

# ALIANȚA FAMILIILOR DIN ROMÂNIA

## ALLIANCE OF ROMANIA'S FAMILIES

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May 30, 2009

Mrs. Daniela Filipiova, President  
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### **LEGAL BRIEF**

Re: Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation (2008/0140)

Dear Mrs. Filipiova:

Greetings from the Alliance of Romania's Families! We respectfully submit this Legal Note to the Employment, Social Policy, Health and Consumer Affairs Council of the European Union opposing the proposed directive referenced above for the reasons explained below. We have reviewed the proposed directive in great detail and it gives us great concern. It does not seem to be well thought-out and it sets a dangerous precedent. It creates conflict between rights and liberties, occasionally it lacks necessary clarity, it unfairly discriminates against civil society by seeking expanded sexual orientation nondiscrimination at the expense of other disadvantaged social and religious groups, and, with respect to sexual orientation, it creates unreasonable social and economic burdens.

The Alliance of Romania's Families is a civic, apolitical and nonreligious, grassroots organization with a constituency of hundreds of thousands of Romania's families. We involve ourselves in specific projects designed to promote and protect family values, life, and religious freedom both in Romania and in the European Union. We respectfully request that this Note be filed among the official papers of your Council and that our views be presented and considered in all future debates in the European Parliament and the Council of Ministers of the European Union related to this proposed directive.

I.

Conflicts of Rights

The proposed directive creates conflicts among rights on the one hand and rights and liberties on the other. These conflicts are caused by the inherently different nature of the four grounds for nondiscrimination which the proposed directive seeks to protect: (1) religion or belief; (2) disability; (3) age; and (4) sexual orientation. Protecting from discrimination persons based on their religion, disability, and age is consistent. But in many respects religious nondiscrimination is incompatible with nondiscrimination based on sexual orientation. This Note, therefore, will concentrate mainly on the threats which the directive poses to religious freedom.

Religion and sexual orientation are not analogous grounds for nondiscrimination but mutually exclusive in most respects. There is diversity of views within the religious communities of the European Union on issues of sexual orientation. The proposed directive fails to consider this very important aspect which for most religious persons amounts to an irreconcilable conflict. Europe's religious tradition is largely incompatible with the relatively new notion of sexual orientation nondiscrimination. It only emerged as a legal doctrine in 1989 with the Treaty of Amsterdam. Additionally, sexual orientation means many things to many people. In addition to being a doctrine of recent currency, it also is in constant flux without well defined or stable perimeters. Religious doctrine, on the other hand, is largely stable and for most of its adherents it is inflexible on certain fundamental issues, sexual orientation being paramount among them. Consequently, indiscriminately forcing sexual orientation nondiscrimination on religious bodies is discriminatory to religion. At bottom, the proposed directive is a departure from the norm and evinces hostility toward religion.

Also, the proposed directive significantly expands sexual orientation nondiscrimination. Until now only applicable in employment, sexual orientation nondiscrimination is now expanded in the areas of social protection, social advantages, education, and access to goods and services.

Of the four grounds of nondiscrimination outlined in the proposed directive, sexual orientation is also the most controversial. There is virtual unanimity that discrimination based on religion, disability, and age could be legitimate ends of the EU's legislative process. But such consensus lacks with respect to sexual orientation. Age is an unavoidable condition for all, and disability for many. Religion is a matter of deep conviction which binds the conscience and most individuals cannot act, or be forced to act or think in opposition to it. By contrast, sexual orientation is a matter of choice. It is not an unavoidable or permanent condition. Consequently, we are of the opinion that the law should not protect choices from discrimination especially when such choices amount to nothing more than mere fads. For most religious persons homosexuality is a sin and society should not protect sinful conduct. Imposing nondiscrimination based on sexual orientation on religious bodies, therefore, violates religious freedom at several levels.

First, sexual orientation nondiscrimination conflicts with **freedom of speech** for religious bodies.

The conflict between sexual orientation and religious bodies already exists in religious teaching and the training of religious personnel for the ministry. It is improper for the proposed directive to use the coercive power of the secular state to impose its views on religious bodies or to ensure a correlation between its secular position on social norms and that of religious bodies. The directive will likely have the effect of preventing religious bodies from promoting the authentic biblical view on sexuality or sexual immorality in general and from criticizing it. This conflict has already manifested itself in recent years in EU member states which have adopted at the national level similar legislation, in particular Sweden and the United Kingdom. The same has been the outcome even outside the EU, in Canada and the United States. In some cases religious personnel have been arrested, convicted, fined, or exposed to public ridicule. The net result of the expansion of sexual orientation nondiscrimination has been the persecution of religious individuals and bodies.

