ALIANŢA FAMILIILOR DIN ROMÂNIA

ALLIANCE OF ROMANIA'S FAMILIES
Str. Zmeica nr. 12, sector 4, Bucuresti
Tel. 0745.783.125 Fax 0318.153.082
www.protejarea-familiei.com
office@protejarea-familiei.com

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Agency for Fundamental Rights of the European Union
Rahlgasse 3
A-1060
Vienna
AUSTRIA
Via fax 43-1-580-30-693
Via email transmission information@fra.europa.eu

Re.: HOMOPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION IN THE EU MEMBER STATES: PART I – LEGAL ANALYSIS: *A LEGAL CRITIQUE AND RESPONSE BY THE ALLIANCE OF ROMANIA'S FAMILIES*

Greetings!

The Alliance of Romania's Families ("ARF") comments on the Report which your Agency released in June 2008 on the subject of homophobia and discrimination on grounds of sexual orientation in the EU Member States. ARF has reviewed the Report in great detail and, after due and careful consideration, responds with this Commentary. We respectfully request that the views expressed in it be considered by the Agency in its future endeavors or recommendations related to the subject of the Report.

ARF is a civic organization duly constituted under the laws of Romania. Our constituency consists of hundreds of thousands of Romanian families whose concerns, interests, and views we represent, promote, and defend. The views expressed in this Commentary are shared by a large segment of Romania's population, they differ from most of the opinions and recommendations expressed in the Report, and, accordingly, should also be considered by the Agency. The Report is fraught with inaccurate statements of law and fact, its conclusions are also largely inaccurate, and its recommendations reflect a biased perception and presentation of the applicable legal principles. Specifically with respect to Romania, the Report contains erroneous statements of law and fact which we will point out as needed.

We address the major themes of the Report seriatim.

I. THERE IS NO INTERNATIONALLY RECOGNIZED RIGHT TO NONDISCRIMINATION BASED ON SEXUAL ORIENTATION

The Report inaccurately and frequently refers to nondiscrimination based on sexual orientation as an international human right. It is not, and the analysis which leads to this conclusion is faulty. There is no consensus in international law and in the international community that such a right exists. With the sole exception of the Treaty of Amsterdam (1999), no other international legal instrument recognizes sexual orientation as a protected trait on the basis of which discrimination or differentiation in treatment would be disallowed. Simply stated, sexual orientation as a ground for nondiscrimination has not received the imprimatur of the world community, de jure or de facto.

None of the international legal instruments which form the legal foundation of the contemporary international system, and which enjoy much broader acceptance in the international community than the Treaty of Amsterdam, reference sexual orientation. These international instruments are: The Convention on the Prevention and Punishment of the Crime of Genocide (December 9, 1948) (which refers to "national, ethnical, racial or religious groups"); The Universal Declaration of Human Rights (1948); Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (commonly known currently as the European Convention on Human Rights); The International Labor Organization Convention on Discrimination in Employment or Occupation (1958); The European Social Charter (1961); The International Covenant on Civil and Political Rights (1966); The International Covenant on Economic, Social and Cultural Rights (1966); International Convention on the Elimination of All Forms of Racial Discrimination (1966); American Convention on Human Rights (Pact of San Jose) (1969); Final Act of the Conference on Security and Cooperation in Europe (Helsinki) (1975) (Part VII); Convention on the Elimination of All Forms of Discrimination Against Women (1979); The African Charter on Human and Peoples' Rights (1981); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989).

The lone Treaty of Amsterdam is insufficient to create an internationally recognized right to nondiscrimination based on sexual orientation. It came into force on May 1, 1999 as the first ever international treaty to explicitly mention and protect sexual orientation, urging Member States to "combat discrimination" based on "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." At best, the Treaty of Amsterdam creates regional international law, not international law of universal applicability of the type recognized as binding on nation states and envisioned in Article 38 of the Statute of the International Court of Justice.

The Charter of Fundamental Rights of the European Union (Nice 2000) has broadened this language in its Article 21 which sweepingly declares that "[A]ny discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." However, the Nice Charter is not binding on the EU Member States. Though included in the drafts of the proposed European Constitutions (2005 and the 2007 Treaty of Lisbon), as of the time of the issuance of the Report in 2008, the Nice Charter had not come into effect.

But even if the Nice Charter had come into effect, the fact that it would only bind 27 states of the more than 190 sovereign nations world-wide, would still be insufficient to compel the conclusion that sexual orientation is part and parcel of international human rights law as opposed to regional international law. The 27 EU Member States represent less than 15% of the current sovereign states of the family of nations. Adoption by less than 15% of nation states of sexual orientation nondiscrimination does not convert it into a human right incorporated into international law.

With respect to the Treaty of Amsterdam the same conclusion applies. It currently applies to only 27 states of the world community, to a relatively and geographically small part of the world, and to a fairly small percentage of the world's population. Notably, it reached the number of 27 states through economic coercion, not the free acquiescence of states. In 1999 when the Treaty of Amsterdam entered into force, the European Union only consisted of 15 states. It was only binding on 15 states, and the further joining of the European Union was predicated upon the applicant states decriminalizing sodomy and agreeing to the terms of the Treaty of Amsterdam. It can hardly be argued then that the principle of nondiscrimination based on sexual orientation reflects the freely given consent of each member state. This observation is warranted because modern international law, having rejected natural law, is based on consensus. Consent must be freely given and it must be uncoerced. The Treaty of Amsterdam imposed sexual orientation as a ground for nondiscrimination on states where homosexuality was virtually unknown by the time an interest was shown in joining the European Union. Therefore, it can further be argued that an undemocratic process is at work in the recommendations of the Report, where precise and radical objectives are set out to be accomplished through the intervention of the state and of legislative bodies, both national and European.

Relevant, too, is that the European Convention on Human Rights, which is binding on a significantly greater number of states, 47 to be precise, does not even recite sexual orientation.

Pointing out that sexual orientation is a protected characteristic in other major democracies around the world, namely the United States of America, Canada, or Australia, would be misleading and unhelpful in recognizing sexual orientation as a protected trait under international law. While Canada may be on the same par with the more liberal states of the European Union, Australia and the United States are not. Australia does not recognize same-sex marriage or civil unions. Similarly, more than half of the states of the United States do not identify sexual orientation as a protected characteristic, 27 reject same sex marriage and civil unions in state constitutions, and others explicitly limit marriage to opposite-sex adults through organic laws. Even Brazil, a country which traditionally has been more tolerant of homosexuality and the rights of homosexuals, has recently set limits. On August 21, 2008 Brazil's Chamber of Deputies voted down a legislative measure seeking to grant to homosexual couples the right to adopt children, and the city of Petropolis abrogated a city ordinance which previously had established Gay Pride Week in the city. And as recently as 2005 60% of Brazil's population was opposed to civil unions for homosexuals. Relevant, too, is that Brazil's Constitution defines marriage as the union between "a man and a woman" and on this basis has refused to legislate same-sex partnerships. (Chapter VII, Family, Children, Adolescents, and Elderly, Article 226(3)

"For purposes of State protection, a stable union between a man and a woman as a family unit shall be recognized and the law shall facilitate conversion of such unions into marriage.") Even the Cayman Islands enacted a law, as recently as September 2008, which defines marriage as the union between a man and a woman.

Of some relevance, too, is the fact that 90 countries around the world still ban sodomy. While this evidence is not presented to suggest that criminalizing sodomy is acceptable, it supports the argument that no internationally recognized right to sexual orientation nondiscrimination exists.

