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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

AND

OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS
(OSCE/ODIHR)

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

Adopted by the Venice Commission
at its 94th Plenary Session
(Venice, 8-9 March 2013)
on the basis of comments by

Mr Sergio BARTOLE (Substitute member, Italy)
Ms Veronika BÍLKOVÁ (Member, Czech Republic)
Mr Christoph GRABENWARTER (Member, Austria)
Ms Hanna SUCHOCKA (Member, Poland)
Mr Richard KATZ (OSCE/ODIHR expert)
Mr Daniel SMILOV (OSCE/ODIHR expert)

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I. Introduction

1. By a letter dated 15 November 2012, Mr Alexandru Tănase, the President of the Constitutional Court of the Republic of Moldova requested an *amicus curiae* brief relating to Law No. 192 of 12 July 2012, banning the use of communist symbols (the hammer and sickle and any carrier of it) in the Republic of Moldova through the amendment of three laws: the law on political parties (CDL-REF(2013)007); the code of contraventions (CDL-REF(2013)008) and the law on freedom of expression (CDL-REF(2013)009). On the same day, the Constitutional Court of Moldova sent a similar request to the OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), asking for its opinion on the compliance of the above-mentioned amendments with relevant international standards and OSCE human dimension commitments.

2. As per standard procedure in cases where similar requests are received, the Venice Commission and the OSCE/ODIHR decided to prepare a joint opinion on the subject matter, of which they informed the Constitutional Court of Moldova. Mr Sergio Bartole, Mrs Veronika Bilkova, Mr Christoph Grabenwarter and Mrs Hanna Suchocka were appointed as rapporteurs for the Venice Commission; OSCE/ODIHR's comments were prepared in consultation with the OSCE/ODIHR Core Group of Experts on Political Parties. The comments are based on the English translation of the Law provided by the Communist Party of Moldova and on the Russian version available on the website of the Moldavian Parliament.

3. The present opinion was adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013).

II. Preliminary remarks

4. As this is an *amicus curiae* brief for the Constitutional Court of Moldova, the intention is not to take a final stand on the issue of the constitutionality of Law No. 192 of 12 July 2012, but to provide the Court with material as to the compatibility of this Law with the applicable European standards as well as with elements from comparative constitutional law in order to facilitate its own consideration under the Constitution of Moldova. It is the Constitutional Court of Moldova that has the final say as regards the binding interpretation of the Constitution and the compatibility of national legislation with it.

III. Background information

A. The symbol of the hammer and sickle

5. The symbol of the hammer and sickle, replacing the original hammer on a plough, was introduced in Russia in 1917/1918, as an expression of the unity of peasants and workers, two main social classes seen as progressive under the Marxist ideology.¹ In 1922, the hammer and sickle became the symbol of the USSR and in 1924, it was officially incorporated into the USSR flag and the coats of arms (1924 Constitution). During the Cold War, the symbol was used in other communist countries in Central and Eastern Europe and on other continents as well.

¹ In Austria, a sickle and a hammer, although not superimposed over each other and not with a communist origin or background, have made part of the coat of arms since 1919 (see Article 8a para 2 Austrian Federal Constitutional Law), where they represent the classes of workers and peasants (which together with the middle class represented by a mural crown, constitute the Austrian nation).

6. The use of the hammer and sickle declined significantly after the fall of communism. Yet, the symbol is still featured on flags or coat of arms of several federal entities of the Russian Federation (the flag of the Vladimir region and the coat of arms of the Bryansk region). It is also used by some private companies, for instance the Russian airlines company Aeroflot. Finally, it should be noted that a hammer and sickle is incorporated into the flag and coats of arms of the Moldovan separatist region of Transnistria.

B. The situation in Moldova

7. Article 32 of the Moldovan Constitution reads:

Freedom of Opinion and Expression

(1) *All citizens are guaranteed the freedom of opinion as well as the freedom of publicly expressing their thoughts and opinions by way of word, image or any other means possible.*

(2) *The freedom of expression may not harm the honour, dignity or the rights of other people to have and express their own opinions or judgements.*

(3) *The law shall forbid and prosecute all actions aimed at denying and slandering the State or the people. Likewise shall be forbidden and prosecuted the investigations to sedition, war, aggression, ethnic, racial or religious hatred, the incitement to discrimination, territorial separatism, public violence, or other actions threatening constitutional order.*

8. Article 41 of the Moldovan Constitution reads:

The Freedom of Political Association

(1) *All citizens are free to associate in parties and other social and political organizations. These organizations contribute to the definition and expression of public political will, and under the rule of law take part in the electing process.*

(2) *All parties and other social/political organizations are equal before the law.*

(3) *The State shall ensure the protection of the rights and legitimate interests of parties and other social/political organizations.*

(4) *Parties and social/political organizations are declared unconstitutional if by their aims or activities they are engaged in fighting against political pluralism, the principles of the rule of law, the sovereignty and independence or territorial integrity of the Republic of Moldova.*

(5) *Secret associations are forbidden.*

(6) *The activity of parties consisting of foreign nationals is forbidden.*

(7) *The organic law shall establish those public offices whose holders may not join political parties.*

9. On 12 July 2012, the Parliament of the Republic of Moldova adopted Resolution No. 191, on the historical and political-legal assessment of the totalitarian communist regime in the Moldavian Soviet Socialist Republic. The resolution condemns the totalitarian communist regime having committed crimes against humanity and informs about the plan to ban the use of communist symbols and the propaganda of totalitarian ideologies.

10. On the same day, the Parliament adopted Law No. 192 which implements this Resolution by banning the use of communist symbols and the propaganda of totalitarian ideologies. The adoption of the law was initiated by the Liberal Party and voted, with the support of the deputies of the Alliance for the European Integration (Liberal Democrats and Democrats), in two

readings, with 53 votes out of 101. Deputies of the Communist Party did not take part in the vote and left the room as a sign of protest. The Law came into effect on 1 October 2012.

11. Both the Resolution and the Law were drafted on the basis of a report submitted in 2010 by the Commission on the Study and Assessment of the Totalitarian Communist Regime (so called Ghimpu Commission), established in January 2010 by the Decree No. 165-V of the interim president of Moldova, Mr Mihai Ghimpu. The Commission recommended that the totalitarian communist regime be condemned for having committed crimes against humanity and that the Parliament enact legislation on lustrations as well as legislation outlawing the use of communist symbols and of the very term “communism”.

12. Through Law No. 192, the Law on Political Parties (CDL-REF(2013)007) was amended to contain a new Article 4 § 5, which bans “the use by political parties of symbols of the totalitarian communist regime (hammer and sickle, any carrier with such symbols), as well as propaganda of totalitarian ideologies”. The Law, moreover, newly provides (Article 22 § 1(e)) that repeated sanctions for breaches of the provisions of this law (including of new Article 4 § 5) lead to the cessation of the activity of the political party.

13. The Code of Contraventions was also amended to contain a new Article 67¹ (CDL-REF(2013)008) stipulating that the propaganda or the use with political or propaganda aims of symbols of the totalitarian communist regime (hammer and sickle, any carrier with such symbols) and the propaganda of totalitarian ideologies are punishable by a fine of 100-150 “conventional units”² for natural persons and of 300-500 “conventional units” for officials and legal persons.

14. The Law on Freedom of Expression was amended to contain a provision (CDL-REF(2013)009) prohibiting “the propaganda and/or the use with political aims of symbols of the totalitarian communist regime (hammer and sickle, any bearer with such symbols) and the propaganda of totalitarian ideologies” (Article 3 § 4.1).

15. On 18 September 2012, 29 parliamentary deputies of the Communist Party challenged the constitutionality of Resolution No. 191 and Law No. 192 in the Constitutional Court of the Republic of Moldova. On 4 October 2012, the Constitutional Court ruled that it did not have the authority to review the Resolution due to its nature and the lack of normative character. At the same time, it declared the complaint about the Law admissible.

16. The Communist Party of the Republic of Moldova is a registered political party since 27 April 1994. Its official party symbol is a Hammer and sickle and an open book. This party participated with this officially registered symbol in six parliamentary elections (1998, 2001, 2005, 2009, 2009 and 2010), one presidential election (1996) and five local elections (1995, 1999, 2003, 2007 and 2011). After the last parliamentary elections, the Moldovan Communist Party held 42 mandates in parliament; it has around 35,000 members.

17. In late 2012, a fine of 3000 lei (the maximum) was imposed on the leader of the Communist Youth Movement for having displayed communist symbols during a rally.