Second, sexual orientation nondiscrimination conflicts with **freedom of association**. The proposed directive can potentially be interpreted to prevent seminaries and religious bodies from not admitting in their theological establishments persons that practice deviant sexual lifestyles or promote such lifestyles. Religion calls for separation between the holy and the unholy, and between it and immoral lifestyles. We are aware of course that in some EU member states certain religious bodies have rejected biblical views on homosexuality, in Sweden or the United Kingdom, for instance, but the majority of others religious establishments continue to oppose it. Specifically with respect to Romania, a recent opinion poll indicated that 91% of its citizens reject homosexuality and that up to 95% of them consider themselves religious. Thus, the blanket prohibitions of the proposed directive ignores this reality and adversely impacts the freedom of religion of many.

A related impact of the directive might be to compel religious associations to admit among their members individuals who claim a sexual orientation which is incompatible with biblical views on the subject or to prohibit them from denying such persons positions in church hierarchy.

Third, people of faith possess **human rights** as well, some of them recognized in truly global international treaties and accepted in practice for hundreds of years. The tendency of European courts, of the European Court of Justice, and of the European Court of Human Rights has been to foster inconsistency in the interpretation and implementation of human rights. And the trend in recent years has been to resolve such conflicts against religious believers. In fact in the aftermath of the 1989 Treaty of Amsterdam religious freedom has constantly lost out to sexual orientation nondiscrimination. The directive now places this very important issue at a cross-roads for the European Union. And this, too, explains the deep worries and reservations toward the directive of the constituency we represent.

## II.

### Access to Goods and Services

Freedom of religion and sexual orientation nondiscrimination also conflict in the murky domain

of access to goods and services. This already is a reality in countries which have adopted similar legislation at the national level, in the United Kingdom, Canada, and the United States, among others. The proposed directive has the potential of being interpreted broadly to define religious and spiritual benefits as public goods and services from which individuals may not be barred based on their sexual orientation. For instance, the offering of the sacraments or communion, the ordination of the clergy, baptismal services, the use of church grounds for holding Bible ordained ceremonies, such as weddings, adult baptismal services, or engagements, could be interpreted as goods and services which religious establishments might be barred from refusing to offer to certain persons because of their biblically incompatible sexual orientation.

These enumerated services cannot be extended to certain categories of individuals because they lack the necessary qualifications to be entitled to their receipt. The qualifications in turn are based on belief and conviction. The recipient must both be qualified based on theological criteria to receive the benefits and must accept the tenets of the church to be entitled to them. It seems the proposed directive is poised to cross this line of the separation between church and state, thus infringing on **theological freedom**.

A similar argument may be made with respect to certain goods and services provided by businesses owned and operated by religious individuals. Forcing sexual orientation nondiscrimination on such enterprises in countries that already have such legislation has resulted in **reverse discrimination**. Enterprises owned and operated by religious persons based on religiously inspired and dictated principles and convictions have been sued successfully by persons claiming discrimination based on sexual orientation. For instance, photography enterprises have been found liable for refusing to provide, based on religious convictions, photography services for same-sex marriages. Religious persons refusing, once again due to their religious convictions, to rent rooms to same sex couples or unmarried couples, have also been sued successfully. Unmistakably, in each one of these cases religious freedom and freedom of conscience lost out. This outcome is decidedly and unmistakably discriminatory against religious persons. This anomaly is striking considering that religious freedom is a fundamental right, in contrast to sexual orientation nondiscrimination which is not. Thus, the potential for the proposed directive to continue to undermine religious freedom and belief is real.

However, one can imagine additional areas in which sexual orientation nondiscrimination could trump religious freedom. Wedding and other celebrations catering services could be barred from refusing such services to customers based on their sexual orientation even though the refusal is based on and compelled by religious convictions. So would also be advertising services run by religious personnel, publishers who could be barred from publishing or printing anything critical of homosexuality, or publishers refusing to publish material which promotes homosexuality.

The **ambiguity** inherent in the directive is an additional trap for religious liberties. It does not define “**goods and services**,” a failure that could prove fatal to religious bodies. Reasonable minds would likely not differ that refusing to sell food to persons because of their sexual orientation is inadmissible. But the same reasonable minds would differ as to the social value or

desirability of forcing religious bodies to grant religiously mandated services to persons who are not entitled to them because of their biblically incompatible social orientation. And the same reasonable minds would agree that the historic right to religious freedom should not give way to the recently created doctrine of sexual orientation nondiscrimination.

