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Justice or Complicity?

LGBT RIGHTS AND THE RUSSIAN COURTS

EQUAL RIGHTS TRUST

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London, September 2016

The **Equal Rights Trust** is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

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The "Pride" of the LGBT community (…) is a pride not associated with sexual orientation itself, but with the fact that, through a path of total destruction, imprisonment, discrimination and humiliation, the people of the LGBT community showed courage, solidarity and perseverance, having defended their historical right to human dignity.

Anonymous, posted on
LGBT youth support website Children-404
20 October 2014

[I]n the [materials published on Children-404] there is information forming a positive image of a man with non-traditional sexual orientation. Belonging to this community increases the self-esteem of an individual, makes his life more comfortable, diverse, joyful, while the negative sides existing in these communities are silenced. The information contained in the materials examined forms an impression of the necessity of the social equivalence of traditional and non-traditional sexual relations: it contains a call for being proud of non-traditional sexual relationships, it creates an illusory attractiveness of the LGBT-community in which normal, clever and educated people interact, it describes this world which is better and more comfortable than the ordinary (…) Thus, it distorts the notion of the social equivalence of traditional and non-traditional sexual relationships.

Comments of the Dzerzhinskiy District Court
of Nizhniy Tagil in upholding the conviction of
Children-404's creator for the offence of
"propaganda of homosexuality to minors"
30 November 2015

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Acknowledgements

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The Trust was greatly assisted in finalising the report by a large number of Russian lawyers and LGBT activists. They made it possible for us to produce a comprehensive report. During November and December 2015, the Trust, together with the Russian LGBT Network, undertook a validation of the first draft, consulting with twelve lawyers and advocates working with the LGBT community in Russia. Following this exercise, Dmitri and Jade revised the draft report, taking into account the feedback received. Additional comments were then received on this second draft from three senior Russian lawyers with significant expertise on discrimination or economic and social rights. Individuals involved in this process have requested that we do not name them due to the sensitivity of the report's contents. We would like to thank each of them for their input.

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This report has been produced as part of a broader project aimed at tackling discrimination against LGBT persons in Russia. The project has been co-ordinated by Jade Glenister with the managerial oversight of Joanna Whiteman and Jim Fitzgerald, Co-Directors at the Trust. The Trust was greatly assisted throughout the project and in the production of the report by its in-country partner, the Russian LGBT Network. The Trust wishes to extend its particular thanks to Maria Kozlovskaya, Senior Lawyer and Project Manager at the Russian LGBT Network, who co-ordinated the work in Russia with oversight from Igor Kochetkov, Chairperson of the Network. We would also like to thank all of the lawyers and activists who we have worked with over the course of the project, whose insights and comments have greatly helped us to understand the situation faced by the LGBT community.

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This report has been produced with the financial assistance of the European Union. The contents of the report are the sole responsibility of the Equal Rights Trust and can in no circumstances be regarded as reflecting the position of the European Union. The Trust wishes to extend its sincere thanks to the staff at the European Union who have supported our work.

Acronyms

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CMCE	Committee of Ministers of the Council of Europe
CPRD	Convention on the Rights of Persons with Disabilities
CRC	Convention on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FCPA	Federal Consumer Protection Authority
FMS	Federal Migration Service
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
HIV	Human Immunodeficiency Virus
HCHR	High Commissioner for Human Rights
HRC	Human Rights Committee
ICD	International Classification of Diseases
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
ILO	International Labour Organization
LGBT	Lesbian, gay, bisexual and transgender
LGBT+	Lesbian, gay, bisexual and transgender and persons of all other sexualities and genders, such as those who are intersex or asexual
NGO	Non-governmental organisation
ORR	Oktyabrskaya Railroad Company
RSFSR	Russian Soviet Federative Socialist Republic
UN	United Nations
USSR	Union of Soviet Social Republics

Executive Summary

This report examines the jurisprudence of the Russian courts in cases relating to the Russian lesbian, gay, bisexual and transgender (LGBT) community. It finds that courts have recognised that people are protected from discrimination on grounds of their sexual orientation. Further, in a number of cases, courts have upheld the rights of the LGBT individuals. These cases indicate that the judiciary has the potential to be effective in holding discriminators accountable, even within the confines of Russia's non-comprehensive legal framework for protection from discrimination. However, the majority of cases paint a much bleaker picture. In these cases, the facts indicate the shocking extent of the discrimination faced by the LGBT community in Russia and the judgments, which fail to properly apply international and regional human rights law, signal judicial sanctioning of this discrimination. There remains significant work to be done for the courts to ensure that LGBT individuals have access to justice for discriminatory violations of their rights.

