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(VENICE COMMISSION)

REPUBLIC OF MOLDOVA

***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)**

**Adopted by the Venice Commission
at its 129th Plenary Session**

(Venise and online, 10-11 December 2021)

on the basis of comments by

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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 at its 129th Plenary Session (Venice and online, 10-11 December 2021).

II. Request

4. This request for an *amicus curiae* brief was 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 Convention¹ are not in line with Articles 31, 35 and 48 of the Constitution².

¹ 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.

² 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

5. For this *amicus curiae* brief, the Constitutional Court of the Republic of 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 would like to recall that it provided a detailed analysis of the Istanbul Convention in its *Opinion for Armenia 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)* CDL-AD(2019) 018, which is also relevant for this *amicus curiae* brief.

7. 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 law. It has aimed to harmonise its replies with the interpretation of the relevant provisions of the Constitution of the Republic of Moldova.

8. In this respect, it is important to underline that the assessment of the compatibility of the Istanbul Convention with the Constitution of the Republic of Moldova is, according to Article 135.1.a of the Constitution of the Republic of Moldova and Article 4.1.a of Law No. 317-XIII on the Constitutional Court of the Republic 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 the Republic of Moldova.

9. The Constitution of the Republic 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.”*

(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.

(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.

10. The Venice Commission would, however, like to reiterate that the choice of ratifying a treaty and so being bound by its obligations is a sovereign act of the State.³ 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*”.⁴ 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.⁵

III. Background

11. The Republic of 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, the Republic of Moldova has ratified the European Convention on Human Rights and is subject to the jurisdiction of the European Court of Human Rights. The Republic of Moldova has ratified the Revised European Social Charter but has not authorised the European Committee of Social Rights to decide collective complaints against it. The Republic of 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.

12. As a UN Member State, the Republic of 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, the Republic of Moldova’s policies and practices are monitored by [UN treaty bodies](#). It has accepted the complaints procedure of four treaty bodies. The Republic of 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. The Republic of 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.

13. The Republic of 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 2021.⁶ 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

³ 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.

⁴ Article 18 of the 1969 *Vienna Convention on the Law of Treaties*.

⁵ 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.

⁶ 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.

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 (having failed to secure an amendment requiring the notion of gender to be limited to biological gender).⁷

14. The ratification was further condemned by the Orthodox Church of the Republic of Moldova,⁸ 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.”

15. When the Istanbul Convention becomes binding on the Republic of Moldova⁹, it will be joining the 34 (out of 47) member States of the Council of Europe that have ratified the legally binding international instrument.¹⁰ 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.

16. 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 of, and discrimination against, 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.

17. 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 be still shrouded in silence.¹¹ The majority of victims of domestic violence are women.¹² The statistical data in the Republic of 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 the Republic of Moldova experienced some form of intimate partner violence.¹³ The perpetrators were 2289 men and 181 women. (Source: General Police Inspectorate).¹⁴ These bodies maintained that the State should take urgent steps to ratify the Istanbul Convention and align its legislation with international standards.

18. The Istanbul Convention has not been well received in various countries of Eastern and Central Europe. Nevertheless, Albania, Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Poland, Romania, Serbia and Slovenia have both signed and ratified the Istanbul Convention, and steps have already been undertaken to implement new solutions into their countries’ legal systems. With the exception of Croatia, all have undergone or are currently

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

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

⁹ 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).

¹⁰ The Convention was adopted (opened for signature) on 11 May 2011. To date it has been ratified by 34 Council of Europe Member States.

¹¹ Explanatory Report, Istanbul Convention.

¹² Cf., Article 2 of the Istanbul Convention – the scope of the Convention, Explanatory Report.

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

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

undergoing evaluation by 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. Poland, for instance, has explained in its final comments, following the evaluation by GREVIO, the actions it has taken and its further plans towards implementing GREVIO findings. Azerbaijan and Russia have not signed the Istanbul Convention at all, and Hungary signed the document as long ago as 2014, but voted against ratification in May 2020 and Turkey withdrew from the Istanbul Convention on 1 July 2021. Six members of the European Union (Bulgaria, Hungary, Czechia, Latvia, Lithuania and Slovakia) have not ratified the Istanbul Convention.

