



Strasbourg, 26 November 2021

CDL(2021)050\*

Opinion No. 1065/2021

Or. Engl.

**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 CONSTITUTIONAL IMPLICATIONS OF THE RATIFICATION  
OF THE COUNCIL OF EUROPE CONVENTION  
ON PREVENTING AND COMBATING  
VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE  
(ISTANBUL CONVENTION)**

**on the basis of comments by**

**Ms Herdis KJERULF THORGEIRSDOTTIR (Member, Iceland)**  
**Mr Pieter van DIJK (Expert, Former Member, the Netherlands)**  
**Ms Janine M. OTÁLORA MALASSIS (Substitute Member, Mexico)**  
**Mr Panayotis VOYATZIS (Substitute Member, Greece)**

---

*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

**Table of Contents**

I.	Introduction .....	3
II.	Request .....	3
III.	Background.....	5
IV.	Analysis .....	7
A.	Article 3 c) of the Istanbul Convention - gender .....	7
B.	Article 14 of the Istanbul Convention - education.....	9
C.	Article 28 of the Istanbul Convention - reporting by professionals.....	12
D.	Article 42 of the Istanbul Convention - Unacceptable justifications for crimes, including crimes committed in the name of so called "honour".....	14
V.	Conclusion.....	15

**Draft - restricted**

## I. Introduction

1. By letter of 27 October 2021, the President of the Constitutional Court of the Republic of Moldova, Ms Domnica Manole, requested an *amicus curiae* brief from the Venice Commission on the constitutional implications of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter, the “Istanbul Convention”).

2. Ms Janine M. Otálora Malassis, Ms Herdis Kjerulf Thorgeirsdottir, Mr Panayotis Voyatzis and Mr Pieter van Dijk acted as rapporteurs for this *amicus curiae* brief.

3. *This amicus curiae brief was drafted on the basis of comments by the rapporteurs. It was adopted by the Venice Commission on ....*

## II. Request

4. This request for an *amicus curiae* brief is based on an application to the Constitutional Court of the Republic of Moldova by two MPs regarding the constitutionality of Law no. 144 of 14 October 2021 on the ratification of the Istanbul Convention. The Law was enacted by the President of the Republic on 20 October 2021, published in the Official Gazette and entered into force on 22 October 2021. The applicants allege that Articles 3 (c), 14, 28 and 42 of the Istanbul Convention<sup>1</sup> are not in line with Articles 31, 35 and 48 of the Constitution<sup>2</sup>.

---

### <sup>1</sup> Article 3 – Definitions

For the purpose of this Convention:

C - “gender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;

### Article 14 – Education

1. Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education.

2. Parties shall take the necessary steps to promote the principles referred to in paragraph 1 in informal educational facilities, as well as in sports, cultural and leisure facilities and the media.

### Article 28 – Reporting by professionals

Parties shall take the necessary measures to ensure that the confidentiality rules imposed by internal law on certain professionals do not constitute an obstacle to the possibility, under appropriate conditions, of their reporting to the competent organisations or authorities if they have reasonable grounds to believe that a serious act of violence covered by the scope of this Convention, has been committed and further serious acts of violence are to be expected.

### Article 42 – Unacceptable justifications for crimes, including crimes committed in the name of so-called “honour”

1. Parties shall take the necessary legislative or other measures to ensure that, in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called “honour” shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.

2. Parties shall take the necessary legislative or other measures to ensure that incitement by any person of a child to commit any of the acts referred to in paragraph 1 shall not diminish the criminal liability of that person for the acts committed.

### <sup>2</sup> Article 31 - Freedom of Conscience

(1) The freedom of conscience shall be guaranteed, and its manifestations should be in a spirit of tolerance and mutual respect.

(2) The freedom of religious cults shall be guaranteed and they shall organise themselves according to their own statutes, under the law.

(3) In their mutual relationships religious cults are forbidden to use, express or incite to hatred or enmity.

(4) Religious cults shall be autonomous, separated from the State and shall enjoy the support of the latter, here included any facilitation for the religious assistance in the army, hospitals, prisons, asylums and orphanages.

### Article 35 - Right to Education

(1) The right to education shall be ensured by way of compulsory comprehensive school system, by secondary education and vocational education, higher education system, as well as by other forms of education and continuous training.

5. For this *amicus curiae* brief, the Constitutional Court of the Republic of Moldova (hereinafter, “Moldova”) has asked the Venice Commission the following: *What are the constitutional implications of Articles 3 (c), 14, 28 and 42 of the Istanbul Convention on the right of the parents to educate their children according to their own religious beliefs and on the concept of the family?*

6. The Venice Commission will limit itself to the questions posed above and reply to them mainly from the perspective of international human rights provisions.

7. In this respect, it is important to underline that the assessment of the compatibility of the Istanbul Convention with the Constitution of Moldova is, according to Article 135.1.a of the Constitution of Moldova and Article 4.1.a of Law No. 317-XIII on the Constitutional Court of Moldova, the task of the Constitutional Court, upon appeal. It will therefore be ultimately up to the Constitutional Court of the Republic of Moldova to decide whether there are any incompatibilities between the Istanbul Convention and the Constitution of Moldova.