18. In the local elections of 11 November 2012, two candidates for mayor of the Moldovan Communist Party were denied registration with the party symbol by the relevant Electoral Communal Constituency Councils pursuant to Law No. 192. These decisions were confirmed by the Central Electoral Commission, and further, on appeal, by the Chisinau Court of Appeal and by the Supreme Court of Justice. These candidates ran in the elections without the party symbol.

² One conventional unit equals 20 Moldovan Lei (Art. 34 par. 1 of the Contraventions Code of R. Moldova).

IV. European standards

A. Council of Europe

19. Freedom of expression is guaranteed under Article 10 of the European Convention on Human Rights as well as under Article 19 of the ICCPR of which almost all European countries, including the Republic of Moldova, are parties. Moreover, it is enshrined in all Constitutions or Bills of Rights adopted by European countries, including the Constitution of the Republic of Moldova (Article 32, see para. 7 above). Freedom of expression is considered “one of the most essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment.”³ Special protection is granted to political speech, as a pre-condition for, and necessary component of, democracy.

20. Freedom of association is guaranteed under Article 11 of the ECHR, Article 22 of the ICCPR and national Constitutions and Bills of Rights, including the Constitution of the Republic of Moldova (Article 41, see para. 8 above). It is “an individual human right which entitles people to come together and collectively pursue, promote and defend their common interests.

21. Notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association as enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy.

22. The European Court of Human Rights has dealt with cases on the display of a symbol associated with a political movement or entity in the context of Article 10 ECHR, notably: *Vajnai v. Hungary* (Application no. 33629/06), judgment of 8 July 2008 (see paras. 51-57); *Fratanolo v. Hungary* (Application no. 29459/10), judgment 3 November 2011 and *Fáber v. Hungary* (Application No. 40721/08), judgment of 24 July 2012 (see paras.39-42 below).

23. Two resolutions of the Parliamentary Assembly of the Council of Europe deal with the condemnation of the totalitarian regimes: Resolution 1096 (1996) on Measures to dismantle the heritage of former communist totalitarian systems⁴ and Resolution 1481 (2006)⁵ on the Need for international condemnation of crimes of totalitarian communist regimes. These resolutions do not deal with the use of communist symbols.

24. The Venice Commission has issued several reports on political parties. The only explicit reference to party symbols is contained in the OSCE/ODIHR and Venice Commission *Guidelines on political party regulation*⁶:

70. It is reasonable that legislation regarding political party registration require that the state be provided with basic information regarding the political party. For example, such regulations may require a statement of the party’s permanent address and the registration of party names and symbols to limit possible confusion on the part of voters and citizens. Some states prohibit the use of names and symbols associated with national or religious institutions. These types of registration requirements are reasonable. Regulation of party names and symbols to avoid

³ ECtHR, *Vajnai*, par. 46

⁴ http://assembly.coe.int/ASP/Doc/XrefATDetails_E.asp?FileID=16507

⁵ <http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=17403&Language=EN>

⁶ OSCE/ODIHR – Venice Commission *Guidelines on Political Party Regulation* (CDL-AD(2010)024, para. 70), available at <http://www.osce.org/odihr/77812>.

confusion is also important for the state to be able to ensure a duly informed electorate able to exercise their free choice.

25. As regards the role of political parties and their dissolution, the Venice Commission has adopted several reports: Report on political parties and elections⁷, Joint Venice Commission-OSCE/ODIHR Guidelines on political party regulation⁸; Guidelines on prohibition or dissolution of political parties⁹.

B. European Union

26. In 2005, in reaction to a proposal by German members of the European Parliament to adopt an anti-racist regulation banning the use of Nazi symbols in the EU states, members of the EP from four post-communist countries (Czech Republic, Hungary, Lithuania, Slovakia) argued that the ban should extend to communist symbols as well. The European Commission rejected this initiative stating that it was not appropriate to deal with this issue in rules aimed to combat racism and recommending that the matter be left to national governments.

27. In December 2010, the foreign ministers of Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania and Romania called on the European Commission "to criminalize the approval, denial or belittling of communist crimes". The Commission found that the member states were not uniform in their opinion on the matter and that conditions had not been met for the EU to pass such legislation.¹⁰

28. Resolution 213 (2009) of the European Parliament on the European conscience and totalitarianism¹¹ expresses strong condemnation for all totalitarian and undemocratic regimes, but does not address the issue of the use of their symbols.

C. The Organization for Security and Co-operation in Europe

29. In June-July 2009, during the 18 annual session of its parliamentary assembly, the Organization for Security and Co-operation in Europe (OSCE) adopted the Vilnius Declaration, which, in one of its resolutions *inter alia*, stated that "in the twentieth century European countries experienced two major totalitarian regimes, Nazi and Stalinist, which brought about genocide, violations of human rights and freedoms, war crimes and crimes against humanity"¹²; urged all OSCE participating States to take a "united stand against all totalitarian rule from

⁷ CDL-AD(2006)025, [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)025-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)025-e.pdf)

⁸ CDL-AD(2010)024, [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)024-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)024-e.pdf)

⁹ (CDL-INF(2000)001, [http://www.venice.coe.int/webforms/documents/CDL-INF\(2000\)001-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-INF(2000)001-e.aspx)

¹⁰ Report from the Commission to the European Parliament and to the Council on "The memory of the crimes committed by totalitarian regimes in Europe" of December 2010 (COM(2010) 783 final, [http://www.google.fr/url?sa=t&rct=j&q=european%20commission%20communist%20symbols%20december%202010&source=web&cd=9&cad=rja&ved=0CHgQFjAl&url=http%3A%2F%2Fec.europa.eu%2Fcommission_2010-2014%2Freading%2Fpdf%2Fcom\(2010\)_873_1_en_act_part1_v61.pdf&ei=EuLrUPDvL0OI0AXN5YCIBg&usq=A FQjCNEzCZ6NshlPWGc1ijv9slpDgWqBnw](http://www.google.fr/url?sa=t&rct=j&q=european%20commission%20communist%20symbols%20december%202010&source=web&cd=9&cad=rja&ved=0CHgQFjAl&url=http%3A%2F%2Fec.europa.eu%2Fcommission_2010-2014%2Freading%2Fpdf%2Fcom(2010)_873_1_en_act_part1_v61.pdf&ei=EuLrUPDvL0OI0AXN5YCIBg&usq=A FQjCNEzCZ6NshlPWGc1ijv9slpDgWqBnw))

¹¹

[http://www.google.fr/url?sa=t&rct=j&q=resolution%20213%20\(2009\)%20of%20the%20european%20parliament%20on%20the%20european%20conscience%20and%20totalitarianism&source=web&cd=3&cad=rja&ved=0CD8Q FjAC&url=http%3A%2F%2Feur-lex.europa.eu%2FLexUriServ%2FLexUriServ.do%3Furi%3DOJ%3AC%3A2010%3A137E%3AFULL%3AEN%3APDF&ei=QAQVUdb8OufT0QXhrYHIBA&usq=AFQjCNEGuU3HpCv8y- 0FRex6x3 XU6s2A](http://www.google.fr/url?sa=t&rct=j&q=resolution%20213%20(2009)%20of%20the%20european%20parliament%20on%20the%20european%20conscience%20and%20totalitarianism&source=web&cd=3&cad=rja&ved=0CD8Q FjAC&url=http%3A%2F%2Feur-lex.europa.eu%2FLexUriServ%2FLexUriServ.do%3Furi%3DOJ%3AC%3A2010%3A137E%3AFULL%3AEN%3APDF&ei=QAQVUdb8OufT0QXhrYHIBA&usq=AFQjCNEGuU3HpCv8y- 0FRex6x3 XU6s2A)

¹² Resolution on Divided Europe Reunited: Promoting Human Rights and Civil Liberties in the OSCE Region in the 21st Century, adopted at the Eighteenth Annual Session of the OSCE Parliamentary Assembly, Vilnius, 29 June to 3 July, 2009, AS(09) D1E, par 3 (http://www.oscepa.org/publications/declarations/doc_download/261-vilnius-declaration-english)

whatever ideological background"¹³; and expressed deep concern at "the glorification of the totalitarian regimes, including the holding of public demonstrations glorifying the Nazi or Stalinist past"¹⁴.

V. Examples of national legislation, jurisprudence and practice¹⁵

A. Ban on communist symbols and propaganda of communism

30. At the national level, legislation banning the use of communist symbols or the propaganda of communism has been enacted in some countries of Central and Eastern Europe, such as the former Czechoslovakia, Hungary, Lithuania and Poland.

