

COMMENTS

IMMORAL TRUTH VS. UNTRUTHFUL MORALS? ATTEMPTS TO RENDER RIGHTS AND FREEDOMS CONDITIONAL UPON SEXUAL ORIENTATION IN LIGHT OF RUSSIA'S INTERNATIONAL OBLIGATIONS

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Our obligation is to define the liberty of all,
not to mandate our own moral code.

*Planned Parenthood of Southeastern Pa. v. Casey*¹

Wrong does not cease to be wrong
because the majority share in it.

*Leo Tolstoy*²

The recently adopted Russian federal legislation provides for imposition of the so-called 'administrative' sanctions for dissemination of any information regarding issues related to 'social equality' of diverse sexual orientations or gender identities 'among minors' for certain purposes (listed in the relevant provision). Under the new laws, such conduct qualifies as an administrative offence. In parallel with the aforementioned amendments, Art. 127 of the Family Code of Russian Federation was modified to prohibit adoptions by married same-sex couples and unmarried citizens of any state where homosexual marriage is permitted.

¹ 505 US 833, 850 (1992).

² A Confession and Other Religious Writings 158 (Jane Kentish, trans.) (Penguin UK 1987).

The present article is written in the attempt to explore whether the recent Russian legislation is compatible with international standards of human rights protection deriving from the International Covenant on Civil and Political Rights and the European Convention on Human Rights and the relevant jurisprudence of international bodies. Is there any possibility to justify the restrictive laws under international law, bearing in mind the support of this legislative trend by the majority of the Russian population?

Keywords: propaganda of non-traditional sexual relationships; freedom of expression; freedom of assembly.

1. Introduction

The notion of the superiority of one social group over another was made notorious by events in the first half of the twentieth century. Now, in 2014, this idea has re-emerged in Russian legislation and is claimed to garner significant support among the country's populace. At the time of writing, this idea had taken the form of a legislative prohibition on the promotion of the 'social equality of traditional and non-traditional sexual relationships'³ among minors in Russia. Already, some factions speak of an extending this prohibition to encompass the criminalisation of same-sex intercourse.⁴

Recently adopted Russian federal legislation provides for the imposition of so-called 'administrative' sanctions for disseminating 'among minors' for certain purposes (listed in the relevant provision), any information regarding issues related to the 'social equality' of persons with diverse sexual orientations or gender identities.⁵ This legislation deems such conduct an administrative offence.⁶ The legislation has led to pickets among opponents, and the courts have already started to apply new administrative sanctions, sentencing picket participants to fines.⁷

³ Кодекс об административных правонарушениях Российской Федерации (КоАП РФ) [Code of Admin. Offenses of the Russian Federation], Dec. 30 2011, No. 195-FZ, Art. 6.21 (as of Oct. 21, 2013).

⁴ See Trudy Ring, *Russian Church Leader Proposes Criminalizing Homosexuality*, Advocate.com (Jan. 10, 2014), <www.advocate.com/news/world-news/2014/01/10/russian-church-leader-proposes-criminalizing-homosexuality> (accessed March 5, 2014). Read more on the threat of possible criminalisation in the ILGA survey: Lucas P. Itaborahy & Jingshu Zhu, *State-Sponsored Homophobia World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love 80* (8th ed., ILGA 2013), available at <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf> (accessed March 5, 2014).

⁵ Russian law provides for a division between administrative and criminal offences, with administrative procedure providing fewer fair trial guarantees than criminal procedure – a point that is regularly scrutinised from a European Convention on Human Rights standpoint. See, e.g., *Menesheva v. Russia*, no. 59261/00 Eur. Ct. H.R., 2006-III, ¶¶ 94–98 and *Zolotukhin v. Russia* [GC], no. 14939/03, Eur. Ct. H.R., 2009-I, ¶¶ 54–57.

⁶ See more detailed discussion on recent developments in Russian law *infra*, sect. 2.

⁷ See *First LGBT Activists Sentenced under Federal Propaganda Law*, Civil Rights Defenders (Dec. 10, 2013), <<https://www.civilrightsdefenders.org/news/russia-first-lgbt-activists-sentenced-under-federal-propaganda-law/>> (accessed March 5, 2014).

The end of 2013 also saw the State Duma (the lower chamber of the Federal Assembly – Russia's legislature) amend the Russian Federation's Family Code to prohibit married same-sex couples and unmarried citizens of states where same-sex marriage is permitted from adopting Russian children.⁸

These laws have been adopted notwithstanding the fact that Russia remains a party to the International Covenant on Civil and Political Rights⁹ and its First Optional Protocol.¹⁰ They come only fifteen years after the country ratified the European Convention on Human Rights and Fundamental Freedoms¹¹ to join the Council of Europe, a regional organisation created in the aftermath of World War II to prevent the reoccurrence of the abuses that characterised that conflict and the years preceding it. Both the ICCPR and the ECHR form part of a post-war rebirth enshrined in the United Nations Charter. This international movement emphasises the centrality of human rights protection¹² secured by international enforcement mechanisms to maintaining international peace and security. It represents a concerted international effort to stave off the deplorable fate suffered by the League of Nations in the 1930s.¹³

The Human Rights Committee [hereinafter HRC]¹⁴ and the European Court of Human Rights [hereinafter Eur. Ct. H.R.], entrusted with the interpretation and implementation of these instruments,¹⁵ have already noted that the standards developed by Russia both in practice and, on the regional level, formally, are incompatible with Russia's international human rights obligations.¹⁶

Why has the Russian legislature, despite its awareness of its international obligations deriving from Eur. Ct. H.R. and HRC case law, adopted legislation that is so clearly discriminatory? Can this initiative potentially be justified by the need to protect traditional values and the child's best interests? Does it matter, in the end,

⁸ See Семейный кодекс Российской Федерации [Family Code of the Russian Federation], Dec. 29, 1995, No. 223-FZ, Art. 127(1) (as of Nov. 25, 2013).

⁹ Int'l Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, signed by the Soviet Union on March 18, 1968 [hereinafter ICCPR].

¹⁰ Optional Protocol to the ICCPR, Dec. 16, 1966, 999 UNTS 302, to which Russia acceded on Oct. 1, 1991.

¹¹ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221 [hereinafter ECHR].

¹² UN Charter, Preamble and Art. 1(3).

¹³ See, e.g., Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press 1999); Yakov Ostrovsky, *UN and Human Rights* (Mezhdunarodnyye otnosheniya 1968).

¹⁴ The quasi-judicial United Nations body examining complaints under the International Covenant on Civil and Political Rights, to whose jurisdiction Russia submitted from Oct. 1, 1991.

¹⁵ ECHR, *supra* n. 11, Arts. 19 and 32; ICCPR, *supra* n. 9, Art. 41 and Preamble to the Optional Protocol.

¹⁶ *Fedotova v. Russia*, CCPR/C/106/D/1932/2010 (Human Rights Comm., Nov. 30, 2012); *Alekseyev v. Russia*, nos. 4916/07, 25924/08, 14599/09 (Eur. Ct. H.R., Oct. 21, 2010); see also the section concerning Russia's international obligations, *infra*.

whether national law is compatible with international standards when the majority of the population supports, rather than condemns 'anti-gay' amendments? These are precisely the questions that this article will seek to explore.

2. Recent developments in Russian legislation

2.1 Amendments concerning freedom of expression

Since 2014, Russian law has prohibited, at the regional and federal levels, propaganda supporting 'non-traditional sexual relationships.' In 2006, Russia became the first state in the world to pass such provisions into law through regional legislation.¹⁷ This precedent was followed by several countries in Central and Eastern

¹⁷ The Amending Law was preceded by nine regional laws using similar wording, the first being adopted in 2006 in the Ryazan Region of Russia, with the others following closely one after the other in 2011 and 2012.

