MEMORANDUM

IN SUPPORT OF THE CONSTITUTIONAL AMENDMENT PROPOSAL

SUBMITTED BY THE COALITION FOR FAMILY

The Ordo Iuris Institute For Legal Culture

Ordo Iuris Institute for Legal Culture
ul. Górnośląska 20/6
00-484 Warszawa
tel. (+ 48 22) 404-38-50
e-mail: biuro@ordoiuris.pl
NIP: 5252565187
The Foundation is registered as number KRS 0000473488

The “Ordo Iuris” Institute for Legal Culture is an independent legal organization established as a foundation in Poland. Ordo Iuris gathers academics and legal practitioners aiming at promotion of legal culture based on the respect for human dignity and rights.

Ordo Iuris is among organisations consulted by the Polish Government within the legislative process. Third parties interventions (including *Amici curiae* briefs) by the Ordo Iuris Institute were already accepted by Polish courts, including Supreme Court of the Republic of Poland. Our Institute was also allowed by the President of the European Committee of Social Rights to submit observations in a complaint considered by the Committee as well as allowed by the President of the European Court of Human Rights to deliver third party intervention.

I. Introduction

At the initiative of the Coalition for Family (Coalitia pentru Familie), the constitutional amendment proposition has been filed with the Romanian Senate on 23 May 2016[1]. The aim of the amendment is to change the phrasing of Article 48 (1) of the Constitution so it would read as follows: 'A family is established through the free willed marriage between one man and one woman, and is based upon their equality and their right and duty to provide for the raising, the education and the training of children'. The said amendment gained support of three million citizens, which is the largest endorsement for such a petition in the entire history of Romania.

Art. 258 (4) of the Civil Code defines the notion of 'spouses' as '*the man and the woman* united through marriage'. According to Article 259 (1) marriage is 'the freely consented union between *one man and one woman'*. Dual-gender nature of marriage is reinforced in Article 277 (1) of the Civil Code which states that 'marriage shall be prohibited between persons of the same sex'.

At present, the Constitutional Court of Romania is in the process of ruling on the constitutionality of abovementioned amendment. Ordo Iuris supports this amendment, as it is in accordance with fundamental rights enshrined in European and International treaties to which Romania engaged itself as well as with jurisprudence of relevant international tribunals. This memorandum highlights that the proposition is fully comply with international and European law, specifically that it does not restrict the right to marry, that it is competence of national states to regulate marriage and family law and that the proposition does not restrain the right to private life and principle of non-discrimination. It also lists some basic long-term consequences of undermining natural identity of marriage.

II The Constitutional Amendment Proposal is in Full Accordance with International Law and Human Rights Standards.

A. Compliance with international law.

Numerous key international human rights charters recognize fundamental role of marriage and family. It is also common practice both in global and regional charters to explicitly highlight the dual-gender nature of marriage. To start with the Universal Declaration of Human Rights, its Art 16 stipulates that "*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.", according to Art. 23 of the International Covenant on Civil and Political Rights "the right of *men and women* of marriageable age to marry and to found a family shall be recognized." Art. 17 of the American Convention on Human Rights states that "the right of *men and women* of marriageable age to marry and to raise a family shall be recognized . . . ."; Art. 9 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

[1] The reference is „Propunerea legislativă de revizuire a Constituţiei României, publicată în Monitorul Oficial, Partea I, nr. 883/25.11.2015, înregistrată la Senat cu nr. b293/2016".

proclaims that states "shall ensure . . . that neither marriage to an alien nor change of nationality by the *husband* during marriage shall automatically change the nationality of the *wife*, render her stateless or force upon her the nationality of the husband.". Preamble of the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages provides that "*men and women* of full age have the right to marry and to found a family . . . ."

The UN Commission on Human Rights, referring to Art. 23 of the International Covenant on Civil and Political Rights, ruled that this Article "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."[2] That ruling could be applied both to all abovementioned treaties and - as shown hereafter - to European Convention on Human Rights (ECHR).

B. Compliance with European Convention on Human Rights.

Constitutional amendment does not restrict the right to marry because there is no right to same sex "marriage".

