



April 22, 2009

Your Excellencies:

We are writing you on behalf of ACCEPT and the International Gay and Lesbian Human Rights Commission (IGLHRC) to ask that you reject the proposal for a new civil code, as it was submitted to the Parliament without observing the legal requirements of proper procedures and transparency. We also ask that the proposal be returned to the executive government so that related public debates be organized in order to assess the need to reform fundamental legal institutions, such as Title 7 of the New Civil Code regarding the Family.

We ask in particular that you reject the proposed amendment to art. 473 of the New Civil Code, which forbids adoption of children by same-sex couples, a legal paradox since, unlike in the majority of European Union member states, Romania does not recognize same-sex partnerships.¹ The amendment is discriminatory in light of domestic and international law and runs counter to the interests of the children and to the findings of social research. The European Court of Human Rights found that sexual orientation discrimination regarding the adoption of children is prohibited by the European Convention (*E.B. v. France, 2007*).

According to reports in the media, on April 1, 2009 the Joint Parliamentary Commission regarding the penal and civil codes and the related codes of procedure brought an amendment to the draft civil code, prohibiting the adoption of children by same-sex couples.

We ask that you reject such amendment based on the following:

1. The amendment runs counter to domestic law: The Romanian Constitution guarantees the equality in rights of Romanian citizens (art. 16.1), "without privileges and without discrimination," while art. 20 stipulates that in case of "conflicts between international human rights treaties and domestic law, international regulations take priority" unless the Romanian law is more progressive. In this context, we note the limitation proposed by members of the Romanian legislature, and the need to invoke art. 20 of the Constitution.

The constitutional principle of equality in rights was transposed into Romanian law through the Government Ordinance 137/2000 regarding the prevention and punishment of all forms of discrimination, as subsequently modified and completed. According to art. 2(1): "*discrimination involves any **distinction, exclusion, restriction or preference** on the basis of race, nationality, ethnicity, language, religion, social group, beliefs, sex, **sexual orientation**, age, disability, non-contagious chronic illness, HIV infection or the belonging to a disfavored group, which has as a purpose or effect*

¹ "Legal study on homophobia and discrimination on grounds of sexual orientation—Romania," Romanita Iordache, Iustina Ionescu, European Union Agency for Fundamental Rights, February 2008; "Homophobia and discrimination on grounds of sexual orientation in the EU Member States Part I – Legal analysis", European Union Agency for Fundamental Rights, 2008 (http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_0608_en.htm)

"Report on the situation of fundamental rights in European Union (2004–2008)," European Parliament, Rapporteur: Guisto Catania

the limitation or impeding of the **equal** recognition, use, or exercise of **human rights and fundamental freedoms or the rights recognized by law**, in the political, economic, social and cultural fields, and in any other aspect of public life.”

2. The amendment runs counter to international and European law and jurisprudence, which provide that the best interest of the child should prevail.

Art. 3(1) of the United Nations Convention on the Rights of the Child provides: “1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

The jurisprudence of the UN Human Rights Committee includes sexual orientation among nondiscrimination grounds in relation to art. 2 and 26 on equality of the International Covenant on Civil and Political Rights (*Toonen v. Australia*, 1994).

Sexual orientation discrimination, as related to adoption of children, runs counter to the European Convention on Human Rights and its Protocol No. 12, ratified by Romania, which extended the protection against discrimination to any right stipulated by law. The European Court of Human Rights found that, generally, the protection of the Convention in art. 14 on nondiscrimination regarding any right stipulated by the Convention includes sexual orientation (*Salgueiro da Silva Mouta v. Portugal*, 1999; *L. and V. v. Austria*, *S.L. v. Austria*, 2003; *Karner v. Austria*, 2003). In *Karner v. Austria*, the Court ruled that unmarried partners are entitled to the same rights, whether they are of the same or opposite sex. In particular, in *E.B. v. France* (2007), the Court established that the prohibition of the adoption of a child because of the sexual orientation of the potential adoptive parents violates art. 8 regarding private life and art. 14 on nondiscrimination. In this case, the French authorities had rejected the request of the applicant to adopt a child because of her sexual orientation. The European Court found that the decision of the French authorities was discriminatory because the different treatment did not have a just and reasonable cause and did not have a legitimate aim.

The European Convention on the Adoption of Children, signed by Romania on March 4, 2009, provides in art. 7(2) that states can „extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship. The Convention illustrates the European trend of nondiscrimination of same sex couples as regards the adoption of children, trend already reflected explicitly in the law of eight countries on the continent.

As for the European Union, discrimination based on sexual orientation is explicitly prohibited in Art. 13 of the Treaty of the European Community (Amsterdam) and Art. 21(1) of the Charter of Fundamental Rights in the European Union.

3. Relevant studies and professional associations have shown that the homosexual orientation of the parents does not have a negative impact on the development of the child.

In 2001, Sweden’s Commission on the situation of children in homosexual families examined Swedish studies in comparison with 40 international studies and concluded that children with homosexual parents had a psychological and social development similar to children with heterosexual parents. The American Psychological Association had arrived to this conclusion already in 1995 on the basis of 43 empirical



studies. Similar studies and conclusions have been made in Belgium, Canada, France, the United Kingdom, The Netherlands and Spain.

The British Associations on Adoption even supported a legislative amendment adopted in 2002 by the British Parliament, which extended the right to adoption to unmarried couples, whether heterosexual or of the same sex.

4. The negative effects of discrimination. Romania cannot adopt sexual orientation discrimination in the law, including with regard to the adoption of children. Any discriminatory law sends the message that the state grants an inferior status to lesbian, gay, and bisexual people; this way, citizens are encouraged to discriminate on their turn. As shown in the recent study by the EU Fundamental Rights Agency,² discrimination based on sexual orientation exists already *in the absence* of any discriminatory law and in spite of explicit provisions to combat discrimination. Romania is the EU member state with the highest intolerance regarding gay people (64% of respondents in opinion pools do not want a homosexual among their neighbors). In Romania there are still cases of intimidation by police in public spaces known as meeting places for gay men, and the annual march for diversity organized by ACCEPT is met every time with violence from opponents. Such amendments to the Civil Code can only escalate the situation.

Domestic jurisprudence shows that the current legislation on adoption cannot be interpreted to allow for adoption by same sex couples. Moreover, from our direct experience with lesbian, gay, and bisexual people, in the last ten years there have not been any requests of this sort. The adoption of a legal provision for a particular target group, in the absence of a socially well-documented need to justify the legislative action, runs counter to the principle of good governance and is worrisome because of its negative effects that such a message coming from the legislature could generate.

The rejection of the amendment, which prohibits explicitly the adoption of children by same sex couples, is needed in order to take into account the highest interest of the child, the rights of the child and of the adoptive parents, and to ensure once more that Romania is in an irreversible process when it comes to diversity, individual rights and freedoms, and equality in rights.

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ACCEPT is the first human rights NGO in Romania that defends and promotes the rights of LGBT people at the national level. www.accept-romania.ro

The International Gay and Lesbian Human Rights Commission (IGLHRC)'s mission is advancing human rights for everyone, everywhere to end discrimination based on sexual orientation, gender identity, or gender expression. IGLHRC has offices in New York, Buenos Aires, and Cape Town. www.iglhrc.org

² "Homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Part II - The Social situation"; European Union Agency for Fundamental Rights, 2009
(http://fra.europa.eu/fraWebsite/products/publications_reports/pub_cr_homophobia_p2_0309_en.htm)