



Parliamentary Assembly of the Council of Europe

**Comments on the draft Resolution and Report on
Discrimination on the basis of sexual orientation
and gender identity**

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Andreas GROSS, Switzerland, Socialist Group

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This report has been prepared at the request and for the purpose of Members of the Parliamentary Assembly of the Council of Europe, by

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The following memorandum screens the main provisions of the draft Resolution under the requirements of European and international law. It appears that, on the one hand, it is legitimate to protect the “LGBT” people from unjustified discrimination; on the other hand, this protection should not end in damage to the family and in the negation of other people’s fundamental rights, especially in the fields of freedom of speech and religious belief.

In particular, the ECLJ has noticed that the draft resolution diminishes or even endangers the following fundamental rights:

- **The freedom of speech**
- **The freedom of religion and conscience;**
- **The higher interest of children:**
- **The States’ sovereign interest and right to protect public morality, family and the best interests of the child.**

Mr Andreas Gross’ draft Resolution should be amended in order to maintain the definition of the family and to protect the fundamental right to disagree with “LGBT ideology”. The appropriate response to violence and unjust discrimination against LGBT people should not include eliminating moral pluralism.



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MEMORANDUM

Preliminary remarks

This report by the Parliamentary Assembly of the Council of Europe has been drawn up at a time of international mobilisation in favour of the affirmation of the “specific rights” of LGBT people. Other events in this context include decisions delivered by the European Court of Human Rights¹; the proposal for a (European Union) Council Directive on the implementation of equality of treatment of persons regardless of their religion or convictions, handicap, age, or sexual orientation (COM (2008) 426)²; the draft recommendation for adoption by the Committee of Ministers on measures to combat discrimination based on sexual orientation or gender identity, to ensure respect for human rights of lesbian, gay and transgender persons and to promote tolerance towards them; and various studies commissioned by the European bodies, such as by the European Union’s Fundamental Rights Agency (FRA)³, by the Committee of Experts on Family Law (CJFA)⁴ and by the European Committee on Legal Cooperation⁵.

This memorandum on the *Gross report and draft Resolution* is based on the case law of the European Court of Human Rights and, to some extent, on the various reports mentioned above.

The underlying logic of this resolution is to endorse a paradigmatic shift from the principle of “*non-discrimination*” to a new principle of “*non-distinction*” based on sexual orientation and gender identity. Whereas the legal notion of “*non-discrimination*” still permits *justified* discrimination, the concept of “*non-distinction*” forbids any difference of treatment, and, ultimately, prohibits any judgment on homosexual behaviors.

The affirmation of the rights of LGBT persons is taking place against a background of the moral neutralisation of sexuality, particularly its LGBT variant. LGBT sexuality is presented as an objective, natural reality beyond the control of willpower and personal freedom. This excludes any possibility even of appreciation on the basis of moral criteria; it further excludes the possibility of objective criteria, such as those concerning the natural state of people and families.

¹ The *Goodwin and I. v. the United Kingdom* judgment delivered by the European Court of Human Rights (ECHR) on 11 July 2002, upholding the prevalence of psychological sexual identity over biological sexual identity; The *E.B. v. France* judgment delivered by the ECHR on 22 January 2008, upholding the neutrality of homosexuality with regard to adoption.

² See Report by the Chairman to the Committee of Permanent Representatives / Council (EPSCO) on progress with the work, 02 June 2009, at <http://register.consilium.europa.eu/pdf/fr/09/st10/st10073-re01.fr09.pdf> [*in French*].

³ Study on homophobia and discrimination on the basis of sexual orientation and gender identity in the EU Member States drawn up by the European Union’s Fundamental Rights Agency (FRA).

⁴ Study by Nigel Lowe on the rights and legal status of children brought up in different marital and non-marital forms of partnership and cohabitation commissioned by the Council of Europe’s Committee of Experts on Family Law (CJFA).

⁵ Study by the Danish Institute of Human Rights, and commissioned by the Council of Europe’s European Committee on Legal Cooperation, on the different marital and non-marital forms of partnership and cohabitation with a view to identifying any measures that might prevent discrimination on the basis of sexual orientation or gender identity.

Morally neutralised and objectivised in this way, sexuality (including LGBT) defines people according to a criterion that is apparently objective, comparable to the objective characteristics defining the state of persons, such as age, sex, and colour. LGBT persons are therefore able to affirm themselves as a community in the eyes of the law. The legal instruments and mechanisms that prohibit discrimination on the basis of objective criteria therefore have to be applied identically to discrimination on the basis of sexual practices.

The ECLJ is particularly concerned by the promotion of undefined concepts such as “*de facto* family”, “*preferred* gender identity”, “hate speech” or “homophobia”. The failure to provide a legal definition of ambiguous concepts such as “hate speech” or “homophobia” should be addressed more than ever, because such provisions are aimed to limit free speech. It appears more and more clearly that the concepts of “hate speech” and “homophobia” are modern tools for censorship and, at least, for the imposition of a compulsory morality.

As explained below, such application plainly interferes with the rights of Member States with regard to national sovereignty and greatly offends subsidiarity principles. Additionally, the Gross report fails to take into account the great weight that must be afforded to religious freedom, save one comment on the chart of page 16 of the Explanatory Memorandum, allowing religious freedom a “narrow” exception. This cursory exception stands in stark contrast to the decisions of the European Court of Human Rights.

I. The Gross report referred to here raises a number of problems. In its *Preliminary Draft Recommendation*, the Gross report has almost nothing real or innovative to recommend to the Committee of Ministers. The essential features are contained in the *Preliminary Draft Resolution*, the main provisions of which are specifically critiqued below, under **Detailed Comments** (p.27).

II. The Report should also include the following additional references, explicitly:

- A.** The necessary respect for the freedom of opinion, expression, conviction and religion, mentioning Articles 9 and 10 of the European Convention on Human Rights. (The moral neutralisation of LGBT behaviour is therefore the basis for the anti-discrimination logic; that is why the freedom of critical expression with regard to LGBT behaviour is being rapidly reduced);
- B.** The higher interest of children;
- C.** Respect for the freedom/sovereignty of States in this matter, in accordance with the diversity of their cultural traditions.

Each point is discussed more thoroughly below in the Memorandum and throughout the Comments.

SECTION 1: FREEDOM OF RELIGIOUS SPEECH AND OPINION CONCERNING SEXUAL ORIENTATION AND PRACTICES

1. Our main concern: The ambiguity and the lack of definition of the concepts of “Hate speech” and “homophobia” gravely endanger the Freedom of Speech. Moreover, the particular stigmatization of religions by the draft text underlines the attempt to undermine the right to public expression of religious beliefs.

2. Freedom of expression is an essential foundation of democratic society. Freedom of expression is not only a guarantee against the State but also a fundamental principle for life in democracy. Freedom of expression is not an end in itself; it is a means for the establishment of a democratic society. Its guarantee reveals the existence of such a society. Freedom of expression applies not only to information and ideas that are favorably received or regarded as inoffensive or indifferent, but also to expression that may offend, shock, or disturb the State or any sector of the population.

3. Freedom of thought, conscience, and religion is one of the foundations of a democratic society and is in its religious dimension, one of the most vital elements contributing to form the identity of believers and their conception of life. Importantly, the protection of conscience or religious sentiment does not preclude criticisms of religions and belief. Only the manner of religious exercise is subject to potential regulation by the State, but even here, such interference is to be narrowly applied, and only for compelling reasons. Additionally, the State may be held liable in its obligation to ensure that those who profess their religious beliefs have a peaceful enjoyment of their right to freedom of thought, conscience, and religion.

4. It should be recalled that freedom of religion also protects the freedom of the public expression of religious belief and religious doctrines. Consequently, public expressions of faith or religious morality should receive a greater level of protection than other forms of free speech. Such is the case for example, for the religious sermons of ministers. Effectively, the public expression of faith or religious morality should not be liable to prosecution because of their opposition to certain ideas or practices morally objectionable, so long as that opposition is expressed peacefully.

5. As the European Court of Human Rights (the “Court”) has explained, the right of conscience is painted with broad strokes:

[F]reedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to “manifest [one’s] religion.” Bearing witness in words and deeds is *bound up* with the existence of religious convictions. . . .⁶

6. While the Court in *Kokkinakis v. Greece* addressed the possible limitations on the manifestation of one’s religious beliefs and convictions under section 2 of Article 9,⁷ the Court continued, noting that, “such an interference is contrary to Article 9 (art. 9) unless it is ‘prescribed by law’, directed at one or more of the legitimate aims in paragraph 2 (art. 9-2) and ‘*necessary in a democratic society*’ for achieving them.”⁸ In determining the *necessity* for laws or regulations that interfere with rights protected under Article 9, the Court will examine whether “measures taken at national level [are] justified in principle and proportionate”⁹ to “the legitimate aim pursued.”¹⁰

A. Parliamentary Assembly Has Recognized the Importance of Religion and Religious Speech in Society.

7. The Parliamentary Assembly of the Council of Europe itself recognizes the importance of religion in society. In its Recommendation No. 1804 (2007), the Assembly made such a declaration:

The Council of Europe must recognise this state of affairs and welcome and respect religion, in all its plurality, as a form of ethical, moral, ideological and spiritual expression of certain European citizens, taking account of the differences between the religions themselves and the circumstances in the country concerned.¹¹

Furthermore, the Assembly has recognized that government should not meddle in religious doctrine and faith:

Governance and religion should not mix. Religion and democracy are not incompatible, however, and sometimes religions play a highly beneficial role...¹²

Freedom of expression is one of the most important human rights, as the Assembly has repeatedly affirmed. In Recommendation 1510 (2006) on freedom of expression and respect for religious beliefs it expresses the view that “freedom of expression as protected under Article 10 of the European Convention on Human Rights *should not be further restricted to meet increasing sensitivities of certain religious groups*”.¹³

⁶ *Kokkinakis v. Greece*, Appl. No. 14307/88, ¶ 31 (E. Ct. H.R. 25 May 1993) (A Jehovah Witness’ rights were violated under Article 9 of the ECHR; his conviction for proselytizing was not justified as the government had not shown that the proselytizing act was done by any improper means, such as fraud) (emphasis added).

⁷ *Id.* ¶ 33.

⁸ *Id.* ¶ 36 (emphasis added).

⁹ *Id.* ¶ 47.

¹⁰ *Id.* ¶ 49.

¹¹ PACE Recommendation 1804 (2007), ¶ 3, *available at* <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/EREC1804.htm#1>.

¹² *Id.* ¶ 10.

¹³ *Id.* ¶ 18 (emphasis added).

While we have an acknowledged duty to respect others and must discourage gratuitous insults, freedom of expression *cannot, needless to say, be restricted out of deference to certain dogmas* or the beliefs of a particular religious community.¹⁴

8. The protection of religious speech and practice is not a new endeavor. The Parliamentary Assembly of the Council of Europe has long recognized the crucial role that religious speech plays in European society. By way of further example, in Recommendation 1086 (1988)¹⁵, specifically addressing “the situation of the Church and freedom of religion in Eastern Europe”, the Assembly called upon “the Committee of Ministers to invite the governments of the Council of Europe member states to take the necessary steps to . . . provide for, *inter alia*, . . . the right to public freedom of religious opinion on an equal footing *with anti-religious propaganda*; [and] . . . the right of Churches and religious associations to *uncensored* access to the mass media (press, radio, television), . . .”¹⁶

9. Thus, in its efforts to promote pluralism and tolerance in a democratic society, the Assembly has recognized the importance of religious speech and practice of faith. In this case, the emphasized statements in Recommendation No. 1804 pertain to the voice of one religious group over another. However, the Assembly cannot avoid the equal application of the principle when focused on the right of religious individuals or organizations to share their faith regarding, for example, the sinfulness of homosexuality, either in private or in public. Such doctrines and the expression thereof do not constitute “hate speech” *per se*, but rather, such doctrines are capable of delivery in a peaceful manner in which a religious adherent genuinely cares for salvation.

