



**EUROPEAN CENTRE FOR LAW AND JUSTICE MEMORANDUM TO THE MEMBERS OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE**

RE: Draft Resolution “Preventing the first form of violence against children: abandonment at birth”: Doc. 11538 (25 March 2008) Report: Social, Health and Family Affairs Committee  
[Rapporteur: Mr Michael HANCOCK, United Kingdom, Alliance of Liberals and Democrats for Europe]

Discussion and vote: Friday 27 June 2008 at 10 a.m.

**Introduction:**

The European Centre for Law and Justice [ECLJ] is a non-profit legal association specializing in international human rights law and has special consultative status before the United Nations as an NGO. ECLJ is an active participant before this Council of Europe body, having several cases before the European Court of Human Rights and also contributing to the European Committee on Social Rights and the Parliamentary Assembly of the Council of Europe.

The ECLJ here expresses its tremendous concern over the Draft Report on Preventing the first form of violence against children: abandonment at birth, and in particular the underlying promotion of abortion as a preventative alternative to abandonment. **Whereas the aspiration of preventing abandonment of infants is an honorable and necessary societal goal, the ECLJ is extremely concerned with the politicization of the Draft Report and the unnecessary promotion of “abortion**

**rights**". The ECLJ stresses that neither does this Council body have competency to make such a declaration, nor is it all appropriate for an international soft law document to promote abortion over life simply because of economic or personal utility. The ECLJ herein strongly opposes the below mentioned wording in the Draft Report as contrary to the right to life and to the ultimate mandate of the Council of Europe in promoting fundamental human rights:

A. Draft Resolution

9. The Assembly invites the member states to:

9.4. recognise a woman's full right to freely choose pregnancy, which means legal and easier access to sexual rights and reproductive health services;

B. Explanatory memorandum by Mr. Hancock, rapporteur

19. Abandonment of children raises the question of access for women (particularly migrant women) to contraception and abortion. Abortion has not been decriminalised in all countries. Even where it is permitted, it is subject to countless administrative formalities which form obstacles to many women in distress. In some cases and in some countries, doctors' conscience clauses or strict time limits on terminations of pregnancies may sometimes render this right, granted to women in principle, worthless in practice.

33. A proactive policy to prevent the abandonment of newborn babies should:

33.3. not allow anonymous childbirth to be legally possible; mothers should be required to give their identity, even though it should of course be possible to establish protected forms of childbirth offering some confidentiality for the mother, but children must not be deprived of the right to find out about their origins and should be allowed to do so even before they have reached the age of majority;

33.6. recognise a woman's full right to freely choose pregnancy, which means legal and easier access to contraception and abortion;

33.7. prevent early and unwanted pregnancies through information and sex education, particularly at school;

**Analysis:**

(a) Abortion

It is necessary to demystify the major underlying theme of the Draft Report, 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 worsening her material state results from the constitutional protection of her liberties to shape her 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>1</sup>

Therefore, the foundational precept of this report that due to the challenges and hardships, personal and financial, facing an abandoned child or the mother that the preference would be to abort the child rather than allow him or her to survive. 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>2</sup> As the Polish Constitutional Court so aptly argued, personal and social circumstances are changeable and should never be allowed to trump the right to life.

Absent the right to life, all human rights become meaningless. As such, all other rights become subject to this right as the antecedent of all other rights. Further, the fundamental right to life cannot and must not be lessened due of the threat of

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<sup>1</sup> Polish Abortion Case, Constitutional Court of Poland, OTK Z.U. z.r. 1997, Nr. 2, 19.

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

abandonment because of the irreversible nature of the termination of pregnancy and the destruction of human life. As the intent of this document is for the furtherance of the rights of the child, the highest premium must be paid to the right of each child to be born, and to pre- and post-natal care. As most Member States are signatories to the Convention of the Rights of the Child<sup>3</sup>, it is necessary that the standards set forth in the Convention be used. The Convention secures greater constitutional rights and liberties to children by detailing human rights that are inherent to the harmonious development of every child everywhere, including: the right to survival; the right to develop to the fullest; protection from harmful influences, abuse and exploitation; and the right to participate fully in family, cultural and social life.

The Convention's Preamble recognizes the "inherent dignity and the equal and inalienable rights of all members of the human family," giving special recognition that "the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth.*"<sup>4</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, despite the potential of being born into potentially poor material and social conditions.

Empirically and scientifically, life at its various stages cannot be differentiated. Legally, absent protection from conception, the right to life enshrined by this Council in

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<sup>3</sup> United Nations Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 2 [hereinafter Convention].

<sup>4</sup> Convention, *supra* note 3, at pmb., § 9 (emphasis added) (quoting United Nations Declaration of the Rights of the Child (proclaimed by General Assembly Resolution 1386 (XIV) of 20 Nov. 1959)). The Declaration served as the basis of the Convention of the Rights of the Child adopted by the U.N. General Assembly 30 years later on 20 November 1989. The Convention on the Rights of the Child was entered into force on 2 September 1990.

the European Convention of Human Rights is divested of all meaning and protection. This same concept is also 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.

Both the Cairo Platform and the Beijing Platform determine that the issue of abortion should be left exclusively to individual nations. The Cairo Platform for Action states that "any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process." Paragraph 106(k) of the Beijing Platform echoes this identical language, respecting State sovereignty as regards defining life and protection of the unborn.<sup>5</sup>

#### (b) Anonymous Child Birth

With regard to point 33.3, making it legally impossible to allow anonymous childbirth, the rapporteur in essence is making the option of child birth a far more unattractive option to those women who would, if able to maintain their anonymity, put their children up for adoption. This measure would thus have the effect of depriving countless infants of happy homes and healthy upbringings with adoptive families and would greatly increase the incidences of abandonment or abortion. As this point is counter-productive to the end goal of this draft report, it should be struck from the report.