In recent years European Court of Human Rights (ECtHR) addressed same-sex couples demands several times. In 2010, referring to Art. 12 of the European Convention on Human Rights ECtHR indicated, similarly to HRC, that "all other substantive Articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate."[3]

In 2014, the ECtHR, answering for the first time on the question of a "right to homosexual marriage", responded in definitive manner, indicating in *Hämäläinen v. Finland* that neither Article 8 nor Article 12 of the Convention can be understood "as imposing an obligation on Contracting States to grant same-sex couples access to marriage"[4] The Court highlighted "the fundamental right of a man and woman to marry and to found a family" clarifying that Article 12 "enshrines the traditional concept of marriage as being between a man and a woman."

This interpretation was very recently reasserted in *Chapin and Charpentier v. France* judgment, wherein the ECtHR unanimously confirmed the non-existence of a right to same sex 'marriage'.[5]

[2] United Nations Commission on Human Rights, *Joslin v. New Zeland*, 17 June 2002, CCPR/C/75/D/902/1999.
[3] *Schalk and Kopf v. Austria*, App. no. 30141/04, 24 June 2010, para 55.
[4] *Hämäläinen v. Finlande,* App. no. 37359/09, 16 July 2014, para 71 and 96.
[5] *Chapin and Charpentier v. France*, App. no 40183/07, 9 June 2016, para 39.

In light of the above it is undoubted that the present constitutional amendment would not constrain or suppress the right to marry for same-sex couples, owing to the fact that such a right does not exist under international and European law.

Defining and regulating marriage is the sole competence of national states.

On the grounds of ECHR the competence to define and to regulate marriage lies with Member States. As literal wording of Art. 12 of the Convention reads, "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.*"

That clear fact was acknowledged by the ECtHR in Schalk and Kopf v. Austria ruling. Therein the Court declared 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"[6]. And because "marriage has deep-rooted social and cultural connotations which may differ largely from one society to another"[7] the Court "must not rush to substitute its own judgment in place of that of the national authorities"[8].

That view was reaffirmed in 2014 by the Court's Grand Chamber in conclusion that "while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples."[9] . in 2016 ECtHT again recalled that the question of same-sex marriage is "subject to the national laws of the Contracting States"[10]

The standpoint of other bodies of the Council of Europe is in consonance with the consistent stance of the ECtHR. The Committee of Ministers in response to a written question complaining about "prohibition of same-sex marriage in Croatia" stated that "Article 12 of the Convention does not impose an obligation on the respondent government to grant a same-sex couple access to marriage"[11]

The Venice Commission, in its opinion[12] on the former Yugoslav Republic of Macedonia draft constitutional amendment defining marriage as monogamous and heterosexual recalled the rulings of ECtHR and highlighting nonexistence of right to same-sex "marriage" noted that the Macedonian amendment is part of the wider trend in numerous European Countries. When giving its opinion[13] on the similar amendment to the Hungarian constitution, the Commission observed that "in the absence of established European standards in this area and in the light of the abovementioned case-law, the Commission concludes that the definition of marriage belongs to the Hungarian state and its constituent legislator"

[6] *Schalk and Kopf v. Austria*, para 61.
[7] *Schalk and Kopf v. Austria*, para 62.
[8] *Schalk and Kopf v. Austria*, para 62.
[9] *Hämäläinen v. Finlande*, para 96.
[10] *Chapin and Charpentier v. France*, para 36.
[11] The Committee of Ministers answer of March 24th 2014 to Written Question no 647, Doc. 13369.
[12] Opinion no 779 of 13 October 2014, CDL-AD(2014)026.
[13] Opinion no 621/2011 of 20 June 2011, CDL-AD(2011)016.

The authoritative bodies of Council of Europe correctly observe the absence of consensus in Europe. In recent years, 12 European states have negated dual-gender nature of marriage: the Netherlands (since 2001), Belgium (2003), Spain (2005), Sweden (2009), Norway (2009), Portugal (2010), Iceland (2010), Denmark (2012), France, England and Wales (2013), Luxembourg (2014) and Ireland (2015).

Simultaneously, 13 others have constitutionalized the definition of marriage as strictly heterosexual and monogamous: Belarus (art. 32), Bulgaria (art. 46), Croatia (art. 62), FYR of Macedonia, Hungary (art. L.1), Latvia (art. 110), Lithuania (art. 38), Moldova (art. 48.2), Montenegro (art. 71), Poland (art. 18), Serbia (art. 62), Slovakia (art. 41) and Ukraine (art. 51).

