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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

DRAFT *AMICUS CURIAE* BRIEF

**FOR THE CONSTITUTIONAL COURT OF THE REPUBLIC OF
MOLDOVA**

ON

**THE CLARITY OF PROVISIONS
ON COMBATING EXTREMIST ACTIVITIES**

On the basis of comments by

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Mr Christoph GRABENWARTER (Member, Austria)
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I. Introduction

1. By a letter dated 4 August 2022, Ms Domnica Manole, President of the Constitutional Court of the Republic of Moldova, submitted a request for an *amicus curiae* brief to the Venice Commission. This request refers to several provisions of Law No. 102, as adopted on 14 April 2022, which, *inter alia*, introduced amendments to the Law on Countering Extremist Activity (No. 54/2003, hereafter “LCEA”) and the Contravention Code (No. 218/2008) introducing a ban on the dissemination of symbols associated with and used in military aggression actions and imposing contraventional liability against the offence.

2. Ms Veronika Bílková (Member, Czech Republic), Mr Christoph Grabenwarter (Member, Austria) and Mr Jan Velaers (Member, Belgium) acted as rapporteurs for this Opinion.

3. It should be noted that the relevant provisions of Law No. 102 were also subject of another request to the Venice Commission: by a letter dated 28 April 2022, Ms Daniela Cujbă, Permanent Representative of the Republic of Moldova to the Council of Europe, transmitted to the Commission the letter of the Bloc of Communists and Socialists, a Parliamentary Faction in the Parliament of the Republic of Moldova, dated 20 April 2022, requesting an opinion of the Venice Commission on certain provisions of two draft laws which have in the meantime been adopted as Laws No. 102 and 143 (see CDL-REF(2022)026 and CDL-REF(2022)027)). Law No. 143 introduced amendments to the Audiovisual Media Services Code (No. 174/2018) and was designed to counter the risks to information security and the spread of fake news and disinformation in the context of the war in Ukraine. That opinion request is dealt with in a separate Opinion.

4. This Opinion was prepared in reliance on the English translation of the laws. The translation may not accurately reflect the original version on all points.

5. This Opinion was drafted on the basis of comments by the rapporteurs. [The draft opinion was examined at the meeting of the Sub-Commission on *** on *** 2022]. It was adopted by the Venice Commission at its *** Plenary Session (Venice, *** 2022).

II. Preliminary remarks

6. The intention of an *amicus curiae* brief for the Constitutional Court of the Republic of Moldova is not to take a final stand on the issue of the constitutionality of the relevant provisions of Law No. 102 as adopted on 14 April 2022, but to provide the Constitutional Court with material to assess the compatibility of the disputed provisions with the applicable European standards in order to facilitate its own consideration under the Constitution of the Republic of Moldova. It is the Constitutional Court that has the final say as regards the binding interpretation of the Constitution and the compatibility of national legislation with it.

III. Background

8. On 14 April 2022, the Parliament of the Republic of Moldova adopted Law No. 102 on Amendments to Some Normative Acts which, *inter alia*, introduced amendments to the Law on Countering Extremist Activity (No. 54/2003, hereafter “LCEA”) and the Contravention Code (No. 218/2008). The adopted Law No. 102 was signed by the President of the Republic on 19 April 2022 and entered into force on 20 April 2022, the day of publication in the Official Journal. Article I of Law No. 102 amends the LCEA of 2003 expanding the categories of symbols whose use is considered to fall under the definition of extremist activity. Article II point 98 of Law No. 102 introduces two new contraventions to the Contravention Code of 2008, one of them (Article 365⁵) linked to the use of symbols.

7. On 3 May 2022, two deputies (representing the Bloc of Communists and Socialists) made an application to the Constitutional Court, asking it to review the constitutionality of Articles I and II point 98 of Law No. 102 and to suspend the operation of Article II point 98. The deputies argued that these provisions violated the right to freedom of expression enshrined in Article 32 of the Constitution, because the ban concerned symbols that did not inherently threaten public order or morality.¹

8. On 5 May 2022, the Constitutional Court rejected the request for the suspension of the operation of Article II point 98 of Law No. 102 on the account that this request was not sufficiently motivated.² The request for the assessment of the constitutionality of Article I and Article II point 98 of Law No. 102 is still pending before the Court and forms the basis for the request for this *amicus curiae* brief, which contains two specific questions:

1) *Do the disputed provisions of Article 1 of the Law No. 54/2003 and Article 365⁵ of the Contravention Code comply with the requirements of clarity of law, as they derive from European legal standards?*

2) *Is it in accordance with European legal standards in the matter of freedom of expression to establish contraventional liability based on the Article 365⁵ of the Contravention Code?*

Therefore, the scope of this Opinion is limited to the two questions raised in the request.

IV. International and national legal framework

A. Human rights standards

9. The use of political symbols is not regulated by any special international instruments. Yet, since such a use constitutes an expression of certain ideas or affiliations, it generally falls under the *right to freedom of expression*. The operation of the media is also covered by this right. The right to freedom of expression is protected both in international law and at the national level.

¹ Депутаты БКС обратились в КС: Закон о запрете Георгиевской ленты в Молдове является попыткой стереть историческую память, *Комсомольская правда*, 3 мая 2022.

² Constitutional Court of the Republic of Moldova, Decision regarding the request for suspension of the action of Article II point 98 of Law No. 102 of 14 April 2022 on Amendments to Some Normative Acts, Notification No. 54a/2022, 5 May 2022.

10. Article 10 of the ECHR states that “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers [...]” (paragraph 1). This right may be restricted, if the restrictions are “prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary” (paragraph 2). The right to freedom of expression is also guaranteed by Article 19 of the Universal Declaration of Human Rights (UDHR) and by Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which also regulates possible restrictions similar to those mentioned in Article 10 of the ECHR. Attention is furthermore drawn to Article 20, paragraph 1 of the ICCPR according to which “any propaganda for war shall be prohibited by law.”

11. Article 32 of the Constitution of the Republic of Moldova guarantees “the freedom of thought and opinion, as well as the freedom of expression in public by way of word, image or any other means possible” (paragraph 1). It adds that “the law shall forbid and prosecute all actions aimed at denying and slandering of the State and people, the instigation to sedition, war of aggression, national, racial or religious hatred, the incitement to discrimination, territorial separatism, public violence, or other manifestations encroaching upon the constitutional regime” (paragraph 3). In addition, Article 34 guarantees the right of access to information. By means of Article 54 of the Constitution, the rights enshrined in Articles 32 and 34 may be restricted under the same conditions as are those foreseen in the ECHR.

12. The requirement that any restriction of the right to freedom of expression must be prescribed by law means that it must have a legal basis and that this legal basis must meet certain qualities – it must be adequately accessible and formulated with sufficient precision.³ If the law criminally sanctions a certain conduct, the lack of specificity could further entail the violation of the principle of legality (*nullum crimen sine lege*) as granted by Article 7 of the ECHR.

13. More precisely, the requirement of adequate accessibility means that the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. And foreseeability of the law implies that a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his/her conduct: s/he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁴ As underlined by the UN Human Rights Committee, “Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not” and they must comply with the non-discrimination provision of the Covenant.⁵

14. It should be noted that in the case-law of the ECtHR there are also judgments in which Article 10 of the ECHR is not applicable at all by virtue of Article 17 of the ECHR.⁶ The ECtHR draws a

³ ECtHR, *Sunday Times v. United Kingdom*, no. 6538/74, 26 April 1979, paragraph 49.

⁴ See ECtHR, *Sunday Times v. United Kingdom*, no. 6538/74, 26 April 1979, paragraph 49. See also communication No. 578/1994, *de Groot v. The Netherlands*, Views adopted on 14 July 1995; Venice Commission, CDL-AD(2015)015, Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, paragraph 22; Venice Commission, CDL-AD(2021)050, Hungary - Opinion on the compatibility with international human rights standards of Act LXXIX amending certain Acts for the protection of children, paragraph 43.

⁵ United Nations Human Rights Committee, General comment No. 34: Article 19: Freedom of opinion and expression, paragraph 25.

