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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

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

**JOINT INTERIM OPINION**

**ON THE LAW OF UKRAINE**

**ON THE CONDEMNATION**  
**OF THE COMMUNIST AND NATIONAL SOCIALIST (NAZI) REGIMES**  
**AND PROHIBITION OF PROPAGANDA OF THEIR SYMBOLS**

**Adopted by the Venice Commission**  
**at its 105<sup>th</sup> Plenary Session**  
**Venice (18-19 December 2015)**

**on the basis of comments by**

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## I. Introduction

1. On 24 September 2015, Mr Stefan Schennach, Chair of the Parliamentary Assembly's Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe, requested an opinion from the Venice Commission on Law no. 317-VIII "*On the condemnation of the communist and national socialist (Nazi) regimes, and prohibition of propaganda of their symbols*" (CDL-REF(2015)045; hereinafter: "Law no. 317-VIII" or the "Law").<sup>1</sup> The Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR) joined the Venice Commission for this opinion.
2. Mr Sergio Bartole, Ms Veronika Bilkova, Ms Regina Kiener and Ms Hanna Suchocka (members of the Venice Commission) acted as rapporteurs for the Venice Commission for this opinion. Mr Boyko Boev contributed to this opinion as an expert on behalf of OSCE/ODIHR.
3. On 16 November 2015, a delegation composed of a rapporteur and two members of the Secretariat of the Venice Commission as well as a representative and an expert from OSCE/ODIHR travelled to Kyiv, Ukraine to meet with representatives from the Ministry of Justice, the Ukrainian Parliament Commissioner for Human Rights, members of Parliament and NGOs to discuss Law no. 317-VIII. The Venice Commission and OSCE/ODIHR are grateful to the Ukrainian interlocutors for their availability to meet for these discussions.
4. This opinion was adopted by the Venice Commission at its 105<sup>th</sup> Plenary Session (Venice, 18-19 December 2015).

## II. Scope of the opinion

5. The scope of this Joint Opinion only covers Law no. 317-VIII, submitted for review by the Parliamentary Assembly of the Council of Europe. It is therefore limited and does not constitute a full and comprehensive review of all the legal acts that were amended by Law no. 317-VIII. This Joint Opinion also does not address the other three laws,<sup>2</sup> together with which Law no. 317-VIII formed a so-called "*decommunisation package*", which is the term often applied to the process of dismantling communist legacies in post-communist States.
6. The Joint Opinion raises key issues and provides indications of areas of concern. In the interests of concision, this Joint Opinion focuses mainly on problematic areas rather than on the positive aspects of Law no. 317-VIII. The ensuing recommendations are based on relevant international human rights and rule of law standards and OSCE commitments, Council of Europe and United Nations standards, as well as good practices from other Council of Europe Member States and OSCE participating States. Where appropriate, they also refer to the relevant recommendations made in previous Venice Commission and OSCE/ODIHR opinions and reports.
7. This Joint Opinion is based on an unofficial English translation of Law no. 317-VIII. Errors from translation may result.

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<sup>1</sup> Закон України No. 317-VIII Про засудження комуністичного та націонал-соціалістичного (нацистського) тоталітарних режимів в Україні та заборону пропаганди їхньої символіки, Відомості Верховної Ради (ВВР), 2015, № 26, ст.219.

<sup>2</sup> Law no. 314-VIII "*On the Legal Status and Honouring the memory of Fighters for Ukraine's Independence in the Twentieth Century*"; Law no. 315-VIII "*On Perpetuation of the victory over Nazism in the Second World War of 1939-1945*"; and Law no. 316-VIII "*On access to the archives of repressive agencies of the Communist totalitarian regime of 1917-1991*".

8. In view of the above, this Joint Opinion is without prejudice to any written or oral recommendations or comments on the respective legal acts or related legislation that the Venice Commission and/or OSCE/ODIHR may make in the future.

### III. Executive Summary

9. From the outset, the Venice Commission and OSCE/ODIHR recognise the right of Ukraine to ban or even criminalise the use of certain symbols of and propaganda for totalitarian regimes. Such legislation is not uncommon throughout the Council of Europe and OSCE regions. However, since the regulation affects human rights, in particular the rights to freedom of expression, association, assembly and elections, the legislation needs to comply with requirements set out by the European Convention on Human Rights (ECHR) and other regional or international human rights instruments. While Law no. 317-VIII may be considered as pursuing legitimate aims, its provisions are not precise enough to enable individuals to regulate their conduct according to the law and to prevent arbitrary interference by public authorities. As such, it does not adhere to the three-fold test of legality, legitimacy and necessity in a democratic society. Furthermore, the Law is too broad in scope and introduces sanctions that are disproportionate to the legitimate aim pursued. Any association that does not comply with Law no. 317-VIII may be banned, which is problematic with regard to every individual's freedom of association. This is particularly the case when it comes to political parties, which play a crucial role in ensuring pluralism and the proper functioning of democracy. The banning of political parties from participation in elections or their dissolution should be a measure of last resort in exceptional cases. The Venice Commission and OSCE/ODIHR would encourage the Ukrainian authorities to follow a "multiperspective" approach to Ukraine's history, that allows a shared vision of its past in order to promote social cohesion, peace and democracy.<sup>3</sup>

10. In light of the above, the Venice Commission and OSCE/ODIHR make the following key recommendations for the improvement of Law no. 317-VIII:

- a) *Symbols*: for the purpose of clarity, the Law should contain a less extensive and exhaustive list of the prohibited symbols;
- b) *Propaganda*: this notion must be clearly defined, especially when it is used for the purpose of criminalising conduct;
- c) *Denial of crimes*: respective provisions must relate to specific crimes and not to the mere "*criminal nature*" of a regime as a whole, which is too vague;
- d) *Sanctions*: only those acts that constitute an actual danger to society should entail criminal responsibility, which should be proportionate to the seriousness of the offence committed. A mere display of a symbol or use of a name should not result in imprisonment; and
- e) *Banning of associations (notably political parties)*: the Law should clarify that banning any association is a measure of last resort in exceptional cases, proportionate to the offence. This is particularly the case for political parties in the light of their important function in a democratic society.

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<sup>3</sup> Multiperspectivity in history has been described as the process of assessing "*historical events from different perspectives*". Ann Low-Beer, *the Council of Europe and School History*, Strasbourg, Council of Europe (1997), pp. 54-55.

#### IV. Background

11. Law no. 317-VIII is part of an on-going process of “decommunisation” in Ukraine, in the wake of which several “decommunisation” laws have been drafted, none of which were adopted. However, in April 2015, Law no. 317-VII was adopted in a package along with three other laws. The other three laws are:

- a) Law no. 314-VIII “*On the Legal Status and Honouring the memory of Fighters for Ukraine’s Independence in the Twentieth Century*”;
- b) Law no. 315-VIII “*On Perpetuation of the victory over Nazism in the Second World War of 1939-1945*”, and
- c) Law no. 316-VIII “*On access to the archives of repressive agencies of the Communist totalitarian regime of 1917-1991*”.

12. All four laws were tabled in Parliament on 9 April 2015 and adopted on the same day under an accelerated procedure (with some changes), but without public debate, which gave rise to criticism.<sup>4</sup>

13. Following the adoption of these laws, a group of scholars and experts on Ukraine from several countries addressed an open letter to President Poroshenko and Mr Hroysman, Chairman of the Parliament, asking them not to sign the bills into law.<sup>5</sup> The group considered that the content and spirit of the laws “*contradict one of the most fundamental political rights: the right to freedom of speech*”.

14. On 15 May 2015, Law no. 317-VIII was signed into law by President Poroshenko, together with the other three laws. All four laws entered into force on 21 May 2015.

#### V. Preliminary remarks

15. The Venice Commission and OSCE/ODIHR recognise the right of Ukraine to ban or even criminalise the use of certain symbols of and propaganda for totalitarian regimes. Ukraine is not the first post-communist country to have adopted a “decommunisation” law. Specific regulations on the condemnation of totalitarian regimes and their symbols are found in several other States and take various forms. In some countries, such regulations exist at the constitutional level and in others at the ordinary-law level (see section VII, C., below).

16. Law no. 317-VIII pursues legitimate aims, some of which are listed in its Preamble. Condemning serious crimes committed by totalitarian regimes, raising public awareness about such crimes, and putting in place measures aimed at preventing the return of such regimes is, in general, fully in line with the principles of democracy, the rule of law and the protection of human rights. It may also be considered to be an expression of the concept of “*democracy capable of defending itself*”<sup>6</sup> and is justified in the light of the case-law of the

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<sup>4</sup> See Ukrainian Parliament Bans Communist, Nazi Propaganda, *Radio Free Europe*, 9 April 2015, online at <http://www.rferl.org/content/ukrainian-parliament-bans-nazi-communist-propaganda/26946986.html>; Coynash, Halya, “Decommunisation” Laws: Deeply Divisive and Destined for Strasbourg, *Human Rights in Ukraine*, 5 May 2015, online at <http://krytyka.com/en/solutions/opinions/decommunization-laws-deeply-divisive-and-destined-for-strasbourg>; Ukraine’s ‘history laws’ purge it of communist symbols but divide the population, *The Telegraph*, 30 June 2015, online at <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11674511/Ukraines-history-laws-purge-it-of-communist-symbols-but-divide-the-population.html>.

<sup>5</sup> Open Letter from Scholars and Experts on Ukraine Re. the So-Called “Anti-Communist Law”, *Voxukraine*, May, 2015; *Krytyka*, April 2015 (online at <http://voxukraine.org/2015/05/07/de-communization-laws-need-to-be-amended-to-conform-to-european-standards/>; [http://krytyka.com/en/articles/open-letter-scholars-and-experts-ukraine-re-so-called-anti-communist-law#footnote1\\_18lbap2](http://krytyka.com/en/articles/open-letter-scholars-and-experts-ukraine-re-so-called-anti-communist-law#footnote1_18lbap2)).

<sup>6</sup> European Court of Human Rights, *Vogt v. Germany*, application no. 17851/91, 26 September 1995, paragraph 59.

European Court of Human Rights on “negationist” expressions,<sup>7</sup> as it is aimed at criminalising “*outrage upon the memory of millions of victims*” (see Article 3.1 of Law no. 317-VIII).

17. As stated in a report on “*The memory of the crimes committed by totalitarian regimes in Europe*” by the EU Commission to the European Parliament and to the Council: “...each Member State has adopted different measures (e.g. justice for victims, justice for perpetrators, fact-finding, symbolic policies, etc.) depending on its specific national circumstances. Even among Member States with similar experiences of totalitarian regimes, the legal instruments, measures and practices adopted may be different as may be the timing for their adoption and implementation.”<sup>8</sup>

18. Taking into account the difficult circumstances that Ukraine has been experiencing in recent times, it is important that the effects of these “decommunisation” laws (notably Law no. 317-VIII) and their policies on social cohesion are taken into consideration. This is especially important in the context of creating a historical memory for the country. It is essential that these laws be implemented in a balanced manner that includes discussions at the local level,<sup>9</sup> in the interests of the peaceful integration of society.