8. The Constitution of Moldova, in its Article 7 sets out that *“The Constitution of the Republic of Moldova shall be the Supreme Law of the State. No law or other legal act which contravenes the provisions of the Constitution shall have legal force.”* The determination to observe international law and international treaties is firmly entrenched in Article 8 of the Constitution and Article 4 of the Constitution stipulates that *“wherever disagreements appear between the conventions and treaties on fundamental human rights to which the Republic of Moldova is a party and its domestic laws, priority shall be given to international regulations.”*

9. The Venice Commission would, however, like to reiterate that the choice of ratifying a treaty and be bound by its obligations is a sovereign act of the State.<sup>3</sup> There is no obligation on States to ratify treaties that stems from international law. Nevertheless, States which have signed a treaty, are obliged *“to refrain from acts which would defeat the object and purpose of a treaty”*.<sup>4</sup> The decision of whether to ratify a treaty reflects both the legal assessment of the instrument and various other (political, ideological, economic, social, cultural and other) interests. It is also a sovereign act of the State to choose the type of relationship it would like to establish between its domestic and the international legal order i.e. what status a treaty will have within the domestic legal order once it is ratified.<sup>5</sup>

---

(2) The State shall ensure, according to the law, the right to choose the language of education and training of persons.

(3) The study of the official language shall be ensured within all types of educational institutions.

(4) State public education is free of charge.

(5) Educational institutions, including those that are not financed by the State, shall be established and shall operate according to the law.

(6) Institutions of higher education shall enjoy the right to autonomy.

(7) The state secondary, vocational and higher education shall be accessible to everyone on the basis of personal merits.

(8) The State shall ensure, according to the law, the freedom of religious education. The State education system is laic.

(9) The parents have prior right to choose the appropriate field of education for their children.

**Article 48 - Family**

(1) The family shall constitute the natural and fundamental element of the society and shall enjoy protection from the State and the society.

(2) The family shall be founded on a freely consented marriage between man and woman, on their equality of rights and on the right and obligation of parents to ensure upbringing and education of their children.

(3) The conditions to conclude, terminate or void a marriage are laid down by the law.

(4) Children have a duty to take care of their parents and to offer necessary help.

<sup>3</sup> See Articles 12 and 14 of the 1969 *Vienna Convention on the Law of Treaties* and CDL-AD(2019)018, Armenia - Opinion on the constitutional implications of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), paragraphs 5-6.

<sup>4</sup> Article 18 of the 1969 *Vienna Convention on the Law of Treaties*.

<sup>5</sup> CDL-AD(2019)018, Armenia - Opinion on the constitutional implications of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), paragraphs 5-6.

### III. Background

10. Moldova is a member State of the Council of Europe and of the United Nations (UN), and as such has human rights obligations both at the regional and universal level. As a member of the Council of Europe, Moldova has ratified the European Convention on Human Rights and is subject to the jurisdiction of the European Court of Human Rights. Moldova has ratified the Revised European Social Charter but has not authorised the European Committee of Social Rights to decide collective complaints against it. Moldova is party to the Council of Europe Convention on Action against Trafficking in Human Beings, the European Convention for the Prevention of Torture and Inhuman Degrading Treatment or Punishment and the Framework Convention for National Minorities. Its human rights policies and practices are also monitored by the Council of Europe's Commissioner for Human Rights, who identifies gaps in human rights protection, conducts country visits, engages in dialogue with States, and prepares thematic reports and advice on human rights obligations.

11. As a UN Member State, Moldova is subject to the oversight of various [UN human rights bodies](#), including the [Human Rights Council](#) and its [Universal Periodic Review](#) and thematic [special procedures](#). As a party to specific universal human rights treaties, Moldova's policies and practices are monitored by UN [treaty bodies](#). It has accepted the complaints procedure of four treaty bodies. Moldova has ratified most of the UN international human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) among others. Moldova has accepted the inquiry procedures of the CAT and CEDAW, which allow the UN treaty bodies to consider allegations of grave or systematic human rights violations.

12. Moldova signed the Istanbul Convention on 6 February 2017, followed by a process of aligning national legislation with the provisions of this treaty. With legislation on domestic violence and its implementation increasingly in line with international standards, the Istanbul Convention was approved by the Moldovan Parliament and ratified on 14 October 2021.<sup>6</sup> The ratification process was not unanimous (as was, for example, the case in Turkey when ratifying the Istanbul Convention on 24 November 2011). Out of 101 members of Parliament, 54 members from the ruling Party of Action and Solidarity voted in favour of ratification. The electoral bloc of communists and socialists in Parliament (BECS) did not participate in the voting procedure and demanded that the issue be taken off the agenda (on the notion of gender being "biological only").<sup>7</sup>

13. The ratification was further condemned by the Orthodox Church of Moldova,<sup>8</sup> which has a strong position in the country. Over 90 per cent of the population identify themselves as members of this Church. In its appeal to the President, Parliament and Government, the Church expressed the opinion that the text of the Istanbul Convention "*denies the reality of the existence of a man and a woman*". It further pointed out in its statement that the Istanbul Convention had proven controversial in other countries as well, seen as a Trojan Horse to introduce a "third sex" and "gay marriage."

14. When the Istanbul Convention will become binding on Moldova<sup>9</sup>, it will be joining the 34 (out of 47) member States of the Council of Europe that have ratified the legally binding international

<sup>6</sup> The ratification process was not unanimous as in the case of Turkey as deputies of the Bloc of Communists and Socialists did not participate in the voting procedure.

<sup>7</sup> <https://interfax.com/newsroom/top-stories/72898/>

<sup>8</sup> <https://orthochristian.com/142237.html>

<sup>9</sup> According to the Treaty Office of the Council of Europe, so far no instrument of ratification has been received from the Republic of Moldova with respect to the Istanbul Convention (status on 25 November 2021).

instrument.<sup>10</sup> The 2011 treaty was signed by 45 countries and is recognised as the main legal standard and the most comprehensive international treaty in preventing and combating violence against women and girls. The Istanbul Convention requires criminalising and legally sanctioning different forms of violence against women, including domestic violence, stalking, sexual harassment and psychological violence. It establishes a comprehensive framework of legal and policy measures for preventing such violence, supporting victims and punishing perpetrators.

