

The Relationship between FoRB and SOGIE Rights

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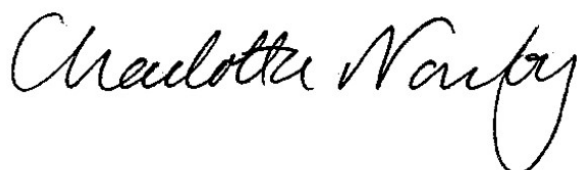
Foreword

On behalf of the SMC – Faith in development, I am very thankful for this report on the relation between FORB and SOGIE rights from a perspective of international human rights law, political developments at the UN level, and how some selected Christian development FBOs are dealing with this issue.

For the SMC network, this report is one very important bit of the puzzle as we start to unpack the relationship between FORB and SOGIE rights as a learning priority. I am confident that it will be a great help for us in our aim to create meeting spaces for dialogue and cooperation on relevant, and sometimes highly complex issues, relating to mission, international development and the role of religion in society.

The SMC network is a platform for ecumenical cooperation between different Christian traditions. Our 29 member organisations and churches have local partners in more than 50 countries from all church families as well as interreligious and faith-based secular partnerships. This breadth is our strength as we see our differences as an asset, challenging us to learn from each other in order to work together in God's mission.

FORB and religious literacy are two of our expert areas and we are a member of the NORFORB network and consortium partner to www.forb-learning.org.

A handwritten signature in black ink, reading "Charlotta Norrby". The script is fluid and cursive, with a large loop at the end of the last name.

Charlotta Norrby,
General secretary
SMC – Faith in Development

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Disclaimer

The following report has been written by the authors in their personal capacity. The report was submitted to the SMC in May 2022 and have since then been processed internally with SMC board and staff before being made public in May 2023. This report has been produced with economic support from Sida. Sida is not responsible for any of its contents.

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1. Introduction

SMC - Faith in Development (SMC) commissioned a study "to provide a factual and descriptive context analysis of the **legal**, **political** and **practical** implications related to freedom of religion or belief (FoRB) and Sexual Orientation and Gender Identity and Expression (SOGIE) rights."¹ The report has three main objectives:

- 1) increase the SMC secretariat and board's knowledge about international law, politics, contextual realities and sector praxis in relation to rightsholders, including people who identify as LGBTQ+, and FoRB (short-term);
- 2) increase capacity for the SMC secretariat and board to, in a conflict-sensitive and human rights-based manner with maintained religious literacy, manage continued internal and external dialogues in relation to FoRB and SOGIE rights (mid-term); and
- 3) increase the capacity of the SMC as a whole to carry out more efficient and relevant international development cooperation and mission from a holistic perspective (long-term).²

The report does not intend to be comprehensive. Given the size constraints (originally intended to be 30 pages maximum),³ it was not possible to analyse in detail all the points raised in the first objective alone. To illustrate this point, if we were to focus only on legal aspects of the relationship between FoRB and SOGIE rights, we would have to analyse several cases brought to courts disputing these rights, including:

- Can a public officer deny services to LGBT+ persons because of their beliefs?⁴
- Can a business deny services to LGBT+ persons?⁵
- Can a person be accused of homophobia for quoting a religious text?⁶
- Can believers express religious views that may consider LGBT+ behaviour as 'wrong' or 'sinful'?⁷
- Is it religious hate speech when LGBT+ persons criticise or mock religious institutions or religions?⁸
- Can a state prohibit Pride parades in order to protect the feelings of religious believers?⁹
- Can a religiously affiliated University deny the enrolment of LGBT+ persons?¹⁰
- Are Faith-based Organisations (FBOs) required to hire LGBT+ persons?¹¹

¹ SMC, *Terms of Reference: Study on FoRB and SOGIE rights in relation to Christian faith-based development cooperation and mission* (2021), p 2.

² *ibid.*

³ *ibid.*, p 4.

⁴ *Eweida and Others v UK* Apps nos 48420/10, 36516/10, 51671/10, and 59842/10 (ECtHR, 15 January 2013), paras 23–30, 70–72, and 102–106.

⁵ *Lee v UK* App no 18860/19 (ECtHR, 07 December 2021).

⁶ 'Helsinki Court Dismisses Christian Democrat Mp's Incitement Case' (*YLE News*, 31 March 2022) <<https://yle.fi/news/3-12382657>> accessed 11 April 2022.

⁷ *R (on the Application of Ngole) v University of Sheffield* Case no C1/2017/3073 (UK Court of Appeal, 03 July 2019) [2019] EWCA Civ 1127.

⁸ 'Polish Court Acquits LGBT Activists in Rainbow Virgin Mary Case' (*DW*) <www.dw.com/en/polish-court-acquits-lgbt-activists-in-rainbow-virgin-mary-case/a-56749372> accessed 04 April 2022.

⁹ *Zhdanov and Others v Russia* Apps nos 12800/08 et al (ECtHR, 16 July 2019).

¹⁰ *Law Society of British Columbia v Trinity Western University* case no 37318 (Supreme Court of Canada, 15 June 2018) [2018] 2 SCR 293

¹¹ *Pavez Pavez v Chile* (Inter-American Court of Human Rights, 4 February 2022) Series C No 449.

This is only a brief list of cases. There could be many other potential legal issues related to religious same-sex marriage and conversion therapy.¹² In this manner, we chose a more principled approach, in order to help increase the knowledge of SMC on the subject. Then, based on this preliminary study, SMC can later develop more comprehensive studies in one or more of the specific areas mentioned above.

1.1 Methodological Notes and Conceptual Remarks

The Research Team comprises legal scholars. We come from different regions and faith backgrounds, but it is also important to emphasise that we have strived to be impartial in the report. We hold to the highest ethical standards of academic integrity in research and observed principles of excellence, honesty, integrity, cooperation, accountability, and safety when researching for this report, as already indicated in our proposal.

An important limitation defined by the SMC was that the report was not intended "to provide the SMC secretariat or board with recommendations", it should "remain at the descriptive and analytical level."¹³ Our approach to description and analysis is based on a human rights perspective. Therefore, the selection of sources and analysis largely reflect this methodology. Although we have also researched in other fields, such as social sciences and political sciences, these fields are explored only to support our findings related to human rights law.¹⁴ The opinions expressed in the interviews are of the interviewees alone, unless explicitly mentioned otherwise.

One conceptual clarification at the outset relates to Sexual Orientation and Gender Identity and Expression (SOGIE) rights. We will explore this concept in more detail later. We often refer to SOGIE rights when we refer to the rights of LGBT+ persons. Sexual orientation rights belong to people of all orientations equally, including LGBT+ and heterosexual persons. The prohibition against discrimination in this regard should be understood as symmetrical, that is, protecting everyone equally.¹⁵ In general, the people most affected by discrimination on these grounds are LGBT+ persons. Our interpretation of the Terms of Reference, which did not refer to heterosexuality or cisgender persons as such, was accordingly to focus on LGBT+ persons.

Another conceptual clarification relates to FBOs. It is noted that there is no unanimous definition of what FBOs are, as the term is relatively new.¹⁶ We decided to differentiate FBOs from religious organisations. Religious organisations are faith-based, but the term FBO has been largely used to designate NGOs which are founded and operate on religious values. We decided to focus on questions related to FBOs

¹² On the latter point, see *The Cooper Report - Recommendations on Legislating Effectively for a Ban on Conversion Practices* (The Ozzane Foundation, 2021)

¹³ SMC, *Terms of Reference* (2021) p 3.

¹⁴ The technical term for this approach is instrumental interdisciplinarity. See Julie Thompson Klein, 'A Taxonomy of Interdisciplinarity' in Robert Frodeman (ed) *The Oxford Handbook of Interdisciplinarity* (OUP 2010) p 23.

¹⁵ See further Robert Wintemute, *Sexual Orientation and Human Rights* (Clarendon Press 1995) pp 6-18.

¹⁶ See further Matthew Clarke and Vicki-Anne Ware, 'Understanding faith-based organizations: How FBOs are contrasted with NGOs in international development literature' (2015) 15 *Progress in Development Studies* 37.

working in development, and focused specifically on Christian development FBOs, even though we mention in the study some examples of FBOs that are not Christian, and some that do not work exclusively on development issues. Our decision was mostly based on the parameters set by SMC – Faith in Development. Under the case studies, we offered description and analysis of the relationship between FoRB and SOGIE rights in Kenya, Colombia, and Bangladesh and in the work of "four Christian development FBOs".¹⁷ Since SMC is an FBO and its partners in the countries mentioned above are also Christian development FBOs, we decided to make the study more focused on those issues.

Christian FBOs are supported by churches and persons of faith with varied perspectives on SOGIE rights. However, FBO functions and mandates are often different than that of churches. For example, a Christian FBO doing humanitarian work cannot refuse to help people because of their sexual orientation, even if the staff of the FBO (or the churches supporting the FBO, or the members of these churches) may oppose same-sex relationships. A lot of the questions mentioned above become less relevant for three main reasons:

- 1) Development FBOs are not generally involved in the celebration of marriages or perform conversion therapy. However, since questions of same-sex marriage and conversion therapy are relevant to some of SMC's members, these issues are briefly discussed.
- 2) It is usually individual persons, not churches or organisations, who raise questions regarding hate speech or the provision of services.
- 3) FBOs working in development cannot discriminate against their beneficiaries and have long adopted this stance in their work.

The most pertinent question in this discussion for FBOs relates to hiring practices. All other issues relate more to a matter of personal conscience or choices in offering services, and it is not for the Team to issue an opinion on these practices. Furthermore, despite a lot of media attention on international cases in this area, several of the questions raised above do not have a strong precedent in international law. There may be ad hoc decisions around FoRB and SOGIE rights that arise in different places, but there is no solid jurisprudence that provides us with any legal certainty on those matters. This does not lend itself to an easy list of 'dos and don'ts' for FoRB actors, but requires us to observe emerging trends.

1.2 Structure

The Team decided to follow the structure provided by SMC in its Terms of Reference for this project and explore the topic in question from **legal**, **political**, and **practical** perspectives. We used the OSCOLA referencing style for references.

Regarding the **legal** questions concerning the relationship between FoRB and SOGIE rights, the theoretical legal framework is straightforward in defining that, by the mere fact of being human rights, both these and other rights are "universal, indivisible and interdependent and interrelated." The whole provision is even clearer in what this principle entails:

¹⁷ SMC, *Terms of Reference* (2021), p 3.

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. **While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.**¹⁸

While the maxim above has often been echoed in human rights circles, it has not always been followed. In order to not lose focus and clarity, we start by examining the fundamentals of FoRB and SOGIE rights in international law. We have decided to focus on three main sets of rights. First, the rights to equality and non-discrimination, as it applies to both religion and sexual orientation. Then we explore the right of everyone – LGBT+ and heterosexual, religious or non-religious, members of minorities or majorities – to FoRB. Finally, we turn to SOGIE rights. By stepping back and providing a strong legal framework, we avoided getting caught up in particular polarised disputes (whether raised by members of religious or LGBT+ groups) while at the same time grounding those debates in international human rights law.

The second chapter focuses on the political aspects of the increased challenges that both FoRB and SOGIE rights have faced. Once again, this analysis is kept general, as we intend to describe the main political characteristics that have emerged from debates concerning the relationship between FoRB and SOGIE rights. The discussion is centred mainly on formal positions taken by states at multilateral fora, as such positions often reflect the clearest evidence of the relevant political dynamics. As with the first chapter, this fundamental analysis can help with more specific issues regarding the relationship between FoRB and SOGIE rights.

Finally, we interviewed representatives of four international Christian FBOs, and one human rights consultant who specialises on SOGIE rights, in order to better understand their perspective on this topic, as well as to cross-check the relevance of our findings to their practice. We also intended to look into the practice of FBOs in Colombia, Bangladesh, and Kenya; nevertheless, despite reaching out to more than a dozen FBOs and NGOs, we did not receive positive responses. Furthermore, none of the representatives of the four FBOs interviewed could comment on these countries. Therefore, we offer a desk-based study of these countries regarding the matters in question. To keep the study impartial, we used discussions at the UN as a guide, as it includes inputs from various FBOs and different political views.

Our opinion is more clearly elaborated in the conclusion, which serves as a summary of the main findings of the report. Since we were not to provide recommendations to SMC, we mentioned a few generic suggestions to FBOs in the conclusion.

¹⁸ UNGA, 'Vienna Declaration and Programme of Action' (12 July 1993) A/CONF.157/23.

2. The Legal Status of FoRB and SOGIE Rights

FoRB and SOGIE rights have been referred to as "parallel claims".¹⁹ They share some features of their legal status in the sense that neither set of rights is upheld in a standalone binding human rights treaty, in contrast with child rights and the prohibition of torture, for example. Both sets of rights are protected through provisions of general human rights treaties and other instruments.

In this section, the Research Team examines three aspects of the relevant legal doctrine. It first considers general non-discrimination and equality provisions that apply to both sets of rights. This section focuses specifically on the way the principle of non-discrimination has been interpreted to include sexual orientation and gender identity. The Team next examines the legal provisions on FoRB. This section also explores the doctrines of religious autonomy and reasonable accommodation. We then examine the legal doctrine relevant to SOGIE rights. It finally analyses some of the convergences and potential points of tension between these strands within the law.

2.1 Non-Discrimination and Equality

Non-discrimination and equality serve as cornerstones of human rights law. On the one hand, the rights to non-discrimination and equality are crucial standalone rights that have specific relevance to FoRB and SOGIE rights. For instance, persons are entitled not to be discriminated on the grounds of their religious identity, sexual orientation, or gender identity. On the other hand, these rights shape the way limitations on rights are interpreted and applied. For example, when limiting a particular manifestation of FoRB, the principle of non-discrimination also needs to be complied with. This principle has now been read into the test by the Human Rights Committee test – the UN body responsible for monitoring the implementation of the ICCPR – on the permissibility of any limitations to FoRB,²⁰ ensuring that discriminatory applications of limitations on FoRB are found to be inconsistent with international law. The same principle has been applied to expressions concerning sexual orientation. For instance, the Human Rights Committee has indeed found that limitations on the freedom of expression cannot be imposed in a manner that is discriminatory on the basis of sexual orientation. A further discussion of this jurisprudential development can be found below.²¹

The scope of the protection of equality and non-discrimination is intended to be broad. Yet the manner in which these principles apply to religion, sexual orientation, and gender identity and expression appear to vary. While "religion" is explicitly mentioned in most non-discrimination or equality provisions, SOGIE rights have not, but they

¹⁹ William N Eskridge, and Robin Fretwell Wilson, and Yale Law School, *Religious Freedom, LGBT Rights, and the Prospects for Common Ground* (Cambridge University Press 2019), p 6.

