

**In the matter of the constitutionality of Article 7(1)(e) of Law 87/2020**

**Before the Constitutional Court of Romania**

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**Written Submissions on behalf of**

**ACCEPT Association**

**AIRE Centre**

**Centre for Reproductive Rights**

**FIDH**

**ILGA-EUROPE**

**Transgender Europe**

Amici

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September 2020

## **I. INTRODUCTION**

1. These written submissions are presented by ACCEPT Association, AIRE Centre, Centre for Reproductive Rights, FIDH, ILGA-EUROPE, Transgender Europe (“Amici”).<sup>1</sup>
2. Pursuant to Article 146(a) of the Constitution, this Court is called upon by the President to examine and determine the constitutionality of Article 7(1)(e) of *Law 87/2020: Proposal to modify and complete the law regarding national education* (“**Art.7(1)(e)**”).<sup>2</sup> The object of the proposed law is that within any space assigned for education and professional training, ‘spreading gender identity theory or opinion’, understood as the theory or opinion that gender is a concept that is different from the biological sex and the two are not always the same, would be illegal.
3. The amici argue that Romania is bound to protect and respect the rights of trans and gender diverse people and prevent discrimination on the grounds of gender identity under international human rights instruments which Romania has ratified.<sup>3</sup> Art.7(1)(e) would prohibit educational institutions from teaching in accordance with international recognised definitions of gender and gender identity. It would exclude recognition of trans and gender diverse identities from educational establishments, including those educating: children, law enforcement and judicial officers, doctors, nurses and other health workers responsible for the provision of healthcare. This would result in significant consequential fundamental human rights breaches including hampering the state authorities’ ability to discharge their obligations of due diligence and protection without discrimination. In turn, this would increase intolerance and lack of understanding about these matters in society as a whole.
4. In determining whether the proposed law is consistent with the Constitution, the Court should consider and be guided by Romania’s international human rights obligations, including the European Convention on Human Rights (‘**ECHR**’), the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (‘**the Istanbul Convention**’), and EU law including the Charter of Fundamental Rights of the European Union (‘**the CFR**’).
5. The amici submit that the adoption of Art.7(1)(e) into domestic law would require, in practice, for all educational purposes, the adoption of a definition of ‘gender identity’ contrary to international law. It constitutes a violation of principles of international law, including dignity and equality; and would additionally result in significant consequential breaches of the human rights protected by Articles 8, 9, 10, 14, Article 2 of Protocol 1, and Protocol 12 of the ECHR; Articles 4, 6, 12, 14 and 15 of the Istanbul Convention and Articles 1, 3, 7, 10, 11 and 21 of the CFR. Art.7(1)(e) is discriminatory, has discriminatory effect and adversely affects particularly vulnerable groups.
6. The amici submit that Art.7(1)(e) is therefore unconstitutional.

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1 See Annex 1 for a description of the organisations.

2 Art.7(1)(e) reads as follows:

*(1)In all education entities and institutions and all spaces that are assigned for education and professional training, including entities that provide extracurricular education, there are strictly forbidden: [...]*

*(e)activities aimed at spreading gender identity theory or opinion, understood as the theory or opinion that gender is a concept that is different from the biological sex and the two are not always the same.*

<sup>3</sup> Committee on Economic, Social and Cultural Rights General Comment No. 20 (2009), para 27, Human Rights Committee, communication No. 488/1992, *Toonen v Australia*; Committee on the Rights of the Child, general comment No. 15 (2013), para 8, Committee Against Torture, general Comment No. 2(2008), para 21 and General Comment No. 3 (2012) paras 32 and 39.

## II. PROTECTION OF GENDER IDENTITY

### A. Definitions

7. The 2006 and 2017 Yogyakarta Principles ('YP 2006' and 'YP 2017', respectively) provide definitions of 'gender identity', 'gender expression' and 'sex characteristics'.<sup>4</sup> The following definitions have been adopted in the interpretation of international legal instruments.<sup>5</sup>

'Gender identity' refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech and mannerisms. (YP 2006)

'Gender Expression' is included within the definition of gender identity and is understood as each person's presentation of the person's gender through physical appearance-including dress, hairstyles, accessories, cosmetics- and mannerisms, speech, behavioural patterns, names and personal references, and noting further that gender expression may or may not conform to a person's gender identity. (YP 2017)

'Sex characteristics' 'each person's physical features relating to sex including genitalia and other sexual and reproductive anatomy, chromosomes, hormones and secondary physical features emerging from puberty' (YP 2017)

'Transgender' refers to persons who identify with a different gender to the one assigned at birth'.

'Gender diverse' can be used to refer to persons whose gender identity – including their gender expression –is at odds with what is perceived as being the gender norm in a particular context at a particular point in time.

'Gender' (in art. 3 Istanbul Convention) as 'the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.'

### B. Gender identity is a protected characteristic.

8. Under international and European Union law, discrimination on the grounds of gender identity is prohibited. The European Court of Human Rights ('ECtHR') explicitly "*reiterate[d] that the prohibition of discrimination under Article 14 of the Convention duly covers questions related to sexual orientation and gender identity.*"<sup>6</sup> The freedom to define one's gender identity is part of one of the most basic essentials of self-determination.<sup>7</sup> Indeed, it is a matter relating to the most

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4 *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2006); and *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (2017).

5 UN Independent Expert, *Protection against violence and discrimination based on sexual orientation and gender identity*, A/73/152, 12 July 2018, 'Trans and Intersex Equality Rights in Europe- a comparative analysis', European Commission, M Van den Brink and P Dunn (2018)

6 *Identoba and Ors v. Georgia*, no. 73235/12, 12 August 2015, at §96. See also *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, 21 December 1999, at § 28; *Aleksejev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, 21 October 2010, at §108.; and *P.V. v. Spain*, no. 35159/09, 30 November 2010, at § 30.

