

**ALLIANCE DEFENSE FUND MEMORANDUM TO THE MEMBERS OF THE  
EUROPEAN PARLIAMENT REGARDING MOTION FOR A EUROPEAN  
PARLIAMENT RESOLUTION ON THE SITUATION OF FUNDAMENTAL RIGHTS  
IN THE EUROPEAN UNION 2004-2008**

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Committee on Civil Liberties, Justice and Home Affairs

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The Alliance Defense Fund [ADF] is an international legal alliance dedicated to the protection of fundamental human rights, specifically the right to life, protection of the traditional family and religious freedoms. Several recommendations proffered in the Motion for a European Parliament Resolution raise issues of the highest institutional concern for ADF as they undermine the right to life, do damage to the institution of the traditional family, curtail freedom of expression and violate the principle of subsidiarity mandated by governing Community Treaty Law.

The position of the proposed Resolution actively promotes a liberalized social policy and corresponding supervisory powers not supported by Treaty law, and in direct contradiction to the Community's principle of subsidiarity. The Motion also erroneously builds its arguments on the supposition of the binding legality of the Charter of Fundamental Rights and on the presumptive speculation of the adoption of the Lisbon Treaty by all Member States, despite the recent referendum to the contrary in Ireland. Building soft law on the presumption that the enactment of the Lisbon Treaty is a foregone conclusion not only strains credulity but runs contrary to the principles of democracy and Member State autonomy. This same reasoning also signals the attitude of the European Parliament to the citizens of Europe that it does not, and will not respect their views as pertains to the ratification of Lisbon.

The following memorandum details the vehement opposition of the Alliance Defense Fund to the proposed Resolution's promotion of anti-life and anti-family measures, and to proposed curtailment of the right to freedom of expression. To this extent, ADF also notes the existing umbrella of binding legislation on the matters detailed in the Resolution vis-à-vis the European Social Charter, and its supervisory body the European Committee for Social Rights, and the European Convention of Human Rights, and its supervisory organ the European Court of Human Rights. More serious than the superfluous nature of the rights and supervisory powers being called for in the Resolution is that many of the proposed recommendations run contrary to existing European and international law, and would fail to meet the Constitutional standards of a number of European Union Member States.

### **Right to Life<sup>1</sup>**

The most basic and fundamental building block of the State is the individual, and therefore human life at all stages of development is worthy of the highest legal protection. Only because a human life exists from the moment of conception, can a person come into existence. “[A] human embryo is a whole living member of the species *Homo sapiens* in the earliest stage of his or her natural development... The embryonic, fetal, child and adolescent stages are stages in the development of a determinate and enduring entity—a human being—who comes into existence as a single-celled organism (the zygote) and develops, if all goes well, into adulthood many years later.”<sup>2</sup>

This same concept is internationally recognized by perhaps the greatest human rights document of recent generations, the Universal Declaration of Human Rights, which in Article 3 states that the right to life is inalienable and extends to all members of the human family.

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<sup>1</sup> See: Paragraphs 61, 62 of the proposed Resolution.

<sup>2</sup> Robert P. George and Christopher Tollefsen, Embryo: A Defense of Human Life (Doubleday, 2008), 3-4.

The draft Resolution's promotion of so-called "abortion rights" throughout the European Union violates the very values upon which the European Union was built by greatly offending the principles of subsidiarity and respect for national sovereignty.

Paragraphs 61-62 of the Motion provide a stark departure from the established case law governing the right to life throughout Europe, vis-à-vis the European Court of Human Rights, by not only promoting enlarged abortion privileges, but also infringing upon domestic laws dealing with conscientious objection of physicians from performing abortions and the use of tax funds for abortion services.

