis of sexual orientation or gender identity; and ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration (Principles 24 (A) and (B)).

The Working Group on discrimination against women and girls in its thematic report on family and culture expressed the opinion that the understanding and legal definition of the family in national legislation should be extended to recognise different forms of family. It noted that the recognition of same-sex couples, for both women and men, and other forms of family is an example of good practice that a number of States have already implemented (A/HRC/29/40, para. 25). The Working Group also pointed out that given that State recognition is often a condition for families to receive services and benefits, such as accommodation and protection provided by the State and/or non-State actors, lack of recognition leads to the marginalisation of these families (*Ibid.*, para. 24). It further noted that all legal definitions of the family should include the right to equality, de jure and de facto, of women and girls within the family. Full equality between women and men, and girls and boys, is a requirement of international human rights law and constitutes a right of women that is vital for the well-being of the family and for society as a whole (*Ibid.*, para. 28). To that end, the Working Group recommends States to recognise and protect, in their constitutions and laws, all forms of family, and affirm and protect women and girls' right to equality in family diversity, by adopting and implementing appropriate measures to protect women from exploitation and discrimination in diverse families, particularly women living in vulnerable situations (*Ibid.*, para. 73 (c) (i)).

The European Court of Human Rights has established that differences in treatment between same-sex couples and heterosexual couples in adoption may amount to violations of Article 14 (prohibition of discrimination) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ratified by Hungary on 5 November 1992) (*See, E.B. v. France* (no. 43546/02) and *X and Others v. Austria* (no. 19010/07)). Also, Resolution 2239 (2018) of the Parliamentary Assembly of the Council of Europe calls on Member States to “provide for joint adoption by same-sex couples, without discrimination on the grounds of sexual orientation” (4.5.2).

Children’s right to identity and protection from abuse

We further wish to express our concern that the Ninth Amendment to the Fundamental Law would restrict children’s identity to their sex assigned at birth and impose an upbringing that “reflects the values based on Hungary’s constitutional identity and Christian culture”. Such exclusion would raise significant concerns about children’s right to self-determination with the corresponding heightened stigmatisation and risk of persecution, abuse, violence and discrimination.

The Committee on the Rights of the Child emphasised the rights of all adolescents to freedom of expression and respect for their physical and psychological integrity, gender identity and emerging autonomy. Moreover, it has clarified that the right of the child to identity, which includes sexual orientation and gender identity, must be respected and taken into consideration when assessing the child’s best interests (CRC/C/GC/14, para. 55). The Committee also highlighted the plights of transgender adolescents, who often face persecution, including abuse and violence, stigmatisation, discrimination, bullying, exclusion from education and training, as well as a lack of family and social support, or access to sexual and reproductive health services and information. In extreme cases, they face sexual assault, rape and even death. These experiences have been linked to low self-esteem, higher rates of depression, suicide and homelessness (CRC/C/GC/20, para. 33). The Committee urged States to take effective action to protect transgender adolescents from all forms of violence, discrimination or bullying by raising public awareness and implementing safety and support measures (*Ibid.*, para. 34).

In this vein, we would like to recall the Concluding Observations of 3 March 2020 of the Committee on the Rights of the Child, in which it was concerned about the lack of information on a national strategy to prevent and address all forms of violence against children, including sexual abuse, including specific measures targeting LGBT and intersex (“LGBTI”) children (CRC/C/HUN/CO/6, para. 23 (a)). In light of this and with reference to its general comment No. 13 (2011) on the right of the child to freedom from all forms of violence, the Committee recommended Hungary to develop a national strategy to prevent and address all forms of violence against children, including sexual abuse, paying particular attention to LGBTI children, and to ensure that the strategy clearly informs children about the procedures available for reporting cases of violence (*Ibid.*, para. 24 (a)). Further, the Committee was seriously concerned about the bullying, abuse and exclusion faced by children in schools, in particular LGBTI children (*Ibid.*, para. 35 (d)). Therefore, it recommended Hungary to intensify its efforts to prevent and address bullying in schools, including online bullying, and to provide support to child victims, in particular, LGBTI children (*Ibid.*, para. 36 (d)).