II. LEGALIZED SAME-SEX FRAMEWORKS HAVE NO SOCIAL UTILITY

The Report properly concedes that both the European Court on Human Rights, which interprets the European Convention on Human Rights, and the United Nations Human Rights Committee, which interprets international legal instruments adopted by the United Nations with respect to human rights, have refused to recognize a right to same-sex marriage. While conceding this major legal impediment, however, the Report urges a multitude of alternate frameworks that would compel all EU Member States to either legislate same-sex marriage or same-sex civil unions, or, alternatively, ensure absolute equality between opposite-sex marriage and same-sex marriage or civil unions.

ARF concedes that there are no legal impediments to EU Member States legislating, individually or collectively, same-sex marriage or same-sex unions, or absolute equality in any and all possible areas, between opposite-sex marriage and same-sex marriage or civil unions. However, the legal logic behind such a radical development would be flawed.

The institution of marriage is not a grant by society to heterosexual couples because of their sexuality. In contrast, same-sex marriage would be a grant bestowed on homosexual couples precisely <u>because</u> of their sexuality. This conceptual distinction is important because, if carried to its logical conclusion, it reveals discrimination based on sex against heterosexual couples. Rather, marriage is a grant from society to heterosexual couples because of the unique and exclusive function which they fulfill and the social utility which their union bestows upon society, namely procreation, the potential for procreation, and the perpetuation of the human race. Same-sex marriage does not fulfill this social function and is void of any social utility. Marriage is unique and a uniquely valuable social institution precisely because of its procreative role. For this reason, too, it benefits and should continue to benefit from unique and heightened societal protection.

A subset of this argument is the illogical result of heterosexual same-sex couples who choose to marry one another instead of persons of the opposite sex. In this case marriage would be bestowed upon heterosexual same-sex couples based not on their sexuality or sexual orientation but on their friendship or associational proclivities. This indeed would be absurd, but nevertheless possible under the framework proposed in the Report. Once more, the net result would be the ordaining of a social institution devoid of any social utility.

Societies legislate and protect only institutions which have social value, such as marriage, education, courts, democratic institutions, the state, the government, the church, the military establishment, the arts, expression, or basic liberties, among others. Precisely because social institutions vary widely in their respective degree of social utility they are afforded different degrees of constitutional or legal protection. No doubt marriage and the family have always been and continue to remain the most important institutions and the institutions with the greatest social utility. They have made possible the emergence and survival of all other social institutions. For good reason, therefore, they deserve a degree of legal protection proportionate to the benefit they confer on society. Conversely, it is contorted logic to assign a place of any importance or meaning in the hierarchy of social institutions to same-sex frameworks which are inherently devoid of any social utility.

This argument is all the more relevant considering that other social issues with undoubtedly more significant societal value and utility, such as the rights of the unborn or of the human embryo, for instance, continue to lack protection in the European Union. That the European Union would, in contrast, spend so much energy and resources on promoting valueless institutions, such as the various and complex same-sex frameworks which are the object of the Report, is truly baffling, and quite frankly, irrational.

III. HIERARCHY OF RIGHTS

The Report recommends that the EU adopt legislation to ensure that "all grounds of discrimination mentioned in Article 13 of the EC Treaty benefit from the same high level of protection ensuring that all can enjoy equal rights to equal treatment." (Page 155 of the Report) The Report laments the seemingly greater degree of protection the EU extends to protected traits other than sexual orientation, such as race, religion, belief, or sex, concluding that this hierarchical disposition "might not be compatible with the status acquired by the prohibition of discrimination on grounds of sexual orientation in international human rights law." (Page 11 of the Report)

This argument, too, rests on shaky ground. The key words here are "international human rights law."

First, sexual orientation nondiscrimination has not attained a peculiar status under international human rights law since, apart from the European Union, no true international legal regime exists related to sexual orientation. So, claiming, as the Report does, that "sexual orientation, just like 'gender identity' clearly have acquired the status of "suspect grounds" in international human rights law," is plainly inaccurate. (Pages 33-34 of the Report) Even the European Court of Human Rights has rejected this view, as the Report has candidly conceded. (Page 34 of the Report) Nevertheless, on this faulty premise the Report concludes, equally erroneously, that "if any hierarchy [of fundamental rights] is to exist, these grounds [i.e. sexual orientation and gender identity] should be placed at its top, rather than at its bottom." (Page 34 of the Report) Citing, as the Report does, to the Yogyakarta Principles on the Application of International Human Rights in Relation to Sexual Orientation and Gender Identity in support of

this proposition is quite disingenuous. The Yogyakarta Principles alone will not convert "sexual orientation" and "gender identity" into "suspect grounds." The Principles were created ex nihilo in 2006 by law professors and representatives of LGBT organizations who simply seek, and have sought for many years, to promote their agenda through international law. However, no court has cited to the Principles, adopted them, or ruled that they constitute an authoritative statement of existing international law on the subject. Simply outlining an academic objective does not necessarily equate to it actually being extant.

It is further to be noted that the conference which outlined the Principles was not attended by official delegations of states or by subjects of international law, did not speak in the name of states, and did not outline the official position of states on the status of sexual orientation under international law. The Yogyakarta Principles were adopted by 29 organizations and individuals from 25 countries. Only 10 were law professors or legal scholars. The remaining 19 individuals who signed the Principles were mere representatives of LGBT organizations from various countries. While Article 38(1)(d) of the Statute of the International Court of Justice recites that "the teachings of the most highly qualified publicists of the various nations" may constitute a "subsidiary means for the determination of rules of [international] law," it is doubtful that any of the 10 legal scholars who affixed their signatures on the Yogyakarta Principles have attained that status.

On the contrary, one could more properly cite to the Doha Declaration (2004) which, unlike the Yogyakarta Principles, was issued by representatives of governments and members of civil society gathered at the Doha International Conference for the Family which commemorated the 10th Anniversary of the International Year of the Family. Tracking language in the Universal Declaration of Human Rights, the Doha Declaration proclaimed that "the right of men and women of marriageable age to marry and to found a family shall be recognized …" Thus, it can more accurately be stated that the prevalent view of the world community is that sexual orientation is not a suspect class in matters of marriage. Simply stated, no source of international law establishes a right to found a family or marry regardless of sexual orientation.

We further note an even more relevant event which took place on December 26, 2004 when the United Nations General Assembly observed the final event of the International Year of the Family. The Assembly adopted Resolution A/59/L.21 which was signed by 149 of the then 191 member states of the world community. The Resolution reaffirmed the commitment of the international community to marriage and the family. The only dissenting view was presented by the Dutch ambassador who, claiming to speak on behalf of the European Union, stressed that "although the family is the basic unit of society, its concept and composition has changed in the course of time." He further asserted that "it is not up to the state to impose limitations [on the right to found a family] on the basis of race, nationality, religion, sexual orientation, or any other status." The Dutch ambassador was the lone voice in the vast family of nations and his subjective opinion is insufficient to convert sexual orientation into a suspect category. The Alliance of Romania's Families rejects this view as being inaccurate and not representative of our views and values.

Second, unlike race, ethnicity, language, or religion, sexual orientation is neither innate nor an immutable trait. (See Peter S. Bearman & Hannah Bruckner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction,* 107 American Journal of Sociology 1179, 1180 (2002) Though concededly this issue is highly controversial and the object of much debate, precisely for this reason sexual orientation should not benefit from the same degree of protection as the other traits with respect to which there is no controversy but full consensus. This argument also applies with particular force to the rights of transsexuals whom the Report awkwardly seeks to fit within the definition of "sexual orientation." (Page 123 of the Report) Gender bending based on personal choices cannot in good conscience be placed in the same category, and deserving of the same degree of protection, as race, religion, or ethnicity.