15. The Istanbul Convention recognises the structural nature of violence against women. The term “*gender-based violence against women*” refers to any violence directed against a woman because she is a woman or that disproportionately affects women. This definition is based on the recognition, set out in the preamble to the Istanbul Convention, that violence against women is a manifestation of the historically unequal power relations between women and men that have led to domination and discrimination of women by men, and that this violence is one of the crucial social mechanisms by which women are maintained in a position of subordination to men.

16. Violence against women, including domestic violence, is one of the most serious forms of gender-based violations of human rights in Europe that appears to still be shrouded in silence.<sup>11</sup> The majority of victims of domestic violence are women.<sup>12</sup> The statistical data in Moldova confirm, for example, that domestic violence is mostly exerted against women. In 2020, the Women’s Law Centre/National Coalition “Life without violence” said that 73 per cent of women in Moldova experienced some form of intimate partner violence.<sup>13</sup> The perpetrators were 2289 men and 181 women. (Source: General Police Inspectorate).<sup>14</sup> These bodies maintained that the State should take urgent steps to ratify the Istanbul Convention and align its legislation with international standards.

17. The Istanbul Convention has not been well received in various countries of Eastern and Central Europe. Romania and Bosnia and Herzegovina have both signed and ratified the Istanbul Convention, and steps have already been undertaken by local policymakers to implement new solutions into their countries’ legal systems. Azerbaijan and Russia have not signed the Istanbul Convention at all, and Hungary signed the document back in 2014, but voted against ratification in May 2020. Turkey was the first country to withdraw from the Istanbul Convention. Six members of the European Union (Bulgaria, Hungary, Czechia, Latvia, Lithuania and Slovakia) did not ratify the Istanbul Convention. In Poland, the Istanbul Convention has caused a heated debate and the country appears to be taking steps to join Turkey in leaving the Istanbul Convention, after a civic draft bill called “*Yes to family, no to gender*” was sent to a committee instead of being rejected by the Parliament in March 2021.

18. In a press release in November 2018, the Council of Europe stated that “*Despite its clearly stated aims, several religious and ultra conservative groups have been spreading false narratives about the Istanbul Convention*”. The press release stated that the Istanbul Convention did not seek to impose a certain lifestyle or interfere with the personal organisation of private life; instead, it sought only to prevent violence against women and domestic violence. The press release stated that “*the Convention is certainly not about ending sexual differences between women and men. Nowhere does the Convention ever imply that women and men are or should be ‘the same’*” and that “*the Convention does not seek to regulate family life and/or family structures: it neither contains a definition of ‘family’ nor does it promote a particular type of family setting.*”<sup>15</sup>

<sup>10</sup> The Convention was adopted (opened for signature) on May 11, 2011. By now it has been ratified by 34 CoE member states.

<sup>11</sup> Explanatory Report.

<sup>12</sup> Cf., Article 2 of the Istanbul Convention – the scope of the Convention, explanatory report.

<sup>13</sup> <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25569&LangID=E>

<sup>14</sup> <https://rm.coe.int/md-2021-2692-coe-myths-and-facts-eng/1680a33d50>

<sup>15</sup> [https://en.wikipedia.org/wiki/Istanbul\\_Convention#cite\\_note-51](https://en.wikipedia.org/wiki/Istanbul_Convention#cite_note-51)

19. The Council of Europe has been supporting member States in the ratification process of the Istanbul Convention with awareness raising programmes, implemented within the framework of the Council of Europe Action Plan for the Republic of Moldova 2017-2020 and funded with Action Plan-level funds.

20. The Istanbul Convention has been associated with “gender ideology”, at which point some started calling it an ideological tool of Western Europe against Christianity and family tradition. The Commissioner for Human Rights recently warned against the political manipulation of homophobia and transphobia in Europe<sup>16</sup> and the growing influence of the “anti-gender” movements, who call into question the concept of gender and whether it is a protected category of the human rights network.<sup>17</sup>

#### IV. Analysis

##### A. Article 3 c) of the Istanbul Convention - gender

21. Article 3 c) of the Convention gives the following definition of “gender”: “gender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men.

22. The Explanatory Report to the Convention contains the following explanation:

*“43. As the Convention places the obligation to prevent and combat violence against women within the wider framework of achieving equality between women and men, the drafters considered it important to define the term “gender”. In the context of this Convention, the term gender, based on the two sexes, male and female, explains that there are also socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men. Research has shown that certain roles or stereotypes reproduce unwanted and harmful practices and contribute to make violence against women acceptable. To overcome such gender roles, 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. Elsewhere, the Convention calls for a gendered understanding of violence against women and domestic violence as a basis for all measures to protect and support victims. This means that these forms of violence need to be addressed in the context of the prevailing inequality between women and men, existing stereotypes, gender roles and discrimination against women in order to adequately respond to the complexity of the phenomenon. The term “gender” under this definition is not intended as a replacement for the terms “women” and “men” used in the Convention.”*

23. It is important to note that the Istanbul Convention does not require States Parties to take any measures to recognise these various categories of persons or to grant them any special legal status. It simply confirms that gender identity ranks – alongside sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, age, state of health, disability, marital status, migrant or refugee status, or other status – among the prohibited grounds of discrimination. This means that an individual may not be denied the protection against violence or the status of victim, and the rights stemming from this status, because of his or her gender identity.<sup>18</sup>

<sup>16</sup> While also mentioning that 30 CoE Member States offer protection for same-sex relationships and right to legal gender recognition.