7 *YY v. Turkey*, no 14793/08, 10 March 2015, at §102. See also *Van Kück v Germany*, no 35968/97, 12 June 2003.

intimate part of an individual's life.<sup>8</sup> Self-determined gender is protected whether or not a person has undergone or intends to undergo reassignment surgery.<sup>9</sup>

9. The ECtHR has affirmed that gender identification as an element of private life falls within the personal sphere protected by Article 8 ECHR and the right of transgender people to personal development and to physical and moral security is guaranteed.<sup>10</sup> Properly considered, principles of freedom and autonomy contradict the idea that a person's role in society is dictated by their biological sex. Self-determined gender is a fundamental part of a person's free and autonomous choice in relation to roles, feelings, forms of expression and behaviours and a cornerstone of their identity.<sup>11</sup>

### **C. Article 7(1)(e) Law 87/2002: Gender identity theory or opinion**

10. 'Gender identity theory or opinion' is defined by Art.7(1)(e) as the notion that 'gender' is a concept that is not the same as biological sex. It is quite clear from the above that the ECHR, 'gender' and 'gender identity' have specific legal definitions that *are* distinct from and different to biological sex.
11. Art. 7(1)(e) would require educational institutions to put forward a notion of gender that is both directly and indirectly discriminatory and contradicted by international law, without scope for challenge or debate. For the reasons set out below, this is contrary to the obligations on Romania to take care that information or knowledge included in a curriculum be conveyed in an "*objective, critical and pluralistic manner.*"<sup>12</sup>

### **III. Romania is required to respect, protect and fulfil human rights without discrimination**

12. As noted by the UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity ('**UN Independent Expert**'), all persons have some form of gender identity.<sup>13</sup> Depending on how their identity is perceived in a particular context, all persons can potentially be subject to violence and discrimination on that basis. The amici agree with the view of the UN Independent Expert that:

*The notion that there is a gender norm, from which certain gender identities "vary" or "depart" is based on a series of preconceptions that must be challenged if all humankind is to enjoy human rights. Those misconceptions include: that human nature is to be classified with reference to a male/female binary system on the basis of the sex assigned at birth; that persons fall neatly and exclusively into that system on the same basis; and that it is a legitimate societal objective that, as a result, persons adopt the roles, feelings, forms of expression and behaviours that are considered inherently "masculine" or "feminine." A fundamental part of the system is a nefarious power asymmetry between the male and the female.*

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8 *Schlumpf v. Switzerland*, no. 29002/02, 8 January 2009.

9 *YT v. Bulgaria*, no. 41701/16, 9 July 2020.

10 *YY v. Turkey*, no 14793/08, 10 March 2015, at §56 and §58.

11 UN Independent Expert A/73/152, 12 July 2018.

12 See, for example, *Kjeldsen, Busk Madsen and Pedersen v Denmark*, no 5095/71, 7 December 1976, at §53.

13 UN Independent Expert A/73/152, 12 July 2018.

13. Human rights are universal, indivisible, interdependent and interrelated.<sup>14</sup> International human rights instruments, including the ECHR, require States to undertake to respect, protect and fulfil the rights guaranteed within them.<sup>15</sup> This is reflected in Article 20 of the Romanian constitution.
14. International human rights bodies have recognised significant concerns about human rights violations based on gender identity, including gender expression, and the pressing need to overcome stereotypes both in respect of gender *and* sex to enable the protection and enjoyment of human rights by transgender and gender diverse people and women.<sup>16</sup>
15. State protection obligations extend to violations of, or interferences with, human rights, committed by third parties such as private individuals, corporations or religious groups. States are required to take operational steps to prevent and stop abuses where the State knew or ought to have known the individual or group of individuals were at risk and ensure that those subjected to abuse can access effective remedies capable of holding those responsible to account.<sup>17</sup>
16. In Romania, deficiencies in the protection of rights and persons under the ambit of gender identity were noted in a 2019 report prepared for the European Commission by legal experts in gender equality and non-discrimination.<sup>18</sup> The report notes:

*Although the LGBTI minority is explicitly protected by the Anti-discrimination Law, it remains the group most under attack, being the subject of legislative proposals aiming to restrict LGBTI rights and the target of acts of aggression during NGO-organised events....Transgender persons cannot invoke any legal protection, as the legislation does not provide any clear processes and standards for gender reassignment procedures or for the issuing of identity papers.*

17. The ECtHR has held that “*the LGBTI community in [Romania] finds itself in a precarious situation, being subject to negative attitudes towards its members.*”<sup>19</sup>
18. The inability to provide education in respect of gender identity as a result of Art. 7(1)(e) would exacerbate these protection deficiencies and increase discrimination, stigmatisation and exclusion from Romanian society of transgender and gender diverse individuals. It will further hamper the ability of State officials to comply with their international obligations to protect fundamental rights and could ultimately cause breaches of those rights.

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14 The Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

15 For example, under Article 1 of the ECHR, States are under an obligation to take all necessary measures to secure for everyone within their jurisdiction the rights and freedoms defined in the Convention. A similar provision can be found in Article 2(1) of the International Covenant on Civil and Political Rights (**‘the ICCPR’**).

16 See, for example, the concluding observations on the fifth periodic report of Peru, adopted by the UN Human Rights Committee at its 107th session (11–28 March 2013), CCPR/C/PER/CO/5, at para. 8

17 *Osman v UK*, no 23452/94, 28 October 1998, at §116,

18 *Country report, Non-discrimination, Romania 2019*, EU Directorate-General for Justice and Consumers.