Third, a right of nondiscrimination based on sexual orientation decreed less than 10 years ago, in 1999 to be precise, cannot claim the same social importance or entitlement to legal protection as the much older grounds, such as race, religion, language, or ethnicity. The longevity of the consensus of the international community with respect to a fundamental right necessarily operates as an objective barometer indicative of the importance that civilized states have traditionally assigned to various fundamental rights.

Fourth, the mere fact that scores of international instruments protect race or religion from discrimination, and only one identifies sexual orientation, should further make it self evident that the world community has traditionally believed in a hierarchy of rights deserving of different levels of protection commensurate with the importance and utility of those traits to the welfare of society. The Conference on Security and Cooperation in Europe (Helsinki 1975) only refers, in Part VII, to the obligation of the participating states to "respect human rights and fundamental freedoms, including freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion." Sexual orientation is conspicuously absent. Notably, however, sexual orientation is not only the youngest protected characteristic to make it into a single European Union treaty, but it also is listed as the last such ground in both the European Convention of Human Rights (1999) and the Treaty of Nice (2000). The Treaty of Nice lists sexual orientation behind "color, social origin, genetic features, language, political or other opinion, membership in a national minority, property, birth, and disability." The logical inference from this language is that this enumeration of grounds was not haphazardly done, but reflects the importance and weight which the drafters allocated to each ground of nondiscrimination.

Nor is a "right" born or recognized overnight, especially a fundamental right. The United States Supreme Court has long affirmed precise and extremely useful guidelines in assessing both the point of birth or recognition of a new right and its importance to society. In Washington v. Glucksberg, 521 US U.S. 702, 740, 117 S.Ct. 2258, 138 L.Ed2d 772 (1997), Justice Rehnquist affirmed that, to qualify as a "fundamental liberty interest," the asserted right must be both "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it] were sacrificed," and also "deeply rooted in this Nation's history and tradition." Evaluated against this insightful commentary, the right to nondiscrimination based on sexual orientation in any and all respects and the placing of sexual orientation on the same level of protection as race

or religion, are indeed awkward propositions. Particularly with respect to Romania, homosexuality was virtually unknown there until less than a generation ago. Homosexual conduct is not "deeply rooted in the [Romanian] Nation's history or tradition." Nor do we believe that nondiscrimination in any and all possible respects with regard to social orientation would constitute a "fundamental liberty interest" of homosexuals. It definitely is not "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it] were sacrificed." On the contrary, society's history teaches that "neither liberty nor justice would exist" without freedom of religion or racial equality.

On a related note, homosexual conduct does not currently enjoy general acceptance in many EU Member States, as reflected by various recent opinion polls. In the course of time this may change, but current reality is such that the criterion of general acceptance is not met. Romania, for instance, has consistently been at the bottom of EU countries regarding acceptance of same-sex marriage or adoptions of children by homosexuals. A TNS Opinion & Social Eurobarometer survey conducted in October 2006 in various EU Member States reflects a wide discrepancy in views regarding these subjects. The highest acceptance of same-sex marriage was found in the Netherlands, with 82% of the public affirming support for it. In contrast, only 11% of Romanians indicated approval of same-sex marriage. Bulgaria is another case in point where only about 20% of the public approves of homosexuality. The same October 2006 opinion survey averaged the separate results from the 27 EU Member States and concluded that overall 56% of Europeans disagreed that homosexual marriage should be instituted throughout the European Union.

In light of this wide discrepancy of views we express our deep concern about the EU's attempts to force socially useless institutions on Romania against the will of the Romania people which also are incongruent with their tradition, civilization, and history. We feel confident that this observation is valid for other EU Member States as well.

In the face of these objective observations it seems quite obvious that the drafters of the Report seek to secure a special and enhanced place for sexual orientation among the fundamental rights recognized and promoted by EU legislation, the status of a first among equals to be precise. The notion of primus inter pares is offensive to basic doctrines of equality. This attempt is quite frightening when considering, as we do below, the criminal penalties suggested for those who disagree with the manner in which they frame the issues regarding sexual orientation.

IV. CONFLICTS OF RIGHTS

A related conceptual pillar of the Report is Article 29 of the Universal Charter of Human Rights which states, in relevant part, that "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Article 29 conveys the principle that rights are not exercised in a vacuum but in relation to each other. For this reason it imposes an international legal obligation on the contracting parties to ensure the avoidance of conflicts in the exercise of rights. It also mandates the principle that no right is absolute and that the exercise of rights may be restricted on various grounds. The mere mention of the authority of states to restrict the exercise of rights implies the existence of a hierarchy of rights, for inevitably not all rights are coextensive, some are more useful to society than others, while the exercise of some may be more harmful to society than others. For instance, there is no redeeming value for pornography even though it is protected by freedom of expression. As stated previously, limiting matters of marriage to opposite-sex persons would be congruent with the states' obligation to restrict the exercising of rights in the interest of public order and the general welfare. Simply stated, sexual orientation cannot claim an equal footing with fundamental rights.

The Report is quick to urge restrictions on the exercise of fundamental freedoms by citizens who disapprove of homosexuality, but has delineated no equivalent parameters for sexual orientation. The European Convention has listed specific restraints on the exercise of such fundamental freedoms as "thought, conscience, and religion;" (Article 9); "right to respect for private and family life;" (Article 8) "freedom of expression;" (Article 10); and "freedom of assembly." (Article 11). Article 9 recites the following with respect to freedom of thought, conscience and religion: "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Rather, it would be more acceptable for sexual orientation to benefit from a case-by-case "reasonable accommodation" status subject to exceptions based on de minimus undue hardship, instead of an equal footing with the more entrenched fundamental freedoms. This proposition is not novel in anti-discrimination law. It exists, for instance, with regard to disability discrimination, where an employer is not obligated to keep employed or to offer employment to disabled persons who are unable to fulfill the essential functions of their job without reasonable accommodation and where implementing reasonable accommodation would constitute an undue hardship on the employer. U.S. Airways v. Burnett, 535 U.S. 391, 122 S.Ct. 1516 (2002) In this manner, fundamental rights avoid irreconcilable conflicts, the dignity of homosexuals is attained, and sexual orientation nondiscrimination does not unduly interfere with the exercise of collective rights.

It is undeniable that the right to sexual orientation nondiscrimination is not absolute, even though the Report fails to so state, and that, just like other rights, its unrestricted exercise can lead to harmful excesses and abuses in both the content ascribed to this right and in the manner of its implementation. An elevated protected status for sexual orientation would not be the solution, but the problem for full enjoyment of fundamental rights.