The report has been published as one aspect of three years of work by the Equal Rights Trust in Russia, carried out in partnership with the Russian LGBT Network. It comes at a particularly crucial time for the LGBT community in Russia and globally. While some countries have seen significant advances made in recent years, such as allowing same-sex marriage, Russia is among the countries which appear to be heading in the other direction, legislating to curtail the rights of LGBT people. In such environments, the courts have a particularly crucial role to play. However, they cannot act alone. The report therefore also calls on Russia's legislating authorities, and regional and international human rights bodies to act decisively. It identifies a particular need to put an end to "justifications" for discrimination which allow the homophobic views of a majority to restrict the rights of the LGBT minority by debunking the myth that restricting LGBT freedom is necessary to protect public morals, traditional family values, religious beliefs and children's best interests.

Part 1: Introduction

Discrimination against the LGBT community in Russia is widespread and severe, including by the authorities. This report therefore seeks to examine the ability of the LGBT community to obtain justice through the court system when faced with discrimination. It provides a critical examination of the approach of Russian courts to cases involving discrimination and inequality experienced by sexual and gender minorities, taking as its conceptual framework the unified human rights framework on equality, as expressed in the Declaration of

Principles on Equality.[1] The unified framework emphasises the central role of equality in the enjoyment of all human rights.

The research into Russian jurisprudence was undertaken by a Russian lawyer with expertise in discrimination law. As is outlined in Part 1.3, the approach taken to the research was a broad one which sought to identify cases relating to all sexual and gender minorities. However, it quickly became apparent that the majority of cases related to lesbian, gay and bisexual individuals, with a small number of cases relating to transgender individuals, and this is why the report focuses on LGBT individuals. The report was validated by a number of Russian lawyers and LGBT activists in two phases: through a roundtable discussion of the first draft of the report with some follow-up written feedback; and through seeking editorial comments on the second draft which was produced following the roundtable.

In Parts 1.4 and 1.5, the report provides a brief background to the transition to democracy and the division of power in Russia, noting that the adoption of the Constitution of the Russian Federation (Federal Constitution) on 12 December 1993 represented a significant advance for the protection of human rights in Russia. However, the turn of the century has seen Russia move towards becoming an authoritarian state and seen increasing levels of discrimination against the LGBT community. In particular, at the governmental level, a number of discriminatory laws have been introduced. In addition to the well-known "anti-propaganda" laws, which prohibit the dissemination of information about LGBT relationships to minors, the Family Code of the Russian Federation has been amended to prohibit adoption or guardianship of children in Russia by persons who have entered into a same-sex union in a foreign state or unmarried persons who are nationals of states where same-sex unions are recognised.

In Part 1.6, the report provides an overview of the court structure and system of precedent in Russia, in which only decisions of the Constitutional Court are binding. The process for appointing judges is also explained, noting that the President of Russia has the final decision on the appointment of all federal judges and that the independence of the judiciary is undermined by dominance of the administrative branch and lack of transparency in the appointment of judges.

Part 1.7 sets out the legal framework. Although Russia does not have a comprehensive anti-discrimination law, Article 19 of the Federal Constitution provides for a right to equality and the Russian legal framework contains a number of general prohibitions of discrimination, including in the Criminal Code of the Russian Federation, the Code of Administrative Offences and the Labour Code. The Constitutional Court of the Russian Federation has confirmed that a number

1 In 2008, in a process facilitated by the Equal Rights Trust, 128 human rights and equality experts from 47 countries in different regions of the world consulted and agreed on a set of principles of equality: the Declaration of Principles on Equality. The Declaration promotes a unified approach to equality and non-discrimination and its principles are "based on concepts and jurisprudence developed in international, regional and national contexts". The Equal Rights Trust, *Declaration of Principles on Equality*, London, 2008, page 2.

of these provisions provide protection for discrimination on the basis that sexual orientation falls within the notion of a "social group" or "other circumstance". Arguably, the provisions could also be read as providing protection on the basis of gender identity, but this has not been explicitly recognised by courts.

Part 2: Addressing Discrimination against LGBT Persons in Courts: Judicial Practice

The second part of the report analyses the decisions of Russian courts in cases involving discrimination against LGBT individuals. It covers discrimination in six different areas: hate-motivated violence against LGBT persons; hate speech against LGBT persons; violations of the rights to freedom of expression and assembly of LGBT persons; restrictions on the right to freedom of association of LGBT organisations; family and private life; and the right to work and education.

As discussed in Part 2.1, in line with international and regional human rights standards which require any discriminatory motivation for a crime to be investigated and to constitute an aggravating factor in sentencing, Russia's Criminal Code provides for aggravated punishment for crimes committed with "enmity with respect to some social group." The Constitutional Court has confirmed that a social group includes sexual orientation. However, despite this, the courts are largely failing to recognise or acknowledge homophobic hatred as an aggravating factor in the commission of crimes. Similarly, as discussed in Part 2.2, while hate speech is prohibited in the Criminal Code, courts have repeatedly failed to find a violation of the latter provision when faced with hate speech directed at the LGBT community, including in respect of highly offensive comments. The failure of the courts to recognise instances of hate speech and homophobic violence sends a message that such speech and violence will be tolerated in Russia.