19 *M.C. and A.C. v. Romania*, no. 12060/12, 12 April 2016, at §118.

19. International human rights bodies have been consistent in calling for specific action to remedy these types of human rights concerns related to gender identity.<sup>20</sup> These calls have included demands to strengthen anti-discrimination laws; review and repeal existing law restricting freedom of expression in respect of gender identity; and secure the human rights of transgender and gender diverse individuals across the education, law enforcement, judicial, health and social services sectors, through provision of information, training and public awareness campaigns.
20. Specifically, in respect of children, the UN Independent Expert has called for the adoption of all measures necessary to protect trans and gender-diverse children from all forms of discrimination and violence, including bullying.<sup>21</sup>
21. If it is impermissible to teach ‘gender ideology’, as defined by Art.7(1)(e), it necessarily follows that none of this action designed to promote and protect gender identity as understood in international law can be taken. In particular, if it is impermissible to conduct public or professional education programmes designed to eradicate stereotypes and discrimination in respect of gender, the abuses will persist.

**D. The law offends against the right to dignity, equality, identity, autonomy and the right to private life**

22. The consequence of Art.7(1)(e) is the refusal to recognise ‘gender identity’ where that differs from biological sex. As observed by the UN Independent Expert:

*...lack of legal recognition negates the identity of the concerned person to such an extent that it provokes what can be described as a fundamental rupture of State obligations.*

23. In addition to forming part of Romania’s Constitution, concepts of dignity and equality before the law are fundamental to and underpin the body of rights provided for by international human rights treaties to which Romania is a party.<sup>22</sup> Dignity has a stand-alone status in Article 1 of the CFR, is one of the foundational guiding values of the EU,<sup>23</sup> and is considered the very essence of the ECHR by the ECtHR.<sup>24</sup> Treatment which humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity may fall within the prohibition of Article 3.<sup>25</sup>

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20 See, for example, UN Independent Expert A/73/152, 12 July 2018; United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, A/HRC/29/23, 4 May 2015; European Parliament Resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, P7\_TA(2014)0062; Council of Europe Parliamentary Assembly resolution 2048 (2015) on discrimination against transgender people in Europe.

21 See Articles 2 (non-discrimination), 3 (best interests), 13 (freedom of expression) and 14 (freedom of thought, conscience and religion) of the UN Convention on the Rights of the Child (‘CRC’).

22 In addition to the ECHR and CFR, which are explicitly referred to here, the concept of dignity is an integral part of numerous other international instruments, including the Universal Declaration of Human Rights (Article 1), the ICCPR (preamble) and the International Covenant on Economic, Social and Cultural Rights (preamble and art 13).

23 Consolidated version of Treaty on European Union Art. 2: “*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.*” and Art. 21(1): “*The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.*”

24 See, for example, *Pretty v. UK*, no. 2346/02, 29 April 2002, at §65; *Bouvid v. Belgium*, no. 23380/09, 28 September 2005, at §89; *SW v. UK*, no. 20166/92, 22 November 1995, at §44; and *Christine Goodwin v. UK*, no. 28957/95, 11 July 2002, at §90.

25 *Pretty v. UK*, no. 2346/02, 29 April 2002, at §52

24. Romania's obligation to respect human rights also requires that it ensures equality before the law, equal protection of the law and freedom from discrimination in law and practice to all persons in Romania, regardless of gender, gender expression, gender identity, or sex in both public and private spheres.
25. The effective recognition of one's gender identity is linked to the right to equal recognition of persons before the law and equal protection of the law, established by Article 6 Universal Declaration of Human Rights and repeated across other human rights instruments.<sup>26</sup> Equal recognition before the law is fundamental to securing civil, political, social and economic rights. Crucially, it impacts the ability and willingness of a State to provide protection to those for whom it is responsible.
26. The right to non-discrimination, as enshrined in Article 14 of the ECHR and Protocol 12, art. 1, requires States to prohibit and prevent discrimination in private and public spheres and to diminish conditions and attitudes that cause or perpetuate such discrimination. Whilst the amici note that Romania prohibits discrimination on the grounds of both sex and gender under law 202/2002, Art.7(1)(e) would contravene this principle.
27. In the context of State obligations to respect, protect and fulfil the right to non-discrimination of women, CEDAW has identified that discrimination of women based on sex and gender is inextricably linked to other factors, including gender identity.<sup>27</sup> The Istanbul Convention calls for a gendered understanding of violence against women and domestic violence as a basis for all measures to protect and support victims of such violence. Article 12(1) frames the eradication of prejudices, customs, traditions and other practices – which are based on the idea of the inferiority of women or on stereotyped gender roles – as a general obligation to prevent violence.
28. Article 8 ECHR protects the right to private life, including personal autonomy and the freedom to establish one's own identity as individual human beings.<sup>28</sup> It can embrace aspects of an individual's physical and social identity.<sup>29</sup> The notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings.<sup>30</sup> As a qualified right, any State interference must be in accordance with the law and necessary in a democratic society.
29. Thus, trans and gender diverse/non-conforming people, whose gender may differ from their biological sex, and those people who reject roles stereotypically associated with their sex, have a right to develop their (gender) identities, without disproportionate State interference. The exercise of autonomy presupposes that people are given a range of valuable options from which to choose.<sup>31</sup> This will not be possible if education in respect of those options is restricted.