²⁰ See *Miriana Hebbadj v France* Comm No 2807/2016 (Human Rights Committee, 17 July 2018) CCPR/C/123/D/2807/2016; *Sonia Yaker v France* Comm No 2747/2016 (Human Rights Committee, 17 July 2018) CCPR/C/123/D/2747/2016. See also Human Rights Committee, 'General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)' (30 July 1993) CCPR/C/21/Rev.1/Add.4, para 8, "Limitations may not be imposed for discriminatory purposes or applied in a discriminatory manner".

²¹ *Fedotova v the Russian Federation* Comm No 1932/2010 (Human Rights Committee, 31 October 2012) CCPR/C/106/D/1932/2010.

have gradually come to be implicitly protected under the categories of "sex" or "other status".

The explicit inclusion of "religion" in non-discrimination provisions can be found in article 2 of the Universal Declaration of Human Rights (UDHR).²² Although the provisions of the UDHR were not intended to have legal force, this right is included in the twin Covenants that were put forward as the binding treaties giving force to the rights upheld in the UDHR. Accordingly, articles 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR) include religion as a ground of non-discrimination.²³ The Human Rights Committee has meanwhile offered important commentary on the scope of these rights, and has clarified that article 26 prohibits "any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground."²⁴

Apart from the ICCPR, non-binding (soft law) documents, such as the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination (1981 Declaration), provide more details about the scope of FoRB. Article 2 of the 1981 Declaration²⁵ recognises that FoRB intolerance and discrimination may ensue from "any State, institutions, group of persons, or person on the grounds of religion or belief"; and intolerance and discrimination based on religion or belief is defined as "any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis". This intolerance and discrimination on the grounds of religion or belief is recognised as constituting "an affront to human dignity".

As mentioned above, and in contrast to the explicit inclusion of religion as a prohibited ground of discrimination, sexual orientation and gender identity have been read into the legal doctrine as prohibited grounds. It is important to note that treaties themselves and binding case law are to be considered "hard law", and that the views of treaty bodies (i.e., international expert bodies established by the treaties themselves to supervise the implementation of the treaties) are considered "soft law" sources. For instance, Human Rights Committee itself has opined that the purpose of its general comments is to promote the implementation of the Covenant, to draw the attention of states parties to insufficiencies disclosed by a large number of state party reports, to improve reporting procedure, and "to stimulate the activities of these States and international organisations in the promotion and protection of human rights".²⁶ It is thus noted that, although the work of treaty bodies are not binding on states, they remain important persuasive sources of international law.

²² UNGA, 'Universal Declaration of Human Rights' (10 December 1948), article 2.

²³ 'International Covenant on Civil and Political Rights' (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 [ICCPR], article 2(1).

²⁴ Human Rights Committee, 'General Comment No. 18: Non-Discrimination' (10 November 1989), para 1.

²⁵ UNGA, 'Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief' (25 November 1981) A/RES/36/55, paras 2.1, 2.2 and 3.

²⁶ Human Rights Committee, 'Report of the Human Rights Committee' in *Official Records of the General Assembly*, 36th Session, Supplement No 40 (A/36/40), annex VII, introduction; Human Rights Committee, *General Comments Adopted by the Human Rights Committee under Article 40, paragraph 4, of the International Covenant on Civil and Political Rights*, 19 May 1989, CCPR/C/21/Rev.1.

The grounds of "sex" and "other status" found in the ICCPR, and in article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been interpreted to include sexual orientation and gender identity.²⁷ The Human Rights Committee in its jurisprudence, for instance, has suggested that "prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation".²⁸ In *Toonen v Australia*, which concerned Tasmania's criminalisation of same-sex conduct, it noted that, in its view, the reference to "sex" in article 26 and article 2(1) "is to be taken as including sexual orientation".²⁹ Moreover, in *Fedotova v Russian Federation*, the Committee considered legislation in Russia that prohibited the advocacy of same sex equality in certain public places such as schools. The author of the communication to the Committee complained that her freedom of expression was violated by the prohibition, and by her prosecution and conviction for advocating for same sex equality outside a secondary school. The Committee found a violation of her freedom of expression and her right to non-discrimination on the grounds of sexual orientation.³⁰

Several other treaty bodies have also observed that sexual orientation and gender identity are prohibited grounds of discrimination. The Committee on Economic Social and Cultural Rights observes in its General Comment No. 20 that sexual orientation is included in the non-discrimination provision in article 2(2) of the ICESCR.³¹ Moreover, the Committee has, in several general comments, recognised the inclusion of sexual orientation and gender identity within the scope of non-discrimination. For example, in General Comment No. 15, the Committee recognised that grounds of non-discrimination with respect to the right to water include sexual orientation.³² In General Comment No. 23, it also recognised that non-discrimination in terms of the right to employment in article 7 (which guarantees equal remuneration for the same or similar jobs), includes a number of grounds as well as sexual orientation and gender identity.³³ In General Comment No. 22, it also noted that article 12, which recognises the right to the highest attainable standard of health requires that persons are not discriminated on the basis of sexual orientation.³⁴ It specifically observes that "the right to sexual and reproductive health ... also encompasses the right of all persons, including lesbian, gay, bisexual, transgender and intersex persons, to be fully respected for their sexual orientation, gender identity and intersex status".³⁵ Moreover, it recognised that "sexual orientation, gender identity, or intersex status"

²⁷ 'International Covenant on Economic, Social and Cultural Rights' (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 [ICESCR], article 2.

²⁸ *Toonen v Australia* Comm no 488/1992 (Human Rights Committee, 31 March 1994) CCPR/C/50/D/488/1992, para 8.7; *Edward Young v Australia* Comm no 941/2000 (Human Rights Committee, 6 August 2003) CCPR/C/78/D/941/2000, para 10.4; and *X v Colombia* Comm no 1361/2005 (Human Rights Committee, 30 March 2007) CCPR/C/89/D/1361/2005, para 7.2.

²⁹ *Toonen v Australia*, para 8.7.

³⁰ *Fedotova v the Russian Federation*, Comm no 1932/2010 (Human Rights Committee, 31 October 2012), CCPR/C/106/D/1932/2010, para 10.5.

³¹ Committee on Economic Social and Cultural Rights, 'General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2(2))' E/C.12/GC/20, para 32.

³² Committee on Economic Social and Cultural Rights, 'General Comment No 15: The Right to Water (Arts. 11 and 12)' (20 January 2003) E/C.12/2002/11, para 13.

³³ Committee on Economic Social and Cultural Rights, 'General Comment No 23: On the Right to Just and Favourable Conditions of Work (Art. 7)' (27 April 2016) E/C.12/GC/23, para 10.

³⁴ Committee on Economic Social and Cultural Rights, 'General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (11 August 2000) E/C.12/2000/4, para 18.

³⁵ Committee on Economic Social and Cultural Rights, 'General Comment No 22 on the Right to Sexual and Reproductive Health' (2 July 2009) E/C.12/GC/22, para 23.

was applicable to the prohibitions on sexual harassment and discrimination in the workplace.³⁶

Meanwhile, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) has, in General Recommendation No. 28, interpreted the obligations in article 2 of the Convention and the prohibition of sex discrimination. It clarifies that article 2 of CEDAW includes gender-based discrimination in that discrimination based on sex is "inextricably linked with other factors".³⁷ In *Alyne da Silva Pimentel Teixeira (deceased) v Brazil*, the Committee in fact recognised "that discrimination against women based on sex and gender is inextricably linked to other factors that affect women, such as ... sexual orientation and gender identity".³⁸ The Committee on the Rights of the Child also underscores the duty not to discriminate on the basis of sexual orientation in its general comments. In addressing its non-discrimination provision in article 2 of the Convention on the Rights of the Child, the Committee's General Comment No. 3 on HIV/AIDS highlights discrimination based on sexual orientation as a matter of concern.³⁹ Moreover, General Comment No. 4 on Adolescent Health and Development states that the grounds of discrimination protected in article 2 "also cover adolescents' sexual orientation".⁴⁰

As evident in the foregoing discussion, the legal consensus among treaty bodies appears to be that the grounds of "sex" and "or other status" have now stretched to include SOGIE. Some states strongly contest this view, as these terms were not originally intended to cover sexual orientation, and the travaux préparatoires of these treaties (the record at the time of the drafting of the instruments) did not envisage that sexual orientation would be covered. State opposition to the inclusion of SOGIE rights is explored further below in the section on political status and implications. Nevertheless, it is clear that international treaty bodies, which are authorised under the treaties themselves to supervise the implementation of these instruments, have advised on the correct interpretation of the treaties. They maintain that sexual orientation and gender identity fall within the scope of non-discrimination and equality provisions. We therefore conclude that international human rights law protects FoRB and SOGIE rights regarding equality and non-discrimination on the same basis. No one should suffer any form of discrimination on the basis of their religion or belief or sexual orientation in relation to any of their human rights.

2.2 The Freedom of Religion or Belief

FoRB is recognised in a number of instruments, although not in a standalone and focussed human rights treaty. Article 18 of the ICCPR sets out two key aspects of FoRB. The first aspect is the right of every person to have or to adopt a religion or belief of

³⁶ *ibid*, para 9. See also para 19.

³⁷ Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 28 on the Core Obligations of States Parties under Article 2' (16 December 2010) CEDAW/C/GC/28, para 18.

³⁸ *Alyne da Silva Pimentel Teixeira (Deceased) v Brazil* Comm no 17/2008 (Committee on the Elimination of Discrimination Against Women, 10 August 2011) CEDAW/C/49/D/17/2008, para 77.

³⁹ Committee on the Rights of the Child, 'General Comment No 3: Hiv/Aids and the Rights of the Child' CRC/GC/2003/3, para 8.

⁴⁰ Committee on the Rights of the Child, 'General Comment No. 4: Adolescent Health and Development' (1 July 2003) CRC/GC/2003/4, para. 6.

their choice. This aspect of FoRB is considered an "absolute" right, and cannot be subject to restrictions of any kind. The second aspect involves the freedom to manifest religion or belief through in worship, observance, practice and teaching.⁴¹

Manifestation of FoRB

A broad range of conduct can fall within the scope of the freedom to manifest religion or belief. In General Comment No. 22 the Human Rights Committee clarifies that worship "extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest."⁴² Observance and practice "include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group."⁴³ Practice and teaching meanwhile "include acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."⁴⁴ Practice and teaching of religion or belief is also interpreted as including the right to share beliefs and to engage in missionary activities.⁴⁵

The fullest basis of an understanding of the collective aspect of FoRB in international norms comes in article 6 of the 1981 Declaration,⁴⁶ that manifestation of FoRB includes, inter alia:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief; and
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

Despite the expansive understanding of a diversity of religion or belief manifestations, this freedom of manifestation is not absolute. All manifestations of religion or belief

⁴¹ ICCPR, article 18(1).

⁴² Human Rights Committee, 'General Comment No 22 – Article 18 (Freedom of Thought, Conscience or Religion)', 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 4.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ See further Heiner Bielefeldt, Nazila Ghanea, and Michael Wiener, *Freedom of Religion or Belief: an International Law Commentary* (OUP 2016), pp 191-203.

⁴⁶ 1981 Declaration, para 6.

may be restricted on certain grounds, including the fundamental rights and freedoms of others.

Several important principles have emerged with respect to the manner in which limitations may be imposed on FoRB. A limitation on FoRB must meet the legal test to determine its permissibility. Each limitation must be (1) prescribed by law, (2) must be necessary, (3) for the protection of public safety, order, health, or morals or the fundamental rights and freedoms of others,⁴⁷ and must be "proportionate". Any restriction that is overbroad, or unrelated to one of the specific aims of listed in article 18(3) of the ICCPR would be impermissible. For example, the Human Rights Committee has clarified that no restriction on FoRB can be imposed on the so-called grounds of "national security". Therefore, for instance, a ban on religious face coverings purely in the interests of national security would be impermissible.

Alongside careful attention to the above understanding on legitimate limitations on the manifestation of religion or belief, we need to consider two other matters – religious autonomy and religious accommodation.

Religious autonomy

Religious autonomy emerges from the recognition that "[t]he autonomous existence of religious communities is indispensable for pluralism in a democratic society"⁴⁸ and "is an issue that lies at the very heart of the protection that the freedom of religion or belief affords".⁴⁹ Religious autonomy needs protecting especially from governmental encroachment, as we recognise that "[t]he autonomous existence of religious communities is indispensable for pluralism in a democratic society."⁵⁰ In fact, "[w]hen the organisational life of the community is not protected by the freedom of religion or belief, all other aspects of the individual's freedom of religion become vulnerable".⁵¹ Julian Rivers reminds us that, "autonomy is not merely the aggregate of several individual liberties, but is the power of a community for self-government under its own law."⁵² The European Court of Human Rights has repeatedly endorsed the principle of autonomy of religious organisations, observing that:

[R]eligious associations are free to determine at their own discretion the manner in which new members are admitted and existing members excluded. The internal structure of a religious organisation and the regulations governing its membership must be seen as a means by which such organisations are able to express their beliefs and maintain their religious traditions.⁵³

Religious organisations are often best placed to make decisions about doctrines and membership. They can also create regulations to forbid some forms of manifestation

⁴⁷ ICCPR, article 18(3).

⁴⁸ *Fernández Martínez v Spain* App no 56030/07 (ECtHR, 12 June 2014), para 126.

⁴⁹ See ODIHR, *Guidelines on the Legal Personality of Religious or Belief Communities* (OSCE 2014), p 21.

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (OUP 2010), p 334.