10. The Assembly must take care not to carve out its own exception to the rule to placate “certain dogmas” of political or philosophical groups any more than religious groups, as it acknowledged in Recommendation 1086—the religious voice has as much a right to be heard as any other group, including those groups wishing to promote socially homosexuality. On this point, the Preliminary Draft Report in several locations refers generally to “hate speech.” The sweep of such terminology is so broad as to unlawfully encompass all religious speech concerning moral strictures on sexuality, whether peaceful or volatile. The terminology can only cause manifest problems as its definition is completely subjective.

11. Moreover, mere speech *must* be distinguished from actual crime. **Under the Convention, it has never been a crime to merely express religious belief, nor should it ever be.** To the contrary, religious speech is highly protected under Articles 9 and 10, and thus, the call to concern over the “hate speech” of religious leaders in the draft Resolution (Section A, para. 6) presents grave concerns.

¹⁴ *Id.* ¶ 19 (emphasis added).

¹⁵ Assembly debate on 5 and 6 October 1988 (12th and 13th Sittings) (see Doc. 5944, report of the Committee on Relations with European Non-Member Countries, Rapporteur : Mr Atkinson). Text adopted by the Assembly on 6 October 1988 (13th Sitting).

¹⁶ *Id.* at ¶¶ 10(vii), 10(xvii) (emphasis added).

B. European Court Of Human Rights Decisions Place Religious Speech In A Privileged Category.

12. The European Court of Human Rights explained in *Kokkinakis v. Greece* that religious freedom, in *word and deed*, is to be vigilantly protected and preserved. It is based on Article 10 of the Convention which provides for the freedom of expression¹⁷, and on Article 9 which provides for the freedom of thought, conscience and religion¹⁸. The plain text of Article 9 removes any doubt that religious expression is specially included within the ambit of the Convention's protections.

13. For a majority of, if not all, religious individuals and organizations alike, homosexuality and the marriage of same-sex couples (including statutorily recognized relationships which have a similar or identical effect to affording "marriage" for same-sex couples) is emphatically a *moral* question. Because these matters are intricately entwined with natural law, religious doctrine, and sacred texts, there can now be no artificial separation by legal regulation due to new efforts to morally neutralize sexuality.

14. As the Court set forth in *Handyside v. The United Kingdom*,¹⁹ with regard to moral standards, States are afforded a wide margin of appreciation:

In particular, *it is not possible* to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. The Court notes at this juncture that, whilst the adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with "indispensable" . . .

¹⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, art. 10, 213 U.N.T.S. 221, 230 (Eur.) [hereinafter ECHR]:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive *and impart information and ideas without interference* by public authority and *regardless of frontiers*. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

¹⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, art. 9, 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.

¹⁹ *Handyside v. The United Kingdom*, App. No. 5493/72 (E. Ct. H.R. 7 Dec. 1976).

neither has it the flexibility of such expressions as “admissible”, “ordinary” . . . “useful” . . . “reasonable” or “desirable”. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context.”²⁰

15. Moreover, the opinions of individuals and organizations, based upon religious belief, cannot be subject to a heckler’s veto, to personal discomfort, or offense of the listener based upon mere disagreement:

The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterizing a “democratic society”. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, *but also to those that offend, shock or disturb the State or any sector of the population*. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society.”²¹

16. The government’s role is to remain neutral and impartial where expression is peaceful. In *Serif v. Greece*,²² the applicant, a Greek citizen and theological school graduate, brought claims to the Court under Articles 9 and 10 after he was convicted, *inter alia*, of usurping the functions of a minister of a known religion during a conflict of leadership which arose between Muslim leaders.²³ Specifically, the behavior underlying the charges of usurpation included, “issuing a message about the religious significance of a feast, delivering a speech at a religious gathering, issuing another message on the occasion of a religious holiday and appearing in the clothes of a religious leader.”²⁴ Examining whether there was a “pressing social need” for the State’s interference with the Applicant’s Convention rights, the Court ruled in the Applicant’s favor under Article 9 (a decision regarding his claim under Article 10 was not necessary as the Court already found a violation of Article 9²⁵), importantly highlighting the role of the State in a religious dispute:

Although the Court recognizes that it is possible that tension is created in situations where a religious *or any other community* becomes divided, it considers that this is one of the *unavoidable consequences of pluralism*. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to *ensure that the competing groups tolerate each other*.²⁶

17. The Court has held similarly with regard to rights of religious exercise and assembly, when a Russian Town Council refused to allow equal access to a public park to the pastor of a minority religion, the “Christ’s Grace” Church of Evangelical Christians.²⁷ In this case, *Barankevich v. Russia*, the Court explained that “[t]he issue of freedom of belief cannot in this case be separated from that of freedom of assembly,” and thus addressed the Applicant’s

²⁰ *Id.* ¶48.

²¹ *Id.* ¶ 49 (emphasis added).

²² *Serif v. Greece*, App. No. 38178/97 (E. Ct. H.R. 1999).

²³ *Id.* ¶ 7, 9, 11, 13.

²⁴ *Id.* ¶ 39.

²⁵ *Id.* ¶ 57.

²⁶ *Id.* ¶ 53.

²⁷ *Barankevich v. Russia*, App. No. 10519/03 (E. Ct. H.R. 26 July 2007).

claims principally under Article 11, but in light of Article 9.²⁸ Under Article 11, and likewise under Article 9, the Court explained, “the only necessity capable of justifying an interference with any of the rights enshrined in those articles is one that may claim to spring from a ‘democratic society.’”²⁹ Continuing, the Court noted that, “[i]n view of the essential nature of freedom of assembly and association and its close relationship with democracy there must be *convincing and compelling reasons to justify an interference with this right . . .*”³⁰ Moreover, “there may in addition be positive obligations to secure the effective enjoyment of these rights.”³¹ In Pastor Barankevich’s case, the Court rejected the basis in the domestic courts for justifying interference on the possibility of raising “discontent among adherents of other religious denominations and provoke[ing] public disorder.”³²

18. The Assembly should do the same with regard to similar subjective feelings of LGBT persons that merely dislike the content of religious doctrines expressed which oppose homosexual conduct, same-sex marriage, or recognized partnerships of same-sex couples. Noting the “hallmarks of a ‘democratic society’ as pluralism, tolerance and broadmindedness,” and considering that the State is obligated to keep a balance to ensure respect for all persons’ beliefs, the Court drew the line regarding the level of interference permitted: “[T]he State has a duty to remain neutral and impartial” and affirmed that **an appropriate response does not include eliminating pluralism.**³³ Where an assembly is peaceful, “participants must be able to hold [their] demonstration without having to fear that they will be subjected to physical violence by their opponents. It is thus the *duty* of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully.”³⁴ The Assembly, where faced with a proposal to quash the right of religious speech against LGBT ideology in blanket fashion through ambiguous terminology, has the same duty.

19. Additionally, the Court was equally “unconvinced” that the government needed to restrict the Pastor Barankevich’s rights of freedom of assembly and religion “for the protection of those whom he was allegedly trying to convert. Under art. 9, freedom to manifest one’s religion includes the right to try to convince one’s neighbor, failing which, moreover, ‘freedom to change one’s religion or belief’, enshrined in that article, would be likely to remain a dead letter.”³⁵

20. To silence the voice of opposition to the legitimacy of homosexuality or same-sex marriage through ambiguous terminology, such as “hate speech,” is precisely the *intolerance* that the Convention protects against. In this sensitive area of moral and religious debate, **the government must at least remain neutral and impartial, and may further be required to institute measures to protect the rights of those wishing to speak out against homosexuality as part of their religious beliefs.** The freedoms provided under Articles 9, 10, and 11 of the Convention firmly establish the right of religious individuals and organizations to express their beliefs peacefully and thus cannot be lumped into an all-consuming category of “hate speech.” There is a right to try to share one’s faith with others and to convince others of that faith, regardless that some may find those beliefs irksome or

²⁸ *Id.* ¶15.

²⁹ *Id.* ¶ 24.

³⁰ *Id.* ¶ 25 (emphasis added).

³¹ *Id.* ¶ 27.

³² *Id.* ¶ 29.

³³ *Id.* ¶ 30.

³⁴ *Id.* ¶ 32 (emphasis added).

³⁵ *Id.* ¶ 34 (citing *Kokkinakis v. Greece*, *supra* note 6, ¶ 31).

disagreeable. As evidenced from Pastor Barankevich's case, there is a right to preach against homosexuality from the pulpit, whether in the private confines of a Church building or in the public domain of a park. Ambiguous laws and regulations which over-reach, to the contrary, would only serve to stifle religious expression and practice. More than this, such laws would violate the Convention. Finally, it is worth noting that the Court has never found, under Article 14 taken in conjunction with Article 10, for a homosexual applicant claiming to be damaged by discriminatory speech based upon sexual orientation.

The resolution should,

- Reaffirm its respect for article 9 and 10 of the European Convention;
- Provide a legal definition of "Hate Speech", and reaffirm that this concept shall never end in a limitation of free speech;
- Provide a legal and practical definition of "homophobia", or abandon this concept;
- Include a general provision reaffirming the fundamental right to freedom of religious opinion, in private and in public, including matters of morality.

Section 2: Respect for the Freedom of Churches and Religious Organizations to Discriminate Based Upon Moral Behavior

21. Our main concern: This resolution jeopardizes religious freedom, and in particular, the fundamental right to act according to religious beliefs in the field of morality. For example, in the UK, all the Catholic adoption agencies have been forced to close because of their conscientious objection to allowing same-sex couples to adopt, as required by the Equality Act Regulations 2007. Additionally, individuals have been sued for exercising their right of conscience, such as Christian owners of *Bed and Breakfast* establishments who have been sued for refusing to rent a bedroom to same-sex couples.

22. In addition to the freedom of speech (under Article 10), the freedoms of assembly and association (under Article 11) may be taken in conjunction with the religious protections afforded under Article 9 of the Convention to protect religious freedom. Notably, under Article 11, there is also recognized a right of autonomy for religious organizations to determine their own doctrines and rules for Church membership. **Thus, government may not penalize a religious organization for determining that it can exclude a person from Church responsibilities, for example, based upon that person's moral behavior,** which could include the practice or promotion of homosexuality or other behaviors contrary to the sacred texts or doctrines of the Church. The rights of assembly, association, and autonomy are as fundamental as the rights of religious freedom and speech under Article 11.³⁶

23. As the Court held in *Hasan and Chaush v. Bulgaria*,³⁷ a case in which a dispute in religious leadership arose and in which the Council of Ministers refused to recognize the new leadership of the Applicant, religious organizational autonomy and the right of association may not be removed:

Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the *autonomous* existence of religious communities is *indispensable* for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.³⁸

³⁶ E. Conv. H.R., Art. 11. Freedom of assembly and association - 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. / 2. 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. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

³⁷ *Hasan and Chaush v. Bulgaria*, [GC] App. No. 30985/96 (26 Oct. 2000).

³⁸ *Id.* ¶ 62 (emphasis added); see also *Religionsgemeinschaft Der Zeugen jehovas and Others v. Austria*, App. No. 40825/98, ¶¶ 61, 78 (E. Ct. H.R. 31 July 2008) (church recognition dispute; under Article 11, reiterating the

24. Further, in *Manoussakis and others v. Greece*,³⁹ the Court noted that “[t]he right to freedom of religion as guaranteed under the Convention *excludes any discretion* on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”⁴⁰

25. In *Svyato-Mykhaylivska Parafiya v. Ukraine*,⁴¹ the Court clearly set forth the standard by which the State may interfere in the affairs, doctrines, and the leadership and membership decisions of religious bodies under Articles 9 and 11—the instances are limited, exhaustive, and the margin of appreciation is very narrow. In *Svyato-Mykhaylivska Parafiya*, the applicant association (“Parish”) claimed unlawful interference by the State when the relevant administrative body refused to register the Parish, which would have permitted the Parish to “exercise the full range of religious activities normally exercised by registered non-governmental legal entities.”⁴² The administrative body and the State’s courts inconsistently gave various reasons for the refusal to register the Parish,⁴³ two of which addressed defects in membership requirements. The Court emphatically rejected the State’s rationale.