By far the most egregious decisions of the courts have come in their repeated sanctioning of violations of the rights to freedom of assembly, association and expression of the LGBT community in Russia. Parts 2.3 and 2.4 of the report discuss the failure of the courts to check blatantly discriminatory "anti-propaganda" laws, which are repeatedly used to prohibit speech and public marches advocating for LGBT rights. The approach of the Constitutional Court in upholding the federal anti-propaganda law is indicative of the failure of the courts to apply international and regional human rights standards on the right to non-discrimination. The Court, although noting that the Federal Constitution prohibited discrimination on the basis of sexual orientation, held that the law was not discriminatory, explaining that it was justified due to the need to protect children in line with traditional views. The courts have also been prepared to order the closing down of a peer-to-peer support network for LGBT teens, Children-404, on the basis that statements such as "I am proud to be gay" and "those who dare to reproach me for daring to be different from the majority can go to hell", amounted to propaganda which must be prohibited in order to protect children. Courts have gone as far as labelling LGBT organisations advocating for tolerance as "extremist" and a threat to national security. The courts' failure to interpret

Russian law in line with international and regional human rights standards has allowed the authorities to continously narrow the space for public discussion of LGBT rights, and it is difficult to now see what space remains.

In relation to the rights to family and private life, Part 2.5 of the report concludes that the courts are again largely failing to protect these rights for the LGBT community. While there is limited jurisprudence in this area, the jurisprudence that was identified – which relates to recognition of same-sex relationships, parental rights of LGBT individuals and gender recognition – demonstrates that the approach of the courts is particularly inconsistent in these spheres. For example, while the rights to private life and to non-discrimination have been explicitly noted in cases relating to a change of legal gender, a failure to implement the consequences of such a change by providing a new employment record was sanctioned by a justice of the peace. This inconstancy makes it difficult for LGBT individuals to have any certainty about basic aspects of their everyday lives. In addition, and arguably more problematically, is the courts willingness to again rely on traditional values as a justification for interferences with the right to family and private life for LGBT individuals. For example, a court relied on an expert opinion that revealing a transgender parent's gender identity would cause her son to form a "distorted understand of traditional relationships between a man and a woman", to order that he be removed from her care.

The final section of the report, Part 2.6, considers the rights to work and to education, examining both positive and negative decisions. The inconsistency of the courts' approach is also particularly evident in this part of the report – similar fact scenarios in which an LGBT individual is denied a job when their prospective employer finds about their sexual orientation have been both criticised and sanctioned by the courts.

Part 3: Conclusions and Recommendations

Part 3.1 of the report concludes that the approach of the Russian courts denies access to justice to the LGBT community for violations of their rights, leaving them with uncertainty in matters affecting their everyday lives. Although there have been a number of positive judgements, courts in these cases often did not address allegations of discrimination in any meaningful way, with the result that there is almost no judicial discussion of discrimination against LGBT persons. Significantly more problematic is the approach of courts in the majority of cases involving the LGBT community, in which they fail to recognise clear cases of discrimination or at times, demonstrate the homophobic attitudes on their own bench. While not a primary aim of the research, the report also highlights the deficiencies in the legal framework, including a number of laws which are blatantly discriminatory against LGBT persons.

In light of these findings, Part 3.2 of the report makes a number of recommendations to the Russian Government, the international and regional community and also to Russian activists and lawyers advocating for LGBT rights. At the national

level, it recommends that the existing national legal framework be interpreted to ensure that prohibitions of discrimination include sexual orientation and gender identity as protected characteristics and that any justifications for differential treatment must be strictly necessary. It also calls on the Russian authorities to review the legal framework and repeal discriminatory laws, such as the "anti-propaganda" laws. A range of other measures are recommended to combat discrimination against the LGBT community, including the introduction of a comprehensive anti-discrimination law, judicial training and public education.

The recommendations call on the regional and international human rights community to take a firmer stance against discrimination against the LGBT community in Russia and also globally. The rights to equality and non-discrimination interpreted properly do not allow for the LGBT community to be afforded what is often considered "different but equal" treatment, particularly in the sphere of family and private life. Justifications of differential treatment based on traditional values and public morals can never be based on the views of the majority alone. The recommendations welcome the appointment of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity and call for this mandate to be fully supported by other UN bodies.

Finally, the report makes a series of recommendations which aim to provide guidance to Russian lawyers and activists working with the LGBT community and taking cases before the Russian courts. It is hoped that this report will assist them as they continue to work to combat discrimination in a particularly difficult environment.