<sup>17</sup> <https://www.coe.int/en/web/commissioner/-/pride-vs-indignity-political-manipulation-of-homophobia-and-transphobia-in-europe?inheritRedirect=true>

<sup>18</sup> See Council of Europe, press release, “Questions and answers on the Istanbul Convention. See also: European Commission for Democracy through Law (hereinafter: “Venice Commission”), CDL-AD(2019)018, Armenia –



24. The Istanbul Convention does not seek to *"eliminate the differences"* between men and women, or to suggest that men and women are, or should be, *"the same"*, but wishes to express the recognition that these two sexes show several characteristics and nuances which must be recognised in order to achieve full recognition of equality between women and men and promote a comprehensive and effective protection of women against violence. It calls for measures to disprove the idea that women are inferior to men. Prejudices, stereotypes, customs and traditions still favour men in many situations. All this hinders women's efforts to disclose and report cases of violence and to achieve respect of their rights.<sup>19</sup> In this respect, the Istanbul Convention reflects Article 16 of the Constitution concerning equality.

25. The Committee set up under the Convention on the Elimination of All Forms of Discrimination against Women, a convention to which Moldova is a party since 1993, has stated in its Recommendation no. 19 of 1992 that gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.<sup>20</sup> And the General Assembly of the United Nations, in its Declaration on the Elimination of Violence against Women of 1993, defines in Article 1 that *"the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"*.<sup>21</sup>

26. The work of various international human rights mechanisms, as well as developments at national, regional and international levels has firmly established the notion of gender equality. This goes hand in hand with eliminating discrimination based on traditional attitudes by which women are regarded as subordinate to men, which subsequently may perpetuate widespread practice involving violence and coercion.

27. Equality and non-discrimination are codified in Article 16 of the Moldovan Constitution along the same lines as in Article 14 of the ECHR and Article 1 of Protocol No. 12 to the ECHR.

28. In its case law, the European Court of Human Rights (hereinafter, the "ECtHR") has repeatedly stated that a difference in treatment between men and women cannot be justified by reference to the traditional distribution of gender roles in society. The ECtHR in a Grand Chamber judgment in 2012 stated that:

*"... [T]he advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention ... In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex."*<sup>22</sup>

29. Furthermore, the ECtHR has cautioned that gender stereotyping by the authorities presented a serious obstacle to the achievement of real substantive gender equality, one of the major goals of the member States of the Council of Europe.<sup>23</sup>

30. CEDAW's Article 5(a) requires States Parties to take *"all appropriate measures"* to *"modify the social and cultural patterns of conduct of men and women"* in an effort to eliminate

---

Opinion on the constitutional implications of the ratification of the Council of Europe Convention on preventing and combatting violence against women and domestic violence (Istanbul Convention), 11-12 October 2019, para. 65.

<sup>19</sup> See: Venice Commission, *supra*, note 2, paras 55-58.

<sup>20</sup> CEDAW, General Recommendation no.19 (1992), §1.

<sup>21</sup> Declaration on the Elimination of Violence against Women of 1993, § 1.

<sup>22</sup> ECtHR, *Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012, § 127.

<sup>23</sup> ECtHR, *Jurčić v. Croatia*, 4 February 2021.



practices that “are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” Article 2(f) reinforces Article 5 by requiring States Parties to take “all appropriate measures” to “modify or abolish ... laws, regulations, customs and practices which constitute discrimination against women.”

31. It may be concluded that Article 3 c) of the Istanbul Convention does not conflict with either Article 31 of the Constitution concerning freedom of conscience or Article 35 of the Constitution concerning the right to education. It does also not seem to conflict with the concept of “family” as defined and protected in Article 48 of the Constitution. The concept of “gender” as defined and applied in the Istanbul Convention is reconcilable with, and may even be instrumental to, the protection of the rights and freedoms laid down in the Constitution, and with the values incorporated in the notion of “family” as a “*natural and fundamental element of the Moldova society*”. In this context, it may be stressed that the Istanbul Convention does not regulate family life as such, and in particular does not prescribe the recognition of same-sex partnerships. It only recognises forced marriages as a form of violence and criminalises it.

### **B. Article 14 of the Istanbul Convention - education**

32. Article 14 of the Istanbul Convention contains provisions on issues to be covered in formal curricula at the different levels of education. The issues expressly mentioned are: equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity. The same issues (principles) must be promoted in informal educational facilities as well as in sports, cultural and leisure facilities and the media.

33. The Explanatory Report contains the following explanation:

*“95. In paragraph 1, this article addresses the need to design, where Parties deem appropriate, teaching material for all levels of education (primary, secondary and tertiary education) that promotes such values and enlightens learners with respect to the various forms of violence covered by the scope of this Convention. Where Parties deem teaching material appropriate, it needs to be adapted to the capacity of learners, which would, for example, require primary school teaching material to meet the intellectual capacity of primary school students. Teaching material means any type of formally developed and approved material that forms part of the curriculum and that, where appropriate, all teachers at a particular school have access to and are required or requested to use in class. As the words “where appropriate” indicate, the drafters did not want to impose a specific model on the Parties. Rather, this provision leaves it to the Parties to decide which type of schooling and which age group of learners they consider such teaching material to be appropriate for. The drafters decided on this wording to allow for a maximum of flexibility in the implementation of this provision also taking into account different possibilities between Parties in determining teaching materials. Some states for instance determine the teaching aims in their formal curriculum while leaving it to the schools to decide on the proper working methods and teaching materials to be used to reach these aims. The term “formal curriculum” refers to the planned programme of objectives, content, learning experiences, resources and assessment offered by a school where appropriate. It does not refer to incidental lessons which can be learnt at school because of particular school policies.”*

34. The only provisions of Article 35 of the Constitution dealing with education that seem relevant in this respect are paragraph 6, dealing with autonomy of higher education, and paragraph 8, dealing with freedom of religious education. However, the issues mentioned in Article 14 of the Istanbul Convention are all issues or principles which constitute core elements of a national legal order based upon fundamental human values and the protection of human rights. These principles and core values have to be respected by the authorities, but also by individuals and

groups, be they religious or not. That there is no place in Europe for convictions and beliefs that justify violence against women is a basic value that must be presumed to also be at the foundation of the Constitution of Moldova.