Constitutional amendment does not restrain the right to private life and principle of non-discrimination

ECtHR declares that Member States are "free, under Article 12 of the Convention as well under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different sex couples".[14] This is not considered as discrimination or a limitation of the right to private life.[15]

Oliari v. Italy[16] and *Vallianatos v. Greece*[17] – two judgments of ECtHR where Member States, as the Court ruled, discriminated against same-sex couples had legal background different from legal situation in Romania since they referred to civil partnership, not to marriage.

C. Compliance with European Union Law.

Competence of EU are limited to precisly specified areas and every legislative proposal has to be grounded in particular competence norm. No such norm empower UE to interfere with Member State's policies regarding marriage and family. On the contrary, as admitted by CJEU in *Maruko*[18] case, "civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence." CJEU repeated that stance in *Romer* judgement, adjudicated that "as European Union law stands at present, legislation on the marital status of persons falls within the competence of Member States."[19]

Accordingly, the explanations of Fundamental Rights Agency related to the Charter of Fundamental Rights of the European Union stresses that Article 9 of the Charter (the right to

[14] *Schalk and Kopf v. Ausrtia*, para 108.
[15] *Chapin and Charpentier v. France*, para 48 quoting *Schalk and Kopf*, para 108 and *Gas and Dubois*, para 66.
[16] Oliari and Others v. Italy, App nos 18766/11 and 36030/11, 21 July 2015.
[17] *Vallianatos v. Greece,* App no 29381/09 and 32684/09, 7 November 2013.
[18] *Tadao Maruko vs Versorgungsanstalt der deutschen Bühnen*, C-267/06, para 59.
[19] *Jürgen Römer v Freie und Hansestadt Hamburg*, C-147/08, 10 May 2011, para 38.

marry and to found a family)[20] "neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex)."[21]

III Necessity of the Law Protecting Marriage

As demonstrated hereinabove, the constitutional amendment proposition is in full accordance with binding international law Romania is involved to. Therefore it is not recommended to block the democratic process by way of precluding the people from voting on subject discussed herein. It seems however appropriate to briefly recall the reasons for which the law should reflect genuine notion of marriage and what are the consequences of undermining natural identity of marriage.

A. What is marriage

Marriage exists to bring a man and a woman together as husband and wife to be father and mother to any children their union produces.[22] It is based on the anthropological truth that men and women are different and complementary, the biological fact that reproduction depends on a man and a woman, and the social reality that each child needs both a mother and a father.[23]

U.S. Supreme Court Justice Robert noticed that "paramount among its many important functions, the institution of marriage has systematically provided for the regulation of heterosexual behavior, brought order to the resulting procreation, and ensured a stable family structure in which children will be reared, educated, and socialized. ... [A]n orderly society requires some mechanism for coping with the fact that sexual intercourse commonly results in pregnancy and childbirth. The institution of marriage is that mechanism. The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other. ... [A]side from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. ... The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic."[24]

B. Public Interest

[20] Art. 9 of the Charter of Fundamental Rights of the European Union stipulates: „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.."

[21] http://fra.europa.eu/en/charterpedia/article/9-right-marry-and-right-found-family

[22] See Ryan T. Anderson, "*Marriage: What It Is, Why It Matters, and the Consequences of Redefining It*" Heritage Foundation Backgrounder No. 2775, 11 March 2013, http://www.heritage.org/research/reports/2013/03/marriage-what-it-is-why-it-matters-and-the-consequences-of-redefining-it.

[23] Sherif Girgis, Ryan T. Anderson, and Robert P. George, "*What Is Marriage? Man and Woman: A Defense*", 2012.

[24] Robert J. Cordy, dissenting opinion in Goodridge, 440 Mass 309, 798 NE2d 941 (2003), [cited in:] M.N. Stewart, *Judical redefinition of marriage*.

The state recognizes marriage not because government cares about emotional feelings as such but because:

- only male–female sexual relationships produce new human beings, and
- those human beings fare best when cared by their biological parents.

Marriage – by way of connecting sex, children, mothers and fathers – is hence an institution that benefits society in a way that no other relationship does. Marriage is thus a personal relationship that serves a public purpose.