31. None of these laws provides for the prohibition for political parties to use the communist symbols as party symbols or any specific sanctions for political parties.

o Czechoslovakia: § 260 of the Criminal Code (1992)

32. In 1991, the Czechoslovak Criminal Code of 1961 was amended to include a new § 260 criminalising those "*supporting and propagating movements which demonstrably aim at suppressing rights and freedoms of citizens or preach national, racial, class, or religious grudge*". Communism and fascism were cited as examples of such movements.

33. The constitutionality of the amendment was challenged in the Czechoslovak Constitutional Court by a group of 83 deputies of the Federal Assembly. In a decision of 4 September 1992, the Constitutional Court rejected the constitutional complaint, upholding the constitutionality of the amended Criminal Code. It declared that § 260 was fully compatible with a range of human rights invoked by the applicants, including freedom of expression, freedom of thought, and the *nullum crimen sine lege* principle. It did so, however, on the understanding that the support for or propaganda of fascism and communism were not criminalized *per se* but only if, and to the extent that these movements fulfil the general criteria of "movements which demonstrably aim at suppressing rights and freedoms of citizens or preach national, racial, class, or religious grudge".

34. The Constitutional Court further made clear that an outright prohibition of the support for or propaganda of fascism or communism would be incompatible with the principles of specificity of criminal law as "in such a case a fascist or a communist movement would not be adequately defined". Finally, focusing more specifically on communism, the Court asserted that the communist ideology could encompass both ideas falling within the scope of § 260 of the Criminal Code (the advocacy of violent seizure of power, the theory of the dictatorship of the proletariat, etc.) and ideas remaining outside this scope (the idea of a class-less society in itself, etc.). Criminalising the support for or propaganda of the movements promoting ideas of the latter type would in the Court's assessment amount to the violation of freedom of expression.

35. In response to this decision, the reference to fascism and communism was struck out of § 260 of the Criminal Code.

o Hungary: Article 269/B of the Criminal Code (2000)

36. Article 269/B of the Hungarian Criminal Code provided that:

¹³ Ibid, par 11

¹⁴ Ibid, par 17

¹⁵ This overview is not exhaustive.

“(1) A person who (a) disseminates, (b) uses in public or (c) exhibits a swastika, an SS-badge, an arrow-cross, a symbol of the hammer and sickle or a red star, or a symbol depicting any of them, commits a misdemeanour – unless a more serious crime is committed – and shall be sentenced to a criminal fine (pénzbüntetés).

(2) The conduct proscribed under paragraph (1) is not punishable, if it is done for the purposes of education, science, art or in order to provide information about history or contemporary events.

(3) Paragraphs (1) and (2) do not apply to the insignia of States which are in force.”

37. This provision was challenged in the Constitutional Court on the basis of, among others, its alleged incompatibility with the freedom of establishing a political party, freedom of thought, conscience and religion, freedom of expression, and the prohibition of discrimination. Most of the applicants challenged the part of the provision declaring it a criminal offence to disseminate, use in public or exhibit the communist symbols (the hammer and sickle, the red star or symbols depicting the same).

38. In its decision of 12 May 2000, the Constitutional Court rejected the application in all its grounds. It declared that: the freedom to establish political parties had not been breached, because *“the penalisation of using symbols of despotism is not in a direct constitutional relation with the freedom to establish and operate political parties”*; the freedom of thought, conscience and religion had not been violated, because *“the statutory provision in question orders the punishment of a certain conduct”* and *“it is the externally oriented use of the symbols concerned rather than the perpetrator’s internal identification therewith that is prohibited by law”*; the prohibition of discrimination had not been breached, because the Criminal Code *“prohibits the use of symbols of despotism in general”*.

39. The most substantive part of the judgment focuses on freedom of expression. Having stressed that freedom of expression was a mother right of the so-called fundamental rights of communication, the Constitutional Court stated that this freedom could only be limited when it is unavoidably necessary and when the restriction complied with the requirement of proportionality. Such can be the situation if a certain conduct *“endangers public peace by offending the dignity of communities committed to the values of democracy”*. The Court further recalled that under international standards, states enjoyed a margin of appreciation when imposing restrictions on freedom of expression and that while exercising this discretion, they should take into account their constitutional values and historical experience.

40. Having applied these standards to the amended provision of the Criminal Code, the Court concluded that no violation of freedom of expression had occurred. The restriction imposed upon the exercise of this freedom had a clear legal basis with contents *“determined well enough to allow the citizens to make their behaviours compliant with the law”*. It pursued a legitimate goal, that of *“the prevention of acts endangering public peace and offending the dignity of the community”*. It was *“unavoidably necessary”* and *“proportionate to the objective of protection”*. The respect for the proportionality was granted by that only three specific active conducts had been outlawed and the provision explicitly allowed for the use of symbols for purposes of education, science, art or historical research.

41. The judgment did not discuss the nature of communist symbols at any length. It took for granted that these symbols (the hammer and sickle and the red-star) had a single, fixed meaning for the inhabitants of Hungary; that they were connected with the communist ideology and the communist regime; that the communist ideology was an ideology of hatred and aggression; and that the symbols were hence symbols of despotism.

42. In 2008, the European Court of Human Rights delivered a judgment relating to the conviction of a Hungarian citizen under Article 269/B of the Criminal Code for wearing a communist symbol during a public event. The applicant, the Vice-President of the Workers' Party, alleged that his conviction was in breach of Article 10 of the ECHR on freedom of expression.

43. The Hungarian government claimed that the application was incompatible *ratione materiae* the provisions of the Convention, pursuant to Article 17 ECHR which states that "*nothing in [the] 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 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.*" The Court rejected this claim asserting that it "cannot conclude that the applicant's display was intended to justify or propagate totalitarian oppression" (par. 25) and that the application would constitute an abuse of the right of petition.

44. Deciding on the merit, the Court confirmed that the criminal sanction imposed on the applicant constituted an interference with the freedom of expression. This interference was prescribed by law and followed legitimate aims, those of the prevention of disorder and the protection of the rights of others. It did not however respond to a pressing social need and, as such, was not necessary in a democratic society. Based on these arguments the Court concluded that the imposition of the criminal sanction on the applicant had amounted to a violation of Article 10 of the European Convention.

45. In November 2011, the ECtHR found another violation of Article 10 ECHR on the basis of this law in the *Fratanoló v. Hungary* Case, also relating to the public display of a red star by a member of a leftist party in Hungary.

46. On 19 February 2013 the Constitutional Court struck down the ban on the use of symbols of fascist and communist totalitarian regimes.

- Lithuania

47. Since June 2010 there is a provision in the Lithuanian Penal Code (Article 170²) on Public endorsement of international crimes, crimes committed by the Soviet Union or Nazi Germany to Lithuanian Republic or its residents, its denial or gross minimization, which stipulates:

- "1. He or she who publicly endorses the crime of genocide and other crimes of humanity or war crimes, established by the Lithuanian Republic laws, acts of the European Union, final (effective) decisions of the Lithuanian courts or decisions by international courts, denies or grossly diminishes such crimes, if it was committed in a threatening, abusive or insulting manner or resulted in disturbance of public order; also if he or she publicly endorses the aggression of USSR or Nazi Germany against Lithuania as well as genocide crime or other crimes against humanity and war crimes committed by USSR or Nazi Germany in the territory of the Republic of Lithuania or against the residents of the Republic of Lithuania, or endorses the serious or grave crimes, committed in 1990- 1991, denies or grossly diminishes them, if it was committed in a threatening, abusive or insulting manner or resulted in disturbance of public order is punishable by a fine, restriction of freedom, or arrest, or imprisonment up to 2 years.
2. A legal person may also be held responsible for such activity".

48. Since June 2008, Article 188¹⁸ of the Code of Administrative Offences ("Demonstration and distribution of Nazi and Soviet Symbols") prohibits distribution and demonstration of Nazi and Soviet symbols. Offenders face a fine of LTL 500-1,000 (EUR 145-289).

49. Similarly, Article 5 of the Law on Meetings stipulates that *“the following meetings shall be prohibited, if their participants: <...> display the flag or coat of arms of Nazi Germany, the USSR or the Lithuanian SSR, or a flag, coat of arms or uniform the constituent part of which is the flag or coat of arms of Nazi Germany, the USSR and the Lithuanian SSR, the images of the leaders of the German National Socialist Party or the USSR Communist Party, responsible for repressions of the Lithuanian population, the symbols or uniforms of the Nazi or Communist organisations, or the flags or badges composed on the basis of the flag or coat of arms of Nazi Germany, the USSR or the Lithuanian SSR, the symbols of the Nazi swastika, the Nazi SS, the Soviet hammer and sickle, the Soviet five-pointed red star, perform the national anthem of Nazi Germany, the USSR or the Lithuanian SSR.”*

50. These provisions appear to have been appealed only twice before the judicial authorities; both cases are currently pending.