⁶ Article 17 of the ECHR states: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction

line where programmes glorify violence and terror propaganda and therefore violate the fundamental values of the ECHR.⁷ Furthermore, statements pursuing the unequivocal aim of justifying war crimes (such as torture or summary executions) amount to deflecting Article 10 of the ECHR from its real purpose and may therefore not fall in the scope of protection of this Article.⁸ At the same time, it must be stressed that according to the settled case-law of the ECtHR, Article 17 of the ECHR is only applicable in exceptional and extreme cases⁹ and that a variety of factors (such as the context¹⁰ and the impact of the impugned conduct¹¹) must be taken into account. This requires an in-depth case-by-case analysis of the measure in question in the context of an individual case.¹² A general assessment on the application of Article 17 of the ECHR with respect to the measures in question is hardly possible.

15. The use of political symbols may moreover be linked to *other human rights*, such as the right to freedom of religion (religious symbols, such as the cross) or the right to freedom of association (religious societies using religious symbols, political parties using political symbols, etc.). These rights are also enshrined in international human rights instruments and in the Constitution of the Republic of Moldova.¹³

B. Opinions and Studies of the Venice Commission and the OSCE/ODIHR

16. The Venice Commission has assessed the compatibility with international standards of national legal acts prohibiting the use of certain symbols in two instances. In 2013, the Venice Commission, together with the OSCE/ODIHR, adopted the Joint Amicus Curiae Brief for the Constitutional Court of Moldova on the compatibility with European Standards of Law No. 192 of 12 July 2012 on the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies of the Republic of Moldova.¹⁴ In 2015, the two institutions adopted the Joint Interim Opinion on the Law of Ukraine on the Condemnation of the Communist and National Socialist (Nazi) Regimes and Prohibition of Propaganda of their Symbols.¹⁵

17. In the two opinions, the Venice Commission and the OSCE/ODIHR noted that “*States are not prevented from banning, or even criminalising, the use of certain symbols [...]*”¹⁶ but recalled

of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

⁷ Cf. ECtHR, *Roj TV A/S v. Denmark*, no. 24683/14, 17 April 2018.

⁸ ECtHR, *Orban and Others v. France*, no. 20985/05, 15 January 2009, paragraph 35.

⁹ ECtHR [GC], *Perinçek v. Switzerland*, no. 27510/08, 15 October 2015, paragraph 114.

¹⁰ See e.g. ECtHR [GC], *Perinçek v. Switzerland*, no. 27510/08, 15 October 2015, paragraph 239; ECtHR, *Garaudy v. France*, no. 65831/01, 24 June 2003.

¹¹ See e.g. ECtHR, *Roj TV A/S v. Denmark*, no. 24683/14, 17 April 2018, paragraph 47, where the court took into account the wide audience of television.

¹² Cf. Venice Commission and OSCE/ODIHR, CDL-AD(2013)004, Joint Amicus Curiae Brief for the Constitutional Court of Moldova on the compatibility with European Standards of Law No. 192 of 12 July 2012 on the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies of the Republic of Moldova, paragraph 67.

¹³ See Article 9 (Freedom of thought, conscience and religion) and Article 11 (Freedom of assembly and association) of the ECHR; Article 18 (Freedom of Thought, Conscience and Religion) and Article 22 (Freedom of Association) of the ICCPR; Article 31 (Freedom of Conscience) and Article 41 (Freedom of Parties and Other Socio-Political Organisations) of the Constitution of the Republic of Moldova.

¹⁴ Venice Commission and OSCE/ODIHR, CDL-AD(2013)004, Joint Amicus Curiae Brief for the Constitutional Court of Moldova on the compatibility with European Standards of Law No. 192 of 12 July 2012 on the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies of the Republic of Moldova.

¹⁵ Venice Commission and OSCE/ODIHR, CDL-AD(2015)041, Joint Interim Opinion on the Law of Ukraine on the Condemnation of the Communist and National Socialist (Nazi) Regimes and Prohibition of Propaganda of their Symbols.

¹⁶ Venice Commission and OSCE/ODIHR, CDL-AD(2013)004, paragraph 124. See also Venice Commission and OSCE/ODIHR, CDL-AD(2015)041, paragraph 116.

that such a ban or criminalisation needs to comply with the requirements of lawful restrictions foreseen by international human rights instruments (legality, legitimacy, and necessity in a democratic society).

18. References to political symbols can also be found in some general studies such as the Joint Guidelines on Political Party Regulation, according to which parties may be required to communicate their symbols and states may prohibit the use of symbols associated with national or religious institutions, in order to avoid possible confusion.¹⁷ The emphasis is placed on the risk of the use of similar symbols by different parties or other institutions and on the ensuing risk of confusion between them, not on the ban of symbols *per se*.

19. The Venice Commission has also adopted many opinions pertaining to various aspects of the freedom of the media, but not with respect to the Republic of Moldova.

20. In 2019, the OSCE/ODIHR issued an Opinion on the previous version of the Law on Countering Extremist Activity of the Republic of Moldova. One of the recommended revisions concerns the original provision on the use of symbols, where the OSCE/ODIHR recommends to “reconsider the reference to the symbols and emblems of so-called “other extremist organisations””.¹⁸ This particular issue is not the object of the current amendments and, as such, it remains outside the scope of the present Opinion.

C. National legal regulation related to the use of symbols: examples

21. Over the years, some states have adopted legal acts regulating the use of certain symbols. Some symbols, such as state symbols (flags, coats of arms) or internationally recognised symbols (e.g. the red cross, red crescent and red crystal¹⁹), have been granted special protection. Other symbols, on the contrary, have been subject to restrictions and bans. This has traditionally been the case of symbols related to the Nazi regime (e.g. the swastika), whose use is outlawed in several countries (e.g. in Austria,²⁰ Belarus,²¹ Brazil,²² France,²³ and the Russian Federation²⁴). Since 1990, moreover, the use of communist symbols (e.g. the hammer and sickle and the red star) has been outlawed in several countries as well (e.g. in Czechoslovakia,²⁵ Hungary,²⁶ Latvia,²⁷ Lithuania,²⁸ Poland²⁹ and Ukraine³⁰). Some countries, moreover, prohibit the use of

¹⁷ Venice Commission and OSCE/ODIHR, CDL-AD(2020)032, Joint Guidelines on Political Party Regulation, paragraph 89. See also Venice Commission, CDL-INF(2000)001, Guidelines on the Prohibition or Dissolution of Political Parties and Analogous Measures, p. 14.

¹⁸ OSCE/ODIHR, Opinion No. FOE-MDA/344/2018, Opinion on the Law on Countering Extremist Activity of the Republic of Moldova, 30 December 2019, paragraph 12, point B.

¹⁹ See The Protection of the Red Cross, Red Crescent and Red Crystal Emblems, Fact Sheet, International Committee of the Red Cross, 24 March 2014.

²⁰ Austria, Law No. 84/1960, Law No. 117/1980.

²¹ Belarus, Administrative Code, Article 17.10.

²² Brazil, Law No. 7716, Article 20, 5 January 1989.

²³ France, Criminal Code, Article R645-1.

²⁴ Russian Federation, Code of Administrative Offence, Article 20.3.

²⁵ Czechoslovakia, Criminal Code, § 260 – Support for and propaganda of movements aimed at suppressing rights and freedoms of citizens, 1991.

²⁶ Hungary, Criminal Code, Section 269/B – The use of totalitarian symbols.

²⁷ Latvia, Amendments to the Law on the Safety of Public Entertainment and Festive Events, 20 June 2013. The Law prohibits distribution and display of both Nazi and communist (Soviet) symbols.

²⁸ Lithuania, Administrative Law, Article 188.18 – Distribution or demonstration of Nazi or Communist symbols, 2008. The Law prohibits distribution and display of both Nazi and communist (Soviet) symbols.

²⁹ Poland, Act of 5 November 2009 amending the Penal Code, the Code of Criminal Procedure, the Executive Penal Code, the Penal Fiscal Code and certain other acts (Journal of Laws - Dz. U. No. 206, item 1589).

³⁰ Ukraine, Law of Ukraine No. 317 on the Condemnation of the Communist and National Socialist (Nazi) Regimes and Prohibition of Propaganda of Their Symbols, 9 April 2015.

totalitarian or unconstitutional symbols without specifying which concrete symbols fall under this qualification (e.g. Albania,³¹ the Czech Republic,³² Germany,³³ Italy³⁴ and Slovakia³⁵).

22. Following the annexation of Crimea by the Russian Federation in March 2014 and, especially, the Russian invasion into Ukraine – amounting to an act of aggression³⁶ – on 24 February 2022, several countries (mainly those neighbouring the Russian Federation) have adopted regulations banning the use of certain symbols that could be associated with these unlawful acts.