The first Act was enacted by authorities of the Ryazan Region in 2006 (Ryazan Regional Law, О защите нравственности и здоровья детей в Рязанской области [On the Protection of the Morals and Health of Children in the Ryazan Region], Apr. 3, 2006, No. 41-oz [hereinafter Ryazan Regional Law No. 41-oz]). This initiative was then supported by the Republic of Bashkortostan, the regions of Arkhangelsk, Kostroma, Krasnodar, Magadan, Novosibirsk and Samara, and the City of St. Petersburg (see Republic of Bashkortostan Law, О внесении изменения в Закон Республики Башкортостан «Об основных гарантиях прав ребенка в Республике Башкортостан» [On Amending the Republic of Bashkortostan Law 'On Fundamental Safeguards of the Rights of the Child in the Republic of Bashkortostan'], July 23, 2012, No. 581-z; Arkhangelsk Regional Law, О внесении изменений и дополнений в областной закон «Об отдельных мерах по защите нравственности и здоровья детей в Архангельской области» [On Amending and Adding to the Regional Law 'On Specific Means of Protection of Health and Morals of Children in the Arkhangelsk Region'], Sept. 30, 2011, No. 226-24-oz; Kostroma Regional Law, О внесении изменений в Закон Костромской области «О гарантиях прав ребенка в Костромской области» и Кодекс Костромской области об административных правонарушениях [On Amending the Kostroma Regional Law 'On Safeguards of the Rights of the Child in the Kostroma Region' and Code of Admin. Offenses of the Kostroma Region], Febr. 15, 2012, No. 193-5-zko; Krasnodar Territory Law, О внесении изменений в отдельные законодательные акты Краснодарского края в части усиления защиты здоровья и духовно-нравственного развития детей [On Amending Specific Legislative Acts of the Krasnodar Territory as Regards the Stepping up of the Protection of Health and the Moral and Spiritual Development of Children], July 3, 2012, No. 2535-kz; Magadan Regional Law, О внесении изменений в отдельные законы Магаданской области в части защиты несовершеннолетних от факторов, негативно влияющих на их физическое, интеллектуальное, психическое, духовное и нравственное развитие [On Amending Specific Magadan Regional Laws as Regards the Protection of Minors from Factors Affecting Their Physical, Intellectual, Psychological, Spiritual, and Moral Development], June 9, 2012, No. 1507-oz; Novosibirsk Regional Law, О внесении изменений в отдельные законы Новосибирской области [On Amending Specific Laws of the Novosibirsk Region], June 14, 2012, No. 226-oz; Samara Regional Law, О внесении изменений в Закон Самарской области «Об административных правонарушениях на территории Самарской области» [On Amending the Samara Regional Law 'On Administrative Offences in the Samara Region'], July 10, No. 75-GD; St. Petersburg Law, О внесении изменений в Закон Санкт-Петербурга «Об административных правонарушениях в Санкт-Петербурге» [On Amending the St. Petersburg Law 'On Administrative Offences in St. Petersburg'], March 7, 2012, No. 108-18; Kaliningrad Regional Law, О внесении изменений и дополнений в Закон Калининградской области «О защите населения Калининградской области от информационной продукции, наносящей вред духовно-нравственному развитию» [On Amending and Adding to the Kaliningrad Regional Law 'On the Protection of the Population of the Kaliningrad Region from Information Harmful to Moral and Spiritual Development'], Jan. 30, 2013, No. 199).

Europe (Moldova and Hungary, with attempts undertaken by Ukraine, Lithuania and Latvia).¹⁸ These developments finally led to the adoption of federal legislation in Russia in 2013.

On July 29, 2013, Federal Law No. 135-FZ amending certain laws of the Russian Federation with a view to protecting children from information propagating the negation of traditional family values, entered into force [hereinafter Amending Law on Propaganda].¹⁹

At the first reading of this proposed new law, in January 2013, the draft bill referred to 'propaganda of homosexual relationships' which was later replaced by 'propaganda of non-traditional sexual relationships.' The adoption of this amending legislation was said to be motivated by the need 'to protect the younger generation from the effects of homosexual propaganda,' which was said to take a 'sweep widely' in Russia, being 'delivered both through the media and through active social actions that promote homosexuality as a behavioural norm.'²⁰

The Amending Law on Propaganda modified three federal acts: the Law on the Rights of the Child Law,²¹ the Law on Protection of Children from Detrimental Information Law,²² and the Code of Administrative Offences of the Russian Federation.²³

The Amending Law on Propaganda has modified the Law on the Rights of the Child to oblige governmental authorities:

[T]o adopt measures in order to protect the child from information propaganda and agitation detrimental to his/her health, moral and spiritual development, including . . . information propagating non-traditional sexual relationships.

'Propagating non-traditional sexual relationships' was also included in the Law on Protection of Children from Detrimental Information as yet another type of

¹⁸ See Report, The Article 19 Law Programme, *Traditional Values? Attempts to Censor Sexuality. Homosexual Propaganda Bans, Freedom of Expression and Equality* 7 (2013), <<http://www.article19.org/data/files/medialibrary/3637/LGBT-propaganda-report-ENGLISH.pdf>> (accessed March 7, 2014) [hereinafter Article 19].

¹⁹ The full text of the amendments in English is available at <<http://www.threefold.ru/russian-laws-amended-federal-law-no-135-fz-amending-certain-laws-russian-federation-view-protect-children>> (accessed March 7, 2014) (unofficial translation).

²⁰ See Explanatory Note to Draft Law No. 44554-6, available at <<http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=44554-6>> (accessed March 7, 2014).

²¹ Federal Law, Об основных гарантиях прав ребенка в Российской Федерации [On the Principal Guarantees of the Rights of the Child in the Russian Federation], July 24, 1998, No. 124-FZ (as of July 2, 2013).

²² Federal Law, О защите детей от информации, причиняющей вред их здоровью и развитию [On the Protection of Children from Information Detrimental to Their Health and Development], Dec. 29, 2010, No. 436-FZ (as of July 2, 2013) [hereinafter Federal Law on the Protection of Children].

²³ *Supra* n. 3.

prohibited action and content aimed at negating family values, which should not be communicated to children.²⁴

To ensure compliance with the aforementioned provisions, a new offence was enshrined in the Code of Administrative Offences. This offence essentially entails the dissemination of any information aimed at

forming non-traditional sexual attitudes among minors, attractiveness of non-traditional sexual relationships, a distorted image of the social equality of traditional and non-traditional sexual relationships, or the forced imposition of information about non-traditional sexual relationships, which can attract interest in such relationships.²⁵

The penalties attached to this offence take the form of fines applied on a graded scale according to the identity of the accused and the extent of mass media use (including the Internet). These penalties range from 4,000 roubles (approximately EUR 90) to 1,000,000 roubles (approx. EUR 22,000) or administrative suspension of activity for up to 90 days (for legal entities). If the same actions are committed by a foreign national or a stateless person, the fine applies together with administrative expulsion from the Russian Federation or administrative arrest for up to 15 days followed by expulsion from the country.

The Amending Law on Propaganda effectively sums up and conclusively upholds at the federal level not only the Russian regional laws that set the ball rolling in 2006,²⁶ but also the practices of interference with freedom of expression that have regularly occurred in Russia even since before that time.²⁷ Such practices have been assessed to constitute both 'consistent' and 'escalating' interference with the freedom of expression²⁸ and have been found to be incompatible with Russia's international obligations.²⁹

In gleaning a comparative perspective it is instructive to note that there are currently around 70 countries worldwide that prohibit the dissemination of information about homosexuality. However, in all such instances that prohibition goes hand in hand with the criminalisation of homosexual acts, attracting sanctions

²⁴ See Federal Law on the Protection of Children, *supra* n. 22, Art. 5.