Of course, we are not referring here to goods and services that all individuals use on a routine basis, such as buying furniture or riding the bus, for instance, but to services which the public selects on an occasional basis because of specific and different needs people have. And there are services generated by belief and religion which cannot be open or made available to all but only to those that qualify to receive them by virtue of belief and by identifying themselves with the religious tenets of the businesses offering those services. It is precisely such specific services that the proposed directive fails to segregate to protect religious freedom.

Among such services are adoption services, marriage counseling services, restroom and locker room accessibility services and amenities located in religious confines, official records issued by religious bodies, names and changes of names, religiously mandated dress codes, gender segregation requirements imposed by religious belief, youth summer camps run by religious establishments, retreat seminars, centers or events sponsored by religious bodies, dating services restricted to a particular religious denomination or opposite-sex couples, and many other similar services. Several examples, some based on real events, should suffice to convey the legitimate and grave concerns of religious bodies, faith-based institutions, and faith-based enterprises:

\* in some countries the Catholic Church has been forced to curtail or completely eliminate its **adoption services**, having been forced, against its Bible-based convictions, to process children for adoption by same-sex or unmarried couples. Examples that readily come to mind include the UK and the State of Massachusetts in the United States. We are aware that the proposed directive seeks to exclude adoption services from its purview. But in light of the existing experience in some Member States this is of little consolation to the many adoption agencies throughout the European Union who, based on their religious convictions, refuse to place children for adoption with same-sex or unmarried couples. The proper remedy then would be for the proposed directive to forthrightly stipulate an exemption stating that religious bodies which run adoption agencies not be required to place children for adoption with same-sex couples or unmarried couples to the extent that such matters are among the core elements of their belief system or theology.

\* religious establishments, churches, seminaries, and similar facilities could be forced to eliminate **segregated restrooms** in favor of unisex washrooms, or to add separate restrooms for persons who claim a gender identify that is neither male nor female, or are in a transitional stage between the two biological sexes

\* religious bodies could be forced to conduct **marriage counseling** for persons involved in same-sex relationships

\* **licensing requirements** for allowing religious personnel or religious bodies to conduct marriage counseling could expand to mandate obligatory courses in same-sex counseling

\* the authority of the state could be used to force out of business religiously-inspired businesses which refuse to provide **counseling on same-sex relationships**, or which, to the contrary, teach that such relationships are unacceptable and should be dissolved

\* religious bodies could be forced to **rewrite birth or marriage certificates** or baptismal records to indicate for the recipients a sex different from their biological sex

\* religious bodies could be forced to **forego** imposing **biblically-mandated discipline** on members who, due to their sexual orientation do not conform to church teachings on the appropriate dress code, conduct, behavior, or manifestations

\* religious bodies could be prohibited from assisting with **counseling**, in congruence with their calling and biblically mandated mission, **persons who wish to exit sexually immoral lifestyles**

\* religious bodies could be forced to forego religiously mandated **segregation of sexes** during worship services, where, for instance, a male transgendered into a female would seek, in violation of church doctrine, to sit among women during the worship service

\* religious bodies could also be forced to eliminate **dating services** restricted to opposite sex individuals

\* the religion protection clauses in the directive could potentially force religious bodies which provide **dating services** to only individuals who belong to a specific denomination to open their services to individuals from other denominations as well

\* the directive has the imminent potential of forcing religious bodies to **employ** and maintain employed in positions which are reflective of the religious bodies' theological identity **persons with a sexual orientation which religious bodies reject**. In fact, there is tangible precedent for this alarm which recently surfaced in the United Kingdom. Its recently proposed Equality Bill contains an interpretive illustration which is quite clear that other than the "post of head of" the religious organization, ministers and bishops, most other lesser staff positions must be open for employment to all persons regardless of their sexual orientation, gender identity, or marital status. Such positions would include youth ministers, secretaries, accountants, and other administrative personnel.