1. INTRODUCTION

Sexual and gender minorities in Russia have long faced discrimination in the enjoyment of their rights, and these violations are becoming increasingly egregious. Members of sexual and gender minorities face significant violence and increasing restrictions on their ability to advocate for equality, including through the denial of their rights to freedom of expression, association and assembly. They also face discrimination when seeking recognition of their right to a family life, and in seeking education and employment opportunities.[1]

This report explores the way in which Russian courts respond to these violations, discussing the approach of the courts to cases which involve discrimination against sexual and gender minorities in the enjoyment of their rights, and their approach to the right to non-discrimination itself. The focus on jurisprudence was adopted for two reasons. Firstly, the ability to seek and obtain redress for discrimination is a critical component of ensuring the right to non-discrimination and other human rights.[2] Secondly, we identified that there was a gap in this regard in Russia, with many members of civil society in Russia reporting that courts were not providing this redress, but with no comprehensive examination of court practice having been undertaken. The report therefore seeks to fill this gap.

1.1 Purpose and Structure of the Report

The purpose of this report is to critically examine the approach of Russian courts to cases involving discrimination and inequality experienced by sexual and gender minorities. The report provides a comprehensive analysis of the case law of Russian courts relating to discrimination based on sexual orientation and gender identity, highlighting decisions that may be both considered positive (in that they provide redress for discrimination) and negative (where no redress for discrimination is provided despite international and European human rights law requiring provision of such redress). As a result, the report identifies where the Russian judiciary is failing to uphold the rights to equality and non-discrimination in relation to sexual orientation and gender identity as they are understood to apply in international and European human rights law.

The report comprises three parts. **Part One** sets out the report's purpose and structure, the conceptual framework that has guided the work and the research

1 A brief overview is provided in Part 1.5.

2 The Equal Rights Trust, *Declaration of Principles on Equality*, London, 2008, Principles 18 and 22.

methodology, including a note on terminology. It also provides the contextual background to the jurisprudence which is the subject of the report. This contextual background consists of four parts: the historical and political context in which the report is set; a brief background on the discrimination faced by the lesbian, gay, bisexual and transgender (LGBT) community in Russia; an overview of the Russian judicial system, including the different types of courts in Russia and the way in which legal precedence operates; and the Russian legal framework aimed at protecting people from discrimination.

Part Two examines the judicial practice of Russian courts with regard to discrimination against LGBT persons. This Part is divided into a number of parts in accordance with the human rights issues identified in the cases discussed in this report. These parts are: the right to be free from inhuman or degrading treatment or punishment; freedom of expression, assembly and association; family and parental rights; and the rights to work and to education.

Part Three contains the report's conclusions and recommendations, based on the assessment of the courts' approach discussed in Part 2. In light of the number of discriminatory laws in place in Russia as well as the inadequacy of the courts' approach in LGBT cases, recommendations are also made in relation to both the legal framework and implementation mechanisms that should be in place to protect sexual and gender minorities from discrimination.

1.2 Conceptual Framework

This report takes as its conceptual framework the unified human rights perspective on equality, as expressed in the Declaration of Principles on Equality.[3] This framework emphasises the integral role of equality in the enjoyment of all human rights. It notes that full equality not only requires freedom from direct and indirect discrimination but also demands positive action and the reasonable accommodation of difference. In particular, the report aims to capture instances of both direct and indirect discrimination and also cases which involved discrimination against individuals perceived to be members of a sexual or gender minority or associated with such a minority.

1.3 Research Methodology, Limitations and Terminology

Part 1 of the report, which provides the contextual background, was developed through desk-based research of existing published resources. The parts on historical and political context and on discrimination against LGBT individuals

3 In 2008, in a process facilitated by the Equal Rights Trust, 128 human rights and equality experts from 47 countries in different regions of the world consulted and agreed on a set of principles of equality: the Declaration of Principles on Equality. The Declaration promotes a unified approach to equality and non-discrimination and its principles are "based on concepts and jurisprudence developed in international, regional and national contexts". *Ibid*., p. 2.

benefitted from comments made by the Russian LGBT Network during the validation process (described in more detail below). The parts on Russia's international and European legal obligations were primarily drawn from the United Nations treaty collection database[4] and ratification statistics published by the Council of Europe[5] respectively.

The main Part of the report, Part 2, presents the findings of a review of decisions of the Russian courts in relation to sexual and gender minorities since the adoption of the Constitution of the Russian Federation (Federal Constitution) on 12 December 1993. This point in time was chosen as the starting point for the research as it coincides with the adoption of the new Federal Constitution, which introduced the concept of an enforceable protection against discrimination in the Russian legal order.[6]

The report sought to take an inclusive approach by identifying cases involving all sexual orientations and gender identities. Thus from the outset, the research sought to identify cases relating to lesbian, gay, bisexual and transgender persons, and persons of all other sexualities and genders, such as those who are intersex or asexual (LGBT+), and took its definition of terms from those most widely accepted by the LGBT+ community, including those advocating for equal rights for LGBT+ individuals. However, it became apparent from the commencement of the research that the majority of cases related to lesbian, gay and bisexual individuals, with a smaller number of cases in the spheres of family and private life relating to transgender individuals. Thus the report uses the acronym LGBT to refer to its findings, but notes that there may be cases which are also relevant to LGBT+.