19. 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."*¹⁵

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

21. The Republic of Moldova has duly undertaken legislative reforms to tackle violence against women.¹⁶ Act No. 196/2016 introduced emergency restriction orders by amending Act No. 45-XVI of 2007 on Preventing and Combating Domestic Violence, and Act No. 71/2016 prohibits the use of sexist language by amending the Law on the Press, the Law on Advertising and the Audiovisual Code. The Republic of Moldova has also made efforts to improve its institutional and policy framework aimed at accelerating the elimination of discrimination against women with the National strategy on preventing and combating violence against women and domestic violence (2018–2023) and the action plan for its implementation (2018– 2020). The CEDAW Committee however noted with concern, in its 2020 concluding observations on the Republic of Moldova's periodic report, the high prevalence of gender-based violence against women in the country, including domestic violence and economic and psychosocial violence, stressing in particular the limited enforcement of the legislative framework to combat gender-based violence due to insufficient resource allocations.¹⁷

IV. Analysis

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

22. 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.

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

¹⁵https://www.coe.int/en/web/democracy/newsroom/-/asset_publisher/XpxicDtFK3Js/content/ending-misconceptions-about-the-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence/16695?inheritRedirect=false

¹⁶ Special measures that are necessary to prevent and protect women from gender-based violence shall not be considered discrimination under the terms of this Convention, cf. Article 4.

¹⁷ Concluding observations on the sixth periodic report of the Republic of Moldova; Draft prepared by the Committee [CEDAW/C/MDA/CO/6].

“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.”

24. 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 ranks – alongside sex, 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.¹⁸

25. The Istanbul Convention also does not seek to *“eliminate the differences”* between men and women, or to suggest that men and women are, or should be, *“the same”*. As was stated in the Venice Commission’s opinion for Armenia on the Istanbul Convention, “By defining the term *gender* in Article 3(c), the Istanbul Convention recognises that violence against women does not only originate from biological differences between men and women, i.e. sex, but mainly from *“socially constructed roles, behaviours and attributes that a given society considers appropriate for women and men”*. Such stereotyped gender roles contribute to the subordinate status of women in society and may result in making harmful practices and violence against women acceptable in the private and public spheres.”¹⁹ In this respect, the Istanbul Convention reflects Article 16 of the Constitution concerning equality.

26. The Committee set up under the UN Convention on the Elimination of All Forms of Discrimination against Women, a convention to which the Republic of Moldova is a party since 1993, has stated in its Recommendation no. 19 of 1992 (as updated by Recommendation no. 35 in 2017)²⁰ 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.²¹ And the

¹⁸ 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 – 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, paragraph 65.

¹⁹ Opinion for Armenia 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) CDL-AD(2019) 018, paragraph 23.

²⁰ https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/35&Lang=en

²¹ CEDAW, General Recommendation no.19 (1992), paragraph 1.

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”*.²²

27. 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.

28. 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.

29. 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.”*²³

30. 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.²⁴

31. 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 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.”*

32. In this context, it may be pointed out that the European Court of Human Rights has expressed that the different types of family and the matters related to it – such as the definition of marriage and adoption – remain subject to the national laws of the Contracting States.²⁵ Consequently, if the Republic of Moldova establishes that marriage is between a man and a woman, and that the foundational element of the family excludes same-sex couples from marriage²⁶ then the Istanbul Convention cannot be considered as foreseeing a different type of family as the one established under domestic Moldovan legislation. It may be concluded that Article 3 c) of the Istanbul Convention does not 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

²² Declaration on the Elimination of Violence against Women of 1993, paragraph 1.

²³ ECtHR, *Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012, paragraph 127.

²⁴ ECtHR, *Jurčić v. Croatia*, 4 February 2021.

²⁵ ECtHR, *Chapin et Charpentier v. France*, Application No. 40183/07. 9 June 2016. paragraph 36.

²⁶ International Lesbian and Gay Alliance. State sponsored homophobia: global legislation overview update (2020). P.329. Available in:

https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf.

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 them.

B. Article 14 of the Istanbul Convention - education

33. 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 (and the principles which underpin them) must be promoted in informal educational facilities as well as in sports, cultural and leisure facilities and the media.

34. 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.”

35. 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 and principles 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 must 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 the Republic of Moldova.

36. It may, therefore, be assumed that the drafters of the Constitution did not have the intention of placing restrictions on the responsible authorities to guarantee an educational system that promotes awareness of and respect for these core values. In addition, the relevant provisions of Article 35 of the Constitution should 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, 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 European Convention on Human Rights and Articles 7 and 17 of the International Covenant on Civil and Political Rights.

37. GREVIO, 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.²⁷

38. 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.²⁸

39. 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.”

40. 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. 1.²⁹ 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.³⁰

41. The Republic of Moldova is party to the Convention on the Rights of the Child (CRC) 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

²⁷ <https://rm.coe.int/grevio-inf-2019-16/168098c61a>

²⁸ Ibid.

²⁹ 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.

³⁰ *Konrad and Others v. Germany* (dec), 11 September 2006.

