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Memorandum

With Reference to

The Legislative Proposal to Revise The Constitution of Romania

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As an international Non-Governmental Organization dedicated to the promotion and protection of human rights in Europe and worldwide, the *European Centre for Law and Justice* (ECLJ) has the honor to submit this memorandum to the Constitutional Court of Romania.
The ECLJ wishes to enlighten the Court concerning the amendment proposition to article 48.1 of the 2003 Constitution of Romania filed by the Coalition for Family with the Romanian Senate on May 23, 2016 and on which the Court will adjudicate soon.

This article 48.1 currently states that *"the family is founded on the freely consented marriage between spouses, their full equality and the right and duty of parents to ensure the upbringing, education and instruction of children"*.
According to Title VII and especially article 150 of this Constitution providing that its *"revision (...) may be initiated by (...) at least 500,000 citizens with the right to vote"*, the Coalition for Family gathered 3,000,000 supporting signatures for a modification of article 48.1 as follows: *"The family is founded on the freely consented marriage between a man and a woman, their full equality and the right and duty of parents to ensure the upbringing, education and instruction of children"*.

Article 152 of the Constitution states the limits for a constitutional revision. It is obvious that the proposed revision does not take place *"during a state of siege or emergency, or in wartime"* (art. 152.3) and does not concern *"the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language"* (art. 152.1).
Article 152.2 also provides that *"no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof"*. According to the proposed amendment to article 48.1 of the Constitution, the word "Spouses" would be replaced and even clarified by the expression "a man and a woman": such a phrasing would have the effect of enshrining in the Constitution the definition of traditional family based on the marriage between a man and a woman which is currently in force in the New Romanian Civil Code. Indeed, "spouses" are defined by article 258.4 of this Code as *"a man and a woman united in marriage"*, *"marriage is the freely consented union between a man and a woman"* according to article 259.1, and article 277.1 provides that *"marriage shall be prohibited between persons of the same sex"*. As Romanian legislation does not provide any right to "same-sex marriage", the proposed revision would not result in the suppression of any right regarding marriage in Romanian law.

It will be interesting to note that some European States have already enshrined in their Constitution the definition of marriage as the union of a man and a woman (I). Besides, since access to "same-sex marriage" is largely presented in terms of human rights, it is relevant to check the consistency of the proposed amendment with Romania's International and European commitments in this field (II).

I. European Constitutions already defining marriage as the union of a man and a woman

On the European continent, a movement of constitutionnalization of the definition of marriage as the union of a man and a woman can be observed.
Indeed, over the past years, 13 European States did so:

- Belarus: *"On reaching the age of consent a woman and a man shall have the right to enter into marriage on a voluntary basis and found a family. Spouses shall have equal rights in family relationships"* (art. 32).
- Bulgaria: *"Matrimony shall be a free union between a man and a woman"* (art. 46.1).
- Croatia: *"(...) Marriage is a life union of a woman and a man"* (art. 62).
- Hungary: *"Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision (...)"* (art L.1).
- Latvia: *"The State shall protect and support marriage - a union between a man and a woman"* (art. 110).
- Lithuania: *"(...) Marriage shall be entered into upon the free consent of man and woman"* (art. 38).
- Moldova: *"The family is founded on the freely consented marriage of husband and wife"* (art. 48.2).
- Montenegro: *"Marriage may be entered into only on the basis of a free consent of a woman and a man"* (art. 71).
- Poland: *"Marriage, being a union of a man and a woman (...)"* (art. 18).
- Serbia: *"(...) Marriage shall be entered into based on the free consent of man and woman before the state body"* (art. 62).
- Slovakia: *"Marriage is a unique union between a man and a woman"* (art. 41.1).
- Ukraine: *"Marriage is based on the free consent of a woman and a man"* (art. 51).

The most recent cases are Hungary in 2012, Croatia in 2013, Slovakia in 2014 and the FYR of Macedonia whose parliament adopted a constitutional amendment on January 20, 2015. Thus Romania would not be the only European State enshrining in its Constitution a definition of marriage as being the union of a man and a woman.

II. An amendment consistent with Romania's International and European commitments

As a Member State of international organizations including the Council of Europe since October 7, 1993, the European Union since January 1, 2007 and the United Nations since December 14, 1955, Romania is bound by some international legal texts drafted in these international fora and by the decisions of their judicial institutions: none of them bans a Member State from providing in its Constitution that marriage is only between a man and a woman.