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26 Article 16 of the ICCPR; Article 15 of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'); Article 8 of the CRC; Article 12 of the Convention on the Rights of Persons with Disabilities; Articles 14 and Protocol 12 of the ECHR; Article 3 of the American Convention on Human Rights; and Article 3 of the African Charter on Human and Peoples' Rights.

27 CEDAW General Recommendation No 28, "The core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women", UN Doc CEDAW/C/GC/28 (2010), para. 9; para. 18

28 See *Christine Goodwin v.UK*, no. 28757/95, 11 July 2002, at §90; and *Gaskin v.UK*, no. 10454/83, 7 July 1989, at §39.

29 *Mikulić v. Croatia*, no 53176/99, 7 February 2002, at §53.

30 *Christine Goodwin v.UK*, no. 28757/95, 11 July 2002, at §90.

31 Opinion of Advocate General Maduro, at para 9, in *S. Coleman v Attridge Law and Steve Law*, C/303/06.

30. At its core, Art.7(1)(e) is thus incompatible with the rights to dignity, equality, identity, autonomy and privacy by way of:
- (i) the underlying assumption that gender is defined by sex, which directly impinges on the dignity of trans and gender diverse people operating to deny their identities; and
  - (ii) in prohibiting education on anything but a narrow view of gender and/or gender identity unsupported by international law.

In both these respects, Art.7(1)(e) proactively, disproportionately and in a discriminatory manner inhibits respect for the private life of those who are trans, gender diverse, or who reject roles stereotypically associated with biological sex.

#### **E. Education and freedom of expression, including expression of gender identity**

31. The President has raised various questions about the extent to which Art.7(1)(e) impinges on the right to freedom of thought, conscience and religion or belief (Article 9) – including the right not to hold a belief – and freedom of expression (Article 10) in the context of the interrelated right to education.<sup>32</sup> As with Article 8 ECHR, these rights are qualified and raise the issue of justification.

##### **i) Freedom of expression**

32. The ECtHR has found that “*such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society*” that freedom of expression 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.<sup>33</sup> Moreover, freedom to receive information “*basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him.*”<sup>34</sup>

##### **ii) Right to education**

33. The right to education directed to the full development of human personality and dignity is well established in international law.<sup>35</sup> Article 2 of Protocol 1 of the ECHR guarantees an individual the right to education, read in light of the ECHR as a whole and the right of parents to have their children educated in conformity with their religious and philosophical convictions.<sup>36</sup> However, this right is subject to the principle that, whilst decisions over the curriculum fall in principle within the competence of the State, the State “*must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.*”<sup>37</sup> This is to enable pupils to develop a critical mind with regard to religion in a calm atmosphere which is free of any misplaced proselytism and/or indoctrination.<sup>38</sup>

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32 See, for example, *Kokkinakis v. Greece*, no. 14307/88, 25 May 1993, at §81.

33 *Delfi v. Estonia*, no. 64569/09, 16 June 2015, at §131.

34 *Leander v. Sweden*, no. 9248/81, 26 March 1987, at §74.

35 ICESCR Art. 13, The right is directed to the full development of the human personality and the sense of its dignity, and it is considered to strengthen the respect for human rights and fundamental freedoms.

36 *Belgian Linguistics Case*, no 1474/62, 23 July 1968 at §5; *Leyla Sahin v Turkey*, no 44774/98, 10 November 2005, §154. The ECtHR has emphasised that the provisions of the Convention and Protocol must be read as a whole meaning that the two parts of Article 2 Protocol 1 must therefore be read not only in light of Article 1 Protocol 1 but also the other articles of the ECHR

37 *Kjeldsen, Busk Madsen and Pedersen v Denmark*, no 5095/71, 7 December 1976, at §53.

38 *Appel-Irrgang and others v Germany*, no. 45216/09, 6 October 2009, at p12.

34. Art.7(1)(e) will restrict academic freedoms of those who educate, those who receive education, and those whose opinion differs from the definition of ‘gender’ permitted by Art.7(1)(e). It would, for example, preclude teaching of certain legal principles derived from international human rights instruments; prevent the sensitizing of health-care workers, including doctors charged with the treatment of LGBT and intersex persons; and also prevent the education of teachers, social workers and others in an effort to prevent bullying and/or run helplines to support LGBT and gender non-conforming/diverse youth. It would be unlawful to train lawyers, law enforcement personnel and the judiciary in what (legally) constitutes discrimination on the grounds of gender or gender identity, how to recognise and protect against gender-based violence, and how to adopt a gender sensitive approach to victims of violence and abuse. This is inconsistent with the rights secured by Articles 8, 9 and 10 and Article 2 of Protocol 1 of the ECHR.
35. States have additionally been called upon to develop public education campaigns and train public officials to combat stigma and discriminatory attitudes, to provide victims of discrimination with effective and appropriate remedies and to ensure that perpetrators face administrative, civil or criminal responsibility, as appropriate.<sup>39</sup> This aim cannot be fulfilled if it is not possible to recognise gender identity or refer to a person as transgender in the context of education campaigns.

### iii) Istanbul Convention and Education

36. In his referral, the President has suggested that Art.7(1)(e) is in breach of Article 6 and Article 14 of the Istanbul Convention. Article 3 of the Istanbul Convention provides the following definition of ‘gender’:

*‘Gender’ shall mean the social constructed roles, behaviours, activities and attributes that a given society considers appropriate for men and women’ and ‘Gender based violence against women shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately’.*

37. Overcoming gender roles and stereotypes based on the idea of the inferiority of women or on stereotyped gender roles is framed in the Istanbul Convention as a general obligation to prevent violence.<sup>40</sup> The term ‘gender’ under this definition is explicitly not intended as a replacement for the terms ‘women’ and ‘men’ used in the Convention.<sup>41</sup>
38. Article 6 obligates Romania to include a gender perspective when implementing the provisions of the Istanbul Convention. The Convention thus *requires* that teaching materials be provided to combat stereotypes and that such education includes a gender perspective. Article 14 obligates Romania to take necessary steps to include teaching materials in education on, *inter alia*, non-stereotyped gender roles.

