'HOMOSEXUAL PROPAGANDA' LAWS IN THE RUSSIAN FEDERATION: ARE THEY IN VIOLATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

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This article examines recently enacted legislation in the Russian Federation designed to regulate so-called 'homosexual propaganda.' Through an analysis of the extant jurisprudence of the European Court of Human Rights (Eur. Ct. H.R.) in respect of discrimination on the grounds of sexual orientation, the article considers the extent to which the existence and enforcement of 'homosexual propaganda' laws can be said to violate rights and freedoms guaranteed by the European Convention on Human Rights (ECHR). The article demonstrates weaknesses in current Eur. Ct. H.R.'s jurisprudence – specifically in relation to Arts. 10, 11 and 14 of the ECHR – and argues that it requires significant evolution to better protect sexual minorities in Russia and elsewhere.

Keywords: European Convention on Human Rights; discrimination; freedom of expression; homosexuality; sexual orientation.

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1. Introduction

In recent years several European states have sought to introduce laws designed to regulate so-called 'homosexual propaganda.' These laws are much wider in scope than any previously in force in Europe. They are significantly different to, for example, now repealed legislation in the United Kingdom that placed a 'prohibition on promoting

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homosexuality' on local authorities.[1] Laws recently introduced in the Russian Federation – as well as proposed and enacted legislation in Hungary, Lithuania, Moldova and Ukraine[2] – go far beyond the regulation of public authorities and potentially criminalize a wide range of public expression by all individuals that includes not only speech but also forms of intimate conduct (such as hand-holding and kissing).

There is an emerging consensus of opinion, among a wide range of commentators and authorities, that the existence and enforcement of 'homosexual propaganda' laws in Russia violates rights and freedoms guaranteed by the European Convention on Human Rights [hereinafter ECHR].[3] This article examines that opinion in the context of the extant jurisprudence of the European Court of Human Rights [hereinafter Eur. Ct. H.R.) in respect of discrimination on the grounds of sexual orientation. It argues that crucial weaknesses exist in Eur. Ct. H.R.'s jurisprudence – specifically in relation to Arts. 10, 11 and 14 of the ECHR – and that significant evolution of this jurisprudence is necessary to protect the rights of sexual minorities in Russia and elsewhere. The analysis offered in this article can be read in light of outstanding complaints to the Eur. Ct. H.R. that allege that 'homosexual propaganda' laws in Russia violate the right to freedom of expression guaranteed by Art. 10 of the ECHR and amount to a form of discrimination prohibited by Art. 14 of the ECHR.[4]

2. The 'Homosexual Propaganda' Laws in the Russian Federation

The recent enactment of laws regulating 'homosexual propaganda' in Russia can be seen as an aspect of a wider global backlash against homosexuality.[5] Whilst some

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1 Section 28 Local Government Act, 1988, c. 9 (Eng.), created Sec. 2A Local Government Act, 1986, c. 10 (Eng.), which provided: 'A local authority shall not –

(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;

(b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.'

Repealed by Ethical Standards in Public Life etc. (Scotland) Act, 2000, asp. 7 (Scotland), and Local Government Act, 2003, c. 26 (Eng.).

2 For a comprehensive overview of legal developments across these states, *see 'Homosexual Propaganda' Bans: Analysis and Recommendations*, International Commission of Jurists and International Lesbian and Gay Association Europe (June 2012), <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/06/Joint-briefing-paper-ICJ-IE-propaganda-bans-25-June.pdf> (accessed May 15, 2015) [hereinafter *'Homosexual Propaganda' Bans*].

3 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

4 For example: *Bayev and Others v. Russia*, nos. 67667/09, 44092/12 and 56717/12 (Eur. Ct. H.R., Oct. 16, 2013).

5 For a discussion, *see* Clifford Bob, The Global Right Wing and the Clash of World Politics (Cambridge University Press 2012).

states have recently escalated programmes of reform to ensure greater legal equality for lesbians and gay men – particularly those jurisdictions that have made same-sex marriage lawful – a number of other states have enacted or are planning to enact laws designed to increase the regulation of sexual minorities. Although the content and scope of such legislation is heterogeneous – and ranges from criminalizing same-sex marriage[6] to intensifying penalties for same-sex sexual acts[7] – a striking similarity across a number of states is the legislative ambition to suppress the 'promotion' of homosexuality in order to meet the expressed aim of ensuring the heterosexual development of minors and the reproduction of 'traditional' cultures and families. For example, Lithuania has enacted law that regulates 'public information which has a detrimental effect on minors' when it 'expresses contempt for family values, encourages the concept of entry into a marriage and creation of a family other than stipulated in the Constitution of the Republic of Lithuania and the Civil Code of the Republic of Lithuania'[8] (the Civil Code of the Republic of Lithuania defines marriage as 'a voluntary agreement between a man and a woman'[9]). Similarly, in Uganda new legislation was enacted to regulate the promotion of homosexuality to strengthen 'the nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family,' 'protect the cherished culture of the people of Uganda,' and 'protect the children and youths of Uganda who are made vulnerable to sexual abuse and deviation as a result of cultural changes.'[10] Such laws reinvigorate longstanding cultural ideas about the threat that homosexuality poses to the moral values of a nation state[11] and the danger posed by social interaction between

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6 For example: Same Sex Marriage (Prohibition) Act, 2013 (Nigeria), at <https://allout-production-site.s3.amazonaws.com/allout-200-Nigeria_Same_Sex_Marriage_Prohibition_Law_2014.pdf> (accessed May 15, 2015).

7 For example: The Anti-Homosexuality Act, 2014 (Act No. 4, 2014) (Uganda), CVII(14) The Uganda Gazette (2014), available at <http://www.refworld.org/pdfid/530c4bc64.pdf> (accessed May 15, 2015). The Constitutional Court of Uganda has since nullified this Act. For a discussion, *see* Paul Johnson, *Making Unjust Law: The Parliament of Uganda and the Anti-Homosexuality Act 2014*, 68(2) Parliamentary Affairs (2014). doi:10.1093/pa/gsu021

8 Article 4(2)(16) Law on the Protection of Minors Against the Detrimental Effect of Public Information, 10 September 2002 – No. IX-1067 (as last amended on 21 October 2011 – No. XI-1624) (Lithuania), at <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=410974> (accessed May 15, 2015).

9 Article 3.7(1) Civil Code of the Republic of Lithuania, 18 July 2000 No. VIII-1864 (last amended on 21 June 2011 No. XI-1484) (Lithuania), at <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=410974> (accessed May 15, 2015).

10 The Anti Homosexuality Bill, 2009 (Bill No. 18, 2009), Memorandum (Uganda), CII(47) The Uganda Gazette, Bills Supplement No. 13 (2009), available at <http://www.publiceye.org/publications/globalizing-the-culture-wars/pdf/uganda-bill-september-09.pdf> (accessed May 15, 2015). Subsequently enacted as The Anti-Homosexuality Act, 2014, *supra* n. 7.

11 Patrick Devlin, The Enforcement of Morals (Oxford University Press 1965), available at <https://www.academia.edu/6371496/Patrick_Devlin_The_Enforcement_of_Morals_Entire_book> (accessed May 15, 2015).

homosexual adults and children. Whilst such ideas have been widely repudiated, in some nation states they continue to underpin attempts to privatize homosexuality and prohibit forms of public expression – such as 'gay pride' demonstrations – to protect 'public morals' and prevent the 'corruption' of children.

Legislative developments in Russia reflect these preoccupations. Since 2006, nine regional jurisdictions in the Russian Federation have amended administrative law to prohibit the propaganda of homosexuality among minors: the Republic of Bashkortostan;[12] the regions of Arkhangelsk,[13] Kostroma,[14] Krasnodar,[15] Magadan,[16]

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[12] Закон Республики Башкортостан от 23 июля 2012 г. № 581-з «О внесении изменения в Закон Республики Башкортостан «Об основных гарантиях прав ребенка в Республике Башкортостан»» [*Zakon Respubliki Bashkortostan ot 23 iyulya 2012 g. No. 581-z 'O vnesenii izmeneniya v Zakon Respubliki Bashkortostan "Ob osnovnykh garantiyakh prav rebenka v Respublike Bashkortostan"'* [Republic of Bashkortostan Law No. 581-z of July 23, 2012, 'On Amending the Republic of Bashkortostan Law "On Fundamental Safeguards of the Rights of the Child in the Republic of Bashkortostan"']].