1. International and European instruments protecting the right to marry

In International and European instruments protecting the right to marry, marriage is traditionally defined as the union for life of a man and a woman and is expressly linked with the foundation of a family which is the basic unit of society and thus entitled to be protected by society and the State.

a. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights - ECHR)

Two provisions of the European Convention on Human Rights deal with marriage: article 8 which protects a right to respect for private and family life and especially article 12 which 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"*.
Contrary to the other provisions of the ECHR which guarantee rights to *"everyone"*, this article 12 expressly mentions *"men and women"* as holders of this right, if they are *"of marriageable age"*. It is interesting to underline that this right is so obvious that ECHR preparatory work did not say anything about it.[1] Besides, the European Court of Human Rights often ruled that in the 1950s, marriage was understood in the traditional sense of the union of two persons of different sex: the Court never departed from this ruling, as we will see later.

b. The 1948 Universal Declaration of Human Rights (UDHR)

Article 16 of the Universal Declaration of Human Rights reads:

> *"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."*

c. The 1976 International Covenant on Civil and Political Rights (ICCPR)

Article 23 of the International Covenant on Civil and Political Rights provides that *"2. The right of men and women of marriageable age to marry and to found a family shall be recognized"*.
The United Nations Human Right Committee has held that the right to marry and to found a family guaranteed by Article 23 § 2 of the ICCPR must be understood as being deliberately and exclusively reserved for men and women, because it is *"the only substantive provision*

[1] G. Puppinck et C. de la Hougue, « La conventionalité de l'abrogation de la loi Taubira », *in* Institut Famille et République, *Livre Blanc Institut Famille et République, Le mariage et la loi : Protéger l'enfant*, 2016, p. 207.

in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "all persons".[2] Furthermore, this article *"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".*[3]

d. The 1978 Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) at the UN

Romania is a State Party of the Convention on the Elimination of all forms of Discrimination Against Women since it signed and ratified it on September 4, 1980 and January 7, 1983 respectively.
Article 16 of the CEDAW shows that the only marriage that is recognized is between a man and a woman. Providing that *"1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (...) b. The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (...) g. The same personal rights as husband and wife (...)"*, article 16 thus insists on the equality between "men and women" and "husband and wife".

e. The 2000 Charter of Fundamental Rights of the European Union (EU Charter)

Article 9 of the Charter of Fundamental Rights of the European Union provides that *"The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."*
Thus, both the ECHR and the EU Charter emphasize that the exercise of the right to marry shall be governed by national laws.

According to the Vienna Convention on the law of treaties, *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".*
In all of those international and European instruments protecting the right to marry and found a family, the ordinary meaning of marriage obviously is opposite sex spouses, as the difference of sex with a reference to the full or marriageable age required for the ability to procreate is stated. Besides, the regulation of the right to marry by national laws is clearly established.

[2] Ms. Juliet Joslin et al. v. New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002).
[3] Ms. Juliet Joslin et al. v. New Zealand, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002), § 8.2.

2. Bodies of the Council of Europe

According to the European Commission for Democracy through Law (Venice Commission) and the Committee of Ministers of the Council of Europe, providing a constitutional definition of marriage as being the union between a man and a woman is consistent with European law.

a. European Commission for Democracy through Law (Venice Commission)

Concerning a similar amendment to the Hungarian fundamental law defining marriage as being the union of a man and a woman, the Venice Commission considered in 2011 that *"In the absence of established European standards in this area and in the light of the above-mentioned caselaw, the Commission concludes that the definition of marriage belongs to the Hungarian state and its constituent legislator".*[4]

The Venice Commission confirmed this position in 2014 concerning the draft amendment to the Constitution of the Former Yugoslav Republic of Macedonia defining marriage as monogamous and heterosexual. In its opinion, the Venice Commission notes that the Macedonian project conforms to the recent trend shared by numerous European States and recalls the jurisprudence of the ECHR, noting the Member States' freedom to regulate this question, the absence of a right to marry for same-sex partners and the deliberately chosen wording of article 12 of the European Convention on Human Rights.[5]

According to the Venice Commission, the definition of marriage thus belongs to Member States which are free to precise in their fundamental texts that marriage is the union of a man and a woman.

b. Committee of Ministers

On March 24, 2014, the Committee of Ministers responded to a written parliamentary question by Mr Mogens Jensen denouncing the "prohibition of same-sex marriage in Croatia" and observed that *"following the results of the referendum of 1 December 2013, the Croatian Constitution contains a provision that defines marriage as the "union between a woman and a man".*
Recalling the case of *Schalk and Kopf v. Austria,*[6] the Committee of Ministers said that *"the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State"* and that *"Article 12 of the Convention does not impose an obligation on the respondent government to grant a same-sex couple access to marriage",*[7]

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[4] European Commission for Democracy through Law (Venice Commission), Opinion no. 621 / 2011, June 17-18, 2011, CDL-AD(2011)016, § 50.
[5] European Commission for Democracy through Law (Venice Commission), Opinion no. 779 / 2014, October 13, 2014, CDL-AD(2014)026, § 14-16.
[6] *Schalk and Kopf v. Austria*, no. 30141/04, June 24, 2010.
[7] CM/AS(2014)Quest647 final, March 18, 2014, https://wcd.coe.int/ViewDoc.jsp?id=2170027&Site=CM

so the Croatian constitutional amendment does not raise any problem in regard to the norms of the Council of Europe.