23. One of the first countries where the prohibition was discussed was Belarus. In September 2018, an online petition seeking the ban of the public use of the two-colour (black and orange) Saint George's Ribbon reached the Belarusian Parliament. It was, however, rejected, with the head of the education, culture and science committee at the House of Representatives arguing that *“the fact that the ribbon of Saint George is being used for certain political purposes nowadays cannot change the positive attitude to it as it is one of the symbols of the Victory. [...] Banning it would be like a spit in the face of those few living fighters against fascists. It would humiliate our memory about numerous victims of the war”*.³⁷

24. On 11 November 2021, the Latvian Parliament (*Saeima*) adopted amendments to the Law on the Security of Public Entertainment and Festivities and to the Law on Meetings, Processions and Pickets. Those amendments ban the use at public events of the Saint George's Ribbon on the account that it had become a symbol of the Russian hybrid war. The offence is punishable by fines up to 350 Euros for individuals and 2,900 Euros for legal persons. Another amendment to these laws was adopted by the *Saeima* on 4 April 2022, extending the ban to *“symbols used in stylistics identifying military aggression and war crimes, except where there is no purpose to justify or glorify such crimes”*.

25. On 19 April 2022, the Lithuanian Parliament (*Seimas*) passed amendments to the Law on Administrative Offences and the Law on Assemblies, prohibiting the public display of *“symbols of totalitarian or authoritarian regimes that were used or are being used by those regimes for their past or present military aggression and/or propaganda of crimes against humanity and war crimes”*. The law indicates that the Saint George's Ribbon shall be deemed a prohibited symbol in all cases. The letters “Z” and “V” are also considered to fall under the prohibition. The public display of the prohibited symbols is punishable by fines up to 900 Euros for individuals and 1,500 Euros for legal persons.

26. On 21 April 2022, a similar legislation, the Act on Amendments to the Penal Code and the Code of Misdemeanour Procedure (Support of Aggression), was adopted by the Estonian Parliament (*Riigikogu*).³⁸ The Act introduced a new offence, Supporting and Justifying International Crimes (new §151¹ of the Penal Code), which consists of *“public display of a symbol associated with an act of aggression, genocide, crime against humanity or the commission of a war crime in a manner that supports or justifies those acts”*. No specific examples of such symbols

³¹ Albania, Criminal Code (Law No. 7895), Article 225, 27 January 1995.

³² Czech Republic, Criminal Code (Law No. 40/2009 Coll.), § 403 – Establishment of, support for, and dissemination of movements aimed at suppressing rights and freedoms of a person.

³³ Germany, Criminal Code, § 86 Dissemination of Means of Propaganda of Unconstitutional Organizations, § 86a Use of Symbols of Unconstitutional Organisations.

³⁴ Italy, Law No. 654, 13 October 1975, article 3; Law No. 205, 26 June 1993, article 2.1.

³⁵ Slovakia, Criminal Code (Law No. 300/2005 Coll.), § 421-422.

³⁶ UN Doc. A/ES-11/L.1, Aggression against Ukraine, 1 March 2022.

³⁷ House of Representatives: Banning Ribbon of Saint George is out of place, Euroradio, 9 September 2018.

³⁸ Estonia, Act amending the Penal Code and the Code of Misdemeanour Procedure (Support for Aggression), 21 April 2022. The Act was made public on 28 April 2022 and entered into force one day later.

are provided in the law. The offence is punishable by fines up to 300 Euros for individuals and up to 32,000 for legal persons.

27. On 22 May 2022, the Ukrainian Parliament (*Verkhovna Rada*) passed the Law on the Prohibition of Propaganda of the Russian Nazi Totalitarian Regime, the Armed Aggression of the Russian Federation as a Terrorist State against Ukraine, the Symbols of the Military Invasion of the Russian Nazi Totalitarian Regime in the Ukraine.³⁹ The law prohibits “*propaganda of the Russian Nazi totalitarian regime, armed aggression of the Russian Federation as a terrorist state against Ukraine*” (Article 2, paragraph 3) and defines “*the use of symbols of the military invasion of the Russian Nazi totalitarian regime in Ukraine*” as a separate type of this propaganda.

28. Examples of such symbols, explicitly indicated in the law, are “*the Latin letters "Z", "V" separately (without a legitimate context or in the context of justifying armed aggression against Ukraine or other hostilities) or by replacing the Cyrillic letters "З", "С", "В", "Ф" or other letters in separate words with a visual emphasis on these letters*” and “*symbols of the Armed Forces of the Russian Federation, including its ground forces, aerospace forces, navy, strategic missile forces, airborne troops, special operations forces, other armed formations and (or) bodies of the terrorist state (aggressor state)*” (Article 2, paragraph 4). An exception is foreseen for the use of the symbols for legitimate purposes, which “*have no signs of propaganda of the Russian Nazi totalitarian regime, armed aggression of the Russian Federation as a terrorist state against Ukraine*” (Article 2, paragraph 6). Individuals and legal persons violating the prohibition on the use of these symbols are liable under the law (Article 3), though no concrete sanctions are indicated in the law.

D. Case-law related to the use of symbols

29. None of the national legal acts adopted in the context of the war in Ukraine has so far been subject to judicial scrutiny. There is, however, national case-law related to some of the previously adopted legal acts banning certain symbols. The compatibility with human rights of such laws has been challenged before the constitutional courts of Czechoslovakia (1992⁴⁰), Hungary (2000,⁴¹ 2013⁴²), Poland (2011⁴³) or Moldova (2013⁴⁴ and 2015⁴⁵). All four constitutional courts have taken a critical stance and have struck down the relevant laws either in part (Czechoslovakia, Poland, Moldova) or in their entirety (Hungary 2013, which gave the legislative a deadline in order to draft a law which would be in line with the judgment’s reasoning).

30. At the international level, the European Court of Human Rights (ECtHR) has dealt with legislation banning certain political symbols in a series of cases concerning Hungary – *Vajnai v. Hungary*,⁴⁶ *Fratanoló v. Hungary*⁴⁷ and *Fáber v. Hungary*.⁴⁸ The first two cases related to the sanctions imposed on the applicants for the public display of a red star, which is explicitly included among the totalitarian symbols enlisted in Article 269/B of the Hungarian Criminal Code (The Use of Totalitarian Symbols). In the third case, the applicant was fined for disobeying police

³⁹ Ukraine, Law No. 2265-IX on the prohibition of propaganda of the Russian Nazi totalitarian regime, the armed aggression of the Russian Federation as a terrorist state against Ukraine, the symbols of the military invasion of the Russian Nazi totalitarian regime in the Ukraine, 22 May 2022. The law was made public on 24 May 2022 and entered into force one day later.

⁴⁰ Constitutional Court of the Czech and Slovak Federative Republic, On the Issue of Totalitarian Ideologies, Threatening Democratic Order of a State, Decision 5/92, 4 September 1992.

⁴¹ Constitutional Court of Hungary, Decision no. 14/2000, 12 May 2000.

⁴² Constitutional Court of Hungary, Decision IV/2478/2012, 19 February 2013.

⁴³ Constitutional Court of Poland, Judgment, Ref. o. K 11/10, 19 July 2011.

⁴⁴ Constitutional Court of the Republic of Moldova, Judgment No. 12, 4 June 2013.

⁴⁵ Constitutional Court of the Republic of Moldova, Judgment No. 28, 23 November 2015.

⁴⁶ ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008.

⁴⁷ ECtHR, *Fratanoló v. Hungary*, no. 29459/10, 3 November 2011.

⁴⁸ ECtHR, *Fáber v. Hungary*, no. 40721/08, 24 July 2012.

instructions not to publicly display the Arpád-striped flag which, although not listed in the law, is allegedly linked to the fascist Arrow Cross Regime. In all the three cases, the ECtHR concluded that the interference with the applicants' rights was not necessary in a democratic society and constituted a violation of Article 10 of the ECHR (read in light of Article 11 of the ECHR in the last case). When reaching this conclusion, it relied on the ambiguous nature of the two symbols (symbols with multiple meanings) and the absence of any relevant social need to sanction people displaying such a symbol.