[13] Закон Архангельской области от 30 сентября 2011 г. № 336-24-ОЗ «О внесении изменений и дополнения в областной закон «Об отдельных мерах по защите нравственности и здоровья детей в Архангельской области»» [*Zakon Arkhangel'skoi oblasti ot 30 sentyabrya No. 336-24-OZ 'O vnesenii izmenenii i dopolneniya v oblastnoi zakon "Ob otdel'nykh merakh po zashchite nravstvennosti i zdorovya detei v Arkhangel'skoi oblasti"'* [Law of the Arkhangelsk Region No. 336-24-OZ of September 30, 2011, 'On Amendments and Addition to the Regional Law "On Some Measures for the Protection of Morals and Health of Children in the Arkhangelsk Region"']].

[14] Закон Костромской области от 15 февраля 2012 г. № 193-5-ЗКО «О внесении изменений в Закон Костромской области «О гарантиях прав ребенка в Костромской области» и Кодекс Костромской области об административных правонарушениях» [*Zakon Kostromskoi oblasti ot 15 fevralya 2012 g. No. 193-5-ZKO 'O vnesenii izmenenii v Zakon Kostromskoi oblasti "O garantiyakh prav rebenka v Kostromskoi oblasti" i Kodeks Kostromskoi oblasti ob administrativnykh pravonarusheniyakh'* [Kostroma Regional Law No. 193-5-ZKO of February 15, 2012, 'On Amending the Kostroma Regional Law "On Safeguards of the Rights of the Child in the Kostroma Region" and the Code of Kostroma Region of Administrative Offences']].

[15] Закон Краснодарского края от 3 июля 2012 г. № 2535-КЗ «О внесении изменений в отдельные законодательные акты Краснодарского края в части усиления защиты здоровья и духовно-нравственного развития детей» [*Zakon Krasnodarskogo kraya ot 3 iyulya 2012 g. No. 2535-KZ 'O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Krasnodarskogo kraya v chasti usileniya zashchity zdorov'ya i dukhovno-nravstvennogo razvitiya detei'* [Krasnodar Territory Law No. 2535-KZ of July 3, 2012, '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']].

[16] Закон Магаданской области от 9 июня 2012 г. № 1507-ОЗ «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» [*Zakon Magadanskoi oblasti ot 9 iyunya 2012 g. No. 1507-OZ 'O vnesenii izmenenii v otdel'nye zakony Magadanskoi oblasti v chasti zashchity nesovershennoletnykh ot faktorov, negativno vliyayushchikh na ikh fizicheskoe, intellektual'noe, psikhicheskoe, dukhovnoe i nravstvennoe razvitie'* [Magadan Regional Law No. 1507-OZ of June 9, 2012, 'On Amending Specific Magadan Regional Laws as Regards the Protection of Minors from Factors That Negatively Affect Their Physical, Intellectual, Psychical, Spiritual, and Moral Development']].

Novosibirsk,[17] Ryazan[18] and Samara;[19] and the City of St. Petersburg[20] (several of these laws have since been repealed following the introduction of federal law, which I discuss below[21]). A similar provision was proposed in the Irkutsk region but the explicit reference to homosexuality was omitted from the final text of the legislation.[22] The Kaliningrad region has also enacted a 'homosexual propaganda' law but it is wider in scope and not limited to propaganda among minors.[23] The Ryazan Oblast was the first to enact legislation that imposed administrative liability on '[p]ublic actions aimed at propaganda of homosexuality (sodomy and lesbianism)'

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17 Закон Новосибирской области от 14 июня 2012 г. № 226-ОЗ «О внесении изменений в отдельные законы Новосибирской области» [*Zakon Novosibirskoi oblasti ot 14 iyunya 2012 g. No. 226-OZ 'O vnesenii izmenenii v otdel'nye zakony Novosibirskoi oblasti'* [Novosibirsk Regional Law No. 226-OZ of June 14 2012 'On Amending Specific Laws of the Novosibirsk Region']].

18 Закон Рязанской области от 3 апреля 2006 г. № 41-ОЗ «О защите нравственности и здоровья детей в Рязанской области» [*Zakon Ryazanskoi oblasti ot 3 aprelya 2006 g. No. 41-OZ 'O zashchite nravstvennosti i zdorovya detei v Ryazanskoi oblasti'* [Ryazan Regional Law No. 41-OZ of April 3, 2006, 'On the Protection of Morals and Health of Children in the Ryazan Region']].

19 Закон Самарской области от 10 июля 2012 г. № 75-ГД «О внесении изменений в Закон Самарской области «Об административных правонарушениях на территории Самарской области»» [*Zakon Samarskoi oblasti ot 10 iyulya 2012 g. No. 75-GD 'O vnesenii izmenenii v Zakon Samarskoi oblasti "Ob administrativnykh pravonarusheniyakh na territorii Samarskoi oblasti"'* [Samara Regional Law No. 75-GD of July 10, 2012, 'On Amending the Samara Regional Law "On Administrative Offences in the Samara Region"']].

20 Закон Санкт-Петербурга от 7 марта 2012 г. № 108-18 «О внесении изменений в Закон Санкт-Петербурга «Об административных правонарушениях в Санкт-Петербурге»» [*Zakon Sankt-Peterburga ot 7 marta 2012 g. No. 108-18 'O vnesenii izmenenii v Zakon Sankt-Peterburga "Ob administrativnykh pravonarusheniyakh v Sankt-Peterburge"'* [St. Petersburg Law No. 108-18 of March 7, 2012, 'On Amending the St. Petersburg Law "On Administrative Offences in St. Petersburg"']].

21 For details of the repeal of regional legislation, *see* License to Harm: Violence and Harassment against LGBT People and Activists in Russia (Human Rights Watch 2014), at <http://www.hrw.org/sites/default/files/reports/russia1214_ForUpload.pdf> (accessed May 16, 2015).

22 Закон Иркутской области от 13 мая 2013 г. № 29-ОЗ «О внесении изменений в Закон Иркутской области «Об отдельных мерах по защите детей от факторов, негативно влияющих на их физическое, интеллектуальное, психическое, духовное и нравственное развитие в Иркутской области»» [*Zakon Irkutskoi oblasti ot 13 maya 2013 g. No. 29-OZ 'O vnesenii izmenenii v Zakon Irkutskoi oblasti "Ob otdel'nykh merakh po zashchite detei ot faktorov, negativno vliyayushchikh na ikh fizicheskoe, intellektual'noe, psikhicheskoe, dukhovnoe i nravstvennoe razvitie v Irkutskoi oblasti"'* [Law of the Irkutsk Region No. 29-OZ of May 13, 2013, 'On Amendments to the Law of the Irkutsk Region "On Some Measures to Protect Children from the Factors That Negatively Affect Their Physical, Intellectual, Psychical, Spiritual and Moral Development in the Irkutsk Region"']].