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 treaty³¹.

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 Montenegro³², Uzbekistan³³, Azerbaijan,³⁴ and Ukraine³⁵.

45. Article 14 of the Istanbul Convention 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 life³⁶, which is in line with Article 16 of the Constitution that forbids discrimination on the basis of sex.

46. Hence, Article 14 of the Istanbul Convention does not violate the right of parents to decide on the education that their children must receive, because it leaves the States sufficient room to respect this right when deciding the manner in which to implement Article 14.

47. Consequently, Article 14 of the Istanbul Convention should not be seen as violating 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

48. 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.

49. 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

³¹CDL-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)*.

³²CDL-AD(2019)010, *Montenegro - Opinion on the draft Law on Freedom of Religion or Beliefs and legal status of religious communities*, paragraph 45.

³³CDL-AD(2020)002, *Uzbekistan - Joint opinion of the Venice Commission and OSCE/ODIHR on the draft Law "On freedom of conscience and religious organisations"* paragraph 54.

³⁴CDL-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*, paragraphs 59-60.

³⁵CDL-AD(2006)030, *Ukraine - Opinion on the Draft Law on the insertion of amendments on Freedom of Conscience and Religious Organisations in Ukraine*, paragraph 27.

³⁶CDL-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)*, paragraph 82.

scope of this Convention has been committed and that further serious acts of such 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.”

50. One of the main fears voiced in public debates regarding the Istanbul Convention is that professionals might be forced by this Convention to breach the confidentiality rule and report the instances of violence to the authorities. In this respect, the Venice Commission has stressed in its opinion for Armenia on the Istanbul Convention that: *“The main purpose of Article 28 of the Istanbul Convention is not to incite States to do away with professional confidentiality, but to incite them to open the way for certain professionals, primarily in the health sector, to report on suspected cases of serious acts of violence against women or domestic violence, without running the risk of being sanctioned for breaching confidentiality. [...] The Istanbul Convention therefore does not require States Parties to legislate in a manner that might be seen as incompatible with the constitutional provisions on confidentiality of communication”* (paragraph 87).

51. In the majority of EU Member States, reporting obligations already exist for professionals who are in contact with children³⁷ (cf., the EU Child Abuse Directive).³⁸ This, however, does not cover the obligation of relevant professionals to report all forms of violence against women/domestic violence because it is limited to suspicions of child sexual abuse.

52. It seems to be alleged that 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, should not be seen as a 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.

53. 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 should 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”

54. 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.

55. 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

³⁷ 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.

³⁸ 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.

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.”

56. One form of gender-based violence, the so-called honour crimes, have been part of the criminal law landscape of Council of Europe Member States for a long time. 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”.³⁹ In its Mid Term Horizontal Review, GREVIO explained this situation in its baseline evaluation reports on Italy and Portugal: “...courts continue to invoke the perpetrator's motives such as ‘hurt feelings’ or ‘jealousy’ to downplay violence and justify a reduced sentence...” and, in its baseline evaluation reports for Italy and Turkey, in order to respond to these challenges it called for “the dismantling of the concept that the honour and prestige of a man or the family are intrinsically associated with the conduct or presumed conduct of the women related to them, as well as for training of judicial professionals and monitoring of judicial practices, including through data collection.”⁴⁰

57. Article 42 of the Istanbul Convention rejects any reference to cultural, traditional or religious practices as a mitigating factor in cases of violence against women, including so-called “honour crimes”.

58. 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 when determining sentences in the cases of so-called „honour crimes”, usually committed by family members.⁴¹

59. 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).

60. 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.

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

62. Violence against women and domestic violence must be categorised as serious crimes. Their prohibition according to European, if not universal, standards touches upon the general conscience of mankind.

³⁹ <https://rm.coe.int/honor-crimes-web-a5/1680925835>

⁴⁰ Mid Term Horizontal Review of GREVIO baseline evaluation reports, paragraph 392.

⁴¹ <https://rm.coe.int/honor-crimes-web-a5/1680925835>

63. 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 as to justify the commitment of acts that are generally considered to be serious crimes.

V. Conclusion

64. 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.

65. 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 law. 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 the Republic of Moldova.

66. 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?*

67. 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 seems to be 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.
- 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 should 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 required 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, should not be seen as violating 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, does not appear to be 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.

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 harmonising 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” seems to be in line with Article 16 of the Constitution of the Republic of Moldova as well as with the obligations it has undertaken as a contracting party to international and regional human rights treaties.

Violence against women and domestic violence should be categorised as 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 as to justify the commitment of acts that are generally considered to be serious crimes.

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