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39 See fn 20

40 See Article 12 of the Istanbul Convention. The explanatory report notes, at para 44, that in the context of violence against women and domestic violence, stereotyped notions of gender reproduce unwanted and harmful practices and lead to violence against women being considered acceptable, Istanbul Convention Explanatory Report CETS 210.

41 See the Explanatory Report CETS 210, para 43.

39. In addition to the duty to educate, Romania has an operational duty to protect victims of violence (see e.g. Articles 1, 4 and 12 of the Istanbul Convention). This duty has a practical extension: Article 15 of the Convention requires appropriate training of the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the Convention including ‘gender-based violence against women.’
40. Article 4(3) requires the Istanbul Convention to be applied without discrimination.<sup>42</sup> It does not limit its scope or protection to certain groups by defining, for example, who is or is not a woman. The Preamble explicitly recognises that men may also be victims of domestic violence. Thus the Convention protects and promotes the rights of any person who might experience gender-based violence, including transgender and gender diverse/non-conforming people, and women and men whose identity does not conform to what “*a given society considers appropriate for women and men.*”
41. In defining ‘gender theory’ the way it does and in prohibiting the teaching of such ‘theory’, Art.7(1)(e) prohibits: educators from teaching to combat stereotypes and providing training to professionals (as required by Articles 14 and 15 of the Istanbul Convention) in a way which is non-discriminatory on the basis of gender (as required by Article 4(3)). It also prohibits the concept of gender being defined as socially constructed (Article 3(c)). This would more generally lead to Romania precluding itself from fulfilling its obligation to protect victims of violence without discrimination on the basis of gender.

#### **F. In any event the proposed law cannot be justified**

42. As recorded by the UN Independent Expert, “[g]ender diversity is illegitimately repressed, generally under the umbrella of culture, religion and tradition.”<sup>43</sup> Issues related to gender identity fall within the most intimate part of an individual’s private life requiring *particularly serious reasons* to justify any interference<sup>44</sup> and/or discriminatory treatment.<sup>45</sup>
43. In so far as Art.7(1)(e) requires educators to *deny* the existence of diverse gender identities and propagate the idea that gender is the same as biological sex, the amici submit that it does not serve a legitimate aim. ‘Gender identity’, as it is now understood in international law, is not a *theory*, but a concept fundamental to human dignity, identity and autonomy, which Romania is obligated to protect without discrimination. The very denial or suppression of gender identity cannot therefore itself be a legitimate aim. The suppression of education in respect of gender identity leads to operational and actual breaches of fundamental rights and therefore cannot be legitimate.

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42 The Explanatory Report CETS 210 notes that non-discrimination provision at Article 4(3) was included in the Istanbul Convention to reflect Parties’ commitments to other human rights treaties, most explicitly Article 14 of the ECHR and Protocol 12 to the ECHR. The inclusion of ‘gender, sexual orientation, gender identity, age, state of health, disability, marital status and migrant or refugee or other status’ properly reflects the approach taken by the ECtHR to art. 14. See [8]-[9] above and e.g., §79 of Bălşan

43 ‘...(A/HRC/21/42, para. 65), resulting in a variety of normative constructions, the existence and enforcement of which have, over time, reinforced the preconceptions and stereotypes at their origin. Salient among these normative constructions are the interpretation of religious texts, through which certain forms of gender identity have been qualified as sinful; the adoption of laws, through which they have been typified as criminal; and their incorporation into medical classifications as pathologies.’ UN Independent Expert A/73/152, 12 July 2018, para 7

44 *YY v Turkey*, Application No 14793/08 at [101], *Goodwin v UK*, Application No 17488/90 at [74], *Van Kuck v Germany*, Application No 35968/97 at [73]; *S and Marper v UK*, Application nos. 30562/04 and 30566/04 at [101]-[102], *Fernandez Martinez*, Application no 56030/07 at [125].

45 *Eweida and Others v UK*, no 48420/10 and 51671/10 at [105]; *Karner v Austria*, no. 40016/98 at [37], *Smith and Grady*, cited above, at [90]; *Schalk and Kopf v Austria*, no. 30141/04 at [97]

44. The specific justification put forward in this case is that the law is required to prevent proselytism based on gender for the protection of morals.<sup>46</sup> The ECtHR has roundly rejected arguments that freedom of expression on LGBT issues can be justifiably restricted on the grounds of protection of morals, in particular, where those reasons are representative of a predisposed bias on the part of a heterosexual majority against a homosexual minority,<sup>47</sup> and where there are concerns in respect of gender reassignment surgery becoming ‘commonplace’ or being misused by certain sections of society.<sup>48</sup> In circumstances where parents’ religious beliefs, sense of morality and/or appropriateness conflicts with the content of state education of children, the ECtHR consistently weigh the balance in favour of pluralism, objectivity, and the right of children to develop their own views.

