



ADF INTERNATIONAL

ECOSOC Special Consultative Status (2010)

UNIVERSAL PERIODIC REVIEW – THIRD CYCLE

**Submission to the 29th session of the
Human Rights Council's Universal Periodic Review Working Group**

January 2018, Geneva, Switzerland

ROMANIA

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(a) Introduction

1. ADF International is a global alliance-building legal organization that advocates for religious freedom, life, and marriage and family before national and international institutions. As well as having ECOSOC consultative status with the United Nations (registered name "Alliance Defending Freedom"), ADF International has accreditation with the European Commission and Parliament, the Organization for Security and Co-operation in Europe, and the Organization of American States, and is a participant in the FRA Fundamental Rights Platform.
2. This submission explains why Romania should take steps to protect marriage and the family within its national law and allow the referendum on marriage to proceed as originally planned.

(b) Marriage and the Family

3. Marriage and family are defined by the Romanian Constitution and the Civil Code.
4. Article 48(1) of the Romanian Constitution states that “the family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children.”
5. The intention of the drafters to include a male-female model in the definition of “spouses” is illustrated by the Civil Code, which was drafted subsequent to the Constitution, and which speaks in Article 258(4) about “the man and the woman united through marriage.” Article 259(1) of the Civil Code states, beyond any doubt, that marriage is “the freely consented union between one man and one woman.”
6. Furthermore, Article 277(1) of the Civil Code emphasizes that “marriage shall be prohibited between persons of the same sex.”
7. Article 277(2) of the Civil Code provides that Romania shall not recognize same-sex unions contracted abroad as marriages (whether by Romanian or by foreign citizens). Article 277(3) provides the same with respect to civil partnerships.
8. Article 277(4) of the Civil Code states that European Union rights to freedom of movement are applicable in the territory of Romania.
9. Furthermore, there is an ongoing citizens’ initiative to enshrine marriage as the union of one man and one woman in the Constitution of Romania. The citizens’ initiative was initiated by the Coalition for Family (*Coaliția pentru Familie*),¹ the stated goal of which is to bring clarity and coherence to the law of Romania, by fully aligning the constitutional definition of marriage with the definition given by the Civil Code. The wording of Article 48(1), as proposed by the Coalition for Family is:
 - a. “A family is established through the free willed marriage between *one man* and *one woman*, and is based upon their equality and their right

¹ For more information, see the website of the Coalition for Family (*Coaliția pentru Familie*), available at: <http://coaliטיפenturfamilie.ro/>.

and duty to provide for the raising, the education and the training of children.”

10. The amendment has been supported by three million citizens, the greatest amount of support for such a petition in the entire history of Romania. These citizens would like to express their democratic will and sovereignty in a direct and open manner, that is, a referendum, in accordance with Article 2 of the Constitution of Romania, which states that “national sovereignty appertains to the Romanian people, who express it through... referendum.”
11. The citizens’ initiative was registered with the Romanian Senate on 23 May 2016. On 20 July 2016 the Constitutional Court of Romania ruled unanimously that the citizens’ initiative was constitutional.
12. Despite the fact that almost one year has passed since that decision, no date has been established for the referendum. This is due to numerous procedural delays, among which:
 - a. the Constitutional Court of Romania delivered the reasoning of 20 July decision only on 14 October, with a delay of more than a month beyond that prescribed by law;²
 - b. the two chambers of Parliament both denied their competence to rule on the marriage initiative, due to a claimed lack of procedural clarity on which chamber had primary jurisdiction; and
 - c. the intention of a number of MPs to table changes to the citizens’ initiative, which attracted further debate in the Romanian Parliament.
13. The proposal is currently pending before the Senate, after having received a vote of assent from the Chamber of Deputies (232 votes out of 270). The earliest date that a referendum could take place is in mid-October 2017.
14. The citizens’ initiative should be seen in the light of international and European human rights conventions and related jurisprudence, which make clear that the competence to define and regulate marriage lies with Member States.³
15. According to the established case-law of the European Court of Human Rights (ECtHR), Article 12 of the Convention [the right to marry] “enshrines the traditional concept of marriage as being between one man and one woman.”⁴
16. The ECtHR found that:

² According to Article 60(1) of Law 47/1992, the prescribed time frame *is* 30 days. The Constitutional Court offered no explanation for the delay in the reasoning.