23 Закон Калининградской области от 30 января 2013 г. № 199 «О внесении изменений и дополнений в Закон Калининградской области «О защите населения Калининградской области от информационной продукции, наносящей вред духовно-нравственному развитию»» [*Zakon Kaliningradskoi oblasti ot 30 yanvarya 2013 g. No. 199 'O vnesenii izmenenii i dopolnenii v Zakon Kaliningradskoi oblasti "O zashchite naseleniya Kaliningradskoi oblasti ot informatsionnoi produktsii, nanosyashchei vred dukhovno-nravstvennomu razvitiyu"'* [Kaliningrad Regional Law No. 199 of January 30, 2013, '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"']].

among minors.[24] As a consequence of this and other regional law there has been consistent and escalating interference with the freedom of expression of gay men and lesbians that has resulted in widespread arrests, detention and the imposition of fines.[25] The United Nations Human Rights Committee [hereinafter UNHRC] held in October 2012[26] that one such conviction under the Ryazan Oblast law amounted to a violation of rights guaranteed by Art. 19(2) (freedom of expression) read in conjunction with Art. 26 (equality before the law) of the International Covenant on Civil and Political Rights.[27]

Despite the view of the UNHRC, the Federal Assembly of the Russian Federation has enacted federal law designed to prohibit 'homosexual propaganda'. Attempts to enact federal legislation began in 2003 when the first of several unsuccessful Bills was introduced in the State Duma with the ambition of regulating 'homosexual propaganda'.[28] In 2012 a further Bill was introduced by the Legislative Assembly of the Novosibirsk Region that proposed amendments to the Code of Administrative Offences of the Russian Federation in order to regulate 'promotion of homosexuality among minors'.[29] During its passage through the State Duma the word 'homosexuality'

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[24] Article 4. Ryazan Regional Law No. 41-OZ, *supra* n. 18. Article 3.10 Ryazan Region Law No. 182-OZ of December 4, 2008, 'On Administrative Offences' [Закон Рязанской области от 4 декабря 2008 г. № 182-ОЗ «Об административных правонарушениях» [*Zakon Ryazanskoi oblasti ot 4 dekabrya 2008 g. No. 41-OZ 'Ob administrativnykh pravonarusheniyakh'*]] provides: 'Public actions aimed at propaganda of homosexuality (sodomy and lesbianism) among minors – shall entail the imposition of an administrative fine on citizens in the amount of one thousand five hundred to two thousand rubles; on officials – from two to four thousand rubles; for legal entities – from ten to twenty thousand rubles.'

[25] For an overview, *see* ILGA-Europe Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2013 (ILGA Europe 2013), at <http://www.ecoi.net/file_upload/90_1369137411_ilga-europe-annual-review-2013.pdf> (accessed May 16, 2015).

[26] *Irina Fedotova v. Russian Federation: Communication No. 1932/2010*, U.N. GAOR, Hum. Rts. Com., 106th Sess., U.N. Doc. CCPR/C/106/D/1932/2010 (2012), at <http://www1.umn.edu/humanrts/undocs/1932-2010.html> (accessed May 16, 2015) [hereinafter *Irina Fedotova v. Russian Federation*].

[27] International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 1, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967).

[28] The Bills were introduced by Deputy Alexander Chuev. For an overview, *see* Convenient Targets: The Anti-'Propaganda' Law & the Threat to LGBT Rights in Russia (August 2013) (Human Rights First 2013), at <http://www.humanrightsfirst.org/uploads/pdfs/HRF-russias-anti-gay-ban-SG.pdf> (accessed May 16, 2015).

[29] Draft Federal Law 'On Amendments to the Code of Administrative Offences of the Russian Federation' [проект федерального закона «О внесении изменений в Кодекс Российской Федерации об административных правонарушениях» [*proekt federal'nogo zakona 'O vnesenii izmenenii v Kodeks Rossiiskoi Federatsii ob administrativnykh pravonarusheniyakh'*]] (registered by State Duma on March 28, 2012). Subsequently entitled: Bill No. 44554-6 'On Amendments to Article 5 of the Federal Law "On Protection of Children from Information Harmful to Their Health and Development," and Some Legislative Acts of the Russian Federation in Order to Protect Children from Information That Promotes the Negation of Traditional Family Values' [законопроект № 44554-6 «О внесении изменений в статью 5 Федерального закона «О защите детей от информации, причиняющей вред их здоровью и развитию» и отдельные законодательные акты Российской Федерации в целях защиты детей от информации, пропагандирующей отрицание традиционных семейных ценностей» [*zakonoproekt*

was replaced by 'non-traditional sexual relations' – 'a broader concept straightforward in legal practice'[30] – and the scope of the legislation was significantly expanded. The law eventually enacted and now in force[31] amends a number of federal laws. The Federal Law 'On Protection of Children from Information Harmful to Their Health and Development' has been amended to prohibit the distribution of information to children that 'promotes non-traditional sexual relations.'[32] Similarly, the Federal Law 'On Basic Guarantees of Children's Rights in the Russian Federation' has been amended to regulate 'information that promotes non-traditional sexual relations.'[33] The most extensive changes made are to the Code of Administrative Offences of the Russian Federation which, through the inclusion of a new section 'Promotion of Non-Traditional Sexual Relations among Minors,' makes it an offence to engage in the 'dissemination of information' to minors that encourages the formation of 'unconventional sexual attitudes' or 'distorted ideas about the social equivalence of traditional and non-traditional sexual relations,' promotes the 'attractiveness of non-traditional sexual relations,' or causes 'interest in such relationships.'[34] The Code of Administrative Offences

No. 44554-6 'O vnesenii izmenenii v stat'yu 5 Federal'nogo zakona "O zashchite detei ot informatsii, prichinyayushchei vred ikh zdorov'yu i razvitiyu" i otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v tselyakh zashchity detei ot informatsii, propagandiruyushchei otritsanie traditsionnykh semeinykh tsennostei']].

30 Federal Assembly of the Russian Federation, Federation Council Committee for Science, Education, Culture and Information Policy, June 24, 2013 (No. 3.9-03/880).

31 Федеральный закон от 29 июня 2013 г. № 135-ФЗ «О внесении изменений в статью 5 Федерального закона «О защите детей от информации, причиняющей вред их здоровью и развитию» и отдельные законодательные акты Российской Федерации в целях защиты детей от информации, пропагандирующей отрицание традиционных семейных ценностей» [*Federal'nyi zakon ot 29 iyunya 2013 g. No. 135-FZ 'O vnesenii izmenenii v stat'yu 5 Federal'nogo zakona "O zashchite detei ot informatsii, prichinyayushchei vred ikh zdorov'yu i razvitiyu" i otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii v tselyakh zashchity detei ot informatsii, propagandiruyushchei otritsanie traditsionnykh semeinykh tsennostei'* [Federal Law No. 135-FZ of June 29, 2013, 'On Amendments to Article 5 of the Federal Law "On Protection of Children from Information Harmful to Their Health and Development," and Some Legislative Acts of the Russian Federation in Order to Protect Children from Information That Promotes the Negation of Traditional Family Values']].

32 Article 5(2)(4) Federal Law No. 436-FZ of December 29, 2010, 'On Protection of Children from Information Harmful to Their Health and Development' [Федеральный закон от 29 декабря 2010 г. № 436-ФЗ «О защите детей от информации, причиняющей вред их здоровью и развитию» [*Federal'nyi zakon ot 29 dekabrya 2010 g. No. 436-FZ 'O zashchite detei ot informatsii, prichinyayushchei vred ikh zdorov'yu i razvitiyu'*]].

33 Article 14(1) Federal Law No. 124-FZ of July 24, 1998, 'On Basic Guarantees of Children's Rights in the Russian Federation' [Федеральный закон от 24 июля 1998 г. № 124-ФЗ «Об основных гарантиях прав ребенка в Российской Федерации» [*Federal'nyi zakon ot 24 iyulya 1998 g. No. 124-FZ 'Ob osnovnykh garantiyakh prav rebenka v Rossiiskoi Federatsii'*]].