35. It may, therefore, be assumed that the drafters of the Constitution did not have the intention to put restrictions on the responsible authorities to guarantee an educational system that promotes conscience of these core values. In addition, the relevant provisions of Article 35 of the Constitution must be read in conjunction with, and interpreted in harmony with, Article 54, paragraph 2, of the Constitution allowing for restrictions of certain rights and freedoms to the extent requested for the protection of the rights, freedoms and dignity of other persons. Moreover, Moldova is already under the international obligation to protect, among others, women and girls against violence and to protect their physical and psychological integrity, *inter alia* in virtue of Articles 3 and 6, respectively, of the European Convention on Human Rights and Articles 7 and 17 of the International Covenant on Civil and Political Rights.<sup>24</sup>

36. The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), which is the independent expert body responsible for monitoring the implementation of the Istanbul Convention by the Parties, recognises that Article 14 of the Istanbul Convention leaves it to the discretion of the parties to the Convention to decide on the age groups and type of schooling to offer relevant teaching material to. Where such material is developed, however, it must be formally approved and form part of the official curriculum. What is required is an integrated approach to gender equality in the education system raising awareness.<sup>25</sup>

37. GREVIO has encouraged authorities to provide students with knowledge and skills on the topics identified in Article 14 of the Istanbul Convention, including through appropriate sex education. Such efforts should be based on measures aimed at the training of education professionals and follow an integrated approach to the issue of equality between women and men in education. To this end, the authorities may wish to be guided by Recommendation CM/Rec(2007)13 of the Committee of Ministers to Council of Europe member States on gender mainstreaming in education.<sup>26</sup>

38. The above requirements have been contested as infringing with the rights of parents to educate their children on the basis of their own beliefs and religion. As provided for in the second sentence of Article 2 to Protocol No. 1 to the ECHR –

*“... In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”*

39. Article 2 of Protocol No. 1 to the ECHR applies to all areas and not only religious instruction. Sex education and ethics thus fall within the scope of Article 2 of Protocol No. 1.<sup>27</sup> It is onto the fundamental right to education that is grafted the right of parents to respect for their religious and philosophical convictions. Consequently, parents may not refuse a child's right to education on the basis of their convictions.<sup>28</sup>

40. The ECtHR considers that it is in the general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society.<sup>29</sup>

<sup>24</sup> See: Venice Commission, *supra*, note 2, paras 40-48.

<sup>25</sup> <https://rm.coe.int/grevio-inf-2019-16/168098c61a>

<sup>26</sup> <https://rm.coe.int/grevio-inf-2019-16/168098c61a>

<sup>27</sup> Cf., ECtHR, *Jimenez Alonso and Jimenez Merino v. Spain*, 25 May 2000; ECtHR, *Dojan and Others v. Germany* (dec.), 13 September 2011; ECtHR, *Appel-Irrgang and Others v. Germany*, 6 October 2009.

<sup>28</sup> *Konrad and Others v. Germany* (dec), 11 September 2006.

<sup>29</sup> *Ibid.*

41. Moldova is party to the Convention on the Rights of the Child which proclaims that childhood is entitled to special care and assistance. As stated in the Preamble of the CRC *“the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity”*. Article 3 of the CRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. Article 18 of the Convention stipulates that parents / legal guardians who have the primary responsibility for the upbringing and the development of the child – the best interest of the child must be their basic concern.

42. Children have the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice (Article 13 of the CRC). States Parties shall respect the right of the child to freedom of thought, conscience and religion, (cf. Article 14 of the CRC) and States Parties shall respect the rights and duties of parents / legal guardians to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. As stated in the Explanatory Report: *“Attitudes, convictions and behavioural patterns are shaped very early on in life. The promotion of gender equality, mutual respect in interpersonal relationships and non-violence must start as early as possible and is primarily a responsibility of parents. Educational establishments, however, have an important role to play in enhancing the promotion of these values”*.

43. In addition, the Venice Commission has stated that Article 14 of the Istanbul Convention does not interfere with the right of parents to educate their children according to their own religious beliefs, because this falls outside the scope of the treaty<sup>30</sup>.

44. Similarly, the Venice Commission has stated on multiple occasions that parents have the right to educate their children according to their own religious beliefs, for instance, in the recommendations for Montenegro<sup>31</sup>, Uzbekistan<sup>32</sup>, Azerbaijan,<sup>33</sup> and Ukraine<sup>34</sup>.

45. Hence, Article 14 only requires the State Parties to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, and non-violent conflict resolution in interpersonal relationships; based on the fact that gender stereotypes and behavioural patterns against women are shaped very early on in life<sup>35</sup>, which is in line with Article 16 of the Constitution that forbids discrimination on the basis of sex.

46. Consequently, Article 14 does not violate the right of parents to decide on the education that their children must receive, because States may still decide the manner in which to implement Article 14 of the Istanbul Convention, as the treaty does not set this out.

---

<sup>30</sup>CDL-AD(2019)018. Armenia - Opinion on the constitutional implications of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) adopted by the Venice Commission at its 120th Plenary Session (Venice, 11-12 October 2019).

<sup>31</sup>CDL-AD(2019)010, Montenegro - Opinion on the draft Law on Freedom of Religion or Beliefs and legal status of religious communities, par. 45.