31. The ECHR has also dealt with the use of political symbols in certain other cases, such as *Donaldson v. United Kingdom*⁴⁹ and *Nix v. Germany*.⁵⁰ The first case concerned the prohibition to display the Easter lily for a person held in prison. The ECtHR noted that *"the Easter lily was considered [...] as a symbol which was inherently linked to the community conflict [...]"* and, as such, it *"was deemed inappropriate in the workplace and in the communal areas of Northern Ireland's prisons"*.⁵¹ Based on this factor and on the limited nature of the interference (the prisoner could wear the symbol when alone in his cell), the ECtHR found the application made under Article 10 of the ECHR manifestly ill-founded and, as such, inadmissible. The second case concerned the sanction imposed on the applicant for the use of the Nazi swastika under Article 86, paragraph 2 of the German Criminal Code (use of symbols of unconstitutional organisations). The ECtHR found that the use of this symbol *"was exactly what the provision sanctioning the use of symbols of unconstitutional organisations was intended to prevent"*⁵² and it consequently reached the same conclusion as in the previous case.

32. Finally, in one case, *A. O. Falun Dafa v. Moldova*,⁵³ the ECtHR has had an opportunity to deal with the situation in the Republic of Moldova, though the case did not require a detailed assessment of the legal regulation applicable to symbols and it was decided under Articles 9 and 11 (freedom of religion and freedom of association) rather than Article 10 (freedom of expression) of the ECHR. In this case, a branch of the Falun Dafa organisation challenged the ban imposed on its symbols resembling a reversed swastika, followed by a dissolution of the branch, allegedly at the request of the Chinese Government. These measures had been declared unlawful by a decision of the Supreme Court of the Republic of Moldova, on the account that they were not necessary in a democratic society. Yet, no compensation was provided, and the applicant could not obtain the enforcement of the decision and its symbol remained listed as extremist material. This made the ECtHR conclude that *"given the fact that the Supreme Court did not award any compensation to the applicants and the Government failed to fully comply with the Supreme Court's judgments to date [...] there has been a violation of Articles 9 and 11 of the Convention, which arises from the banning of the applicant organisations' symbol and their dissolution"*.⁵⁴

V. Analysis

A. Content of the relevant provisions of Law No. 102

33. In its Article I, Law No. 102 amends the Law on Countering Extremist Activity (LCEA) by expanding the category of symbols whose *"display, manufacture, distribution, as well as holding for the purpose of public distribution"* is considered to fall under the definition of "extremist activity" (Article 1 of the LCEA). Previously, the provision encompassed four categories of symbols, namely *"fascist attributes or symbols"*, *"National Socialist (Nazi) attributes or symbols"*, *"attributes or symbols of an extremist organisation"*, as well as *"attributes or symbols created by stylisation"*

⁴⁹ ECtHR, *Donaldson v. United Kingdom*, no. 56975/09, 25 January 2011.

⁵⁰ ECtHR, *Nix v. Germany*, no. 35285/16, 5 April 2018.

⁵¹ ECtHR, *Donaldson v. United Kingdom*, no. 56975/09, 25 January 2011, paragraph 29.

⁵² ECtHR, *Nix v. Germany*, no. 35285/16, 5 April 2018, paragraph 54.

⁵³ ECtHR, *A. O. Falun Dafa and Others v. The Republic of Moldova*, no. 29458/15, 29 June 2021.

⁵⁴ ECtHR, *A. O. Falun Dafa and Others v. The Republic of Moldova*, no. 29458/15, 29 June 2021, paragraph 21.

of” the previous categories of symbols *“and which may be confused with them”*. Now, a new category, *“the generally known attributes or symbols used in the context of acts of military aggression, war crimes or crimes against humanity, as well as propaganda or glorification of these actions”*, has been added.

34. Law No. 102 also contains a specification of the new category. It indicates that this category encompasses *“flags, bands and coloured/awareness ribbons (black and orange), emblems [...], badges, uniforms, slogans, greetings, and any other such insignia used by participants in acts of military aggression, war crimes or crimes against humanity”*. The general known character means that the attributes and symbols are *“objectively known to the general public at the international and local level”*.

35. There is an exception introduced for the use of all the five categories of symbols for scientific, educational or artistic purposes and, in the case of the new category, for ribbons making part of the insignia, medals or orders granted for participation in WWII.

36. Article I of Law No. 102 furthermore modifies the definition of “extremist material” which is described as *“material intended for public dissemination and intended to incite, excuse or justify the necessity of such activities, or justify the practice of committing war crimes or other crimes aimed at the total or partial destruction of an ethnic, social, racial, national or religious group”*. Such material may consist not only of documents but also of those symbols which are enlisted above.

37. In its Article II, Law No. 102 amends the Contravention Code. Point 98 introduces two new contraventions, one of which is relevant for the present Opinion. Namely, the new Article 365⁵ on “Violation of citizens' rights by disseminating generally known attributes and symbols that are used in the context of acts of military aggression, war crimes or crimes against humanity, as well as propaganda or glorification of such actions” criminalises *“making, sale, dissemination, possession for dissemination and public use of the generally known attributes and symbols used in the context of acts of military aggression, war crimes or crimes against humanity, and the propaganda or glorification of such actions”*. This contravention is punishable by fines from 90 to 180 conventional units⁵⁵ (ca. 225 to 450€) or with unpaid work for the benefit of the community from 30 to 60 hours for individuals, fines from 180 to 360 conventional units (ca. 450 to 900€) for persons in charge and fines from 360 to 600 conventional units (ca. 900 to 1500€) for legal persons.

B. Interference with the right to freedom of expression

38. Symbols play an important role in human lives.⁵⁶ Formed on the basis of the Greek word symbolon (token or watchword), a symbol is usually defined as *“a visual image or sign representing an idea”*.⁵⁷ In the well-known typology introduced by the UK philosopher Ch. S. Peirce, the symbol, together with the icon and the index, are types of signs (representamen) which serve to represent an object producing an effect (interpretant) upon a person. While an icon denotes the object by physical resemblance (onomatopoetic words, pictures, etc.) and an index does so by factual connection (clouds-rain, smoke-fire etc.), a symbol has just a conventional relationship to the object it represents (religious and political symbols, etc.).⁵⁸ That entails that unlike the two other types of signs, symbols are open to various

⁵⁵ According to Art. 34(1) of the Contravention Code, one conventional unit equals 50 MDL, i.e., ca. 2.5€.

⁵⁶ See also Bílková, Veronika, Symbols of Illiberalism in the World of Liberal States, *Baltic Journal of International Law*, Vol. 15, No. 1, 2015, pp. 249-267.

⁵⁷ *Signs and Symbols*, Dorling Kindersley Publishing, 2008, p. 6.

⁵⁸ Atkin, Albert, Peirce's Theory of Signs, *Stanford Encyclopedia of Philosophy* (online), 4 August 2022.

interpretations, as conventional meanings assigned to them may differ substantively over time, among societies and also within a single society.

39. Symbols also play an important role in political life. People use them to signal their affiliation to certain political forces or their adherence to certain political ideas. The use of symbols in the political context, as in any other context, falls under the right to freedom of expression. The ECtHR has already dealt with cases on the display of symbols associated with political opinions and extremist activities in the context of Article 10 ECHR and considers sanctions for the display of symbols as an interference with Article 10 ECHR.⁵⁹ Furthermore, a broad range of other activities involving symbols has already been qualified as falling within the scope of Article 10 ECHR.⁶⁰ In the 2013 Joint Amicus Curiae Brief for the Constitutional Court of Moldova dealing with an issue closely linked to the present matter, the Venice Commission and the OSCE/ODIHR also considered provisions prohibiting the “use” of symbols of the totalitarian communist regime as within the scope of Article 10 ECHR.⁶¹

40. Law No. 102 adds a new category of symbols, whose use is considered to constitute extremist activity and amounts to a contravention under the new Article 365⁵ of the Contravention Code. It also defines materials containing such symbols as extremist material. Under the LCEA, extremist activity and the dissemination of extremist material is not allowed in rallies (Article 13). Such activity must not be carried out, and such materials must not be disseminated, by public, religious or other organisations (Article 6) or the media (Article 7). The violation of these obligations entails legal liability and may result, as the last measure, in the suspension or cessation of the activities for the organisation or the media. The Ministry of Justice keeps a register of extremist organisations and extremist material (Article 10).

41. It can be concluded that the new legal regulation applicable to the use of symbols constitutes an interference with the right to freedom of expression. To be compatible with the international and national standards applicable to this right (Article 10 of the ECHR and Article 32 of the Constitution of the Republic of Moldova), such interference needs to: a) be prescribed by law, b) pursue a legitimate aim, and c) be necessary in a democratic society. The burden of proof to establish that these requirements are met rests with the state.