To this extent, the European Court of Human Rights has held that, with relation to Article 2, a wide margin of appreciation must be granted Member States with regards to making decisions affecting life where sensitive moral decisions are at play. In making such decisions, the Court must strike a balance between the various interests involved, including legal, medical, philosophical, ethical and religious dimensions while at the same time taking into consideration the various approaches utilized by Member States.<sup>3</sup>

The right to life and determination of when life begins in particular is an issue upon which the European Court of Human Rights has determined is inappropriate for the European institutions to impose their own views. The interpretation of the Convention with regards to life issues is that such measures must be enacted only at the domestic level:

...it is not only legally difficult to seek harmonisation of national laws at Community level, but because of lack of consensus, it would be inappropriate to impose one exclusive moral code . . . the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere . . . [and] the issue of such protection has not been resolved within the majority of the Contracting States themselves . . . [and] there is no European consensus on the scientific and legal definition of the

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<sup>3</sup> ECtHR, Vo v. France, Judgment of 8 July 2004, Application No. 53924/00, § 82.

beginning of life.<sup>4</sup>

As the Community lacks competency in the issue of life, and as Member States are not yet legally bound by the Charter of Fundamental rights, the governing jurisprudence of the European Court of Human Rights to which all Community Member States are subject requires that legislation relating to life be enacted only at the domestic level.

The fundamental right to life cannot and must not be made inferior to tertiary rights because of the irreversible nature of abortion and the destruction of human life. Statements in the draft Resolution such as those made in paragraph 61 regarding the full enjoyment of reproductive “rights” fails to take into consideration the fundamental right to life of the child, respect for family life, and the interest of the State in ensuring a healthy and vital citizenry. Paragraph 11 of the Draft Resolution therefore, arguing for the elimination of human rights categorization pillars, ignores that while all human rights may be interdependent, certain fundamental rights like life operates as the only cornerstones which may support the human rights structure and without which, human rights protections could not exist.

It is necessary to demystify the major theme underlying Paragraph 61-62, that being that the variable of poor social circumstances serves as a justification for the promotion of greater availability to contraception and abortion. The Polish Constitutional Court, holding the Polish legislature’s 1993 act liberalizing the country’s abortion law as unconstitutional, stated it well when discussing the issue of a woman’s material rights when compared to the rights of the child. The statement is equally true of the child’s right to life when taken in comparison to the potential of a poor material state: “Human life is “a fundamental human good.” A woman’s right to not worsen her material state results from the constitutional protection of her liberties to shape her

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<sup>4</sup> Vo v. France, App. No. 53924/00, 40 E.H.R.R. 12, 2004 WL 1808739 Eur. Ct. H.R. § 82 (2004).

life conditions and fulfill her family needs. However, this protection cannot go further than the protection of the fundamental good of human life in relation to which existential conditions are secondary and changeable.”<sup>5</sup>

Such quality of life assessments are not only highly inappropriate for this forum, but also set a dire and dangerous precedent to the corpus of international soft law. Under no circumstances should the personal situation and life conditions of a child be placed above that child’s right to life.<sup>6</sup>

The Draft Resolution’s proposal on expanded abortion privileges and funding fails to recognize developing medical knowledge and the ever increasing consensus that the child from the moment of conception is human and deserves protection. This failure is highlighted all the more when taken in comparison to other areas of European law where the unborn child has garnered the appropriate legal protections under both domestic and international law.

ADF also opposes the language utilized in paragraph 61 of the proposed Resolution regarding compulsory “sexual education.” Competency in this matter is beyond the mandate of the European Parliament and has, by European consensus and ratification of the European Social Charter, been afforded to the European Committee on Social Rights. Furthermore, competency in matters of education and curriculum development are specifically enumerated by Community law as belonging to Member States.

### **Same-Sex Partnerships<sup>7</sup>**

Subsidiarity and respect for national sovereignty are two of the main pillars upon which the European Union was founded. The European Convention of Human Rights and the Charter of Fundamental Freedoms was drafted with a view to safeguarding fundamental human rights

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<sup>5</sup> Polish Abortion Case, Constitutional Court of Poland, OTK Z.U. z.r. 1997, Nr. 2, 19.

<sup>6</sup> Cf. Polish Abortion Case, Constitutional Court of Poland, OTK Z.U. z.r. 1997, Nr. 2, 19.