34 Article 6.21 Federal Law No. 195-FZ of December 30, 2001, 'Code of Administrative Offences of the Russian Federation' (as amended on February 12, 2015) [Федеральный закон от 30 декабря 2001 г. № 195-ФЗ «Кодекс Российской Федерации об административных правонарушениях» (действующая редакция от 12 февраля 2015 г.) [*Federal'nyi zakon ot 30 dekabrya 2001 g. No. 195-FZ 'Kodeks Rossiiskoi Federatsii ob administrativnykh pravonarusheniyakh' (deistvuyushchaya redaktsiya ot 12 fevralya 2015 g.)*]].

of the Russian Federation now contains a group of measures penalizing those convicted of engaging in the dissemination of information about non-traditional sexual relations among minors: Russian citizens and officials who promote non-traditional sexual relations to minors can be fined, and legal entities (which include private businesses) which engage in such activity can be fined or have their activities suspended; any promotion of non-traditional sexual relations to minors that employs the media and / or information and telecommunications networks (including the Internet) can incur higher fines; and foreign nationals or stateless persons who promote non-traditional sexual relations to minors can incur a fine with administrative deportation outside of the Russian Federation, or administrative arrest for up to 15 days with administrative deportation outside of the Russian Federation (with higher fines for activities involving media and / or information and telecommunications networks).[35]

The federal propaganda law was passed through the Federal Assembly with the enthusiastic support of all legislators. The State Duma passed the Bill at First Reading by 388-1 on January 25, 2013, and at Third Reading by 436-0 on June 11, 2013. The Federation Council passed the Bill by 137-0 on June 26, 2013. The law received the required approval from the President of Russia, Vladimir Putin, on June 29, 2013. Putin, who had frequently voiced his support for initiatives designed to 'protect' children from homosexuality, stated publically that the new legal measures are 'not about imposing some sort of sanctions on homosexuality [but] about protecting children from such information.'[36]

The Constitutional Court of the Russian Federation has given its approval to regional 'homosexual propaganda' laws. The Constitutional Court has held that the Ryazan Oblast law, in regulating 'activity aimed at purposeful and uncontrolled dissemination of information which is able to cause damage to moral and spiritual development or to the health of minors,' does not violate Arts. 19 (equality before the law), 29 (freedom of thought and speech) and 55(3) (circumstances in which human and civil rights and freedoms may be limited by federal law) of the Constitution of the Russian Federation.[37] The Supreme Court of the Russian Federation has also given its tacit approval to the propaganda laws by rejecting appeals against convictions in the lower courts. For example, in a consideration of the Arkhangelsk law, the Supreme Court held that regulating 'homosexual propaganda' to minors was justified, lawful and not in violation of any other federal law.[38] The Supreme Court emphasized that

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35 Article 6.21 Federal Law No. 195-FZ, *supra* n. 34.

36 Corinne Pinfold, *Putin Signs Anti-'Gay Propaganda' Bill into Law*, Pink News (Jun. 30, 2013), <http://www.pinknews.co.uk/2013/06/30/russia-putin-signs-anti-gay-propaganda-bill-into-law/> (accessed May 16, 2015).

37 Decision of the Constitutional Court of the Russian Federation No. 151-O-O of January 19, 2010 [hereinafter Decision No. 151-O-O].

38 Decision of the Supreme Court of the Russian Federation No. 1-APG12-11 of August 15, 2012. There have been several subsequent decisions, for example: No. 78-APG12-16 of October 3, 2012; No. 87-APG12-2 of November 7, 2012.

the regional laws do not prohibit all public expression of homosexuality and do not interfere with the right to obtain and convey general and neutral information regarding homosexuality. The Supreme Court also stated that the anti-propaganda laws do not prevent the holding of public events (such as 'gay pride' events) or debates but regulate the discussion of homosexuality specifically in relation to minors. This opinion has been repeatedly restated by the Russian government who argue that the propaganda laws are in compliance with federal and constitutional law and, rather than unnecessarily impairing citizens' rights to freedom of expression, provide a balanced and proportionate response to the need to protect children from information about homosexuality that they are 'not able to critically estimate' due to their age.[39]

3. Current Opinion on 'Homosexual Propaganda' Laws and International Human Rights Standards

As discussed above, in 2012 the UNHRC held that Russian 'homosexual propaganda' legislation is in violation of the right to freedom of expression provided by the International Covenant on Civil and Political Rights.[40] This view reflects the consistent interpretation of the right to freedom of expression by the UNHRC to favour the widest enjoyment of this right and the minimal toleration of state interference with it.[41] In this respect, the UNHRC's 'General Comment No. 34' is relevant to a consideration of 'homosexual propaganda' laws since it reiterated that any restriction on public expression 'must be understood in the light of universality of human rights and the principle of non-discrimination' and 'must be based on principles not deriving exclusively from a single tradition.'[42] This is particularly important in light of the United Nations Human Rights Council's more recent adoption of the Resolution sponsored by Russia that promotes an interpretation of human rights on the basis of 'traditional values.'[43] Various organs of the United Nations have consistently criticized Russian 'homosexual

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[39] *Communication from the Russian Federation Concerning the Case of Alekseyev against Russian Federation (application no. 4916/07)*, Secretariat of the Committee of Ministers of the Council of Europe, 1164th mtg., Doc. DH-DD(2013)67 (2013), at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2221951&SecMode=1&DocId=1973964&Usage=2> (accessed May 16, 2015) [hereinafter *Communication from the Russian Federation*].

[40] *Irina Fedotova v. Russian Federation*, *supra* n. 26.

[41] Michael O'Flaherty, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee's General Comment No 34*, 12(4) Human Rights Law Review (2012). doi:10.1093/hrlr/ngs030

[42] *General Comment No. 34: Article 19: Freedom of Opinion and Expression*, U.N. GAOR, Hum. Rts. Comm., 102nd Sess., ¶ 32, U.N. Doc. CCPR/C/GC/34 (2011), at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed May 16, 2015).

[43] *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Human Rights Council Res. 21/3, U.N. Doc. A/HRC/RES/21/3 (October 9, 2012), at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G12/173/96/PDF/G1217396.pdf?OpenElement> (accessed May 16, 2015).

propaganda' laws, with the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression most recently stating that the federal law is not based on 'reasonable and objective criteria.'[44] The United Nations, through the High Commissioner for Human Rights, has made clear that states should, in compliance with the International Covenant on Civil and Political Rights, '[e]nsure that individuals can exercise their rights to freedom of expression, association and peaceful assembly in safety without discrimination on grounds of sexual orientation.'[45]

Various organs of the Council of Europe have also expressed the opinion that 'homosexual propaganda' laws violate international human rights standards, including the ECHR. The European Commission for Democracy through Law (Venice Commission) has stated that 'homosexual propaganda' laws are incompatible with the ECHR because: they are not formulated with sufficient precision; the justifications given for them fail to satisfy the necessity and proportionality tests required by the Eur. Ct. H.R.; and they discriminate on the basis of sexual orientation.[46] The Venice Commission draws upon a range of Eur. Ct. H.R.'s jurisprudence – which I examine below – to support their argument that 'the measures in question appear to be incompatible with "the underlying values of the ECHR" . . .'[47] This opinion was legitimized by the Parliamentary Assembly of the Council of Europe in a Resolution which stated that the Assembly 'deplores the unanimous approval' of 'homosexual propaganda' laws by Russian legislators and called upon 'the relevant local and regional authorities in the Russian Federation to repeal legislation.'[48] The Secretary General of the Council of Europe, Thorbjørn Jagland, has also stated that 'homosexual propaganda' laws are potentially in violation of the ECHR.[49]

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[44] *Russia Must Drop Draft Bill That Would Penalize 'Homosexual Propaganda' – UN Experts*, UN News Centre (Feb. 1, 2013), <http://www.un.org/apps/news/story.asp?NewsID=44050&Cr=lesbian&Cr1=#.UdKijKVpLA5> (accessed May 16, 2015).

[45] *Discriminatory Laws and Practices and Acts of Violence against Individuals Based on Their Sexual Orientation and Gender Identity: Report of the United Nations High Commissioner for Human Rights, U.N. GAOR, Human Rights Council*, 19th Sess., Agenda Items 2 and 8: Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General; Follow-up and Implementation of the Vienna Declaration and Programme of Action, U.N. Doc. A/HRC/19/41 (2011), at <http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf> (accessed May 16, 2015).

[46] *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*, Venice Comm'n, Opinion 707/2012 (CDL-AD(2013)022) (2013), at <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)022-e> (accessed May 16, 2015) [hereinafter *On the Issue of the Prohibition*].

[47] *Id*. at ¶ 82.

[48] *Tackling Discrimination on the Grounds of Sexual Orientation and Gender Identity*, Parliamentary Assembly of the Council of Europe Res. 1948, ¶ 10.8 (2013), at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20010&lang=en> (accessed May 16, 2015).

[49] *Letter to Volodymyr Lytvyn, Chairman of the Verkhovna Rada*, Council of Europe, Secretary General (October 4, 2012), at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680089060> (accessed May 16, 2015).