²⁵ See Code of Admin. Offences of the Russian Federation, *supra* n. 3, Art. 6.21.

²⁶ See, e.g., Ryazan Regional Law No. 41-oz, *supra* n. 17.

²⁷ See *Gay Parades Banned in Moscow for 100 Years*, BBC News (Aug. 17, 2012), <<http://www.bbc.co.uk/news/world-europe-19293465>> (accessed March 7, 2014).

²⁸ Paul Johnson, *Homosexual Propaganda' Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?* (University of York Working Paper [Draft 8th July 2013]), available at <http://papers.ssrn.com/abstract_id=2251005> (accessed March 7, 2014); for an overview, see ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe* 187–189 (2013), available at <http://www.ecoi.net/file_upload/90_1369137411_ilga-europe-annual-review-2013.pdf> (accessed March 7, 2014).

²⁹ See *infra* n. 33 and 34.

the severity of which can extend to imprisonment and even death.³⁰ Whilst Russia's present day situation might not be so severe, it is undeniable that Russian legislation has lost its neutrality on homosexuality and is acquiring an increasingly restrictive character, raising concerns of potential criminalisation.

2.2. Amendments concerning the right to adopt a child

Parallel to the Amending Law on Propaganda, another act modifying certain laws regulating care for children without parental care entered into force on July 3, 2013 (Anti-Adoption Amending Law).³¹

This law was said to be aimed at improving 'the mechanisms of legal, organizational and psychological-pedagogical support of Russian citizens intending to adopt'³² children and facilitating the procedure for adoption.

However, the same law amended Art. 127 of the Family Code, which now prohibits adoptions by two categories of potential parents:

(1) persons of the same sex, who had their marriage registered in any state where homosexual marriages are recognized; and

(2) unmarried citizens (irrespective of their sexual orientation) of any state where homosexual marriage is permitted.

As such, this law precludes both married homosexual couples *and* certain heterosexual couples from adopting children from Russia.

In sum, Russian law's recent prohibition of 'propaganda of non-traditional sexual relationships' under threat of administrative sanction and its preclusion of the adoption of Russian orphans by both married homosexual couples and the citizens of states recognizing such marriages, have both been founded on claims regarding the need to protect the child's best interests and 'traditional values.'

3. The positions taken by Russia's three branches of power

3.1 Russian case-law as the main contributor to the current wording of the Amending Law on Propaganda

The past seven years have seen regional bans on 'homosexual propaganda' assessed as violative of the ICCPR by the HRC in *Fedotova v. Russia*,³³ whilst a refusal

³⁰ See Article 19, *supra* n. 18; Itaborahy & Zhu, *supra* n. 4, at 80.

³¹ Federal Law, О внесении изменений в отдельные законодательные акты Российской Федерации по вопросам устройства детей-сирот и детей, оставшихся без попечения родителей [On the Amendments to Certain Russian Laws on Care for Orphans and Children Left without Parental Care], July 2, 2013, No 167-FZ.

³² See Explanatory Note to Draft Law No. 229781-6, О внесении изменений в отдельные законодательные акты Российской Федерации по вопросам устройства детей-сирот и детей, оставшихся без попечения родителей [On the Amendments to Certain Russian Laws on Care for Orphans and Children Left without Parental Care], available at <[http://asozd2.duma.gov.ru/main.nsf/\(spravka\)?openagent&rn=229781-6](http://asozd2.duma.gov.ru/main.nsf/(spravka)?openagent&rn=229781-6)> (accessed March 7, 2014).

³³ *Fedotova*, CCPR/C/106/D/1932/2010, *supra* n. 16.

to allow the organisation of a gay pride parade was found incompatible with the ECHR by the Eur. Ct. H.R. in *Alekseyev v. Russia*.³⁴ However, the discriminatory laws and practices that pre-existed the Amending Law on Propaganda attracted no condemnation or criticism from the supreme judicial instances of the Russian Federation, including the Constitutional and Supreme Courts.

On the contrary, the Amending Law on Propaganda's wording has in fact been borrowed from case law on this subject developed over the past seven years by Russia's higher courts.

The Constitutional Court of Russia approved Ryazan Region's legislation on 'homosexual propaganda' in its Ruling No. 151-O-O (Jan. 19, 2010). This Ruling concerned an attempt to challenge certain regional laws, including the Law of the Ryazan Region on Administrative Offences, under which the applicants were punished for displaying banners near a school building that stated 'Homosexuality is normal' and 'I am proud of my homosexuality.'

The Constitutional Court emphasised that 'family, motherhood and childhood in traditional perception are those values which ensure continuous change of generations and preservation and development of the whole multinational people of the Russian Federation.'³⁵ For this reason special governmental protection of these values was deemed necessary. Moreover, the legitimate interests of minors was found to require that the State protect children from factors that negatively affect their physical, intellectual, mental, spiritual and moral development.

According to the Constitutional Court, since it was aimed at the realisation of these principles of Russian law, the Ryazan Region's ban on 'homosexual propaganda' was permissible. As such, the regional legislation at issue was found not to be discriminatory or in any other way improperly restrictive of freedom of expression.

Importantly, the Constitutional Court defined 'propaganda' as an activity of 'purposeful and uncontrolled dissemination of information, detrimental to health, [and] moral . . . development forming a distorted image of the social equality of of traditional and non-traditional relationships . . .'

The jurisprudence of the *Supreme Court of Russia* adopts a similar definition of 'homosexual propaganda,' evincing an analogous approach to the issue. In 2012, the judicial department of administrative affairs of the Supreme Court considered three cases involving the 'homosexual propaganda.'

The first case (Ruling dated Aug. 15, 2012)³⁶ saw the Arkhangelsk Region's legislation prohibiting sexual propaganda contested on the basis that it created legal uncertainty as a result of the use of vague terms such as 'propaganda' and 'homosexuality.'

³⁴ *Alekseyev, supra* n. 16; see also the section concerning Russia's international obligations *infra*.

³⁵ Ruling No. 151-O-O of the Constitutional Court of the Russian Federation (Jan. 19, 2010), ¶ 3.

³⁶ Ruling No. 1-APG12-11 of the Judicial Board on Administrative Cases of the Supreme Court of the Russian Federation (Aug. 15, 2012).

The Supreme Court did not find any ambiguity in the regional law's terminology, ruling that the words 'propaganda' and 'homosexuality' have well-known meanings. Here, propaganda was defined as 'an activity of natural or legal persons consisting in the dissemination of information, aimed at forming in the consciousness certain attitudes and stereotypes, or encouraging persons to whom it is addressed to commit something or refrain from it.'³⁷

To summarise, the Supreme Court's reasoning in its Ruling of Aug. 15, 2012, was principally founded on two ideas: first, that propaganda of homosexuality denies traditional family values; and second, that a child cannot critically assess incoming information and that his or her own interest in non-traditional relationships can easily be incited despite the fact that such interest is not 'objectively' based 'on the physiological characteristics of the child.'

According to the Supreme Court's interpretation of the UN Convention on the Rights of Child and the UN Declaration on the Rights of the Child, the law in question is necessary to protect children's best interests and the State's obligation to protect the child's personality and self-identification from the negative effects of the active promotion of homosexuality.

The Supreme Court further concluded that the contested legislation was fully consistent with Russian and international law, because the only means of expressing one's opinion that had been prohibited was 'homosexual propaganda.' Neither the mere mention of homosexuality, nor discussion of the social status of minorities, falls under this notion, the court reasoned and thus everyone is free to receive and disseminate information containing general, neutral content, and to conduct public events or discuss the status of LGBT persons.