<sup>32</sup>CDL-AD(2020)002, Uzbekistan - Joint opinion of the Venice Commission and OSCE/ODIHR on the draft Law "On freedom of conscience and religious organisations" par. 54.

<sup>33</sup>CDL-AD(2012)022, Joint Opinion on the Law on Freedom of Religious Belief of the Republic of Azerbaijan by the Venice Commission and the OSCE/ODIHR, par. 59-60.

<sup>34</sup>CDL-AD(2006)030. Ukraine - Opinion on the Draft Law on the insertion of amendments on Freedom of Conscience and Religious Organisations in Ukraine, par. 27.

<sup>35</sup>CDL-AD(2019)018, Armenia - Opinion on the constitutional implications of the ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), par. 82.

47. The Istanbul Convention is a much younger document than the ECHR (1950); the ICCPR (1966) and even the CRC (1989). At the time of the adoption of the ECHR, homosexual conduct was still widely criminalised. A major change in perspective has occurred over the last seventy years with a global trend towards decriminalising same-sex acts.<sup>36</sup> There is, however, still opposition among many countries to the advancement of LGBT rights / non-stereotyped gender roles. Since 1995, same-sex acts between consenting adults in private has been legal in Moldova. In September 2002, new laws were introduced to harmonise the age of consent.<sup>37</sup>

48. The ECtHR has addressed the issue of sexual orientation in a number of cases. It has recognised that sexual orientation is protected by Article 8 and that it is covered by the prohibition of discrimination in Article 14.<sup>38</sup> The non-discrimination provision in Article 16 of the Constitution of Moldova stipulates that “*all citizens*” are equal before the law in Moldova. The existence of an increasing European consensus in these matters is accompanied by a narrow margin of appreciation accorded to member States.<sup>39</sup>

49. The ECtHR has drawn a clear distinction between conferring substantive rights on homosexual persons (same-sex marriage, adoption of children etc.) as being fundamentally different from recognising their right to campaign for such rights:<sup>40</sup>

*“Therefore, measures which seek to remove from the public domain promotion of other sexual identities except heterosexual, affect the basic tenets of a democratic society, characterized by pluralism, tolerance and broadmindedness, as well as the fair and proper treatment of minorities. Thus, such measures would have to be justified by compelling reasons.”<sup>41</sup>*

50. Consequently, steps on the part of the Government to include these issues and principles, “where appropriate”, in curricula as a “core” of civilization and as a necessity to protect certain basic rights, cannot be said to violate Article 35 of the Constitution. In this context it may also be important to point to the fact that Article 35 itself contains obligatory aspects of education: compulsory elementary education; study of the official language; accessibility for everyone of secondary, vocational and higher education; and the laic character of State education.

### **C. Article 28 of the Istanbul Convention - reporting by professionals**

51. Article 28 of the Istanbul Convention requires necessary steps to be taken by the State to ensure that the confidentiality rules imposed by internal law on certain professionals do not constitute an obstacle for reporting serious acts of violence.

52. The Explanatory Report states the following:

*“146. Under this article Parties to the Convention must ensure that professionals normally bound by rules of professional secrecy (such as, for example, doctors and psychiatrists) have the possibility to report to competent organisations or authorities if they have reasonable grounds to believe that a serious act of violence covered by the scope of this Convention has been committed and that further serious acts of such*

---

<sup>36</sup> So far, 28 countries in the world recognise same-sex marriages, and 34 others provide for some partnership recognition for same-sex couples. As of December 2020, 81 countries had laws against discrimination in the workplace on the basis of sexual orientation. Twenty years ago, there were only 15. See: <https://ilga.org/ilga-world-releases-state-sponsored-homophobia-December-2020-update>

<sup>37</sup> [https://en.wikipedia.org/wiki/LGBT\\_rights\\_in\\_Moldova#cite\\_note-gaytimes-5](https://en.wikipedia.org/wiki/LGBT_rights_in_Moldova#cite_note-gaytimes-5)

<sup>38</sup> See: X and Others v Austria, judgment of 19 February 2013, § 99 and the cases quoted therein.

<sup>39</sup> CDL-AD(2013)022 Opinion on the issue of the prohibition of so-called "Propaganda of homosexuality in the light of recent legislation in some Council of Europe Member States, § 44.

<sup>40</sup> Ibid, § 46.

<sup>41</sup> Ibid, § 48.

*violence are to be expected. These are cumulative requirements for reporting and cover, for example, typical cases of domestic violence where the victim has already been subjected to serious acts of violence and further violence is likely to occur.*

*147. It is important to note that this provision does not impose an obligation for such professionals to report. It only grants these persons the possibility of doing so without any risk of breach of confidence. While confidentiality rules may be imposed by legislation, issues of confidentiality and breach of such may also be governed by codes of ethics or professional standards for the different professional groups. This provision seeks to ensure that neither type of confidentiality rule would stand in the way of reporting serious acts of violence. The aim of this provision is to protect life and limb of victims rather than the initiation of a criminal investigation. It is therefore important to enable those professionals who, after careful assessment, wish to protect victims of violence.*

*148. The term “under appropriate conditions” means that Parties may determine the situations or cases to which this provision applies. For instance, Parties may make the obligation contained in Article 28 contingent on the prior consent of the victim, with the exception of some specific cases such as where the victim is a minor or is unable to protect her or himself due to physical or mental disabilities. Moreover, each Party is responsible for determining the categories of professionals to which this provision applies. The term “certain professionals” is intended to cover any number of professionals whose functions involve contact with women, men and children who may be victims of any of the forms of violence covered by the scope of this Convention. Additionally, this article does not affect the rights, in conformity with Article 6 ECHR, of those accused of acts to which this Convention applies, whether in civil or criminal proceedings.”*