Several NGOs, such as the International Commission of Jurists[50] and Article 19,[51] have argued that 'homosexual propaganda' laws are not compatible with the right to freedom of expression protected by international law. The International Commission of Jurists and the International Lesbian and Gay Association have explicitly argued that 'homosexual propaganda' laws are in violation of the ECHR.[52] However, this view remains heavily disputed by other interested parties. For example, two Russian-based NGOs (The Family and Demography Foundation and the Interregional Public Organization 'For Family Rights') have stated that 'homosexual propaganda' laws comply with international human rights standards because they pursue the legitimate aims of protecting the health of children, promoting the family, and ensuring the continued existence of public morals.[53] These NGOs claim that 'homosexual propaganda' laws are a proportionate response to meeting these aims because of the significant threat posed by homosexuality to the physical, spiritual and moral wellbeing of minors. Similar arguments have been and will continue to be advanced by the Russian authorities to assert that, in respect of their obligations under the ECHR, they have a margin of appreciation in which to determine whether to regulate public forms of expression about homosexuality among minors.

4. '**Homosexual Propaganda**' **Laws and the ECHR**

In light of disagreement about the compatibility of 'homosexual propaganda' laws with the ECHR, in the remainder of this Article I will consider Russian law in respect of existing Eur. Ct. H.R.'s jurisprudence.

4.1. Article 10

The ECHR right most relevant to 'homosexual propaganda' laws in Russia is Art. 10. Article 10 defines the right to freedom of expression and includes the right to hold opinions and to receive and impart information and ideas without interference

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[50] *Communication from a NGO (ICJ – International Commission of Jurists) in the Case of Alekseyev against Russian Federation (application no. 4916/07)*, Secretariat of the Committee of Ministers of the Council of Europe, 1164th mtg., Doc. DH-DD(2013)193 (2013), at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2221951&SecMode=1&DocId=1973964&Usage=2> (accessed May 16, 2015).

[51] Traditional Values? Attempts to Censor Sexuality: Homosexual Propaganda Bans, Freedom of Expression and Equality (Article 19 2013), at <http://www.refworld.org/docid/513da4692.html> (accessed May 16, 2015).

[52] *'Homosexual Propaganda' Bans*, *supra* n. 2.

[53] *Memorandum for the European Commission for Democracy through Law in View It Preparing an Opinion on the Russian and Ukrainian Laws Limiting Propaganda of Homosexuality*, Family and Demography Foundation, Interregional Public Organization 'For Family Rights,' All-Ukrainian Public Organization 'The Parents' Committee of Ukraine' (May 9, 2013), at <http://www.familypolicy.ru/rep/int-13-050en.pdf> (accessed May 16, 2015).

by a public authority. Like the other qualified rights of the ECHR, Art. 10 specifies that a public authority may only interfere with an individual's right to freedom of expression when such interference is prescribed by law, pursues one of a number of legitimate aims and is necessary in a democratic society. However, since its earliest judgments, the Eur. Ct. H.R. has consistently held that freedom of expression is a vital element of a democratic society and, as such, Art. 10 must be interpreted widely to protect the right to convey information or ideas that are not only 'favourably received or regarded as inoffensive or as a matter of indifference, but also . . . offend, shock or disturb the State or any sector of the population.'[54]

The first stage of a review by the Eur. Ct. H.R. of any complaint brought under Art. 10 concerns an assessment of whether a restriction of freedom of expression is prescribed by law. The settled jurisprudence of the Eur. Ct. H.R. is that to pass this test a law must be 'adequately accessible' and 'formulated with sufficient precision to enable the citizen to regulate his conduct.'[55] The Venice Commission has stated that the vagueness of terms such as 'homosexual propaganda' means that Russian 'homosexual propaganda' laws are unlikely to satisfy the prescribed by law test.[56] However, the Venice Commission's opinion fails to take account of the textual amendments made to the federal law by the Federal Assembly that were designed to ensure that the law regulates public information about 'non-traditional sexual relations' rather than 'homosexuality.' This formulation may be more likely to satisfy the prescribed by law test insofar as it can be argued that the term 'sexual relations' does not suffer from the ambiguity of 'homosexuality' (which can mean either sexual orientation or practice). Whilst 'non-traditional' may appear vague, the Eur. Ct. H.R. has previously accepted that 'frequently laws are framed in a manner that is not absolutely precise' and that judicial interpretation of such laws is adequate to provide the required precision.[57] In this respect, the Russian government will cite the judicial interpretations given by the Constitutional Court and Supreme Court of the Russian Federation that, as I outlined above, have attempted to provide a more precise definition of 'homosexual propaganda' as, for example, information that encourages children to form 'warped perceptions that traditional and non-traditional marital relations are socially equal.'[58]

If the Eur. Ct. H.R. decides that any Russian propaganda law passes the prescribed by law test then it will adjudicate the merits of whether the law pursues one of a number of legitimate aims and is necessary in a democratic society. The Russian government

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54 *Handyside v. the United Kingdom*, ¶ 49, no. 5493/72 (Eur. Ct. H.R., Dec. 7, 1976).

55 *The Sunday Times v. the United Kingdom (No. 1)*, ¶ 49, no. 6538/74 (Eur. Ct. H.R., Apr. 26, 1979).

56 *On the Issue of the Prohibition*, *supra* n. 46.

57 *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, ¶ 30, no. 10572/83 (Eur. Ct. H.R., Nov. 20, 1989).

58 Decision No. 151-O-O, *supra* n. 37.

will most likely argue that the law is necessary to meet the legitimate aims of 'the protection of health or morals' and 'the protection of the rights of others.' Since these aims are explicitly written into the propaganda laws it is possible that they will pass the legitimate aims test and, therefore, the crucial question for the Eur. Ct. H.R. will be whether the laws are necessary in a democratic society. The Eur. Ct. H.R. has long held that for any restriction on freedom of expression to be deemed to be necessary in a democratic society, and therefore compatible with Art. 10, it must correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued.'[59] In this respect, the Venice Commission has expressed the opinion that '[s]weeping restrictions on the freedom of expression that target not only certain specific types of content . . . but apply to all categories of expression, from political discussion and artistic expression to commercial speech . . . cannot be considered "necessary in a democratic society"'.[60]

When considering whether 'homosexual propaganda' laws could be considered to correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued' for the purposes of Art. 10 it is important to note that, although the Eur. Ct. H.R. has long regarded freedom of expression as a cornerstone of the pluralism, tolerance and broadmindedness that is essential to a democratic society, it has never found in favour of a gay or lesbian applicant who has made an Art. 10 complaint about an interference with the expression of their sexual orientation. The Eur. Ct. H.R. has upheld complaints about the regulation of discussions about homosexuality by journalists and academics[61] but has never recognized that an interference with the public expression of an individual's 'homosexual orientation' (whether expressed in the form of speech or acts) to be a violation of Art. 10. Whilst Art. 10 has been invoked in a range of complaints relating to various aspects of sexual orientation and expression, the Eur. Ct. H.R. has consistently found that the interference complained of corresponded to a pressing social need and was proportionate to the legitimate aim pursued. Although some of the extant Eur. Ct. H.R.'s jurisprudence on Art. 10 and sexual orientation is considerably old, it remains pertinent to a consideration of contemporary 'homosexual propaganda' laws for a number of reasons: first, because it is a reminder of the long history of attempts to regulate the freedom of expression of sexual minorities in Europe; second, because it shows the ways in which gay men and lesbians have previously attempted to develop Art. 10 rights under the ECHR; third, because it demonstrates the similarity between historical and contemporary arguments made by states to justify the regulation of public expressions about

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59 For example: *Wingrove v. the United Kingdom*, no. 17419/90 (Eur. Ct. H.R., Nov. 25, 1996).

60 *On the Issue of the Prohibition*, *supra* n. 46, ¶ 68.