The following terms are used:

Bisexual refers to a person who is emotionally and/or sexually attracted to persons of more than one gender.[7]

Gay refers to men who are emotionally and/or sexually attracted to men. The term is often used to cover both men and women who are

4 United Nations, *United Nations Treaty Series Online Collection*, available at: https://treaties.un.org.

5 Council of Europe, "Statistics on signatures and ratifications: Russia", available at: http://www.coe.int/en/web/conventions/search-on-states/-/conventions/chartStats/RUS.

6 Article 123 of the 1936 Constitution of the Union of Soviet Socialist Republics (USSR) (the "Stalin" Constitution) declared equality before the law of all Soviet citizens regardless of their nationality and race in all spheres of life and Article 122 declared equality of women and men. Chapter 6 ("Soviet Citizenship. Equality of Citizens") of the 1977 Constitution of the USSR (the "Brezhnev" Constitution) established detailed guarantees of equality in Articles 33 to 38. Similar provisions were included in the Russian Soviet Federative Socialist Republic (RSFSR) Constitutions. However, these guarantees were not directly enforceable in courts during the Soviet rule.

7 ILGA-Europe, "ILGA-Europe Glossary", available at: http://old.ilga-europe.org/home/publications/glossary; and Stonewall, "Glossary of Terms", available at: http://www.stonewall.org.uk/help-advice/glossary-terms.

attracted to their own sex, but in this report is used only to refer to men to ensure clarity.[8]

Gender identity refers to a person's individual experience or sense of their own gender, whether female, male or something else. This may or may not correspond with the sex that the person was assigned at birth and includes a person's sense of their body and other expressions of gender such as dress, speech and mannerisms.[9]

Intersex refers to those people who are born with reproductive or sexual anatomy that does not fit typical binary notions of being male or female. An intersex person may have the biological attributes of both sexes or lack some of the biological attributes considered necessary to be defined as one or the other sex. The term does not include those who deliberately alter their own anatomical characteristics.[10]

Lesbian refers to women who are emotionally and/or sexually attracted to women.[11]

LGBT is the acronym for lesbian, gay, bisexual and transgender.[12]

LGBT+ is the acronym for LGBT and also includes all other sexualities and genders, such as those who are intersex or asexual.[13]

LGBTI is the acronym for lesbian, gay, bisexual, transgender and intersex persons.

Sexual orientation refers to "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender, the same gender, or more than one gender."[14]

8 Ibid. and GLAAD, "GLAAD Media Reference Guide – Terms to Avoid", available at: http://www.glaad.org/reference/offensive. While some sources note that gay is used in reference to both men and women and in accordance with their own identification, ILGA-Europe notes that gay should only be used in reference to men.

9 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2008; and see ILGA-Europe, above, note 7.

10 Organisation Internationale des Intersexués – Organization Intersex International, "What is intersex?", available at: http://oiiinternational.com/2533/welcome/; Intersex Society of North America, "What is intersex?", available at: http://www.isna.org/faq/what_is_intersex; and Gross, S., Intersex, Intersex South Africa, availa*b*le at: http://www.intersex.org.za/images/training_materials/Intersex_Booklet_HIVOS-DSD.pdf; and see ILGA-Europe, above, note 7.

11 See above, note 7.

12 *Ibid.*

13 See, for example, Pride in London, "Who we are", available at: http://prideinlondon.org/about-us/who-we-are; and MY LGBT PLUS, "Why the Plus?", available at: http://www.mylgbtplus.org/why-the-plus.

14 See Yogyakarta Principles, above, note 9. See also note 7; GLAAD, note 8; and Council of Europe, "SOGI Database: Glossary", available at: http://www.coe.int/en/web/sogidatabase/glossary.

Transgender is an umbrella term which describes persons whose gender identity or expression is not the same as that assigned to them at birth. "It includes those people who feel they have to, prefer to, or choose to, whether by clothing, accessories, mannerisms, speech patterns, cosmetics or body modification, present themselves differently from the expectations of the gender role assigned to them at birth."[15]

The report refers to *same-sex relationships* and *different-sex relationships* as a way to distinguish between the differing legal treatment of the two in Russia.[16] The terminology adopted in the Russian legal context is often outdated or offensive (such as use of the expression "non-traditional sexual relationships"), but has been used in the report to accurately reflect the way in which LGBT individuals and their lives are referred to in the Russian legal context. It should also be noted that at a number of points, the reports quotes homophobic or transphobic statements which are deeply offensive. The report reproduces these statements without amendment or censorship, in the interests of presenting an accurate picture of the experiences of the LGBT persons affected.