First, the right to sexual orientation nondiscrimination already conflicts with freedom of religion, and incidents related to this conflict abound. Sweden has pressed criminal charges, successfully at times, against individuals or institutions which criticized same-sex marriage based on their sincerely held religious convictions. Similar developments have occurred, and continue to occur in Canada and in the United Kingdom. The United States is no exception to this trend, although in the United States the judiciary and the legislative have proceeded with more caution. It is often forgotten that freedom of religion is significantly older and more universally entrenched in the consciousness of individuals and nations than the freedom of nondiscrimination based on sexual orientation. The practice in the more socially liberal states of the EU suggests that freedom of religion is being relegated to a secondary tier status and sexual orientation is placed at the top. The doctrine of nondiscrimination based on sexual orientation seemingly has trumped long held church doctrines regarding the sanctity of marriage, the nature and composition of marriage and the family, or the role of Christian education and tradition in the fashioning of society. The rights of conscientious objectors with respect to sexual orientation continue to be eroded in the United Kingdom, Sweden, Belgium, and the Netherlands. Civil servants are coerced to perform same-sex marriages even though their religious convictions forbid them to do so. The same reality is emerging with respect to employment practices by religious institutions, education, adoptions, and the rearing of children. Frequently one reads about people who speak out against homosexuality losing their jobs or being ridiculed or marginalized, including academics that professionally frame the issues and cannot objectively be accused of homophobia or incitement to hatred against homosexuals. This radical trend is an undue restraint on freedom of thought, conscience, and religion. All the while, freedom of religion is inaccurately perceived and portrayed as a subterfuge for discrimination and unfettered prejudice.

Just how far the conflict between freedom of religion and the right to sexual orientation nondiscrimination has gone and just how irrational it has become is exemplified by two separate lawsuits filed in the United States in June and July of 2008 against Bible translators for having inserted the word "homosexual" in their translation of 1 Corinthians 6:9. The plaintiff claimed that in this respect the translations offended him on grounds of sexual orientation and demanded compensatory damages to the tune of $60 million. Brandon LaShawn Fowler v. Zondervan Publishing House, Case 2-08-cv-12889; In the United States District Court for the Eastern District of Michigan; Southern Division. Similar suits by homosexuals motivated by anti-religious bigotry are becoming increasingly common.

A fairly comprehensive book, just published by US legal scholars which points out precisely the conflict between the right to sexual orientation nondiscrimination and religious liberties is Anthony Picarello, Jr, et al., Same-Sex Marriage and Religious Liberty (2008). The proper way to resolve conflicts is to accommodate religious beliefs and establishments by exempting them from requirements or laws related to sexual orientation which interfere with the practice or expression of their faith. An approach of preeminence in favor of sexual orientation, favored by the Report, would necessarily foster hatred and discrimination against religion and religious establishments. Religion, creed, and belief are of the very essence and central to one's identity. They define who the person is, more so than sexuality, race, disability, national origin,

age, genetic make up, social status, or any other defining trait which domestic or international legal instruments seek to protect. It is a violation of one's right to personal autonomy to demand that one relinquish her religious views on homosexuality, homosexual practices, or the place of homosexuality in civil society which she may have held all her life. This being said, we doubt that Article 9 of the European Convention would trump religious liberties in favor of sexual orientation. Unmistakably religion is a suspect class under domestic and international law, and therefore, deserving of a greater degree of protection than most other fundamental rights. Sexual orientation, on the other hand, is not a suspect class, in spite of the repeated statements to the contrary contained in the Report. Religion is a necessity of life for humans. Homosexuality is not.

Additionally, accommodation of religious views is not new in law. It exists with respect to zoning regulations or employment, for instance. This balancing act is part of living in a democratic society. See, for instance, the recently published Christopher Eisgruber (Princeton University) and Lawrence Sager (University of Texas School of Law)'s Religious Freedom and the Constitution (Harvard University Press 2007). Similar doctrines for accommodation of religious beliefs and practices are also common in the jurisprudence of the European Court of Human Rights. See, Jilan Kamal, *Justified Interference With Religious Freedom: The European Court of Human Rights and the Need for Mediating Doctrine Under Article 9(2)* 46 Columbia Journal of Transnational Law, 667 (2008).

Australia, too, has enacted the Equal Opportunity Act (1984) which exempts religion and religious establishments from certain requirements which otherwise would conflict with their religious doctrines. (Article 50 Religious Bodies: (1) This Part does not render unlawful discrimination in relation to: (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or (c) any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion. (2) Where an educational or other institution is administered in accordance with the precepts of a particular religion, discrimination on the ground of sexuality, or cohabitation with another person of the same sex as a couple on a genuine domestic basis, that arises in the course of the administration of that institution and is founded on the precepts of that religion is not rendered unlawful by this Part.")

The Report should also be mindful that some EU Member States have strong protective language in their constitutions respecting religious liberties. For instance, Romania's Constitution states that "freedom of religious beliefs may not be curtailed under any circumstance." Article 29(1). EU laws do not displace the religious liberty constitutionally granted to Romania's citizens. (Article 11 of the Romanian Constitution.)

More concerns are fostered by the broad language related to a rather ambiguous area in which sexual orientation discrimination is forbidden, namely "the supply of goods and services." (Page 11 of the Report). There are no safeguards against abuses, such as the possibility that a

marriage ceremony be declared a “service” which churches would be obligated to perform for homosexual couples; that churches, while making their amenities available for the celebration of opposite-sex marriages and refusing similar accommodation to same-sex celebrations would not be penalized or closed for this reason; that churches, while ordaining heterosexuals but not homosexuals for the ministry would not likewise be penalized; or that, generally, religious establishments would not be subjected to abusive legal process and penalties for refusing to “supply goods and services” to homosexuals in matters that directly hinge on their religious beliefs and convictions. Additional examples relate to private establishments founded on or owned by persons who hold the sincere religious belief that homosexuality, along with other forms of sexual immorality, is a sin. For, instance, under the Report’s logic and directives a landlord opposed to sexual immorality would be compelled to rent rooms to persons who engage in same-sex or opposite-sex relations, in violations of the landlord’s religious beliefs. The same outcome would apply to a store owner who refused to carry sexually explicit magazines. Compelling such individuals or businesses to violate their beliefs and religious convictions under these circumstances would be a form of publicly endorsed persecution and reverse discrimination based on religion and belief.

A second area which is rife for conflicts is parental rights. Parents should have the right to make fundamental decisions with respect to their children’s education. The Report is disappointedly decisive that nondiscrimination based on sexual orientation must trump parental rights. Even a balancing of rights is seemingly out of the question. The Report has blurred the line between reasonable education against prejudice and in favor of tolerance and indoctrination into a lifestyle with which most parents disagree.

V. ENHANCED POSITION FOR SEXUAL ORIENTATION

One major and inescapable observation about the Report is its attempt to ensure an enhanced position for sexual orientation among the fundamental rights protected by the EU. This is a fundamental criticism that ARF has of the Report. The Report is both a shield and a sword, seeking both recognition and promotion of an agenda based on sexual orientation, while at the same time silencing those who disagree. Examples which point to this conclusion are legion.

5.1 Asylum: Take the right to asylum, for instance. The Report urges EU Member States to liberalize their asylum laws to allow sexual partners of homosexual asylees to join them in the EU state which granted them asylum. The rationale urged in the Report for reaching this objective is family equality, meaning that if the spouse of a married person is allowed entry in the country of the other spouse’s asylum, but denying the same opportunity to homosexual couples, this amounts to discrimination based on sexual orientation. (Page 16 of the Report) Conceding the obvious faults in this view, which we discuss below, the Report pleads for the extension of “family reunification” to same-sex partners in a “durable and stable relationship.” Though thoroughly misguided, this argument points out, once more, the enhanced position which the Report seeks to obtain for sexual orientation among the enumerated EU fundamental rights.