51. In summer 2012, a Bielorussian car with a hammer and sickle symbol in its hood was prevented from entering the Lithuanian territory under the law. In October 2012, Lithuania pressed the European Commission to remove a poster displaying a hammer and sickle from a poster contest within the theme 'Europe4all' held in its Brussels headquarters. The Lithuanian representative in the EU Leonid Donskis called the hammer and sickle “a modern symbol /.../ related to an ideology based on violence /and/ symboli/sing/ pain of Central and Eastern Europe”.

- Poland: Article 256 of the Criminal Code (2011)

52. Article 11 of the Constitution of Poland states that: *“The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means”*. Article 13 of the Constitution, however, further provides that: *“Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be forbidden”*.

53. Pursuant to article 188 § 4 of the Constitution, it is the Constitutional Tribunal that rules on the constitutionality of a given political party's goals and activities. The Polish Constitution does not contain regulations pertaining to a ban on the use of totalitarian symbols. As it is clearly stipulated that the prohibition is based on the party's aims and activities, i.e. the very essence of its endeavours, it is excluded that the prohibition may relate solely to the party's external presentation in the form of symbols.

54. The Political Parties Act of 27 June 1997 provides two kinds of control mechanisms of political parties in the context of the above-mentioned constitutional restrictions of their objectives and activities: a) preventive control which takes place the moment a party is registered and b) repressive control. Courts of law register political parties. Art. 14. 1. states that in the event of doubts as to the constitutionality of a party's goals and activities as set forth in its charter (...) or programme, the registering Court suspends the registration procedure (art. 12) and petitions the Constitutional Tribunal to rule on the constitutionality thereof (Art. 14. 3). In the event the Constitutional Tribunal rules that a political party's goals are unconstitutional, the Court denies its registration. Art. 44 concerns repressive control pertaining to an already registered party. In the event the Constitutional Tribunal (in accordance with art. 188.4) rules that its aims or activities do not conform to the Constitution, the registering court immediately moves to strike it from the registry.

55. Article 286 of the 1997 penal code provided: *“Whosoever publicly propagates a fascist or other totalitarian state system or calls for hatred based upon national, ethnic, racial or religious differences or irreligion is subject to punishment.”* In 2009, §§ 2 to 4 were added to Article 286, which now reads:

“1. Whosoever publicly propagates a fascist or other totalitarian state system or calls for hatred based upon national, ethnic, racial or religious differences or irreligion, is subject to punishment.

2. Whoever produces, records or imports, purchases, stores, possesses, present, transport or send - for the purpose of dissemination - printed materials, recordings or other objects comprising the content specified in § 1 or being carriers of fascist, communist or other totalitarian symbols, shall be subject to the same penalty.

3. The perpetrator of the act prohibited under § 2 shall not commit an offence, if the said act was committed as part of artistic, educational, collecting or academic activity.

4. In the event of conviction for the offence indicated in § 2, the court shall order forfeiture of the objects referred to in § 2, even if they do not constitute the property of the perpetrator”.

56. Several MPs of the leftist Democratic Left Alliance (SLD) challenged the constitutionality of these amendments before the Constitutional Court, contending that the disproportionate nature of the amendment would limit public expression and unfettered public debate as well as result in arbitrary measures on the part of a state organ. They also maintained that the amendment was contrary to article 10 ECHR.

57. The Constitutional Tribunal ruled (sig. K 11/10 of 19 July 2011) that the phrasing “or serving as a carrier of fascist, communist or other totalitarian symbolism” of the amended article 256 § 2 of the Penal Code was incompatible with article 42 § 1 (principle of “*nullum crimen sine lege*”) with reference to article 54 § 1 (freedom of expression) of the Polish Constitution. But the Tribunal ruled that art. 256 § 2 of the Penal Code criminalising “the production, duplication, import, purchase, storage, possession, presentation, transport or transfer for the purpose of dissemination of printed matter, recordings or other objects containing the substance defined in art. 256 § 1 of the Penal Code complied with article 42 § 1 in reference to article 54 § 1 and article 2 of the Constitution. In substantiating its ruling, the Tribunal referred to solutions in force in other countries, especially the situation in Hungary and the ruling of the European Court of Human Rights in the case of *Vajnai v Hungary*.

58. The Constitutional Tribunal concluded that “the regulations and rulings of courts in European states, especially in Germany and Hungary, permit one to state that criminalisation of the preparation, distribution or publication of materials propagating a totalitarian regime or calling for hatred on the grounds of nationality, religion, origin or race is permissible in the event that legal and penal definitions are sufficiently precise so as not to constitute unjustified interference with freedom of expression and do not allow expanding interpretation. Freedom of speech is a value under special protection. Interfering with it by means of penal regulations requires precision and caution on the part of lawmakers and law courts alike.” (...) “In view of the similarity of the legal order of Hungary to that of Poland, the Tribunal considered the consequences of the ECHR’s ruling in the case of *Vajnai v Hungary* for an evaluation of Polish regulations. That specifically applied to the question of art. 256 § 2 not criminalising behaviour relating to symbols, which may be ambivalent in nature, and to whether that regulation does not violate freedom of speech through its imprecision.” The Tribunal reiterated its earlier stand that “the use of an under-defined phrase requires particular procedural guarantees ensuring transparency and the means for the evaluating organ to evaluate the concrete substance with which an imprecise phrase is filled.”

59. In reference to the ECHR’s ruling in the case of *Vajnai v Hungary*, the Tribunal stated that the use of objects whose significance may be ambiguous cannot be subject to penal liability.

B. Ban on totalitarian or unconstitutional symbols and related propaganda

60. In several other countries, the use of totalitarian or unconstitutional symbols or relating propaganda is prohibited, without specifying whether the regulation extends to communist symbols and ideology or not. Such is the situation for example in Albania¹⁶, the Czech Republic¹⁷, Germany¹⁸, Italy¹⁹ and Slovakia²⁰.

61. In the Czech Republic, where it is a criminal offence to support and propagate “movements aimed at suppressing rights and freedoms of citizens” (see footnote 14), the interpretation of what these movements are became necessary, as the Criminal Code does not specify this. In December 2011 a report on the commission of a crime was submitted to the police in connection with a combined mosaic of the red star and the hammer and sickle, exhibited on the façade of one of the houses in the centre of the Czech town of Semily. The mosaic, originally

¹⁶ Criminal Code, Article 225, Distributing unconstitutional writings: 1) Distribution of writings or use of symbols belonging to an unconstitutional party, organization or associations or to one previously banned on the same grounds, is punishable by a fine or up to three years of imprisonment. 2) Distributing or infiltrating materials, writings or symbols into the Republic of Albania from abroad, with the intent to overturn the constitutional order or affect the territorial integrity of the country, is punishable by a fine or up to three years of imprisonment.

¹⁷ § 260 of the 1961 Criminal Code: Support and Propagation of Movements Aimed at Suppressing Citizens' Rights and Freedoms. (1) A person who supports or propagates a movement which aims at suppressing the rights and freedoms of citizens, or which promotes national, racial, class or religious hatred, shall be sentenced to a term of imprisonment of from one to five years. (2) An offender shall be sentenced to a term of from three to eight years if: (a) he commits an act under sub-provision (1) by using the press (print), film, radio or TV broadcasting, or some other similarly effective means; or (b) he commits such act as a member of an organised group; or (c) he commits such act during a state defence emergency. § 403 of the 2009 Criminal Code: Sec. 403 - Foundation, support and promotion of a movement aiming at suppression of rights and liberties of the human. (1) A person who founds, supports or promotes a movement aiming ascertainably at suppression of the rights and liberties of the human or who promulgates racial, ethnic, religious or class hate or hate against another group of persons is liable to imprisonment for a term of one to five years. (2) The offender is liable to imprisonment for a term of three to eight years a) if he commits the act as introduced in Sec. 403-1 by the use of press, film, radio or television broadcasting, publicly accessible computer network or in another likewise effectual way, b) if he commits such an act as a member of an organised group, c) if he commits such an act as a military person, or d) if he commits such an act in the state of national emergency or in the state of war. (3) Preparation [of the act as introduced in Sec. 403-1] is liable to punishment.