53. In the majority of EU Member States, reporting obligations exist for professionals who are in contact with children,<sup>42</sup> (cf., the EU Child Abuse Directive).<sup>43</sup>

54. The principle of professional confidentiality may conflict, on the one hand, with the integrity and free conscience of the professional concerned and, on the other hand, with the protection of the women or girls concerned. Accepting the treaty obligation to make professional reporting possible “*under appropriate conditions*”, which may also include the condition of prior consent of the alleged or potential victim, is not in violation of the freedom of conscience protected by Article 31, paragraph 1 of the Constitution. That provision qualifies the exercise of freedom of conscience by stating that its exercise should be in a spirit of tolerance and mutual respect. It may be clear that this spirit should work primarily in favour of the victim, or potential victim, rather than of the perpetrator or potential perpetrator of an act of violence.

---

<sup>42</sup> In 15 Member States (Bulgaria, Croatia, Denmark, Estonia, France, Hungary, Ireland, Lithuania, Luxembourg, Poland, Romania, Slovenia, Spain, Sweden and the United Kingdom) reporting obligations are in place for all professionals.

In 10 Member States (Austria, Belgium, Cyprus, the Czech Republic, Greece, Finland, Italy, Latvia, Portugal and Slovakia) existing obligations only address certain professional groups such as social workers or teachers. In Germany, Malta and the Netherlands, no reporting obligations were in place in March 2014. In Malta, however, the new draft Child Protection Act (Out of Home Care), introduces the obligation of mandatory reporting for all professionals and volunteers.

In many Member States, the anonymity of reporting professionals is not always guaranteed, as in Denmark, Greece and Lithuania, for example. This lack of anonymity may sometimes discourage professionals from reporting a case of a presumed victim.

<sup>43</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

55. Moreover, Article 24, paragraph 1 of the Constitution obliges the State to guarantee every individual the right to life and physical and mental integrity. This provision must be taken into account when interpreting and delimiting Article 28 of the Istanbul Convention. This may lead to harmonizing the interpretation and application of the two provisions so as to alleviate any possible conflict.

#### **D. Article 42 of the Istanbul Convention - Unacceptable justifications for crimes, including crimes committed in the name of so called “honour”**

56. Article 42 of the Istanbul Convention contains the obligation to ensure that in criminal procedures concerning violence against women and domestic violence culture, custom, religion, tradition or so-called “honour” shall not be regarded as justification for such acts.

57. The Explanatory Report sets out the following:

*“216. The drafters enshrined in this Convention an important general principle: nobody under the jurisdiction of the courts of one of the Parties to this Convention will be allowed to validly invoke what he or she believes to be an element of his or her culture, religion or other form of personal reason to justify the commission of what is simply an element of a criminal offence, i.e. violence against women. In order to address crimes committed in the name of so-called “honour” the drafters intended to ensure that crimes committed to punish a victim for her or his behaviour are not justified. Consequently, this article sets out the obligation for Parties, in paragraph 1, to ensure that culture, custom, religion, tradition or so-called “honour”, are not regarded as justification for any of the acts of violence covered by the scope of this Convention. This means that Parties are required to ensure that criminal law and criminal procedural law do not permit as justifications claims of the accused justifying his or her acts as committed in order to prevent or punish a victim’s suspected, perceived or actual transgression of cultural, religious, social or traditional norms or customs of appropriate behaviour.*

*217. In addition, this provision requires Parties to ensure that personal convictions and individual beliefs of judicial actors do not lead to interpretations of the law that amount to a justification on any of the above-mentioned grounds. Paragraph 1 thus reinforces for the particular area of criminal law the obligation contained in Article 12, paragraph 5, of the Convention.”*

58. So-called honour crimes are one form of gendered-based violence. Crimes committed in the name of so-called “honour” are usually crimes that have been part of the criminal law landscape of Council of Europe Member States for a long time. The types of violence covered by Article 42 affect or concern specific groups in European societies, they occur in certain ethnic groups and are often not identified and remedied in the institutional response to violence against women.<sup>44</sup> There are examples from different countries where judges handed down lenient sentences because the perpetrator claimed to have acted out of respect for his culture, tradition, religion or custom to restore his so-called “honour”.<sup>45</sup>

59. This provision rejects any reference to cultural, traditional or religious practices as a mitigating factor in cases of violence against women, including so-called “honour crimes”.

60. The Istanbul Convention advocates a holistic response to all forms of violence against women and girls. It aims to end impunity as its Article 46 calls for aggravating circumstances

<sup>44</sup> See GREVIO report on Montenegro and Turkey: <https://www.coe.int/en/web/istanbul-convention/-/grevio-publishes-its-reports-on-montenegro-and-turkey>

<sup>45</sup> <https://rm.coe.int/honor-crimes-web-a5/1680925835>



when determining sentences in the cases of so-called „honour crimes”, usually committed by family members.<sup>46</sup>

61. Ending impunity for gender-based violence is one of the aims of the Istanbul Convention. But its provisions are also directed at preventing such violence. Article 53 of the Istanbul Convention introduces restraining and protection orders for all forms of gender-based violence, not only domestic violence. There are additional measures which the Istanbul Convention requires States Parties to take to prevent “honour-crimes” such as setting up services for women at risk of being murdered by their relatives (see Articles 22 and 24).

62. In particular, alerting authorities is very important in relation to “honour crimes” where women fear their own relatives and must be able to confide in persons they trust.