First, to accurately establish sexual orientation and persecution on such a ground in the context of asylum proceedings is problematic and the equivalent of a moving target. Simply being homosexual or engaging in homosexual acts which foster negative public reaction should not be the threshold entitling one to asylum. Likewise, establishing one's sexuality before the court for purposes of securing asylum is an evasive matter. Establishing the "stability and durability" of the same-sex relationship for purposes of the same-sex partner obtaining vicarious asylum is equally ambiguous. The Report simply glosses over this important notion, ignoring the factual reality that same-sex partners by and large do not entertain stable or durable relationships.

Second, countless studies and surveys have consistently revealed that stable or durable homosexual relationships are few and far between. Michael Bailey, a psychologist and long time researcher and supporter of the rights of homosexuals, has candidly admitted this much in his landmark The Man Who Would be Queen – The Science of Gender Bending and Transsexualism (2003). On point, he concludes that "… there will always be fewer gay men who are romantically attached. Gay men will always have many more sex partners that straight people do. Those who are attached will be less sexually monogamous. And although some gay male relationships will be for life, those will be many fewer than among heterosexual couples. … The aspects of gay men's relationships that cause discomfort -- the preeminence of sexuality, the relatively short typical duration, the sexual infidelity – are indeed destructive in the heterosexual context, but they are much less so among gay men." (Pages 100-101)

Other studies have revealed that most cohabiting relationships last a year or less. Mike HcManus and Harriet McManus, Living Together: Myths, Risks & Answers (Howard Books, 2008) (pages 67-68).

Third, granting asylum by proxy (or subsidiary protection as the Report states) based on sexual orientation is discriminatory as to other associational relationships. Granted that sexual orientation may constitute a distinct social group for purposes of asylum, there are other social groups which also fulfill the definition of "particular social group" which developed under international human rights law. The Report quite accurately defines membership in a particular social group as "the members of that group [which] share a common characteristic or belief fundamental to the members' identity, and that the group is perceived to have a distinct identity in the society of origin." (Page 83 of the Report) Under this definition colonies of lepers could also constitute a particular social group for asylum purposes. Lepers abound in many tropical states and have historically been marginalized and discriminated against. However, it is doubtful that any EU Member State would grant asylum to lepers or, more to the point, that a leper asylee would be legally entitled to bring into the EU Member States his leper friends or entire leper colonies with which the leper asylee had had a "durable and stable relationship." This differentiation in treatment is, arguably, discriminatory, for, after all, lepers should qualify as being "disabled" under EU law. Yet, the very fact that an argument is made to facilitate the relocation of same sex-partners in the asylum context reveals a bias in favor of creating a special status for same-sex relationships in the European Union. Even heterosexual couples could not benefit from this distorted logic. It would be inconceivable for a male asylee to request asylum by proxy on behalf of his girlfriend with whom he had a durable and stable relationship in his

former country of residence. Asylum by proxy would also be discriminatory as to the practitioners of polygamous marriages, whether de jure or de facto. Who and how many of the asylee's legal and/or de jure spouses would be allowed to join him in the country of sanctuary? What about asylees who claim bisexuality as their sexual identity and who in the former country of residence had a stable and durable relationship with both men and women? No other grounds for asylum present these complicated and cumbersome entanglements, from both a legal or policy point of view.

5.2 Same-Sex Sexual Harassment: Another example, quite frightening one might say, of the Report seeking a first among equals status for sexual orientation is sexual harassment. The Report equates sexual harassment of homosexuals with "persecution … [or] a form of inhuman or degrading treatment leading to subsidiary protection" for asylum purposes. (Page 16 of the Report) It also recommends criminal penalties. Suggesting criminal consequences for workplace harassment based on sexual orientation is quite hard to justify and, frankly, outlandish. (" … harassment in the workplace, which under the Employment Equality Directive should be treated as a form of discrimination and should be subjected to effective, proportionate and dissuasive sanctions, which may be of a criminal nature.") (Page 19 of the Report)

One is compelled to arrive at the same conclusion with respect to the suggestion that the standard for actionable sexual harassment in the case of same-sex harassment be lowered. (Page 88 of the Report) This is discrimination based on sex with respect to women or opposite-sex sexual harassment. It is further ignored that discrimination and harassment come in many colors. Would, for instance, denial of a promotion because of sexual orientation entitle one to asylum in an EU Member State, or subject one to criminal sanctions? Would it come within the "minimum level of severity" contemplated in the Report as the threshold for granting asylum based on sexual orientation? (page 88 of the Report) Or, would it fall within the "feelings of fear, anguish and inferiority capable of humiliating and debasing" language of the Report? (Page 88 of the Report)

Some guidance on this issue comes from language found in the United States Supreme Court's ruling in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998). While emphasizing that antiharassment laws are not designed to constitute a "code of civility," it also set the parameters for what is actionable sexual harassment. Antiharassment laws do "not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive is beyond" the scope of antiharassment laws.

The Report thus gravitates toward the extreme position that even perceived hostility because of sexual orientation be made actionable, and that loosely defined "homophobia" be penalized.

5.3 Equality Bodies. A related example indicative of the attempt to foster enhanced protection for sexual orientation is the suggestion to establish “equality bodies” specialized in sexual orientation discrimination alone. So much for equality of treatment with respect to all fundamental rights. Known in different states by different names, the equality bodies or human rights commissions, are open to complaints of discrimination from citizens. The rationale for setting up separate equality bodies for sexual orientation defies logic and, frankly, is offensive. The very notion that homosexuals are afraid to disclose their sexual orientation to the regular equality bodies, and, consequently, are liable to suffer discrimination more than others, is a mere hypothesis lacking corroboration. It is also to be considered that in many EU Member States the incidence of homosexuality is so insignificant, that setting up separate sexual orientation bodies would be extremely costly. Romania, for instance, has an equality body in each of its 42 administrative subdivisions. The cost of setting up separate equality bodies for homosexuals and staffing them with persons well versed in sexual orientation issues would be prohibitive. Coupled with the fact that discrimination against homosexuals is extremely rare, the rationale for creating separate equality bodies specialized in sexual orientation discrimination is difficult to comprehend.

Also, the experience of equality bodies with respect to sexual orientation reveals excesses on the part of both the equality bodies and the complainants. Most complaints are frivolous, insensitive, and relate to trivial matters. For instance, homosexuals have frequently filed complaints with equality bodies complaining about “biased” media reports or commentaries regarding homosexuality; about religiously inspired speeches which equate homosexuality with sin; or about not being allowed “equal access” to schools to promote sexual education from a homosexual perspective, even though schools already teach sexual education. As a result, one of the unfortunate side effects of the aggressive work of equality bodies has been reverse discrimination.

Precisely because equality bodies tend to intimidate civil society with respect to sexual orientation issues, civil society is often denied the right to articulate its own collective rights. In Romania, for instance, a radio station refused to air, in 2006, a public announcement for citizens to sign a petition calling on the government to protect marriage. The radio station manager expressed fear of being sued for discrimination by Romania’s “equality body” (The National Council for the Combating of Discrimination) on behalf of homosexual groups. In some countries equality bodies have become genuine inquisitorial bodies, Canada and the United Kingdom being prime examples.

And inquisitorial bodies would be the last thing that Romanians need. They had enough of them in the recent past. During the communist regime, the communist state’s political police, the dreaded Securitate, infiltrated civil and religious gatherings and groups to detect and then prosecute dissenters. Homosexual activists do likewise today, attending, for instance church services or scrutinizing the media to report to “equality bodies” on individuals, groups, or opinions unfavorable to homosexuality in the hopes that they will be prosecuted, fined, or silenced.