## VI. National legal framework

### A. The Constitution of Ukraine

19. Chapter I of Ukraine’s Constitution sets out general constitutional principles. Under this Chapter, Article 3 declares that “*human rights and freedoms, and guarantees thereof shall determine the essence and course of activities of the State. The State shall be responsible to the individual for its activities. Affirming and ensuring human rights and freedoms shall be the main duty of the State*” (paragraph 2) and Article 8 recognises the principle of the rule of law. Normative legal acts are adopted on the basis of the Constitution and must be in conformity with it, since the Constitution is the supreme law of the land.

20. Article 11 of the Constitution stipulates that “*the State promotes the consolidation and development of the Ukrainian nation, of its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine*”. The four Ukrainian “decommunisation” laws, including Law no. 317-VIII, seem to be based on this Article.

21. Article 15 of the Constitution holds that social life in Ukraine is based on the principles of political, economic and ideological diversity, that “*no ideology shall be recognised by the State as mandatory*” (paragraph 2) and that censorship is prohibited (paragraph 3); also, the State guarantees any “*freedom of political activity that is not prohibited by the Constitution and the laws of Ukraine*” (paragraph 4).

22. The catalogue of human rights and fundamental freedoms is laid down in Chapter II of the Constitution:

- Article 34 guarantees the right to freedom of expression; the same provision holds that everyone has the right to freely collect, store, use and disseminate information. Restrictions to these rights have to fulfil the conditions set out in Article 34.3. Thus,

<sup>7</sup> European Court of Human Rights, *Norwood v. the United Kingdom*, no. 23131/03, decision as to admissibility (inadmissible), 16 November 2004.

<sup>8</sup> “The memory of the crimes committed by totalitarian regimes in Europe” of December 2010 (COM(2010)783).

<sup>9</sup> See Ms Astrid Thors, OSCE High Commissioner on National Minorities reference to the “decommunisation” laws: (Address, 19 November 2015) <https://www.osce.org/pc/201961?download=true>; (Statement, 16 July 2015) <https://www.osce.org/pc/173196?download=true>

any interference must be in line with the law and pursue a legitimate aim (such as national security, territorial indivisibility or public order, prevention of disturbances or crimes, protection of public health, reputation or rights of others, prevention of publication of information received confidentially, or protection of the authority and impartiality of justice).

- According to Article 36, citizens of Ukraine have the right to freedom of association in political parties and public organisations, with the exception of restrictions established by law in the interests of national security and public order, the protection of public health or the protection of rights and freedoms of others (paragraph 1). Restrictions on membership in political parties are established exclusively by the Constitution and the laws of Ukraine (paragraph 2).
- Article 37 deals with the prohibition of political parties and public associations. The establishment and activity of political parties and public associations are prohibited if *“their programme goals or actions are aimed at the liquidation of the independence of Ukraine, the change of the constitutional order by violent means, the violation of the sovereignty and territorial indivisibility of the State, the undermining of its security, the unlawful seizure of State power, the propaganda of war and of violence, the incitement of inter-ethnic, racial, or religious enmity, and the encroachments on human rights and freedoms and the health of the population”* (paragraph 1). According to Article 37.4, the prohibition of the activity of associations of citizens is exercised only through judicial procedure.
- The political rights of citizens – i.e. to participate in the administration of state affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to bodies of State power and bodies of local self-government – are guaranteed by Article 38.
- Pursuant to Article 140, *“[l]ocal self-government is the right of a territorial community – residents of a village or a voluntary association of residents of several villages into one village community, residents of a settlement, and of a city – to independently resolve issues of local character within the limits of the Constitution and the laws of Ukraine”* (paragraph 1).

23. Finally, under Article 9 of Ukraine’s Constitution, *“international treaties in force, approved by the Verkhovna Rada [Parliament] of Ukraine as binding, shall be an integral part of the national legislation of Ukraine”*.

## **B. Law no. 317-VIII**

### **1. Preamble**

24. The Preamble of Law no. 317-VIII refers to the Universal Declaration of Human Rights (UDHR), to resolutions of the Council of Europe’s Parliamentary Assembly,<sup>10</sup> to resolutions and declarations of the OSCE’s Parliamentary Assembly<sup>11</sup> and the European Parliament,<sup>12</sup>

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<sup>10</sup> Council of Europe Parliamentary Assembly Resolutions No. 1096 (1996) “Measures to dismantle the heritage of former communist totalitarian systems”, online at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en>, No. 1481 (2006) “Need for international condemnation of crimes of totalitarian communist regimes”, online at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17403&lang=en>, No. 1495 (2006) “Combating the resurrection of Nazi ideology”, online at: <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17427&lang=en>, No. 1652 (2009) “Attitude to memorials exposed to different historical interpretations in Council of Europe member states”, online at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17713&lang=en>.

<sup>11</sup> OSCE Parliamentary Assembly “Resolution on Divided Europe Reunited: Promoting Human Rights and Civil Liberties in the OSCE Region in the 21<sup>st</sup> century”, online at: <https://www.oscepa.org/documents/all-documents/annual-sessions/2009-vilnius/declaration-6/261-2009-vilnius-declaration-eng/file..>

<sup>12</sup> Declaration of the European Parliament on the proclamation of 23 August as European Day of Remembrance for Victims of Stalinism and Nazism (23 August 2008), online at: [http://www.europarl.europa.eu/sides/getDoc.do?reference=P6\\_TA\(2008\)0439&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?reference=P6_TA(2008)0439&language=EN), European

as well as to a joint statement made by several delegations to the United Nations on the occasion of the 70<sup>th</sup> anniversary of the *Holodomor*.<sup>13</sup> It then defines the Law's objectives, such as the protection of human rights and liberties; strengthening the independent, democratic, constitutional state; facilitating the consolidation and development of the Ukrainian nation according to Article 11 of the Constitution; preventing repetition of crimes of communist and Nazi regimes, preventing discrimination, and restoring historical and social justice. This kind of wording is common to "decommunisation" laws, in other words laws that are part of the process of dismantling communist legacies in post-communist States.

25. Wording in the Preamble that is particular to Law no. 317-VIII underlines that the latter's role is also "*to eliminate the threat to independence, sovereignty, territorial integrity and national security of Ukraine*", clearly connected to recent and current events in the country.

26. The Law should therefore be read in the context of modern Ukrainian history. In the 20<sup>th</sup> century, the people of Ukraine have suffered under two totalitarian regimes: the Soviet regime in 1917-1991 and the Nazi regime in 1941-1945. During World War II, Ukraine lost a large part of its population and many more died as a result of the *Holodomor* in 1932-1933. The two totalitarian regimes were both imposed on Ukraine from outside and the condemnation of these regimes is therefore also perceived by the government as the confirmation of the nation's right to self-determination and to independent statehood. In 2006, the Ukrainian Parliament passed a law which classified the *Holodomor* as an act of genocide.<sup>14</sup> In addition, in 2015, the Parliament adopted a resolution on the genocide of Crimean Tatars that took place in 1944.<sup>15</sup>

27. Law no. 317-VIII contains two main parts. The first part (Articles 1-6) defines basic terms (Article 1), condemns the communist and the Nazi regimes as "*criminal ... and incompatible with the fundamental human rights and citizens' rights and liberties*" (Article 2.1 and 2.2), prohibits propaganda for these regimes as well as the use and propaganda of the symbols of such regimes (Articles 3-4), and sets out provisions on the investigation and dissemination of information on the crimes committed by the above-mentioned regimes (Article 5). It also states that "*the persons guilty of violation of this Law shall be held liable in accordance with the Law*" (Article 6.1).

28. The second part of the Law contains final and transitional provisions. Fifteen legislative acts are amended, namely the Criminal Code of Ukraine, the Law on Printed Media (Press) in Ukraine, the Law on Protection of the Rights to Trademarks and Service Marks, the Law on News Agencies, the Law on Presidential Election in Ukraine, the Law on Local Public Administrations, the Law on Political Parties in Ukraine, the Law on State Registration of Legal Entities and Entrepreneurs-Individuals, the Law on Geographical Names, the Law on

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Parliament resolution on the commemoration of the *Holodomor*, the Ukraine artificial famine (1932-1933) (23 October 2008), online at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0523&language=EN>, European Parliament Resolution on European conscience and totalitarianism (2 April 2009), online at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0213+0+DOC+XML+V0//EN>.

<sup>13</sup> The term *Holodomor* refers to the artificial famine in Ukraine of 1932-1933, in which an estimated 2.5-7.5 million Ukrainians died; see Joint statement by the delegations of Azerbaijan, Bangladesh, Belarus, Benin, Bosnia and Herzegovina, Canada, Egypt, Georgia, Guatemala, Jamaica, Kazakhstan, Mongolia, Nauru, Pakistan, Qatar, the Republic of Moldova, the Russian Federation, Saudi Arabia, the Sudan, the Syrian Arab Republic, Tajikistan, Timor-Leste, Ukraine, the United Arab Emirates and the United States of America on the seventieth anniversary of the Great Famine of 1932-1933 in Ukraine (*Holodomor*) Online at: <http://un.mfa.gov.ua/en/documents/holodomor/un>.

<sup>14</sup> Law of Ukraine no. 376-V "On Holodomor of 1932 - 33 in Ukraine".

<sup>15</sup> Resolution No.792-VIII, On Recognition of the Genocide of the Crimean Tatars, 12 November 2015 (in Ukrainian: Постанова Верховної Ради України № 792-VIII Про визнання геноциду кримськотатарського народу(Відомості Верховної Ради (ВВР), 2015, № 49-50, ст.469)).

Television and Radio Broadcasting, the Law on Elections to the *Verkhovna Rada* of the Autonomous Republic of Crimea, Local *Radas* and Village, Town/City Heads, the Law on Information, the Law on Elections of People's Deputies of Ukraine, the Law on Non-Governmental Organisations, and the Law on Assigning Names (nicknames) of Individuals, Jubilee and Holiday Dates, Names and Dates of Historical Events to Legal Entities and Property Items. The mere enumeration of these laws indicates how far-reaching Law no. 317-VIII is and how many areas of life its provisions will affect.