¹⁸ Criminal Code, § 86 Dissemination of Means of Propaganda of Unconstitutional Organizations: (1) Whoever domestically disseminates or produces, stocks, imports or exports or makes publicly accessible through data storage media for dissemination domestically or abroad, means of propaganda: 1. of a party which has been declared to be unconstitutional by the Federal Constitutional Court or a party or organization, as to which it has been determined, no longer subject to appeal, that it is a substitute organization of such a party; [...] 4. means of propaganda, the contents of which are intended to further the aims of a former National Socialist organization, shall be punished with imprisonment for not more than three years or a fine. [...] (3) Subsection (1) shall not be applicable if the means of propaganda or the act serves to further civil enlightenment, to avert unconstitutional aims, to promote art or science, research or teaching, reporting about current historical events or similar purposes. [...] § 86a StGB Use of Symbols of Unconstitutional Organizations: (1) Whoever: 1. domestically distributes or publicly uses, in a meeting or in writings (§ 11 subsection (3)) disseminated by him, symbols of one of the parties or organizations indicated in § 86 subsection (1), nos. 1, 2 and 4; or 2. produces, stocks, imports or exports objects which depict or contain such symbols for distribution or use domestically or abroad, in the manner indicated in number 1, shall be punished with imprisonment for not more than three years or a fine. (2) Symbols, within the meaning of subsection (1), shall be, in particular, flags, insignia, uniforms, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those named in sentence 1 shall be deemed to be equivalent thereto. [...]

¹⁹ Law n.13 October 1975, n.654, article 3: Any organisation, association, movement or group aiming at inciting to discrimination or violence on racial, ethnical, national or religious grounds shall be prohibited. Law n.26 June 1993, n.205, article 2.1: Anyone who, at public gatherings, expresses or exhibits emblems or symbols characteristic of or usual for organisations, associations, movements or groups referred to in Article 3 of Law 654/1975 is punished with imprisonment for up to three years and a fine between 200,000 and 300,000 liras (100 to 150 euros).

²⁰ Criminal Code, Section 422: (1) Any person who publicly demonstrates, in particular, by using flags, badges, uniforms, slogans, his sympathies for movements leading to the suppression of fundamental rights and freedoms shall be liable to a term of imprisonment of six month to three years.

created in the 1970s, had been unveiled when an advertising banner installed unlawfully on the house had been removed. The report alleged that the public exhibition of this symbol was in breach of § 260 of the Criminal Code.

62. In February 2012, the Police issued a notification deciding not to proceed with the case. The notification recalled that no list of symbols which would be automatically banned existed in the Czech Republic. Each symbol therefore had to be assessed on a case-by-case basis. Considering the mosaic, the Police asserted that although the two symbols of the hammer and sickle and the red star were, due to the Czech history, habitually linked to communism, they had a wider meaning, with the hammer and sickle generally expressing the union between the farmers and the workers in their fight against the capital; and the red star being a traditional symbol of liberty used also outside communist circles. The Police further claimed that the unveiling of the mosaic had not been aimed at propagating communism. Such propagation, moreover, would not necessarily fall into the scope of application of § 260 of the Criminal Code, because “communism as such does not always aim at illegitimate goals”. The use of communist symbols only amounts to a crime, if it is connected with “a strand of communism which seeks to seize the power by violence, wants /.../ to abolish free elections, and preaches the dictatorship of the proletariat and the leading role of the /communist/ party”. It is the opinion of the Czech Police that this condition was not satisfied in the Semily Mosaic case.

C. Ban on Nazi symbols and propaganda

63. Finally some countries, such as Austria, Belarus, Brazil, France and the Russian Federation outlaw Nazi symbols and propaganda.

VI. Analysis of Law 192

A. Interference

64. Law No. 192 prohibits the use of the symbols of the totalitarian communist regime, as well as the propaganda of totalitarian ideologies. Physical and legal persons who breach this ban are liable to be fined. Political parties who are sanctioned for repeated breaches of the ban can be disbanded. Sanctioning (by fine and/or dissolution) individuals and political parties for the use of symbols of the totalitarian communist regime and the propaganda of totalitarian ideologies, undoubtedly constitutes interference into freedom of expression and freedom of association.

65. In addition, pursuant to Law No. 192, candidates of the Moldovan Communist Party are now prevented from running in elections using their - legally registered - party symbol. The Venice Commission has previously stressed that “political parties exist for the purpose of winning political power through free and fair elections”²¹ and also that “a major function of political parties is the presentation of candidates for elections in an effort to gain and exercise political authority”.²² It is undisputable that alongside with party names, symbols contribute to informing the electorate duly in order for them to exercise their free choice; voters identify the candidates also through the party name and the party symbol. It is the view of the Venice Commission and of the OSCE/ODIHR that the inability of the Communist Party and its candidates to run in elections under their registered and publicly recognised symbol amounts to an interference with their freedom of association (and also with their right to free and fair elections under Article 3 of Protocol No. 1 to the ECHR.)

²¹ Report on political parties and elections, CDL-AD(2006)025

²² OSCE-ODIHR – Venice Commission *Guidelines on political party regulation*, paragraph 126.

66. Pursuant to the established case-law of the ECtHR, an interference with the freedom of expression and freedom of association, if it is to be legitimate, needs: a) to be prescribed by law, b) to pursue a legitimate aim, and c) to be necessary in a democratic society. The burden of proof to establish that these requirements are met is on the state.

67. It could be argued that no interference takes place, because the practices banned by Law No. 192 do not enjoy protection under the ECHR and other international instruments in the first place. Article 17 of the ECHR declares that “nothing /.../ 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 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”.

68. It must be noted that the ECtHR has applied Article 17 rather rarely and always with respect to particular manifestations of freedom of expression and to particular organizations (see *Vajnai v. Hungary*, §§ 24-26). There is moreover a decreasing tendency in the use of Article 17. Finally, Article 3(4) of the Law on Freedom of Expression, clearly states that the restrictions on freedom of expression stemming from Law No. 192 are imposed within the limits previewed by Article 3(3) of the Law on Freedom of Expression, which mirrors Article 10(2) of the ECHR. It is clearly impossible for a measure to fall within the scope of Article 10(2) of the ECHR and to be excluded from the protection of the ECHR under Article 17 at the same time. In the opinion of the Venice Commission and the OSCE/ODIHR, Article 17 is therefore inapplicable in the case at hand.

B. Prescribed by Law

69. Interferences into freedom of expression and freedom of association need to be prescribed by law. According to the case law of the ECtHR, the expressions “prescribed by law” and “in accordance with the law” in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct (see, among other authorities, *Sunday Times v. the United Kingdom* (no. 1), 26 April 1979, § 49, Series A no. 30). Experience shows, however, that it is impossible to attain absolute precision in the framing of legal provisions. If the law criminally sanctions a certain conduct, the lack of specificity could further entail the violation of the principle of *nullum crimen sine lege*, under Article 7 ECHR.

70. Law No. 192 is undoubtedly a “law” in the formal sense of Articles 10(2) and 11(2) of the ECHR. It remains to be established whether it meets the conditions of accessibility and foreseeability, so as to meet the qualitative requirements inherent in the concept of “law”.

a. “Symbols of the Totalitarian Communist Regime”

71. Law No. 192 bans the use of symbols of the totalitarian communist regime. The Constitutional Court of Poland stated that the reference to “carriers of fascist, communist or other totalitarian symbols” was not specific enough and allowed for numerous interpretations (2011 Case). The reference to “a swastika, an SS-badge, an arrow-cross, a symbol of the hammer and sickle or a red star, or a symbol depicting any of them” in the Criminal Code of Hungary was on the contrary found fully compatible with the principle of specificity by both the Constitutional Court of Hungary and the ECtHR.

72. Law No. 192 explicitly states that symbols of the totalitarian communist regime, whose use and propaganda are banned, encompass “hammer and sickle and any carrier with such symbols”. The wording suggests that the list of prohibited symbols is an enumerative one, any other symbols conventionally related to communism, such as the red star, being excluded from

its scope of application. Moreover, that the symbol is targeted due to its association with communism implies that the only form banned by the law is the one conventionally used by communist regimes, with the hammer and sickle superimposed over each other.

73. In so far as it refers to “totalitarian communist symbols”, in the view of the Venice Commission and the OSCE/ODIHR, the Law No. 192 is unambiguous, and, hence, compatible with the principle of specificity.

b. “Propaganda of Totalitarian Ideologies”

74. The reference to “the propaganda of totalitarian ideologies” is more problematic. Law No. 192 fails to enumerate which ideologies count as “totalitarian”. Since the law was enacted as part of an anti-communist package, it could be presumed that the legislator had the communist ideology in mind. Yet, the plural form of the word (“ideologies”) in the text suggests that the communist ideology is not the only one covered. Which other ideologies, if any, fall into the scope of application of the Law remains, however, unclear.