This is the approach that has been followed by the Supreme Court in later cases.³⁸

This unanimity among the highest courts of the land regarding cases involving the assessment of anti-propaganda legislation was recently reconfirmed by the Constitutional Court in its Ruling No. 1718-O (Oct. 24, 2013).³⁹ Here, the Court restated its finding that regional law prohibiting homosexual propaganda (Law of St. Petersburg 'On Administrative Offences in St. Petersburg') is consistent with

³⁷ Furthermore, a similar definition can be found in Art. 3 of the Model Law, *О защите детей от информации, причиняющей вред их здоровью и развитию* [On the Protection of Children from Information Detrimental to their Health and Development], Dec. 3, 2009 (adopted at the 33rd Plenary Session of the Interparliamentary Assembly of the CIS Member States).

³⁸ Ruling No. 78-APG12-16 of the Judicial Board on Administrative Cases of the Supreme Court of the Russian Federation (Oct. 3, 2012) (The applicant contested the legality of Saint-Petersburg's law 'On Administrative Offences in St. Petersburg,' which prohibits and penalises the propaganda of sodomy, lesbianism, bisexuality and transgenderism among minors); Ruling No. 87-APG12-2 of the Judicial Board on Administrative Cases of the Supreme Court of the Russian Federation (Nov. 7, 2012) (The applicant contested the legality of Kostroma Regional Law 'On Safeguards of the Rights of the Child in the Kostroma Region,' which prohibits homosexual, lesbian and transgender propaganda).

³⁹ Ruling No. 1718-O of the Constitutional Court of the Russian Federation (Oct. 24, 2013).

the Russian Constitution and international standards. The applicant in this case had been fined under the legislation at issue for standing near St. Petersburg City Administration Building with a banner quoting an aphorism by a famous Russian actress to the effect that 'Homosexuality is not a perversion. Lawn hockey and ice ballet are.'⁴⁰ The Constitutional Court reiterated its position, but made one interesting remark: that courts should employ (by analogy) the distinction made by the Constitutional Court between *information* and *campaigning* in the course of an electoral campaign in order to distinguish propaganda from other forms of information dissemination.⁴¹

While the approach of Russia's highest courts seems to be unanimous, at least in terms of a general attitude in support of the prohibition of homosexual propaganda, jurisprudence among the lower courts is less consistent.

As observed by the Venice Commission, 'it appears [that there are] divergent decisions on the application of provisions concerning 'homosexual propaganda' in different regions.'⁴² For example, the magistrate judge of judicial district no. 8 of the city of Kostroma in its decision of March 23, 2012 did not consider a single picket with a poster stating 'Who will protect gay teenagers?' situated near a children's library to be 'homosexual propaganda.' However, the same person was punished under St. Petersburg Law 'On Administrative Offences' for holding up a banner with the aforementioned slogan describing ice ballet and lawn hockey as perversions. In March 2012, a demonstrator was convicted by Oktyabrskiy District Court of Arkhangelsk for having picketed with a banner that read: 'Among children there are no less gays and lesbians than among adults.' At the same time, the Leninskiy District Court of Kostroma acquitted another person who had been holding up a poster with the same content. Likewise, in March 2013, a Regional Court in the Kostroma Region granted an appeal brought by one of organisers of a gay pride parade, finding the refusal to authorise the public event illegal. The court further ruled that rallies and marches did not fall under the notion of 'propaganda of homosexuality' and could not be prohibited on that basis.⁴³

Notwithstanding some positive examples in lower court practice, the uncertainty surrounding the application of laws prohibiting the propaganda of non-traditional

⁴⁰ See *Gay Activist Fined with St. Pete Court Verdict*, RT (May 4, 2013), <<http://on.rt.com/oygzvo>> (accessed March 7, 2014).

⁴¹ 'Agitation' (in contrast to 'information') is an activity aimed at inducing people into engaging in certain conduct; see Judgment No. 15-P of the Constitutional Court of the Russian Federation (Oct. 30, 2003).

⁴² See Venice Commission, Opinion No. 707/2012, On the Issue of the Prohibition of So-Called 'Propaganda of Homosexuality' in the Light of Recent Legislation in Some Member States of the Council of Europe, 14–15 June, 2013, ¶ 33, available at <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)022-e)> (accessed March 7, 2014).

⁴³ Human Rights First, *Convenient Targets, The Anti-'Propaganda' Law & the Threat to LGBT Rights in Russia* 8–9 (Aug. 2013), available at <<http://www.humanrightsfirst.org/uploads/pdfs/HRF-russias-anti-gay-ban-SG.pdf>> (accessed March 7, 2014).

sexual relationships remains most significant. Apart from restricting freedom of expression, as well as some forms of public assembly such as pickets with banners or pride parades, the anti-propaganda provisions also place limitations on freedom of association.

For example, in March 2012, the Pervomaisky District Court of Krasnodar was faced with a refusal by the Ministry of Justice's department in the Krasnodar Region to register a regional sports social movement called 'Pride House in Sochi.' Assessing the legality of the Department's decision, the Court noted, *inter alia*, that:

[a]s far as the Articles of Association of . . . 'Pride House in Sochi' lists as one of its objectives informing people of the LGBT-movement in Russia, it [the movement] will be capable of having a massive ideological impact on citizens. However, the aims of the movement must not contradict principles of public order and public morals. Such objectives forming an understanding of the need to combat homophobia and the creation of positive attitudes towards LGBT-sportsmen contradict public morals as they are aimed at the augmentation of citizens belonging to sexual minorities, which violates the notions of good and evil . . . vice and virtue . . . existing in the society. . . . [M]oreover, it might undermine the sovereignty of the Russian Federation because of a decrease in its population.⁴⁴

It is little surprise that having provided such reasoning, the Court upheld the departmental refusal to register the 'Pride House in Sochi' movement.

3.2. 'Chinese whispers' among Russian law makers

Russian politicians appear to share the views of the Russian higher courts on this issue.

In the parliamentary discussion at the first reading of the bill for the Amending Law on Propaganda, the head of the committee responsible for preparing of the draft law, State Duma Deputy Elena Mizulina, indicated her belief that the Duma had 'all legal grounds for adopting such a law.' In doing so, she referred specifically to the UN Convention on the Rights of Child. According to the Deputy, this convention 'obliges a state to protect children due to their immaturity . . . as they are incapable of critically assessing certain actions and protecting themselves.'

Ms Mizulina also referred to the 1981 judgment of the Eur. Ct. H.R. in the case of *Dudgeon v. the United Kingdom*.⁴⁵ The Deputy's reading of this judgment found that: (a) 'certain control over homosexual conduct is necessary in democratic society

⁴⁴ Judgment No. 2-1161/12 of the Pervomaisky District Court of Krasnodar (Febr. 20, 2012).

⁴⁵ See transcript of the session of the State Duma (Jan. 25, 2013), <<http://transcript.duma.gov.ru/node/3789/>> (accessed March 8, 2014).

in order to prevent . . . corruption of especially vulnerable persons – children and teenagers;’ (b) ‘it is for the national authorities to decide which guarantees are necessary for the protection of morals in the country, in particular, they must define the age until which such guarantees will be provided for children and young people;’ and (c) that ‘the moral climate of the society must be taken into account – tolerance or intolerance to such conduct as well as religious factors. Russian society in this regard is very conservative, that is why the adoption of such a law is justified.’⁴⁶

In an interview with a Russian newspaper, Deputy Mizulina noted that only information aimed at cultivating a certain way of thinking in a child would be regarded as propaganda under the new law. Any other information, such as news on LGBT issues, she said, would not fall within its ambit. Mizulina affirmed that pieces of art are altogether excluded from the Protection of Children from Detrimental Information Law, ‘except for child pornography and obscene language.’ She also stated that the law would not serve as a basis for the prohibition of gay pride events, which should be conducted in line with a special law on public meetings, except in so far as children should not take part in such events and they should not be held in close proximity to children’s playgrounds, *etc.*⁴⁷

In a recent address to the Parliamentary Assembly of the Council of Europe, State Duma speaker, Sergei Naryshkin, indicated that the new law ‘takes into account national and cultural values, and at the same time retains in full all the rights of LGBT people.’⁴⁸

Russian parliamentarians appear to sit in two camps in their attempts to justify the anti-propaganda law under international law, referring to both public morals and traditional values as the basis for the Amending Law on Propaganda.