61 *Kobenter and Standard Verlags GmbH v. Austria*, no. 60899/00 (Eur. Ct. H.R., Nov. 2, 2006); *Porubova v. Russia*, no. 8237/03 (Eur. Ct. H.R., Oct. 8, 2009); *Sapan v. Turkey*, no. 44102/04 (Eur. Ct. H.R., Jun. 8, 2010).

homosexuality; fourth, and perhaps most importantly, because it shows how the Eur. Ct. H.R. has often regarded an interference with the public expression of sexual minorities to be a proportionate response to meet a legitimate aim.

The Eur. Ct. H.R. has often rejected Art. 10 complaints relating to homosexuality because of claims made about the necessity of protecting (particularly children's) morals. The most well known example of this is *Handyside v. the United Kingdom* in which the Eur. Ct. H.R. rejected an Art. 10 complaint by a publisher about his conviction for publishing a schoolbook that contained a discussion of homosexuality regarded by the authorities as having the potential to cause 'pernicious effects' on the moral development of children.[62] Subsequent to *Handyside*, the Eur. Ct. H.R. and former European Commission on Human Rights [hereinafter Eur. Comm'n H.R.] issued a series of decisions and judgments that rejected complaints by gay men and lesbians under Art. 10 relating to: restriction of the freedom to express feelings of love within a homosexual sexual relationship;[63] the censorship of writing and imagery relating to homosexuality and religion;[64] disciplinary sanctions imposed by an employer on a teacher because of her public discussion of her homosexuality;[65] and the suppression of a public demonstration about the homosexual victims of fascism.[66] In all of these cases, the Eur. Ct. H.R. and Eur. Comm'n H.R. regarded the interference with the Art. 10 rights of gay men and lesbians to be within the margin of appreciation available to contracting states and to be a proportionate response to pursuing a legitimate aim. In short, the interference with Art. 10 rights was regarded to be necessary in a democratic society.

More recently in *Smith and Grady v. the United Kingdom* the Eur. Ct. H.R. held that a prohibition on homosexuality in the armed forces, and the subsequent discharge of service men and women because of it, did not give rise to the need to examine the applicants' Art. 10 complaints.[67] Although the Eur. Ct. H.R. stated that limitations placed on the expression of sexual orientation *could* constitute an interference with Art. 10 it held that, because homosexuality is 'an essentially private manifestation of human personality,' the issue of freedom of expression was subsidiary to the principal issue of the right to respect for private life.[68] This represents just one instance in Eur. Ct. H.R.'s jurisprudence where the public expression of homosexuality has been

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62 *Handyside v. the United Kingdom*, *supra* n. 54, at ¶ 52.

63 *X. v. the United Kingdom*, no. 7215/75 (Eur. Comm'n H.R. Rep., Oct. 12, 1978).

64 *X. Ltd. and Y. v. the United Kingdom*, no. 8710/79 (Eur. Comm'n H.R. Dec., May 7, 1982); *see also Wingrove v. the United Kingdom, supra* n. 59.

65 *Morissens v. Belgium*, no. 11389/85 (Eur. Comm'n H.R. Dec., May 3, 1988).

66 *Hauer and Guggenheim v. Austria*, no. 18116/91 (Eur. Comm'n H.R. Dec., Oct. 13, 1993).

67 *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96 (Eur. Ct. H.R., Sep. 27, 1999).

68 *Id*. ¶ 127.

regarded as of lesser importance than rights to sexual privacy. There has been a long-standing and problematic conceptual separation by the Eur. Ct. H.R. of issues relating to the private and public spheres in respect of homosexuality that has often resulted in a failure to comprehend the ways in which 'private life' depends upon the protection of wider social, cultural, civil, and political rights associated with the public sphere.[69] A consequence of the Eur. Ct. H.R.'s approach is that, despite explicit encouragement from the Council of Europe to Member States to recognize the Art. 10 rights of sexual minorities,[70] there is nothing in Eur. Ct. H.R.'s jurisprudence relating to sexual orientation that explicitly suggests that the type of curtailment of freedom of expression that 'homosexual propaganda' laws create constitutes a violation of Art. 10.

A relevant development can be seen in *Vejdeland and Others v. Sweden*, in which an Art. 10 complaint was brought by a group of individuals who had been prosecuted for the distribution of printed material in schools that was deemed to constitute hate speech against sexual minorities.[71] In rejecting the complaint the Eur. Ct. H.R. strongly endorsed the view that children require protection from anti-gay hate speech and the judgment can be seen to give practical expression to Recommendation CM/Rec(2010)5 of the Council of Europe which encourages 'safeguarding the right of children and youth to education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity.'[72] *Vejdeland* could be interpreted as ostensibly reversing the principle of moral protection established in *Handyside* insofar as it suggests that in a democratic society it is necessary to protect children from homophobia rather than information about homosexuality. However, whilst the judgment of *Vejdeland* establishes that children should not be subject to anti-gay propaganda it does not explicitly establish that Art. 10 protects the dissemination of information to children about homosexuality that Russian authorities wish to regulate.

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69 *See* Paul Johnson, Homosexuality and the European Court of Human Rights (Routledge 2013) [hereinafter Johnson, Homosexuality].

70 Recommendation CM/Rec(2010)5 to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity, Committee of Ministers of the Council of Europe, 1081st mtg., Appendix, ¶ 13 (2010), at <https://wcd.coe.int/ViewDoc.jsp?id=1606669> (accessed May 16, 2015) [hereinafter Recommendation CM/Rec(2010)5, Appendix], provides: 'Member states should take appropriate measures to ensure, in accordance with Article 10 of the Convention, that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, including with respect to the freedom to receive and impart information on subjects dealing with sexual orientation or gender identity.'

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

72 Recommendation CM/Rec(2010)5, Appendix, *supra* n. 70, ¶ 31.

4.2. Article 11

Because Art. 10 jurisprudence on sexual orientation discrimination is 'thin,' those seeking to challenge 'homosexual propaganda' laws have looked to Eur. Ct. H.R.'s jurisprudence on Art. 11. This is not altogether surprising since the Eur. Ct. H.R. has held that freedom of expression is a fundamental aspect of the rights protected by Art. 11. In *Ezelin v. France*, the Eur. Ct. H.R. determined that Art. 10 is to be regarded as a *lex generalis* in respect of Art. 11, which is a *lex specalis*, and therefore the 'protection of personal opinions, secured by Article 10 . . . is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 . . .'[73] Article 11 provides for the right to freedom of peaceful assembly and to freedom of association with others. No restrictions on these rights is allowed other than when such restrictions are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. In recent years the Eur. Ct. H.R. has issued three significant Art. 11 judgments in respect of complaints about restrictions placed on assembly and association on the grounds of sexual orientation. In *Bączkowski and Others v. Poland*,[74] *Alekseyev v. Russia*,[75] and *Genderdoc-M v. Moldova*,[76] the Court has upheld Art. 11 complaints about restrictions placed on 'gay pride' events.

The Eur. Ct. H.R.'s case law on Art. 11 is undoubtedly relevant and significant in respect of 'homosexual propaganda' laws. The key case is *Alekseyev v. Russia*, in which the Eur. Ct. H.R. considered a complaint about the repeated refusals by public authorities in Moscow to allow the applicant to hold a gay pride event. The Russian government argued that the public authorities had acted lawfully and within their margin of appreciation when refusing permission for the events. Furthermore, in light of statements made by several religious groups suggesting that the proposed assemblies would cause moral offence and raise significant safety issues, the government argued that the authorities were pursuing the legitimate aims of the protection of public safety and the prevention of disorder, the protection of morals, and the protection of the rights and freedoms of others. The Eur. Ct. H.R. upheld the applicant's complaint, finding a violation of, *inter alia*, Art. 11 alone and Art. 14 taken in conjunction with Art. 11. In its review, the Eur. Ct. H.R. significantly evolved its jurisprudence on freedom of assembly in respect of sexual orientation. From the outset, the Eur. Ct. H.R. dispensed with the parties' disputes regarding the legality and legitimacy of the 'ban' on gay pride events. The Eur. Ct. H.R. stated that it could 'dispense with ruling on these points because, irrespective of the aim and the domestic

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[73] *Ezelin v. France*, ¶ 37, no. 11800/85 (Eur. Ct. H.R., Apr. 26, 1991).