26. First noting the general legal principles, the Court recalled the strictures on States under Article 9 and explained that because “religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference.”⁴⁴ The Court next reiterated, as stated in *Manoussakis*, the unlawfulness of State interference to determine the legitimacy of religious beliefs:

[T]he right of believers to freedom of religion, which includes the right to manifest one’s religion in community with others, encompasses the expectation that believers will be allowed to associate freely, without arbitrary State intervention. The State’s duty of neutrality and impartiality, as defined in the Court’s case-law, is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs.⁴⁵

27. Thus, any determination, as espoused within the draft Resolution, that would denounce religious beliefs which oppose homosexuality or same-sex marriage as immoral cannot stand. The draft Resolution points out that “only particularly serious reasons may justify differences in treatment based on sexual orientation;”⁴⁶ however, religious freedom (which includes speech, assembly, association and autonomy) provides justification which exceeds the boundary of “particularly serious.” As the Court pointedly emphasized, “the list of exceptions to freedom of religion and assembly, as contained in Articles 9 and 11 of the Convention, is exhaustive, they must be *construed strictly and only convincing and compelling reasons can*

right of autonomous existence for religious organizations as “indispensable for pluralism in a democratic society, and is, thus, an issue at the very heart of the protection which Article 9 affords”).

³⁹ *Manoussakis and others v. Greece*, App. No. 18748/91 (E. Ct. H.R. 26 Sept. 1996) (Jehovah’s Witnesses prosecuted for failing to register their place of worship).

⁴⁰ *Id.* ¶ 47 (emphasis added).

⁴¹ *Svyato-Mykhaylivska Parafiya v. Ukraine*, App. No. 77703/01 (E. Ct. H.R. 14 June 2007).

⁴² *Id.* ¶ 5, 123.

⁴³ *Id.* ¶ 139.

⁴⁴ *Id.* ¶ 112.

⁴⁵ *Id.* ¶ 113.

⁴⁶ Mr. Andreas Gross, Draft Resolution [hereinafter, “Draft Resolution”] (8 Dec. 2009), at ¶ 2; Mr. Andreas Gross, Explanatory memorandum, at 15, ¶ 40 (citing *Karner v. Austria*, App. No. 40016/98 (E. Ct. H.R. 24 Oct. 2003)).

justify restrictions. *The States have only a limited margin of appreciation in these matters.*⁴⁷ Moreover, “[a]ny such restriction must correspond to a ‘pressing social need’ and must be ‘proportionate to the legitimate aim pursued’”⁴⁸

28. While the *Draft Resolution* calls for legal recognition and protection for LGBT families⁴⁹, including legal recognition of same sex partnerships⁵⁰ and legal recognition in documents that reflect preferred gender identity⁵¹, any requirement imposed on religious bodies to recognize such certificates would absolutely interfere with religious freedom (where such recognition conflicts with Church doctrine). Particularly in States in which birth or marriage certificates celebrated by the Church are recognized by the State, Churches would have the *weighty and legitimate* reasons necessary to justify a difference in treatment.

29. Also, the high respect due religious freedom importantly includes membership determinations. In *Svyato-Mykhaylivska Parafiya v. Ukraine*, the Court found that the refusal to register the Parish constituted an interference with religious freedom under Article 9 and freedom of association under Article 11. The Court examined, *inter alia*, whether the interference was “necessary in a democratic society.” Addressing the issues relating to membership, the Court first held that “the State cannot oblige a legitimately existing private-law association to admit members or exclude existing members. Interference of this sort would run counter to the freedom of religious associations to regulate their conduct and to administer their affairs freely.”⁵² Solidifying the notion of religious autonomy for religious doctrine, the Court drew the line against any State interference whatsoever:

The internal structure of a religious organisation and the regulations governing its membership must be seen as a means by which such organisations are able to express their beliefs and maintain their religious traditions. The Court points out that the right to freedom of religion *excludes any discretion* on the part of the State to determine whether the means used to express religious beliefs are legitimate.⁵³

30. The principles discussed herein also apply to employment within religious organizations. Council of the European Union Directive 2000/78/EC (27 November 2000)⁵⁴ “establishing a general framework for equal treatment and occupation”⁵⁵ provides for religious autonomy despite its inclusion of sexual orientation as an impermissible ground for discrimination with regard to occupational requirements. This Directive recognizes the immunity of the churches and other religious organizations in the enforcement of anti-discrimination policies, when related to moral and religious behavior. In its article 4⁵⁶, the Directive makes clear that “in

⁴⁷ *Svyato-Mykhaylivska Parfiya v. Ukraine*, *supra* note 41, ¶ 114 (citing *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, ¶ 84, ECHR 2001-IX) (emphasis added).

⁴⁸ *Id.* ¶ 137.

⁴⁹ *Draft Resolution*, *supra* note 46, ¶ 8.

⁵⁰ *Id.* ¶ 14.8.

⁵¹ *Id.* ¶ 14.11.2.

⁵² *Svyato-Mykhaylivska Parfiya v. Ukraine*, *supra* note 41, ¶ 146.

⁵³ *Id.* ¶ 150 (citing *Hasan and Chaush*, *supra* note 37, ¶ 78; and *Manoussakis and Others v. Greece*, *supra* note 39, ¶ 47).

⁵⁴ Council Directive 2000/78/EC, ¶ 24 (27 Nov. 2000), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML>.

⁵⁵ Official Journal L 303, 02/12/2000 P. 0016-0022.

⁵⁶ Article 4 - Occupational requirements:

1. Notwithstanding Article 2(1) and (2) [defining “equal treatment”, “discrimination” and “indirect discrimination”], Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 [which includes sexual orientation]

the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief *shall not constitute discrimination* where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos."⁵⁷

31. Importantly, the European Court of Human Rights recently applied this Directive to uphold the right of a Catholic organisation to decide not to renew the contract of an employee when that employee took a public stand against the Christian faith.⁵⁸ The Court held that the Catholic organisation pursued a "legitimate aim" in discriminating against a professor who was strongly opposed to the Christian faith:

In these circumstances, the Court considers that the decision of the Faculty Council could be seen as inspired by the legitimate aim of protecting right of others, which manifests itself in the interest of the University of inspiring his teaching Catholic doctrine.⁵⁹

32. Thus, any reference in the draft Resolution which would imply or overtly determine that religious belief or doctrine which opposes LGBT equality ideology is illegitimate must fail. Such determinations fall well outside the province of the Assembly.

The Resolution should,

- **Reaffirm the fundamental right of individuals and of religious and confessional organizations to act according to their moral and religious beliefs.**
- **Reaffirm that the moral or religious ethos of employers or service providers should be duly taken into account in the appreciation of the legality of discrimination.**

shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

Id.

⁵⁷ *Id.* art.4, § 2 (emphasis added).

⁵⁸ *Lombardi Vallauri v. Italy*, App. No. 39128/05 (E. Ct. H.R. 20 Oct. 2009).

⁵⁹ *Id.* (footnote omitted).

SECTION 3: SOVEREIGNTY OF MEMBER STATES IN THE FIELD OF MORALITY AND RELIGION, PARTICULARLY WITH REGARD TO SAME-SEX UNIONS.

33. Our main concern: The resolution promotes an artificial conception of the family and of marriage and requires from national legislations the recognition of same sex marriage or partnership. Of particular concern is the attempt of this resolution to create a “right to adopt” a child⁶⁰. In so doing, the draft resolution infringes natural law, the national sovereignties, and the case law of the European Court of Human Rights.

34. With regard to the promotion of regulation concerning religious freedom in the area of LGBT “rights,” the Assembly would violate the very values upon which the Council of Europe was built by greatly offending subsidiarity principles and respect for national sovereignty. The draft Resolution calls for a stark departure from the established case law, vis-à-vis the European Court of Human Rights, by infringing upon domestic laws which protect the right of religious belief and practice, as well as the right to voice those beliefs in sharing one’s faith with others in private and in public spheres. The Assembly may not interfere with the Member States’ margin of appreciation to determine the morality of same-sex unions, same-sex marriage, or any other reformulation of “family” that may be artificially constructed. The deconstruction of the traditional understanding of family, and a reconstruction of that definition based upon artificial means which conflicts with religious tenets of numerous faiths, is a grave concern.

35. The draft Resolution proposes to interfere with not only religious beliefs and expressions of morality as mentioned above, but also States’ right to determine educational programs in schools.⁶¹

A. There is No Right Under the Convention to Same-Sex Marriage or to Full And Equal Treatment of Equivalent Relational Partnerships.

36. As the Court explained in *Thlimmenos v. Greece*,⁶² “[t]he right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”⁶³ **The European Court of Human Rights has yet to**

⁶⁰ See § 14.9. “provide the possibility for joint parental responsibility of each partner’s children, if not also the right of each partner to adopt the other partner’s children;”

⁶¹ See Draft Resolution, at 4, ¶ 14.12 (“introduce or develop anti-discrimination and awareness-raising programmes fostering tolerance, respect and understanding of LGBT persons, in particular for . . . schools . . . ;”)

⁶² [GC] App. No. 34369/97 (E. Ct. H.R. 6 April 2000) (Court agreed with applicant that a criminal conviction for failing to where a military uniform did not permit authorities to refuse to appoint him to post of chartered accountant under Article 14 taken in conjunction with Article 9).

⁶³ *Id.* ¶ 44.

recognize that there is any right under the European Convention on Human Rights to same sex marriage or partnership. Nor has the Court held that domestic partnerships (or any similarly recognized relationship of same sex couples) should enjoy an equal status to that of traditional marriage. The Court has and should continue to leave this matter to the Member States' margin of appreciation.

37. Initially, with regard to the definition of discrimination proffered by the Convention, it is clear from both the use of the *travaux préparatoire* or use of a plain meaning hermeneutic, that discrimination against homosexuals or the transgendered within the meaning of Article 12 of the Convention is not applicable. With regard to the latter method, the triggering terms, "homosexual", "sexual orientation", or "transgender" are not found within the exhaustive list of Article 14. Therefore, under the plain meaning of the text, it is clear that the Article meant to exclude these terms from the Convention definition of Article 14.

Furthermore, the *travaux préparatoire* itself shows that the intent of the draftsmen of Article 14 was that the contents of the Article be exhaustive. Article 4 of the Draft Recommendation stated that simple enumeration of the rights and freedoms to be safeguarded by Article 14 was not sufficient and that the majority of Member States insisted on clear and concise definitions of which groups would be protected under the Article.⁶⁴

38. With respect to marriage and its attendant rights, privileges, and responsibilities, Article 14, taken in conjunction with Article 12, does not reach same-sex couples for a right of "marriage," and neither does it purport to extend all the legal incidents of marriage upon governmentally recognized partnerships. In this realm, the Court has held that Member States enjoy an important margin of appreciation.

Article 12 of the Convention expressly provides that,

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.⁶⁵

The Court has held, and has not waned from its position that,

the right to marry guaranteed by Article 12 (art. 12) refers to the *traditional* marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 (art. 12) is mainly concerned to protect marriage as the basis of the family.⁶⁶

As to the Member States' margin of appreciation, the Court has determined that,

Article 12 (art. 12) lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment [in a Member State restricting] marriage of persons who are not of the opposite biological sex *cannot* be said to have an effect of this kind.⁶⁷

⁶⁴ Article 14 of the Draft Recommendation (Collected Edition, I, p. 105; or *Doc. Ass.* 1949, No. 77, p. 205).