## **2. First part of Law no. 317-VIII (Articles 1-6)**

### **Article 1**

29. This Article provides the definitions of the terms used in the Law: "*communist party*" (section 1 paragraph 1); "*propaganda of communist and national socialist (Nazi) totalitarian regimes*" (section 1 paragraph 2); "*Soviet state security bodies*" (section 1 paragraph 3); "*symbols of communist totalitarian regime*" (section 1 paragraph 4 letters a–h); and "*symbols of the national socialist (Nazi) totalitarian regime*" (section 1 paragraph 5 letters a–f).

30. The definition of symbols is very broad, covering flags, coats of arms, anthems, various images, monuments, slogans, geographical names, etc. It is interesting to note that, while the definition of communist symbols extends not only to those directly related to the territory of Ukraine (for instance, the flags and coats of arms of other communist countries), the definition of Nazi symbols remains strictly limited to those of the National Socialist German Workers' Party (NSDAP).

31. Propaganda of communist and Nazi totalitarian regimes is defined as "*public denial, in particular in mass media, of criminal nature of the communist totalitarian regime of 1917-1991 in Ukraine, national socialist (Nazi) totalitarian regime, dissemination of information oriented to find excuses to the criminal nature of the communist and national socialist (Nazi) totalitarian regimes, activities of the Soviet state security bodies, establishing Soviet rule in the territory of Ukraine or on its individual administrative territories, persecution of the fighters for independence of Ukraine in XX century, production and/or dissemination and public use of the products containing the symbols of the communist and national socialist (Nazi) totalitarian regimes*". This means that unlawful "*propaganda*" could cover three different types of actions: (1) public denial of the criminal nature of the regimes concerned, (2) dissemination of information aimed at justifying the criminal nature of the regimes concerned, and (3) the production and/or dissemination and public use of products containing the symbols of these regimes (see section VII., C., 1, a) below).

### **Article 2**

32. This Article condemns the communist totalitarian regime of 1917–1991 in Ukraine and the Nazi totalitarian regime.

### **Article 3**

33. This Article prohibits propaganda of the communist and Nazi regimes and of their symbols (section 1). Such propaganda constitutes grounds for denying the registration of a legal entity, political party, association or media and/or the grounds for prohibiting them (section 2). Legal entities, political parties, associations or (print) media that fail to comply with the Law shall be outlawed by court judgment. Such media publishing activities shall be prohibited (section 3). However, the decision on a finding of non-compliance lies with the competent central executive authority. The procedure is to be established by the Cabinet of

Ministers of Ukraine (section 4). In case of political parties or their units, such a decision entails the prohibition to participate in elections (section 5).

#### **Article 4**

34. This Article prohibits the use and propaganda of symbols of communist and Nazi regimes. As a consequence, production, dissemination and public use of these symbols (including souvenirs), public performance of the anthems of the USSR, Ukrainian SSR (USRR), other union or autonomous Soviet Republics or their fragments are outlawed in Ukraine (paragraph 1). The exceptions to this rule are set out in Article 4.2 and 4.3 (for instance: display of banned symbols in museums, exhibitions etc.; in works of art created before the Law came into effect; on memorials located within graveyards or on graves of honour; in private collections and private archives, or in the antiques trade). Also, the prohibition does not cover the use of banned symbols in teachers' books, students' books and other materials of research and education and in works of art created after the Law comes into effect, provided this use does not result in propaganda of a criminal nature of the two regimes (section unnumbered).

#### **Article 5**

35. This Article obliges the State: to investigate the crimes of genocide, crimes against humanity and war crimes committed by the communist or Nazi regime in Ukraine in 1917-1991; to take steps to raise public awareness about these crimes and to encourage and support activities of non-governmental organisations engaging in the research and dissemination of information about such crimes. Archived documents relating to the crimes shall not be classified information and shall be disclosed to the public.

#### **Article 6**

36. This Article sets out the liability rules according to which the "*persons guilty of violation of this Law shall be liable in accordance with the law*" i.e. the Criminal Code.

### **3. Second part of Law no. 317-VIII (Article 7 – Final and transitional provisions)**

37. Article 7.2.1 establishes a new offence under the Criminal Code of Ukraine, namely the production and dissemination of communist and Nazi symbols and propaganda of communist and Nazi totalitarian regimes (new Article 436<sup>1</sup>). The offence consists in producing, disseminating or publicly using symbols of communist or Nazi regimes including in the form of souvenirs, publicly performing anthems of the USSR, the Ukrainian SSR, other union or autonomous Soviet Republics or their fragments, except for the use in situations foreseen in Article 4.3 of the Law. The offence shall be punishable by restraint of liberty or imprisonment for a term of up to five years (five to ten years if the act is committed by persons holding public office; is repeated, or is committed by an organised group using mass media), with or without the confiscation of property.

38. Articles 7.2.6 and 7.2.9 set out the obligation to rename geographical locations which hold the name or nickname of leading representatives of the communist regime and to remove monuments and memorial signs relating to these individuals and to certain events in the Ukrainian history. The task to rename geographical locations and remove monuments falls on village or municipal councils or city/town mayors and should be carried out within six months after the entry into force of the Law. If the competent organs fail to act, the task should be carried out by the head of the relevant regional public administration within three

months after the expiry of the first period (Article 7.2.6). According to data provided by the Ukrainian Institute of National Remembrance, the obligation to rename geographical places concerns 84 towns, including the third biggest Ukrainian city of Dnepropetrovsk, and over 900 villages.<sup>16</sup> The obligation also relates to districts, parks, streets, squares, bridges and similar places.

## VII. International legal framework

39. Law no. 317-VIII is assessed with respect to the applicable European and international standards that include various hard and soft law instruments, adopted at the international, European and OSCE levels.

### A. International standards

40. In its current wording, Law no. 317-VIII could affect the exercise of the right to freedom of expression (Article 10 ECHR, Article 19 UDHR and Article 19 of the International Covenant on Civil and Political Rights (ICCPR)),<sup>17</sup> the right to freedom of association (Article 11 ECHR, Article 20 UDHR and Article 22 ICCPR) and electoral rights (Article 3 Protocol I ECHR and Article 25 ICCPR). All of these rights are also part of the OSCE commitments, which participating States, including Ukraine, committed to adhere to. Of particular importance are paragraphs 9 and 10 of the OSCE Copenhagen Document.<sup>18</sup>

41. Article 7 ECHR, Article 11.2 UDHR and Article 15 ICCPR enshrine the *nullum crimen sine lege* principle, which may also be of relevance in this respect. This principle entails that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed” (Article 15.1 ICCPR). Under Article 15 ECHR and Article 4.2 ICCPR, the principle is strictly non-derogable.

42. The ensuing paragraphs will present the relevant standards pertaining to the freedom of expression, notably Article 10 ECHR, as this right is the most likely to be affected by Law no. 317-VIII. The right to freedom of association and electoral rights are not discussed any further in this section, but will be addressed under Law no. 317-VIII’s potentially problematic aspects (see paragraph 82, below).

#### 1. Scope of protection

43. Article 10 ECHR not only protects the substance of the ideas and information expressed, but also the form in which they are conveyed.<sup>19</sup> Thus, the scope of Article 10

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<sup>16</sup> Online at: <http://www.memory.gov.ua/page/dekomunizatsiya-0>.

<sup>17</sup> The ICCPR in its Article 20 adds that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law” (paragraph 2).

<sup>18</sup> Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, online at: <http://www.osce.org/de/odihr/elections/14304>; the relevant parts of paragraphs 9 and 10 state: “everyone will have the right to freedom of expression including the right to communication. This right will include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The exercise of this right may be subject only to such restrictions as are prescribed by law and are consistent with international standards.” (9.1); “the right of association will be guaranteed” (9.3) “In reaffirming their commitment to ensure effectively the rights of the individual to know and act upon human rights and fundamental freedoms, and to contribute actively, individually or in association with others, to their promotion and protection, the participating States express their commitment to respect the right of everyone, individually or in association with others, to seek, receive and impart freely views and information on human rights and fundamental freedoms, including the rights to disseminate and publish such views and information” (10.1).

<sup>19</sup> European Court of Human Rights, *Oberschlick v. Austria* (no. 1), 23 May 1991, Series A no. 204, paragraph 57.

ECHR includes nonverbal communication of ideas and impressions, notably by wearing or display of symbols<sup>20</sup> or by symbolic acts.<sup>21</sup> For example, the European Court of Human Rights has held that the display of a symbol associated with a political movement or entity – such as a flag – is capable of expressing identification with ideas or representing them and consequently falls within the ambit of “expression” protected by Article 10 ECHR. In a recent case, the Court reiterated that Article 10 ECHR is applicable “*not only to the more common forms of expression such as speeches and written texts, but also to other and less obvious media through which people sometimes choose to convey their opinions, messages, ideas and criticisms*”.<sup>22</sup> Special protection is granted to political speech, as a pre-condition for, and necessary component of, democracy. Political expression generally enjoys a heightened level of protection due to its importance in a democratic society.<sup>23</sup>

44. According to the European Court of Human Rights, protection of communication exists irrespective of content. In its famous *Handyside* Judgment, the Court held that freedom of expression “*is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*”.<sup>24</sup>

45. The European Commission on Human Rights (former Commission) and the European Court of Human Rights have dealt with a number of cases under Article 10 ECHR that concern the denial of the Holocaust and other statements relating to Nazi crimes. The former Commission as well as the Court had found most applications in such cases inadmissible; in those rare exceptions where they did deal with the merits of the complaints, they either held that the State’s interferences with the applicant’s right to freedom of expression had been “*necessary in a democratic society*”,<sup>25</sup> or referred to Article 17 ECHR to declare the complaints incompatible *ratione materiae* with the provisions of the European Convention on Human Rights.<sup>26</sup>

46. Apart from crimes committed by the Nazi regime, the European Court of Human Rights has been very reluctant to endorse an infringement on the freedom of expression when it comes to historical debates. When determining whether State interferences with the freedom to make statements touching upon historical issues were “*necessary in a democratic society*”, the Court has had regard to an array of factors: the manner in which the impugned statements were phrased and the way in which they could be construed, the specific interest or right affected by the statements, the possible impact of the statements made, and the time that has elapsed since the relevant historical events have taken place.<sup>27</sup>

<sup>20</sup> European Court of Human Rights, *Vajnai v. Hungary*, application no. 33629/06, Judgment of 8 July 2008: violation of Article 10 ECHR, applicant wore a five-pointed red star; European Court of Human Rights, *Fáber v. Hungary*, application no. 40721/08, 24 July 2012, paragraph 36. See also CCPR, *Shin v. Republic of Korea*, 926/2000 (2004), paragraph 7.2.

<sup>21</sup> European Court of Human Rights, *Shvydka v. Ukraine*, application no. 17888/12, Judgment of 30 October 2014.