Moreover, international human rights acknowledge that everyone has the right to recognition as a person before the law, including persons of diverse gender identities. Such human treaties include Article 6 of the UDHR, Article 16 of the ICCPR, Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) (ratified by Hungary on 22 December 1980), and Article 8 of the Convention on the Rights to Child (“CRC”) (ratified by Hungary on 7 October 1991).

In this vein, the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity urged States to enact recognition systems for the gender identity of trans and gender diverse children, taking into account the best interests of the child as a primary consideration and respect for the child’s right to express views in accordance with age and maturity, in line with the CRC (Articles 3 (1) and 12 and general comments Nos. 12 and 14) and, in particular, in keeping with the safeguards established pursuant to Article 19 of the Convention, which must not be excessive or discriminatory in relation to other safeguards that give recognition to the autonomy and decisional power of children of a certain age in other areas (A/73/152, paras. 35 and 81 (a)).

Development of personality and the person, gender equality and the right to privacy

We would like to specifically draw the attention of your Excellency’s Government to Article 17 of the ICCPR, which prohibits any “arbitrary or unlawful interference” with the right to privacy. As noted by the Special Rapporteur on the right to privacy, privacy includes gender identity and, “[g]ender identity is integral to personality and important to self-determination, dignity and freedom. Everyone, irrespective of their biological sex, sex characteristics, sexual orientation or gender identity or expression, is entitled to the full enjoyment of the right to privacy” (A/HRC/43/52 paras. 15, 20 (d) (iii)). Further, States should “take all measures necessary to provide a safe environment by protecting the right to privacy to enable the child to develop freely” (*Ibid.*, para. 33 (b)).

We wish to express our concern that these legislative proposals may erode the privacy of gender diverse individuals and as a result, their ability to access other human rights. We are also concerned at the possible implications for the right to bodily integrity of gender diverse children, particularly children with variations in sex characteristics. These children could be subjected to unnecessary medical treatment, including surgery, when their diversity is not respected and protected.

No discrimination against LGBT persons in the name of religion or belief

Traditional, historical, religious or cultural attitudes cannot be used to justify the violation of human rights for LGBT persons. The Special Rapporteur on freedom of religion or belief rejected any claim that religious beliefs can be invoked as a legitimate “justification” for violence or discrimination on the basis of their sexual orientation or gender identity (A/HRC/43/48, para. 69). In light of this, he recommended States: (i) reaffirm that traditional, historical, religious or cultural attitudes must not be used to justify violation of human rights, (ii) combat all forms of violence and coercion perpetrated against LGBT persons justified with reference to religious practice or belief,

and ensure their personal safety and liberty, and (iii) publicly condemn expressions of hostility against, and the perpetuation of harmful gender stereotypes of LGBT persons when “justified” with reference to religious belief; and instead express active support for gender equality (*Ibid.*, paras. 76 (a), (d), and (g)).

In view of the aforementioned observations, we respectfully urge your Excellency’s Government to revoke the proposed bills and repeal them completely as they appear not to be in conformity with international human rights law.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned information.
2. Please provide information as to why these dispositions are being brought forth under the state of exception, and what (if any) if the connection with the exceptional situation under which it has been declared.
3. Please provide information on how the Draft Bill T/13647 and the Draft Bill T/13648 would be compatible with your obligation to ensure that all persons are guaranteed their legitimate right to privacy and provided with equal protection of the law without any type of discrimination, including on the basis of sexual orientation or gender identity, and not to discriminate against certain forms of marriage and family arrangements.
4. Please indicate the measures taken by your Excellency’s Government to provide legal recognition to couples regardless of sexual orientation or gender identity.
5. Please provide details of the assessment of the human rights impacts of these proposed legislative changes, and measures taken to ensure that the implementation of these proposals is not accompanied by increases in discrimination, harassment or violence towards LGBT individuals, of any age.
6. Please provide the full details of how denial of trans and gender-diverse children’s identity and imposition of a specific set of values that would de facto stigmatise sexual and gender diverse children and increase violence and discrimination against LGBT children and adolescents would be compatible with your obligations under the international legal framework of human rights law and standards including, among other things, ICCPR, CEDAW, and CRC. Especially, please explain how such denial would be compatible with Articles 3 (1) (the best interests of the child), 8 (the right to preservation of identity), 12 (freedom of expression), and 19 (protection from abuse) of CRC.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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