⁵³ *Svyato-Mykhaylivska Parafiya v Ukraine* App no 77703/01 (ECtHR, 14 June 2007) para 150.

within their communities, as long as they are complying with the rule of law and "the rights and freedoms of others". Courts, such as the European Court of Human Rights have taken into account religious autonomy "as a consideration subject to balancing against other rights".⁵⁴ Consideration of religious autonomy – for example in relation to FoRB and SOGIE – does not mean that the case is always tilted in favour of religious organisations, but that "human rights arguments must be counted on both sides of the legal equation and not just on behalf of the part of the dissenting member" who challenges the decision of the religious organisation.⁵⁵

The international law on religious autonomy is far from settled in terms of the precise balance to be struck between competing organisational and individual interests. However, it is clear that any restriction on religious autonomy would be subject to the permissibility test discussed above, and can only be imposed by law, where it is strictly necessary and proportionate, and for the purpose of protecting a legitimate public interest. The most common sphere of religious autonomy applicable to FBOs would be in terms of their ability to recruit staff from the affiliated religious group. In jurisdictions such as the United States, such differentiation, particularly when applied to ministers and leadership positions, has been recognised as legally permissible.⁵⁶ We also note that caselaw around FoRB and SOGIE rights have given due consideration to the doctrines of some religious organisations regarding sexual orientation when examining employment practices of religious organisations with regard to key staff who publicly represent the ethos of the organisation. As discussed below, international law standards on non-discrimination do not appear to permit a general exception for FBOs to differentiate on the basis of sexual orientation or gender identity when employing staff. If at all, the exception would apply to the appointment of ministers and leaders.

Religious accommodation

Religious accommodation may be regarded as a twin consideration alongside religious autonomy. The term draws from article 2 of the Convention on the Rights of Persons with Disabilities, which defines "reasonable accommodation" as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms". It has long been used in Canadian jurisprudence with respect to FoRB claims under the Canadian Charter of Rights and Freedoms.⁵⁷

Scholars such as Katayoun Alidadi have highlighted the "facilitative framework" that reasonable accommodation offers. She argues that it is not so much "outcome determining", but its "core strength" is that it is facilitative of considering contexts with "an eye for an individual analysis and a tailored individual solution". "It is the

⁵⁴ Ian Leigh, 'Balancing Religious Autonomy and Other Human Rights under the European Convention' (2012) 1 *Oxford Journal of Law and Religion* 109, p 125.

⁵⁵ *ibid*, pp 110-111.

⁵⁶ 'Title VII of the Civil Rights Act of 1964' (United States).

⁵⁷ Sujit Choudhry, 'Rights Adjudication in a Plurinational State: The Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation' 50 *Osgoode Hall law journal* 575, p 575.

flexibility of the tool in the hands of judges that allows it to play a useful role in diverse situations".⁵⁸

The principle of "reasonable accommodation" is particularly relevant to religious minorities, and can be relied on to impose a positive obligation on the state to consider the special interests of a religious minority when setting out general law and policy. Scholars such as Matthew Gibson argue that the principle enables "religious individuals to feel less alienated by the law".⁵⁹ The question has arisen in some individual communications before the Human Rights Committee where the Committee was generally of the view that religious preferences should be reasonably accommodated.⁶⁰

However, the Committee has not explicitly recommended that this principle be relied upon in determining the permissibility of a limitation under article 18(3) of the ICCPR. Therefore, it is safe to presume that reasonable accommodation with respect to religious preferences is not a general principle within international law. Any potential tension between religious manifestation and SOGIE rights would need to be resolved on a case-by-case basis and with due regard to the legal test on the permissibility of a limitation on FoRB.

2.3 The Protection of SOGIE Rights

The absence of specific mention of SOGIE rights in early international human rights law instruments reflects the fact that the application of rights and protections to LGBT+ persons has emerged through interpretation and jurisprudence. Over time, it has become very clear that such persons must have all their rights upheld and protected on an equal basis with others. LGBT+ persons, in just the same manner as everyone else, are entitled to liberty and security of person.⁶¹ Yet, in many countries, they face killing, torture and violence, including sexual violence.⁶²

Norms protecting SOGIE rights have emerged at the international level, especially clustered around several themes: equality and non-discrimination, liberty and security, autonomy, privacy, and family rights. The first of these themes has been discussed above.

⁵⁸ Katayoun Alidadi, *Religion, Equality and Employment in Europe: The Case for Reasonable Accommodation* (Hart Publishing 2017), p 69.

⁵⁹ Matthew Gibson, "The God "Dilution"? Religion, Discrimination and the Case for Reasonable Accommodation" (2013) 72 *Cambridge Law Journal* 578, p 616.

⁶⁰ *FA v France* Comm No 2662/2015 (Human Rights Committee, 16 July 2018) CCPR/C/123/D/2662/2015 and *Prince v South Africa* Commn no 1474/2006 (Human Rights Committee, 31 October 2007) CCPR/C/91/D/1474/2006.

⁶¹ ICCPR, article 9.

⁶² *Ending Violence and Other Human Rights Violations Based on Sexual Orientation and Gender Identity: A Joint Dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations* (Pretoria University Law Press 2016).

The Human Rights Committee has emphasised that liberty and security of person applies to everyone, including lesbian, gay, bisexual and transgender persons.⁶³ States must accordingly protect persons "against intentional infliction of bodily or mental injury" whether this is carried out by government or other actors, undertake "measures to prevent future injury and retrospective measures", and take measures to address patterns of violence against persons on the basis of their sexual orientation or gender identity.⁶⁴

The UN Special Rapporteur on FoRB has observed that, "[t]hirty-two countries continue to criminalise and are increasing the penalties for same-sex relationships".⁶⁵ The violence against and criminalisation⁶⁶ of LGBT+ persons are sometimes carried out in the name of religion and giving religious justifications. These religious justifications for violence or criminalisation are sometimes carried out by the state itself, but in the name of religion. In others, it is not carried out by state actors but is "with explicit or tacit encouragement from State officials".⁶⁷ It was also reported to the UN Special Rapporteur on FoRB that:

State-sanctioned laws and practices that promote gender-based discrimination created a permissive environment for non-State actors to commit violence against LGBT+ persons, and that the multi-layered negative impact of gender discriminatory laws on access to health, education and employment could be stark.⁶⁸

In 2011, the UN Human Rights Council adopted the first resolution on sexual orientation and gender identity,⁶⁹ and in 2016, it established the mandate of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity⁷⁰ ('Independent Expert on SOGI'). The Independent Expert has an important mandate in terms of the promotion of SOGIE rights. The mandate seeks to explore ways to better protect and promote SOGIE through means such as: "assessing implementation of human rights standards; identifying best practices and gaps; raising awareness of these issues; identifying and addressing the root causes of violence and discrimination; engaging in dialogue and consulting with States and other relevant stakeholders to foster the protection of LGBT and gender-diverse persons; and facilitating and supporting the provision of advisory services, technical assistance, capacity-building and international cooperation to

⁶³ Human Rights Committee, 'General Comment No 35: Article 9 (Liberty and Security of Person)' (16 December 2014).

⁶⁴ *ibid.*

⁶⁵ Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief: Gender-Based Violence and Discrimination in the Name of Religion or Belief' (24 August 2020) A/HRC/43/48, para 22.

⁶⁶ By way of example, Human Rights Watch observes that "men who have sex with men have been publicly caned under sharia law in Indonesia; that ISIS in Syria targets homosexuality; and that the Maldives, Mauritania, and Saudi Arabia criminalize it". Ryan Thoreson, 'Recognising Religious Liberty as an LGBTI Issue' (*Human Rights Watch*, 12 June 2018) <<https://www.hrw.org/news/2018/06/12/recognizing-religious-freedom-lgbt-issue>> accessed 11 April 2022.

⁶⁷ Report on Gender-based violence and discrimination in the name of religion or belief, para 8.

⁶⁸ *ibid.*, para 20.

⁶⁹ Human Rights Council, 'Resolution 17/19. Human Rights, Sexual Orientation and Gender Identity' (14 July 2011) A/HRC/RES/17/19.

⁷⁰ Human Rights Council, 'Resolution 32/2. Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity' (15 July 2016) A/HRC/RES/32/2.

combat violence and discrimination."⁷¹ In fulfilling this mandate, the Independent Expert on SOGI issues urgent appeals to states, conducts fact-finding missions, and prepares thematic reports pertaining to SOGIE rights.

With respect to norms concerning autonomy, the Independent Expert commented on how conversion therapy, i.e., where an individual is subjected to "therapy" to "convert" them from their sexual orientation or gender identity, violates freedom and autonomy, and has even determined that conversion therapy can amount to a form of torture.⁷² His report referenced findings from the Committee on Economic, Social and Cultural Rights, the Committee Against Torture, the Committee on the Right of Persons with Disabilities, and the Committee on the Rights of the Child in support of this point. In the same report, he outlined three approaches that tend to guide conversion therapy, and lists faith-based approaches as one of them.⁷³ The Independent Expert emphasized the need to protect the individual's self-determination, freedom, and autonomy in determining their own course.⁷⁴

The Special Rapporteur on FoRB has supported the Independent Expert's position on conversion therapy. In his report on FoRB and gender equality, he stated that he was "alarmed by ongoing reports of State authorities' failure to effectively investigate incidents of such violence or hold perpetrators accountable".⁷⁵ Though this stance on conversion therapy is still to become more defined in international jurisprudence, it is one that is also becoming more vocal in national-level advocacy. For example, such national-level advocacy has been very pronounced in countries such as the UK and New Zealand.

Another set of SOGIE rights cluster around the issue of privacy. Article 17 of the ICCPR states that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation",⁷⁶ and that everyone has the right to the protection of the law in order to ensure this.⁷⁷

In General Comment No. 16 on the right to privacy, the Human Rights Committee recognises the right of every person to be protected "against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation"⁷⁸ and the state obligation to provide

⁷¹ *ibid.*

⁷² Human Rights Council, 'Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity: Practices of So-Called "Conversion Therapy"' (1 May 2020) A/HRC/44/53, 2000, para 62. Also outlined in the Press Release, "Conversion Therapy' Can Amount to Torture and Should Be Banned Says UN Expert' (OHCHR, 13 July 2020) <www.ohchr.org/en/stories/2020/07/conversion-therapy-can-amount-torture-and-should-be-banned-says-un-expert> accessed 11 April 2022.

⁷³ A/HRC/44/53, para 41.

⁷⁴ See 'About the Mandate: Independent Expert on Sexual Orientation and Gender Identity' (OHCHR) <www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/about-mandate> accessed 25 April 2022.

⁷⁵ Report on Gender-based violence and discrimination in the name of religion or belief, para 42.

⁷⁶ ICCPR, article 17(1).

⁷⁷ *ibid.*, article 17(2).

⁷⁸ Human Rights Committee, 'General Comment No. 16: Article 17 (Right to Privacy), the Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation' (8 April 1988), para 1.

"adequate legislation"⁷⁹ to uphold this right. The right protects everyone against unlawful and arbitrary interferences,⁸⁰ and requires measures and provisions for everyone to be able to effectively protect themselves against attacks and to have "an effective remedy against those responsible" for such violent acts.⁸¹

The Human Rights Committee has in fact received individual communications that connect SOGIE rights to privacy. In *Edward Young v Australia*, the author of the communication complained that the Tasmanian criminal code did "not distinguish between sexual activity *in private* and sexual activity *in public* and bring[s] private activity *into the public domain*" (Emphasis added.)⁸² The Committee's ruling was founded on the right to be left alone, where there are no reasonable safety, public order, health or moral grounds offered by the state party to justify the interference with privacy. Consequently, the Committee has "rightly and repeatedly" found "that protection against arbitrary or unlawful interference with privacy precludes prosecution and punishment for homosexual relations between consenting adults".⁸³

Finally, SOGIE rights draw from norms relating to "family life". Article 23 of the ICCPR recognises the "family" as "the natural and fundamental group unit of society",⁸⁴ which is entitled to protection by society and the state. It recognises the "right of men and women of marriageable age to marry and to found a family".⁸⁵ The Human Rights Committee's General Comment No. 19 on the family does not define the "family". Instead, it notes that the concept of the family "may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition". The Committee "emphasises that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in article 23".⁸⁶ The definition is, then, to be determined at the national level. The Committee's General Comment on privacy meanwhile calls on States to give the family "a broad interpretation to include all those comprising the family as understood in the society of the State party concerned".⁸⁷

If the question of the definition of the family is to be decided by the State, that does not deflect from the fact that in many societies this determination will be influenced by religion. Dominic McGoldrick observes that "there is far less agreement or consensus between States on sexual orientation discrimination in relation to same-sex issues concerning marriage, family life, adoption, sex education and the general education of children in relation to sexual orientation issues".⁸⁸ Therefore, while "family life" is an important source of SOGIE rights, the degree of definitional

⁷⁹ *ibid*, para 17.

⁸⁰ *ibid*, para 2.

⁸¹ *ibid*, para 17.

⁸² *Edward Young v Australia*, Individual opinion of Individual opinion by Committee members Mrs Ruth Wedgwood and Mr Franco DePasquale (concurring).

⁸³ *X v Colombia*, Separate opinion by Mr Abdelfattah Amor and Mr Ahmed Tawfik Khalil (dissenting).

⁸⁴ ICCPR, article 23(1).

⁸⁵ *ibid*, article 23(2).

⁸⁶ Human Rights Committee, 'General Comment No. 19: Article 23 (the Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (27 July 1990), para 2.

⁸⁷ General Comment No. 16, para 5.

⁸⁸ Dominic McGoldrick, 'Development and Status of Sexual Orientation Discrimination under International Human Rights Law' (2016) 16 *Human Rights Law Review* 613, p 667.

discretion offered to states at the national level can form a barrier to SOGIE rights. In this context, religiously motivated exclusion of LGBT+ persons from the scope of the "family" in many states remains likely, and is yet to be fully addressed under international law. Again, it is not likely that SMC FBOs are involved in this question. Yet the question of the definition of family may arise, on occasion, in relation to staff and the benefits that may extend to their families.

Legal norms concerning SOGIE rights have also developed at the regional level. For example, Resolution 275 of the African Commission on Human and Peoples' Rights urges states to "end all acts of violence and abuse, whether committed by State or non-state actors", and to prohibit and punish all forms of violence that targets persons "on the basis of their imputed or real sexual orientation or gender identities", this requiring "proper investigation and diligent prosecution of perpetrators, and establishing judicial procedures responsive to the needs of victims".⁸⁹

Apart from state initiatives at the international and regional level, certain non-state initiatives have also sought to contribute towards the development of a robust discourse on SOGIE rights. Principle 33 of the Yogyakarta Principles⁹⁰ Plus 10 upholds the freedom of everyone, "from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics."⁹¹ Laws and provisions should not criminalise or sanction LGBT+ persons, whether explicitly or through the "application of general punitive provisions such as acts against nature, morality, public decency, vagrancy, sodomy and propaganda law".⁹² It also calls for the repeal of other forms of criminalisation, sanction and discriminatory laws, and for accountability "for any act of violence, intimidation or abuse based on the criminalisation of sexual orientation, gender identity, gender expression and sex characteristics."⁹³

2.4 Interface between Manifestation of Religion or Belief and SOGIE Rights

What does manifestation of religion or belief, informed by religious autonomy and religious accommodation, mean for its interrelationship with SOGIE rights? Returning to the questions raised in the introduction, does it inform, for example, those questions mostly closely associated with religious institutions?