<sup>22</sup> European Court of Human Rights, *Murat Vural v. Turkey*, application no. 9540/07, Judgment of 21 October 2014, paragraph 44.

<sup>23</sup> European Court of Human Rights *Lingens v Austria*, application 9815/82), Judgment of 8 July 1986, paragraph 42: “[F]reedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention”; see also European Court of Human Rights *Wingrove v United Kingdom*, application no.17419/90, Judgment of 25 November 1996, paragraph 58 “[T]here is little scope under Article 10 paragraph 2 of the Convention (art. 10-2) for restrictions on political speech or on debate of questions of public interest”.

<sup>24</sup> European Court of Human Rights, *Handyside v. the United Kingdom*, application no. 5493/72, Judgment of 7 December 1976 (Plenary), paragraph 49.

<sup>25</sup> European Court of Human Rights, *Witzsch v. Germany (no. 1)* (dec.), application no. 41448/98, 20 April 1999; *Schimanek v. Austria* (dec.), application no. 32307/96, 1 February 2000; *Gollnisch v. France* (dec.), application no. 48135/08, 7 June 2011.

<sup>26</sup> European Court of Human Rights, *Garaudy v. France* (dec.), application no. 65831/01, ECHR 2003-IX; *Witzsch v. Germany (no. 2)* (dec.), application no. 7485/03, 13 December 2005.

<sup>27</sup> European Court of Human Rights, *Perinçek v. Switzerland* (GC), application no. 27510/08, Judgment of 15 October 2015, paragraphs 215 *et seq.*

## 2. Limitations

47. According to Article 10.2 ECHR, the exercise of the freedoms outlined in paragraph 1 may be subject to such formalities, conditions, restrictions or penalties as are “*prescribed by law*”. The European Court of Human Rights specifies in its case-law that the law must be adequately accessible and foreseeable, i.e. formulated with sufficient precision to enable the individual to regulate his or her conduct.<sup>28</sup> There must also be “*a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention*”.<sup>29</sup>

48. As regards criminal law sanctions, a lack of specificity, i.e. where a law lacks clarity and precision, could entail a violation of the principle of *nullum crimen sine lege* guaranteed by Article 7 ECHR.<sup>30</sup> The principle stipulates that “*no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed*” (Article 7 of the ECHR). It is an absolute principle to which no limitation nor derogation may apply.

49. Law no. 327-VIII introduces a new criminal offence of production and dissemination of communist and Nazi symbols and propaganda of communist and Nazi totalitarian regimes (new Article 436<sup>1</sup>). This provision refers to some terms which are vague and ambiguous. The prosecution of individuals for this offence might therefore, depending on the circumstances of the case, constitute a violation of the *nullum crimen sine lege* principle.

50. Freedom of expression may further be subject only to restrictions seeking to pursue a “*legitimate aim*” as listed in Article 10.2 ECHR (national security, territorial integrity or public safety, prevention of disorder or crime, protection of health or morals, protection of the reputation or rights of others, preventing the disclosure of information received in confidence or maintaining the authority and impartiality of the judiciary).

51. In this context, special mention must be made of the fact that Law no. 317-VIII specifically targets political speech. It should be noted that both the European Court of Human Rights and the UN Human Rights Committee (CCPR) refer to political speech as an especially sensitive area within the realm of protection cast by Article 10 ECHR and Article 19 ICCPR.<sup>31</sup> The European Court of Human Rights stated in its case-law that a “*pressing and specific social need is particularly important*”<sup>32</sup> if restrictions on political speech are to be justified, thus taking a strict approach when assessing the necessity of measures as envisaged by the Law.

52. When it comes to the use and display of symbols, the Court has held in the past that utmost care must be taken in applying any restrictions, especially when the case involves symbols which have multiple meanings. The Court has thus noted that a blanket ban on such symbols may also restrict their use in contexts in which no restriction would be

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<sup>28</sup> European Court of Human Rights, *The Sunday Times v. the United Kingdom (no. 1)*, application no. 6538/74, Judgment of 26 April 1979, paragraph 49; *Shvydka v. Ukraine*, application no. 17888/12, Judgment of 30 October 2014, paragraph 39.

<sup>29</sup> European Court of Human Rights, *Malone v. the United Kingdom*, application no. 8691/79, 2 August 1984, paragraph 67.

<sup>30</sup> European Court of Human Rights, *Kokkinakis v. Greece*, application no. 14307/88, Judgment of 25 Mai 1993, paragraphs 37 *et seq.*

<sup>31</sup> European Court of Human Rights, *Vajnai v. Hungary*, application no. 33629/06, Judgment of 8 July 2008, paragraph 51; CCPR General Comment no. 34,

Article 19: Freedoms of opinion and expression (CCPR/C/GC/34), paragraph 38.

<sup>32</sup> European Court of Human Rights, *Vajnai v. Hungary*, application no. 33629/06, Judgment of 8 July 2008, paragraph 51.

justified.<sup>33</sup> In the case of Law no. 317-VIII, this relates predominantly to symbols which were used by the communist regime, but which might have a broader meaning beyond said regime.

53. In its *Vajnai* Judgment, the European Court of Human Rights has also considered that feelings of the general public – however understandable – cannot be regarded as grounds affirming the existence of a pressing social need. In the Court’s view, a legal system “*which applies restrictions on human rights in order to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognised in a democratic society, since that society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler’s veto*”.<sup>34</sup> On the other hand, a particular historical experience and context have been considered “*a weighty factor in the assessment of the existence of a pressing social need*” for the Court in many cases.<sup>35</sup>

54. 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*”.<sup>36</sup> Any interference with the freedom of expression must thus be “*proportionate to the legitimate aim pursued*”.<sup>37</sup> The State must strike the right balance between the rights of individuals to be restricted and the protection of other important social values.<sup>38</sup> When assessing proportionality, factors to be taken into account include: the importance of the rights and values at stake (does the interference target a particularly important area?) and the scope and severity of the interference (how many persons are potentially concerned? How radically is the right limited? What sanctions are foreseen?).

55. The European Court of Human Rights has reiterated, in its established case-law, that although freedom of expression may be subject to exceptions, these “*must be narrowly interpreted*” and “*the necessity for any restrictions must be convincingly established*”.<sup>39</sup>

56. In this context, the Court has stressed that States have a narrow margin of appreciation under Article 10.2 ECHR for restrictions on political speech or on the debate of questions of public interest.<sup>40</sup> The Court considers that, in a democratic society, even small and informal

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<sup>33</sup> European Court of Human Rights, *Vajnai v. Hungary*, application no. 33629/06, Judgment of 8 July 2008, paragraph 54 *et seq.*

<sup>34</sup> European Court of Human Rights, *Vajnai v. Hungary*, application no. 33629/06, Judgment of 8 July 2008, paragraph 57. See also European Court of Human Rights, *Fratanolu v. Hungary*, application no. 29459/10, Judgment of 3 November 2011, paragraph 25.

<sup>35</sup> European Court of Human Rights, *Perinçek v. Switzerland* (GC), application no. 27510/08, Judgment of 15 October 2015, paragraph 242; *Vogt v. Germany*, application No. 17851/91, judgment of 26 September 1995, paragraphs 51 and 59; *Rekvényi v Hungary*, application no. 25390/94, judgment of 25 May 1999, paragraphs 41 and 47; *Refah Partisi and Others v. Turkey* (GC), application nos. 41340/98, 41342/98, 41343/98 and 41344/98, Judgment of 13 February 2003, paragraphs 124-125. §§ 124-25; *Jahn and Others v. Germany* (GC), application nos. 46720/99, 72203/01 and 72552/01, judgment of 30 June 2005 paragraph 116.

<sup>36</sup> European Court of Human Rights, *Vajnai v. Hungary*, application no. 33629/06, paragraph 46; European Court of Human Rights, *Handyside v. the United Kingdom*, application no. 5493/72, Judgment of 7 December 1976, paragraph 49; European Court of Human Rights, *Observer and Guardian v. the United Kingdom*, Judgment of 26 November 1991, Series A no. 216, paragraph 59; European Court of Human Rights, *Vogt v. Germany*, application no. 17851/91, 26 September 1995, paragraph 52; see also CCPR, *Aduayom et al. v. Togo*, 422-424/1990 (1996), paragraph 7.4

<sup>37</sup> European Court of Human Rights, *Parti Nationaliste Basque – Organisation Régionale d’Iparralde v. France*, application no. 71251/01, 7 September 2007, paragraph 45.

<sup>38</sup> See also J. Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention of Human Rights*, Martinus Nijhoff Publishers, 2009, pp. 31-226.

<sup>39</sup> See, for instance, European Court of Human Rights, *Observer and Guardian v. the United Kingdom*, Judgment of 26 November 1991, Series A no. 216, paragraph 59.

<sup>40</sup> European Court of Human Rights, *Feldek v. Slovakia*, application no. 29032/95, ECHR 2001-VIII, paragraph 74; *Sürek v. Turkey* (no. 1) (GC), application no. 26682/95, ECHR 1999-IV, paragraph 61. See also European Court of Human Rights, *von Hannover v. Germany*, application no. 59320/00, Judgment of 24 June 2004, paragraph 60.

campaign groups must be able to carry out their activities effectively and that there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest.<sup>41</sup>

57. In several judgments, the European Court of Human Rights has reiterated the “*chilling effect*” that the fear of sanctions has on the exercise of freedom of expression. This effect is also a factor which plays a role in assessing the proportionality – and thereby the justification – of the sanctions imposed.<sup>42</sup>

58. Furthermore, sanctions, like all limitations, have to be proportionate to the legitimate aim pursued. As a general rule, both the Court and the CCPR have held that imprisonment is an inappropriate sanction for non-violent expression.<sup>43</sup> The CCPR also stresses that journalists should not be penalised for carrying out their legitimate activities.<sup>44</sup>

## **B. Further international guidelines**

59. In its 2013 Joint *amicus curiae* brief for the Constitutional Court of Moldova, the Venice Commission and OSCE/ODIHR have dealt with the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies in the Republic of Moldova.<sup>45</sup> A further explicit reference to party symbols may be found in the OSCE/ODIHR - Venice Commission Guidelines on Political Party Regulation.<sup>46</sup> According to the Guidelines, registration requirements, such as the prohibition of the use of names and symbols associated with national or religious institutions as well as the regulation of party names and symbols to avoid confusion, are considered reasonable. Other reports dealing with political parties and their dissolution are: the Venice Commission Report on the Participation of Political Parties in Elections<sup>47</sup> and the Venice Commission Guidelines on the Prohibition or Dissolution of Political Parties and Analogous Measures.<sup>48</sup>

60. The Parliamentary Assembly of the Council of Europe has adopted two resolutions that deal with the condemnation of totalitarian communist regimes: Resolution 1096 (1996) on Measures to dismantle the heritage of former communist totalitarian systems,<sup>49</sup> and Resolution 1481 (2006) on the Need for international condemnation of crimes of totalitarian communist regimes.<sup>50</sup> Also of interest in this context are Resolution 1495 (2006) on Combating the resurgence of Nazi ideology<sup>51</sup> and Resolution 1652 (2009) on the Attitude to memorials exposed to different historical interpretations in Council of Europe Member

<sup>41</sup> European Court of Human Rights, *Steel and Morris v. the United Kingdom*, application no. 68416/01, Judgment of 15 February 2005, paragraph 89.