45. The two cases below aim to demonstrate these principles by analogy:

iv) **Dojan and others v. Germany, no 319/08; 2455/08;7908/10, 13 September 2011**

46. The applicants complained that their children’s compulsory attendance at, *inter alia*, sexual education classes – and the refusal of the domestic authorities to exempt their children – breached Article 2 of Protocol 1 of the ECHR. The aim of the classes had been to provide pupils with knowledge of biological, ethical, social and cultural aspects of sexuality according to their age and maturity. In turn, this knowledge was intended to enable them to develop their own moral views and an independent approach towards their own sexuality. The Court found that those objectives were consonant with the principles of pluralism and objectivity embodied in the provision.. The Court further found that there was no indication that the education provided had put into question the parents’ sexual education of their children based on their religious convictions or that the children had been influenced to approve of or reject specific sexual behaviour contrary to their parents’ religious and philosophical convictions.

v) **Bayev and others v Russia, no 67667/09, Judgment of 20 June 2017,**

47. The applicants challenged their conviction for the administrative offence of “*public activities aimed at the promotion of homosexuality among minors*”. They complained that the ban which they had defied breached their right to freedom of expression under Article 10 of the ECHR. The Government of Russia accepted the ban constituted an interference. However, it advanced the argument that there was an incompatibility between maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality. The Court rejected that argument and emphasized that there was not just one way or one choice when it comes to leading one’s family or private life. It held that these negative attitudes on the part of a heterosexual majority cannot of themselves amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour.

#### IV. **Conclusion**

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46 Expunere de Motive, Legea nationale nr. 1/2011, Vasile Cristian Lungu, Senator de Salaj

47 *Lustig-Prean and Beckett v. UK*, nos. 31417/96 and 32377/96, 27 September 1999; *Smith and Grady v. UK*, nos. 33985/96 and 33986/96, 27 September 1999; *Perkins and R. v. UK*, nos. 43208/98 and 44875/98, 22 October 2002; and *Beck, Copp and Bazeley v. UK*, nos. 48535/99, 48536/99 and 48537/99, 22 October 2002.

48 *YY v Turkey*, Application No 14793/08, 10 June 2015 - see 76-80. See also 100-122 in which the ECtHR rejected this argument in part on the basis that the margin of appreciation is narrower where intimate or ‘key’ rights are at stake, and on the basis of the increased social acceptance of trans people

48. As detailed above, Art.7(1)(e) violates the following human rights enshrined in the ECHR:
- (i) the right to equality before the law and equal protection of the law;
  - (ii) the right to respect for identity, autonomy and private life;
  - (iii) the rights to freedom of opinion and belief, expression and assembly; and
  - (iv) the right to enjoy one's rights without discrimination and not to be subjected to unjustifiable discrimination by a public authority including on the grounds of gender and gender identity.
- The provision further violates the provisions of the Istanbul Convention namely Articles 3 (definition), 6, 12 and 14.
49. These various interferences with and restrictions on fundamental rights cannot be justified on the basis that they protect the rights of persons who believe that gender is defined by sex. Since the law infringes the fundamental rights of others, any restriction would require particularly serious reasons by way of justification, which are not present. Further, no matter how genuinely the belief enforced by Art.7(1)(e), the consequences of the prohibition contained in the law are so detrimental to the rights we have identified that any interference with the belief must be proportionate. This is because that interference, which protects the rights of others identified above, is obligated by the ECHR and the other international instruments to which Romania is party.
50. In light of the above, the amici submit that, *mutatis mutandis*, Romania's obligation under international human rights law to respect human rights guaranteed in the numerous international human rights instruments by which it is bound, require it to refrain from effectively adopting Art.7(1)(e) given the expressly discriminatory nature of such a measure.

## Annex I      The Amici

1. **ACCEPT Association** is a non-governmental organization that aims to defend and promote human rights, as provided in the Romanian Constitution and in the international treaties to which Romania is a party. ACCEPT defends and promotes in particular the rights of LGBTI people (lesbian, gay, bisexual, transgender and intersex) and has a legitimate interest in preventing and combating discrimination on the grounds of sexual orientation and gender identity, as set out in the statutory provisions (Articles 5 and 6 of the ACCEPT Statute) and the activities it carries out, including cases of strategic litigation before national and European courts (ECHR, CJEU). The ACCEPT Association also directly supports the rights of LGBTI people in Romania by providing support, counselling and assistance, including legal assistance, to people in the community for more than 25 years.
2. **The AIRE Centre** was founded in 1993 and is a London-based NGO whose mission is to promote awareness of European law rights and assist vulnerable and marginalised individuals to vindicate those rights. The AIRE Centre regularly provides training to judges, lawyers and NGOs throughout Europe on the Convention, and particularly on the rights of lesbian, gay, bisexual, transgender and intersex (“LGBTI”) individuals under the Convention. The AIRE Centre also provides free legal advice on EU law and the intersection of EU law and the Convention.
3. **The Center for Reproductive Rights** is one of the world’s leading legal human rights organizations in the field of gender equality and sexual and reproductive health and rights. The Center works to advance the respect, protection and fulfilment of women’s human rights in the field of reproductive health. To this end the Center engages in strategic litigation to advance women’s human rights and in this capacity, has filed and won several landmark cases before international and regional courts and quasi-judicial bodies. The Center has also filed and won major domestic cases on women’s reproductive health and rights in a range of national jurisdictions. The Center regularly submits third-party interventions in national and international cases which are often relied upon by national courts and international bodies in their determinations. The Center’s expertise is also frequently called upon by regional and international human rights bodies, such as the Council of Europe and the UN treaty monitoring bodies.
4. **FIDH** (Fédération Internationale pour les Droits Humains: <http://www.fidh.org>), founded in 1922, is an international human rights non-governmental organisation with its headquarters in Paris, France. It brings together 192 national human rights organisations from 117 countries in all regions of the world. FIDH's mandate is to defend all human rights enshrined in the Universal Declaration of Human Rights, including the right to be free from discrimination. FIDH is involved in strategic litigation before domestic jurisdictions (France, Guinea Conakry, Ivory Coast, etc), regional courts and bodies (African Commission and Court on Human and Peoples' Rights, Inter-American Court of Human Rights, European Committee of Social Rights, European Court of Human Rights) and international/ised jurisdictions (International Criminal Court, Extraordinary Chambers in the Courts of Cambodia).
5. **ILGA-Europe** (The European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association: <https://www.ilga-europe.org>) was founded in 1996 and is based in Brussels. It seeks to defend the human rights of those who face discrimination on grounds of sexual orientation, gender identity or gender expression and sex characteristics, at the European level. It was granted