In order to try to identify as many cases as possible, cases were considered relevant when it was identified that: the case was brought by or on behalf of a self-identifying LGBT individual or activist; the facts of the case directly involved an LGBT individual or activist (for example, where a parent of a child was an LGBT individual in family proceedings); the case involved a regional or federal law that referred to sexual orientation, gender identity, "homosexuality" (or "homosexualism", which is the term used in the Russian context) or LGBT; the case involved examination of views espoused by one of the parties in relation to sexual orientation, gender identity, or LGBT (either positive or negative); and cases where the court discussed sexual orientation, gender identity, "homosexuality" (or "homosexualism") or LGBT. Cases which referred to discrimination more broadly (i.e. that did not have one of the previously mentioned links to sexual orientation or gender identity) were not included unless they provided an analogous example or were considered a leading case on discrimination (such as the cases from the higher Russian courts, the Constitutional Court and the Supreme Court).

The report aimed to capture cases under each of the following categories:

i. restrictions on human rights and liberties on the basis of sexual orientation or gender identity;
ii. failure to provide reasonable accommodation to LGBT+ individuals;
iii. hate-motivated crimes or other offences against LGBT+ individuals; and
iv. prosecution on the basis of sexual orientation or gender identity, or on the basis of ideas advocated about sexual orientation or gender identity.

15 See above, note 9, Council of Europe; ILGA-Europe; and Stonewall.

16 See GLAAD, above, note 8.

In many of the cases identified, discrimination arguments were not explicitly advanced as a basis for the claims or defences. However, where an individual or a legal entity suffered a particular disadvantage because of his or her sexual orientation or gender identity, or because of the nature of ideas about sexual orientation or gender identity he or she wanted to advocate, such cases were included because the central issue was a difference in treatment based on sexual orientation or gender identity. The failure by a judge to address an obvious case of *prima facie* discrimination against an LGBT person is, in this regard, considered as an example of negative case law. The research did not identify any cases relating to the need to take positive action measures in respect of disadvantage faced on the basis of sexual orientation or gender identity.

A range of sources were used to identify and obtain cases which met the criteria of relevance noted above. Russian courts are required by law to publish their decisions on their websites. However, in practice, the accuracy of this information is inadequate and there is no ability to search for decisions on the websites by the use of key terms. There is also no comprehensive database of all jurisprudence of the Russian courts. In light of these limitations, cases were located in a number of different ways. Relevant cases were searched for in legal databases maintained by commercial providers (for which a fee is payable for use) such as Consultant Plus, Garant, and Kodeks, and legal databases for which no fee is payable for use such as Rospravosudie.com. A wide range of search terms were used to identify cases in these databases, including "discrimination", "homophobia", "homosexual" (and variations such as "homosexuality" and "homosexualism"), "sexual orientation", "gender identity", "gay", "transgender" and "lesbian". A number of different databases were used in order to compensate for limitations in either coverage (not all databases are comprehensive) or quality of the database (some databases are not accurate in their descriptions of cases). In addition, individual lawyers provided information about cases that they had been involved in or were aware of, such that these cases could then be located on the websites of individual courts. In a few instances, the lawyers provided copies of the decisions. Similarly, studies of Russian human rights organisations and activist groups, such as Moscow Helsinki Group, the Russian LGBT Network, Human Rights Resource Center and Coming Out (St. Petersburg) were reviewed in order to identify cases that were then located on the website of the relevant court.[17] In a few instances, summaries of domestic decisions made by regional and international human rights bodies have formed the basis for an explanation of the domestic proceedings; where this has occurred, this is clearly indicated in the footnotes by reference to the relevant body.

A first draft of the report (in both English and Russian) was sent to a number of Russian legal experts and LGBT advocates, and then discussed during a one-day roundtable held in Russia in December 2015. The feedback from this roundtable, and additional comments made following the roundtable, were incorporated into the second draft of the report. Further comments were then sought on the second draft of the report throughout July and August 2016, with three experts

17 Upon request, the Equal Rights Trust may provide cases that cannot be found through publicly available sources.

on Russian law and jurisprudence providing comments that were incorporated into the final draft.

Although every effort has been made to identify all relevant jurisprudence since the adoption of the Federal Constitution at the end of 1993, given the limitations noted above, it is inevitable that some cases will have not have been identified and included. In addition, while courts are generally required to publish their decisions, there are a number of situations in which courts are prohibited from publishing decisions due to the nature of the information they discuss (for example, cases involving personal information such as adoption records or medical information). Finally, parties to a case may request that the court does not publish a decision where sensitive personal information would be revealed. In total, around 1,000 cases were reviewed, of which approximately 200 were considered to meet our criteria and thus considered to be related to discrimination against LGBT persons.

1.4 Historical and Political Context

In order to understand the discrimination faced by LGBT individuals in Russia today, and also the approach of the Russian judiciary to cases involving discrimination, an understanding of the political context in Russia is required. This Part therefore provides a brief background to the transition to democracy and the division of power in Russia.