\* with respect to **education**, religious bodies could be compelled to admit for theological training persons with a sexual orientation which is incompatible with biblical teachings or the organization's theological tenets

\* a similar effect upon religious bodies could be the forced **ordination** of persons with a biblically incompatible sexual orientation, under the guise that ordination is a “service” or a prerequisite for being licensed into the ministry

\* a similarly adverse impact could result with respect to the **religious curriculum** in private schools where sexual orientation nondiscrimination would be used as an argument to eliminate the teaching of religious doctrines critical of immoral lifestyles or, alternatively, to compel the teaching of doctrines which approve them

\* **religious schools** could be required to change the structure of their dormitories to accommodate transgendered individuals

\* religious schools could be compelled to offer rooms for **cohabitation** to same-sex couples as they do to opposite sex married couples

\* in Member States which bestow **tax exempt status** on religious bodies, such status could be revoked if the services and benefits they provide to their members are not extended to individuals with a biblically incompatible sexual orientation

\* **medical providers** who based on conscience and religious convictions refuse to provide artificial insemination to same-sex couples could be forced to abandon their convictions for the sake of making a living

\* the faithful could potentially be prohibited from **wearing** or displaying **religious symbols** and paraphernalia in **public**

\* the line between religious services and public services of religious bodies will be blurred and abused to the detriment of religious establishments

\* **religious media and broadcasting** could be adversely impacted as well where licensing or unlicensing of faith-based media organizations would be contingent upon the adoption of notions, doctrines and practices compatible with the proposed directive as it relates to sexual orientation issues. A recent example surfaced in Brazil where the government is considering adding warning labels to Christian programs it deems “homophobic” and recommending against viewing by individuals below 18.

\* grave concern is caused by the possibility of applying the definition of “**harassment**” (Article 2(3) of the proposed directive) to religious bodies. (Harassment is defined as “unwanted conduct ... [which] takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.”) Under this definition virtually any person could claim “harassment” to the extent religious bodies express, teach, or practice disapproval of biblically-nonconforming lifestyles.

\* with respect to the prohibition of nondiscrimination in the area of “**social advantages**,” religious organizations could be adversely impacted when refusing to provide grants or scholarships, for either theological or secular education, to students who do not fulfill biblically mandated criteria because of their chosen sexual orientation

\* religious persons could be forced to **render services** to the homosexual community which are designed to promote the cause of that community **in violation of their religious convictions**. Even though one Canadian court has found that this would be unlawful, Ontario Human Rights Commission v. Brockie (2002) 22 DLR (4th) 1974, there is no guarantee that in the highly fluid domain of jurisprudence the European Court of Justice or the European Court of Human Rights might not make a contrary pronouncement.

### III.

#### What Is Sexual Orientation ?

Another significant shortcoming of the proposed directive is the lack of definitional parameters. Specifically, a definition for sexual orientation is lacking. This shortcoming is a seed for the directive’s future disorderly interpretation. The Ontario (Canada) Human Rights Commission interprets “sexual orientation” to be “an immutable personal characteristic that forms part of an individual’s identity. Sexual orientation encompasses the range of human sexuality from gay to lesbian to bisexual and heterosexual orientations, including intimate emotional and romantic attachments and relationships.”  
<http://www.ohrc.on.ca/en/resources/Policies/SexualOrientationPolicyEN>

Reasonable minds differ whether sexual orientation is immutable. There is no scientific consensus that such is the case and in fact the current research trend is in the opposite direction, namely that homosexuality is not biologically engrained but socially engineered. Further, at the national level Member States may choose to ascribe different definitions to sexual orientation and, under the impetus of evolving research, to even discard it altogether. Thus, a conflict of interpretation would necessarily ensue.

### IV.

#### National Sovereignty

We now express concerns about the directive based on national sovereignty considerations. As written, the directive would have the impact of shifting ultimate responsibility for interpreting human rights legislation away from the national judiciary to the European Court of Justice. This would be unacceptable since interpreting human rights and their meaning has to be contextualized in the cultural and traditional background of each member state separately. The ECJ lacks this ability and the sensibility necessary to make the proper decisions. In this regard we agree with the comment in the Resolution of the German Federal Council that “[T]he different legal systems and traditions of the member states must be considered and it must be left

up to them as to how they ensure protection from discrimination.” (Paragraph #3, Resolution of the Bundesrat, September 19, 2008) Friction between national laws and the directive would also be inevitable.

Further discontent is raised by the directive seeking to allocate to the European Union matters that are of the competence of the member states, not of union-wide concern. One of the practical outcomes of the Directive will likely be the transferring of ultimate control and decision-making authority in the area of human rights from national parliaments to the European Parliament.