⁸⁹ The African Commission on Human and Peoples' Rights, 'Resolution 275 on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity' (Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights in Luanda, Angola, 28 April to 12 May 2014) ACHPR/Res.275(LV)2014, para 4.

⁹⁰ For a discussion of the emergence of the Yogyakarta process see Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 Human Rights Law Review 207, pp 232-237.

⁹¹ 'Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity Plus 10' (10 November 2017) <<http://yogyakartaprinciples.org/>> accessed 11 April 2022, principle 33.

⁹² *ibid*, principle 33A.

⁹³ *ibid*, principle 33F.

- Can a religiously affiliated university deny the enrolment of LGBT+ persons?
- Can a religious group seek to persuade LGBT+ persons to change their sexual orientation?
- Are FBOs required to hire LGBT+ persons?

A synthesis of the caselaw suggests that international law sets out certain key parameters, but does not determine every question that may arise. The caselaw does not offer precise answers to these questions. As we stated at the outset of this study, most FBOs will not find themselves involved in celebrating marriages or performing conversion therapy, and it is usually individual persons, not churches or organisations, who raise questions regarding hate speech or the provision of services. Moreover, FBOs working in the development sector are governed by anti-discrimination law and humanitarian principles, and cannot discriminate against their beneficiaries.

Questions may, however, arise in relation to hiring practices. Both the principles of religious autonomy and reasonable accommodation are relevant in this regard. And it may be recalled that international law does not offer a formula as such on the precise balance to be struck between a religious organisation's autonomy in hiring, and potentially competing human rights norms relating to non-discrimination. What is clear, however, is that any restriction on that autonomy must meet the permissibility criteria mentioned above. For instance, an organisation's decision-making autonomy over whom to hire may be restricted only where the restriction is prescribed by law, is necessary and proportionate, and only for the protection of some legitimate public interest.

In some countries, FBOs may enjoy some degree of autonomy over whom they wish to recruit. For instance, in the United States, FBOs can consider religion in deciding whom to hire and fire.⁹⁴ Such autonomy could be viewed as a departure of sorts from the extent of autonomy afforded to non-religious institutions. Yet there is no evidence to suggest that religious autonomy and religious accommodation automatically override any competing principle of non-discrimination on the basis of SOGIE. Even if FBOs could distinguish in terms of religious identity when hiring staff, the law, where it prohibits discrimination on the grounds of sexual orientation and gender identity, does not appear to automatically exempt FBOs from such prohibition.⁹⁵ Therefore, it is not the principles of religious autonomy and religious accommodation that govern the question of whether FBOs can distinguish on the basis of sexual orientation and gender identity when hiring. Instead, it is the recognition or non-recognition of sexual orientation and gender identity as a prohibited ground of discrimination that is usually determinative. Therefore, as a general principle of international law, non-discrimination on the basis of SOGIE would prevail over religious autonomy with respect to hiring and firing. However, it would appear that an exception with respect to appointing ministers and leaders may exist in some jurisdictions. Therefore, religious autonomy would occasionally permit selectivity on the basis of sexual orientation and gender identity when appointing ministers and leaders in a manner that is consistent with the prevailing doctrine of the religious group in question.

⁹⁴ 'Title VII of the Civil Rights Act of 1964'.

⁹⁵ *Pavez Pavez v Chile* (Inter-American Court of Human Rights, 4 February 2022) Series C No 449.

3. Political Status and Implications

The political status of FoRB and SOGIE rights has important implications with respect to correlations and tensions between these two domains. Such implications can operate at both the international and regional level, and across fora within the United Nations (UN) system. The major lines of argument and contestation appear to be around religious, cultural, and family values, and claims that SOGIE rights are at odds with these values. In this context, members states, particularly with Muslim-majority populations and/or with Islam as a state religion, have tended to oppose the advancement of SOGIE rights within UN fora. However, as explained below, the political picture is complex, and there is both support for SOGIE rights within the Muslim world, and opposition to SOGIE rights within the non-Muslim (and specifically, Christian) world.

This section of the report discusses the political status of FoRB and SOGIE rights and potential implications that emerge from such a status. The regional dynamics surrounding this issue are, to a large extent, reflected in voting patterns within the UN system.

3.1 Faith-Based Advocacy

Prior to delving into the politics concerning FoRB and SOGIE rights within the UN system, it is worth noting that faith-based advocacy within the UN has generally remained supportive of SOGIE rights. A study back in 2015 noted "significant support by groups working from various faith perspectives for advocacy efforts on a full range of [SOGIE] rights issues at the international level, particularly in joining national coalitions for Universal Periodic Review (UPR) submissions or treaty body shadow reports."⁹⁶ The relevant issues include family rights, relationship recognition, bodily integrity, torture, the criminalisation of sex work, and the freedoms of expression, association, and assembly. The study cites several key examples of FBOs engaging initiatives concerning SOGIE rights. A German civil society coalition, for instance, submitted a report to the UPR process that contained a chapter on violations of the rights of intersex people in Germany. Moreover, the Malaysian national UPR civil society coalition referenced the politicisation of religion in relation to SOGIE rights as well as the criminalisation of sex work. Meanwhile, FBOs in Venezuela have raised concerns regarding the interference of the Catholic Church in governmental action on LGBTI rights.⁹⁷

Muslim FBOs do not appear to directly engage on SOGIE rights, or at least have not done so in a widely observable manner, within the UN system. That is not to say, however, that Muslim-majority regions lack SOGIE rights advocacy. Organisations such as Muslims for Progressive Values (MPV), which operates in the United States and Malaysia, have promoted SOGIE rights from a Muslim perspective. Moreover, in the MENA region, non-governmental organisations that do not identify as FBOs, such

⁹⁶ 'Faith Efforts at the Un to Advance Human Rights Relating to Sexual Orientation, Gender Identity or Intersex Status' (*Arcus Foundation*) <www.oursplatform.org/wp-content/uploads/ARCUS_paper_faith_SOGII-2015.pdf> accessed 11 April 2022.

⁹⁷ *ibid.*

as the Arab Foundation for Freedoms and Equality, support sexual health, sexuality, gender and bodily rights movements.

3.2 Polarisation within the UN General Assembly

Some degree of polarisation in terms of religion or belief and SOGIE rights is clearly apparent within the UN General Assembly (UNGA). No UNGA resolution on SOGIE rights has successfully been adopted, primarily due to opposition from the Organisation of Islamic Cooperation (OIC). In 2008, a joint statement condemning violence on the basis of sexual orientation or gender identity was presented by Argentina and has since been signed as a declaration by close to a hundred states. However, in response to this statement, the OIC presented a counter statement that rejected SOGIE rights. Both statements remain open for signature, and neither have been adopted as resolutions, thereby reflecting a continuing impasse within the UNGA on the question of SOGIE rights. Furthermore, in 2012 the organisation issued a statement asserting that "while considering the issue of human rights, national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind. From this perspective, the issue of sexual orientation is unacceptable to the OIC".⁹⁸

The opposition, as seen from the overtly religious identity of the OIC, appears to be broadly grounded in claims surrounding religion or belief. The OIC's position is often predicated around the perceived incompatibility between SOGIE rights and Islamic family values.⁹⁹ Some of the OIC claims about Islamic values are, however, contested. For example, MPV has sought to include SOGIE rights advocacy within "traditional Qur'anic values of social justice and equality for all".¹⁰⁰ A lecture series offered by MPV seeks to dismantle religious justifications for homophobia within Muslim communities.¹⁰¹ The Mecca Institute is another example of a Muslim FBO that has advocated for LGBT-inclusivity, and has established a progressive online Islamic seminary that promotes Islamic learning and research on the compatibility of SOGIE rights with Islamic values.¹⁰²

Apart from the position of the OIC, the UNGA has featured other faith-based opposition to certain aspects of SOGIE rights. For instance, the Holy See's Permanent Observer at the United Nations opposed the 2008 declaration on the basis that it would compel countries to recognise same-sex marriage.¹⁰³

⁹⁸ OIC, 'Letter from the OIC to the Human Rights Council' (14 February 2012) POL/SO/2012, para 7.

⁹⁹ See Robert C. Blitt, 'The Organization of Islamic Cooperation's (OIC) Response to Sexual Orientation and Gender Identity Rights: A Challenge to Equality and Nondiscrimination under International Law' (2018) 28 *Transnational Law & Contemporary Problems* 89.

¹⁰⁰ See 'About' (*Muslims for Progressive Values*) <<https://www.mpvusa.org/about-overview>> accessed 11 April 2022.

¹⁰¹ See 'LGBTQI Lecture Series' (*Muslims for Progressive Values*, 2020) <https://youtube.com/playlist?list=PLE3saqAXcc3ahCLB4FWqyd7XAJ_Lh72IZ> accessed 11 April 2022.

¹⁰² See 'Moving Progressive Islam Forward: LGBT' (*Mecca Institute*, 2020) <www.meccainstitute.org/lgbt> accessed 11 April 2022.

¹⁰³ See 'Vatican Criticised for Opposing Gay Decriminalisation' (*The Irish Times*, 02 December 2008) <www.irishtimes.com/news/vatican-criticised-for-opposing-gay-decriminalisation-1.832492> accessed 11 April 2022

Meanwhile, the UNGA's periodic resolution on FoRB – which was last adopted in December 2021 – is conspicuously silent on the question of SOGIE rights.¹⁰⁴ This silence indicates an overall reluctance on the part of member states to renegotiate the parameters of this consensus resolution on FoRB to include considerations pertaining to SOGIE rights.

3.3 Development within the UN Human Rights Council

The divisive politics on questions of religion or belief and SOGIE rights are also apparent in the UN Human Rights Council (UNHRC), although some notable advances towards greater harmonisation have been made in this forum. The establishment of the Mandate of the "Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity" in 2016 was a major milestone in the promotion and protection of SOGIE rights at the international level. The mandate was created in pursuance of UNHRC resolution 32/2 on "Protection against violence and discrimination based on sexual orientation and gender identity" adopted in 2016.

Several clauses of the 2016 resolution specifically refer to religion. It reiterates "the importance of respecting regional, cultural and religious value systems as well as particularities in considering human rights issues".¹⁰⁵ It underlines "the fundamental importance of respecting relevant domestic debates at the national level on matters associated with historical, cultural, social and religious sensitivities".¹⁰⁶ The resolution then commits states to fulfil their obligations "while ensuring respect for the sovereign right of each country as well as its national laws, development priorities, the various religious and ethical values and cultural backgrounds of its people" and "in full conformity with universally recognised international human rights".¹⁰⁷ A crucial aspect of the resolution was the appointment of an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity for a period of three years.¹⁰⁸

The 2016 resolution signals that states are cognisant of the potential tensions that may exist between the protection and promotion of SOGIE rights and certain religious sensitivities and values. The resolution is an important political articulation of certain members states' commitment to advancing SOGIE rights while remaining sensitive to diverse religious backgrounds. But it also revealed the extent of the disagreement among member states. Only 23 members of the UNHRC voted in favour of the resolution, whereas 18 voted against it, and six abstained.

States within the European Union have consistently voted in favour of SOGIE rights at UN fora and were seen to champion the 2016 resolution. The EU position at UN fora remains consistent with the position reflected in EU resolutions on LGBTQ rights, and more recently, in the 2019 European Parliament resolution on the rights of intersex persons.¹⁰⁹

¹⁰⁴ UNGA, 'Resolution 76/156. Freedom of Religion or Belief' (16 December 2021) A/RES/76/156.

¹⁰⁵ A/HRC/RES/32/2, preambular para 7.

¹⁰⁶ *ibid*, preambular para 8.

¹⁰⁷ *ibid*, preambular para 11.

¹⁰⁸ *ibid*, para 3.

¹⁰⁹ European Parliament, 'Resolution on the Rights of Intersex People' (14 February 2019) 2018/2878 (RSP).

Among those who voted for the 2016 UNHRC resolution were Christian (and specifically Catholic) majority Latin American countries such as Bolivia, Ecuador, El Salvador, Mexico, Panama, and Venezuela. This position remains consistent with practices across the Latin American region,¹¹⁰ and specifically, with the stance of the Organisation of American States (OAS). For instance, the 2017 OAS Resolution AG/RES 2908 on the "Promotion and Protection of Human Rights" contains strong commitments on the protection and promotion of SOGIE rights.¹¹¹

No country from the African continent, nor from the Middle Eastern or South Asian regions voted in favour of the 2016 UNHRC resolution. In fact, Algeria, Bangladesh, Burundi, Congo, Côte d'Ivoire, Ethiopia, Indonesia, Kenya, Kyrgyzstan, Maldives, Morocco, Nigeria, Qatar, Saudi Arabia, Togo, and United Arab Emirates voted against the resolution alongside China and Russia. Many of the countries in this list, including those from the MENA region and South Asia, have majority Muslim populations. Some of these countries also have Islam as the state religion (Algeria, Bangladesh, Burundi, Maldives, Morocco, Qatar, Saudi Arabia and the United Arab Emirates). The voting patterns accordingly signal clear religious (and indeed geographic) fault lines with respect to the stance of member states on the protection and promotion of SOGIE rights.

In 2019, the UNHRC adopted another key resolution. Resolution 41/18 extended the mandate of the Independent Expert on SOGI for a further period of three years. Once again, the resolution acknowledged the need to bear in mind the "significance of national and regional particularities and various historical, cultural and religious backgrounds".¹¹² Yet it clearly reinforced the principle that states have a duty, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

A number of Christian-majority countries from Latin America (i.e., Argentina, Brazil, Chile, Mexico, Peru, and Uruguay) were among the 27 members that voted in favour of the resolution. Interestingly, the Philippines and South Africa, which abstained on the 2016 resolution, voted in favour of the 2019 resolution. Moreover, two countries from the African continent – Rwanda and Tunisia – also voted in favour. Tunisia's decision to vote in favour of the resolution is extremely important, as nearly its entire population identify as Muslim. This voting pattern signalled that even within a short period of three years (2016 to 2019) more countries with strong religious influences have begun to acknowledge the need to protect and promote SOGIE rights.