<sup>42</sup> European Court of Human Rights, *Nikula v. Finland*, application no. 31611/96, ECHR 2002-II, paragraph 54; *Cumpănă and Mazăre v. Romania* (GC), application no. 33348/96, ECHR 2004-XI paragraph 114; *Elci and Others v. Turkey*, application nos. 23145/93 and 25091/94, 13 November 2003, paragraph 714; *Dammann v. Switzerland*, application no. 77551/01, Judgment of 25 April 2006, paragraph 57; *Kudeshkina v. Russia*, application no. 29492/05, Judgment of 26 February 2009, paragraph 99.

<sup>43</sup> European Court of Human Rights, *Murat Vural v. Turkey*, application no. 9540/07, Judgment of 21 October 2014, paragraphs 66 *et seq.*; CCPR General Comment no. 34, Article 19: Freedoms of opinion and expression (CCPR/C/GC/34), paragraph 47.

<sup>44</sup> CCPR General Comment no. 34, Article 19: Freedoms of opinion and expression (CCPR/C/GC/34), paragraph 46.

<sup>45</sup> 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 (CDL-AD(2013)004).

<sup>46</sup> CDL-AD(2010)024, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)024-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)024-e).

<sup>47</sup> CDL-AD(2006)025, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2006\)025-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)025-e)

<sup>48</sup> CDL-INF(2000)001, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF\(2000\)001-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)001-e)

<sup>49</sup> <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507&lang=en>

<sup>50</sup> <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17403&lang=en>

<sup>51</sup> <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17427&lang=en>

States.<sup>52</sup> These instruments are relevant as far as they contain an assessment of totalitarian regimes and/or ideologies. They do not explicitly deal with totalitarian symbols or the propaganda of these symbols.

61. The OSCE has adopted the Vilnius Declaration, which in one of its resolutions holds 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*”. The resolution urges all OSCE participating States to take a “*united stand against all totalitarian rule from whatever ideological background*”; it expresses its deep concern over “*the glorification of the totalitarian regimes, including the holding of public demonstrations glorifying the Nazi or Stalinist past*”.<sup>53</sup>

62. At the same time, in its Ljubljana Guidelines on Integration of Diverse Societies, the OSCE underlines that the issue of historical memory (notably the display and use of symbols in public spaces) should be addressed in a balanced way by taking into account its effect on the social cohesion of the country. Guideline 50 urges States to “*promote integration by respecting the claims and sensitivities of both minority and majority groups regarding the display and use of symbols in shared public space. While being mindful of freedom of expression, States should avoid the divisive use of symbols and discourage such displays by non-State actors. Where appropriate, opportunities to promote inclusive symbols should be sought*”.<sup>54</sup>

63. 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 EU States, members of the Parliament from four post-communist countries (Czech Republic, Hungary, Lithuania and Slovakia) argued that the ban should also cover communist symbols. The European Commission rejected this initiative on the basis that it was not appropriate to deal with this issue in rules aimed at combatting racism and recommended that the matter be left to national governments.<sup>55</sup>

64. However, in 2008, the European Parliament adopted a “*Resolution on the Commemoration of the Holodomor, the Ukraine Artificial Famine (1932-1933)*”. This Resolution “*recognises the Holodomor [...] as an appalling crime against the Ukrainian people, and against humanity*” (Article E.1(a)).

65. One year later, in 2009, the European Parliament adopted Resolution 213 on the European conscience and totalitarianism.<sup>56</sup> The Resolution expresses strong condemnation for all totalitarian and undemocratic regimes, but does not address the issue of the use of their symbols.

66. In December 2010, the foreign ministers of Lithuania, Latvia, Bulgaria, Hungary, Romania and the Czech Republic called on the European Commission “*to criminalize the approval, denial or belittling of communist crimes*”. In the European Commission’s report to the European Parliament and to the Council on “*The memory of the crimes committed by totalitarian regimes in Europe*” of December 2010, the Commission held that the Member

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<sup>52</sup> <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17713&lang=en>

<sup>53</sup> Resolution on Divided Europe Reunited: Promoting Human Rights and Civil Liberties in the OSCE Region in the 21<sup>st</sup> century, adopted at the Eighteenth Annual Session of the OSCE Parliamentary Assembly, AS(09)D1E, paragraphs 3, 11 and 17.

<sup>54</sup> Ljubljana Guidelines on Integration of Diverse Societies, guideline 50 on “*Diversity of symbols and their use in the public domain*”, pp. 64-65, <https://www.osce.org/hcnm/96883?download=true>

<sup>55</sup> BBC, *EU rejects Communist symbol ban*, 8 February 2005.

<sup>56</sup> See reference at CDL-AD(2013)004, paragraph 28 with footnote 11.

States were not uniform in their opinion on the matter and that conditions to pass such legislation had not been met, but that the matter would be kept under review.<sup>57</sup>

### C. National legislation: examples

67. The main concept of banning propaganda for totalitarian ideologies in general and National Socialism and communism in particular is not uncommon. Legislation banning the use of Nazi symbols and/or Nazi propaganda exists in Austria,<sup>58</sup> Belarus,<sup>59</sup> Brazil,<sup>60</sup> France<sup>61</sup> and the Russian Federation.<sup>62</sup> Legislation banning the use of communist symbols or the propaganda of communism has been enacted in the former Czechoslovakia,<sup>63</sup> Hungary,<sup>64</sup> Lithuania<sup>65</sup> and Poland.<sup>66</sup> Several other countries have banned the use of totalitarian or unconstitutional symbols or related propaganda without specifying whether or not the regulation extends to communist symbols and ideology. This is the case for Albania,<sup>67</sup> the Czech Republic,<sup>68</sup> Italy,<sup>69</sup> Slovakia<sup>70</sup> and Germany to a certain extent.<sup>71</sup>

68. There are also other national laws relating to the former totalitarian regimes (for instance the Act on the Illegality of the Communist Regime and on Resistance Against It, enacted in the Czech Republic in 1993<sup>72</sup>).

69. The compatibility with human rights of some of these laws has been challenged before the constitutional courts of Czechoslovakia (1992<sup>73</sup>), Hungary (2000,<sup>74</sup> 2013<sup>75</sup>), Poland (2011<sup>76</sup>) and Moldova (2013<sup>77</sup>). All four constitutional courts have taken a critical stance on laws banning the use of certain political symbols and have struck down these laws either in part (Czechoslovakia, Poland) or in their entirety (Hungary 2013, which gave the legislative a deadline in order to draft a law which was in line with the judgment's reasoning).

<sup>57</sup> See reference at CDL-AD(2013)004, paragraphs 26 and 27 with footnote 10.

<sup>58</sup> Austria, *Law no. 84/1960, Law no. 117/1980*.

<sup>59</sup> Belarus, *Administrative Code*, Article 17.10.

<sup>60</sup> Brazil, *Law no. 7716*, Article 20, 5 January 1989.

<sup>61</sup> France, *Criminal Code*, Article R645-1.

<sup>62</sup> Russian Federation, *Code of Administrative Offense*, Article 20.3.

<sup>63</sup> Czechoslovakia, *Criminal Code*, § 260 – Support for and propaganda of movements aimed at suppressing rights and freedoms of citizens, 1991.

<sup>64</sup> Hungary, *Criminal Code*, Section 269/B – The use of totalitarian symbols.

<sup>65</sup> Lithuania, *Administrative Law*, Article 188.18 – Distribution or demonstration of Nazi or Communist symbols, 2008. The Law prohibits distribution and demonstration of Nazi and Soviet symbols. Offenders face a fine of LTL 500-1,000 (EUR 145-289).

<sup>66</sup> Poland, *Act of 5 November 2009* amending the Penal Code, the Code of Criminal Procedure, the Executive Penal Code, the Penal Fiscal Code and certain other acts (Journal of Laws - Dz. U. No. 206, item 1589).

<sup>67</sup> Albania, *Criminal Code* (Law no. 7895), Article 225, 27 January 1995.

<sup>68</sup> Czech Republic, *Criminal Code* (Law no. 40/2009 Coll.), § 403 – Establishment of, support for, and dissemination of movements aimed at suppressing rights and freedoms of a person.

<sup>69</sup> Italy, Law no. 654, 13 October 1975, Article 3; Law no. 205, 26 June 1993, Article 2.1.

<sup>70</sup> Slovakia, *Criminal Code* (Law no. 300/2005 Coll.), § 421-422.

<sup>71</sup> Germany, *Criminal Code*, § 86 Dissemination of Means of Propaganda of Unconstitutional Organisations, § 86a Use of Symbols of Unconstitutional Organisations. However, while it is true that German law prohibits the symbols of all prohibited parties and organisations without reference to whether this extends to communist or Nazi ideologies, there is an explicit reference to national socialist organisations: “Whosoever within Germany disseminates or produces, stocks, imports or exports or makes publicly accessible through data storage media for dissemination within Germany or abroad, propaganda material...4) the contents of which are intended to further the aims of a former National Socialist organisation, shall be liable to imprisonment not exceeding three years or a fine.”

<sup>72</sup> Czech Republic, *Act on the Illegality of the Communist Regime and on resistance Against It* (Law no. 198/1993 Coll.), adopted on 9 July 1993.

<sup>73</sup> Constitutional Court of the Czech and Slovak Federative Republic, *On the Issue of Totalitarian Ideologies, Threatening Democratic Order of a State*, Decision 5/92, 4 September 1992.

<sup>74</sup> Constitutional Court of Hungary, *Decision no. 14/2000*, 12 May 2000.

<sup>75</sup> Constitutional Court of Hungary, *Decision IV/2478/2012*, 19 February 2013.

<sup>76</sup> Constitutional Court of Poland, *Judgment*, Ref. o. K 11/10, 19 July 2011.

<sup>77</sup> Constitutional Court of Moldova, *Judgment*, 4 June 2013.