³ Article 12 of the European Convention on Human Rights (ECHR), Article 16 of the Universal Declaration of Human Rights (UDHR), Article 23 of the International Covenant on Civil and Political Rights (ICCPR), Article 23 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 9 of the Charter of Fundamental Rights of the European Union (EU Charter).

⁴ *Hämäläinen v. Finland*, no. 37359/09 (16 July 2014), paras 71 and 96, referred to also in *Chapin and Charpentier v. France*, no. 40183/07 (9 June 2016), para 37 (emphasis added).

Although the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that *there is no European consensus regarding same-sex marriage*.

...

[T]he reference to domestic law reflects the diversity of national regulations, which range from allowing same-sex marriage to explicitly forbidding it. By referring to national law, Article 9 of the Charter leaves the decision whether or not to allow same-sex marriages to the States.

...

[T]he attachment to the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption by Convention States of biological criteria for determining a person's sex for the purpose of marriage.

...

In that connection, the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court re-iterates that *it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society*.⁵

17. The ECtHR has repeatedly and explicitly ruled out any other possible interpretation of Article 12, based on the plain reading of the Convention and the context in which it was originally drafted.
18. This view was upheld by the European Commission for Democracy through Law (the Venice Commission).⁶
19. The same understanding is reflected by the United Nations Human Rights Committee, which, in interpreting the phrase 'men and women of marriageable age,' clearly stated that:

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.

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State

⁵ *Schalk and Kopf v. Austria*, no. 30141/04 (2010), paras 58, 60, 51 and 62 (emphasis added).

⁶ Committee of Ministers, Reply to Written Question No 647 (Doc. 13369), Prohibition of same sex Marriage in Croatia (24 March 2014), <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20576&lang=en>>, European Commission for Democracy Through Law (Venice Commission), Opinion No 621/2011 (2 August 2011) on the New Constitution of Hungary and Opinion No 779/2014 (13 October 2014), Opinion on the Seven Amendments to the Constitution of Former Yugoslav Republic of Macedonia (13 October 2014).

party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.⁷

20. The jurisprudence of the Court of Justice of the European Union (CJEU) has also confirmed this.⁸ The constitutional framework of the EU means that such legislation *must* respect national competence in this area, and this is evident from the language permeating the relevant Directives and Regulations.⁹

(c) Recommendations

21. In light of the aforementioned, ADF International suggests the following recommendations be made to Romania:
- a. Give effect to the citizens' initiative in its current form calling for the protection of marriage as the union of one man and one woman in the Constitution of Romania, with Parliament being compelled not to change the wording of the amendment as this would contradict the will of the three million citizens who signed the petition and would eschew the democratic processes; and
 - b. Organise as soon as possible the referendum to constitutionally enshrine the definition of marriage as the union of a man and a woman, for which three million citizens have asked, in order to give effect to the democratic will of these citizens.

⁷ *Juliet Joslin et al. v. New Zealand*, Communication No. 902/1999, UN Doc A/57/40 at 214 (2002) paras 8.2 and 8.3.

⁸ *Jürgen Römer v. Freie und Hansestadt Hamburg*, C-147/08 (10 May 2011), para 38, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, C-267/06 (1 April 2008), para 59, *David L. Parris v. Trinity College Dublin*, C-443/15 (24 November 2016), para 59.

⁹ EU Directive on the Free Movement of Persons paragraph 6 of the recital, article 3(2); Directive on Family Reunification paragraph 10



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