5.4 Distortion of the Law. The distortion of applicable international legal instruments further conveys the notion that the Report seeks to confer a privileged status on sexual orientation among fundamental rights. For instance, while it is accurate that "freedom of expression cannot be invoked by individuals or groups whose objective is to destroy the rights and freedoms of others," (page 114 of the Report), it is inaccurate that in this context Article 30 of the Universal Declaration of Human Rights speaks to sexual orientation. The Universal Declaration of Human Rights nowhere alludes to sexual orientation. It is also inaccurate that the European Convention on Human Rights makes the same pronouncement with respect to sexual orientation. The European Court has limited this pronouncement to "rights and freedoms set forth in the Convention." The European Court did not discuss the Treaty of Amsterdam there, but the Convention, which makes no mention of sexual orientation. Precisely because the Report's arguments are circuitous, they convey the same indication that a special position is sought for sexual orientation among the fundamental rights of the EU.

On a related note, a fundamental principle of legal interpretation is the intent of the drafters. Repeatedly the Report alludes to various international legal instruments for the proposition that they support a right to nondiscrimination based on sexual orientation, even though the expression "sexual orientation" is missing. The Report cannot simply tag "sexual orientation" to these international legal instruments and obtain the desired result. A similar attempt was recently defeated under the Laws of the State of Pennsylvania where the court refused to read "sexual orientation" into a "hate crimes" law because it did not recite "sexual orientation" among the grounds to which the law applied. Marcavage v. Rendell, 936 A.2d 188 (2007) (court could not read "sexual intimidation" into statute prohibiting ethnic intimidation)

5.5 Sexual Orientation as a "Suspect Class" This issue has been discussed supra, but merits reiteration. The European Court of Human Rights has not recognized sexual orientation as a suspect class, yet the Report immodestly and repeatedly refers to it as being such under international human rights law. Simply repeating that sexual orientation is a suspect class does not necessarily make it so. Courts, not the opinion of writers, no matter how sophisticated, declare what a "suspect class" is for purposes of constitutional protection.

VI. DISCRIMINATION V. DIFFERENTIATION

The Report also overlooks the fact that differentiation in treatment is not necessarily invidious discrimination. It makes the blanket proposition that every societal benefit conferred on opposite-sex marriage must be conferred on same-sex couples, or else discrimination is the result. No exception. Right on point, it states, in a conclusory fashion, that "[W]hat makes the current situation particularly difficult to defend is that there appears to be no justification, other than political, for treating discrimination on grounds of sexual orientation, any differently from discrimination on grounds of race or ethnic origin." (Page 35 of the Report)

This blanket assertion misses the mark on substantive grounds. First, it not only violates Article 20 of the Universal Declaration of Human Rights, but it also ignores the reality that different treatment is not necessarily discrimination. Different treatment in different contexts

with respect to persons or institutions performing different functions with different degrees of social utility is necessary to an orderly society. It is not discrimination. For instance, a husband may claim discrimination based on sex because he, unlike his wife, is not entitled to pregnancy leave in connection with the birth of a child. Romanian legislation allows women up to 2 years of paid pregnancy and maternity leave. Fathers are not entitled to this benefit. Absolute equality between the sexes would mandate that fathers, too, be allowed an equal amount of time in paid leave. Naturally this would be absurd precisely because the functions of the woman and of the man under the circumstances are different. Illogical, too, would be the man's argument that he, too, had made a significant contribution to procreation and, therefore, should be entitled to the same benefit as the woman. If the man's argument were accepted, the overwhelming majority of men and women of conceivable age would not be employed.

Second, democracies affirm equality only among similarly situated persons in nearly identical circumstances. McDonald v. Santa Fe Rail Transportation, 427 U.S. 273, 283, 96 S.Ct. 2574, 49 L.Ed.2d (1976). It is plain that same-sex relationships and opposite-sex relationships are not similarly situated and that they seldom, if ever, operate in nearly identical contexts. The foremost rationale for opposite-sex marriage is procreation and the rearing of children, two fundamental societal objectives which are entirely lacking with respect to same-sex relationships, and especially with respect to the subset of same-sex relationships which are not based on sexual orientation, namely same-sex heterosexual couples. This position was taken as early as 1971 when the first case on same-sex marriage was reported, Baker v. Nelson, 191 NW2d 185 (Minn. 1971) In that case a male same-sex couple argued that "restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory." The Minnesota Supreme Court rejected this argument, holding that "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis. … Marriage and procreation are fundamental to the very existence and survival of the race. This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. ... There is no irrational or invidious discrimination." Previously, the United States Supreme Court similarly remarked, in dicta, that "Marriage and procreation are fundamental to the very existence and survival of the race" and, on that basis, struck down an Oklahoma law which mandated the forced sterilization of criminals. Skinner v. Oklahoma, 316 U.S. 535 (1942).

These case recitals should be sufficient to illustrate that sophisticated jurisprudence of the highest caliber rejects the notion that same-sex and opposite-sex marriage are symmetrical.

As for the political argument recited in the Report, it is too simplistic to be even taken seriously. As stated above, same-sex relationships have no social usefulness and do not enhance the welfare of society. Opposite-sex relationships do, and for this reason have been placed at the top of societal protection for thousands of years. The ECHR has explicitly leaned in this direction since Estevez v. Spain (Appeal No. 56501/00, 2001) ("marriage remains an institution which is widely accepted as conferring a particular status on those who enter it.")

VII. HATE CRIMES AND HATE SPEECH

Probably there is no other area discussed in the Report that is more ambiguous and, therefore, more susceptible to abuse and excesses than the area of hate crimes and hate speech as they relate to sexual orientation. The objective here is to silence those who disagree with homosexuality. Recommending criminal penalties for discrimination on grounds of sexual orientation is extreme to say the least and impossible to reconcile with existing law. (Page 19 of the Report) It is also impractical. For instance, it is managers who in the work place act on behalf of the employer. Criminalizing sexual orientation discrimination in the work place would penalize the individual managers not the corporation. Also, singling out sexual orientation discrimination for criminal retribution is discriminatory with respect to the other grounds of nondiscrimination where no equivalent retribution is envisaged. After all, all crimes are committed out of hate. But, once again, this, too, conveys the notion promoted in the Report that sexual orientation nondiscrimination is more socially valuable and more deserving of protection than discrimination on other grounds.

Drawing parallels between sexual orientation on the one hand and national, racial or religious hatred on the other hand, for the purpose of securing the criminalization of “homophobic intent” or “homophobic motivation” is unpersuasive. The world community has unambiguously expressed consensus that “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” See Article 20(2) of the International Covenant on Civil and Political Rights (1966). No such consensus exists with respect to sexual orientation. Ninety (90) states currently ban sodomy altogether while 191 concur with the foregoing statement. Also, the history of national, racial or religious hostilities has been much different from the history of the relations between civil society and homosexuality. While history is replete, to this day, with countless hostilities fostered by national origin, race, and religious differences, there hardly are any notable incidents of equal dimension with respect to sexual orientation. Furthermore, insisting on criminalizing “homophobic intent” and “homophobic motivation” is discriminatory with respect to other categories of individuals who are protected from discrimination, namely women, the aged, or the disabled, among others.