⁶⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (or European Convention on Human Rights) [hereinafter "ECHR"], art. 12.

⁶⁶ *Rees v. The United Kingdom*, App. No. 9532/81 (E. Ct. H.R. 17 Oct. 1986), ¶ 49 (emphasis added).

⁶⁷ *Id.* ¶ 50 (emphasis added).

Even more recently, and repeatedly, the Court has affirmed “that the protection of the *family in the traditional sense* is, in principle, a *weighty and legitimate reason* which might justify a difference in treatment”⁶⁸

39. While the Court’s absolute stance with regard to marriage has been *narrowly* nuanced with regard to the particular plight of individuals who have actually undergone gender reassignment surgery based upon recognition of a medical condition and treatment prescribed,⁶⁹ **the Court has not altered its stance that Article 12 only protects the right of persons of the opposite sex to enter into the covenant of “traditional marriage.”** Most recently in *Courten v. The United Kingdom*⁷⁰ and *M.W. v. The United Kingdom*,⁷¹ the Court affirmed that with regard to defining traditional marriage as only between one man and one woman, a certain margin of appreciation still belongs to the Member States.

40. First, in *Courten*, the applicant sought an extra-statutory tax concession equivalent to an exemption from inheritance tax when his homosexual partner of 27 years died in 2005.⁷² The applicant argued that “refusal to extend the exemption to a same-sex cohabiting couple that had been prohibited from marrying was contrary to Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1.”⁷³ Mr Courten attempted to rely on the Grand Chamber judgment in *Burden v. The United Kingdom*,⁷⁴ arguing that although “consanguinity could be distinguished from married couples and civil partners[,] this ground of distinction could not apply to cohabiting same sex couples.”⁷⁵ Thus, the applicant argued that the Court implicitly held “that cohabiting same sex couples would be in an analogous position to married heterosexual couples.”⁷⁶

41. The Court disagreed, first noting that “States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment in law.”⁷⁷ Although the margin of appreciation varies according to the circumstances, subject matter, and background, “*notwithstanding social changes*, marriage remains an institution that is widely accepted as conferring a particular status on those who

⁶⁸ *Karner v. Austria*, *supra* note 46, ¶ 40 (citing *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI and cited references) (emphasis added).

⁶⁹ *See L. v. Lithuania*, App. No. 27527/03, ¶ 56 (E. Ct. H.R. 11 Sept. 2007) (“States are required, by their positive obligation under Article 8, to implement the recognition of the gender change in *post-operative transsexuals*” (emphasis added); unnecessary to examine matter separately under Article 12, *id.* ¶ 64); *Goodwin v. The United Kingdom*, app. No. 28957/95, ¶¶ 78, 81 (“Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual . . . it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads”, *id.* ¶ 78; “The Court considers it more significant however that transsexualism has wide international recognition as a *medical condition* for which *treatment is provided* in order to afford relief”, *id.* ¶ 81 (emphasis added)).

⁷⁰ *Courten v. The United Kingdom*, App. No. 4479/06 (E. Ct. H.R. 4 Nov. 2008) (as to admissibility).

⁷¹ *M.W. v. The United Kingdom*, App. No. 11313/02 (E. Ct. H.R. 23 June 2009) (as to admissibility).

⁷² *Courten*, *supra* note 70, at 2 (circumstances of the case).

⁷³ *Id.*

⁷⁴ *Burden v. The United Kingdom*, [GC] App. No. 13378/05 (E. Ct. H.R. 29 April 2008) (two sisters asserted they were in the “relatively similar or analogous position to co-habiting married and Civil Partnership Act couples for the purposes of inheritance tax,” *id.* ¶ 61; GC held that siblings are qualitatively different from married couples or registered same-sex couples under the Civil Partnership Act, *id.* ¶ 62; denial of comparable status as married or in civil partnership for inheritance tax purposes constituted no violation under Article 14 taken in conjunction with Article 1 of Protocol No. 1, *id.* ¶66).

⁷⁵ *Courten*, *supra* note 70, at 4.

⁷⁶ *Id.*

⁷⁷ *Id.* at 5.

enter it and, indeed, it is singled out for special treatment under Article 12 of the Convention.”⁷⁸ Even against the applicant’s argument that the facts of his case predated the entry into force of the United Kingdom’s Civil Partnership Act of 2004 (and thus that he was unable to enter into a legally-binding arrangement akin to marriage as the Court’s decision in *Burden* required), the Court affirmed that there was “no established consensus” in this area of the law among the States, and thus, the Member “States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.”⁷⁹

42. Again in June 2009, the Court in *M.W. v. The United Kingdom* considered a nearly identical claim to Mr. Courten’s claim. The Applicant here was not eligible to avail himself of bereavement pay upon the death of his homosexual partner, although the benefit was available to the survivor of a married couple.⁸⁰ Similarly, the Applicant claimed he was unable to achieve formal recognition of the relationship, as his partner had died before the Civil Partnership Act 2004 entered into force (on 5 Dec. 2005). Again relying on the Grand Chamber’s decision in *Burden*, the Applicant asserted that treating him the same as the survivor of an unmarried heterosexual couple constituted discrimination “given the significant differences between [the] two situations.”⁸¹ Additionally, third party interveners argued “indirect discrimination based on [the applicant’s] sexual orientation.”⁸² However, “[c]ontrary to the submission of the applicant,” the Court held, “it is *not* implicit in the *Burden* judgment that, had there been no Civil Partnership Act, same-sex relationships would still have been equated with marital relationships.”⁸³ Not only did the Court find that the United Kingdom’s enactment of the Civil Partnership Act 2004 *could not* constitute any prior admission of discrimination under the Convention, but the enactment itself in 2004 “*remained* within their margin of appreciation.”⁸⁴ Importantly, the Court did *not* decide that any sufficient “consensus” among the Member States had come about since November 2008.

43. Although the Court in *M.W. v. The United Kingdom* considered that a third party intervener “described” an “emerging consensus”⁸⁵ among the States regarding the rights of same-sex couples (of which the Court noted that United Kingdom joined when it enacted a Civil Partnership Act), the Court did *not* hold that there was *actually* a consensus, or even that any such “consensus” could mean that a domestic partnership could be the equivalent of “traditional marriage” under Article 12. Here, it is worthy to note that the Court in *Burden* expressly observed that “Member States have adopted a *variety* of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted different policies as regards the grant of inheritance tax exemptions to the various categories of survivor; States, *in principle*, *remaining free to devise different rules in the field of taxation policy*.”⁸⁶ Thus, the Grand Chamber acknowledged a rather wide margin of appreciation for the States to determine even benefits.

44. Moreover, the assessment of the Member States’ margin of appreciation cannot be based upon an “emerging consensus,” that was “described” by the third party intervener (but not necessarily accepted by the Court) in *M.W. v. The United Kingdom*, as the term “emerging” is

⁷⁸ *Id* at 5 (emphasis added).

⁷⁹ *Id.* at 6.

⁸⁰ *M.W. v. The United Kingdom*, *supra* note 71, at 2.

⁸¹ *Id.* at 4-5.

⁸² *Id.* at 5.

⁸³ *Id.* at 5-6 (first emphasis added).

⁸⁴ *Id.* at 6.

⁸⁵ *Id.*

⁸⁶ *Burden*, *supra* note 74, ¶ 65 (emphasis added).

quite ambiguous. Adding the term, “emerging” to modify “consensus” is not sufficient to narrow or remove Member States’ margin of appreciation. There is either consensus, or there is not. **As the situation stands currently, 42 Member States of the Council of Europe (quite a large majority) do not permit same sex couples to enter into marriage.**⁸⁷ The remaining five which do allow such recognition emphatically do not form a sufficient consensus to carve an inroad into Member States’ protected margin of appreciation. This data contradicts the conclusion from Mr Gross’s draft Resolution and Explanatory Memorandum. As the Court determined in *B. and L. v. The United Kingdom*,⁸⁸

Article 12 expressly provides for regulation of marriage by national law and given the *sensitive moral choices* concerned and the importance to be attached to the protection of children and the fostering of secure family environments, this Court *must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society.*⁸⁹

45. Even the Commission of the European Communities’ recently proposed, in its “Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation” to address discrimination “outside the labour market,” supporting Member States’ sovereignty.⁹⁰ The Proposal considered principles of subsidiarity and concluded that distinctions based upon marital and family status, and for the purposes of adoption, must be left to the Member States to determine:

The diversity of European societies is one of Europe’s strengths, and is to be respected in line with the principle of subsidiarity. Issues such as the organisation and content of education, *recognition of marital or family status, adoption, reproductive rights and other similar questions are best decided at national level.* The Directive does not therefore require any Member State to amend its present laws and practices in relation to these issues. *Nor does it affect national rules governing the activities of churches and other religious organisations or their relationship with the state.* So, for example, it will remain for Member States alone to take decisions on questions such as whether to allow selective admission to schools, or prohibit or allow the wearing or

⁸⁷ Norway, Sweden, Netherlands, Spain, and Belgium permit civil marriage for same-sex couples. See *Sweden Allows Same-Sex marriage*, BBC News, 2 April 2009, <http://news.bbc.co.uk/1/hi/europe/7978495.stm>.

⁸⁸ *B. and L. v. The United Kingdom*, App. No. 36536/02 (E. Ct. H.R. 13 Dec. 2005).

⁸⁹ *Id.* ¶36 (emphasis added). As quoted above for the same proposition, *Handyside* also affirms the wide margin of appreciation for the States on morality matters. *Handyside v. The United Kingdom*, *supra* note 19, ¶48 (“In particular, *it is not possible* to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterized by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them. The Court notes at this juncture that, whilst the adjective ‘necessary’, within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with ‘indispensable’ . . . neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’ . . . ‘useful’ . . . ‘reasonable’ or ‘desirable’. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.” (emphasis added)).

⁹⁰ Commission of the European Communities, *Proposal for a COUNCIL DIRECTIVE on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, at 2, § 1, {SEC(2008) 2180} {SEC(2008) 2181}, COM(2008) 426 final, 2008/0140 (CNS) (Brussels, 2 July 2008), available at http://eur-lex.europa.eu/Result.do?code=52008PC0426&Submit=Search&RechType=RECH_celex&_submit=Search.

display of religious symbols in schools, *whether to recognise same-sex marriages, and the nature of any relationship between organised religion and the state.*⁹¹

Accordingly, Article 3 of the Proposed Council Directive would recognize the established boundary lines for States important margin of appreciation on such sensitive, moral matters. As the memorandum supporting the proposed directive explains,

The text makes it clear that *matters related to marital and family status, which includes adoption, are outside the scope of the directive. This includes reproductive rights. Member States remain free to decide whether or not to institute and recognise legally registered partnerships.* However once national law recognizes such relationships as comparable to that of spouses then the principle of equal treatment applies.⁹²

46. The right to extend or not to extend all the rights and benefits of marriage (or even some) to same-sex couples in the form of legislation (whether piece-meal or through formal recognition of relationship status, such as civil partnership) is a decision that involves moral choices for a large majority of the Member States. There can be no argument to the contrary whereas the claim to marriage benefits, whether in whole or in part, is a claim to marriage. To argue otherwise plays a semantic game. Moreover, the right of marriage and redefinition of the family inherently involve and profoundly affect the well-being of children, as discussed in more detail below.

B. The Reconstruction and Re-Definition of Marriage and Family, and Particularly the Profound Effects Such Reconstruction Will Have on the Well-Being of Children, Should Be a Critical Consideration.