70. The judgment on the ban on communist and national socialist symbols by the Hungarian Constitutional Court was preceded by a judgment of the European Court of Human Rights which found, *inter alia*, the red star symbol too ambivalent in meaning to be placed under a general ban and that a blanket ban on such a symbol could not satisfy the requirement of necessity stipulated by Article 10.2 ECHR.<sup>78</sup> The Venice Commission and OSCE/ODIHR, in their Joint *amicus curiae* brief for the Constitutional Court of Moldova on the prohibition of the use of symbols of the totalitarian communist regime and of the promotion of totalitarian ideologies in the Republic of Moldova, also emphasised the issue of the banned acts' specificity and the issue of necessity where the mere display of symbols resulted in criminal prosecution in the absence of an examination as to whether they represented dangerous propaganda.<sup>79</sup>

## VIII. Analysis

71. The following analysis reviews the compatibility of Law no. 317-VIII with the Constitution of Ukraine, with applicable European and international standards as well as with elements from comparative constitutional law.

### A. Legislative procedure

72. Law no. 317-VIII was adopted by means of an accelerated procedure without public debate. It is not clear whether this procedure complies with the requirements of the Constitution of Ukraine and the laws governing the legislative process. However, while noting that a lack of transparent law-making procedures, and of public consultations in particular will usually lead to problems of ownership and implementation, this does not jeopardise the status of Law no. 317-VIII as a law.

### B. General aims of Law no. 317-VIII

73. The aims of the Law are not clearly defined. During their meetings with various stakeholders in Kyiv, the delegation of the Venice Commission and OSCE/ODIHR was informed about the Law's various purposes, some of which are not included in the list of purposes contained in the Preamble. This lack of a clear aim is one of the weaknesses of the Law. It might be helpful to clearly state the aim in a substantive provision of Law no. 317-VIII, particularly in the light of the vagueness of this Law's terminology and the broadness of actions to which this Law can be applied.

### C. Substantive remarks

74. The following analysis will focus on the substantive provisions of Law no. 317-VIII. The amendments to numerous legislative acts of Ukraine, listed in Article 7, are not discussed separately, as this would require examining them in their respective regulatory contexts. As an exception, the amendments to the Criminal Code (Article 7 section 2 paragraph 1) are taken into consideration. This is due to the fact that they are sufficiently clear without context and are, at the same time, of eminent importance in assessing whether Law no. 317-VIII meets the proportionality test.

75. Since the primary focus of Law no. 317-VIII is on regulating (symbolic) speech, the following comments focus on this Law's conformity with international standards on freedom

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<sup>78</sup> See CDL-AD(2013)004, paragraph 44 *et seq.*; European Court of Human Rights, *Fratano v. Hungary*, application no. 29459/10, Judgment of 3 November 2011, paragraph 25.

<sup>79</sup> CDL-AD(2013)004, paragraph 125.

of expression. These comments are followed by additional remarks concerning freedom of association and electoral rights, which are also affected by certain provisions of the Law.

## 1. Freedom of expression

76. By banning “*propaganda of communist and national socialist (Nazi) totalitarian regimes and their symbols*” (Article 3 section 1) and imposing criminal sanctions for contraventions, Law no. 317-VIII interferes with the right to freedom of expression (Article 10 ECHR, Article 19 UDHR and Article 19 ICCPR; see above). Law no. 317-VIII’s compatibility with Article 10 ECHR and Article 19 ICCPR hinges on whether the restrictions and penalties that it stipulates are justified according to Article 10.2 ECHR and Article 19.3 ICCPR, i.e. whether they satisfy the requirements of prescription by law, pursuance of a legitimate aim and necessity in a democratic society (notably under the ECHR test).<sup>80</sup>

### a) Prescribed by law

77. In order to meet the requirement of being prescribed by law, the latter must be accessible and those provisions that restrict the freedom of expression must be sufficiently clear and their application sufficiently foreseeable (see above). A law is accessible when citizens are “*able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case*”.<sup>81</sup> The Law was published in the Official Gazette and is also available online on the Parliament’s webpage and is hence accessible.<sup>82</sup> As regards clarity and foreseeability, the Law combines several problematic elements, which are prevalent throughout the entire Law.

78. Notably, Law no. 317-VIII uses very broad category definitions (for instance the definition of “*communist party*” in Article 1 section 1, referring to historical local level structures in a large number of different [former] States or the definition of “*Soviet state security bodies*” in Article 1 section 3, referring to individual personnel of [former] States).

79. The list of banned symbols is likewise very extensive (see for instance Article 1 section 1 paragraph 4 letters e and g, encompassing pictures of and quotations from any former staff of Soviet state security). Also, the individual symbols are only vaguely defined and not depicted in the Law itself. For instance, it is difficult to anticipate what exactly is forbidden by Article 1 section 1 paragraph 4 letter c, which refers to “*flags, symbols, images or other attributes reproducing the combination of a sickle and a hammer, a sickle, a hammer and a five-pointed star, a plough, a hammer and a five-pointed star*”.

80. Several items in the list of symbols contain extremely open wording, making it virtually impossible to anticipate the scope of application of the Law in practice. The passages in the following sub-provisions exemplify this issue (Article 1 section 1 paragraph 4 letters a – d; bold added):

“4) *symbols of communist totalitarian regime – symbols, which contain:*

- a. *any image of state flags, coats of arms and **other symbols** of the USSR, Ukrainian SSR (USRR), other union or autonomous Soviet Republics of the USSR, the so-called “people’s democracies”: People’s Republic of Albania (Socialist People’s Republic of Albania), People’s Republic of Bulgaria, German Democratic Republic, People’s Republic of Romania (Socialist*

<sup>80</sup> CCPR General Comment no. 34, para. 22 (“the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.”)

<sup>81</sup> European Court of Human Rights, *Sunday Times v. the United Kingdom*, paragraph 49.

<sup>82</sup> At <http://zakon5.rada.gov.ua/laws/show/317-19?test=4/UMfPEGznhh/wD.ZiU1BwTsHI45As80msh8le6>

- Republic of Romania), Hungarian People's Republic, Czechoslovak Socialist Republic, Federative People's Republic of Yugoslavia (Socialist Federative Republic of Yugoslavia) and socialist republics in its composition, except those which are effective (valid) flags or coats of arms of the countries;*
- b. anthems of the USSR, Ukrainian SSR (USRR), other union or autonomous Soviet republics **or their fragments**;*
  - c. flags, symbols, images **or other attributes** reproducing the combination of a sickle and a hammer, a sickle, a hammer and a five-pointed star, a plough, a hammer and a five-pointed star;*
  - d. symbols of the communist party **or its elements**;*"

81. The European Court of Human Rights, in its *Vajnai* Judgment has made it clear that it does not endorse the general banning of symbols that can have numerous different meanings. In the same Judgment, the Court exemplified that the red star is such a symbol<sup>83</sup> and declared "*the ban in question ... too broad in view of the multiple meanings of*"<sup>84</sup> several of the symbols enumerated in the Law. The same is true for several of the enlisted symbols in Article 1 section 1 paragraph 4 letter c.

82. In contrast, Article 1 section 1 paragraph 5, which lists symbols relating to national socialist ideology, is shorter and clearer, even though it also lacks depiction and contains some open wording ("*quotations of persons, who held key management positions in the National Socialist German Workers' Party (NSDAP)*"). Contrary to the list of symbols of the communist totalitarian regime, this list is, however, restricted solely to symbols relating to Germany during the period from 1939 to 1945. A law banning propaganda and certain symbols linked to two specific ideologies should ideally be consistent in terms of scope and detail of description of activities of both ideologies.

83. The definition of propaganda of communist and Nazi regimes under Article 1 section 1 paragraph 2 is also vague. Under the definition, propaganda may take three forms. The first consists in public denial, in particular in mass media, of the criminal nature of the communist or Nazi regimes. The definition does not provide a list of specific crimes which may not be denied, and the term "*excuses for the criminal nature*" of the above regimes could include a wide variety of statements that are not necessarily tied to a specific crime committed by the State; any statement showing any aspect of these regimes in a positive light would appear to suffice. The second form consists in the dissemination of information aimed at finding excuses for the criminal nature of the communist or Nazi regimes. The determination of whether the dissemination of information has such a purpose requires an assessment of the subjective intent of the actor. The third form consists in the production and/or dissemination and public use of the products containing the symbols of the communist and Nazi regimes.

84. Moreover, this definition of propaganda does not provide any elements to clearly distinguish it from other forms of expression guaranteed by Article 10 ECHR. "Propaganda" should also imply something more than the mere expression of opinions and ideas.

85. Although this was not raised in the Joint *amicus curiae* brief for Moldova, "propaganda" usually makes reference to an activity aimed at proselytizing people to certain ideas and opinions. Law no. 317-VIII addresses this element in association with the banned regimes and deems it an "*outrage upon memory of millions of victims*" of these regimes and as dangerous to a democratic society. However, the combination of broadness, vagueness, openness, lack of objective detectability and ambiguity in meaning, places the applicability of the Law's provisions – both in terms of what can be a forbidden symbol and which acts in

<sup>83</sup> European Court of Human Rights, *Vajnai v. Hungary*, application no. 33629/06, Judgment of 8 July 2008, paragraphs 51 *et seq.*

<sup>84</sup> *Ibid.*, paragraph 54.

relation to such a symbol may be forbidden – almost completely at the authorities' discretion. It does so to a degree that may lead to a situation where individuals could transgress provisions of the Law accidentally and without intent. Indeed, it is near to impossible for individuals to properly anticipate lawful or unlawful behaviour based on the text of the Law. In the opinion of the Venice Commission and OSCE/ODIHR, the Law therefore does not seem to meet the requirements of clarity and foreseeability.

**b) Pursuance of a legitimate aim**

86. The Preamble (paragraphs 4 *et seq.*) defines the aims of the Law in the following terms: “*striving to protect human rights and liberties, striving to develop and strengthen the independent, democratic, constitutional state, ... facilitat[ing] the consolidation and development of the Ukrainian nation, [maintaining] its historical consciousness in order to prevent repetition of crimes of communist and national socialist (Nazi) regimes, any discrimination by national or social origin, class, ethnicity, race or on other basis in future, restore historical and social justice, eliminate the threat to independence, sovereignty, territorial integrity and national security of Ukraine.*”

87. As in the case of the Moldovan legislation, reviewed by the Venice Commission and OSCE/ODIHR in their Joint *amicus curiae* brief for the Constitutional Court of Moldova, Law no. 317-VIII appears to use 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. 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. 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.<sup>85</sup> Additionally, Law no. 317-VII states that the prevention of such crimes in the future is one of its aims, as well as the elimination of a threat to independence, sovereignty, territorial integrity and national security. The Law may seek to further these aims by establishing a common historical record and, with this, promote a unifying Ukrainian identity.