C. Legitimacy of the interference with the right to freedom of expression

1. Prescribed by law (legality)

42. Any restriction of the right to freedom of expression must be prescribed by law. That means that it must have a legal basis and that this legal basis must meet certain qualities – it must be adequately accessible and formulated with sufficient precision.⁶² If the law criminally sanctions a certain conduct, the lack of specificity could further entail the violation of the principle of legality (*nullum crimen sine lege*) as granted by Article 7 of the ECHR.

⁵⁹ ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008, paragraphs 20-26; ECtHR, *Fratanoló v. Hungary*, no. 29459/10, 3 November 2011, paragraph 13; ECtHR, *Fáber v. Hungary*, no. 40721/08, 24 July 2012, paragraph 29; ECtHR, *Nix v. Germany*, no. 35285/16, 5 April 2018, paragraphs 43-45.

⁶⁰ E.g. ECtHR, *Shvydka v. Ukraine*, no. 17888/12, 30 October 2014, concerning the removal of a band from a wreath during a ceremony; ECtHR, *Murat Vural v. Turkey*, no. 9540/07, 21 October 2014, concerning the pouring of paint over statues.

⁶¹ Venice Commission and OSCE/ODIHR, CDL-AD(2013)004, Joint Amicus Curiae Brief for the Constitutional Court of Moldova on the compatibility with European Standards of Law No. 192 of 12 July 2012 on the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies of the Republic of Moldova, paragraphs 64-68.

⁶² ECtHR, *Sunday Times v. United Kingdom*, no. 6538/74, 26 April 1979, paragraph 49.

43. Law No. 102 is undoubtedly a “law” in the sense of Article 10, paragraph 2 of the ECHR (and Article 54, paragraph 2 of the Constitution of the Republic of Moldova). It is also adequately accessible, as its text was published in the Official Journal and is available on the parliamentary website as well as on various legal sites.⁶³ Concerning the requirement of precision, the Venice Commission recalls that it is hardly possible to attain absolute precision in the framing of legal provisions. As the ECtHR has repeatedly held, “*many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice*”.⁶⁴ At the same time, legal acts must be formulated in such a way as to enable citizens to regulate their conduct (requirement of foreseeability).

44. The relevant provisions of Law No. 102 seem to largely meet this test. Although they do not contain any specific list of concrete symbols which fall under “*generally known symbols used in the contexts of acts of military aggression, war crimes and crimes against humanity*”, they provide a general specification of such symbols and indicate one example (the Saint George’s Ribbon). Moreover, the Law No. 102 also defines the term “generally known” as “*objectively known to the general public at international and national level*”. This suggests that only symbols which are generally associated with an entity having engaged in the war of aggression, war crimes or crimes against humanity are deemed prohibited.

45. The amendments, as is also clear from the explanation note attached to the legislative proposal introducing the provisions on symbols,⁶⁵ primarily react to the current war in Ukraine and to the use of certain symbols associated with this war, in the territory of Moldova. There seems to be a large consensus that such symbols encompass, in addition to the Saint George’s Ribbon, the letters “Z” and “V” (when used in the form reminiscent of the use by the Russian armed forces in Ukraine).⁶⁶ These same symbols are also targeted by the recent legislation adopted in Latvia, Lithuania, Estonia and Ukraine, which suggests that they are indeed generally recognised, at international and national level, as symbols related to the current war of aggression against Ukraine. As these symbols are now well known in the public debate there is no doubt that the Moldovan law also refers to them.

46. The Venice Commission is aware that in 2015, in its Judgment No. 28, the Constitutional Court of the Republic of Moldova concluded that the provision banning “*propagation and public display of Nazi attributes or symbols, or similar attributes or symbols that could be confounded with the Nazi attributes and symbols*” lacked the necessary precision. The Court held that “*inexistence of an exhaustive list of Nazi attributes and symbols in the law, as well as attributes and symbols that are similar to these make the challenged normative provisions a regulation that lacks sufficient specification*”.⁶⁷ The Court noted that as there was no specification of what Nazi symbols meant, and as the prohibition concerned not only Nazi symbols but also similar symbols that could be confounded with Nazi symbols, the provision “*grant[ed] an extremely broad margin of discretion to the courts*”.⁶⁸ It required courts first to identify what Nazi symbols are and then to decide which other symbols might be similar to such symbols. The Court noted that leaving such

⁶³ Such as the legis.md – the Government Register of Legal Acts.

⁶⁴ ECtHR, *Sunday Times Case*, *op. cit.*, para 49.

⁶⁵ LC No. 01/03-44, Amendment to the draft law no. 15 of 20.01.2022 regarding the amendment of the Contravention Code of the Republic of Moldova no. 218/2008, 7 April 2022.

⁶⁶ Moldovan President Signs Law Banning Symbols Of Russia Aggression; Lithuanian Parliament Passes Similar Ban, Radio Free Europe/Radio Liberty, 19 April 2022; В Молдове символы Z, V и георгиевская лента запрещены, Бельцкий независимый портал, 8. 4. 2022, online at <https://esp.md/ru/sobytiya/2022/04/08/v-moldove-simvoly-z-v-i-georgievskaya-lenta-zapreshcheny>; Какие символы запрещены в Молдове на праздновании Дня Победы, а какие – нет, Bloknot, 9. 5. 2022, online at <https://bloknot-moldova.ru/news/kakie-simvoly-zapreshcheny-v-moldove-na-prazdnovan-1476273>

⁶⁷ Constitutional Court Judgment No. 28, 23 November 2015, paragraph 68.

⁶⁸ Constitutional Court Judgment No. 28, 23 November 2015, paragraph 72.

a comprehensive assessment to a court might bring about “*extensive interpretation in criminal matters*”.⁶⁹

47. The Venice Commission considers that as far as the new category of prohibited symbols is concerned, Law No. 102 does not suffer of the same deficiencies.⁷⁰ Although it does not contain an exhaustive list of “*generally known symbols used in the contexts of acts of military aggression, war crimes and crimes against humanity*”, the category is made specific through the general description, the indication of an example and the requirement that the symbol should be objectively known to the general public at the international and national level. This requirement is crucial, as it limits the number of cases in which the authorities can qualify a symbol to fall under the definition in question; in particular, it forms a basis – or at least a legal starting point – for a stringent and uniform interpretation and application of the provision.⁷¹

48. In summary, most of the relevant terms of the provision are defined in the law in a manner which the Venice Commission considers to be sufficiently precise: The notion of “*extremist activity*” is defined by the use, display, manufacture and dissemination of several symbol groups. And the categories of prohibited symbols, especially the one in question that concerns “*generally known attributes or symbols that are used in the context of acts of military aggression, war crimes or crimes against humanity, as well as the propaganda or glorification of these actions*” are defined further in the paragraphs added by the new legislation. By providing for a sequence of referrals, the provision includes definitions for relevant terms and further limits the margin of appreciation of the authorities to known symbols and connotations.

49. That said, the Venice Commission notes that the critical assessment provided by the Constitutional Court in 2015 might still be relevant with respect to the last category of symbols, i.e., symbols created by stylisation of the other symbols, and which may be confused with the latter. By means of Law No. 102, this category has now been extended to symbols created by stylisation of the “*generally known symbols used in the contexts of acts of military aggression, war crimes and crimes against humanity*” and which may be confused with those symbols. This category remains undefined in the LCEA and it is left to the administrative and judicial practice to decide what stylisation means and when a stylised symbol could be confused with one of the prohibited symbols. It might indeed be considered that, as the Constitutional Court concluded in its above-mentioned judgment, such a regulation “*grants an extremely broad margin of discretion to the courts*”⁷² and risks bringing about “*extensive interpretation in criminal matters*”.⁷³ The Venice Commission considers that an explicit specification of this category of symbols should be added in the law.

50. Furthermore, the Venice Commission is of the view that it is necessary to further specify the terms “*propaganda or glorification*” which are employed both in the definition of the aforementioned category of symbols (which are created by stylisation of the other symbols) and of the new category of symbols (which are used in the context of military aggression, war crimes

⁶⁹ Constitutional Court Judgment No. 28, 23 November 2015, paragraph 70.

⁷⁰ The deficiencies of the original regulation were largely redressed through amendments to the LCEA adopted in 2016, which introduced the above-mentioned definitions of the first four categories of prohibited symbols (see above in the Chapter “*Content of the amendments*”). Cf. Law No. 128 on Amendments to the Law on Combating Extremist Activities No. 54-XV of February 21, 2003, 6 September 2016, Article 1.