3. European Court of Human Rights case-law

The European Court of Human Rights is the judicial body which interprets the provisions of the 1950 European Convention on Human Rights: some rulings are particularly important as regards the definition of marriage as being the union between a man and a woman. In that field, the Court recalled and confirmed its case-law on June 9, 2016 in the case of *Chapin and Charpentier v. France.*[8]

a. Article 12 reads according to the traditional definition of marriage

The European Court of Human Rights has repeatedly stated *"that the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex".*[9]
In the case of *Schalk and Kopf v. Austria*, the Court noted that the wording of article 12 (*"men and women"*), differed from that of all the other articles (*"everyone"* or *"no one"*) and concluded that *"the choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex"* (§ 55).
In the case of *Hämäläinen v. Finland* (§ 96), the Grand Chamber of the Court also clarified *"the fundamental right of a man and woman to marry and to found a family"* assuring that article 12 *"enshrines the traditional concept of marriage as being between a man and a woman"*.
Recalling this judgment (§ 66) and the one in the case of *Oliari and others v. Italy,*[10] the Court also ruled in the case of *Chapin and Charpentier v. France* (§§ 36-37) that article 12 confirmed the traditional definition of marriage, which is the union between a man and a woman and *"cannot be interpreted as imposing such an obligation on the governments of the Contracting States to grant same-sex couples access to marriage"*.

b. Non-existence of a right to marriage for same-sex partners under the ECHR

On July 16, 2014, in the case of *Hämäläinen v. Finland,*[11] the European Court of Human Rights, answering in Grand Chamber for the first time on the question of a "right to homosexual marriage", gave a response in which its formulation appears definitive, indicating that neither article 8 nor article 12 of the Convention can be understood *"as*

[8] *Chapin and Charpentier v. France*, no. 40183/07, June 9, 2016 (available in French only).
[9] *Sheffield and Horsham v. UK*, [GC], no. 22985/93 and 23390/94, July 30, 1998, § 66.
[10] *Oliari and others v. Italy*, nos. 18766/11 and 36030/11, July 21, 2015.
[11] *Hämäläinen v. Finland*, [GC], no. 37359/09, July, 16, 2014.

imposing an obligation on Contracting States to grant same-sex couples access to marriage" (§ 71 and 96).
More recently in the case of *Chapin and Charpentier v. France* (§ 48), the Court also recalled the case of *Schalk and Kopf v. Austria* (§ 108) and *Gas and Dubois v. France* (§ 66)[12] and ruled that *"States are still free (...) to restrict access to marriage to different-sex couples"* in regard to the right to respect for private life (guaranteed by art. 8) and the principle of non-discrimination (art. 14).
Thus it appears that the European Convention on Human Rights does not include a right to marriage for same-sex partners, neither under the right to respect for private and family life (art. 8) nor the right to marry and found a family (art. 12).

c. Margin of appreciation belonging to the States for the regulation of marriage

In fields raising sensitive issues regarding morals or ethics and especially when States do not share the same view, the European Court of Human Rights often recognized them as having a large margin of appreciation (*Hämäläinen v. Finland*, § 75; *X, Y and Z v. UK*, [GC], no. 21830/93, April 22, 1997, § 44).[13]
Indeed, in the case of *Schalk and Kopf v. Austria*, the Court clearly ruled that *"as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State"* (§ 61).
Once again, the case of *Chapin and Charpentier v. France* was the occasion for the Court to stress, with a reference to *Schalk and Kopf v. Austria*, that the question of "same-sex marriage" is *"subject to the national laws of the Contracting States"* (§ 36).
States are thus free to regulate marriage and can define it as being the union of a man and a woman.
To conclude, only marriage between a man and a woman is protected under the European Convention on Human Rights. It seems clear that the norms of the Council of Europe do not require governments to grant same-sex partners access to marriage nor prevent them from defining marriage in their Constitution as only between one man and one woman.

CONCLUSION

It follows from the above that the proposed constitutional amendment is consistent with Romanian Constitution and with Romania's international commitments.
The *European Centre for Law and Justice* recommends that the Constitutional Court of Romania gives a favorable opinion to the proposed amendment.

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[12] *Gas and Dubois v. France*, no. 25951/07, March 15, 2012.
[13] G. Puppinck et C. de la Hougue, « La conventionalité de l'abrogation de la loi Taubira », *op. cit.*, p. 211.