If civil marriage did not serve an important public interest, then there would be no reason for governments to formalize it. It is precisely those public interest due to which particular privileges are granted and attributed to marriage.

Oppositely, different facilities related to marriage cannot be regarded as public interest since they do not exist for the sake of themselves but the rationale of their existence is marriage itself. If public interest was equalized with those facilities than the very idea of marriage would be open to question because they might be of use for any configuration of persons (including friends, siblings or roommates).

It i also in public interest when the law recognizes, protects and promotes marriage and by doing that conduces strong families. The stronger family is the lesser interference of government is needed since broken families and big government go together: lack of marriage friendly culture leads to family breakdown and social pathology which require additional spending on state intervention.

C. Consequences of undermining natural identity of marriage.

<u>Weakening of marriage by undermining marriage norms.</u>

Morals and law constantly influence each other. Changes to social policy can have an impact on what the public believes to be right and good about marriage. The notion of marriage involves set of marital norms that define it. Those norms, like monogamy, permanence, fidelity and exclusivity are vital to the stability of procreative relationships and serve the common good of society.

When the norm of male–female sexual complementarity is abandoned as an essential characteristic of marriage, than marriage itself will be striped of clear framework and reduced to love and feelings. “As more people absorb the new law’s lesson that marriage is fundamentally about emotions, marriages will increasingly take on emotion’s tyrannical inconstancy. Because there is no reason that emotional unions — any more than the emotions that define them, or friendships generally — should be permanent or limited to two, these norms of marriage would make less sense. People would feel less bound to live by them whenever they simply preferred to live otherwise. And, being less able to understand the value of marriage itself as a certain sort of union, even apart from its emotional satisfactions,

they would miss the reasons they had for marrying or staying with a spouse as feelings waned, or waxed for others."[25]

Contestation of the worth and uniqueness of fatherhood and motherhood.

Redefinition of marriage removes dual-gender characteristic of that social institution. It signals to society that the roles of mothers and fathers are totally interchangeable and two fathers or two mothers are equally good as mother and father. However, it also signals that mothers and fathers are *de facto* needless.

The consequences would affect particularly men. This is because marriage is a primary means of shaping men's identities and behaviors (e.g., sexual, economic, etc.) from self-centered in nature to child- and family-centered in orientation. "If men are legally defined as optional to marriage and childrearing, then marriage will likely struggle to maintain its primacy as a means for men to establish their masculine identity in ways that serve children best. A gender-free definition of marriage—where gender is officially irrelevant to its structure and meaning—will likely have less social power to draw heterosexual men into marriage and thus less power to serve marriage's vital child-welfare purposes." [26]

Negating children's right to be raised by their biological parents.

By definition, two men or two women cannot be the natural, biological parents of the children they rise. Consequently, children of same-sex couples will always be raised by someone other than their natural, biological mother or/and father. If we formalize same-sex marriage, the state can make no coherent argument that biological parenthood is better than third party reproduction. Third-party reproduction turns children into commodities that can be purchased, and ultimately denies children their right to be raised by their biological parents.

Threat to religious liberty.

Redefining marriage inevitably leads to assumption that traditional views are discriminatory. Thus, they will consequently be forcing out from public sphere by legal, economic and social pressure. Once the natural identity of marriage is undermined, those who continue to believe that marriage is by nature a union between man and woman would be threatened by state administration, non-discrimination law, and private persons.[27]

IV Conclusion

Having taken these points into consideration we consider the proposed constitutional amendment to be in full compliance with international and European law. It clearly does not restrict the right to marry and lies in the area of exclusive competence of national authorities.

[25] Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense*, 2012.
[26] Alan J. Hawkins i Jason S. Carroll, *Beyond the Expansion Framework: How Same-Sex Marriage Changes the Institutional Meaning of Marriage and Heterosexual Men's Conception of Marriage*, 2014
[27] T.M.Messner, "*Same-Sex Marriage and the Threat to Religious Liberty*.", Heritage Foundation, 2008.

The proposed amendment also does not restrain the right to private life and principle of non-discrimination. Apart from legal clarity, there are numerous legitimate arguments in favor of the amendment worth hearing and discussing in public debate.

Thus the Ordo Iuris Institute for Legal Culture recommends that the Constitutional Court of Romania allow democratic process to be continued.

Amicus Curiae prepared by Rafał Dorosiński, Attorney