[74] *Bączkowski and Others v. Poland*, no. 1543/06 (Eur. Ct. H.R., May 3, 2007).

[75] *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09 (Eur. Ct. H.R., Oct. 21, 2010).

[76] *Genderdoc-M v. Moldova*, no. 9106/06 (Eur. Ct. H.R., Jun. 12, 2012).

lawfulness of the ban, it fell short of being necessary in a democratic society . . .'[77] This is extremely important because it decisively articulates the view that the existence of domestic law designed to curtail the public assembly of homosexuals does not in itself provide a justification for interference with Art. 11 rights. Nor do the legitimate aims prescribed by Art. 11(2) provide a secure basis for justifying the restriction of the peaceful assembly of homosexuals. The Russian government argued that the interference by public authorities was justified because it pursued a number of legitimate aims: in the first instance, as stated above, namely the protection of public safety and the prevention of disorder, the protection of morals and the protection of the rights and freedoms of others;[78] and in the second instance, 'because propaganda promoting homosexuality was incompatible with religious doctrines and the moral values of the majority, and could be harmful if seen by children or vulnerable adults.'[79] In respect of these two latter aims, the Eur. Ct. H.R. stated that, although it would not consider the question of legitimacy, 'in any event the ban was disproportionate to either of the two alleged aims'.[80]

The most significant aspect of *Alekseyev* in respect of 'homosexual propaganda' laws is that it explicitly rejects the claim that limiting freedom of assembly on the grounds of sexual orientation is necessary in a democratic society in order to protect minors. The Eur. Ct. H.R. decisively rejected the Russian government's argument that gay pride events should be banned 'as a matter of principle' because they could be harmful if seen by children, stating:

> There is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or 'vulnerable adults.' On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case. Such debate, backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard.[81]

In this sense, the Eur. Ct. H.R. implicitly endorsed the view that all members of society (including minors) benefit from open public debate about homosexuality that is comprised of a range of views. Furthermore, it determined that there is no margin of appreciation available to contracting states to interfere with the right to assembly and expression in order to restrict such public debate.

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77 *Alekseyev v. Russia*, *supra* n. 75, ¶ 69.

78 *Id.* ¶ 65.

79 *Id.* ¶ 78.

80 *Id.* ¶ 79.

81 *Id.* ¶ 86.

In its subsequent supervision of the execution of the *Alekseyev* judgment, the Committee of Ministers of the Council of Europe has included a consideration of the 'homosexual propaganda' laws. This clearly indicates to the Russian government that the Committee of Ministers regards the *Alekseyev* judgment as relevant to the wider issue of regulating information about homosexuality to minors. On March 7, 2013, the Committee of Ministers

> expressed serious concerns with regard to the current legislative work aimed at introducing prohibition of the 'promotion of homosexuality' at federal level and considered that the adoption of such a law could raise serious questions as to the compliance by the Russian Federation with its obligations under Article 46 of the Convention [in respect of the *Alekseyev* judgment].[82]

Whilst *Alekseyev* can therefore be seen as a strong foundation for making a compelling case that 'homosexual propaganda' laws in Russia are in violation of the ECHR it is also important to recognize its limitations. The judgment is not a consideration of freedom of expression *per se* but is primarily concerned with the right to exercise freedom of assembly for the purpose of peacefully campaigning for gay and lesbian rights. No doubt recognizing this, the Russian government has stated that domestic judicial interpretations of the term 'propaganda' establish that 'homosexual propaganda' laws do not interfere with the right to freedom of assembly that is protected by the *Alekseyev* judgment.[83] The government has stated that in the majority of regions that have adopted 'homosexual propaganda' laws there have been no refusals to hold gay pride events on these grounds. It has further stated that in those regions where applicants have been refused permission to hold gay pride events on the grounds that they would infringe 'homosexual propaganda' laws, public authorities have accommodated organizers and enabled events to take place at alternative times and places. The Russian government has cited several decisions from domestic lower courts that have held that forms of public expression relating to homosexuality (for example, picketing near a children's library with signs saying 'we do not choose our sexual orientation' or 'who will protect gay teenagers?'[84]) have not been classified as propaganda that infringes the law.

The Russian government's claim that propaganda laws are narrowly interpreted and restrictively enforced has been disputed by NGOs who argue that the laws are operationalized indiscriminately on the basis that homosexuality is immoral and

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[82] *Case No. 23*, Committee of Ministers of the Council of Europe, 1164th mtg., ¶ 3, Decisions (2013), at <https://wcd.coe.int/ViewDoc.jsp?id=2039741> (accessed May 16, 2015).

[83] *Communication from the Russian Federation*, *supra* n. 39.

[84] Decision of the Justice of the Peace of Judicial District No. 8 of the City of Kostroma of March 23, 2013. For details *see Communication from the Russian Federation*, *supra* n. 39.

should not be discussed in the public sphere.[85] The vagueness of wording in both the regional and federal laws, that give expression to the longstanding (but widely discredited) idea that homosexuality is a threat to the development of children, certainly provides the potential to regulate a wide range of public speech and action. Because wide regulation is highly likely to happen in the future – and may expand to cover an increasing range of speech and actions – it is important to note that the *Alekseyev* judgment does not comprehensively address the range of public expression and action that might fall within the ambit of the propaganda laws. Whilst in *Alekseyev* the Eur. Ct. H.R. legitimized 'open public debate' of homosexuality it also placed significant emphasis on the applicant's statement that 'the participants [at gay pride] had not intended to exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views.'[86] The Russian government have considerable scope to argue that 'homosexual propaganda' laws regulate forms of speech and behaviour that go beyond the freedom of expression protected by *Alekseyev*. For example, they may argue that a same-sex couple kissing in public is a form of 'sexually provocative behaviour' that promotes 'non-traditional sexual relations' to minors. It remains to be seen, therefore, whether the Eur. Ct. H.R. will go beyond the protection of the 'mere mention of homosexuality, or open public debate about sexual minorities' social status' and bring within the protection of Art. 10 the wider range of speech and behaviour that the Russian authorities wish to regulate.

4.3. Article 14

Recent developments in Art. 14 jurisprudence in respect of sexual orientation discrimination arguably provide the most fruitful basis for challenging 'homosexual propaganda' laws. Article 14 prohibits discrimination in the enjoyment of rights and freedoms guaranteed by the ECHR. Whilst the Eur. Ct. H.R. has repeatedly stated that Art. 14 is not an autonomous provision and has effect only in relation to other ECHR rights, it has also established that the application of Art. 14 does not presuppose a violation of another aspect of the ECHR but, rather, that the facts of the complaint must fall within the ambit of one or more of the other substantive provisions.[87] This constitutes the first of four 'tests' that a complaint about alleged discrimination must pass in order for the Eur. Ct. H.R. to find a violation of Art. 14. The second test involves

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[85] *Communication from NGOs (Russian LGBT Human Rights Project GayRussia.Ru and North-West Advocacy Center (NWAC)) in the Case of Alekseyev against Russian Federation (application no. 4916/07)*, Secretariat of the Committee of Ministers of the Council of Europe, 1150th mtg., Doc. DH-DD(2012)852 (2012), at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2149672&SecMode=1&DocId=1928554&Usage=2> (accessed May 16, 2015).

[86] *Alekseyev v. Russia*, *supra* n. 75, ¶ 82.