75. Moreover, the legislation fails to specify what ideas, concepts, and principles enter within totalitarian ideologies that shall not be propagated. Ideologies, defined as “systems of ideas and ideals, especially those which form the basis of economic or political theory and policy” (Oxford Dictionary), tend to be complex and comprehensive, encompassing an interwoven set of ideas. They may have many strands and currents, differing from each other quite substantively. Ideologies can also overlap, sharing some of their ideas and principles. Even political scientists and philosophers would most probably not be able to agree on the exact contents of various ideologies. Expecting that the common citizen could score better in this area would mean raising the bar to an unrealistic height.

76. The Venice Commission notes that the Polish Constitutional Court found that the expression “fascist or communist symbols” was not specific enough for people to know which symbols were prohibited (2011 Case). The Czechoslovak Constitutional Court declared that criminalising the support for or propaganda of “fascism and communism” without defining these terms would amount to the violation of the principle of specificity (1992 Case). The term “totalitarian ideologies” is at least as vague and open-ended as “communist or fascist symbols” or “fascism and communism”, if not more so.

77. In addition, the Venice Commission and the OSCE/ODIHR note that in Moldova, political parties may be declared unconstitutional “if by their aims or activities they are engaged in fighting against political pluralism, the principles of the rule of law (...)”, under Article 41 of the Constitution, and are prohibited under Article 3 of the Law on Political Parties if through their statute and programme they convey “ideas contrary to the provisions of the Moldovan constitution”. If the “propaganda of totalitarian ideologies” does not fall within the scope of Article 3 of the Law on Political Parties so as to require additional regulation under Law No. 192, then the meaning of prohibited “totalitarian ideologies” is even more unclear.

78. The Venice Commission and the OSCE/ODIHR therefore consider that, from a European perspective and unless there is a clear and easily accessible definition elsewhere in Moldovan law or in consistent national case-law, in so far as it refers to “totalitarian ideologies” Law No. 192 fails to meet the specificity required by Articles 10 and 11 ECHR. The conclusion therefore is that the prohibition of propaganda of “totalitarian ideologies” is not in conformity with European standards, without it being necessary to proceed with the assessment of its necessity in a democratic society.

C. In pursuance of a legitimate aim

79. Freedom of expression and freedom of association may be restricted only in pursuance of the legitimate aims stated in Articles 10(2) and 11(2) of the ECHR (and, analogously, in Articles 19(3) and 22(2) of the ICCPR).

80. As is the practice with *amicus curiae* briefs, the Venice Commission and the OSCE/ODIHR have not discussed the law under consideration with the Moldovan legislator, and have therefore not been informed in detail about the legislator's specific aims. Against the background of its enactment, it may nonetheless be presumed that this law seeks in the first place, using a backward-looking perspective, to heal the pain of the past by making it unlawful for people to use symbols and propagate ideas associated with a former regime responsible for serious crimes.²³ The ban in this sense is aimed at protecting the dignity of victims, helping the population to overcome the trauma of the past, and contributing to reconciliation.

81. At the same time, the ban on the use of such symbols and the propaganda of such ideologies may also seek to protect the democratic system and human rights and fundamental freedoms. In this case, as the ECtHR found in cases of dissolution of political parties²⁴, the ban aims at preventing extremist movements from offending other citizens and from carrying out their plans and reaching their objectives.²⁵

82. In the view of the Venice Commission and the OSCE/ODIHR, in the case of Moldova a ban on the use of the communist regime's symbols may have a particular dimension different from the ones pertaining in many other post-communist states. Unlike such states as Hungary or Poland, Moldova was not only part of the Soviet sphere of influence in the broader sense of the term, but constituted an integral part of the structure of the federation known as the Union of Socialist Soviet Republics. Within that state structure, the symbol of the hammer and sickle was the official emblem of a state (art. 143 of the 1936 Constitution of the USSR) which employed undemocratic and totalitarian methods including non-observance of freedom of speech and political pluralism. Therefore, in the case of Moldova, the invocation of that symbol by political parties might be seen not only as an emotional device but also as a reference to a concrete legal act (the Soviet constitution), which had been binding in today's territory of Moldova, and to the methods it represented.

83. In the light of the foregoing, the Venice Commission and the OSCE/ODIHR consider that the law may be deemed to serve the legitimate aims of preventing disorder, protecting public safety and protecting the rights and freedoms of others.

D. Necessary in a Democratic Society

84. Restrictions imposed upon freedom of expression and upon freedom of association have to respond to a pressing social need and be proportional to that need. When adopting them, states enjoy a margin of appreciation allowing them to take account of their constitutional values and historical experience. The discretion reflects that states are the best placed to assess the situation on their territory and decide on the measures that need to be adopted. At the same time, states need to take into consideration the importance of the protected right and

²³ This perspective was put forward by Hungary in the Vajnai case, in which the Government invoked "uneasy feelings, fear or indignation [...] and sometimes even the violation/ of the rights of deceased" (par. 33) that the display of symbols of the former communist regime could give rise to.

²⁴ *Herri Batasuna and Batasuna v. Spain*, 30 June 2009, para. 63-64; *United Communist Party v. Turkey*, para. 41.

²⁵ This is the perspective taken by the Czechoslovak Constitutional Court in the 1992 Case and the Czech Police in the 2012 Semily Mosaic Case.

the special emphasis placed upon freedom of political speech and freedom of association for political parties. The Venice Commission and the OSCE/ODIHR recall that under international standards, freedom of expression extends also to information or ideas which may be found offending, shocking, and disturbing.

85. As the ECtHR stressed in the Vajnai Case, limitations upon the freedom of expression relating to political speech are “justified only in so far as there exists a clear, pressing and specific social need. Consequently, utmost care must be observed in applying any restrictions, especially when the case involves symbols which have multiple meanings” (par. 51). Similarly, in the Freedom and Democracy Party (ÖZDEP) Case, the ECtHR declared that “in view of the essential role played by political parties in the proper functioning of democracy, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties’ freedom of association” (par. 44).

86. Law No. 192 bans the use of communist symbols and the propaganda of totalitarian ideologies through three channels: a) the law on political parties, b) the law on freedom of expression and c) the code of contraventions. The Venice Commission and the OSCE/ODIHR will examine if due provision for taking into account the proportionality of the ban is made in each of these legislative texts.

a. Limitation on political parties

87. New paragraph 5 of Article 4 of the Law on Political Parties prohibits “the use by parties of symbols of the totalitarian communist regime (hammer and sickle and any support with these symbols), as well as the promotion of totalitarian ideologies”, without introducing any qualification in view of the application of these restrictions. The prohibition is thus absolute and is not restricted to cases of clear and present danger for a democratic society, national security and prevention of constitutional disorder. Indeed no criteria are given for the application of this prohibition by the courts and the public authorities.

88. This blanket prohibition affects not only occasional manifestations of freedom of expression, but also the stable organization of the Communist Party of Moldova, which has the hammer and sickle as its duly registered and publicly recognized party symbol. It does so in two ways: first, pursuant to new paragraph 1.e) of Article 22 of the Law on Political Parties, repeated sanctions for breaching the provisions of this law lead to the cessation of the activities of the party. This means that for a political party, the repeated violation of the ban on the use of communist symbols entails the most radical penalty available, the termination of the existence of the party. Moreover, the termination comes automatically, with no judicial review. Just two displays of the hammer and sickle, followed by the imposition of fines, are thus enough for the party to cease its existence. Secondly, candidates of the Moldovan Communist Party may not run for elections with the party symbol, which affects the party’s chances that its prospected voters duly identify its candidates.

89. It is well established in the case-law of the European Court of Human Rights that drastic measures, such as the dissolution of an entire political party, may only be taken in the most serious cases.²⁶ That is why the nature and severity of the interference is also a factor to be taken into account when assessing its proportionality.²⁷

²⁶ see *Refah Partisi; United Communist Party of Turkey and Others*, cited above, § 46; *Socialist Party and Others v. Turkey*, 25 May 1998, § 50, Reports 1998-III; and *Freedom and Democracy Party (ÖZDEP) v. Turkey* [GC], no. 23885/94, § 45, ECHR 1999-VIII; *Herri Batasuna and Batasuna v. Spain*, § 78.

²⁷ see, for example, *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 64, ECHR 1999-IV, *Herri Batasuna*, § 78.