consultative status with the Council of Europe in 1998 and with the United Nations Economic and Social Council in 2006. Its membership consists of over 500 nongovernmental organizations across the Council of Europe countries and Central Asia. ILGA-Europe has frequently intervened before the European Court of Human Rights and domestic courts in cases concerning discrimination based on sexual orientation, gender identity or expression, and sex characteristics.

6. **Transgender Europe** (TGEU, <http://tgeu.org/>) is a not-for-profit regional umbrella organization working for equality and the advancement of the human rights of transgender persons in Europe. Founded in 2005, it represents 109 member organizations and 200 individual members in 42 countries and is registered under German law. TGEU advocates for the rights of transgender persons at the Council of Europe (where it has participatory status), the European Union and the Organization for Security and Cooperation in Europe, builds capacity of organizations and initiatives supporting transgender equality and rights at the national level and engages in research into the human rights situation of transgender people in Europe and other parts of the world.

## Annex II Recommendations of International Bodies

1. **European Parliament resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity (2013/2183(INI))** calls for the European Commission, Member States and relevant agencies to work on a comprehensive multiannual policy to protect the fundamental rights of LGBTI people. It's recommendations are [emphasis added]:

A. whereas the European Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities;

B. whereas in defining and implementing its policies and activities, the European Union aims to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;

C. whereas in June 2013 the Council of the European Union adopted strong guidelines to promote and protect the enjoyment of all human rights by LGBTI persons outside the European Union, and should ensure that they are protected effectively inside the EU;

**D. whereas the European Union already coordinates its action through comprehensive policies in the field of equality and non-discrimination through the 'Framework strategy for non-discrimination and equal opportunities for all', in the field of gender equality through the 'Strategy for equality between women and men 2010-2015', in the field of disability through the 'European Disability Strategy 2010-2020', and in the field of equality for Roma persons through the 'EU Framework for National Roma Integration Strategies up to 2020';**

E. whereas in its 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union', the Commission has acknowledged the necessity of developing individual policies concerning certain specific fundamental rights on the basis of the Treaties;

F. whereas in the 2013 EU LGBT survey, the European Union Agency for Fundamental Rights (FRA) found that across the EU in the year preceding the survey one in two LGBT respondents felt discriminated against or harassed on grounds of sexual orientation, one in three were discriminated against when accessing goods or services, one in four were physically attacked, and one in five were discriminated against in employment or occupation;

**G. whereas the FRA recommended that the EU and Member States develop action plans promoting respect for LGBT persons and protection of their fundamental rights;**

H. whereas in May 2013 11 equality ministers<sup>(5)</sup> called on the Commission to issue a comprehensive EU policy for LGBT equality, and 10 Member States<sup>(6)</sup> have already adopted or are discussing similar policies at national and regional levels;

I. whereas the European Parliament has asked 10 times for a comprehensive European Union policy instrument for equality on grounds of sexual orientation and gender identity;

2. Council of Europe Parliamentary Assembly Resolution 2048 (2015) *Discrimination against transgender people in Europe* calls inter alia, for extensive anti-discrimination legislation and policies, European states to prohibit discrimination and implement human rights standards and for the provision of information, awareness raising and training specifically calls for [emphasis added]:

1. The Parliamentary Assembly regrets that transgender people face widespread discrimination in Europe. This takes a variety of forms, including difficulties in access to work, housing and health services, and transgender people are frequently targeted by hate speech, hate crime, bullying and physical and psychological violence. Transgender people are also at particular risk of multiple discrimination. The fact that the situation of transgender people is considered as a disease by international diagnosis manuals is disrespectful of their human dignity and an additional obstacle to social inclusion.
2. Awareness of the situation of transgender people is largely insufficient among the general public and accurate, unbiased information in the media is scarce. This leads to higher levels of prejudice and hostility which could be avoided.
3. The Assembly is concerned about the violations of fundamental rights, notably the right to private life and to physical integrity, faced by transgender people when applying for legal gender recognition; relevant procedures often require sterilisation, divorce, a diagnosis of mental illness, surgical interventions and other medical treatments as preconditions. In addition, administrative burdens and additional requirements, such as a period of “life experience” in the gender of choice, make recognition procedures generally cumbersome. Furthermore, a large number of European countries have no provisions on gender recognition at all, making it impossible for transgender people to change the name and gender marker on personal identity documents and public registers.
4. A number of Council of Europe member States have recently reformed their legislation on legal gender recognition or are in the process of doing so. Some regulations are based on the principle of self-determination and do not require long and complex procedures or the involvement of medical practitioners or psychiatrists.
5. The Assembly welcomes, in this context, the emergence of a right to gender identity, first enshrined in the legislation of Malta, which gives every individual the right to recognition of their gender identity and the right to be treated and identified according to this identity.
6. In the light of these considerations, the Assembly calls on member States to:

**6.1.** as concerns anti-discrimination legislation and policies:

**6.1.1.** explicitly prohibit discrimination based on gender identity in national non-discrimination legislation and include the human rights situation of transgender people in the mandate of national human rights institutions, with an explicit reference to gender identity;

6.1.2. implement international human rights standards, including the case law of the European Court of Human Rights in this field, without discrimination on grounds of gender identity;

6.1.3. collect and analyse information and data on the human rights situation of transgender people, including discrimination on grounds of gender identity and multiple discrimination, as well as transphobic intolerance and hate crimes; these data are necessary for the design and implementation of anti-discrimination legislation and policies and for the monitoring of their impact;

6.1.4. enact hate crime legislation which affords specific protection for transgender people against transphobic crimes and incidents; provide specific training to sensitise law-enforcement officials and members of the judiciary;

6.1.5. provide effective protection against discrimination on grounds of gender identity in access to employment in the public and private sectors and in access to housing, justice and health care;

6.1.6. involve and consult transgender people and their organisations when drafting and implementing policy and legal measures which concern them;

6.2. as concerns legal gender recognition:

6.2.1. develop quick, transparent and accessible procedures, based on self-determination, for changing the name and registered sex of transgender people on birth certificates, identity cards, passports, educational certificates and other similar documents; make these procedures available for all people who seek to use them, irrespective of age, medical status, financial situation or police record;

6.2.2. abolish sterilisation and other compulsory medical treatment, as well as a mental health diagnosis, as a necessary legal requirement to recognise a person's gender identity in laws regulating the procedure for changing a name and registered gender;

6.2.3. remove any restrictions on the right of transgender people to remain in an existing marriage upon recognition of their gender; ensure that spouses or children do not lose certain rights;

6.2.4. consider including a third gender option in identity documents for those who seek it;

6.2.5. ensure that the best interests of the child are a primary consideration in all decisions concerning children;

**6.3.** as concerns gender reassignment treatment and health care:

**6.3.1.** make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible for transgender people, and ensure that they are reimbursed by public health insurance schemes; limitations to cost coverage must be lawful, objective and proportionate;

**6.3.2.** include transgender people explicitly in suicide prevention research, plans and measures; explore alternative trans health-care models, based on informed consent;

**6.3.3.** amend classifications of diseases used at national level and advocate the modification of international classifications, making sure that transgender people, including children, are not labelled as mentally ill, while ensuring stigma-free access to necessary medical treatment;

**6.4.** as concerns information, awareness raising and training:

**6.4.1.** address the human rights of transgender people and discrimination based on gender identity through human rights education and training programmes, as well as awareness-raising campaigns aimed at the general public;

**6.4.2.** provide information and training to education professionals, law-enforcement officers and health-service professionals, including psychologists, psychiatrists and general practitioners, with regard to the rights and specific needs of transgender people, with a special focus on the requirement to respect their privacy and dignity.

51. The UN Independent Expert made the following Recommendations in report *Protection against violence and discrimination based on sexual orientation and gender identity*, 12 July 2018, A/73/152 [emphasis added]:

75. These recommendations should be read in conjunction with those included in previous reports of the mandate holder to the Human Rights Council and the General Assembly insofar as they are relevant to the analysis and conclusions presented above.

(a) Enact recognition systems for the gender identity of trans and gender-diverse children, taking into account the best interests of the child as a primary consideration and respect for the child's right to express views in accordance with age and maturity, in line with the Convention on the Rights of the Child (arts. 3 (1) and 12 and general comments Nos. 12 and 14) and, in particular, in keeping with the safeguards established pursuant to article 19 of the Convention, which must not be excessive or discriminatory in relation to other safeguards that give recognition to the autonomy and decisional power of children of a certain age in other areas. States should also fulfil their obligation to ensure to the maximum extent possible the survival and development of the child (art. 6 and general comment No. 5) and the creation of an environment that respects human dignity;

(b)Eliminate abusive requirements as prerequisites for change of name, legal sex or gender, including forced, coerced or otherwise involuntary sterilization; medical procedures related to transition, including surgeries and hormonal therapies; undergoing medical diagnosis, psychological appraisals or other medical or psychosocial procedures or treatment; requirements relating to economic status; health; marital, family or parental status; and any third-party opinion. This should extend to ensuring that a person’s criminal record, immigration status or other status is not used to prevent a change of name, legal sex or gender;

(c)Carefully review the reasoning behind the gathering and exhibition of certain data, and the rules governing data management, which must include separate considerations for the need to gather and the need to exhibit, as well as rigorous adherence to risk assessment and management considerations under the “do no harm” principle, and the participation of the affected populations and communities in the design, implementation and evaluation of the data-gathering systems. States must refrain from gathering and exhibiting data without a legitimate, proportionate and necessary purpose and ensure that, when data must be collected, it should be done on the basis of self-determination, while respecting privacy and confidentiality;

(d)Enact gender recognition systems concerning the rights of trans persons to change their name and gender markers on identification documents. The procedure involved should ensure due respect for free and informed choice and bodily autonomy. In particular, taking into account identified best practices, the processes should:

(i)Be based on self-determination by the applicant;

ii)Be a simple administrative process;

(iii)Be confidential;

(iv)Be based solely on the free and informed consent of the applicant without requirements such as medical and/or psychological or other certifications that could be unreasonable or pathologizing;

(v)Acknowledge and recognize non-binary identities, such as gender identities that are neither “man” nor “woman” and offer a multiplicity of gender marker options;

(vi)Be accessible and, to the extent possible, cost-free;

(e)Examine seemingly neutral requirements that are prerequisites for change of name, legal sex or gender for potential or actual disproportionate effects in the light of the realities of the trans populations in each given context.