47. The Assembly must take care to consider and protect the welfare of children, which is intrinsically related to the deconstruction of the traditional family and the reconstruction or redefinition of the family to include LGBT families, or any other nuanced construction.⁹³

48. Beginning with the foundational definition of marriage and family, the Harvard Journal of Law and Policy has published a defense of maintaining the objective definition of marriage as between members of the opposite sex as the optimal social institution, proffering a number of key arguments, chief amongst which are:

- It provides the most effective means yet developed to maximize the private welfare provided to children conceived by heterosexual coupling (with “private welfare” meaning not only basic requirements like food and shelter but also education, play, work, discipline, love, and respect);
- It provides the indispensable foundation for that child-rearing mode—that is, married mother-father child-rearing—that correlates (in ways not subject to reasonable dispute) with the optimal outcomes deemed crucial for a child’s, and therefore society’s, well-being;

⁹¹ *Id.* at 6, § 3 (emphasis added).

⁹² *Id.* at 8 (§ 5 continued) (emphasis added).

⁹³ See *Burden v. The United Kingdom*, *supra* note 74.

- It is society’s primary and most effective means of bridging the male-female divide;
- It is society’s only means of transforming a male into husband-father, and a female into wife-mother, statuses and identities particularly beneficial to society;
- It provides social and official endorsement of the form of adult intimacy—married heterosexual intercourse—that society may rationally value above all other such forms.⁹⁴

49. By altering 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 deinstitutionalised and therefore is drained of its social good.⁹⁵

50. The essence of the homosexual marriage debate is not simply the inclusion of another component into the definition of the term, and nor is it mere semantics. Marriage and family life as concepts extend far beyond the idea of a free choice of partnership and fidelity. They include seminally the component of procreation and child rearing as the basic building block of any society. There are two primary social policy objectives achieved by maintaining the objective definition of traditional marriage. First, it is on the one hand fundamentally child-centered, going beyond the couple to the next generation. Second, it provides a stable normative institution whereby men and women are protected in a monogamous relationship.⁹⁶

51. Fragmenting parenthood and valuing “intentional” parenthood over all else will ultimately leave children more, rather than less, insecure.⁹⁷ The overwhelming weight of social science data establishes that the well-being of children depends in enormous measure on healthy marriages between men and women who procreate the children. Civil marriage is ultimately about protecting the right of children to know and be raised by both of their biological parents. This central truth is recognized in the United Nations Convention on the Rights of the Child, which states that “the child shall ... have the right from birth to a name, the right to acquire a nationality and, as far as possible, *the right to know and be cared for by his or her parents.*”⁹⁸

52. Furthermore, the recently revised European Convention on the Adoption of Children⁹⁹, which updated the 1967 Convention, in Article 7, fails to extend a universal right to adoption for homosexual couples, leaving the matter to the discretion of individual Member States.¹⁰⁰ The position of this Convention serves as an important interpretive tool as to how European and international legislation seeks to deal with the expansion of homosexual rights. It is of vital importance for the Assembly to respect national and cultural sovereignty over such sensitive moral issues, as the Convention has done.

⁹⁴ Monte Neil Stewart, *Marriage Facts*, Harvard Journal of Law and Policy, Vol. 31, No. 1, 321-22 (2007).

⁹⁵ *Id.* at 323.

⁹⁶ *Id.* at 325.

⁹⁷ Dan Cere & Mary Ann Glendon, *The Future of Family Law: Law & the Family Crisis in North America* 38 (Institute for American Values 2005).

⁹⁸ G.A. Res. 44/25, Art. 7 U.N. Doc. A/44/49 (Nov. 20, 1989) (emphasis added).

⁹⁹ [2008] COETS 1 (27 Nov. 2008).

¹⁰⁰ Although Article 7 permits adoption by one person under section 1.b., section 2 of Article 7 creates an option regarding same-sex couples: “States are free to extend the scope of this Convention to same sex couples who are married to each other or who have entered into a registered partnership together. They are free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship.” *Id.* In other words, a mandatory requirement of extending the right to same sex couples was considered and rejected.

53. Even gay marriage advocates concede that gay marriage would profoundly affect children. A leading gay rights advocate, William Eskridge, has observed that gay marriage

involves the reconfiguration of family—de-emphasizing blood, gender, and kinship ties and emphasizing the value of interpersonal commitment. In our legal culture the linchpin of family law has been the marriage between a man and a woman who have children through procreative sex. Gay experience with “families we choose” delinks family from gender, blood, and kinship. Gay families of choice are relatively ungendered, raise children that are biologically unrelated to one or both parents, and often form no more than a shadowy connection between the larger kinship groups.¹⁰¹

54. Governmental approval of same-sex marriage sends the message to all citizens, including heterosexuals who might some day be parents, that it is immaterial to the State whether children are raised by their biological mother and father. Under the paradigm shift in which marriage is about adult close relationships, adults choose the relationships that best suit them at the moment, **and children are expected to adapt**. But social science evidence establishes overwhelmingly “that family structure matters for children, and the family structure that helps the most is a family headed by two biological parents in a low-conflict marriage.”¹⁰² Compiling statistical data, the authors demonstrate that “children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes” in all areas.¹⁰³

55. State approval of gay marriage also sends the message that it is unimportant whether children have both a mother and a father. Fathers and mothers become fungible and the state thereby ignores abundant social science data establishing that both boys and girls do best when they have parents of both sexes.¹⁰⁴ As United States Supreme Court Justice Ruth Bader Ginsburg has pointed out, the “two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.”¹⁰⁵ “Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”¹⁰⁶ Notably, appreciating the innate differences between men and women and

¹⁰¹ William N. Eskridge Jr., *Gaylaw: Challenging the Apartheid of the Closet* 11 (Harvard University Press 1999).

¹⁰² See, e.g., Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, *Marriage from a Child’s Perspective: How Does Family Structure Affect Children and What Can We Do About It?* Child Trends Research Brief (Washington, DC: Child Trends, June, 2002), at 1 [hereinafter “*Marriage from a Child’s Perspective*”], also available at <http://www.childtrends.org/files/MarriageRB602.pdf>; see also William J. Doherty, et. al., *Why Marriage Matters: 21 Conclusions from the Social Sciences* (New York City: Institute for American Values, 2002); Maggie Gallagher and Joshua K Baker, *Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child*, 4 *Margins* 161, 162 (2004) (concluding that “family structure does matter, and that a married mother and father is the family structure that best protects children”).

¹⁰³ *Marriage from a Child’s Perspective*, *supra* note 102, at 6.

¹⁰⁴ Eleanor Maccoby, *The Two Sexes* 284 (Harvard University Press 1998); David Popenoe, *Life Without Father* 144, 146 (Harvard University Press 1996); David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem* 219 (1995); Kyle D. Pruett, *Fatherhood* 41-52 (New York Press 2000); H.B. Biller, *Fathers and Families: Paternal Factors in Child Development* 1-3 (1993); Carin Neitzel and Ann Dopkins Stright, *Mothers’ Scaffolding of Children’s Problem Solving: Establishing a Foundation of Academic Self-Regulatory Competence*, 17 *Journal of Family Psychology* 75-92 (2003) (“The cognitive and emotional support of mothers is very important in helping a child develop “self-regulatory behavior.”).

¹⁰⁵ *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)).

¹⁰⁶ *Virginia*, 518 U.S. at 533.

the unique contributions each sex makes in child-rearing is fundamentally at odds with the same-sex claim that “the modern individuation of women has resulted in the kind of fluidity of gender roles for men and women” that makes the presence of both genders within a family unnecessary.¹⁰⁷

56. Because of the risk to children’s well-being, the promotion of same-sex partnerships and their universal legal recognition serves to damage the concept of marriage with the same social force that full legal recognition of homosexual marriage does. While a legal distinction exists between same-sex partnerships and same-sex marriage, semiotically the differentiation is *de minimus*—it is a legal fiction. For good reason—the purposes of safeguarding the social entity of marriage as it has been understood for time immemorial—the Council of Europe should play no role in social engineering among the Member States and respect national sovereignty as mandated by the European Court of Human Rights on this issue.

C. There is No Right to Same Sex Marriage or Equality to Marriage for Same-Sex Unions Under The International Covenant on Civil and Political Rights (“ICCPR”),¹⁰⁸ and Religious Freedom is Likewise Preserved As Under the Convention.

57. Additionally, expanding the discussion to international law, the rights of conscience and religious belief are also protected by Article 18 of the ICCPR. The interpretation of Article 18 of the ICCPR also lends itself to the interpretation of Article 9 of the ECHR. Even during the drafting of the ECHR, the Committee of Ministers advised the Committee of Experts to “follow the drafting of the anticipated United Nations Covenant,”¹⁰⁹ referring to the Universal Declaration of Human Rights and the future ICCPR; the draft was to be based on the “yet ‘incomplete’ ICCPR.”¹¹⁰ The text of Article 18 of the ICCPR closely tracks Article 9 of the ECHR¹¹¹.

¹⁰⁷ Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. Rev. 1501, 1606 (1997).

¹⁰⁸ International Covenant on Civil and Political Rights, art. 18, 23 Mar. 1976, 999 U.N.T.S. 171 [hereinafter “ICCPR”].

¹⁰⁹ Christopher Decker and Lucia Fresa, *The Status of Conscientious Objection Under Article 4 of the European Convention on Human Rights*, Int’l Law and Politics Vol. 33:379, 384 (2001) [hereinafter Decker and Fresa].

¹¹⁰ *Id.* at 384 and n.19; see also Hitomi Takemura, *International Human Right to Conscientious Objection to Military Service and Individual Duties to Disobey Manifestly Illegal Orders* 86, 88 (Springer-Verlag Berlin Heidelberg) (2009) (article 9 was among the articles that, while the E. Conv. H.R. was still being drafted, was “in line with the wording of the International Covenant of Civil and Political Rights, which was still being drafted”).

¹¹¹ International Covenant on Civil and Political Rights art. 18, 23 Mar. 1976, 999 U.N.T.S. 171 [hereinafter ICCPR]. Article 18: 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. / 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. / 3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. / 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

58. Additionally, in 2001, the Standing Committee, acting on behalf of the Parliamentary Assembly, issued Recommendation No.1518¹¹²; included in the *Explanatory Memorandum*, the Rapporteur observed that,

[t]he wording of Article 9 of the ECHR can be compared to Article 18 of the United Nations International Covenant on Civil and Political Rights or Article 18 of the Universal Declaration of Human Rights. The right to refuse military service for reasons of conscience is thus inherent in the concept of freedom of thought, conscience and religion.¹¹³

59. Because the texts are so strikingly similar, the United Nations Human Rights Committee's ("HRC") interpretation of Article 18 of the ICCPR is important to the interpretation of Article 9 of the Convention.¹¹⁴ In its General Comment No. 22, interpreting Article 18, the Human Rights Committee first explained that the right to freedom of thought, conscience and religion "in article 18.1 is far reaching and profound . . ."¹¹⁵ Thus, there is a recognized right under international law to hold beliefs and to express those beliefs, including a belief that homosexuality is morally wrong or sinful, according to the dictates of one's faith. As explained above under Article 9 of the Convention (as well as under Articles 10 and 11), the right to express one's beliefs applies publicly as well as privately.

60. The HRC's decision in *Joslin v. New Zealand*, Communication No. 902/1999, provides additional support for a right to speak out against same-sex marriage (and consequently, that there is no violation of international law to deny any "right" to same-sex marriage or partnership for the reasons stated above under the Convention.) In *Joslin*, when two lesbian couples claimed violations of the ICCPR (under articles 16, 17, 23, paragraphs 1 and 2, and 26) after being denied the ability to marry in New Zealand, the **HRC rebuffed that claim, finding that under article 23, paragraph 2, a State's obligation does not include the recognition of marriage other than that between a man and a woman wishing to marry:**

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.¹¹⁶

¹¹² Recommendation 1518 (2001) (pertaining to *Exercise of the right of conscientious objection to military service in Council of Europe member states*), adopted by the Standing Committee, acting on behalf of the Council of Europe, 23 May 2001 (*see* Doc. 8809).

¹¹³ *See* PACE Doc. 8809, ¶ 19.