One of the main proponents of the ‘traditional values justification’ is Chairman of the Constitutional Court of Russia, Judge Valery Zorkin. In a speech devoted to 20 years of the Russian Constitution, Judge Zorkin condemned Russia’s obligations of so-called ‘limitless tolerance’ as ‘tolerance of any vicious sexual or gender practices.’ He also defined as dangerous for the social and cultural identity of Russia

⁴⁶ See transcript of the session of the State Duma (Jan. 25, 2013), *supra* n. 45.

⁴⁷ Ekaterina Vinokurova, *Людей ведь раздражают не геи, а пропаганда: Интервью с Еленой Мизулиной, председателем Комитета Государственной Думы по делам семьи, женщин и детей* [People are Irritated, Not with Gays, but with Propaganda: An Interview with Elena Mizulina, Head of the Duma Committee on Family, Womens and Childrens], *Gazeta.ru* (June 10, 2013), <http://www.gazeta.ru/politics/2013/06/10_a_5375845.shtml> (accessed March 8, 2014).

⁴⁸ *Нарышкин позвал членов ПАСЕ в московские гей-клубы* [Naryshkin Invited Members of PACE to Moscow Gay-Clubs], *Lenta.ru* (Oct. 1, 2013), <<http://lenta.ru/news/2013/10/01/naryshkin/>> (accessed March 8, 2014).

attempts to forcibly impose (*i.e.* by means of propaganda and regulations) psychological and legal innovations that are unacceptable to Russian society, which is still deeply traditional.⁴⁹

In Judge Zorkin's view, there is a rising conflict between the moral norms deeply rooted in society and the 'tendency of changes in the Russian reality which are propagated and observed,' and which, he states, threaten Russia's 'relative stability,' 'sociality' and 'statehood.'

Reference to the 'traditional values of Russian society' omits to take into account that such 'traditional values' have long existed not only in Russia but in virtually all other states around the world, with European countries and the US abandoning criminal sanctions for homosexuality only in the past 30 years.⁵⁰

3.3 The realities of Russian law enforcement

The Federal Service for the Supervision of Communications, Information Technology and Mass Media [hereinafter Roskomnadzor] recently initiated a public discussion on the Children's Information Security Framework. This framework is intended to detail the legislation on the protection of children from detrimental information and 'flesh out' the relevant law enforcement procedures and general legal concepts.⁵¹

Together with Roskomnadzor's recently extended powers, which according to some reports include the power to extra judicially block online content, it is envisaged that the Framework will serve as the basis for censorship in Russia, including scientific censorship.⁵²

As regards the subject of this article, the preamble to the relevant section under the Framework provides twelve criteria in four general categories, which are intended

⁴⁹ Valery Zorkin, Конституционный вектор России. 20 лет реализации Основного закона страны [Russian Constitutional Vector. 20 Years of Implementation of the Basic Law], 2013(6236) Российская газета [Russian Gazette], available at <https://www.academia.edu/5355551/_20_> (accessed March 8, 2014).

⁵⁰ The Texas state law criminalising sodomy was struck down by the US Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), a decision which, by precedent also obviated all the remaining sodomy laws of other U.S. states. See also George Painter, *The Sensibilities of Our Forefathers. The History of Sodomy Laws in the United States*, <www.glapn.org/sodomylaws/sensibilities/introduction.htm> (accessed March 8, 2014).

⁵¹ See Концепция информационной безопасности детей [Children's Information Security Framework] (Roskomnadzor 2013), <<http://rkn.gov.ru/mass-communications/p700/p701/>> (accessed March 8, 2014).

⁵² See Anna Leontyeva, Концепция информационной безопасности детей как угроза профессиональной деятельности российских психологов [The Children's Information Security Framework as a Threat to Professional Activity to Russian Psychologists], Русский журнал [Russian Magazine] (Jan. 8, 2014), <<http://www.russ.ru/pole/Koncepciya-informacionnoj-bezopasnosti-detej-kak-ugroza-professional-noj-deyatelnosti-rossijskih-psihologov>> (accessed March 8, 2014).

to enable an assessment of the impropriety of information. Each criterion is provided with one specific example.⁵³

These criteria include ‘arguing that traditional families do not meet the needs of modern society or the modern individual’ (which includes the idea that the traditional family model has ‘lost many of its functions and become an obstacle to the free development of individuals’), websites that publish ‘out-of-context’ statistics about children adopted by gay and straight couples, which could lead children and teens to believe that gay couples are ‘no worse than straight couples at coping with parental responsibilities,’ using ‘attractive’ or ‘repelling’ images to discredit traditional and propagate alternative family models, which includes portraying a homosexual couple favourably and a heterosexual couple negatively, or publishing lists of famous living or deceased gay individuals – the latter being prohibited as information depicting gay people as role models.

At first glance, Roskomnadzor’s assertion that only ‘false information’⁵⁴ will fall within the scope of the Amending Law on Propaganda appears to represent a softer approach than that taken by Russia’s Supreme and Constitutional courts, whose definition of propaganda encompasses the dissemination of any information, regardless of its veracity. However, the content of the Framework itself reveals that its authors have adopted their own standard for propaganda under which any positive information about homosexuality would fall foul of the prohibition.⁵⁵ In doing so, Roskomnadzor has clearly strayed beyond the stated intentions of lawmakers in introducing this legislation (*see supra*).

Thus, Russian authorities are likely to refer to the traditional values of Russian society supported by the vast majority of the populace, the desire to pursue Russia’s demographic interests, and the claim that it is only propaganda and not the LGBT individuals themselves that is targeted by the law.⁵⁶ It appears that neither Russia’s courts nor its legislators or enforcement agencies can conceive of the provisions restricting the rights of the LGBT community as contradictory to international law.

⁵³ Alexander Voiskunsky et al., *Раздел 6. Критерии вредного для здоровья и развития детей контента информационной продукции, распространяемой в информационно-телекоммуникационной сети Интернет* [Part 6. Criteria of Internet Content Harmful for Children’s Health and Development] (Galina Soldatova, ed.) 79–83, in *Children’s Information Security Framework*, *supra* n. 51, <rkn.gov.ru/docs/Razdel_6.pdf> (accessed March 8, 2014).

⁵⁴ *Id.*

⁵⁵ For example, under criteria 4.1.2. the disclosure of any positive information about raising children by homosexual couples will be qualified as prohibited propaganda.

⁵⁶ As stated last spring by Russian President Vladimir Putin at a news conference in Amsterdam (*Gay Rights Not Violated in Russia – Putin*, RIA Novosti (Apr. 9, 2013), <<http://en.ria.ru/russia/20130409/180521813/Gay-Rights-Not-Violated-in-Russia---Putin.html>> (accessed March 8, 2014)).

4. Russia's obligations under international law

The Amending Law on Propaganda raises serious concerns about Russia's prevailing international obligations regarding the rights to freedom of expression and freedom of assembly, as well as the prohibition of discrimination, enshrined and guaranteed by the ICCPR and the ECHR. The Anti-Adoption Amending Law likewise raises concerns about non-discrimination obligations under these instruments.