<sup>7</sup> See: Paragraphs 75-77 of the proposed Resolution.

and providing a floor, and not a ceiling, of compliance with the enumerated rights provided in these documents. One of the hallmarks of Community law has been the principle of subsidiarity, which *inter alia*, states that in those areas not specifically enumerated as powers of the Community, that action is therefore best suited to the individual Member States to order their own legislative and social affairs. This principle presumes that judges and legislators within the various member states are better suited to interpreting and implementing their own human rights safeguards and social policies according to the specific socio-political and cultural environment of their countries than civil servants or unelected officials sitting in Brussels.

Any attempt to extend universal recognition to same-sex partnerships has the effect of injuring the long standing concept and social structure of marriage, protections of which have deep rooted, moral and historical value in many Member States.

Article 12 of the European Convention of Human Right states: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”<sup>8</sup> No such binding corollary right exists to civil partnerships of any kind and as such, these partnerships do not rise to the level of rights under pan-European law.

In defining Article 12, we must look to the *travaux préparatoire* of the text, to the intent of those who drafted it and finally to the meaning borne upon the words when the Article was ratified by the Member States of Council of Europe, of which all Members of the European Union are also subject. It is clear from both the *travaux préparatoire* and the interpretation of Article 12 by the European Court of Human Rights that it envisioned Convention protection only

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<sup>8</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, Rome, 4 November 1950.

for opposite sex marriages.<sup>9</sup> No mention is made in the legislative history of ever intending Article 12 to mean anything but marriage between people of the opposite sex. Furthermore, when the Article was ratified by the member states, the underlying agreement in acceding to the terms of Article 12 was that the definition of marriage be that between a man and a woman.

The family, founded on opposite-sex marriage, is a concept that predates the European Convention of Human Rights and the Charter of Fundamental Rights and is an enshrined and protected value in the majority of European Union Member States. Any attempt by this body to enact measures to infringe upon the judicial, legislative and moral traditions of the Community's Member States is an inappropriate form of activism in a realm where the Parliament has no legislative competency. These efforts would include the promotion of civil partnerships, whether for same-sex couples or otherwise, as a privilege enjoying similar or equal protections as marriage.

A view of marriage as a subjective, evolving paradigm reduces the concept to a position that it is merely just one form of household. However, the purpose of civil marriage is to ensure the stability of the social structure for the bearing and raising of children.<sup>10</sup> Because of the serious social policy implications involved, it has been left to the individual Member States.

An argument that the failure to recognize civil partnerships for same- and opposite-sex couples is discriminatory also lacks legal support; as does the supposition that Member States do not have a right to place restrictions on laws governing civil partnership or marriage. Restrictions on defining marriage, for example, are not *per se* unnecessary in a democratic society and have been upheld time and again by the European Court of Human Rights.<sup>11</sup> Such restrictions do not,

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<sup>9</sup> See e.g. ECHR, Rees v. The United Kingdom, Application No. 9532/81, Judgment of 12/12/1984.

<sup>10</sup> Cf. Anderson v. King County, 138 P.3d 963, 982-83 (Wash. 2006).

<sup>11</sup> The seminal precedent in this regard, particularly on the issue of marriage between partners of the same sex, is Rees v. the United Kingdom; see: *inter alia* n. 2.

as has been criticized, create second-class citizens. Restrictions in place regarding age, mental capacity and fraud, for example, are common means of protecting public health and morals. Furthermore, institutional requirements such as blood tests, application for marriage licenses, and consummation of the marriage are also universally regarded as justifiable means of legitimizing marriage. The argument that restrictions on choice of a partner limits the meaning and purpose of marriage are therefore, under these customary and universally accepted pre-requisites to marriage, clearly erroneous. For the same reasons, that being the high level of respect given to the institution of marriage by governing European law, Member States must be afforded the right to protect the institution of marriage from the natural devaluation which occurs with the recognition of same-sex partnerships.