The opposition to SOGIE rights within the Middle East and in Asia, and particularly within Muslim-majority countries in those regions, continued to be reflected in how states voted on the 2019 UNHRC resolution. Afghanistan, Bahrain, Bangladesh, Iraq, Pakistan, Qatar, and Saudi Arabia were among the twelve member states that voted against the resolution. Moreover, Egypt, Nigeria, and Somalia – all Muslim-majority African countries – also voted against the resolution. In essence, the general lack of

¹¹⁰ Inter-American Commission on Human Rights, *Advances and Challenges Towards the Recognition of the Rights of LGBTI Persons in the Americas* (OAS, 2018).

¹¹¹ OAS, 'Resolution Ag/Res. 2908: Promotion and Protection of Human Rights' (21 June 2017) AG/RES. 2908 (XLVII-O/17).

¹¹² Human Rights Council, 'Resolution 41/18. Mandate of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity' (12 July 2019) A/HRC/RES/41/18, preambular para 5.

receptiveness to SOGIE rights among states with Muslim-majority populations is clearly reflected in the voting patterns of the UNHRC.

The apparent tension between religion or belief and SOGIE rights is reflected in the process of adopting the 2016 and 2019 resolutions in the UNHRC. Political opposition to SOGIE rights does not necessarily emanate from all states with notable religious influences. Instead, the opposition is much more regional and specific to *some* religious influences. In essence, it would be incorrect to conclude that countries with strong Christian influences, such as those in Latin America, oppose SOGIE rights. To the contrary, Christian-majority countries in Latin America have, at least in the recent past, voted in favour of the protection and promotion of SOGIE rights. Ultimately, the widespread support for the 2016 and 2019 UNHRC resolutions among Christian-majority Latin American countries suggests that religion or belief does not necessarily present a barrier to SOGIE rights. By contrast, certain religious and cultural sensibilities emerging from Africa, the Middle East, and South Asia have prompted a number of states from these regions to remain less receptive to SOGIE rights. Such unreceptiveness appears to be confined to geographical particularities, and to some extent, religious sensibilities surrounding Islam.

As seen in the advocacy work of some Muslim FBOs, it would be incorrect to suggest that Islam alone drives opposition to SOGIE rights. Moreover, Tunisia's decision to support the establishment of a special mandate on SOGIE rights remains a notable outlier. Tunisia supported the special mandate despite being a Muslim-majority country, and despite the fact that Islam is the state religion of Tunisia.¹¹³

It should also be noted that opposition to SOGIE rights comes from sources beyond the Islamic world as well. Many groups in the Americas and Europe vocally oppose such rights. Homophobic and transphobic groups in Latin America have staged large demonstrations opposing SOGIE rights. In Brazil, these groups helped elect Jair Bolsonaro who has made openly homophobic statements in public.¹¹⁴ In Colombia, conservative forces mobilised to defeat an effort in 2016 by the Ministry of Education to distribute pamphlets in schools for the purpose of discussing tolerance for sexual diversity.¹¹⁵ Scholars have noted that over the past decade, homo- and transphobic discourses have expanded to featured strong backlash against SOGIE rights among newer Christian groups in Latin America.¹¹⁶ While it is difficult to define these groups clearly along terms such as "evangelicalism" or "Pentecostalism", they are broadly distinguished by their tendency to adopt a literal meaning of selected passages in the Bible, and to take a hard-line posture on issues of sexuality and family affairs.¹¹⁷ Meanwhile, in Europe, countries including Hungary and Poland have seen a rise in opposition to SOGIE rights. In 2021, a new law in Hungary was introduced to ban information in schools deemed to promote better understanding of homosexuality and

¹¹³ See 'Constitution of Tunisia' (2014), articles 1 and 6.

¹¹⁴ See Javier Corrales, 'The Expansion of LGBT Rights in Latin America and the Backlash' in Michael J. Bosia, Sandra M. McEvoy and Momin Rahman (eds), *The Oxford Handbook of Global LGBT and Sexual Diversity Politics* (Oxford University Press 2020), p 190.

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ See Anne Motley Hallum, 'Taking Stock and Building Bridges: Feminism, Women's Movements, and Pentecostalism in Latin America' (2003) 38 *Latin American Research Review* 169.

gender change.¹¹⁸ In Poland, several so-called "LGBT-ideology free zones" continue to operate. In both cases, traditional church groups have been linked to the opposition to SOGIE rights. For instance, in Poland, many of the so-called "LGBT-ideology free zones" are within the Catholic conservative parts of the country.¹¹⁹

3.4 Implications for FoRB and SOGIE Rights

The political developments at UN fora have two important implications for FoRB and SOGIE rights. First, the potential for transcending fault lines between (most) Islamic countries and the non-Muslim world on questions of FoRB and SOGIE rights appear to be limited within the current political climate. This context may change in the future. Yet the OIC's formal position on SOGIE rights appears to be fairly entrenched. Tunisia remains an interesting and crucial outlier in this respect; a deeper study and understanding of such outliers may be important to exploring avenues for transformation.

Second, developments within the UNHRC have produced the climate for an exploration of commonalities across FoRB and SOGIE rights. One clear example of this potential is the inclusion of 'religion' as part of the 2021-2023 research agenda of the mandate of the Independent Expert on SOGI. Such research has the potential to contribute towards the recognition of the intersectionality and compatibility of FoRB and SOGIE rights, particularly in an international context where polarisation and incompatibility between these two domains are often assumed.

¹¹⁸ Tony Wesolowsky, 'The Worrying Regression of LGBT Rights in Eastern Europe' (*Radio Free Europe Radio Liberty*, 23 December 2021) <www.rferl.org/a/lgbt-rights-eastern-europe-backsliding/31622890.html> accessed 11 April 2022.

¹¹⁹ 'Three Polish Regions Revoke Anti-LGBT Declarations' (*Euroactiv*, 28 September 2021) <www.euractiv.com/section/non-discrimination/news/three-polish-regions-revoke-anti-lgbt-declarations/> accessed 11 April 2022.

4. Case Studies

In this section, we provide some factual insights into the relationship between FoRB and SOGIE rights. We start with an overview of the situation regarding these rights in three countries, namely Kenya, Colombia, and Bangladesh. Then we move into a qualitative analysis of the topic based on experts working in this area.

We interviewed five experts: two working in NGOs focusing on FoRB, one human rights consultant who works with SOGIE human rights defenders, and two from Christian development FBOs.

In order to arrange these interviews, we contacted several international NGOs from a broad range of Christian theological traditions, and not also ones without any Christian affiliations. We also contacted local charities working in the specific countries we were focusing on. Unfortunately, despite several attempts,¹²⁰ we only had limited success in securing interviews with representatives of international FBOs and NGOs and were not able to interview anyone from Kenya, Colombia, or Bangladesh. Since we were not able to contact them, it is impossible to know why they did not reply to us, but based on the other international interviews, we assume four main factors:

- FBOs usually do not directly work in areas concerning FoRB and/or SOGIE rights.
- We were required to not contact partners of SMC in the countries mentioned.
- The topic is considered by some as sensitive, and some people may feel uneasy to voice their opinions about it.
- The organisations approached did not have time or did not find the topic relevant.

That said, the country analyses offer a description of the correlation and tension between FoRB and SOGIE rights in those contexts. Likewise, the interviews were extremely helpful in providing different perspectives on the topic based on the participants' vast experience working with human rights internationally.

4.1 Kenya

There is increasing national and international concern about the protection of LGBT+ persons in Kenya. The Kenyan Penal code criminalises what it defines as “unnatural offences” – i.e., consensual adult same-sex relations – prescribing a penalty of imprisonment for fourteen years.¹²¹ Unsurprisingly, LGTB+ persons often face

¹²⁰ We contacted 20 FBOs and NGOS, but only succeed in getting five interviews. The list of organisations contacted is the following:

- **International FBOs:** Stefanus Alliance, Finska Missionssällskapet, Tearfund, World Vision UK, World Vision International; CAFOD, ILGA, Forum 18, & GIN-SSOGIE.
- **Kenya:** Christian Aid, Caritas, National Gay & Lesbian Human Rights Commission, and two other FBOs which responded but we cancelled the interviews due to their links with SMC.
- **Colombia:** Christian Aid, Caritas, and Colombia Diversa.
- **Bangladesh:** Christian Aid, Caritas, and Boys of Bangladesh.

¹²¹ 'Penal Code [Kenya]' (1 August 1930), sections 162-165.

discrimination in the country.¹²² In recent years, LGBT+ NGOs managed to guarantee their right to freedom of association, but were not able to get a legal decision declaring prohibitions on their freedom of association as unconstitutional.¹²³ This prohibition has been the main concern of national and international human rights actors in this area.

Non-discrimination

The Human Rights Committee, after analysing the latest periodic review from Kenya regarding the ICCPR, issued its concluding observations and welcomed "the enactment of the Registration of Persons (Amendment) Bill of 2019, which provides for the legal recognition of intersex persons".¹²⁴ Nevertheless, it expressed concern in several areas explored in this report. One of the concluding observations expressed concern about the "lack of comprehensive anti-discrimination legislation, in line with article 27 of the Constitution and the provisions of the Covenant [arts 2 and 26]",¹²⁵ and determined that Kenya should address discriminatory attitudes in society and respect diversity as well as:

[a]dopt comprehensive legislation prohibiting discrimination, including multiple, direct and indirect discrimination, in all spheres, in both the public and the private sectors, on all the grounds prohibited under the Covenant, including sex, **sexual orientation, gender identity, religion**, disability, albinism, socioeconomic status, HIV/AIDS status, ethnic and political affiliation or other status;¹²⁶

The CEDAW Committee has also called for the adoption of comprehensive anti-discrimination laws and recommended Kenya to "exercise due diligence to protect all women, including lesbian, bisexual and transgender women and intersex persons, against discrimination by adopting comprehensive anti-discrimination legislation affording such protection."¹²⁷

This request for robust anti-discrimination legislation has been made repeatedly by several NGOs,¹²⁸ which often refer to the recommendation from Sweden to Kenya during the Universal Periodic Review (UPR).¹²⁹ The UPR is a process within the Human Rights Council where the human rights records of every UN Member State are reviewed. During this process, states receive a compilation of reports from NGOs, a

¹²² Human Rights Council, 'Summary of Stakeholders' Submissions on Kenya' (5 November 2019) A/HRC/WG.6/35/KEN/3, para 20.

¹²³ Kennedy Kanyali Mwikya, '#Repeal162: Same-Sex Marriage Bogeyman an Incomprehensible Justification for Criminalizing Same-Sex Conduct' (*OxHRH Blog*, June 2019) <<https://ohrh.law.ox.ac.uk/repeal162-same-sex-marriage-bogeyman-an-incomprehensible-justification-for-criminalizing-same-sex-conduct/>> accessed 25 April 2022.

¹²⁴ Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Kenya' (11 May 2021) CCPR/C/KEN/CO/4, para 2 (b).

¹²⁵ *ibid*, para 10.

¹²⁶ *ibid*, para 11(a) (emphasis added).

¹²⁷ Committee on the Elimination of Discrimination against Women, 'Concluding Observations on the Eighth Periodic Report of Kenya' (22 November 2017) CEDAW/C/KEN/CO/8, para 11.

¹²⁸ See eg A/HRC/WG.6/35/KEN/3, paras 20 and 51.

¹²⁹ Human Rights Council, 'Report of the Working Group on the Universal Periodic Review' (26 March 2015) A/HRC/29/10, para 142.41.

report from the UN, and comments from other states about human rights issues.¹³⁰ In the UPR, the Holy See recommended for Kenya to "[c]ontinue implementing the legislation on the protection of the rights of indigenous peoples and their lands, as well as the anti-discrimination laws, especially with regard to **religion** and physical conditions such as albinism."¹³¹

FoRB

In the latest UPR report, there are few concerns about FoRB in Kenya, mostly being related to violent acts perpetrated by the Al-Shabaab in the areas bordering Somalia.¹³² Christian FBOs in Kenya, in their reports to the UPR, have focused largely on other human rights issues. For example, Christian Aid & ERIKS – alongside the Gay and Lesbian Coalition of Kenya – expressed concern about prison overcrowding, the right to social security, the rights of indigenous peoples, and the rights of refugees.¹³³

SOGIE rights

In its review of Kenya's report, the Human Rights Committee expressed concern "about reports of the use of arbitrary arrest and detention" inter alia among LGBT+ individuals.¹³⁴ It also expressed concern about the following issues:

(a) Sections 162 and 165 of the Penal Code criminalising same-sex relations, and the High Court ruling in 2019 that declared those provisions to be constitutional; (b) The State party reporting that that prohibition is based upon same-sex relations being unacceptable to Kenyan culture and values but not providing information about any measures taken to address discriminatory attitudes and stigma among the general public; (c) Reports of lesbian, gay, bisexual, transgender and intersex individuals experiencing harassment, discrimination and violence, including violations perpetrated by law enforcement officers and vigilante groups, and facing barriers to access justice and remedies; (d) Incidences of children being expelled from schools on the basis of actual or suspected sexual orientation and/or gender identity; (e) Cases of non-urgent, irreversible surgical procedures, infanticide and abandonment among intersex children (arts. 2, 6, 7, 17 and 26).¹³⁵

The first point, regarding sections 162 and 165, has been the main concern regarding the rights to liberty and security of LGBT+ persons in Kenya, as stated by the Kenya National Commission on Human Rights that "the criminalisation of same-sex conduct underpinned violence, discrimination and stigmatisation of lesbian, gay, bisexual and transgender persons."¹³⁶ This point was also reiterated by several NGOs.¹³⁷

¹³⁰ 'Universal Periodic Review' (OHCHR) <www.ohchr.org/en/hr-bodies/upr/upr-main> accessed 25 April 2022.

¹³¹ A/HRC/29/10, para 142.179 (emphasis added).

¹³² A/HRC/WG6/35/KEN/3, paras 34, 36, and 54.