Russia is a signatory to the UN Charter (since Oct. 24, 1945), the ICCPR (since March 18, 1968), the ECHR (since Febr. 28, 1996) and the Convention on the Rights of the Child [hereinafter CRC] (since Jan. 26, 1990). All of these treaties place a particular emphasis on human rights protection, with the ICCPR forming a part of the so-called International Bill of Rights,⁵⁷ and ECHR being the first convention drafted to reflect the provisions of the Universal Declaration of Human Rights in 1950.

As outlined above, in discussing the Amending Law on Propaganda, Russian lawmakers made brief reference to the CRC and the ECtHR judgement in *Dudgeon v. the United Kingdom*. Neither the practice of the Committee on the Rights of the Child nor the full test developed by the Court either at the time of *Dudgeon* (1981) or since, were addressed. Importantly, in adopting the Amending Law the State Duma failed to assess that law's compatibility with the prohibition on discrimination.

4.1. Compliance with international standards for the protection of freedom of expression

Freedom of expression is the right to hold opinions and to receive and impart information and ideas without interference from public authority, regardless of frontiers.⁵⁸

Freedom of expression (speech) emerged in the United States together with the idea of 'legitimate and loyal opposition.'⁵⁹ It is essentially a guarantee against both the state and society when they seek to silence voices of disagreement. As such, freedom of expression applies even to those ideas or that information that might 'offend, shock or disturb the State or any sector of the population,' and not only to information or ideas that are favourably received or regarded as inoffensive or neutral.⁶⁰

⁵⁷ Consisting of the Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 at 71 (1948); the ICCPR with its two Optional Protocols, *supra* n. 9; and the International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966).

⁵⁸ See Universal Declaration of Human Rights, *id.* at Art. 19; ICCPR, *id.* at Art. 19; ECHR, *supra* n. 11, at Art. 10.

⁵⁹ James Magee, *Freedom of Expression 2* (Greenwood Publishing Group 2002).

⁶⁰ *Handyside v. United Kingdom*, ¶ 49, no. 24 (Eur. Ct. H.R. (Ser. A), Dec. 7, 1976).

Freedom of expression is closely related to freedom of assembly, which is the right to express an opinion by gathering together as a group.⁶¹

The rights to freedom of expression and assembly as enshrined in the ECHR and the ICCPR can be subject to restrictions. However, such restrictions must meet certain criteria (discussed *infra*) and comply with the general underlying rule that no such restriction may 'put in jeopardy the right itself.'⁶²

The criteria to be met by any restriction constitute what is referred to as a 'three-part test' that has been developed by international and regional judicial and quasi-judicial tribunals: any limitation must be 'provided by law,' pursue a legitimate aim and be proportionate and necessary for achievement of that aim.⁶³ Failure to meet this criteria will render State interference with these rights unlawful in the eyes of a competent international tribunal.

Importantly, the ban of propaganda of homosexuality would ordinarily be considered by the Eur. Ct. H.R. and the HRC under freedom of expression provisions in conjunction with articles prohibiting discrimination.⁶⁴

Below we will discuss whether Russia's recent legislative innovations comply with the aforementioned requirements elaborated by the Eur. Ct. H.R.

Criterion one: restrictions must be provided by law. Although the Eur. Ct. H.R. has consistently held that the interpretation of domestic law lies primarily within the prerogative of the domestic authorities, the Court regards the criterion 'prescribed by law' as having a so-called 'autonomous meaning.' Here, for a legal act to be recognised a 'law' within the meaning of the Convention, the mere existence of a legislative act or regulation in domestic law will not suffice. To fall within the ambits of Arts. 8–11, a law must possess the quality of law – that is, it must be accessible and 'foreseeable.' Foreseeability requires that such law is 'formulated with sufficient precision' to enable a person to determine (if need be with professional advice), 'to a degree that is reasonable in the circumstances, the consequences which a given action may entail,' and to regulate his or her conduct accordingly.⁶⁵

⁶¹ See Universal Declaration of Human Rights, *supra* n. 57, at Art. 20; ICCPR, *supra* n. 57, at Art. 21; ECHR, *supra* n. 11, at Art. 11.

⁶² UN Human Rights Comm., General Comment No. 10: Freedom of Opinion (Art. 19), ¶ 4, 19th Sess., UN Doc. HRI/GEN/1/Rev.1 (1994).

⁶³ See 'three-part test' applied by the Eur. Ct. H.R. to Art. 11 restrictions in *Bączkowski and Others v. Poland*, ¶ 69, no. 1543/06 (Eur. Ct. H.R., May 3, 2007); *Alexeyev*, *supra* n. 16, at ¶ 69; and to Art. 8 and Art. 14 restrictions in *X and others v. Austria* [GC], ¶ 98, no. 19010/07 (Eur. Ct. H.R., Feb. 19, 2013). See also Human Rights Comm., General Comment No. 34: Freedoms of Opinion and Expression (Art. 19), 102nd Sess., UN Doc. CCPR/C/GC/34 (2011).

⁶⁴ For cases discussing the right of non-discrimination on the basis of sexual orientation, see, e.g., *Kozak v. Poland*, ¶ 92, no. 13102/02 (Eur. Ct. H.R., Mar. 2, 2010); *Salgueiro da Silva Mouta v. Portugal*, ¶ 36, no. 33290/96 (Eur. Ct. H.R., Dec. 21, 1999); *Tooncn v. Australia*, CCPR/C/50/D/488/1992 (Human Rights Comm., Apr. 4, 1994).

⁶⁵ See, e.g., *Sunday Times v. UK (no. 1)*, ¶ 49, no. 30 (Eur. Ct. H.R. (Ser. A), Apr. 26, 1979); *Larissis and Others v. Greece*, Eur. Ct. H.R., 1998-I, 378, ¶ 40; *Hashman and Harrup v. United Kingdom* [GC], Eur. Ct. H.R., 1999-VIII, ¶ 3; *Rotaru v. Romania* [GC], Eur. Ct. H.R., 2000-V, ¶ 52.

Importantly, the Eur. Ct. H.R. has noted that, although a degree of vagueness will always be present in any law, 'legal discretion granted to the executive' should not be expressed 'in terms of unfettered power'. As such, law 'must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise.' Moreover, it should not entail 'the extensive application of a restriction to any party's detriment.'⁶⁶

As indicated above, by adopting discriminatory blanket provisions, the Russian legislature has created a risk of abuse by the executive. The parliamentary discussion outlined in the previous section reflects a failure on the part of the Amending Law's drafters to foresee that the term 'propaganda' would be as expansively defined as it has been in the Framework – the subsidiary regulatory document developed by the Roskomnadzor. On the face of it, the Framework permits the assumption that one of its immediate effects will be to censor any medium of expression, including books, movies or exhibitions. This will negatively impact public debate on important social issues.

Furthermore, it remains unclear how the definitions of 'propaganda' and 'among minors' as defined in law (regionally and nationally) and interpreted by state authorities (in the Framework), meet the criterion of foreseeability as regards the issue of holding up banners that contain general statements regarding homosexuality.⁶⁷

Taking into account the homophobic mood gripping Russian society,⁶⁸ it may further be argued that by adopting the Amending Law on Propaganda, which undoubtedly stigmatises the LGBT community (and the application of which starts to stigmatise particular individuals⁶⁹), the authorities have created a potential for abuse at the local level, for example, at police stations or in prisons.

Criteria two and three: pursuit of a legitimate by necessary and proportionate means. In adopting the Amending Law on Propaganda, the domestic authorities referred to the aims of protecting morals and the rights of others, which are indeed legitimate pursuits under Art. 10 of the ECHR.

⁶⁶ *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09 (Eur. Ct. H.R., June 7, 2012), ¶ 143; see also *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94 (Eur. Ct. H.R., July 8, 1999), ¶ 36.