63. The Istanbul Convention requires States Parties to recognise that gender-based violence such as “honour crimes” may amount to persecution and give rise to refugee status or leave to remain in the country. Articles 60 and 61 address this complex issue by requiring states parties to interpret the 1951 Convention Relating to the Status of Refugees in a more gender-sensitive manner, to recognise persecution on the grounds of gender, and not to expel anyone to a country where their life or freedom is under threat.

64. Protecting women against “honour crimes” is in line with Article 16 of the Constitution of Moldova as well as with the obligations it has undertaken as a contracting party to international and regional human rights treaties.

65. Criminal norms regarding serious crimes must be of an unconditional character and have general application. Violence against women and domestic violence are such serious crimes. Their prohibition according to European, if not universal, standards touches upon the general conscience of mankind.

66. It may, therefore, be assumed that the drafters of the Constitution did not have the intention to define freedom of opinion, religion and conviction, and the right to education in such a way that these may justify the commitment of acts that are generally considered to be very serious crimes.

## V. Conclusion

67. The Venice Commission reiterates that the ratification of a treaty is a sovereign act of the State. The choice of the type of relationship it would like to establish between its domestic and the international legal order, in other words what status a treaty will have within the domestic legal order once it is ratified, is also a sovereign act of the State.

68. In this amicus curiae brief, the Venice Commission has limited itself to the questions posed by the Constitutional Court of the Republic of Moldova and replied to them mainly from the perspective of international human rights provisions. It will be up to the Constitutional Court of the Republic of Moldova to decide whether there are any incompatibilities between the Istanbul Convention and the Constitution of Moldova.

69. The request received by the Venice Commission from the Constitutional Court of the Republic of Moldova was as follows: *What are the constitutional implications of Articles 3 (c), 14, 28 and 42 of the Istanbul Convention on the right of the parents to educate their children according to their own religious beliefs and on the concept of the family?*

---

<sup>46</sup> <https://rm.coe.int/honor-crimes-web-a5/1680925835>



70. The conclusions reached on the main issues in this *amicus curiae* brief are as follows:

- With respect to Article 3 (c) of the Istanbul Convention (Gender)  
The objective of the gendered understanding in Article 3 (c) of the Istanbul Convention, is to eradicate violence perpetuated by prevailing attitudes of women being inferior to men. This provision is in line with Article 16 of the Constitution on Equality according to which “*all citizens of the Republic of Moldova shall be equal before the law . . . regardless of sex*” and where the “*foremost duty of the State shall be the respect and protection of the human person*” and with Article 48 of the Constitution, which provides that the family is founded on a freely consented marriage between a husband and wife, on their full equality in rights.

Article 3 (c) of the Istanbul Convention is not targeted at abolishing traditional families. It may, on the contrary, be argued that the objective of Article 3 (c) supports the protection offered to “mothers and children” in Article 50 of the Constitution, while of course the former’s scope of application is wider.

- With respect to Article 14 of the Istanbul Convention (Education)  
On non-stereotyped gender roles, the requirement of enhancing gendered understanding in education is in full accordance with international and European standards. The Republic of Moldova is already under the international obligation to protect, among others, women and girls against violence and to protect their physical and psychological integrity, *inter alia* in virtue of Articles 3 and 6, respectively, of the ECHR and Articles 7 and 17 of the ICCPR.

The relevant provisions of Article 35 of the Constitution of the Republic of Moldova must be read in conjunction with, and interpreted in harmony with, Article 54, paragraph 2, of the Constitution allowing for restrictions of certain rights and freedoms to the extent requested for the protection of the rights, freedoms and dignity of other persons. Therefore, steps on the part of the Government to include these issues and principles, “where appropriate”, in curricula as a “core” of civilization and as a necessity to protect certain basic rights, cannot be said to violate Article 35 of the Constitution.

- With respect to Article 28 of the Istanbul Convention (Reporting by professionals)  
This provision requires necessary steps to be taken by the State to ensure that the confidentiality rules imposed by internal law on certain professionals do not constitute an obstacle for reporting serious acts of violence.

Accepting the treaty obligation to make professional reporting possible “*under appropriate conditions*”, which may also include the condition of prior consent of the alleged or potential victim, is not in violation of the freedom of conscience protected by Article 31, paragraph 1 of the Constitution of the Republic of Moldova. That provision qualifies the exercise of freedom of conscience by stating that its exercise should be in a spirit of tolerance and mutual respect. It may be clear that this spirit should work primarily in favour of the victim, or potential victim, rather than of the perpetrator or potential perpetrator of an act of violence.

In addition, Article 24, paragraph 1 of the Constitution, which obliges the State to guarantee every individual the right to life and physical and mental integrity should also be taken into account when interpreting and delimiting Article 28 of the Istanbul Convention. This may lead to harmonizing the interpretation and application of the two provisions so as to alleviate any possible conflict.

- With respect to Article 42 of the Istanbul Convention (Unacceptable justifications for crimes, including crimes committed in the name of so-called “honour”)  
This provision contains the obligation to ensure that in criminal procedures concerning violence against women and domestic violence culture, custom, religion, tradition or so-called “honour” shall not be regarded as justification for such acts.

Protecting women against “honour crimes” is in line with Article 16 of the Constitution of Moldova as well as with the obligations it has undertaken as a contracting party to international and regional human rights treaties.

Criminal norms regarding serious crimes must be of an unconditional character and have general application. Violence against women and domestic violence are such serious crimes. Their prohibition according to European, if not universal, standards touches upon the general conscience of mankind.

It may, therefore, be assumed that the drafters of the Constitution did not have the intention to define freedom of opinion, religion and conviction, and the right to education in such a way that these may justify the commitment of acts that are generally considered to be very serious crimes.

71. The Venice Commission remains at the disposal of the Constitutional Court of the Republic of Moldova for any further assistance in this matter.

Draft - restricted