⁷¹ During discussions held in Chisinau on 22-23 September 2022 in relation to the Venice Commission’s Opinion On amendments to the Audiovisual Media Services Code and to some normative acts including the ban on symbols associated with and used in military aggression actions, CDL-AD (2022)xxx, all the interlocutors of the rapporteurs agreed that the types of symbols which were prohibited (in the present situation, the Saint George’s Ribbon, the letters “Z” and “V”) were well known to the public. The prohibition was also widely publicised, *inter alia* by the police.

⁷² Constitutional Court Judgment No. 28, 23 November 2015, paragraph 72.

⁷³ Constitutional Court Judgment No. 28, 23 November 2015, paragraph 70.

and crimes against humanity). In a previous Opinion, the Venice Commission stated that “propaganda’ usually makes reference to an activity aimed at proselytising people to certain ideas and opinions.”⁷⁴ That said, it is to be noted that the term “propaganda” is not generally in use in law and that there is no fixed definition of it in international law.

2. Pursuance of a legitimate aim (legitimacy)

51. The second condition of lawful restrictions on the right to freedom of expression concerns the aims of such restrictions. These aims have to be legitimate, i.e., they have to correspond to one of the aims explicitly stipulated in Article 10, paragraph 2 of the ECHR (and Article 54, paragraph 2 of the national Constitution), and the restrictions have to actually pursue these aims and not serve predominantly another purpose.⁷⁵ Since freedom of expression is one of the essential foundations of the European human rights system, the exceptions foreseen in Article 10, paragraph 2 of the ECHR must be narrowly interpreted.⁷⁶

52. The explanation attached to the legislative proposal introducing the provisions on symbols indicates that “[i]n the context of the war in Ukraine, there is an increase in cases of use on the territory of the Republic of Moldova of the symbols used in this war that support, justify and glorify aggression. The use of such symbolism, besides the fact that it indirectly promotes the war, leads to the emergence of social tensions and creates premises for the spread of inter-ethnic hatred”.⁷⁷ This statement seems to refer to the interests of national security, territorial integrity, public safety and prevention of disorder (in terms of the ECHR) and to the interests of national security, territorial integrity and public order aiming at preventing mass riots (in terms of the Constitution). In this context, it should also be noted that Article 20, paragraph 1 of the ICCPR explicitly provides that “any propaganda for war shall be prohibited by law.” In the same sense, Article 32, paragraph 3 of the national Constitution provides that „the law shall forbid and prosecute all actions aimed at [...] instigation to sedition, war of aggression, [...] territorial separatism, [...]”

53. The ECtHR has repeatedly held that “the whole structure of the Convention rests on the general assumption that public authorities in the member States act in good faith”.⁷⁸ While this assumption is rebuttable, there need to be reasonable grounds to believe that national authorities resorted to restrictions for other purposes than those officially declared and that such other, ulterior purposes played the predominant role. The Venice Commission is not aware of any such reasonable grounds, and it concludes that the requirement of legitimacy seems to be met.

3. Necessary in a democratic society (necessity and proportionality)

54. Restrictions on the right to freedom of expression have to respond to a pressing social need and be proportionate to the legitimate aim pursued.⁷⁹ When adopting them, states enjoy a margin of appreciation but they need to take into consideration the importance of the protected right and the special emphasis placed upon freedom of political speech.⁸⁰ The Venice Commission recalls

⁷⁴ Venice Commission and OSCE/ODIHR, CDL-AD(2015)041, Joint Interim Opinion on the Law of Ukraine on the Condemnation of the Communist and National Socialist (Nazi) Regimes and Prohibition of Propaganda of their Symbols, paragraph 85. According to a 2020 law review article aimed at defining propaganda, there is consensus that it includes an element of manipulation or distortion of the rational will of a person, and that it must also have both persuasive power and persuasive effect. See Sinha, G. A. (2020). Lies, gaslighting and propaganda. *Buff. L. Rev.*, 68, 1037.

⁷⁵ See ECtHR, *Merabishvili v. Georgia*, no. 72508/13, 28 November 2017, paragraph 305.

⁷⁶ ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008, paragraph 46.

⁷⁷ LC No. 01/03-44, Amendment to the draft law no. 15 of 20.01.2022 regarding the amendment of the Contravention Code of the Republic of Moldova no. 218/2008, 7 April 2022.

⁷⁸ ECtHR, *Khodorkovskiy v. Russia*, no. 5829/04, 31 May 2011, paragraph 255.

⁷⁹ ECtHR, *Chauvy and Others v. France*, no. 64915/01, 29 June 2004, paragraph 70.

⁸⁰ ECtHR, *Feldek v. Slovakia*, no. 29032/95, paragraph 74.

that under international standards, freedom of expression extends also to information or ideas which may be found offending, shocking, and disturbing.⁸¹

55. In the *Fáber Case*, the ECtHR specified that “when the right to freedom of expression is exercised in the context of political speech through the use of symbols, utmost care must be observed in applying any restrictions, especially if the case involves symbols which have multiple meanings”.⁸² It also emphasised that a meaningful distinction between “shocking and offensive language which is protected by Article 10 and that which forfeits its right to tolerance in a democratic society”⁸³ can only be made after a careful examination of the context. Thus, the assessment of the legal regulation applicable to the use of political symbols must always be done *in concreto* rather than *in abstracto*, i.e., it must take account of the concrete legal, political, social and cultural context. This context includes the specific national “historical role and experience”⁸⁴ as well as the current situation and the “real and present danger”⁸⁵ that the use of a certain symbol may bring about. The restrictions imposed on a certain symbol may therefore be found acceptable in one place/time but unacceptable in another place/time.

56. The contextual argument accounts for a relatively large margin of appreciation granted to states. As the ECtHR held in the *Donaldson* case, since “cultural and political emblems may have many levels of meaning which can only fully be understood by persons with a full understanding of their historical background, [...] Contracting States must enjoy a wide margin of appreciation in assessing which emblems could potentially inflame existing tensions if displayed publicly”.⁸⁶ The discretion left to states is however not unlimited and it is subject to supervision at the national and international level.

57. In the *Vajnai* and *Fratanoló* cases, the ECtHR concluded that the symbol at stake (a red star) had “several meanings in the context of the present case”.⁸⁷ The general ban of this symbol, not taking into account the particular circumstances of its use (who uses it and for what purposes), therefore constituted an excessive interference with the right to freedom of expression. The ECtHR also noted that there were no indications that the public use of the relevant symbol would trigger an actual or even remote danger of disorder, adding that “the containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a “pressing social need”.⁸⁸ Finally, the ECtHR drew attention to the severe nature of the sanction imposed on those violating the ban on the use of the relevant symbol, which “although relatively light, belongs to the criminal-law sphere, entailing the most serious consequences”.⁸⁹ Taking all these factors into account, the ECtHR concluded that the interference with the applicants’ freedom of expression did not meet the requirement of the necessity in a democratic society, and, as such, it amounted to a violation of Article 10 of the ECHR.⁹⁰

58. In the 2013 Joint Amicus Curiae Brief for the Constitutional Court of Moldova relating to the use of political symbols, the Venice Commission and the OSCE/ODIHR proceeded in a similar way as the ECtHR in the two aforementioned Hungarian cases. They first noted that the display of the symbol at stake (a hammer and a sickle) could not “be understood today in Moldova as

⁸¹ ECtHR, *Handyside v. United Kingdom*, no. 5493/72, 7 December 1976, paragraph 49.

⁸² ECtHR, *Fáber v. Hungary*, no. 40721/08, 24 July 2012, paragraph 36. See also ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008, paragraph 51.

⁸³ ECtHR, *Fáber v. Hungary*, no. 40721/08, 24 July 2012, paragraph 36.

⁸⁴ ECtHR, *Nix v. Germany*, no. 35285/16, 5 April 2018, paragraph 47.

⁸⁵ ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008, paragraph 49.

⁸⁶ ECtHR, *Donaldson v. United Kingdom*, no. 56975/09, 25 January 2011, paragraph 28.

⁸⁷ ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008, paragraph 56; ECtHR, *Fratanoló v. Hungary*, no. 29459/10, 3 November 2011, paragraph 25.

⁸⁸ ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008, paragraph 55.

⁸⁹ ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008, paragraph 58.