No less relevant is also the fact that the terms “homophobia,” “homophobic,” “homophobic intent” and “homophobic motivation” are extremely ambiguous and fluid. No objective legal definition of these terms exists, and the meaning ascribed to them depends on whether one is the recipient of these labels or the one affixing them on others. Their meaning is in the eye of the beholder and they mean many things to many people. For instance, defining “homophobia” or “homophobes” to mean persons who disapprove of same-sex sexual relationships is unfounded. For disapproval of such relationships may not necessarily be based on a specific “phobia” but on some perfectly rational theory of sexual morality. Indeed, very likely the majority of those who disapprove of homosexual acts do so not because they hate or fear homosexuals, but because they view homosexual acts as sexually immoral, as they also do sexual infidelity, adultery, premarital sex, lust, promiscuity, lewdness, or pornography. To such persons “homophobia” is a matter of belief more than an attitude. Criminalizing belief, therefore, is incompatible with the very notion of a democratic way of life. Incarcerating someone for any

moral, ethical, philosophical or psychological expression that questions homosexual practices is simply irrational.

On the other hand, if "homophobia" is defined more along Freudian lines as one's subjective fears of his own homosexual feelings and their repression, then true "homophobes" would be few and far between. It would not be worth the time or resources of the EU to deal with them. Rather, the Report aims at a broad definition of homophobia to include anything that would be subjectively deemed as offensive by a homosexual person but not necessarily so by a reasonable or objective person. (Pages 112-116 of the Report) The Report's position that opposition to homosexuality is based almost exclusively upon widespread phobia discourages the rational discussion and analysis so much needed in jurisprudence.

Additionally, hate speech implicates abundant ambiguity, while the law strives on clarity. Homophobia is too flexible a concept to fit the strictures of the law. Sweepingly defining it as "verbal assault or abuse" (page 116 of the Report) runs afoul of constitutional protections for freedom of expression, especially since "verbal assault and abuse" is a matter of subjective assessment. The harassment doctrine is so vaguely worded and so broad in its language that anyone could be subjected to punishment for any sort of speech a homosexual person might deem offensive. This is incompatible with the notion of the market of ideas so essential to a healthy and functioning democracy. On these grounds, on August 4, 2008 the Hungarian Constitutional Court struck down as unconstitutional two legislative proposals aimed at criminalizing "inflammatory public discourse" on grounds of, among others, sexuality. One bill sought to enable citizens to bring civil actions against a speaker even if the hateful speech was not aimed directly at them but to the particular social or sexual group to which they belonged. The court stated that "in a free and democratic society the expression of extreme and exclusive opinion does not endanger the foundations and operations of society, because by expressing such views, the discriminator confines itself to the periphery." The Budapest Times, July 7, 2008.

Citizens have the right to petition their governments and thus reinvigorate the democratic process. But the Report could be construed to convey that any petition drive that implicates sexual orientation must be disallowed because somehow it offends homosexuals. Hence, it must be homophobic because it incites to hatred and discrimination. This would indeed be irrational in the extreme, as one's freedom of belief would necessarily be violated. For it would serve one nothing to be allowed freedom of belief but not the freedom to express it. As Thomas Jefferson once remarked, in penning the Virginia Bill for Establishing Religious Freedom, "The opinions of men are not the object of civil government, nor under its jurisdiction."

Furthermore, the recommendation that torts, libel in particular, be utilized to ward off homophobic conduct is not a mainstream proposition and does not quite square with traditional defamation standards. (Page 120 of the Report) Truth is an absolute defense to defamation, as are consent and opinion. An opinion, no matter how offensive or how offensively received, may not be the object of a libel action. Only factual statements are actionable, to the extent that they are untruthful and injurious to reputation. Calling someone offensive names or epithets is not actionable either. Modifying the law of delicts simply to accommodate and facilitate the

objectives of the homosexual community is both discriminatory with respect to collective rights and another example of the Report's attempt to create a special regime of positive discrimination in favor of sexual orientation.

VIII. FREEDOM OF ASSEMBLY

The Report is quite problematic regarding freedom of assembly. Its arguments are one sided and manichaean. It demonizes those who express disapproval of homosexuality in public, and proposes a presumption that homosexuals exercise their freedom of assembly properly. ("Thus, demonstrations against LGBT people, which may be seen to incite directly to hatred or discrimination against this group – as opposed to, for instance, demonstrations in favor of the 'sanctity of marriage' or of the 'traditional family' – may be prohibited without this leading to a violation of Article 11 ECHR." (Pages 104-106 of the Report)

Arguably any public gathering which denounces homosexuality, including on religious grounds, could be interpreted as inciting to hatred and violence, even though that is not the intent of the attendants. The same observation applies to what the Report calls "counter-demonstrations" held simultaneously with homosexual marches. Under the Report's recommendations, the former must ipso facto be perceived as inciting to hatred and violence, and therefore must be banned. (Page 104 of the Report)

The Report thus is a shield for homosexual conduct, no matter how opprobrious, and a sword against those who think or express different views. Homosexual marches, euphemistically termed "equality marches," gay fests," "antidiscrimination events," or "diversity marches," are always accompanied by foul public conduct by the participants. Some of them have displayed public acts of masturbation and oral sex. Conveniently justified and labeled permissible by those who engage in such conduct because they allegedly constitute a form of "sexual expression," such conduct is necessarily immoral and injurious to public morality. Some countries, like Romania, for instance, impose on the government a constitutional obligation to prevent public gatherings which undermine public morality. (Article 53(1) of the Romanian Constitution)

Equally troubling is the intransigence of homosexual march organizers. Occasionally the marches are organized in locations and at times that are intentionally designed to arouse public discontent and to offend religious citizens. Examples abound, from homosexual marches held in Jerusalem to the one scheduled to take place in Sarajevo, Bosnia toward the end of September 2008 during the Month of Ramadan. The fact that Ramadan is viewed as a Holy Month in Islam and that Sarajevo is 85% Muslim seemingly is not compelling enough for homosexual organizers to hold their march somewhere else or at a different time. There is no need for deliberately fostering antagonism and a conflict of rights on both sides of the equation. For while holding a homosexual march might be viewed by homosexuals as freedom of expression, it is viewed by Muslims as blasphemy. Thus, the Report fails to take into account the legitimate concerns of civil society, and places homosexual marches beyond the reach of the law. It is also ignored that homosexual groups disrupt conferences on themes which disapprove of homosexuality, are vociferous and disrespectful. They likewise aggressively push for sexual education in the form of

indoctrination, even though the national laws of some EU Member States, Romania, for instance, ban the incitement to sex of minors. The "coming out" homosexual drives, targeting minors, clearly violate such laws.

Here we must point out factual inaccuracies about Romania contained in the Report. On Page 111 the Reports refers to "Normality (sic!) Marches" held around the time the country's homosexual community and its friends hold their annual march. The Report inaccurately states that the marches are or have been initiated by the "Conservative Party, in cooperation with the Romanian Orthodox Church and extreme right-wing groups." Neither the Conservative Party nor the Romanian Orthodox Church have anything to do with the yearly Marches for Normality in Romania. Intentionally seeking to debase and place in a false light a political party and the Romanian Orthodox Church, with a following of 18 million persons, in a public Report of the European Union is uncalled-for, especially when the factual basis for the assertion is patently erroneous. On the other hand, the Report is silent with respect to the lewd acts committed in public by members of the homosexual community, as well as the aggressive manner in which they carried out their march in June 2007 which resulted in many arrests. The Report's presumption that LGBT groups can do no wrong is not only unwarranted, but reflects the Report's bias and undermines its credibility.