¹³³ Respectively, *ibid*, paras 44, 77, 113, and 117.

¹³⁴ CCPR/C/KEN/CO/4, para 32.

¹³⁵ *ibid*, para 12.

¹³⁶ A/HRC/WG6/35/KEN/3, para 3.

¹³⁷ *ibid*, para 43.

The Human Rights Committee also recommended that Kenya decriminalise same-sex relations.¹³⁸ This recommendation was also made by several states during the UPR process in 2020, including Iceland, Chile, Italy, Mexico, and the US.¹³⁹ Sweden had recommended the same to Kenya in 2015,¹⁴⁰ and Kenya recognised that this issue was challenging and being discussed in the country.¹⁴¹ In the latest report, Sweden requested further action to promote the rights of LGBT+ persons.¹⁴²

Other concerns voiced by international bodies in relation to SOGIE rights in Kenya include the treatment of LGBT+ refugees, asylum seekers and migrants, limitations to the right of LGBT+ persons to freedom of expression, and discrimination towards LGBT+ persons in the workplace and their right to work.¹⁴³

Interface between FoRB & SOGIE rights

As mentioned above, Christian FBOs working on development do not tend to get involved in potential conflicts between FoRB and SOGIE rights. We could not find any issue in their operations that would lead to tensions between these rights. There are, however, tensions between religious groups and SOGIE rights. Sometimes this sentiment is expressed very indirectly, for instance, several religious organisations stated during the UPR process that Kenya was reluctant "to adopt the draft Family Protection Policy, which was aimed at promoting a culture of marriage and religious and cultural practices supportive to the dignity of the family, amongst other elements."¹⁴⁴ Since same-sex relations are criminalised, this was in relation to a policy that would support the prohibition of same-sex couples from gaining state recognition of their relationship.

One of the organisations mentioned above, the Kenya Christian Professionals Forum (KCFN), describes itself as a group of:

Christian Professionals from various denominations sharing common values on Life, Family, Religion, Value-Based Education & Governance. We provide technical support in influencing the development of a legal and social environment that is supportive of biblical values in society through research, advocacy, mentorship and witnessing. Our key partners are the Kenya Conference of Catholic Bishops (KCCB), National Council of Churches of Kenya (NCCCK) and the Evangelical Alliance of Kenya (EAK).¹⁴⁵

¹³⁸ CCPR/C/KEN/CO/4, para 13.

¹³⁹ Respectively, Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Kenya' (20 March 2020) A/HRC/44/9, paras 144.27, 144.31, 144.33, 144.36, and 144.39.

¹⁴⁰ A/HRC/29/10, paras 142.4, and 142.41.

¹⁴¹ *ibid*, para 83.

¹⁴² A/HRC/44/9, para 105.

¹⁴³ Respectively, CCPR/C/KEN/CO/4, paras 36, 42, and Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on Kenya' (18 November 2019) A/HRC/WG.6/35/KEN/2, para 50.

¹⁴⁴ A/HRC/WG.6/35/KEN/3, para 72. The organisations are: Edmund Rice Advocacy Network, Pax Romana (ICMICA), Kenya Movement of Catholic Professionals, Secular Franciscan Order, JPIC office of the Comboni Missionary of the Heart of Jesus, Jesuit Hakimani Centre, Dominicans for Justice and Peace in East Africa, Embulbul Education and Counselling Centre, Fahamu Africa, Kenya Christian Professionals Forum, Paralegal Network of End Poverty with Justice Initiative, Alabasta Africa, Pearls & Treasures Trust, Edmund Rice Foundation Kenya and Ruben FM.

¹⁴⁵ 'About Us' (*The Kenya Christian Professionals Forum*, 2021) <<https://kcpf.or.ke/about-us/>> accessed 25 April 2022.

In both legal cases mentioned above, of LGBT organisations challenging the prohibition of association and the criminalisation of same-sex relationships, KCFN acted as a third interested party declaring that such actions were aimed at advancing "a cause against public policy" and seeking to "legalise criminality, that is homosexuality", which the organisation clearly opposes, as stated in the 26 paragraphs supporting the state in the latest case on the matter.¹⁴⁶ Nevertheless, it would be incorrect to assume that all Christian groups in Kenya are against SOGIE rights. The Global Interfaith Network for People of All Sexes, Sexual Orientation, Gender Identities and Expressions (GIN-SSOGIE), which has the support of some Christian leaders, has been active in Kenya, producing leaflets for LGBT+ persons to cope with stigma and dealing with anti-SOGIE politics.¹⁴⁷

4.2 Colombia

Colombia presents a fairly different context than the other states analysed in this report, but not dissimilar to other states in the region. It has high levels of violence related to internal conflicts between the state and paramilitary groups, as well as drug trafficking. Violence affects mostly vulnerable persons, in this context "women, children, older adults, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons, Afro-Colombians and indigenous peoples."¹⁴⁸ However, it also has progressive human rights legislation, and individuals in Colombia benefit from the protection not only of its constitution and UN human rights treaties, but also the regional human rights system as a member of the Organisation of American States. Consequently, in this context, the problems are related to the implementation and realisation of human rights, rather than formal legal protection.

Non-discrimination

The Human Rights Committee, in its review of the implementation of the ICCPR in Colombia, summarises the situation of non-discrimination in the state, as follows:

The Committee recognizes the efforts made by the State party to protect the rights of lesbian, gay, bisexual, transgender and intersex persons, including the decisions of the Constitutional Court that guarantee the rights of same-sex couples to enter into civil marriages and to adopt children, and its efforts to combat discrimination and violence directed at them. The Committee is concerned, however, by reports that such persons have been the target of acts of violence, including murder, and police misconduct because of their sexual orientation or gender identity (arts. 2, 6, 7 and 26) [rights to non-discrimination, the right to life, and the prohibition of torture].¹⁴⁹

¹⁴⁶ *EG v Non-Governmental Organisations Co-Ordination Board & 4 Others* [2015] eKLR, para 9; and *EG & 7 Others v Attorney General; Dkm & 9 Others (Interested Parties)* [2020] eKLR, paras 70-95.

¹⁴⁷ See eg 'Coping Strategies for Dealing with Anti-LGBTI Politics and Stigma' (GIN-SSOGIE, 2020) <<https://gin-ssogie.org/wp-content/uploads/2020/07/Kenya-Coping-with-Anti-LGBTI-Politics-and-Stigma.pdf>> accessed 25 April 2022. See further A S Van Klinken, *Kenyan, Christian, Queer: Religion, LGBT Activism, and Arts of Resistance in Africa* (Pennsylvania State University Press 2019).

¹⁴⁸ Human Rights Committee, 'Concluding Observations on the Seventh Periodic Report of Colombia' (17 November 2016) CCPR/C/COL/CO/7, para 9 (c).

¹⁴⁹ *ibid*, para 16.

NGOs (including the Lutheran World Federation) and states (including the Czech Republic and Iceland) made similar observations during the UPR process regarding combatting discrimination against LGBT+ persons.¹⁵⁰ During the process, the only concern related to religious non-discrimination was raised by CSW; however, that does not mean it does not take place in the country.¹⁵¹

ForB

As mentioned above, violations of freedom of religion or belief have not been raised in the latest Concluding Observations by the Human Rights Committee, nor in the Report of the Working Group on the Universal Periodic Review regarding Colombia. The only mention during the latter process was made by CSW, which expressed concern "about intimidation, violence and killings targeting religious leaders and members of religious communities."¹⁵² Still, Open Doors indicates Colombia as the only country in South America in its Top 50 countries where Christians face the most persecution.¹⁵³

SOGIE rights

Violations of SOGIE rights seem to be widespread in Colombia, despite the efforts of the state to curb them. Members of the LGBT+ community have been subjected to a series of violations, as the Office of the High Commissioner for Human Rights (OHCHR) reported during the UPR process that they have suffered "killings, attacks, threats, arrest and detentions, infringements of the rights to privacy, enforced disappearances and sexual violence."¹⁵⁴ To illustrate this point, a group of NGOs informed the UN that "440 lesbian, gay, bisexual and transgender persons had been murdered between 2013 and 2016. At least 148 of those murders had been motivated by prejudice against the victim's sexual orientation."¹⁵⁵

In 2015, the Inter-American Commission on Human Rights published an extensive report on violence against lesbian, gay, bisexual, trans and intersex persons in the Americas. In this report, the Inter-American Commission details several cases of violations of the right to life, discrimination in the provision of health services, and incitement to violence against LGBT+ persons, as well as instances of "corrective rape" as described below:

During the October 2014 visit to Colombia of the Chair of the IACHR, the Rapporteurship on the Rights of LGBTI Persons was informed of the case of a trans woman in Barranquilla who, after suffering many years of attacks and discrimination, was brutally raped by a group of four men who

¹⁵⁰ See eg Human Rights Council, 'Summary of Stakeholders' Submissions on Colombia' (12 March 2018) A/HRC/WG.6/30/COL/3 paras 21-23; and Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Colombia' (9 July 2018) A/HRC/39/6, paras 120.23-120.24.

¹⁵¹ A/HRC/WG6/30/COL/3, para 48.

¹⁵² *ibid*, para 48.

¹⁵³ 'Colombia' (*Open Doors*, 2022) <www.opendoorsuk.org/persecution/world-watch-list/colombia/> accessed 25 April 2022.

¹⁵⁴ Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on Colombia' (12 March 2018) A/HRC/WG.6/30/COL/2, para 41.

¹⁵⁵ A/HRC/WG6/30/COL/3, para 30.

introduced several ants into her anus. She committed suicide shortly after the episode.¹⁵⁶

Interface between FoRB & SOGIE rights

Religious groups, to our knowledge, have not challenged the accounts of violence suffered by members of the LGBT+ in Colombia. Consequently, any challenge from religious communities to SOGIE rights would more likely be related to the right to private and family life, the right to marriage, and issues of freedom of expression. In 2016, the Constitutional Court of Colombia approved same-sex marriages, deciding that, despite article 42 of the Colombian Constitution defining that marriage is between a man and a woman, this provision should not be understood in isolation, but in harmony with the principles of human dignity, personal liberty, and equality.¹⁵⁷ The same principles were applied by the Court when deciding that same-sex couples could adopt children, with the additional explanation that it was in the best interests of abandoned children to have a family.¹⁵⁸ More recently, the Court also allowed non-binary people to be registered as such in official documents.¹⁵⁹

Some religious communities (such as the Methodist church in Bogota) celebrated same-sex marriages even before the decision of the Constitutional Court.¹⁶⁰ Still, as expected, some third parties intervened, arguing that same-sex marriage could affect FoRB. A citizen called Ryan T. Anderson suggested that same-sex marriage would lead to violations of FoRB, because married couples would be able to adopt children, and religious adoption agencies would not be able to deny services to them despite objecting to that.¹⁶¹ A dissenting Justice also protested that, in Colombia, those who profess Christian values are being persecuted by political powers that have an ultra-liberal agenda.¹⁶² In the other two cases mentioned above, no contestation concerning FoRB was raised.

4.3 Bangladesh

As with Kenya, Bangladesh also inherited a British Penal code which criminalises "unnatural behaviour" under section 377 of its Penal Code, as follows:

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment] for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The fact that this provision is still kept in the Penal code has generated much international criticism and discrimination on the ground, as described below.

¹⁵⁶ Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas* (OAS, 2015), para 169.

¹⁵⁷ *Case SU214/16* (Constitutional Court of Colombia, 28 April 2016).

¹⁵⁸ *Case C-683/15* (Constitutional Court of Colombia, 4 November 2015).

¹⁵⁹ *Case T-033/22* (Constitutional Court of Colombia, 4 February 2022).

¹⁶⁰ '¿Quiénes Somos?' (*Iglesia Colombiana Metodista*, 2022) <<https://metodistabogota.org/quienes-somos/#ministeriolgbt+>> accessed 25 April 2022.

¹⁶¹ *Case SU214/16*, section B (1).

¹⁶² *ibid*, dissenting vote of Justice Jorge Ignacio Pretelt Chaljub, para 9.

Non-discrimination

In its review of Bangladesh, the Human Rights Committee expressed concern at the discrimination of LGBT+ persons in the state, given the:

Criminalisation under section 377 of the Penal Code of consensual sexual acts between same-sex couples, which are termed "unnatural behaviour", stigmatisation, harassment and violence against lesbian, gay, bisexual and transgender persons, barriers to assistance in seeking employment of "hijras", who are considered as transgender persons, by the administration of invasive and humiliating medical examinations to prove transgender status (arts. 2-3 and 26-27) [articles of the ICCPR on non-discrimination].¹⁶³

The Committee further observed that Bangladesh should decriminalise such offences, and ensure that acts of harassment and discrimination against LGBT+ persons are properly investigated.¹⁶⁴ Likewise, the Committee stated that Bangladesh should: "Protect the safety and security of **persons belonging to minority religious groups and ensure** their ability to fully enjoy **their freedom of religion and to worship without fear of attack**".¹⁶⁵

During the 2018 UPR process, several countries – including Brazil, Canada, Mexico and Italy – recommended that Bangladesh should take measures to eradicate violence and discrimination against LGBT+ persons.¹⁶⁶ The Office of the High Commissioner for Human Rights as well as several NGOs made similar requests in their submissions.¹⁶⁷ Bangladesh did not support these recommendations.¹⁶⁸ However, Bangladesh accepted shortcomings in relation to discrimination against religious minorities, as noted by Austria, Estonia, and Argentina.¹⁶⁹

ForB

The UN Special Rapporteur on ForB, Heiner Bielefeldt, visited Bangladesh in 2015, and in his report, he explained that Bangladesh's tradition of respecting religious pluralism is increasingly being eroded due to religious extremist actors.¹⁷⁰ The Special Rapporteur also reported an increase in the politicisation of religion, as well as issues concerning social ostracism after conversions, and blasphemy laws.¹⁷¹

¹⁶³ Human Rights Committee, 'Concluding Observations on the Initial Report of Bangladesh' (27 April 2017) CCPR/C/BGD/CO/1, para 11 (e).

¹⁶⁴ *ibid*, para 12 (e).

¹⁶⁵ *ibid*, para 12 (b) (emphasis added).

¹⁶⁶ Respectively, Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Bangladesh' (11 July 2018) A/HRC/39/12, paras 149.25, 149.36, 149.30, and 149.55.