¹¹⁴ Decker and Fresa, *supra* note 109, at 412-13.

¹¹⁵ Office of the High Commissioner for Human Rights, Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience, and religion (Art. 18):30/07/93.CCPR/C/21/Rev.1/Add.4, General Comment No. 22, ¶ 1* (1993), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument).

¹¹⁶ *Joslin v. New Zealand*, Communication No. 902/1999, ¶8.2 (Human Rights Committee 17 July 2002), CCPR/C/75/D/902/1999.

61. Of the fifteen Committee members participating in this decision, two concurred, stating that they “found no difficulty in joining the Committee’s consensus on the interpretation of the right to marry under article 23, paragraph 2.”¹¹⁷ While these two members went on to dispute whether certain rights or benefits ought to be granted to same-sex couples outside the bounds of marriage (and importantly, only two of the fifteen members drew this conclusion), they also qualified their assertion, opening the possibility that a denial of a right or benefit could be justified “on reasonable and objective criteria.”¹¹⁸

62. The Resolution should,

- **Refer to Article 12 of the European Convention, recalling that it only protects the right of persons of the opposite sex to enter into the covenant of “traditional marriage.”**
- **Reaffirm that there is no “right” to same sex marriage or partnership under the international and European law.**
- **Reaffirm that marriage is a public institution that is fundamentally “child-centered”.**

¹¹⁷ *Id.* at Appendix (Individual opinion of Committee members Mr. Rajsoomer Lallah and Mr. Martin Scheinin (concurring)).

¹¹⁸ *Id.*

DETAILED COMMENTS

Below are specific assertions taken from the draft Resolution and Recommendation, together with specific responses.

Preliminary Draft Report

A. Preliminary Draft Resolution



1. The Parliamentary Assembly recalls that sexual orientation, which covers heterosexuality, bisexuality and homosexuality, is a profound part of the identity of each and every human being. The Assembly also recalls that homosexuality has been decriminalised in all member states of the Council of Europe. Gender identity refers to each person's deeply felt internal and individual experience of gender. A transgender person is someone whose gender identity does not correspond to the gender he or she was assigned at birth.

The subjective definition of “gender identity” and “transgender” should be refused.

The final sentence should be replaced by:

A transgender person is someone [who feels that] his/her gender identity does not correspond [to the sexual identity he/she was born with].

Explanation: a gender is not assigned at birth; it is an actual fact.



2. Under international law, all human beings are born free and equal in dignity and rights. Sexual orientation and gender identity are recognised as a prohibited ground of discrimination. According to the European Court of Human Rights, a difference in treatment is discriminatory if it has no objective and reasonable justification. Since sexual orientation is a most intimate aspect of an individual's private life, the Court considers that only particularly serious reasons may justify differences in treatment based on sexual orientation. Negative attitudes on the part of a heterosexual majority against a homosexual minority cannot amount to sufficient justification, any more than similar negative attitudes towards those of a different race, origin or colour.

The first part of this paragraph is in fact based on ECHR jurisprudence (judgment in the case of *Salgueiro da Silva Mouta v. Portugal*, ECHR, 21 December 1999: RTD Civ. 2000, p. 313, observation by J. Hauser).

Delete the final sentence [“Negative attitudes...”]

The final sentence raises difficulties, as it divides society according to a falsely objective sexual criterion (majority/minority) that may be assimilated to criteria of colour, race or origin, with a view to prohibiting any subjective–moral–appreciation of not sexual behaviour but a so-called social minority.

Moreover, judging or expressing a critical opinion in respect of homosexuality cannot in any way be assimilated to an insult or incitation to violence, which are punishable at law.



4. Transgender persons face a cycle of discrimination and deprivation of their rights in many Council of Europe member states due to discriminatory attitudes and to obstacles in obtaining gender reassignment treatment and legal recognition of the new gender. One consequence is the relatively high suicide rate among transgender persons.

Delete “legal” from the wording “legal recognition of the new gender”.

The State is under no obligation to legally recognise the new gender; it retains a degree of freedom in amending the person’s civil status.



6. Hate speech by certain public figures, including religious leaders, and hate speech in the media and internet are also of particular concern. The Assembly stresses that it is the paramount duty of all public authorities not only to protect the rights enshrined in human rights instruments in a practical and effective manner, but also to refrain from speech likely to legitimise and fuel discrimination or hatred based on intolerance.

In addition to the concerns expressed in the Memorandum above, why is there only mention of “religious leaders” and not the rest of the list of leaders used by the Commissioner (political leaders, journalists, etc)?

Delete “likely” as this extends the label of “hate speech” too far, making it possible to sanction any speech “likely” to be considered intolerant. (See discussion as pertaining to ambiguity of the terminology “hate speech” in Memorandum above).

Add a reminder of freedom of expression, opinion and conscience at the end of the paragraph: (...) based on intolerance, [in accordance with freedom of expression, opinion and conscience guaranteed by Articles 9 and 10 of the European Convention of Human Rights].



8. The denial of rights to *de facto* “LGBT families” in many member states must also be addressed, including through the legal recognition and protection of these families.

Delete the entire paragraph for the reasons set forth in the Memorandum above with regard to the Member States’ wide margin of appreciation.

At the very least:

replace “families” by “couples”;

delete “including through the legal recognition”.

Promotion of the concept of the *de facto* “LGBT family” is aimed at giving same-sex couples the benefit of the rights guaranteed by Article 12 of the ECHR to the family based on the heterosexual union of a man and a woman.

De facto transsexual couples and family life

The judgment in the case of *X, Y and Z v. the United Kingdom* (ECHR, 22 April 1997: D. 1997, jurisprudence p. 582, note by S. Grataloup; JCP G 1998, I, 107, chron. F. Sudre) upholds recognition of the title of “family life” to *de facto* relationships between unrelated persons. The European Court qualifies as “*de facto* family links” the links between a male transsexual who was born female, his partner, and the latter’s child conceived by artificial insemination using a donor’s sperm, based on both the effective relationship and on “*appearances*”, which would seem to make up for the fact of being unrelated. The European Court noted that X was “*living in society as a man*”, assuming “*in everyone’s eyes*” the role of the male partner and “*has acted as Z’s ‘father’ in every respect*” (§ 35-37). However, this recognition of family life between a transsexual and his partner’s child is not followed up, since the Court takes the absence of a common European norm on granting parental rights to transsexuals as the basis for considering that Article 8 does not place a positive obligation on the national authorities “*formally to recognise as the father of a child a person who is not the biological father*” (ECHR, *X, Y and Z v. the United Kingdom*, as above, § 52).

Homosexual couples and de facto “family life”

Homosexual couples do not have the benefit of recognition of “family life”. The European Commission on Human Rights previously (*ECommHR, decision of 14 May 1986, S. v. the United Kingdom: D. and R., 47, p. 274. – ECommHR, decision of 10 February 1990, B. v. the United Kingdom: D. and R., 64, p. 278. – ECommHR, decision of 09 November 1989, Anna Eriksson and Asta Goldschmidt v. Sweden: D. and R., 63, p. 213*) and the European Court today (*ECHR, decision of 10 May 2001, case no. 56501/00, Mata Estevez v. Spain, quoted above*) refuse to consider that a lasting homosexual relationship counts as “family life” within the meaning of Article 8. As a result, a homosexual partner may not claim the right to respect for family life in order to obtain the transfer of a residential lease in his/her favour on the death of his/her partner (*ECommHR, decision of 15 May 1996, Rööslü v. Germany: D. and R., 85-B, p. 149*); however, the partner is henceforth justified in doing so on the basis of right to respect for one’s home (*ECHR, 24 July 2003, Karner v. Austria: RD published 2004, p. 841, observation by M. Levinet*). See also the discussion in the Memorandum above pertaining to *Burden v. The United Kingdom* [GC], *Courten v. The United Kingdom*, and *M.W. v. The United Kingdom*.

The European Court of Justice (ECJ) has the same conception of “family life” and, in a case in which the applicant party had been refused by the English railway company that employed her the benefit of reduced fares for her female partner, the ECJ, on the basis of jurisprudence at the European Court of Human Rights, found that “*in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex*” (*ECJ, 17 February 1998, case C-249/96, L.-J. Grant v. South-West Trains Ltd: RUDH, 1998, 45, point 35; JTDE, 1998, 110, note by A. Weyembergh; RTD Civ. 1998, p. 529, note by J. Raynard. – ECJ, 31 May 2001, cases C-122 and C-125/99P, points 34 and 37, D. and Sweden v. Council: RTDH 2002, p. 663, observation by C. Maubernard*).



14.1. ensure that the fundamental rights of LGBT people, including freedom of expression and freedom of assembly and association, are respected, in line with international human rights standards;

Delete “of LGBT people”: LGBT people do not have specific rights.

Replace the sentence by wording on the lines of:

“ensure that LGBT people have their human rights respected, including in line with...”.



14.2. provide legal remedies to victims and put an end to impunity for those who violate fundamental rights of LGBT people, in particular their right to life and security;

Same comment: LGBT people do not have any special or specific fundamental rights.

Replace by “... who violate their fundamental rights...;” (*their* refers to victims).



14.6. ensure that discrimination on the basis of sexual orientation and gender identity can be effectively reported to judicial and non-judicial bodies and ensure that national human rights structures and equality bodies effectively address these issues;

Delete **“non judicial”**: these “non-judicial bodies” are independent administrative authorities responsible for the *political* mission of combating any attitude deemed discriminatory; these structures raise a problem as they are not required to abide by the rules and guarantees of legal procedures.



14.8. ensure legal recognition of same-sex partnerships, as already recommended by the Assembly in 2000, by providing for:

14.8.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;

14.8.2. "next of kin" status;

14.8.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship;

14.8.4. recognition of provisions with similar effects adopted by other member states;

Delete the entire paragraph

The ECHR leaves it to each State to decide whether or not to grant same-sex couples legal status. See discussion in Memorandum above pertaining to the Member States’ margin of appreciation.

Moreover, this request goes further than that expressed in paragraphs 22 to 24 of the Draft Recommendation of the Council of Europe’s Committee of Ministers (doc. DH-LGBT(2009)008 Rev.)¹¹⁹.

¹¹⁹ Appendix to the preliminary draft recommendation of the Committee of Ministers on measures to combat discrimination based on sexual orientation or gender identity:

“22. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor’s pension benefits and tenancy rights;

At the very least (the least damaging), replace the paragraph by the wording negotiated in the draft recommendation of the Council of Europe’s Committee of Ministers in paragraph 24.

“providing same-sex couples with legal or other means to address the practical problems related to the social reality in which they live”.

As far as marriage *stricto sensu* is concerned, Article 12 of the ECHR only guarantees the right to marry and found a family to men and women of marriageable age, according to the national laws governing the exercise of the right.¹²⁰

In the current state of European jurisprudence, Article 12 cannot be taken as foundation for claiming any right to homosexual marriage. The European Court of Human Rights holds that “given the existence of little common ground” and despite the evolution noted in many European States towards legal recognition of stable *de facto* same-sex unions, the Party States enjoyed a wide margin of appreciation. It therefore held that the fact of making entitlement to a survivor’s pension conditional on the link of marriage (and hence refusing the benefit to a same-sex partner) had a “legitimate aim, which [was] the protection of the family based on marriage bonds” and did not constitute an infringement of the Convention (*ECHR, decision of 10 May 2001, case no. 56501/00, Mata Estevez v. Spain*). See also the discussion in the Memorandum above pertaining to *Burden v. The United Kingdom* [GC], *Courten v. The United Kingdom*, and *M.W. v. The United Kingdom*.