We also have examined in depth internal Romanian legislation regarding sexual orientation nondiscrimination. It is fairly extensive and comprehensive and there is no need to adopt additional legislation, definitely not at the EU level. In this respect the proposed directive would probably not be a gap-filler for most Member States and therefore we agree with similar views expressed about similar national legislation in resolutions against the directive passed by the Parliaments of Germany, France, and the Czech Republic.

And this leads us to another, related topic. The objective of the European Parliament should be to eliminate legal redundancy, not to foster it. If implemented, the directive will spawn a large volume of litigation, straining the already limited judicial resources of the Member States and of the EU. Also, both the ECJ and the ECHR have crowded dockets. Litigation will only compound the problem, and the positive tangible results, if any, will likely be minimal.

We now express reservations about the proposed directive’s **Article 13** (“Compliance”) which demands that “any [national] laws, regulations and administrative provisions contrary to the principle of equal treatment [be] abolished,” and that “any contractual provisions, internal rules of undertaking, and rules governing profit-making or **non-profit-making associations** contrary to the principle of equal treatment are, or may be, declared null and void or are amended.”

This is a truly frightening requirement. Religious establishments are by and large nonprofit associations. Imposing upon them the strictures of the directive would effectively destroy them. Equality and equal treatment are understood in different ways by different persons, cultures and civilizations, and differentiation among individuals does not ipso facto amount to inequality. Defining equality and equal treatment is also largely a subjective exercise which for many individuals depends on their religious convictions. Therefore, given the severe repercussions which Article 13 is likely to have in the event the directive is adopted, we recommend that it be eliminated entirely. Each Member State should be allowed to decide for itself the philosophical and legal definition of equality and equal treatment.

## V.

### Unintended Adverse Consequences

But the proposed directive likely will have additional, unintended and adverse consequences. It will set a dangerous precedent which future generations of Europeans will likely use to justify

more extreme legislative enactments in favor or against other groups. It will encourage Member States to become even more bold in their marginalization of religion by legislative means. Religious freedom will be undermined. Reasonable tolerance will be strained. Hostility toward religion and religious persons will be fostered. Religious citizens of the European Union will be relegated to a second tier status and isolation. The religious identity of hundreds of millions of citizens of the European Union will be threatened. The right of religious organizations to make free choices will be impaired. Reverse discrimination against religious organizations and individuals will ensue. Until now the beneficiaries of sound and stable legal protections, religious bodies will likely, from now on, lose them. An atmosphere of legal insecurity and intimidation for religious bodies will emerge. Religious bodies will be compelled to engage in self-censorship or be threatened with state imposed censorship. Opposition to various manifestations and trends intrinsically intertwined with sexual orientation will be silenced. Freedom to worship will be attenuated. Freedom of conscience will be atrophied. The heap of rights will grow to the detriment of freedoms. Moral and ethical considerations in the drafting of legislation will be displaced. In the course of time civil penalties against religious bodies will likely be supplanted by criminal penalties. Judicial interpretations of human rights instruments will foster chaos, uncertainty, an ambiguity, rather than clarity. (On this subject we recommend Jeffrey A. Brauch, *The Dangerous Search for an Elusive Consensus: What the Supreme Court Should Learn From the European Court of Human Rights*, 52 Howard Law Journal 299 (2009), concluding that the ECHR's long experience demonstrates that the European consensus standard endangers both human rights and the rule of law) The principle and time-honored practice of separation of church and state will have been violated. In essence the secular will impose on the religious secular conduct and notions incompatible with theological doctrine. Secular intolerance against churches, synagogues and mosques will be wide-spread. In some instances the directive will pit against one another not only rights and freedoms, but also positively created rights against constitutional provisions of Member States, Romania being one of them, which protect religion and religious expression.

## VI.

### Our Plea

In sum, we opine that European society will not become better but worse off as a result of this proposed directive, a step closer to the totalitarian nightmare which it shook off only a generation ago. And on this subject the citizens of Romania are extremely sensitive. A generation ago they warded off totalitarianism, only to be faced with the present threat of having imposed upon them thought and behavioral patterns incongruent with their tradition, culture, and civilization. Thus, we respectfully request that the Council of Ministers of the European Union vote down the proposed directive. We also appeal to the Romanian government to instruct its representatives on the Council to do likewise. We finally urge the Romanian Parliament to be sensitive to the need to protect the religious liberties of Romania's citizens and adopt a resolution, as has already been

done in Germany, France, and the Czech Republic, demanding that Romania cast its vote against the proposed directive.

Respectfully submitted,

*Dr. Peter Costea*

BY \_\_\_\_\_  
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PC/my

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