#### (c) Sexual Education

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<sup>5</sup> International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, Report of the International Conference on Population and Development, U.N. Doc. A/Conf.171/13 (Oct. 18, 1994), P 8.25; Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, Beijing Declaration and Platform for Action, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995), P 106(k).

The ECLJ also questions the necessity of point 33.7 of the explanatory memorandum regarding prevention of unwanted pregnancies through information and sex education, particularly in school. Competency over the issue of required sexual and health education lies with the European Committee on Social Rights [ECSR]. The explanatory memorandum provided in the draft report is therefore not only redundant, but signals an extension of the Parliamentary Assembly's jurisdiction. The promotion of sexual education within the context of the draft report also unnecessarily prejudices Member States with regards to currently pending complaints before the European Social Committee.<sup>6</sup>

Sexual education under the European Social Charter is a component of mandatory health education and is governed by Article 11 of the Charter. The ECSR has held that the substance of health education, including sexual education, should seek to focus on general health and well being and focus on problem areas endemic to each individual Member State:

Article 11 para. 2 of the Charter requires that health education in school be provided throughout the entire period of schooling and that it cover the following subjects: prevention of smoking and alcohol abuse, sexual and reproductive education, in particular with regard to prevention of sexually transmitted diseases and Aids, road safety and promotion of healthy eating habits. It being understood that the activities may be more or less developed in accordance with the nature of the public health problems in the countries. The Committee is of the opinion that the integration of these subjects into the school curricula will contribute to giving full effect to this provision.<sup>7</sup>

Under an analysis of the correlation between Article 11 of the European Social Charter and Article 2 and 3 of the European Convention of Human Rights, which is the

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<sup>6</sup> No. 45/2007, International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia (admissible)

<sup>7</sup> ECSR, Conclusions XV-2, Belgium, p. 97.

hermeneutic utilized by the ECSR, it is clear that what is required of Member States with regard to health education in protecting the right to life and providing adequate health care education is the deterrence of serious and imminent risks to health. It is further clear that wide discretion is provided to Member States in determining what those risks may be. The Council of Europe does not require Member States to legislate against each and every potential risk to health; to do so would place an undue burden on Member States and would restrict the legislative freedom and national sovereignty over cultural rights enjoyed by Member States.

Precisely stated with regard to sexual education programmes, Member States are required under their obligations to both the European Social Charter and the European Convention of Human Rights, to establish a curriculum which both reflects the cultural and moral sensitivities of the people within their Member State while at the same time educating children regarding high risk behavior in problem areas effecting their population. Thus, prevalency of abandonment and teenage pregnancy as well as respect for cultural and moral beliefs are key factors in determining the nature and extent of sexual education programmes in schools. The substance of each Member State's Curriculum is determinable only by the Member States, making infringement in this area by PACE inappropriate.

#### (d) Sexual and Reproductive Health

Grave concern arises when international organizations use forums such as the Parliamentary Assembly of the Council of Europe to advance their political platforms. While the term sexual and reproductive health is a component of international law, it is vital to acknowledge that no binding United Nations or international documents have

defined the term. The term has been the subject of very heated debate among delegates, Member States and NGOs of the United Nations. For this very reason, as a reaction to safeguarding national sovereignty and closely held moral and cultural beliefs, the term has escaped definition and therefore must be understood by analyzing the individual needs of each Member State and their cultural and moral views. The plethora of soft law materials from the United Nations and other international bodies is neither persuasive nor legally binding. Clarification as to the intent of the usage of the term in the draft report should be utilized so as to avoid divisive politicization of the document. If the draft report uses the term to denote abortion and contraceptive services, which as detailed above runs contrary to the purpose of ensuring the rights of the child and makes inappropriate quality of life judgments, then the term should be struck.

**Conclusion:**

Whereas the aspiration of preventing abandonment of infants is an honourable and necessary societal goal, the ECLJ is extremely concerned with the politicization of the Draft Report and the unnecessary promotion of abortion rights. The inclusion of the aforementioned text seriously undermines the goals set forth in diminishing the occurrence of abandonment, promoting the right to life and protecting the rights of the child. Furthermore, ECLJ is gravely concerned with any attempt to place legal barriers to anonymous birth which would undoubtedly increase the number of abortions, make adoption a far less attractive option and diminish a woman's right to choose pregnancy. Language regarding sexual education, the jurisdictional competency being that of the

European Committee on Social Rights, should be excluded. Clarification is also necessary regarding the use of the term sexual and reproductive health.

ECLJ is most concerned however with the qualitative assessment of life provided by the Draft Report, and the utilitarian calculus promoting abortion over life as a result of being born into inadequate social and financial circumstances. As social and financial circumstances are changeable and the termination of pregnancy irreparable, it is institutionally unacceptable for the Parliamentary Assembly to promote such a worldview with its underlying shadow of social eugenics.

It is the opinion of the European Centre for Law and Justice therefore, that § 9, 9.2 of the Draft Resolution and §§ 19, 33, 33.3, 33.6 and 33.7 be struck from the Draft Report or amended appropriately to meet the treaty obligations of Council Member States to the Convention of the Rights of the Child as well as to promote the fundamental freedoms enshrined in the European Convention of Human Rights.

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