⁹⁰ ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008, paragraph 58; ECtHR, *Fratanoló v. Hungary*, no. 29459/10, 3 November 2011, paragraph 28.

representing exclusively support for the communist totalitarian rule".⁹¹ The specific meaning of the symbol needed to be established in light of the circumstances of a particular case. The Venice Commission and the OSCE/ODIHR went on and stated that they were not in the position to assess whether the need to heal the pain of the past by banning a symbol that could be associated with this past was, more than 20 years after the fall of communism, "*still so acute and pressing*" and that they had no knowledge "*of a real and present danger of any political movement or party aiming to restore communist dictatorship*".⁹² Finally, they highlighted the severity of the sanction consisting *inter alia* in the automatic termination of the activities of a political party,⁹³ and they found the legal regulation incompatible with Article 10 (and also Article 11) of the ECHR.⁹⁴

59. The Constitutional Court of the Republic of Moldova applied the same reasoning and reached the same conclusions in its 2013 judgment on the control of constitutionality of provisions on banning communist symbols and the promotion of totalitarian ideologies⁹⁵ and its 2015 judgment on the control of constitutionality of provisions on the use of Nazi symbols.⁹⁶

60. In the present case, Law No. 102 extends the prohibition on the use of certain symbols to a category of symbols which is defined through its association with serious international crimes (aggression, war crimes, crimes against humanity). These symbols need to be "generally known" to have this association, thus taking account of the question which symbols are generally known to be associated with serious international crime in a certain period of time. As far as the Saint George's Ribbon is concerned, although this symbol can be used to commemorate the victory in 'The Great Fatherland War', in its current use it has predominantly become a symbol "of the military power of the contemporary Russian state" and of the "support of the Putin regime" and its annexation of Crimea and the war in Ukraine.⁹⁷ The mere use of one of the "*generally known symbols used in the contexts of acts of military aggression, war crimes and crimes against humanity*" should be sufficient to "*show support for totalitarian ideas*" and to amount, in itself, to "*promoting of totalitarian ideologies dangerous for society*".⁹⁸

61. Moreover, the context in which Law No. 102 was adopted differs from that in the *Vajnai* and *Fraternaló* cases, when the ban on the use of symbols was applied to persons clearly not holding extremist views and not constituting public danger, and from that assessed in the 2013 Joint Amicus Curiae Brief for the Constitutional Court of Moldova, where no risk of "*any actual, immediate or even remote danger of disorder or threat to the rights of others triggered by the public display of the hammer and sickle in Moldova*"⁹⁹ could be identified.

62. To the contrary, the Russian attack on Ukraine has worsened the security situation in Central and Eastern Europe. The Republic of Moldova, as one of the former Soviet republics, hosting an important Russian-speaking minority and having a part of its territory effectively occupied by the Russian Federation since the 1990s, has legitimate reasons to have serious concerns for its external security. The war in Ukraine and the arrival of a large number of war refugees have also exacerbated internal political, economic and social tensions within the Moldovan society. The Venice Commission considers that in this specific context, it is plausible to argue that the display

⁹¹ Venice Commission and OSCE/ODIHR, CDL-AD(2013)004, Joint Amicus Curiae Brief for the Constitutional Court of Moldova on the compatibility with European Standards of Law No. 192 of 12 July 2012 on the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies of the Republic of Moldova, paragraph 104.

⁹² Venice Commission and OSCE/ODIHR, CDL-AD(2013)004, paragraph 105.

⁹³ Venice Commission and OSCE/ODIHR, CDL-AD(2013)004, paragraph 106.

⁹⁴ Venice Commission and OSCE/ODIHR, CDL-AD(2013)004, paragraphs 112 and 122.

⁹⁵ Constitutional Court Judgment No. 12, 4 June 2013.

⁹⁶ Constitutional Court Judgment No. 28, 23 November 2015.

⁹⁷ See Kolstø, Pål, "Symbol of the War – But Which One? The St. George Ribbon in Russian Nation-Building", *Slavonic and East European Review*, October 2016, pages 680-681, 685.

⁹⁸ Constitutional Court Judgment No. 28, 23 November 2015, paragraph 77.

⁹⁹ Venice Commission and OSCE/ODIHR, CDL-AD(2013)004, paragraph 121.

of the symbols used by the Russian armed forces in the current war could produce an actual and immediate danger of disorder and a threat to the national security and the rights of others, including those of Ukrainian war refugees, and that there is a pressing social need to impose a ban on such use.

63. The Venice Commission commends that Law No. 102 introduces an exception for the use of all the categories of prohibited symbols for scientific, educational or artistic purposes and that there is a special exception foreseen for ribbons making part of the insignia, medals or orders granted for participation in WWII. The Saint George's Ribbon was indeed attached to various awards used in the Soviet (Red) army during WWII or to commemorate WWII, such as the 'Medal for the Victory over Germany in the Great Patriotic War of 1941-1945', the military Order of Glory of various degrees or certain jubilee medals ('Thirty Years of Victory in the Great Patriotic War 1941-1945', 'Forty Years of Victory in the Great Patriotic War 1941-1945'). These awards and medals are conventionally worn during the celebrations of the 'Day of Victory' (9 May) and on other occasions, and it seems that Law No. 102 leaves space for the continuation of this practice. The Venice Commission underlines the importance of the continued use of the symbol in these limited conditions as it indicates the will of Moldovan legislator to respect the principle of proportionality.

64. Another factor that needs to be taken into consideration when assessing the proportionality of a measure are the sanctions of the provision in question. The ECtHR dealt with the question of the proportionality of sanctions in several cases. In the case of *Shvydka v. Ukraine*, the ECtHR considered the sanction of ten days detention for a wrongdoing which did not involve any violence or danger disproportionate.¹⁰⁰ In the case of *Murat Vural v. Turkey*, it considered that a sanction of five years was grossly disproportionate to the legitimate aim pursued and therefore not necessary in a democratic society.¹⁰¹ In the 2015 Joint Opinion on Ukrainian legislation, the Venice Commission and the OSCE/ODIHR considered penalties of imprisonment of up to five years and between five and ten years, without the possibility for more lenient sanctions, as disproportionate. This, especially in the light that the ECtHR as well as the CCPR consider even the threat of custodial sentences for non-violent expression to be inappropriate.¹⁰²

65. For the case in question, the use of prohibited symbols entails legal liability which can take various forms. First, the LCEA foresees administrative sanctions, going up to the suspension or cessation of activities for public, religious or other organisations (Article 6) and for the media (Article 7). The procedure is regulated in detail by the two provisions, it involves several progressive steps spanning over a period of more than 12 months and the final decision is taken by a court. It is recalled that *"any serious sanctions such as suspension and ban of mass media institutions [and also associations] should only be possible in the most serious situations, when the conduct constitutes a criminal offence in national law, which should itself be in compliance with the principle of legal certainty and international human rights, including freedom of expression, standards"*.¹⁰³ Provided that these conditions are met, the regulation, as applied to the use of prohibited symbols, seems to offer adequate guarantees against misuse and to be compatible with international and national human rights standards.

¹⁰⁰ ECtHR, *Shvydka v. Ukraine*, no. 17888/12, 30 October 2014, paragraph 41.

¹⁰¹ ECtHR, *Murat Vural v. Turkey*, no. 9540/07, 21 October 2014, paragraph 68.

¹⁰² Venice Commission and OSCE/ODIHR, CDL-AD(2015)041, Joint Interim Opinion on the Law of Ukraine on the Condemnation of the Communist and National Socialist (Nazi) Regimes and Prohibition of Propaganda of their Symbols, paragraphs 57 and 93. See ECtHR, *Murat Vural v. Turkey*, no. 9540/07, paragraphs 66f.; CCPR General Comment no. 34, Article 19: Freedoms of opinion and expression (CCPR/C/GC/34), paragraph 47.

¹⁰³ OSCE/ODIHR, Opinion No. FOE-MDA/344/2018, Opinion on the Law on Countering Extremist Activity of the Republic of Moldova, 30 December 2019, paragraph 59.

66. Secondly, individuals and legal persons may be held criminally responsible under Article 365⁵ of the Contravention Code. The contravention, which relates to the new category of prohibited symbols introduced by Law No. 102, entails fines of 90 to 180 conventional units (ca. 225 to 450€) or unpaid work for the benefit of the community from 30 to 60 hours for individuals; fines of 180 to 360 conventional units (ca. 450 to 900€) for persons in charge; and fines of 360 to 600 conventional units (ca. 900 to 1500€) for legal persons.