90. The ECtHR has also stressed that a political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds.²⁸

91. The Court has further stated that the constitution and programme of a political party cannot be taken into account as the sole criterion for determining its objectives and intentions. The content of the programme must be compared with the actions of the party's leaders and members and the positions they defend. Taken together, these acts and stances may be relevant in proceedings for the dissolution of a political party, provided that as a whole they disclose its aims and intentions.²⁹

92. The Venice Commission also stressed in its 1999 Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures that "the prohibition or dissolution of political parties as a far-reaching measure should be used with utmost restraint". The termination is only justified "in case of parties which advocate the use of violence or use violence as a political means to overthrow the democratic constitutional order, thereby undermining the rights and freedoms guaranteed by the constitution".

93. The OSCE/ODIHR – Venice Commission *Guidelines on Political Party Regulation* similarly prescribe that "the possibility to dissolve or prohibit a political party from forming should be exceptionally narrowly tailored and applied only in extreme cases. Political parties should never be dissolved for minor administrative or operational breaches of conduct. [...] Nor should a political party be prohibited or dissolved because its ideas are unfavourable, unpopular or offensive. If the party concerned does not use violence and does not threaten civil peace or the democratic constitutional order of the country, then neither prohibition nor dissolution is justified."³⁰

94. The ECtHR indicated in the Vajnai Case that any ban on the use of symbols needs to take into account the plurality of meanings assigned to most symbols. As "signs or images identifying an idea, a person or an event with the purpose of establishing a link between the sign and the symbolised ideas, persons or events on the basis of their common features" (Hungary, p. 18), symbols are by their very nature open to different interpretations and associations.

95. In former communist Countries of CEE the hammer and sickle is first associated with the past communist regimes of Central and Eastern Europe. There is a consensus that massive violations of human rights were committed by these regimes. Accordingly, over the past two decades, several countries of the region have enacted legislation condemning their former regime and declaring it unlawful or criminal. In Moldova, such condemnation was brought about by Resolution No. 191 on the historical and political-legal assessment of the totalitarian communist regime in the Moldavian Soviet Socialist Republic of June 2012. Devoid of

²⁸ see, mutatis mutandis, *Socialist Party and Others v. Turkey*, cited above, §§ 46 and 47; *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*, cited above, § 46; *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 49, ECHR 2002-II; and *Refah Partisi and Others*, cited above, § 98.

²⁹ see *United Communist Party of Turkey and Others* § 58, cited above, and *Socialist Party and Others*, § 48, cited above.

³⁰ OSCE/ODIHR – Venice Commission *Guidelines on Political Party Regulation*, paragraph 92.

normative force, the resolution is important in giving a political and moral assessment of the former regime.

96. Critical assessment of the totalitarian communist regimes in Central and Eastern Europe is also put forward in Resolutions 1096(1996) and 1481(2006) of the PACE and Resolution 213 (2009) of the European Parliament. The same instruments emphasize the need to clearly distance oneself from the past crimes and to ensure that rights and dignity of victims are respected.

97. However, the hammer and sickle is also linked with communism more generally. The evaluation of this ideology seems to be less unanimous in Europe. In Resolution 1481(2006), the PACE conceded that “some European communist parties had made contribution to achieving democracy” (par. 4). In the Semily Mosaic Case, the Czech Police held that “communism as such does not always aim at illegitimate goals” (p. 2). Only three years after the fall of communism, in 1992, the Czechoslovak Constitutional Court declared that communism as such does not necessarily meet the criterion of a movement aimed at suppressing rights and freedoms of citizens. Moreover, communist parties lawfully operate in many countries in and outside Europe. There are few countries, if any, in which communism *per se*, without further conditions, would be unlawful.

98. The current practice of the use of the hammer and sickle symbol in Europe is also indicative (see paras 5-6).

99. Some believe that the hammer and sickle represents exclusively communist totalitarian rule. In Lithuania (see paras 47-49), the use of the hammer and sickle is banned. In the Semily Mosaic Case (2012) instead the Czech Police interpreted the hammer and sickle as a symbol related not solely to the past communist regime, but to communism more broadly.

100. The ECtHR in the Vajnai Case cast doubts on the legality of this ban, declaring section 269/B of the Criminal Code “unacceptably broad” (par. 56), but it did not address the hammer and sickle specifically.

101. The Venice Commission and the OSCE/ODIHR stress that the hammer and sickle is used by several (but not all) legally registered communist parties across Europe (Austria, Bosnia and Herzegovina, Germany, Italy, Norway, Portugal, Romania, San Marino, Sweden).

102. The Venice Commission and the OSCE/ODIHR further note and attach particular importance to the fact that the hammer and sickle was officially registered by the Communist Party of Moldova as party symbol on 27 April 1994 and has since been legally used by that party. The Moldovan Communist Party participated with this officially registered symbol in six parliamentary elections (1998, 2001, 2005, 2009, 2009 and 2010), one presidential election (1996) and five local elections (1995, 1999, 2003, 2007 and 2011); this party has thus participated in the political life of Moldova both as the ruling party and as the opposition, with no known intention to violently overthrow the democratic constitutional order.

103. It is acknowledged that an individual or a party using the hammer and sickle must know that it was used by the past totalitarian communist regime. However, in the absence of indications, in the party programme and in concrete actions, that the crimes committed by that regime are approved and its totalitarian ideology is embraced, the use of this communist symbol may not of itself be taken as defying the rule of law. It is indeed conceivable that a leftist party based on democratic principles and functioning within a democratic system may use a communist symbol without questioning the democratic principles according to which the state functions. In Moldova, in particular, because of the frequent and undisputed use of the symbol by the Moldovan Communist Party since 1994, the connection between the symbol and the totalitarian communist ideology must be considered as more remote.

104. The Venice Commission and the OSCE/ODIHR are therefore of the opinion that, from a European perspective, the display of the hammer and sickle cannot be understood today in Moldova as representing exclusively support for the communist totalitarian rule. This conclusion is also supported by the fact that Law No. 192 itself adds to the prohibition of display of the hammer and sickle, the prohibition of propaganda of totalitarian ideologies: the Moldovan legislator considered that the two types of conduct were distinct.

105. As for the existence of a “pressing social need” to ban the symbols of the past totalitarian communist regime in today’s Moldova (assuming that there have been factors preventing the adoption of such ban for almost 25 years after the fall of the Communist regime), in respect of the aim of healing the pain of the past, the Venice Commission and the OSCE/ODIHR are not in the position to assess whether this need is still so acute and pressing; as concerns the prevention of disorder and public safety, the Venice Commission and the OSCE/ODIHR note that Moldova has been a member of the Council of Europe since July 1995 and a party to the European Convention on Human Rights since September 1997. They have no knowledge of a real and present danger of any political movement or party aiming to restore communist dictatorship. The containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a “pressing social need”.

106. Even assuming that a pressing social need could be proved to exist, the Venice Commission and the OSCE/ODIHR stress that such need could not justify the imposition of an absolute prohibition, with, in addition, the automatic sanction of the termination of the activities of the party: a relationship of proportionality should in any event exist. The pursuit of unconstitutional goals leading to the termination of the activity of a political party must in any case be established on a case-by-case basis, through a decision taken by a judicial organ in “a procedure offering all guarantees of due process, openness and a fair trial”. There may not be any automaticity.

107. It should be noted that the Moldovan Law on Political Parties does provide for a judicial procedure of termination of the activity of a political party. Political parties that through their statute and programme convey ideas contrary to the provisions of the Moldovan constitution are prohibited under Article 3 of the Law on Political Parties. Further, it is possible under Article 21 through a decision of the Chisinau Court of Appeal in accordance with the procedure set forth in this provision, to limit the activity of a political party “if through its actions serious damages are caused to political pluralism or to the fundamental democratic principles”. Dissolution may be pronounced by the Chisinau Court of Appeal under Article 22 in case the political party commits within one year the same actions which were previously limited under Article 21 or if the fulfilment of the party’s political will is accomplished through illicit ways or means contrary to the public order.

108. Article 4 paragraph 5, coupled with Article 22(1)(e) of the Law on Political Parties, circumvents this procedure, by getting rid of the judicial review and the proportionality requirement.

109. It also entails the exclusion of party candidates from running for elections with their official symbol, by mere operation of technical provisions of the electoral legislation.