Community jurisprudence is in line with this, since the ECJ considers it to be established that the definition of the term ‘marriage’, as commonly admitted by the Member States, designates a union between two people of differing sex and consequently refuses to assimilate the status under Swedish law of a “*registered partnership*” to that of marriage and include in the official concept of a “*married official*” persons subject to a legal scheme separate to that of marriage (*ECJ, 31 May 2001, cases C-122 and C-125/99P, D. and Sweden v. Council, points 34 and 37: RTDH 2002, p. 663, observation by C. Maubernard*).¹²¹

Article 16¹²² of the Universal Declaration of Human Rights of 10 December 1948 and Article 23¹²³ of the International Covenant on Civil and Political Rights of 16 December

23. Where national legislation recognises registered same-sex partnerships, their legal status and their rights and obligations should be equivalent to those of heterosexual couples in a comparable situation;

24. Where national legislation does not recognise registered same-sex partnerships nor unmarried couples, member states are invited to consider the possibility of providing same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.”

¹²⁰ ECHR –Art. 12. Right to marry. “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.”

¹²¹ Source [in French]: *Jurisclassseur Europe Traité*, vol. 6524: Convention Européenne des Droits de l’Homme. – Droits garantis. – Droit au respect de la vie privée et familiale, Prof. Frédéric Sudre)

¹²² Universal Declaration of Human Rights of 10 December 1948:

Article 16: 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

¹²³ International Covenant on Civil and Political Rights of 16 December 1966.

1966 repeat the conditions laid down in Article 12 of the ECHR and add to them the conditions of the free and full consent of the intending spouses and equality of the rights and responsibilities of spouses, and acknowledge the fundamental natural nature of the family within society. See also the discussion in the Memorandum above pertaining to the HRC decision in *Joslin v. New Zealand*, Communication No. 902/1999 (17 July 2002).

Furthermore, the Member States retain the right to add legal conditions to the right to marry thus recognised, and have a certain margin for appreciation in doing so. Consequently, the legal restrictions on the right to marry, mainly concerning physical and mental health, morality, and related spouses, are not necessarily considered as being contrary to the demands of the European Convention on Human Rights. See discussion in Memorandum above pertaining to the Members States margin of appreciation.



14.9. provide the possibility for joint parental responsibility of each partner's children, if not also the right of each partner to adopt the other partner's children;
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Delete the sentence as it disregards the interests of the child and supposes some kind of *right* to adopt and share parental authority. See discussion in Memorandum above regarding Member States' margin of appreciation and the vital importance pertaining to the detrimental effects on children when deprived of a mother and father in a stable marital relationship.

At the very least (the least damaging), replace it by a sentence on the lines of the following:
“consider, when it is the interest of the children, a joint exercise of the parental responsibility of the partner’s children”.

Indeed:

- No-one may claim a “right” to adopt; *a fortiori* there is no “right” to adopt the partner’s children.
- The rules governing parental authority, whether as regards sharing or delegating that authority, must be applied exclusively in the higher interest of the child. There can be no general rule providing for the systematic sharing of such authority exclusively on the basis of the type of sexual relationship two people have.
- This sentence totally ignores the interests of the child.

The European Court of Human Rights admits—*only*—that consideration of the homosexuality of the person delegating parental authority and the person to whom it is delegated cannot justify alone refusal of delegation of parental authority without constituting discrimination

Article 23: 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

contrary to Articles 8 and 14, taken together, of the European Convention on Human Rights¹²⁴. The solution is the same as regards adoption.



14.10. ensure that laws relating to the adoption of unrelated children by single persons are applied without distinctions based on sexual orientation, in accordance with the 2008 *E.B. v. France* judgment of the European Court of Human Rights;

Delete the paragraph

At the least, replace it by the following:

“ensure that laws relating to the adoption of unrelated children by single persons are applied in accordance with European Court of Human Rights case-law”.

Otherwise, replace **“without distinction”** by **“without discrimination”**.

In the case of *E.B. v. France* (ECHR, Grand Chamber, 22 January 2008, no. 43546/02), the Court did not at any point prohibit difference in treatment, but only unjustified discrimination.

The Court held that difference in treatment on the basis of sexual orientation was not in itself necessarily contrary to the ECHR. It was rather the *justification* for the different treatment that was under scrutiny—it was the *legitimacy of the aim being pursued* by such distinction that was being judged. In other words, the Court sought to determine whether there was unjustified discrimination, rather than just difference in treatment (§ 90).¹²⁵

In § 91, the ECHR judge recalled the Court’s constant jurisprudence¹²⁶ according to which a difference in treatment was discriminatory, for the purposes of Article 14, if it had no objective and reasonable justification, i.e. if it did not pursue a “legitimate aim” in a democratic society, or that there was no “reasonable proportionality between the means employed and the aim sought to be realised”.¹²⁷

The legitimate aim of the different treatment is usually checked by the Court in its form, concentrating on consideration of the condition of proportionality. The lack of reasonable proportionality is the decisive criterion in qualifying unequal treatment as discrimination.

¹²⁴ See ECHR *Salgueiro da Silva Mouta v. Portugal*, ECHR, 21 December 1999: *Juris-Data no. 1999-125672; Family law 2000, comm. 145, observation by A. Gouttenoire. – Palau-Martinez v. France: ECHR, 16 December 2003: Juris-Data no. 2003-237339; JCP G 2004, II, 10 122, note by A. Gouttenoire*)

¹²⁵ ECHR in Grand Chamber on 22 January 2008, no. 43546/02, *E.B. v. France*, § 90: “The applicant therefore suffered a difference in treatment. Regard must be had to the aim behind that difference in treatment and, if the aim was legitimate, to whether the different treatment was justified.”

¹²⁶ ECHR, 23 July 1968, *Belgian Linguistics Case*, § 10: GA ECHR, no. 8. – ECHR, 26 February 2002, *Fretté v. France*, § 34: JCP G 2002, II, 10074, note by A. Gouttenoire and F. Sudre

¹²⁷ ECHR in Grand Chamber on 22 January 2008, no. 43546/02, *E.B. v. France*. “The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a “legitimate aim” or that there is no “reasonable proportionality between the means employed and the aim sought to be realised” (see, *inter alia*, *Karlheinz Schmidt*, cited above, § 24; *Petrovic*, cited above, § 30; and *Salgueiro da Silva Mouta*, cited above, § 29). Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8 (see, *mutatis mutandis*, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 89, ECHR 1999-VI; *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 82, 27 September 1999; and *S.L. v. Austria*, no. 45330/99, § 37, ECHR 2003-I).”

As the Court acknowledges, the Party States a certain margin for appreciation in determining if and to what extent differences between situations that are similar in other respects justify different treatment at law¹²⁸.

It should be stressed that in respect of rights involving personal autonomy (privacy and family life, Art. 8 of the ECHR), such as sexual orientation, only reasons that are “*particularly convincing and weighty*” can justify different treatment.

Again in the case of *E.B. v. France*, it was because France initially authorised the adoption of a child by a single person (without explicitly excluding a homosexual single person) that withholding approval may not be applied only on the basis of the applicant’s sexual orientation. There must be particularly convincing and weighty reasons. It should be stressed that the Court does not in any way require the legalisation of adoption by a single person (whether homosexual or not); it is solely when such adoption is provided for at law that it must be implemented without unjustified discrimination.

Thus, in the case of *E.B. v. France*, the Court did not consider the homosexuality of a candidate for adoption as justification on its own for different treatment. If sexual orientation were the only reason for refusal, the Court held that this constituted discrimination. It is in this sense that paragraphs 93 and 96¹²⁹ should be read, as their ambiguous wording might lead to the belief that there is unjustified discrimination when a distinction is made.



14.11.2. documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilisation;

In this paragraph, “sterilisation” refers in fact to the surgical operation to change sex, one of the effects of which is sterilisation. This allows purely administrative transsexualism, *on paper*.

Replace by “**documents that reflect an individual’s gender reassignment**”

Where the Court has permitted such recognition, it has left the manner in which such administration is to be achieved to the States. *See Goodwin v. The United Kingdom*, App. No. 28957/95 (E. Ct. H.R. 11 July 2002). Moreover, the Court’s recognition of the right of marriage for transgendered persons was very narrow, based upon recognition of a medical condition and treatment prescribed. The Court’s decisions extend only to the particular plight of individuals who have actually undergone gender reassignment surgery. *See L. v. Lithuania*, App. No. 27527/03, ¶ 56 (E. Ct. H.R. 11 Sept. 2007) (“States are required, by their

¹²⁸ ECHR, 28 November 1984, series A, no. 87, *Rasmussen v. Denmark*, § 40: JDI 1986, p. 1074, observation by P. Tavernier.

¹²⁹ The Court holds that, as the reasons put forward for making such a distinction were based solely on consideration of the applicant’s sexual orientation, different treatment could constitute discrimination for the purposes of the Convention (*Salgueiro da Silva Mouta*, cited above, § 36).
(...)

In view of the foregoing, it could not be denied that, in turning down the application for approval to adopt made by the applicant, the national authorities had drawn a distinction dictated by factors relating to the applicant's sexual orientation that it was not permissible to draw under the Convention (see *Salgueiro da Silva Mouta* judgment, cited above, § 36).

positive obligation under Article 8, to implement the recognition of the gender change in *post-operative transsexuals*” (emphasis added); unnecessary to examine matter separately under Article 12, *id.* ¶ 64); *Goodwin v. The United Kingdom*, app. No. 28957/95, ¶¶ 78, 81 (“Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual . . . it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads”, *id.* ¶ 78; “The Court considers it more significant however that transsexualism has wide international recognition as a *medical condition* for which *treatment is provided* in order to afford relief”, *id.* ¶ 81 (emphasis added)).



14.11.5. relationship recognition and the right to found a family, in accordance with the case law of the European Court of Human Rights;

Delete “and a right to found a family”

- The ECHR guarantees for transsexuals the *right to marry*, but not the right to found a family.

The ECHR, in its judgment in the case of *Goodwin and I. v. the United Kingdom*¹³⁰ on 11 July 2002, upheld the prevalence of the psychological gender of transsexuals over their biological gender. In this judgment, the Court recognised that transsexuals have the right to have their civil status amended, and to marry a person of the opposite sex to their new gender. In doing so, the ECHR judge:

- dissociated marriage from family life, considering that the possibility of founding a family was separate from that of marrying;
- gave preference to psychological and social gender over biological gender in order to define the sexual quality of a man or woman within the meaning of the Convention.

Previously, the ECHR had held that the right to marry referred to the marriage between two people of different biological sexes, and considered marriage as the foundation for the family, since Article 12 refers to the “right to marry and found a family”. The ECHR henceforth considers that founding a family is not a condition of marriage. Founding a family consists of a couple’s ability to conceive or raise a child. The *Goodwin* judgment constituted a spectacular turnaround in jurisprudence in terms of how to interpret the right

¹³⁰ N. Deffains, Reconnaissance juridique de la conversion sexuelle et droit au mariage des transsexuels [legal recognition of sex-changes and the marriage of transsexuals]: Europe 2002, commentary 395; family law 2002, commentary 133, note by A. Gouttenoire-Cornut; Defrénois 2003, Article 37802, chron. by J. Massip, no. 76; JCP G 2003, I, 101, no. 1, chron. by J. Rubellin-Devichi; JCP G 2003, I, 109, no. 8, chron. by F. Sudre. – F. Sudre, J.-P. Marguénaud, J. Andriantsimbazovina, A. Gouttenoire and M. Levinet, Les grands arrêts de la Cour européenne des droits de l’homme [major decisions of the European Court of Human Rights]: PUF, 2nd edition, 2004, no. 38, p. 354 et seq.; D. 2003, p. 2032, note by A-S. Chavent-Leclère; D. 2003, p. 525, observation by C. Birsan; RD Sanit. Soc. 2003, p. 137, no. 11, observation by F. Monéger; AJF 2002, p. 413, observation by F. Granet; P. Wachsmann and A. Marienburg-Wachsmann, “La folie dans la loi. Considérations critiques sur la nouvelle jurisprudence de la Cour européenne des droits de l’homme en matière de transsexualisme” [madness and the law – critical considerations of the new jurisprudence at the European Court of Human Rights on transsexual issues]. In connection with the *Goodwin v. the United Kingdom* and *I. v. the United Kingdom* of 11 July 2002 judgments: RTDH 2003, p. 1157 et seq.; V. Berger, Jurisprudence of the European Court of Human Rights: Sirey, 9th edition, 2004, no. 153.

to marry referred to in Article 12 of the Convention. Contrary to its habitual practice, this turnaround has taken place even though, as the Court points out, there is no consensus on this point in Europe; furthermore, as the Court has acknowledged, “fewer countries permitted the marriage of transsexuals in their assigned gender than recognised the change of gender itself”.