[87] *See* Robert Wintemute, *'Within the Ambit:' How Big Is the 'Gap' in Article 14 European Convention on Human Rights?*, 2004(4) European Human Rights Law Review.

determining whether the alleged reason for a difference in treatment falls within the scope of one of the grounds covered by Art. 14. The third test concerns determining whether a complainant is in a relevantly similar or analogous situation with another class of persons who are treated more favourably. All three of these tests should be perfunctory in a complaint about 'homosexual propaganda' laws because: Arts. 8, 10 or 11 can be cited as the ECHR right which the substance of the complaint falls under; sexual orientation is now firmly accepted as a ground for the purposes of Art. 14; and laws which regulate ideas about or practices relating to homosexuality or 'non-traditional sexual relations' inevitably distinguish their target population from another class of persons (heterosexuals or those who engage in so-called 'traditional sexual relations') that are treated more favourably. It is the fourth Art. 14 test that will therefore prove decisive in any complaint about 'homosexual propaganda' laws to the Eur. Ct. H.R. This concerns the issue of whether any difference in treatment has an objective and reasonable justification. The Eur. Ct. H.R. has often held that, for the purposes of Art. 14, a difference in treatment has no objective and reasonable justification if 'it does not pursue a "legitimate aim" or that there is no "reasonable proportionality between the means employed and the aim sought to be realised" . . .'[88]

Recent formulations of 'objective and reasonable' test in respect of Art. 14 complaints relating to sexual orientation show that the Eur. Ct. H.R. has progressively narrowed the scope for states to justify differences in treatment based on sexuality. For example, in *Kozak v. Poland* the Eur. Ct. H.R. stated that for a difference in treatment based on sexual orientation to constitute discrimination

> it must be established that there is no objective and reasonable justification for the impugned distinction, which means that it does not pursue a 'legitimate aim' or that there is no 'reasonable proportionality between the means employed and the aim sought to be realised' . . . Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention . . .[89]

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

[89] *Kozak v. Poland*, ¶¶ 91–92, no. 13102/02 (Eur. Ct. H.R., Mar. 2, 2010).

Although *Kozak* suggests that contracting states have little or no margin of appreciation in respect of maintaining differences in treatment based on sexual orientation, this principle is not applied uniformly in respect of all issues. For instance, in *Schalk and Kopf v. Austria*, the Eur. Ct. H.R. held that, although same-sex and different-sex couples are in an analogous situation in respect of their need for legal recognition and protection of their relationships, the Austrian state had not exceeded the margin of appreciation available to it when differentiating between couples on the grounds of sexual orientation in order to deny same-sex couples the opportunity to contract civil marriage or to offer them a form of registered partnership with fewer rights and benefits than those attached to marriage.[90] The Eur. Ct. H.R. stated:

> On the one hand, the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification . . . On the other hand, a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy . . . The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States . . .[91]

The difference between judgments like *Kozak* and *Schalk and Kopf* creates considerable ambiguity in the Eur. Ct. H.R.'s approach to discrimination on the grounds of sexual orientation.[92] The Russian government will no doubt argue that 'homosexual propaganda' laws pursue a 'social strategy' and that the wide margin of appreciation available to it cannot be closed down by the non-existence of common ground between the laws of other European states (because this is only 'one of the relevant factors' to be taken into account). However, opponents of the 'homosexual propaganda' laws can look to other Eur. Ct. H.R. case law to support an Art. 14 complaint. For example, in *L. and V. v. Austria*, the Eur. Ct. H.R. stated that criminal laws that embody 'a predisposed bias on the part of a heterosexual majority against a homosexual minority . . . cannot of themselves be considered . . . to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour . . .'[93] The idea that a 'predisposed bias' against homosexuals amounts to discrimination was given

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90 *Schalk and Kopf v. Austria*, no. 30141/04 (Eur. Ct. H.R., Jun. 24, 2010).

91 *Id*. ¶¶ 97–98.

92 For a wider discussion, *see* Johnson, Homosexuality, *supra* n. 69.

93 *L. and V. v. Austria*, ¶ 52, nos. 39392/98 and 39829/98 (Eur. Ct. H.R., Jan. 9, 2003).

further expression in *Alekseyev v. Russia* when the Eur. Ct. H.R. upheld the applicant's Art. 14 complaint principally because 'the main reason for the ban imposed on the [gay pride] events organised by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality . . .'[94]

The Russian government will likely argue that 'homosexual propaganda' laws do not reflect a 'disapproval' of homosexuality but, rather, are a reasonable and objective measure necessary in all the circumstances to meet the legitimate aim of protecting the moral development of children. They may also point to the development of similar laws in other Council of Europe states to claim that there is a 'trend' towards the existence of a consensus on this type of 'social strategy.' Although the Eur. Ct. H.R. dismissed the relevance of European consensus in *Alekseyev*, this related to the right of individuals to exercise freedom of assembly for the purposes of campaigning for rights (which includes 'the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms').[95] The Russian government will argue that 'homosexual propaganda' laws do not impair that right *per se* but regulate a narrower range of information about 'non-traditional sexual relations' to minors. The Eur. Ct. H.R.'s recent jurisprudence on Art. 14 in conjunction with the family life limb of Art. 8 in respect of same-sex couples and their children[96] suggests that it will not be receptive to claims about the legitimacy or necessity of regulating children's 'exposure' to homosexuality. The Eur. Ct. H.R. has stated that whilst the protection of 'the family in the traditional sense' is 'a weighty and legitimate reason which might justify a difference in treatment' on the grounds of sexual orientation, a state's margin of appreciation is narrow and it must show that any measure is 'necessary' and not merely 'in principle suited' to achieve this aim.[97] However, as well as bearing in mind the limitations of the *Alekseyev* judgment outlined above, it is important to recognize that whatever principles can be extrapolated from the Eur. Ct. H.R.'s case law about the family and the social interaction it facilitates between homosexual adults and children,[98] this aspect of Eur. Ct. H.R.'s jurisprudence relates to the private, not the public, sphere.

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94 *Alekseyev v. Russia*, *supra* n. 75, ¶ 109.

95 *Id.* ¶ 84.

96 *See, e.g., X. and Others v. Austria* [GC], no. 19010/07 (Eur. Ct. H.R., Feb. 19, 2013).

97 *Karner v. Austria*, ¶¶ 40–41, no. 40016/98 (Eur. Ct. H.R., Jul. 24, 2003).

98 For example, Amnesty International argues that Eur. Ct. H.R.'s jurisprudence has already established that any attempt to 'protect' children from information about homosexuality is in violation of the ECHR. *Submission to the Steering Committee for Human Rights (CDDH) of the Council of Europe: The Implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, Amnesty International (Feb. 15, 2013), <http://www.refworld.org/docid/513068412.html> (accessed May 16, 2015).

5. Conclusions

Whilst there is every reason to be optimistic that the Eur. Ct. H.R. would uphold a complaint about Russia's 'homosexual propaganda' laws there is also a need to recognize that Eur. Ct. H.R.'s jurisprudence in this area needs significant evolution. In response to any complaint to the Eur. Ct. H.R., the Russian government would defend the legislation as being narrow in scope, designed to address a legitimate aim, and a proportionate response necessary to meet the pressing social need of protecting minors. Whilst it seems highly likely that the Eur. Ct. H.R. would draw upon its recent Art. 11 jurisprudence to reject such justifications in respect of restrictions on public assemblies (such as 'gay pride' events) it is less certain how it will approach other potential restrictions created by 'homosexual propaganda' laws. For example, there is nothing in Eur. Ct. H.R.'s jurisprudence that protects the public distribution of factual or educational materials to children designed to encourage them to develop a positive understanding of homosexual sexual orientation and intimate relationships, or the public expression of same-sex intimacy (such as hand-holding or kissing) in the presence of minors. These aspects of speech and action arguably go beyond 'the mere mention of homosexuality, or open public debate about sexual minorities' social status' that is discussed in *Alekseyev v. Russia*.[99] For those opposed to 'homosexual propaganda' laws it is to be hoped, therefore, that in response to a complaint the Eur. Ct. H.R. would significantly evolve its jurisprudence to protect these aspects of public expression. Specifically, it is to be hoped that the Eur. Ct. H.R. establishes the principle that any regulation of public information to minors about homosexual sexual orientation and intimate relationships or public displays of same-sex intimate acts, if it exceeds the regulation placed on corresponding information about heterosexual sexual orientation and intimate relationships or public displays of opposite-sex intimate acts, amounts to a violation of Art. 8 (where it concerns acts associated with 'private life') and Art. 10 (where it concerns opinion and ideas) taken in conjunction with Art. 14 of the ECHR. This would establish the firm principle that if the reason for any public restriction of information or activity was based solely on the fact that it related to homosexuality then this would amount to discrimination under the ECHR.

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[99] *Alekseyev v. Russia*, *supra* n. 75, ¶ 86.

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