By changing or devaluing the definition of marriage, the entire social concept is therefore altered and damaged irreparably. By suppressing the objective meaning of marriage, the concept becomes radically deinstitutionalized and therefore is drained of its social goods.<sup>12</sup>

The essence of the same-sex partnership recognition debate is not simply the inclusion of another component into the definition of the term, nor is it mere semantics. Marriage as a concept extends far beyond the idea of a free choice of partnership and fidelity and includes seminally the component of procreation and child rearing as the basic building block of any society. The proposed Resolution's promotion of universal recognition of same-sex partnerships clearly runs contrary to the protection of these social goods.

The primary two social policy objectives achieved by maintaining the objective definition of conjugal marriage is that it is on the one hand fundamentally child-centred, going beyond the couple to the next generation, and second that it provides a stable, normative institution whereby

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<sup>12</sup> *Id.* , 323; *see also* David Blankenhorn, "The Future of Marriage."

men and women are protected from the social and personal damage caused by sexual attraction outside the confines of a monogamous relationship.<sup>13</sup>

The promotion of same-sex partnerships and their universal legal recognition serves to damage the concept of conjugal marriage with the same social force as full legal recognition of same-sex “marriage.” While a legal distinction exists between same-sex partnerships and same-sex “marriage,” semantically the differentiation is *de minimus*. For the purposes of safeguarding the social entity of marriage as it has been understood for time immemorial, the European Parliament should play no role in social engineering among the Member States and should respect national sovereignty as mandated by the European Court of Human Rights on this issue.

Attempts to garner universal recognition of same-sex unions throughout the European Union failed in July 2004 at the meeting of European Union Justice and Interior Ministers on the issue of security, justice and interior issues. The proposal was vehemently opposed by several ministers who expressed “radical disapproval” because they viewed the proposal as “absolutely unacceptable” and a misuse of the “EU for a cultural revolution aimed against the traditional family.”<sup>14</sup>

The vast divergence of views and cultural mores on the issue, coupled with the denial by the European Union’s Council of Minister of the proposal to extend universal legal recognition to same-sex couples, would lead to a strong public backlash against this body for attempting to legitimize same-sex partnerships through the adoption of soft law. Even granting the fact that a substantial number of Member States give some form of legal recognition to same-sex partnerships, the very fact that recognition has been constitutionally denied in other Member

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<sup>13</sup> *Id.*, 325. See also: Council on Family Law, the Future of Family Law: Law and the Marriage Crisis in North America, 12–13 (2005), available at [http://www.marriagedebate.com/pdf/future\\_of\\_family\\_law.pdf](http://www.marriagedebate.com/pdf/future_of_family_law.pdf).

<sup>14</sup> See e.g. Palko and Lipsic taken aback by decision to condone homosexuality, Radio Slovakia International, July 20, 2004.

States should foreclose any attempt by the European Union to legislate in this area based on the founding principles of this institution.

### **Freedom of Expression<sup>15</sup>**

It is of vital importance in discussing the issue of defining the legal parameters of speech with regard to homosexual behavior, as it relates to the proposals set forth in Paragraphs 38 and 40 of the proposed Resolution, that all rhetoric be laid aside. A sharp demarcation must be made between the issue of hate speech or hate crimes against practitioners of homosexual behavior and the issue of the legal right to express opinions contrary to that behaviour on moral grounds, or otherwise. The very fact that violent behavior has occurred towards those practicing homosexual behavior does not have any bearing on the issue of whether freedom of speech should be so severely restricted as to promote social indoctrination at the Community level. The allowance of such reasoning to tinge the goals of the proposed Resolution sets a very dangerous precedent.

Key to understanding the issues underlying the legality of speech on the matter of homosexual behavior within Europe is that the European Court of Human Rights has never ruled in favour of an Applicant claiming violations of either Article 10 on freedom of expression, or Article 10 when taken in conjunction with Article 14 (prohibition on discrimination), for speech directed against them either individually or collectively. Precisely stated, under prevailing European jurisprudence, the rights for which the Motion for a European Parliament Resolution advocate not only lack support, but are non-existent.