⁶⁷ See, on this issue, the section above devoted to Russian judicial practice and the Venice Commission's *Opinion*, *supra* n. 42, ¶ 33.

⁶⁸ According to a Levada Center survey, 67% of respondents would rather approve than condemn the adoption of 'anti-propaganda' law. See News Rel., *Россияне о репрессивных законах* [Russians on Repressive Laws] (Nov. 25, 2013), <<http://www.levada.ru/25-11-2013/rossiyane-o-repressivnykh-zakonakh>> (accessed March 8, 2014).

⁶⁹ For example, see information regarding a case reported to be the first one in Russia where a child was held liable under the new anti-propaganda legislation, in which a juvenile affairs commission defined a girl as 'openly admitting her non-traditional sexual orientation' and created a file on her with the commission for a 'systemic dissemination of information aimed at forming a distorted image of the social equality of traditional and non-traditional sexual relationships among minors' (in this case, the schoolmates). See Alexei Novoselov, *За гей-пропаганду впервые наказан ребенок* [A Child Was First Time Held Liable for Gay-Propaganda], *Znak.com* (Febr. 2, 2014) <<http://www.znak.com/urfo/news/2014-02-02/1017612.html>> (accessed March 8, 2014).

However, the choice of measures available to a State party in achieving such aims is not unlimited. As with the ‘prescribed by law’ criterion, the domestic authorities enjoy a considerable margin of appreciation in determining the necessity of any given measure – that is, the extent to which it satisfies a ‘pressing social need.’⁷⁰ Nonetheless, this margin of appreciation is not absolute. Indeed, as the ECHR’s enforcement body, the Eur. Ct. H.R. may render a final determination on whether a restriction meets the requirements of the relevant articles of the Convention.⁷¹ In assessing ‘pressing social need’ the Court has developed a standard of proportionality that is required between the restriction and the pressing social need. It will also assess whether the authorities have had ‘relevant and sufficient reasons’ for the interference at issue.⁷²

Furthermore, this limb of the threefold test can also entail enquiry by the Court into whether common ground exists between members states on a given matter – sometimes referred to as the ‘European consensus’ requirement. If similar regulation is adopted by other members states, the margin of appreciation will be narrower, and *vice versa*.⁷³

According to the Eur. Ct. H.R., the reasons adduced by a state for adopting certain measures will require particularly convincing justification when it comes to differences in treatment on the basis of sexual orientation. The Court has unequivocally stated, in numerous cases, that mere reference to the sexual orientation of an individual as justification for a particular action will amount to a violation of Art. 14 of the ECHR.⁷⁴

The HRC has adopted a very similar position. In the case of *Fedotova v. Russia*, the Committee found a violation of freedom of expression provisions under the ICCPR when read in connection with Art. 26 thereof prohibiting discrimination.⁷⁵

While the protection of morals is a legitimate aim to pursue in seeking to limit freedom of expression under both the ECHR and the ICCPR, the Eur. Ct. H.R. normally regards only obscene expressions as contradicting public morals,⁷⁶ and the HRC evinces support for this inclination.⁷⁷

The prohibition on the propaganda of homosexuality does not distinguish between obscene materials and any other type of content related to homosexuality. It is worded in a way that clearly targets same-sex relationships as such.

⁷⁰ *Handyside*, *supra* n. 60, at ¶¶ 48–49; *Engel and Others v. the Netherlands*, ¶ 100, no. 22 (Eur. Ct. H.R. (Ser. A), June 8, 1976); *De Wilde, Ooms and Versyp v. Belgium*, ¶ 93, no. 12 (Eur. Ct. H.R. (Ser. A), June 18, 1971); *Golder v. the United Kingdom*, ¶ 45, no. 18 (Eur. Ct. H.R. (Ser. A), Feb. 21, 1975).

⁷¹ ECHR, *supra* n. 11, at Art. 19; *Fressoz and Roire v. France* [GC], no. 29183/95, Eur. Ct. H.R., 1999-I, ¶ 45.

⁷² *Sunday Times*, *supra* n. 65, at ¶ 62.

⁷³ *Rasmussen v. Denmark*, ¶ 40, no. 87 (Eur. Ct. H.R. (Ser. A), Nov. 28, 1984).

⁷⁴ See *Kozak*, *supra* n. 64, at ¶ 92.

⁷⁵ *Fedotova*, *supra* n. 16.

⁷⁶ Venice Commission’s *Opinion*, *supra* n. 42, at ¶ 55.

⁷⁷ Sarah Joseph & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* 626 (3rd ed., Oxford University Press 2013).

The Eur. Ct. H.R. has consistently held that the right to sexual orientation is included under Art. 8 of the Convention.⁷⁸ This right is also recognised under Art. 17 of the ICCPR.

In its General Comment No. 22, the HRC highlighted that ‘the concept of morals derives from many social, philosophical and religious traditions,’ and that limitations ‘for the purpose of protecting morals must be based on principles not deriving from a single tradition.’⁷⁹

The Eur. Ct. H.R.’s case law, as derived from *Dudgeon v. UK*, firmly rejects the notion that an ‘erosion of existing moral standards’ could serve as sufficient justification for an interference with the right to privacy under Art. 8.⁸⁰ In the recent case of *Alekseyev v Russia*, the Eur. Ct. H.R. noted, regarding freedom of assembly, that the rights of minorities cannot, under the Convention, be made conditional upon their acceptance by the majority.⁸¹ Moreover, the Court most recently declined to find a violation of the freedom of expression in a case where the domestic courts had imposed sanctions for homophobic hate speech.⁸²

In light of this, it would be very difficult, if not impossible, for Russia to defend its position to the effect that homosexuality, as such, is contrary to the ‘morals’ of Russian society.

As regards the aim of protecting the rights of children, the Eur. Ct. H.R. has already declined to accept that there is any ‘scientific evidence or sociological data’ suggesting that mere mention of homosexuality, or open public debate about sexual minorities’ social status, would adversely affect children.⁸³ The HRC has also observed, as regards Russia’s earlier regional laws, that there is a significant difference between involving children in sexual activity and ‘giving expression to [a person’s] sexual identity.’⁸⁴

Notably, in 2003 the Committee on the Rights of the Child explicitly extended the guarantees under Art. 2 of the CRC prohibiting all forms of discrimination against children to adolescents’ sexual orientation.⁸⁵ Furthermore, in its 2002 Concluding Observations on the United Kingdom and Northern Ireland the CRC called upon the state to annul Sect. 28 of its domestic law on the promotion of homosexuality, after

⁷⁸ See *Kozak*, *supra* n. 64, at ¶ 83.

⁷⁹ UN Human Rights Comm., General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), ¶ 8, 48th Sess., UN Doc CCPR/C/21/Rev.1/Add.4 (1993).

⁸⁰ *Dudgeon v. United Kingdom*, ¶ 14, no. 7525/76 (Eur. Ct. H.R., Oct. 22, 1981); see also *Smith and Grady v. United Kingdom*, nos. 33985/96, 33986/96 (Eur. Ct. H.R., Sept. 27, 1999).

⁸¹ *Alekseyev*, *supra* n. 16, at ¶ 81.

⁸² *Vejdeland and Others v. Sweden*, no. 1813/07 (Eur. Ct. H.R., Feb. 9, 2012).

⁸³ *Alekseyev*, *supra* n. 16, at ¶ 86.

⁸⁴ *Fedotova*, *supra* n. 16, at ¶ 10.7.