¹⁶⁷ Respectively, Human Rights Council, 'Report of the Office of the United Nations High Commissioner for Human Rights: Compilation on Bangladesh' (19 March 2018) A/HRC/WG.6/30/BGD/2, paras 14-15; and Human Rights Council, 'Summary of Stakeholders' Submissions on Bangladesh' (13 March 2018) A/HRC/WG.6/30/BGD/3, para 12.

¹⁶⁸ A/HRC/39/12, para 149.

¹⁶⁹ Respectively, *ibid*, para 147.156, 148.4, and 148.24.

¹⁷⁰ Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief on His Mission to Bangladesh' (22 January 2016) A/HRC/31/18/Add.2.

¹⁷¹ *ibid*, paras 33-39, 57-62, and 84-88.

The OHCHR also highlighted concerns about the right to FoRB in the UPR.¹⁷² Several NGOs and CSW expressed similar concerns, highlighting issues of land grabbing belonging to members of religious minorities and legislation contrary to international human rights law, such as blasphemy laws.¹⁷³ ADF recommended Bangladesh defeat the Islamic State and other terrorist groups, as well as for the government to improve its maternal healthcare and resist calls to liberalise abortion.¹⁷⁴ The Government of Bangladesh responded that it is "is deeply committed to protect and promote the rights of the religious and ethnic minorities in the country" – as it has addressed the issue of violence against religious minorities and desecration of places of worship – and it "actively advocates the motto: 'Each unto his or her religion, Festivals are for All'".¹⁷⁵ Bangladesh has also accepted recommendations from other states – including the Holy See, the UK, Poland, and Haiti – to promote FoRB and combat religious extremism.¹⁷⁶

SOGIE rights

While Bangladesh has engaged international actors demanding more protection to religious minorities, it has not done so regarding LGBT+ persons and communities.¹⁷⁷ Several NGOs and the National Human Rights Commission of Bangladesh have stated that LGBT+ persons are "among the most marginalised groups in Bangladesh and face both state and non-state harassment and violence".¹⁷⁸ Indeed numerous SOGIE rights have been violated, including the right to life (LGBT+ activists have been killed by religious extremists), the right to liberty and security (as the Penal Code prohibits same-sex relationships), freedom of assembly and expression (a Pride parade was cancelled by the police in 2016, due to several online threats to LGBT+ persons) – a clear example of heckler's veto –, right to education (LGBT+ students face harassment in schools), as well as several forms of discrimination (including forced marriages, homelessness, and in the workplace).¹⁷⁹ A particularly vulnerable group is the hijra community, a group of transgender or "third-gender" people, who are mostly Hindu.¹⁸⁰ The United Nations country team on Bangladesh also included this concern in its UPR submission, asserting that "alternative mechanisms should be introduced to protect lesbian, gay, bisexual, transgender and intersex persons and recommended that Bangladesh acknowledge the existence of sexual and gender minorities and abolish section 377 [of the Penal Code]."

¹⁷² A/HRC/WG6/30/BGD/2, paras 29-30.

¹⁷³ A/HRC/WG6/30/BGD/3, paras 11,13, 15, and 30-32.

¹⁷⁴ *ibid*, paras 17, and 51-52.

¹⁷⁵ Human Rights Council, 'National Report: Bangladesh' (26 February 2018) A/HRC/WG.6/30/BGD/1, paras 68-72.

¹⁷⁶ Respectively, A/HRC/39/12, paras 147.64, 147.67, 147.74, and 147.139.

¹⁷⁷ A/HRC/WG6/30/BGD/1.

¹⁷⁸ A/HRC/WG6/30/BGD/3, para 12.

¹⁷⁹ Human Rights Committee, 'Submission by Mir Abu Reyad, Representative of the LGBTI Community in Bangladesh, to the Un Human Rights Committee' (March 2017) INT_CCPR_CSS_BGD_26532_E.

¹⁸⁰ See further, 'The Third Gender and Hijras' (*Harvard Divinity School*, 2018) <<https://rpl.hds.harvard.edu/religion-context/case-studies/gender/third-gender-and-hijras>> accessed 25 April 2022.

Interface between FoRB & SOGIE rights

Bangladesh offers an interesting insight into the relationship between FoRB and SOGIE rights. On the one hand, LGBT+ persons face discrimination from religious groups. It has been reported that there is:

Prolific anecdotal evidence points to growing threads of extremist sermons in mosques throughout Bangladesh that routinely condemn homosexuals as heretics that are to be punished or killed. This is echoed in local social media posts condemning homosexuality and justifying these attacks.¹⁸¹

On the other hand, members of LGBT+ communities face similar challenges as members of religious minorities. Regarding freedom of expression, several NGOs pointed out that since offending religious beliefs is prohibited by law, both members of religious minorities and LGBT+ communities are limited in what they can say in public and online, as their views might be considered as offensive to the majority Muslim population.¹⁸² While Bangladesh accepted the recommendation from the UK to "Work with civil society to develop a road map to implement Human Rights Council resolution 16/18 on combating religious intolerance", which could lead to a review of blasphemy laws, the state has not accepted calls to decriminalise such laws.¹⁸³

Finally, the hijras are often members of religious communities, and accepted as such. Other LGBT+ persons may suffer more prejudice, even if they identify as believers of different faiths. Indeed, as reported by the former Special Rapporteur on FoRB, "[t]he idea that individuals belonging to sexual minorities should be able to exercise their freedom of religion or belief like everyone else may strike many people as unusual or even unthinkable."¹⁸⁴ The conclusion of the Special Rapporteur on this topic was clear, direct, and hopeful:

The Special Rapporteur would like to stress that the right to freedom of religion or belief is guaranteed for every single human being, so no one should be deprived the right on the basis of sexuality, gender, ethnicity or caste. He has heard of encouraging initiatives by representatives of sexual minorities and religious community leaders in South Asia, including some from Bangladesh, who met to discuss and better understand these issues.¹⁸⁵

4.4 Interviews

As mentioned at the beginning of this section, we interviewed five experts on human rights and development, namely:

- Ed Brown: Secretary-General of Stefanus Alliance International
- John Kinahan: Assistant Editor of Forum 18 and Member of the OSCE/ODIHR Panel of Experts on FoRB
- Rolf Stefansson: Finnish Evangelical Lutheran Mission

¹⁸¹ INT_CCPR_CSS_BGD_26532_E.

¹⁸² A/HRC/WG6/30/BGD/3, para 32.

¹⁸³ Respectively, A/HRC/39/12, paras 147.63, and 149.46.

¹⁸⁴ A/HRC/31/18/Add2, para 93.

¹⁸⁵ A/HRC/31/18/Add2 (ibid), para 95.

- Daniel Ó Cluanaigh: Human Rights Consultant specialised in SOGIE rights
- A fifth speaker preferred to keep her name confidential. She works as a director for gender equality & social inclusion in an international FBO.

It is important to emphasise that the experts spoke in their personal capacities, based on their experiences with the organisations mentioned above and elsewhere.

FoRB

The first set of questions to the participants aimed at assessing their understanding of FoRB, potential challenges regarding these rights, and its relationship with their practical work.

The participants working in FBOs involved in development do not work specifically on the promotion of FoRB. They noted its importance, especially vis-à-vis the protection of civic space and the rule of law, but no more important than any other civic and political right in this regard. Mr Kinahan similarly emphasised the importance of FoRB as a right for everyone, which is highly interconnected with other fundamental human rights. Mr Brown mentioned the importance of "right-sizing" FoRB,¹⁸⁶ that is, understanding FoRB within a broader human rights context. Mr Ó Cluanaigh highlighted the importance of FoRB for people to have the freedom to search for deeper values in life and be able to express them alone or in community with others. In this manner, FoRB is also closely related to freedom of expression as well as freedom of association and assembly.

The responses were more diverse when we asked about challenges, as the area where the participants work varies substantially. For FBOs working in development, the questions appear to be only tangentially related to their work. In some of their programmes, it might be difficult to develop policies, given the spectrum of Christian beliefs. For example, one policy could be well accepted in Sweden but not in Uganda. Some organisations could also have challenges in funding their activities, as some donors ask for them to work on issues outside of their mandates, for instance, sexual and reproductive health or SOGIE rights. One of the participants observed that, generally, FBOs from the US tend to have a more "top-down" approach when working in the Global South, which could be perceived by local communities as disruptive. He stated that European FBOs tend to work more alongside local churches and FBOs to find solutions for their problems. These issues were pointed out in relation to FBOs, not FoRB, and indeed have little connection with FoRB, but could be relevant to other Christian development FBOs.

On the more specific issue of funding and pressure to work in areas outside one's mandate, one participant illustrated that their organisation is clear in its proposals that it does not work on abortion issues, but that they work in other areas supporting health care. Another example given by this participant related to the creation of policy in areas that might be considered sensitive. It was mentioned that creating a policy on gender equality for the organisation took several years of researching different Christian perspectives on the topic in several countries where the organisation

¹⁸⁶ Marie Juul Petersen and Katherine Marshall, *The International Promotion of Freedom of Religion or Belief* (The Danish Institute for Human Rights, 2019).

operates, then about three years of internal advocacy, and finally, the development of a theological statement supporting gender equality.

Speaking more broadly about general challenges to FoRB, several participants mentioned two main challenges. Mr Stefansson and Mr Kinahan spoke about the challenges of FoRB in the context of the shrinking space for civil society. Mr Stefansson stated that challenges to FoRB were not always connected to tensions between religions but largely connected to disrespecting the rule of law. He mentioned the example of Colombia, where many churches working in the peace process suffered a backlash. Mr Kinahan works largely in countries which were formerly part of the Soviet Union, where corruption, a lack of political willingness to implement international human rights obligations, and the wish of unelected rulers to impose complete control of society are barriers to the realisation of FoRB.. In these countries, leaders are highly resistant to change and often avoid free elections, which is a problem for human rights in general, and FoRB is another casualty of these systems.

Another point commonly highlighted by the interviewees was identity politics and the polarisation that this has caused in societies. Mr Brown asserted that in several contexts, FoRB has been co-opted by conservatives and ignored or even antagonised by progressives. Staff in FBOs working with FoRB may come from different political and theological perspectives, but they manage to work together by emphasising the importance of rights over ideological differences. The same does not apply to other contexts. Mr Stefansson mentioned that policies under former President Donald Trump regarding religious freedom were problematic, and that they raised more tensions between FoRB and other rights. He also noted the case involving politician Päivi Räsänen in Finland, who was accused of hate speech when she made comments against Pride parades, as an example of identity politics and balancing different rights.¹⁸⁷ However, he recalled that the growth of religious and political fundamentalism is not exclusive to North America and Europe; the same takes place in, among others, Nepal, India, and Pakistan. Mr Ó Cluanaigh mentioned that identity is key for religious and non-religious groups; it can bring people together around common causes but also accentuate divisions when in-group/out-group dynamics take place.

Some solutions were proposed to deal with these challenges based on the experience of the experts. Mr Kinahan underscored the importance of research and documentation of what is happening on the ground. When people are afraid to speak because of retaliation from state or non-state actors, it becomes more difficult to acquire a full picture of the situation, but Forum 18 has researchers that do their best to collect snapshots of the situation in repressive countries and in this way they can make more accurate recommendations. Mr Brown mentioned three points to address the challenges mentioned above: 1) FoRB education (among others, NorForb, developing booklets on FoRB, FoRB training, building networks) can be helpful in teaching people about FoRB and its relationship with other rights; 2) Promoting FoRB among a wide range of actors (e.g. media, IGOs, NGOs); and 3) working towards FoRB for everyone, not only members of majority groups.

¹⁸⁷ 'Helsinki Court Dismisses Christian Democrat MP's Incitement Case'.

SOGIE rights

The second set of questions aimed at assessing the interviewees' understanding of SOGIE rights. The first question in this regard was: "When you think about SOGIE Rights, what specific rights come to mind?"

Mr Kinahan asserted that all human rights come to mind. LGBT+ persons have all human rights. In repressive states, they might face violations of all human rights, therefore there is no need for such categorisation. Indeed, the rights highlighted next are not based on specific rights the LGBT+ persons have, but those claimed by LGBT+ persons when they are violated. Other participants mentioned the right to life, prohibition of torture and persecution, personal liberty and security, freedom of movement, right to privacy, equality and non-discrimination, the right to be in same-sex relationships and marry. Although there is no hierarchy of rights, most participants highlighted the importance of the right to life and prohibition of torture before other human rights, emphasising the high levels of discrimination and persecution of LGBT+ persons in many countries of the Global South.

The second question aimed at understanding what the participants identified as some of the main causes for the violation of SOGIE rights. The answers were similar to challenges related to FoRB, but were from slightly different perspectives among the interviewees. Mr Kinahan reiterated that all human rights violations in the contexts where Forum 18 works are related to the wish of unelected rulers to retain complete control of the state and society. . In this context, he referred to the 2016 report of the Special Rapporteur on Freedom of Religion, stating that:

Freedom of religion or belief rightly has been termed a “gateway” to other freedoms, including freedom of expression and freedom of peaceful assembly and association. There can be no free religious community life without respect for those other freedoms, which are closely intertwined with the right to freedom of religion or belief itself. This is exactly what worries authoritarian Governments and often causes them to curb freedom of religion or belief.¹⁸⁸

Mr Kinahan also stated that these regimes are highly patriarchal, and LGBT+ communities challenge this by their simple existence. The interviewer noted that these dynamics can be noted in the LGBT+ cases on freedom of assembly brought against Russia at the ECtHR,¹⁸⁹ as well in some of Patriarch Kirill's statements in support of the war in Ukraine, as he stated in his Forgiveness Sunday sermon that the invasion of Ukraine was about:

which side of God humanity will be on, in the divide between supporters of gay pride events – or the Western governments that allow them – and their opponents in Russian-backed eastern Ukraine. [...] Pride parades are designed to demonstrate that sin is one variation of human behavior. That's why in order to join the club of those countries, you have to have a gay pride parade.¹⁹⁰

¹⁸⁸ UNGA, 'Interim report of the Special Rapporteur on freedom of religion or belief' (2 August 2016) A/71/269, para 33.

¹⁸⁹ *Zhdanov and Others v Russia*.