The Court has decided to disregard the absence of a consensus, since it states that “in the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society could no longer be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved”. By developing a new right to “personal development” that is absent from the letter and spirit of the ECHR, and by imposing the normality of transsexualism, the ECHR is distancing itself from European legal and social reality.



14.12. introduce or develop anti-discrimination and awareness-raising programmes fostering tolerance, respect and understanding of LGBT persons, in particular for public officials, the judiciary, law-enforcement bodies and the armed forces, as well as schools, the media, the medical profession and sporting circles;

And from the **Preliminary Draft Recommendation**,

3.2.2. further mainstream issues relating to discrimination on the basis of sexual orientation and gender identity in its activities, and disseminate the case law of the European Court of Human Rights on sexual orientation and gender identity, including through publications and training materials;

These provisions should be produced from an objective standpoint only; rights of religious freedom as addressed in the Memorandum above, under the Convention Articles 9, 10, and 11 should be noted as important in the preparation of any such programmes, publications and training materials.



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Discrimination on the basis of sexual orientation and gender identity

Report

Committee on Legal Affairs and Human Rights

Rapporteur: Mr Andreas GROSS, Switzerland, Socialist Group

Summary

The Committee on Legal Affairs and Human Rights points out that sexual orientation – be it heterosexuality, bisexuality or homosexuality – is a profound part of the identity of each one of us. Under international law nobody should be treated differently because of their sexual orientation. Yet lesbian, gay, bisexual and transgender people across Europe still face deep-rooted prejudice and widespread discrimination. This can range from physical violence – including, in the worst cases, killings – through to hate crimes, gags on expression, bans on demonstrations, state intrusion into private life and unfair treatment at school or in the workplace.

Transgender people are refused gender reassignment treatment or told they cannot register their new gender, contributing to high rates of suicide in this group.

These human rights violations must end, as well as incitement to commit them from public figures, according to the committee. Meanwhile, Council of Europe member states should ensure legal recognition of same-sex partnerships, providing notably for “next of kin” status and the possibility to jointly parent each others’ children, if not also the right of each partner to adopt the other partner’s children.

Dialogue between all bodies, based on mutual respect, is essential in order to improve mutual understanding, combat attitudes of prejudice and facilitate public debates and reforms on issues concerning lesbian, gay, bisexual and transgender people.

A. Draft resolution

1. The Parliamentary Assembly recalls that sexual orientation, which covers heterosexuality, bisexuality and homosexuality, is a profound part of the identity of each and every human being. The Assembly also recalls that homosexuality has been decriminalised in all member states of the Council of Europe. Gender identity refers to each person's deeply felt internal and individual experience of gender. A transgender person is someone whose gender identity does not correspond to the gender he or she was assigned at birth.

2. Under international law, all human beings are born free and equal in dignity and rights. Sexual orientation and gender identity are recognised as a prohibited ground of discrimination. According to the European Court of Human Rights, a difference in treatment is discriminatory if it has no objective and reasonable justification. Since sexual orientation is a most intimate aspect of an individual's private life, the Court considers that only particularly serious reasons may justify differences in treatment based on sexual orientation. Negative attitudes on the part of a heterosexual majority against a homosexual minority cannot amount to sufficient justification, any more than similar negative attitudes towards those of a different race, origin or colour.

3. Nevertheless, Lesbian, Gay, Bisexual and Transgender (LGBT) persons, as well as human rights defenders working for the rights of LGBT persons, face deeply rooted prejudices, hostility and widespread discrimination all over Europe. The lack of knowledge and understanding about sexual orientation and gender identity is a challenge to be addressed in most Council of Europe member states, since it results in an extensive range of human rights violations, affecting the lives of millions of people. Major concerns include physical and verbal violence (hate crimes and hate speech), undue restrictions on freedom of expression, freedom of assembly and association, violations of the right to respect for private and family life, violations of rights to education, work and health, as well as regular stigmatisation. As a consequence, many LGBT persons across Europe live in fear and have to conceal their sexual orientation or gender identity.

4. Transgender persons face a cycle of discrimination and deprivation of their rights in many Council of Europe member states due to discriminatory attitudes and to obstacles in obtaining gender reassignment treatment and legal recognition of the new gender. One consequence is the relatively high suicide rate among transgender persons.

5. The Assembly is particularly concerned by the violation of the rights to freedom of assembly and freedom of expression for LGBT persons in a number of Council of Europe member states since these rights are pillars of democracy. This has been illustrated by the banning or attempted banning of peaceful rallies or demonstrations of LGBT persons and their supporters and the overt or tacit support some politicians have given to violent counter-demonstrations.

6. Hate speech by certain public figures, including religious leaders, and hate speech in the media and internet are also of particular concern. The Assembly stresses that it is the paramount duty of all public authorities not only to protect the rights enshrined in human rights instruments in a practical and effective manner, but also to refrain from speech likely to legitimise and fuel discrimination or hatred based on intolerance.

7. Homophobia and transphobia have particularly serious consequences for young LGBT people. They face widespread bullying, sometimes unhelpful or hostile teachers, and curricula which either ignore LGBT issues or propagate homophobic or transphobic attitudes. A combination of discriminatory attitudes in society and rejection by the family can be very damaging for the mental health of young LGBT people, as evidenced by suicide rates which are much higher than those in the wider youth population.

8. The denial of rights to *de facto* "LGBT families" in many member states must also be addressed, including through the legal recognition and protection of these families.

9. On the other hand, the Assembly welcomes the fact that, in some cases, political and judicial authorities have taken a number of measures against discrimination affecting LGBT persons.

10. In this context, the Assembly welcomes the work of the Committee of Ministers, which is preparing a recommendation on measures to combat discrimination on grounds of sexual orientation and gender identity, to ensure respect for human rights of LGBT persons and to promote tolerance towards them, the high priority given by the Council of Europe Commissioner for Human Rights to this issue, as well as the recent reports of the European Union Fundamental Rights Agency on homophobia and discrimination on grounds of sexual orientation in European Union member states.

11. Recalling its Recommendations 1474 (2000) on the situation of lesbians and gays in Council of Europe member states and 1117 (1989) on the conditions of transsexuals, the Assembly again condemns the various forms of discrimination suffered by LGBT people in Council of Europe member states. LGBT people should not have to fear being stigmatised and victimised, either in the public and private spheres.

12. The Assembly considers that the Council of Europe has the duty to promote a clear message of respect and non-discrimination so that everybody can live in dignity in all its member states.

13. The eradication of homophobia and transphobia also requires political will in member states to implement a consistent human rights approach and to embark on a wide range of initiatives. In this respect, the Assembly stresses the specific responsibility of parliamentarians in initiating and supporting changes in legislation and policies in Council of Europe member states.

14. Consequently, the Assembly calls on member states to address these issues and in particular to:

14.1. ensure that the fundamental rights of LGBT people, including freedom of expression and freedom of assembly and association, are respected, in line with international human rights standards;

14.2. provide legal remedies to victims and put an end to impunity for those who violate fundamental rights of LGBT people, in particular their right to life and security;

14.3. condemn hate speech and discriminatory statements and effectively protect LGBT persons from such statements;

14.4. adopt and implement anti-discrimination legislation which includes sexual orientation and gender identity among the prohibited grounds for discrimination, as well as sanctions for infringements;

14.5. revoke legislative provisions which are not in conformity with the case law of the European Court of Human Rights;

14.6. ensure that discrimination on the basis of sexual orientation and gender identity can be effectively reported to judicial and non-judicial bodies and ensure that national human rights structures and equality bodies effectively address these issues;

14.7. sign and ratify Protocol No. 12 to the European Convention on Human Rights providing for a general prohibition of discrimination;

14.8. ensure legal recognition of same-sex partnerships, as already recommended by the Assembly in 2000, by providing for:

14.8.1. the same pecuniary rights and obligations as those pertaining to different-sex couples;

14.8.2. "next of kin" status;

14.8.3. measures to ensure that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship;

- 14.8.4. recognition of provisions with similar effects adopted by other member states;
- 14.9. provide the possibility for joint parental responsibility of each partner's children, if not also the right of each partner to adopt the other partner's children;
- 14.10. ensure that laws relating to the adoption of unrelated children by single persons are applied without distinctions based on sexual orientation, in accordance with the 2008 *E.B. v. France* judgment of the European Court of Human Rights;
- 14.11. address the specific discrimination and human rights violations faced by transgender persons and, in particular, ensure in legislation and in practice their right to:
 - 14.11.1. safety;
 - 14.11.2. documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilisation;
 - 14.11.3. access to gender reassignment treatment and equal treatment in health care areas;
 - 14.11.4. equal access to work, goods, services, housing and other facilities, without prejudice;
 - 14.11.5. relationship recognition and the right to found a family, in accordance with the case law of the European Court of Human Rights;
- 14.12. introduce or develop anti-discrimination and awareness-raising programmes fostering tolerance, respect and understanding of LGBT persons, in particular for public officials, the judiciary, law-enforcement bodies and the armed forces, as well as schools, the media, the medical profession and sporting circles;
- 14.13. promote research on discrimination on the basis of sexual orientation and gender identity, establish and/or maintain regular contacts with human rights defenders working on the rights of LGBT persons and consult them on issues relating to such discrimination;
- 14.14. encourage dialogue between national human rights institutions, equality bodies, human rights defenders working on the rights of LGBT persons and religious institutions, based on mutual respect, in order to facilitate public debates and reforms on issues concerning LGBT persons;
- 14.15. recognise persecution of LGBT persons as a ground for granting asylum and implement the 2008 Guidance Note on refugee claims relating to sexual orientation and gender identity of the Office of the United Nations High Commissioner for Refugees.

B. Draft recommendation

1. Referring to its Resolution ... (2009), the Parliamentary Assembly commends the Committee of Ministers for its decision of 2 July 2008 to prepare a recommendation on measures to combat discrimination based on sexual orientation or gender identity.

2. The Assembly considers that the Council of Europe has indeed the duty to promote a clear message of respect and non-discrimination. In addition, the Council of Europe is particularly well placed to develop human rights standards, offer expertise and advice and serve as a forum for discussion on issues related to discrimination on the basis of sexual orientation and gender identity.

3. Consequently, the Assembly recommends that the Committee of Ministers:

3.1. adopt the recommendation currently under preparation on measures to combat discrimination on grounds of sexual orientation and gender identity, to ensure respect for human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them and subsequently monitor its implementation;

3.2. define further Council of Europe action in this field, in particular:

3.2.1. instruct a relevant Council of Europe body to review and address issues related to discrimination on the basis of sexual orientation and gender identity in member states, and provide the necessary resources to this body to carry out this task;

3.2.2. further mainstream issues relating to discrimination on the basis of sexual orientation and gender identity in its activities, and disseminate the case law of the European Court of Human Rights on sexual orientation and gender identity, including through publications and training materials;

3.2.3. in the framework of its work on children and violence, address in particular the issue of homophobic and transphobic bullying at school;

3.2.4. further develop anti-discrimination and awareness-raising programmes fostering tolerance, respect and understanding of lesbian, gay, bisexual and transgender persons and, in particular, organise a campaign to combat discrimination on the basis of sexual orientation and gender identity.