110. In this respect, the Venice Commission and the OSCE/ODIHR have stated in their *Guidelines on political party regulation* that “... where existing registration requirements are changed, such changes should not result in the revocation of the registration status of a political party. Parties registered under previous registration legislation should be able to maintain their status as political parties and given a reasonable opportunity to supplement their registration

*documents.*³¹ Under Article 18 of the Law on Political Parties, changes in the applicable legislation entail the obligation for the political party to amend and complete their statute “in compliance with the established procedure”. If the use of the hammer and sickle by the Moldovan Communist Party is not acceptable any more, this party should be given a reasonable opportunity to proceed with the required changes and in the meantime its candidates should be allowed to run in elections with the official symbol.

111. It is further noted that Paragraph 5 of Article 4 prohibits the use of communist symbols “by parties”. The Venice Commission in its Guidelines on Prohibition or Dissolution of Political Parties has stressed that a distinction should be drawn between the individual behaviours of the members of a political party and the activities of the party itself, even if it did not react to those behaviours.

112. In conclusion, from a European perspective, the Venice Commission and the OSCE/ODIHR are of the view that the blanket prohibition set forth in Article 4 paragraph 5 and its effects pursuant to Article 22(1)(e) of the Law on Political Parties are clearly contrary to international standards (Articles 10 and 11 ECHR).

b. Limitation of freedom of expression

113. Article 32 § 3 of the Moldovan Constitution, mirroring Article 10 § 2 ECHR, lists the manifestations of the exercise of the freedom of opinion and expression which the law is allowed to forbid and sanction (“actions aimed at denying and slandering of the State and people, instigation to sedition, war of aggression, national and/or racial or religious hatred, incitement to discrimination, territorial separatism, public violence or other manifestations encroaching upon the constitutional regime are concerned”: see para. 5 above). This provision requires legislative implementation in view of the identification of the cases to which the constitutional limitation can be applied as far as a real danger is at stake. The list of required or possible limitations in Article 32 clearly excludes the possibility of restricting the exercise of freedom of expression when it is not aimed at endangering the interests and values protected by the Constitution.

114. The application of the limitations provided in § 3 of Article 3 of the law on freedom of expression is permitted under paragraph 4 “only if the restriction is proportional to the situation that caused it, observing the proper balance of interests protected: freedom of speech and freedom of the public to be informed”. This means that the freedom of expression can only be restricted when the measure is proportional to the aims pursued in compliance with a fair balance, for instance between the guarantee of the freedom of speech and freedom of the public to be informed. The competent public authority (executive or judicial) is thus given some discretion and entrusted with the task of balancing, through an administrative or judicial act, the different interests which can be affected.

115. New Article 4¹ of the Law on Freedom of Expression prohibits “the dissemination and/or the use for political purposes of symbols of the totalitarian communist regime” and “the promotion of totalitarian ideologies” under the conditions of paragraph 3, hence only when they encroach on the constitutional regime and only if the restriction is proportional to the legitimate aim pursued, that is, if they are such as to produce a clear and present danger. As concerns communist symbols, therefore, provided that the criterion of necessity in a democratic society is respected, this provision in principle meets international standards.

³¹ OSCE/ODIHR – Venice Commission *Guidelines on Political Party Regulation*, paragraph 68.

116. It must be noted, however, that paragraph 4 of Article 3 setting out the principle of balancing of interests provides that only freedom of speech and freedom of the public to be informed should be taken into account. The dissemination and use of totalitarian symbols risk to conflict with other rights and freedoms, which are not explicitly provided for in the law. In the absence of a specific rule, there is therefore the danger that the provisions regarding the communist symbols and ideologies may be handled differently by the various courts and public administration authorities.

117. As regards the promotion of totalitarian ideologies, the Venice Commission and the OSCE/ODIHR have already expressed the opinion (see paragraphs 74-78 above) that, from a European perspective, it does not comply with the criterion of being “in accordance with the law” within the meaning of Article 10 ECHR, so that it is not necessary to examine its proportionality.

c. Contraventions

118. Art. 67.1 of the contravention code of the Republic of Moldova provides for sanctions for the dissemination and/or use, for political or propagandistic purposes, of totalitarian communist regime symbols and for the promotion of totalitarian ideologies.

119. The sanction is provided in the form of a contravention. Although the fine of 100-150 conventional units for individuals and 300-500 conventional units for officials and legal persons is relatively high by Moldovan standards, it does not exceed the amounts previewed for other contraventions in an exaggerated way. The prohibition relates to “the use and propaganda of the symbols with political and propagandistic aims”, thus making it clear that the law would not apply to non-political (personal, artistic, educational etc.) use of the hammer and sickle. The intricacy of drawing a clear line between the former and the latter should however be acknowledged here.

120. As regards the promotion of totalitarian ideologies, the Venice Commission and the OSCE/ODIHR have already expressed the opinion (see paragraphs 74-78 above) that it does not comply with the criterion of being “in accordance with the law” within the meaning of Article 10 ECHR, so that it is not necessary to examine its proportionality.

121. As regards the use of the hammer and sickle, the Venice Commission and the OSCE/ODIHR recall that the ECtHR has stressed in the Vajnai case that the potential propagation of the communist totalitarian ideology, obnoxious as it may be, cannot be the sole reason to limit the use of a symbol, especially one with multiple meanings by way of a criminal sanction. The mere display or use of a symbol by an individual, including by a member of a registered political party with no known totalitarian ambitions, cannot be equated with dangerous propaganda. According to Article 67.1 of the Moldovan Contraventions Code, instead, the dissemination and/or use for political or propagandistic purposes of totalitarian communist regime symbols is irrefutably considered to do so. The Venice Commission and the OSCE/ODIHR are not aware 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. This prohibition thus appears to be unacceptably broad, as instead of aiming at individuals and movements preaching violence and hatred (there are provisions in the Moldovan criminal code which already prohibit doing so: Article 341 and 346), it simply targets people using a certain symbol for political or propagandistic purposes.

122. In conclusion, from a European perspective, the Venice Commission and the OSCE/ODIHR are of the view that Article 67.1 of the Contraventions Code of Moldova does not meet the standards of Article 10 ECHR.

VII. Concluding Remarks

123. As this is an *amicus curiae* brief for the Constitutional Court of Moldova, the intention is not to take a final stand on the issue of the constitutionality of Law No. 192 of 12 July 2012, but to provide the Court with material as to the compatibility of this law with European standards and with elements from comparative constitutional law, in order to facilitate the Court's consideration of Law No. 192 under the Constitution of Moldova. It is the Constitutional Court of Moldova that has the final say as regards the binding interpretation of the Moldovan Constitution and the compatibility of national legislation with it.

124. States are not prevented from banning, or even criminalising, the use of certain symbols and the propaganda of certain ideologies. Yet, such ban or criminalisation needs to comply with several requirements, in order to satisfy the European standards on freedom of expression and freedom of association, as developed in the case-law of the European Court on Human Rights and in the works of the Venice Commission and the OSCE/ODIHR.

- First, the ban needs to be provided by a law that is accessible and formulated with sufficient precision. The law has to specify which symbols and which ideologies are banned and what the consequences of the breach of the ban are.
- Secondly, the ban must pursue exclusively the legitimate aims enumerated in Articles 10 and 11 ECHR.
- Thirdly, the ban needs to be necessary in a democratic society. It has to respond to “a pressing social need” and to be proportionate to the legitimate aims pursued.

125. Law No. 192 of 12 July 2012 appears to fail to meet these requirements on several grounds.

- First, by banning the propaganda of “totalitarian ideologies” without defining this term, the law does not satisfy the principle of specificity, making it difficult for people to adjust their conduct to the requirements of the legal regulation and, consequently, posing serious threats to free political debate within the Moldovan society.
- Secondly, it remains uncertain whether, and to what extent, the prohibition responds to “a pressing social need”.
- Thirdly, the risk of automatic termination of the existence of political parties that have been fined for repeated violations of the Contravention Code is clearly beyond any proportion to the legitimate aims pursued by the law and to the urgency of the situation.
- Fourthly, the Moldovan Communist Party may not be exposed to the cessation of its activities if it continues to use its symbol and its candidates may not be prevented from running in elections with the party symbol; if the use of the hammer and sickle by the Moldovan Communist Party is not acceptable any more, this party should be given a reasonable opportunity to proceed with the required changes and in the meantime its candidates should be allowed to run in elections with the official symbol.
- Fifthly, fines may not be imposed on account of the mere display of the hammer and sickle and should only be applicable when the display has been proven to have represented dangerous propaganda.

126. The Venice Commission and the OSCE/ODIHR remain at the disposal of the Constitutional Court or other authorities of the Republic of Moldova for any further assistance that they may need.