⁸⁵ UN Comm. on the Rights of the Child, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, ¶ 6, 33rd Sess., UN Doc CRC/GC/2003/4 (2003).

expressing concern that homosexual and transsexual young people had no access to appropriate information, support and necessary protection required to enable them to live their sexual orientation.⁸⁶ In its General Comment No. 3, the Committee on the Rights of the Child drew States parties' attention to the fact that 'children require relevant, appropriate, and timely information' in order to be able to deal with their sexuality and protect themselves from HIV. The Committee specifically underlined that 'effective HIV/AIDS prevention requires States to refrain from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information.'⁸⁷

While the CRC's approach to matters of sexual orientation appears to be very firm, the Committee takes a clear stance regarding pornography, violence and racism as content that is harmful to children, sharing the Eur. Ct. H.R.'s approach to limiting freedom of expression in this regard.

Finally, the Eur. Ct. H.R. notably distinguishes between substantive rights and rights to campaign therefor the latter being protected under Arts. 10 and 11 of the Convention.⁸⁸ Thus, even in the absence of Convention protection for a particular right (such as, the right to same-sex marriage), any limitation upon the right to campaign for such a right would also need to pass the three-part test described above.

Therefore, because the margin of appreciation applicable to Russia's prohibition on the propaganda of homosexuality is in fact quite narrow, the rationale Russia has offered for the adoption of this prohibition is unlikely to be found by the Eur. Ct. H.R. as having preserved a balance between traditional family values and the rights of the sexual minority.⁸⁹

4.2. Compliance with international standards on adoption rights

Cases concerning parental rights are usually considered by the Eur. Ct. H.R. under two provisions of the Convention: Art. 8, which guarantees the protection of private and family life and Art. 14 prohibiting any form of discrimination.⁹⁰

In this regard, there is little consensus between the Council of Europe member states on substantive questions concerning the rights of same-sex couples.⁹¹ The

⁸⁶ UN Comm. on the Rights of the Child, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, ¶¶ 41 and 42(d), 31st Sess., CRC/C/15/Add.188 (2002), available at <http://www.essex.ac.uk/armedcon/story_id/000020.pdf> (accessed March 8, 2014).

⁸⁷ UN Comm. on the Rights of the Child, General Comment No. 3: HIV/AIDS and the Rights of the Child, ¶16, 33rd Sess., CRC/GC/2003/3 (2003), available at <http://www.unicef.org/aids/files/UNHCHR_HIV_and_childrens_rights_2003.pdf> (accessed March 8, 2014).

⁸⁸ *Alekseyev*, *supra* n. 16, at ¶ 84.

⁸⁹ *Cf. Kozak v. Poland*, *supra* n. 64, at ¶ 99.

⁹⁰ See in particular on the issue of adoptions in *X and others v. Austria*, *supra* n. 63; *Gas and Dubois v. France*, no. 25951/07 (Eur. Ct. H.R., March 15, 2012); *E.B. v. France*, no. 43546/02 (Eur. Ct. H.R., Jan. 22, 2008); *Fretté v. France*, no. 36515/97, Eur. Ct. H.R., 2002-I.

⁹¹ *X and others*, *supra* n. 63, at ¶ 149.

Court has, therefore, used very careful and neutral language in the cases involving the issue of adoption, in contrast to its strict approach to many other issues related to homosexuality.⁹²

The Eur. Ct. H.R. underlines that Art. 8 does not provide for the right to adopt,⁹³ and, as a result, has never held that the right to adopt a child must be granted to a homosexual person (or couple).

However, the Court has referred to the prohibition on discrimination as applicable to the enforcement of any restrictions of the rights guaranteed by the Convention in such matters.

In its most recent case on the matter, *X and others v. Austria*, the Court decided that the respondent State had behaved in a discriminatory manner by allowing second-parent adoption⁹⁴ for heterosexual couples while prohibiting such adoption for same-sex couples.⁹⁵

Thus, while restrictions upon who can be a candidate as an adoptive parent are not challengeable before the Eur. Ct. H.R. *per se*, a failure by the state to provide an 'objective and reasonable justification for the impugned distinction'⁹⁶ vis-à-vis heterosexual parents has the potential for success before the Court. Moreover, the Anti-Adoption Amending Law can be reproached from the perspective of the quality of the legal requirement it enshrines. The law uses the term 'same-sex marriages,' which is not defined in Russian law, recognizing only the union of a man and a woman as marriage under Art. 1(3) of the Family Code. Thus, competent authorities will have to determine whether the laws of a foreign State (whose national intends to adopt a child in Russia) permit 'same-sex marriages.' This problem may particularly arise in applying the ban to the second category of 'prohibited' adopters: citizens of a state where homosexual marriages are permitted.

There is a risk that authorities not familiar with foreign law may extend the ban to countries where same-sex partnerships and other forms of same-sex union registration are allowed. Here, the new provisions give authorities a discretion that could lead to arbitrary refusals, creating uncertainty on the part of potential adoptive parents.

⁹² Such as, for example, criminal liability for homosexual relations between adults, equality in tax matters, the right to succeed to a deceased partner's tenancy, and many other rights (for a recent overview of such rights, see *Alekseyev*, *supra* n. 16, at ¶ 83).

⁹³ *X and others*, *supra* n. 63, at ¶ 135.

⁹⁴ When 'one member of a same-sex couple, consisting of two women or two men living together as partners, seeks to adopt the child of the other partner, so that both partners have parental rights vis-à-vis the child.' See *X & others*, *supra* n. 63, written comments by FIDH, ICJ, ILGA-Europe, BAAF, NELFA, and ECSOL 1 (Aug. 1, 2012), available at <<http://www.ilga-europe.org/content/download/23764/152109/file/Written%20comments%20on%20X%20&%20Others%20v.%20Austria.pdf>> (accessed March 8, 2014).

⁹⁵ *X and others*, *supra* n. 63, at ¶¶ 111–153.

⁹⁶ *E.B. v. France* [GC], no. 43546/02 (Eur. Ct. H.R., Jan. 22, 2008), ¶ 91.

5. Conclusion

Following an examination of recent legislative amendments introduced in the Russian Federation, this article must inevitably conclude that a strong case can be made that Russia's prohibition on the 'propaganda of non-traditional sexual relationships' is incompatible with international law and that amendments concerning adoptive parents are potentially discriminatory in character.

Furthermore, an alarming trend that may not be as apparent to those who are outsiders to the Russian Federation, is that state-blessed homophobia is gathering pace and has already affected not only the minds of an abstract 'vast majority' but also those of the political elite and professional communities of lawyers, judges, and even scholars.

While the importance of freedom of expression and public dialogue in this very new area for human rights law cannot be overstated, the legislative approach currently under adoption in Russia is, on the contrary, clearly aimed at the degradation of existing international standards in this respect – pluralism, broadmindedness and tolerance being among them.

The cornerstone of Russian law, the 1993 Russian Constitution, declares, in line with international law that 'man, his rights and freedoms are the supreme value.'⁹⁷

Whether democracy can remain constitutional where restrictions on human rights overstep internationally recognised boundaries and essentially negate their declared values, is one of the principle questions raised by this newly adopted legislation in Russia.

As Russian law moves further away from the standards of protection enshrined in international law regarding LGBT rights to freedom of expression and non-discrimination, the likes of cases such as *Alekseyev v. Russia* and *Fedotova v. Russia* are sure to become recurring entries on the judicial dockets of the Eur. Ct. H.R. and HRC.⁹⁸

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⁹⁷ Konst. RF Art. 2 (1993) (Russ).

⁹⁸ In autumn 2013 the Eur. Ct. H.R. communicated the case of *Bayev v. Russia* (communicated case), no. 67667/09 (Eur. Ct. H.R., Oct. 16, 2013). Here, the applicants have complained of a violation of Arts. 10 and 14 of the ECHR. They argue that the prohibition on 'homosexual propaganda' constitutes a blanket discriminatory ban on the mere mention of homosexuality and that it applies irrespective of the content of the message.

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