88. As a result, while not mentioning all possible and presumed aims specifically, the Law may be deemed to serve the legitimate aims of preventing disorder or crime, the interests of national security, territorial integrity and protecting public safety and protecting the rights and freedoms of others.<sup>86</sup>

**c) Necessary in a democratic society**

89. Law no. 317-VIII targets political speech and other symbolic forms of the expression of political views and opinions. The Law also pertains to history and its interpretation. While it is not unusual or illegitimate to use legal tools to give an official assessment of a certain period of history, it is important that such tools are not used to impose a view of history on the persons living in a State or to forestall public debate.<sup>87</sup> The Law should also not prevent free academic research and free artistic creation.

90. The notion of “necessity” implies a “*pressing social need*” that needs to be addressed with the adoption of the Law.<sup>88</sup> During its meetings with various stakeholders in Kyiv, the Venice Commission and OSCE/ODIHR delegation was told on several occasions that the Law was necessary “*in light of Ukraine’s political and security situation*”. The Venice

<sup>85</sup> CDL-AD(2013)004, paragraphs 80 *et seq.*

<sup>86</sup> *Ibid*, paragraph 83.

<sup>87</sup> European Court of Human Rights, *Pernicek v. Switzerland*, application no. 27510/08, 15 October 2015.

<sup>88</sup> *Handyside v. the United Kingdom*, application no. 5493/72, Judgment of 7 December 1976 (Plenary), paragraph 48.

Commission and OSCE/ODIHR acknowledge that the current political and security situation in Ukraine sets the country apart from other countries in the Council of Europe and OSCE areas, notably those whose laws or practices the European Court of Human Rights has ruled on regarding the issue of decommunisation. However, “[e]xtreme care must be taken by States parties to ensure that [...] provisions relating to national security, [...] are crafted and applied in a manner that conforms to the strict requirements of paragraph 3”.<sup>89</sup>

91. By potentially labelling accounts of the period of 1917-1991 which deviate from the official accounts as propaganda of the communist or Nazi regime, Law no. 317-VIII risks stifling public debate about this period of modern Ukrainian history. This also negatively affects an open and public debate in national media. Without such a debate, however, some of the purposes pursued by this Law – for instance that of restoring historical and social justice – will be difficult to achieve.

92. As no exception for research or artistic creation is foreseen under Article 3 and as the exceptions foreseen under Article 4 section 3 and (unnumbered) section 4 only apply to research that is conducted in a manner that is not prohibited by the legislation of Ukraine or not resulting in propaganda, Law no. 317-VIII risks forestalling independent academic inquiry into modern Ukrainian history. At the same time, such inquiry is necessary to restore historical and social justice. Article 3 might also clash with Article 5 of the Law, which calls for investigation of crimes committed by the communist and Nazi regimes and putting the historical record straight. This will be difficult to achieve if free historical research cannot be carried out.

93. By reference to the Criminal Code amended in Article 7, section 2, paragraph 1, Law no. 317-VIII stipulates that in cases of violations of the Law, penalties of imprisonment of up to five years and between five and ten years, shall be imposed respectively. The Law does not provide for more lenient penalties such as monetary fines. Bearing in mind that both the European Court of Human Rights and the CCPR consider even the threat of custodial sentences for non-violent expression to be inappropriate (see above, paragraph 57), the severity of these penalties is evidently disproportionate to the (principally) legitimate aims pursued by Law no. 317-VIII. This is even more obvious in cases in which any of the acts prohibited by the Law amount to political expression. In the *Case of Murat Vural v. Turkey*, the European Court of Human Rights clearly stated that, in principle, “*peaceful and non-violent forms of expression should not be made subject to the threat of imposition of a custodial sentence*”.<sup>90</sup>

94. The Ukrainian interlocutors, whom the delegation of the Venice Commission and OSCE/ODIHR met in Kyiv, nearly all agreed that the criminal sanctions provided under Law no. 317-VIII were too harsh and should be revised. The Venice Commission and OSCE/ODIHR would welcome a revision of the imposed sanctions.

95. Together with the lack of foreseeability stated above, these drastic penalties are otherwise likely to produce what the European Court of Human Rights refers to as a “*chilling effect*”, potentially stifling the exercise of freedom of expression in general and of political speech in particular throughout society. Rather than protect the dignity of victims and prevent the return of a totalitarian regime, this might effectively discourage people from engaging in public affairs.

96. A second major issue regarding the requirement of proportionality is the application of the Law’s restrictions and penalties based solely on the act itself (i.e. *actus reus*) without the requirement of criminal intent (i.e. *mens rea*). This means that the Law stipulates criminal

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<sup>89</sup> Paragraph 30 of CCPR General Comment 34.

<sup>90</sup> European Court of Human Rights, *Murat Vural v. Turkey*, application no. 9540/07, paragraph 66.

prosecution<sup>91</sup> for quite vaguely-defined acts (see Article 1 in conjunction with Articles 3 and 4) without regard to the circumstances of the individual case or the intent of the performance. The Law thereby applies to all such acts without requiring that the individual behaviour actually propagates a totalitarian ideology and thereby constitutes a “*real and present danger*”<sup>92</sup> to the legitimate aims of the Law. This would not appear to constitute a proportionate measure in line with Article 10.2 of the European Convention on Human Rights.

**d) Special aspect: the media**

97. By including the phrase “*in particular in mass media*” in its (vague) definition of forbidden propaganda (Article 1 section 1 paragraph 2), the Law specifically places journalists and others working in the media under the threat of criminal prosecution. The role of the media is crucial in providing access to information and in performing a “watchdog” role in relation to the functioning of democracy. Contested information and potentially problematic speech should be addressed in an open debate.<sup>93</sup> Given the important role of free media, the broad and vague language of Article 1 section 1 paragraph 2, Article 3 section 2 and Article 7 section 10 paragraph 2 may lead to disproportionate restrictions on media freedom.

98. Article 3 section 2 places “*printed mass media source[s]*” under the threat of being outlawed and inhibits their publication in cases involving transgression of the Law. The provision therefore effectively allows the State to censor the media. Censorship would, in any context, constitute a severe infringement on the freedom of expression and opinion – of those citizens expressing themselves *via* the media as well as those seeking information through the media. However, in the context of Law no. 317-VIII, the censorship that Article 3 section 2 introduces is even more problematic: given that the central provisions of the Law (defining forbidden propaganda and forbidden symbols) are not in conformity with the requirements of clarity and foreseeability, it is the opinion of the Venice Commission and OSCE/ODIHR that Article 3 section 2 would enable the authorities to shut down media and/or control media output at their discretion. This is a disproportionate sanction, particularly given the important role that the media plays in a democratic society. Outlawing media outlets and banning their publications should be the last resort in the most extreme cases only and would only be justifiable in exceptional situations e.g. if the publication incites to violence.

99. According to Article 3 section 3 of Law no. 317-VIII, “*where a legal entity, political party, other association of citizens, printed mass media source does not comply with this Law, its activities/publishing shall be ceased by court upon a claim to be initiated by a central executive authority responsible for implementing of the governmental policy on state registration of legal entities, registration (legalizing) of associations of citizens, non-governmental unions, other NGOs or other competent public authorities*”. Article 3 section 4 states that “[a] decision on non-compliance of the activities, name and/or symbols of the legal entity, political party, other association of citizens with this Law is in the competence of the central executive authority”. The latter provision might imply that a decision on non-compliance may be taken by the central executive authority even in the absence of a court finding. Even though the Ministry of Justice, in a written submission of 2 December 2015, has clarified that the court shall take the final decision in such cases, it is recommended to revise the wording of Article 3 section 4 to make it more compliant with the wording of section 3 of the same provision.

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<sup>91</sup> It remains unclear whether the Law additionally stipulates civil law liability.

<sup>92</sup> European Court of Human Rights, *Vajnai v. Hungary*, application no. 33629/06, Judgment of 8 July 2008, paragraph 57.

<sup>93</sup> See also the OSCE Representative on Freedom of the Media, 18 May 2015, online at: <http://www.osce.org/fom/158581>.

### e) *Special aspect: renaming*

100. Law no. 317-VIII provides local administrations with a deadline of six months to dismantle certain monuments and memorials and to rename public streets and other places (Article 7 paragraph 15 sections 6-8). These objects and places are of direct interest to various communities residing in the areas concerned.

101. While it is legitimate for a State to attempt to de-commemorate the totalitarian communist past and place a new narrative of national history and memory into public space in this manner, the process should be based on principles of inclusiveness and good governance. Sufficient time should be foreseen for consultations with the population, including at the local levels. The latter should aim at achieving a balance between the reasonable interests of all groups in society. Thus, decisions regarding the re-naming of streets, buildings and other public spaces should be made in an inclusive and participatory manner by the elected local councils, rather than by State administrations. The Ukrainian authorities should thus consider extending the period of implementation for these provisions or provide for exceptions in case the decisions have not been made within the prescribed six months. In any case, they should allow for extended consultations in the communities concerned. The involvement of local self-governance on renaming is crucial in conveying the message that a given territory is shared in harmony by various population groups and in line with the on-going decentralisation processes.

## 2. Freedom of association

102. In addition to criminal prosecution, Article 3 enables the State to deny registration to and outlaw associations of any kind, including political parties and non-governmental organisations, for engaging in propaganda as defined in Article 1. State competence to disable the effective organisation of political actors, in any context, constitutes a considerable interference with the right to freedom of association. In Law no. 317-VIII, numerous key elements are problematic with regard to the requirements of clarity and foreseeability. Hence, outlawing an association on the basis of the Law seems likely to constitute a breach of Article 11 ECHR and Article 22 ICCPR (freedom of association).

103. Freedom of association is also guaranteed by Articles 36-37 of the Constitution of Ukraine. It is "*an individual human right which entitles people to come together and collectively pursue, promote and defend their common interests*".<sup>94</sup> The freedom of association is of particular importance for political parties, due to the role that they play in ensuring pluralism and the proper functioning of democracy.<sup>95</sup>

104. There is a close link between the freedom of expression and freedom of association.<sup>96</sup> They both help ensure that the democratic nature of a State is safeguarded and that the protection of human rights is guaranteed. As the Venice Commission stated in its opinion for Azerbaijan, "*it is impossible to defend individual rights, if citizens are unable to organize around common needs and interests and speak up for them publicly*".<sup>97</sup> Thus, freedom of

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<sup>94</sup> Venice Commission, CDL-AD (2011)035, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan*, paragraph 39

<sup>95</sup> European Court of Human Rights, *Refah Partisi and Others v. Turkey*, (GC) application nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, paragraph 31. See also Resolution 1308 (2002) of the Parliamentary Assembly of the Council of Europe, on "Restrictions on political parties in the Council of Europe's Member States".