Also in Romania, in May 2008 profamily groups held public gatherings designed to foster awareness to the need to protect marriage and the family in their country. There was nothing homophobic about the marches. Even so, the Romanian police confiscated some of the banners carried by the participants which recited that children have the right to a mother and a father, it being claimed that the banners could be construed as discriminatory and offensive to individuals promoting homosexual adoptions. Needless to say, the confiscatory act was a violation of freedom of expression. Children do have, in fact, under the UN Convention on the Rights of the Child, the right to a "mother and a father." (Article 7) The confiscatory act also violated Article 11 of the European Convention on freedom of assembly which states, in relevant part, that "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

But then, following the legal extrapolations of the Report, it could be argued that the confiscatory act may have been justified since it conveyed disapproval of homosexual adoptions. (See page 106 of the Report "… the possibility for the national authorities to ban demonstrations which, being directed against the LGBT community, may be seen as an incitement to hate, violence or discrimination.") Naturally, this would once again show a bias in favor of sexual orientation rights trumping the rights of the child enshrined in a truly international legal instrument. Additionally, the "may" qualifier in this sentence reflects deliberate ambiguity in support of the LGBT community and against the rest of society. Seemingly, according to the Report the mere expression of a different point of view is likely to trigger criminal repercussions. Undoubtedly, any statement which disapproves of homosexuality, no matter how professionally phrased or expressed, "may" be construed as "incitement to hate, violence, and discrimination,"

even what the Report calls actions in support of the "sanctity of marriage" or "traditional marriage." But then, in a democracy, it is not the prerogative of a minority to delineate the extent to which the majority may exercise its rights.

IX. GOOD PRACTICE

What the Report calls "good practice," we call a recipe for discrimination. (Pages 143-147 of the Report)

9.1 Transsexuality: We oppose gender reassignment procedures for transsexuals to be paid with public funds. Transsexualism, also known as gender dysphoria, is a highly fluid concept. Gender reassignments more often than not have to do with aesthetic proclivities. Deference should be given to the prevailing opinion in the medical and psychological community that transsexualism is a psychological deformity which needs to be cured through therapy. Paul McHugh, "Surgical Sex," First Thing, 147 (November 2004)

The psychological community, however, is also keenly aware of the politics involved in the "emancipation of transsexuality" and has cautioned against a rush to a political solution to what is in fact an emotional and mental disorder. See, Dr. Kenneth J. Zucker, Gender Identity in Children and Adolescents (2006). Noting "[T]he politics of sex and gender in postmodern Western culture," Dr. Zucker, probably the world's greatest expert on transsexuality along with Dr. Paul McHugh, has cautioned that they raise "complex social and ethical issues." He suggested that clinicians should not cave in to political pressure to identify GID ("Gender Identity Disorder") as a "normal variant of gendered behavior," and concluded that "These and other questions force the clinician to think long and hard about theoretical, ethical, and treatment issues." On balance, Dr. Zucker counsels against gender reassignment, and Dr. Paul McHugh, University Distinguished Service Professor of Psychiatry at Johns Hopkins University, has completely removed himself from transsexual issues. He has also remarked that the psychological profession's involvement with transsexuality has irreversibly blotted the profession: "As for the adults who came to us claiming to have discovered their "true" sexual identity and to have heard about sex-changing operations, we psychiatrists have been distracted from studying the causes and natures of their mental misdirections by preparing them for surgery and for a life in the other sex. We have wasted scientific and technical resources and damaged our professional credibility by collaborating with madness rather than trying to study, cure, and ultimately prevent it." (First Thing, supra)

Also, transsexuality, along with sexual orientation, would be the only protected grounds which are subject to one's control, unlike the other grounds over which one has no choice, such as race, ethnic or national origin, sex, age, or disability, for instance, or little choice, such as religion. Classified by psychiatrists as a gender identity disorder (GID), transsexuality is a fluid concept based on one's behavioral preference, for instance the persons with whom one desires sexual relations. Defining legal protections based on individual behaviors or perceptions radically departs from traditional nondiscrimination laws and creates a system subject to manipulation.

With respect to transsexuality the Report would best serve the needs of transsexuals by encouraging their treatment through therapy, not by giving in to their long laundry list of fantasies and desires. In this manner, respect for collective rights would also be respected, and an undue and unnecessary burden on society would be removed.

9.2 Reporting Sexual Orientation Discrimination: We respectfully submit that the Report's frustration with the relatively small number of discrimination cases based on sexual orientation which are reported to the equality bodies of EU Member States may have more to do with the relatively small number of homosexuals in some of the member states and the fact that by and large they are not discriminated against, as opposed to "fear" of disclosing their identity. (Page 145 of the Report) On the other hand, the Report's insistence on reporting reflects an obsession with statistics and the apparent intent to subsequently use them to support broad allegations of prevalent homophobia in the EU Member States. In this regard we plead for intellectual honesty. Insisting on reporting also encourages frivolous reporting. Frivolous reporting makes for bad public policy and benefits no one.

9.3 "Homosexual Emancipation Policy": We see no need for a "homosexual emancipation policy," to use a radical term found in the Report. (Page 145 of the Report) On the contrary, we see in this attempt a push toward indoctrination of impressionable young and fragile minds. The suggestion of "making homosexuality a subject for discussion in secondary education" more clearly points to this objective. (Page 146 of the Report) By and large, homosexuals do not bring children into the world and are not parents. Parents and parental rights must be given priority when it comes to their children's education. Romanians recently shook off communist indoctrination and are not ready for another form of indoctrination, especially one that, like communism, is alien to their civilization tradition, history, and culture. Please respect our values and the values of others who think alike.

But then, any "homosexual education" would reject accommodating the views of those who disagree with homosexuality or with homosexual acts. For the latter would inevitably be labeled "homophobic" and worthy of exclusion, even though scientifically or factually accurate. For instance, would there be room to inform of the dangers of homosexuality and of homosexual acts, such as sexually transmitted diseases; that 70% of all HIV sufferers are practicing homosexual males; that homosexual acts pose a heightened risk of shortening one's life; that homosexuality is not genetically determined; that it is a lifestyle that should be rejected; that sex is the centrality of most homosexuals' lives; that the only thing that most homosexuals look forward to in life is sexual intercourse and sexual satisfaction at all cost; that homosexuality can be cured; that homosexuals experience a high rate of drug use; that homosexuals are essentially promiscuous and are incapable of fostering or sustaining monogamous relationships? Or would the young schoolers be allowed to view the recent BBC 3 TV documentary, "The Trouble With Gay Men" by Simon Fanshawe, himself a homosexual, depicting the decadent and deplorable lifestyle of the UK's homosexual community? We know the answer, for the Report makes it fairly plain – No. So much then for intellectual honesty and balance in homosexual education.

X. CONCLUSION

ARF appreciates the opportunity to submit this Commentary and the attention given to it. We trust it will be forwarded to the appropriate and competent EU bodies and will be presented in each venue in which the Report will also be submitted. And we have a few suggestions of our own as well. A study should be undertaken on the conflict, actual and potential, which sexual orientation has with the more fundamental freedoms of the citizens of the European Union, namely religion, belief, expression, and parental rights. The EU should also commission a committee empowered to thoroughly investigate and report on these concerns shared by the overwhelming majority of the EU's citizens. The commission should consist of representatives of family groups, religious groups, and parental rights groups from each member state of the European Union.

Respectfully submitted,

BY: *Dr. Peter Costea, Esq.*

Dr. Peter Costea, Esq.
President, Alliance of Romania's Families