67. In the *Vajnai* case, the ECtHR noted that *“the potential propagation of [totalitarian] ideology, obnoxious as it may be, cannot be the sole reason to limit it by way of a criminal sanction”*.¹⁰⁴ That said, this assessment was closely linked to the context of the case, where *“a symbol which may have several meanings [...] was displayed by a leader of a registered political party with no known totalitarian ambitions”*,¹⁰⁵ and should not be read as a general rejection of the possibility to sanction the use of prohibited symbols by means of criminal law. In fact, in the *Nix* case, the ECtHR expressly accepted *“the legislature’s choice to criminally sanction the use”*¹⁰⁶ of certain symbols (Nazi symbols there) as legitimate and lawful. The Moldovan legislator made the same choice in Law No. 102 as the German legislation underlying the *Nix* case. Moreover, it opted for a milder type of offence (contravention) entailing less severe consequences (lower fines, no risk of imprisonment).

68. In comparison with the sanctions of Law No. 192 on the prohibition of symbols of the totalitarian communist regime, reviewed by the Venice Commission and the OSCE/ODIHR in their Joint Amicus Curiae Brief in 2013, the sanctions in question have lower minimum fines for individual persons and officials (90, compared to 100 conventional units and 180, compared to 300 conventional units, respectively) but higher minimum fines for legal persons (360, compared to 300 conventional units). Also, the maximum fines are partly higher in the present case (180, compared to 150 conventional units for individuals and 360, compared to 500 conventional units for officials). In the Joint Amicus Curiae Brief it was found that although these fines were relatively high by Moldovan standards, they did not exceed the amounts foreseen for other contraventions in an exaggerated way. It was also stressed that the limitation of the scope of the provision to specific illegitimate purposes (propaganda and political and propagandistic aims) thus allowing a broad range of non-political activities involving the named symbols, was an important factor that needed to be taken into consideration.¹⁰⁷ As mentioned above, the provisions introduced by Law No. 102 also have several limitations and exceptions for e.g. artistic and educational purposes.

69. These circumstances indicate in the light of the aforementioned case-law that the sanctions in questions can be considered proportionate. A final assessment of the proportionality of the sanctions can only be carried out on an individual case-by-case basis and depends largely on the practice of enforcement of the authorities.

70. That said, the Venice Commission notes that there is also a criminal offence, under Article 176¹ of the Criminal Code (Violation of the rights of citizens by propaganda of fascism, racism and xenophobia and by the denial of Holocaust), concerning the use of fascist, racist and xenophobic symbols, which are defined as *“banners, emblems, badges, uniforms, slogans, greeting formulas, as well as any other similar signs”* that promote *“fascist, racist or xenophobic ideas, concepts or doctrines, such as hatred and violence on ethnic, racial or religious grounds, superiority of some races and inferiority of others, anti-Semitism, incitement to xenophobia and*

¹⁰⁴ ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008, paragraph 56.

¹⁰⁵ ECtHR, *Vajnai v. Hungary*, no. 33629/06, 8 July 2008, paragraph 56.

¹⁰⁶ ECtHR, *Nix v. Germany*, no. 35285/16, 5 April 2018, paragraph 47.

¹⁰⁷ Venice Commission and OSCE/ODIHR, CDL-AD(2013)004, Joint Amicus Curiae Brief for the Constitutional Court of Moldova on the compatibility with European Standards of Law No. 192 of 12 July 2012 on the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies of the Republic of Moldova, paragraph 119.

extremism” (Article 134¹⁸ of the Criminal Code).¹⁰⁸ The question arises whether the use of the symbols referred to in Law No. 102 might also fall under this Article. The Venice Commission recommends clarifying the two-track system of criminally sanctioning the use of prohibited symbols and dispelling any possible uncertainties as to the relationship between the symbols described in the Criminal Code (fascist, racist and xenophobe symbols) and in the LCEA and the Contravention Code (fascist symbols, Nazi symbols, symbols of extremist organisations and war-related symbols).

VI. Conclusion

71. On 14 April 2022, the Parliament of the Republic of Moldova adopted Law No. 102 on Amendments to Some Normative Acts which, *inter alia*, introduced amendments to the Law on Countering Extremist Activity (No. 54/2003, hereafter “LCEA”) and the Contravention Code (No. 218/2008). The adopted Law No. 102 was signed by the President of the Republic on 19 April 2022 and entered into force on 20 April 2022, the day of publication in the Official Journal. Article I of Law No. 102 amends the LCEA of 2003 expanding the categories of symbols whose use is considered to fall under the definition of extremist activity. Article II point 98 of Law No. 102 introduces two new contraventions to the Contravention Code of 2008, one of them (Article 365⁵) linked to the use of symbols. The Venice Commission has adopted an opinion on this law at the request of the Permanent Representative of the Republic of Moldova to the Council of Europe on behalf of the Bloc of Communists and Socialists (CDL-AD(2022)xxx).

72. By a letter dated 4 August 2022, Ms Domnica Manole, President of the Constitutional Court of the Republic of Moldova, submitted a request for an *amicus curiae brief* to the Venice Commission on the following questions:

- 1) Do the disputed provisions of Article 1 of the Law No. 54/2003 and Article 365⁵ of the Contravention Code comply with the requirements of clarity of law, as they derive from European legal standards?
- 2) Is it in accordance with European legal standards in the matter of freedom of expression to establish contraventional liability based on the Article 365⁵ of the Contravention Code?

73. The intention of this *amicus curiae brief* for the Constitutional Court of the Republic of Moldova is not to take a final stand on the issue of the constitutionality of the relevant provisions of Law No. 102 as adopted on 14 April 2022, but to provide the Constitutional Court with material to assess the compatibility of the disputed provisions with the applicable European standards in order to facilitate its own consideration under the Constitution of the Republic of Moldova. It is the Constitutional Court that has the final say as regards the binding interpretation of the Constitution and the compatibility of national legislation with it.

74. The Venice Commission recalls that states are not prevented from enacting legislation banning, or even criminalising, the use of certain symbols. Yet, since such legislation interferes with the right to freedom of expression, as protected by Article 10 of the ECHR and Article 32 of the Constitution of the Republic of Moldova, it needs to comply with the three requirements of lawful restrictions, i.e., the requirements of legality (prescribed by law), legitimacy (pursues a legitimate aim) and necessity and proportionality (is necessary in a democratic society).

75. In the Venice Commission’s opinion, the amendments introduced by Law No. 102 in principle meet these conditions. According to the authors of the law, “in the context of the war in Ukraine,

¹⁰⁸ The crime entails fines from 500 to 1,000 conventional units (ca. 1,250 to 2,500€) or unpaid work in favour of society for a period of 180 to 240 hours or imprisonment for a period of three months to three years with deprivation of the right to hold certain positions or engage in certain activities for up to five years, for individuals; and, for legal persons, fines of 1,000 to 3,000 conventional units (ca. 2,500 to 7,500€) with deprivation of the right to engage in certain activities for a period of up to five years, or dissolution.

there is an increase in cases of use on the territory of the Republic of Moldova of the symbols used in this war that support, justify and glorify aggression” which “leads to the emergence of social tensions and creates premises for the spread of inter-ethnic hatred”. The Venice Commission considers that in this specific context, it is plausible to argue that the display of the symbols used by the Russian armed forces in the current war could produce an actual and immediate danger of disorder and a threat to the national security and the rights of others, including those of Ukrainian war refugees, and that there is a pressing social need to impose a ban on such use.

76. Furthermore, in the view of the Venice Commission most of the relevant terms of the disputed provisions are defined in the law in a sufficiently precise manner: The notion of “extremist activity” is defined by the use, display, manufacture and dissemination of several symbol groups. And the categories of prohibited symbols, especially the one in question that concerns “generally known attributes or symbols that are used in the context of acts of military aggression, war crimes or crimes against humanity, as well as the propaganda or glorification of these actions” are defined further in the paragraphs added by the new legislation. By providing for a sequence of referrals, the provision includes definitions for relevant terms and further limits the margin of appreciation of the authorities to known symbols and connotations.

77. The Venice Commission is nonetheless of the view that some further legal clarifications would be called for, namely:

1. introducing an explicit specification of the category of symbols “created by stylising” other prohibited symbols, and of the terms “propaganda or glorification”, in the definition of extremist activity under Article 1 (lit. b) of the LCEA; and
2. clarifying the two-track system of criminally sanctioning the use of prohibited symbols and dispelling any possible uncertainties as to the relationship between the symbols described in the Criminal Code and in the LCEA/the Contravention Code.

78. The Venice Commission remains at the disposal of the Constitutional Court of other authorities of the Republic of Moldova for any further assistance that they may need.