¹⁹⁰ 'Russian Church Leader Appears to Blame Gay Pride Parades for Ukraine War' (*The Moscow Times*, 7 March 2022) <www.themoscowtimes.com/2022/03/07/news-from-russia-what-you-missed-over-the-weekend-153-a76802> accessed 25 April 2022

Mr Ó Cluanaigh similarly explained that countries with strong nationalist ideologies and with large military forces tend to be more patriarchal and heteronormative. Religious organisations – especially those where affiliation means more than just sharing theological beliefs but being part of a superior group – can cause divisions which in extreme cases can lead to persecution of out-groups. There is also a social aspect in which discrimination of LGBT+ persons is not a matter of policy but one of performance, where some people discriminate against LGBT+ persons just to emphasise their allegiance with the majoritarian ideology. These interrelated narratives help to reinforce stereotypes and a high level of discrimination against LGBT+ persons, where the more one deviates from the norm (be that religious, political, or gender), the higher the likelihood of discrimination and violence against that person. Hence the high levels of homicides against transgender people.¹⁹¹ Intersectionality is helpful in explaining some of the vulnerability of LGBT+ persons. He provided the example of how black lesbian women have been the target of "corrective rape" by armed groups in Colombia.¹⁹² The interviewee noted that intersectional discrimination is also the cause of violence against members of LGBT+ communities in other countries in Latin America, as illustrated by the infamous murder of Marielle Franco in Brazil. Marielle was a woman, black, lesbian, from a poor community, thus vulnerable in many forms, despite being a well-known politician.¹⁹³

Mr Brown also noted that people who break from traditional identities become more vulnerable as they are viewed as a threat to majoritarian groups. The majority then justify shunning or persecution using religious text, traditions, politics, and every power they have to ostracise those who are different. Once again, this can be perceived in relation to LGBT+ persons as well as members of minority religious and non-religious groups. Mr Brown cited the work of Jonathan Haidt as helpful in explaining these dynamics.¹⁹⁴

The participants from development FBOs simply mention that most churches in the Global South would oppose physical violence against LGBT+ persons but would not be willing to promote other rights for them. One interviewee noted that there is no major challenge regarding SOGIE rights for her organisation. In some countries, people are open about the inclusion of LGBT+ persons, while in others they are not. Yet this has not been a major issue for the organisation; it is simply a new issue.

Interface between FoRB & SOGIE rights

The third set of questions aimed at assessing approaches to deal with potential tensions between FoRB and SOGIE rights. The questions to the participants on this point were:

¹⁹¹ 'Tdor: In Memoriam' (GLAAD, 20 November 2021) <www.glaad.org/blog/tdor-memoriam> accessed 25 April 2022

¹⁹² Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas*, para 360.

¹⁹³ 'Marielle and Monica: The LGBT Activists Resisting Bolsonaro's Brazil - Video' (*The Guardian*, 28 December 2018) <www.theguardian.com/world/video/2018/dec/28/marielle-and-monica-the-lgbt-activists-resisting-bolsonaros-brazil-video> accessed 25 April 2022.

¹⁹⁴ Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Penguin, 2013).

- i) Do you see a potential for there to be tensions between FoRB and SOGIE rights?
- ii) If so, what are some of the practical contexts in which these tensions arise?
- iii) What are some of the strategies your organisation engages in to avoid or deal with potential tensions between FoRB and SOGIE rights?

Mr Ó Cluanaigh stated that he worked mostly with human rights defenders where the main concern was their right to life as well as liberty and security. Despite specialising in SOGIE rights, his focus was more on protecting the physical integrity of LGBT+ persons rather than potential conflicts between FoRB and SOGIE rights. Regarding such conflicts, he mentioned that the issue had not been firmly decided in courts, and it will become more of a matter of defining the contours of freedom of expression. He also noticed while working in the field that junior staff in FBOs tend to be much more open towards human rights for everyone and not excluding particular groups from protection, while difficulties often lied with respect to senior-level officials who were more connected with the religious organisations funding their projects.

Mr Brown highlighted the notion of purity in discrimination against women and LGBT+ persons, as raised by Jonathan Haidt. Religions always define what is pure and what is contaminated, what is allowed and what is forbidden; people who cross these lines are often at risk of being shunned. Religious groups might translate these ancient practices into FoRB and use them against others, but this would surely be against the spirit of human rights. Hence, the Stefanus Alliance has looked into intersectionality (e.g. FoRB and Women's rights, FoRB and freedom of expression) to approach such conflicts. FoRB and SOGIE is an area where they intend to work but have not discussed yet. As one of the strategies to avoid such conflicts, the organisation has engaged with other FBOs and international organisations to better promote FoRB.

Mr Kinahan took a principled approach, explaining that: "one needs to start with an understanding that all human beings have all rights. It depends on how things are framed. If you approach such conflicts from the perspective that everyone must have the maximum enjoyment of their rights, then several potential conflicts may disappear". The particular relationship between FoRB and SOGIE right, in his opinion, has barely started to be discussed, and several FBOs avoid this issue.

The director for gender equality and social inclusion stated that international FBOs have a role to play with local FBOs in making local change happen. Local partners can be champions for inclusion and non-discrimination. Potential tensions between FoRB and SOGIE rights can, in her opinion, happen when Global North perspectives are forced on countries in the Global South. She explained: "The priorities for western governments aren't necessarily the priority for local governments." While one source of potential tensions is political, the other is the power dynamics between genders. In this manner, the struggles that LGBT+ persons face can be compared in many ways to discrimination against women. In any case, she stated that it is important for FBOs to make it clear that they do not discriminate against beneficiaries and that FBOs need to explain to their staff what are the particular barriers that LGBT+ persons can face to access basic services. Three examples highlight how this particular organisation has dealt with related challenges.

The first example was the already mentioned policy on gender equality. This was done by assessing internal and external culture, drafting a new policy, advocating internally

for change, drafting a theological statement, then reviewing their own policies, and providing an anti-harassment and anti-discrimination hotline for staff to report these issues if it happens. According to the director, internal communications during and after this process is fundamental to ensure that the organisation achieves its goals.

The second example was that the organisation works, among other areas, with children. They focus on supporting children in poverty, those victims of natural disasters, children facing violence, and those who are discriminated against. Despite the organisation not working particularly on SOGIE rights, it was aware that LGBT+ children face discrimination. Therefore, within their mandate, the organisation was able to focus particularly on protecting LGBT+ children without having to go through the same long process to update its policy. This is not a sustainable solution, but an interesting short-term solution until more robust policies can be implemented.

The third example was a local branch of the organisation, which operates on a majoritarian Christian Pacific Island and is fairly conservative. Despite not having a mandate to work with LGBT+ persons, the local office decided to work on the promotion of SOGIE rights. The office started explaining the situation to their church partners and working with other grassroots organisations. In this way, they were able to start promoting SOGIE rights without causing divisions in the local community.

Mr Stefansson mentioned potential tensions in Finland and countries where the Finnish Evangelical Lutheran Mission (FELM) operates, and provided very interesting solutions to these issues. The organisation operates both as a development agency (funded by the Finnish Ministry for Foreign Affairs), as well as a missionary society (funded by churches). When FELM works in development with funds from the Ministry for Foreign Affairs, it must follow EU non-discrimination laws. Mr Stefansson stated that this had been an eye-opener for many people working in the field as well; several partners of FELM operate in countries with strong colonial traditions, which were anti-SOGIE rights (particularly in Southern Africa and South Asia). In these contexts, most churches consider same-sex relationships a sin, and some would even excommunicate LGBT+ persons. Mr Stefansson explained that in these countries many religious leaders are aware of LGBT+ members in their community and would likely be more caring towards them, but they worry about a backlash from their community. However, when they operate with clear guidelines that they cannot discriminate against beneficiaries, then this makes it easier for the local communities to comply with these norms. Mr Stefansson did not see requests from the government to enforce non-discrimination measures as a burden or undue interference with FELM's work. On the contrary, he perceived it as a positive step towards treating everyone fairly. Additionally, this was not only FELM's position, but also that of the Government of Finland, as well as the EU. So having this backing from funders and international organisations was most welcomed. The only problem Mr Stefansson noted was that people working in the field could change their behaviours because of funding and not personal conviction, which says a lot about the power of economics in this area.

Regarding the work as a missionary society, Mr Stefansson said that dialogue is the best strategy to avoid and deal with potential conflict. He said that people are open if they do not feel that they are being cornered. Still, he stated that:

every church should understand that they cannot harass or harm anyone, no matter their moral concerns about LGBT rights. We should draw a line there. This is our stand, but not only because it is imposed by law or our donor. This discussion started within our organisation.

The difficulty with dialogue is who is talking on behalf of religious communities. In churches, most leaders might represent the opinions of the majority of their congregations, but it is difficult to expect change if marginalised groups do not have a voice in these discussions. Mr Stefansson said that "it is important that communities themselves can raise those voices (to protect marginalised LGBT people). But we need to make the minorities visible. The challenge lies in both letting local organisations be autonomous while also encouraging them to change."

It was important to raise matters internally as clearly as possible. That was the case with FELM, which sent – as a missionary society – a same-sex couple abroad. This was very controversial among some churches.¹⁹⁵ Despite the criticism, FELM stood by its values, and this did not affect funding for the organisation. Here is the final lesson from these interviews, despite all the noise created by "conscience wars", little of this is related to the work of FBOs, and when it is, they usually have the network and resources to overcome such challenges.

¹⁹⁵ See eg Jussi Rytönen, 'Lähetysseuran Vaatimus Homoparin Lähettämisestä Työhön Kambodžaan Osoittaa Lähetyskentän Kunnioituksen Puutetta' (*Kotimaa*, 18 December 2013) <www.kotimaa.fi/artikkeli/lahetysseuran-vaatimus-homoparin-lahettamisesta-tyohon-kambodzaan-osoittaa-lahetyskentan-kunnioitu/> accessed 25 April 2022.

5. Conclusion

Our findings in this report draw from research, analysis, and interviews. We note that the jurisprudence in this area has turned on the particular facts of each case and one cannot draw out easy generalisations from them. In other areas, the law is far from settled but the key legal doctrine and trends have been outlined.

Three major findings may be summarised. First, the legal consensus among treaty bodies appears to be that the grounds of "sex" and "or other status" include SOGIE. It is clear that international treaty bodies are unanimous on the position that sexual orientation and gender identity fall within the scope of non-discrimination and equality provisions. It is therefore safe to conclude that international human rights law protects FoRB and SOGIE rights regarding equality and non-discrimination on the same basis.

Second, religious autonomy and reasonable accommodation remain relevant principles to the scope and limit of the freedom to manifest religion or belief. Hiring and firing staff is a sphere in which some potential tensions between religious manifestation and SOGIE may arise. We found that international law expects a balance to be struck between competing interests wherein FoRB and SOGIE rights are maximised. On the one hand, there is a general expectation that recruitment practices of FBOs complies with general legal norms on non-discrimination, including on the basis of sexual orientation and gender identity. On the other hand, some jurisdictions have recognised the autonomy of religious organisations to be selective when appointing ministers and leaders. In essence, we note that the law in this area is far from settled.

Third, the political context within the UN reflects a polarisation among states on questions concerning SOGIE rights. The opposition to SOGIE rights among certain blocs such as the OIC appears to be entrenched. However, many other blocs that contain strong religious influences, such as Latin America, which has strong Christian religious influences, have overtly supported SOGIE rights. Moreover, certain Muslim majority countries such as Tunisia have remained outliers in terms of their overt support for SOGIE rights within UN fora. In this context, the UNHRC has produced the climate for an exploration of commonalities across FoRB and SOGIE rights, and for a deeper recognition of the intersectionality and compatibility of FoRB and SOGIE rights.

Apart from these general findings, a number of observations may be made with respect to the country studies that we conducted. All three countries examined – Kenya, Bangladesh, and Colombia – have been called upon by NGOs, the UN, and several countries to improve their record in protecting LGBT+ persons from discrimination. The main differences noticed in the analysis of these states is that Colombia seems willing to provide LGBT+ persons with rights, despite several instances of violence against LGBT+ persons still taking place in the country. Kenya officially admits at international fora that it faces challenges in this domain, but does not seem to be willing to take adequate action domestically. Bangladesh has thus far ignored calls to take action against discrimination on grounds of sexual orientation.

The sober findings of this report may be contrasted with the "conscience wars" some are very vocal about in North America and somewhat now also in Europe, suggesting that one set of human rights concerns needs to "defeat" the other. This creates some anxiety among FBOs, and concern that their work may be at risk of extinguishing in such a climate. These "wars" get ammunition from the narratives of some in the name of "family rights" and Christian values – "values" that seem selective in not upholding "love your neighbour as yourself",¹⁹⁶ but focused on repressing SOGIE rights.

Based on the interviews conducted with experts in the field, it appears that in reality, most FBOs do not see themselves engaged in such a "war". In relation to the countries analysed, we observe that some Christian FBOs actively oppose SOGIE rights, some support them, but most are in-between – not actively engaged on political issues and dealing with them on a case-by-case basis. Interviewees did not report seeing this in conflict terms, and raised very few issues regarding such potential conflicts. The interviews largely confirmed our assumptions that most discourses that aims to pit FoRB against SOGIE rights do not affect FBOs directly. Not even the consultant who specialised on SOGIE rights mentioned "contemporary" conflicts between FoRB and SOGIE rights as a major issue. On the contrary, all participants understood the importance of maximising all human rights for all persons.

It is noted that most interviewees are from organisations that work in similar areas of SMC. Still, for a more accurate reading of these issues, it would be good for SMC to consult its own partners to check if they have similar or different perspectives on the topic. We selected a diverse and highly qualified group of experts to be interviewed, but we do not assume that they represent a consensus view of the topic, as we also pointed out FBOs that disagree with these perspectives.

In conclusion, we note that there may be arenas that Christian FBOs may want to be clear about, and we offer the following suggestions in this respect:

- If the FBO has a definite stance on areas of education (e.g. reflecting LGBT+ lifestyles) or health (sexual and reproductive health services to LGBT+) it should first make this clear in its mandate, and second be willing to disengage from these areas of work. Religious accommodation and religious autonomy cannot and will not stretch to discriminating in government and public services.
- While the FBOs themselves may be clear on non-discrimination and upholding humanitarian principles in their humanitarian work, they also need to be careful in the stance and approach of local organisations they partner with.
- In being mindful of the trends in the law in this arena, it is important to distinguish the public fear-mongering narratives and the pace of soft and hard law changes actually taking place.

¹⁹⁶ Mark 12:31

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