Until the dissolution of the Soviet Union, Russia existed as the Russian Soviet Federative Socialist Republic (RSFSR).[18] The RSFSR was established in 1917 as a sovereign State after the October Revolution and the end of the Russian Empire.[19] In 1922, the RSFSR signed a treaty with three other soviet republics, which established the Union of Soviet Socialist Republics (USSR), a sovereign State.[20] The RSFSR was therefore a federation within the federation. Although each of the fifteen republics which eventually made up the USSR were formally known as sovereign states, the USSR acted as a single sovereign federative State in international relations and became one of the superpowers which established the United Nations in 1945.[21] The sovereignty of soviet republics within the USSR (as well as republics within the RSFSR) was therefore a mere declaration; in reality the government was highly centralised.[22]

18 The name "RSFSR" came into existence in 1918 to refer to "Russia Socialist Federative Soviet Republic". Following the adoption of the Constitution of the USSR in 1936, the name was changed to "Russia Soviet Federative Socialist Republic" but the acronym remained the same.

19 *Resolution of the Provisional Government on declaring Russia a Republic*, 1 September 1917 (Постановление Временного правительства о провозглашении России республикой, от 1 сентября 1917 года). After the October 1917 revolution the unofficial name of the State became "Soviet Russia".

20 The treaty establishing the USSR was signed by the RSFRS, the Ukrainian Socialist Soviet Republic, the Belorussian Socialist Soviet Republic and the Zakavkazskaya Socialist Federative Soviet Republic.

21 However, due to the desire of the USSR to have more socialist states in the United Nations, the Belorussian and Ukrainian Soviet Socialist Republics became two of the states that founded the United Nations in 1945 and formally remained members.

22 Although the 1936 and 1977 Constitutions of the USSR described the republics as "sovereign" states, all key political and legislative powers were reserved to the USSR.

Modern Russia, or the Russian Federation as it is officially known, came into existence when the USSR was dissolved in 1991, following the secession of the Baltic States (Estonia, Lithuania and Latvia), which at that time were three of the 15 republics of the USSR.[23] The decision to dissolve the USSR was formally enacted on 26 December 1991 by the Supreme Council of the Soviet Union and eventually endorsed by the remaining 12 republics following the conclusion of the Belovezha Accords by the Russian, Ukrainian and Belarusian presidents on 8 December 1991.[24] The newly independent Russian Federation declared its continuity as the successor of the USSR in international relations, a declaration which was accepted by other states.[25] This allowed the Russian Federation to retain the seat previously held by the USSR as a permanent member of the UN Security Council.[26]

In 1993, a new Federal Constitution was enacted by referendum.[27] Under the Federal Constitution, Russia became a semi-presidential republic. The President is the key political figure although he or she does not formally belong to any of the State institutions.[28] The federal bicameral parliament consists of the State Duma (the lower house) and the Council of the Federation (the upper house). Members of the Duma (parliamentarians) are elected by the public, whereas members of the Council of the Federation (senators) are appointed by regional legislative and executive bodies (there are two representatives from each region), and by the President (who can appoint a number no more than 10% of the total number of the representatives appointed by the regions).[29]

As a federation, Russia consists of 85 constituent entities – subjects of the federation. The generic term, constituent entities, is used because there are six different types of entities: 22 republics, nine provinces, 46 oblasts, three federal cities, one autonomous oblast, and four autonomous provinces.[30] Despite their different names, all territorial entities (sometimes unofficially referred to as "regions") have equal powers in their relationship with the Federation. Nevertheless, national entities (republics) have certain symbolic privileges, such as

23 The independence of the Baltic states was recognised by the USSR in 1991.

24 *Treaty Establishing the Commonwealth of the Independent States*, 8 December 1991 (Соглашение об образовании Содружества Независимых Государств, от 8 декабря 1991 года).

25 Note verbale by the Ministry of Foreign Affairs of the Russian Federation dated 13 January 1992, transmitting the letter of the Russian President of 24 December 1991 (Нота Министерства иностранных дел Российской Федарации от 13 января 1992 года).

26 Letter of the Russian President of 24 December 1991 (Письмо Президента Российской Федерации от 24 декабря 1991 года). The notice of 24 December 1991 was acknowledged by the UN Secretary General and received no objections by other States.

27 Constitution of the Russian Federation, enacted by popular vote on 12 December 1993 (Federal Constitution) (Конституция Российской Федерации, принята всенародным голосованием 12 декабря 1993 года).

28 *Ibid.*, Article 83.

29 Federal Law, "On the Procedure of Forming of the Federation Council of the Federal Assembly of the Russian Federation", 3 December 2012, No. 229-FZ (Федеральный закон от 3 декабря 2012 года № 229-ФЗ "О порядке формирования Совета Федерации Федерального Собрания Российской Федерации").