As the European Court of Human Rights has repeatedly held, “Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions

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<sup>15</sup> See: Paragraphs 38, 40, 72-78, 109 of the proposed Resolution.

for its progress and for each individual's self-fulfillment."<sup>16</sup> The Court has also held on numerous occasions that freedom of expression constitutes one of the essential foundations of a democratic society, the hallmarks of which are tolerance, broadmindedness and pluralism.<sup>17</sup>

Furthermore, it is paramount that the European Union not indoctrinate its citizens and it cannot be allowed to create distinctions between persons holding one opinion or another. Any such categorizations would be contrary to the principles of democracy which have been so bravely defended throughout the recent history of Europe.<sup>18</sup> This freedom of expression protects not only "the information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broad-mindedness without which there is no democratic society."<sup>19</sup>

In summation, the proposed recommendations of the Motion for a European Parliament Resolution clearly are contrary to the governing law on expression in Europe and are violative of the very principles upon which Europe was founded.

### **Family Rights<sup>20</sup>**

While ADF applauds many of the draft Resolution's efforts to support the family and the upbringing of children, the proposed Resolution fails to make reference to the fact that it is necessary that social legislation governing family rights promote benefits and safeguards

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<sup>16</sup> Lingens v. Austria, 1986; Sener v. Turkey, 2000; Thoma v. Luxembourg, 2001; Maronek v. Slovakia, 2001; Dichand and Others v. Austria, 2002, etc.

<sup>17</sup> See e.g.: Handyside v. The United Kingdom, 1976.

<sup>18</sup> Cf., Report of the Committee of Ministers, in Theory and Practice of the European Convention on Human Rights, Van Dijk and Van Hoof, Kluwer, 1990, p. 413.

<sup>19</sup> Handyside v. the United Kingdom, 1976; Sunday Times v. the United Kingdom, 1979; Lingens v. Austria, 1986; Oberschlick v. Austria, 1991; Thorgeir Thorgeirson v. Iceland, 1992; Jersild v. Denmark, 1994; Goodwin v. the United Kingdom, 1996; De Haes and Gijssels v. Belgium, 1997; Dalban v. Romania, 1999; Arslan v. Turkey, 1999; Thoma v. Luxembourg, 2001; Jerusalem v. Austria, 2001; Maronek v. Slovakia, 2001; Dichand and Others v. Austria, 2002.

<sup>20</sup> See: Paragraph 131 of the proposed Resolution.

ensuring the rights of women to take on the vital and honourable vocation of stay-at-home motherhood.

The active promotion and institutionalization of the concept of “working mother” necessarily downgrades the vocation of stay-at-home motherhood. The devaluation of traditional motherhood has serious consequences in the upbringing and nurturing of children. The recommendations of the draft Resolution in effect, ignore the rights and needs of stay-at-home mothers. The consequences of this approach are to make motherhood a less attractive option to women who may feel unnecessary social pressure to embark on a career other than motherhood. Rather than being seen with stigma, stay-at-home motherhood should be promoted as the optimal form of household.

A working mother’s income often quickly becomes absorbed into the family’s budget, while at the same time her real social and economic value as a primary care-giver are severely depleted.<sup>21</sup> It would be to the credit of European social policy to implement further measures making stay-at-home motherhood a financial possibility rather than promoting measure which further devalue this vocation. The nourishment, care and devotion that a mother provides for her children in their developing years provides such fundamental societal benefits as to be comparable to any professional work. This reality should be realized through European social legislation.

## **Conclusion**

Whereas the aspirations of promoting and safeguarding human rights is and will continue to be a necessary component of the work of the European Union, it is nonetheless critical that any recommendations for Community action respect the principle of subsidiarity and varying constitutional traditions of the individual Member States. It is the opinion of ADF that the above-

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<sup>21</sup> Cf. Elizabeth Warren, The New Economics of the American Family, 12 AMBKRIILR 1, 6-7.

enumerated issues effecting intimate social and moral policies far exceeds the competency of this body and does damage to the governing law established by the Member States both domestically and within the context of their obligations to the European Convention of Human Rights. As such, ADF respectfully submits that pursuant to the obligations of Members of European Parliament to respect the rule of law, it is paramount that the proposed Resolution be voted down.

Respectfully submitted,

**13 January 2009**