<sup>96</sup> See e.g. OSCE/ODIHR and Venice Commission "Guidelines on Freedom of Association", online at <http://www.osce.org/odihr/132371?download=true>, paragraph 17: "The right to freedom of association is interrelated with other human rights and freedoms, such as the rights to freedom of expression and opinion, freedom of assembly and freedom of thought, conscience and religion".

<sup>97</sup> Venice Commission, CDL-AD(2011)035, paragraph 102.

expression and freedom of association are, in a way, prerequisites for the exercise of other rights.

105. Denial and/or withdrawal of registration for associations clearly interferes with the freedom of association.<sup>98</sup> The same is true for political parties, which are unique forms of associations vital for the functioning of democracy.<sup>99</sup> The three-fold test of legality, legitimacy and necessity in a democratic society also applies here. The test must be applied particularly strictly, with a very limited margin of appreciation left to the State, where political parties are concerned.<sup>100</sup> In the *Freedom and Democracy Party (ÖZDEP)* case, the European Court of Human Rights held 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*”.<sup>101</sup>

106. According to Article 3.3 of Law no.317-VIII, legal entities, political parties, other associations or printed mass media, engaging in propaganda of communist or Nazi regimes or using a symbol of these regimes in their name, shall be denied registration and/or have their registration terminated (Article 3).

107. The Venice Commission and OSCE/ODIHR recall that “(…) *the opportunity for a state to dissolve a political party or prohibit one from being formed should be exceptionally narrowly tailored and applied only in extreme cases. Such a high level of protection has been deemed appropriate by the European Court of Human Rights, given political parties’ fundamental roles in the democratic process.*”<sup>102</sup> Also “[A] *actions undertaken by particular individuals within a party membership, when not officially representing the party, should be attributed only to those individuals.*”<sup>103</sup> Furthermore, the Venice Commission and OSCE/ODIHR Guidelines on Political Party Regulation emphasise that “*dissolution or refusal of registration should only be applied if no less restrictive means of regulation can be found. Dissolution is the most severe sanction available and should not be considered proportionate except in cases of the most significant violations*”.<sup>104</sup>

108. The mere public use of a prohibited symbol - be it by an individual party representative or a party as a whole - should not bring about the dissolution of an association. Given their status in a democratic society, the same is particularly true for political parties. Law no. 317-VIII, however, foresees such dissolution without referring to the unconstitutional nature of the activity of the party. This means that parties may be disbanded under the Law merely on the basis of their name or their symbol. These provisions of the Law therefore seem to fail the proportionality test.

109. So far, on 24 July 2015, the Ministry of Justice of Ukraine has deprived the Communist Party of Ukraine, the Communist Party of Ukraine (renewed) and the Communist Party of

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<sup>98</sup> OSCE/ODIHR and Venice Commission “Guidelines on Freedom of Association”, online at <http://www.osce.org/odihr/132371?download=true>, paragraphs 244-257.

<sup>99</sup> OSCE/ODIHR and Venice Commission “Guidelines on Political Party Regulation”, online at <http://www.osce.org/odihr/77812?download=true>, paragraphs 45-46.

<sup>100</sup> See also O. Akbulut, Criteria Developed by the European Court of Human Rights on the Dissolution of Political Parties, *Fordham International Law Journal*, Vol. 34, 2010-2010, pp. 46-77.

<sup>101</sup> European Court of Human Rights, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, application no. 23885/94, 8 December 1999, paragraph 44.

<sup>102</sup> Guidelines on Political Party Regulation (CDL-AD(2010)024), paragraph 89.

<sup>103</sup> Ibid, paragraph 95.

<sup>104</sup> Online at <http://www.osce.org/odihr/77812?download=true> paragraphs 89, 90; see also OSCE/ODIHR and Venice Commission “Guidelines on Freedom of Association”, online at <http://www.osce.org/odihr/132371?download=true>, paragraph 251.

Workers and Peasants of their right to participate in elections.<sup>105</sup> According to the Ukrainian interlocutors that the delegation of the Venice Commission and OSCE/ODIHR met in Kyiv, the parties concerned were given a certain period of time (i.e. one month) to align themselves with the Law. This meant that they had to change their names and/or symbols within that time limit. The delegation was told that the parties in question had not done so and that on 30 September 2015, the District Administrative Court of Kyiv disbanded the Communist Party of Ukraine (renewed) and the Communist Party of Workers and Peasants.<sup>106</sup> Since there is no further legal recourse available in Ukraine, the Communist Party of Ukraine has filed an application with the European Court of Human Rights in October 2015, arguing that the denial of their right to participate in elections violates Articles 6, 9, 10 and 14 ECHR and Article 3 Protocol I and Protocol 12 ECHR.<sup>107</sup>

110. The Law is furthermore likely to have a detrimental effect on some private businesses and associations which, in many parts of Ukraine, contain historic elements in the names of their enterprises or products. This constitutes a disproportionate interference both with the freedom of association and with the freedom of expression in the private domain.

### 3. Electoral rights

111. Article 3 section 5 of Law no. 317-VIII provides that political parties may not be electoral subjects if they have been found to be in violation of the Law by the competent central executive authority. This restriction interferes with the rights of members of said parties or organisations to stand for election. Indirectly, it also affects the rights of the electorate (by depriving them of the possibility to vote for members of the parties that the provision applies to). It clearly interferes with the right to free elections, as guaranteed by Article 3 Protocol I ECHR and Article 25 ICCPR, which includes the right of political parties and their candidates to stand for elections (see also Article 38 of the Constitution of Ukraine).

112. Even if Article 3 Protocol I ECHR (right to free elections) does not explicitly foresee the possibility of restrictions, the European Court of Human Rights has made it clear in its case-law that this right is not absolute either.<sup>108</sup> The test that the Court has applied in considering applications submitted under Article 3 of Protocol I ECHR is similar to that foreseen in paragraph 2 of Articles 10 and 11 ECHR. It relies on two requirements, namely those of legitimacy and proportionality.<sup>109</sup>

113. While this interference might, on the grounds stated above, pursue legitimate aims, it is not proportionate to these aims because it excludes political parties from participation in elections without taking into account the severity of non-compliance with the Law by the political party. As pointed out by the Venice Commission and OSCE/ODIHR in the Joint Guidelines on Political Party Regulation, “*sanctions must bear a relationship to the violation and respect the principle of proportionality*”.<sup>110</sup> Exclusion from the electoral process is one of the most drastic sanctions that can be taken against a political party. It is analogous to a

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<sup>105</sup> Justice Ministry bans three communist parties from taking part in election process as they violate Ukrainian law – minister, *Interfax-Ukraine*, 24 July 2015.

<sup>106</sup> Суд заборонив діяльність двох компартій, *Українська правда*, 1. 10. 2015.

<sup>107</sup> КПУ спрямувала до Європейського суду з прав людини позов щодо порушення державою Україна основоположних прав і свобод людини, *КПУ*, 30. 10. 2015.

<sup>108</sup> See, for instance, the European Court of Human Rights, *Alajos Kiss v. Hungary*, application no. 38832/06, 20 May 2010.

<sup>109</sup> “It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.” European Court of Human Rights, *Mathieu-Mohin and Clerfayt v. Belgium*, application no. 9267/81, 2 March 1987, paragraph 52.

<sup>110</sup> CDL-AD(2010)024, paragraph 225.

party's prohibition or dissolution, but was not analysed as such by the Venice Commission in its Guidelines on Prohibition and Dissolution of Political Parties since this measure was not applied in any of the countries under consideration.<sup>111</sup>

114. Moreover, as mentioned above, the Law's lack of clarity and foreseeability adds to the risk that this provision may not be in conformity with international human rights law.

115. The exclusion of a party from participation in elections is, according to the Law, based on a claim by an executive organ subject to the decision of a court of law. In this context, it should be noted that "*legislation should require that the state provide an effective remedy for any violation of the fundamental rights of association and expression. The remedy may be provided by a competent administrative, legislative or judicial authority, but must be available for all violations of fundamental rights granted by international and regional instruments. Remedies must be provided expeditiously in order to be effective. A remedy that is granted too late is of little remedial benefit*".<sup>112</sup> Thus, "*any interference by authorities in the activities of political parties should provide an opportunity for the party to challenge such decision or action in a court of law and to have the challenge adjudicated publicly by an impartial tribunal. This is particularly true in regard to the prohibition or dissolution of a political party, where a court should make the final decision on such a serious matter. A hearing before a competent judicial authority should be necessary in all cases of dissolution or prohibition*".<sup>113</sup>

## IX. Conclusion

116. The Venice Commission and OSCE/ODIHR recognise the right of Ukraine to ban or even criminalise the use of certain symbols of and propaganda for totalitarian regimes. While States are free to enact legislation that bans or even criminalises the use of symbols and propaganda of certain totalitarian regimes, such laws must comply with the requirements set by the ECHR and other regional or international human rights instruments, as well as with their national constitutions.

117. Should such laws interfere with the freedom of expression or the freedom of association, they must meet the three-fold test of legality, legitimacy and necessity in a democratic society. When they interfere with the right to free elections, they must meet the conditions of legality and proportionality. The laws may under no condition violate the *nullum crimen sine lege* principle.

118. While Law no. 317-VIII may be considered as pursuing legitimate aims, it is not precise enough to enable individuals to regulate their conduct according to the law and to prevent arbitrary interference by public authorities.

119. The Venice Commission and the OSCE/ODIHR would therefore like to make the following recommendations regarding Law no. 317-VIII:

- a) *Symbols*: for the purpose of clarity, the Law should contain a less extensive and exhaustive list of the prohibited symbols;
- b) *Propaganda*: this notion must be clearly defined, especially when it is used for the purpose of criminalising conduct;

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<sup>111</sup> CDL-INF(2000)001, Guidelines on prohibition and dissolution of political parties – Appendix I – Report adopted by the Venice Commission at its 35<sup>th</sup> plenary session, III.B, p. 13.

<sup>112</sup> Ibid, paragraph 229.

<sup>113</sup> Ibid, paragraph 230.

- c) *Denial of crimes*: respective provisions must relate to specific crimes and not to the mere "*criminal nature*" of a regime as a whole, which is too vague;
- d) *Sanctions*: only those acts that constitute an actual danger to society should entail criminal responsibility, which should be proportionate to the seriousness of the offence committed. A mere display of a symbol or use of a name should not result in imprisonment; and
- e) *Banning of associations (notably political parties)*: the Law should clarify that banning any association is a measure of last resort in exceptional cases, proportionate to the offence. This is particularly the case for political parties in the light of their important function in a democratic society.

120. The Venice Commission and OSCE/ODIHR remain at the disposal of the Ukrainian authorities for any further assistance they may need.