30 See above, note 27, Article 65.

the right to have their own constitutions and national languages.[31] Following the annexation of the Crimean Peninsula by Russia, the status of this territory continues to be contested. However, Russia considers the Republic of Crimea and Sevastopol to be the 84th and the 85th subjects of the Russian Federation.[32]

The Federal Constitution was a major step forward in terms of advancing human rights, declaring for the first time that:

> *Man, his rights and freedoms shall be the supreme value. It shall be a duty of the state to recognise, respect and protect the rights and liberties of man and citizen.*[33]

Article 18 goes on to state that:

> *The rights and liberties of man and citizen shall have direct effect. They shall determine the meaning, content and application of the laws, and the activities of the legislative and executive branches and local self-government, and shall be secured by the judiciary.*

In addition, the Federal Constitution provides for supremacy of international treaties over domestic law (a point discussed in further detail in Part 1.7.5):

> *The commonly recognised principles and norms of international law and the international treaties of the Russian Federation shall be a component part of its legal system. If an international treaty of the Russian Federation stipulates other rules than those stipulated by the law, the rules of the international treaty shall apply.*[34]

The Federal Constitution also established the Constitutional Court, which is vested with the power to accept individual petitions against unconstitutional laws, thus introducing the notion of constitutional control over the legislature.[35]

31 *Ibid*., Article 66.

32 Federal Constitutional Law of 21 March 2014, No. 6-FKZ, on admission to the Russian Federation of the Republic of Crimea and the formation within the Russian Federation of new entities – the Republic of Crimea and the federal city of Sevastopol (Федеральный конституционный закон от 21.03.2014 № 6-ФКЗ (ред. от 29.12.2015) "О принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов – Республики Крым и города федерального значения Севастополя"). Given that, as a matter of Russian law, the Republic of Crimea and Sevastopol are subjects of the federation, this report treats them as such. However, the Equal Rights Trust notes that the annexation of these territories has been condemned by a United Nations General Assembly Resolution (United Nations General Assembly, Resolution No. 28/262, *Territorial Integrity of Ukraine,* UN Doc. A/RES/68/262, 1 April 2014) and that the vast majority of states do not recognise the territories as federal subjects of the Russian Federation. As such, the Equal Rights Trust considers these territories of Ukraine in all respects. The inclusion of these territories as federal subjects in this report in no way constitutes an endorsement of the Russian Federation's claims to sovereignty.

33 See above, note 27, Article 2. There is no official English translation of the Federal Constitution. This report has used the translation available on the website of the Supreme Court, available at: http://www.supcourt.ru/catalog.php?c1=English&c2=Documents&c3=&id=6806.

34 *Ibid.,* Article 15(4).

35 *Ibid*., Article 125.

Despite this progress, the Soviet legacy has greatly influenced, and even dominate, the legal regime in many spheres, including the judiciary. The President of the Supreme Court of the Russian Federation, Vyacheslav Lebedev, has been in office since 1989 when he became the President of the former Supreme Court of the USSR. Unlike in the Baltic States, no measures were taken in Russia to hold judges accountable for their part in human rights violations taking place under Soviet rule.[36]

Since 2000, many decisions of the Constitutional Court have endorsed a gradual but stark transformation of Russia from a democracy to an authoritarian state. The notion of constitutional control of the legislature has lost its original meaning as the Constitutional Court repeatedly refuses to criticise manifestly unconstitutional laws adopted by the Federal Parliament.[37] In 2013, the Federal Constitution was amended to abolish the Supreme Commercial Court, which had, until then, been regarded as the only truly independent judicial branch.[38]

The broad and increasing powers of the president are also of concern. The president determines Russia's internal and external politics. While formally this determination must be done on the basis of federal laws, the reality is that federal laws are adapted to the president's decisions, be they formal or informal.[39] The president appoints the prime minister with the consent of the parliament and appoints all ministers. The key ministers report directly to the president and not to the prime minister, including the ministers for defence, foreign affairs and the interior.[40] *De facto* presidential powers are even broader, and the Presidential Administration is viewed by many as the real government.[41] The Federal Constitution was amended in 2008 to extend the term of office of the president from four to six years. Taken together with a previous ruling of the Constitutional Court endorsing the re-election of a president who has already served two consecutive terms, this change has significantly curtailed the democratic achievements of the early 1990s.[42]

36 The convictions for anti-Soviet activities were overturned throughout the 1990s and 2000s due to the lack of *actus reus*.

37 See, for example, Judgment of the Constitutional Court of Russia, 8 April 2014, No. 10-P, regarding the "foreign agents" law (Постановление Конституционного Суда Российской Федерации от 8 апреля 2014 года № 8-П); and Judgment of the Constitutional Court of Russia, 23 September 2014, No. 24-P, regarding the "propaganda of non-traditional sexual relations" (Постановление Конституционного Суда Российской Федерации от 23 сентября 2014 года № 24-П).

38 Law of the Russian Federation, 5 February 2014, No. 2-FKZ, amending the Federal Constitution (Закон Российской Федерации от 5 февраля 2014 года "О поправке к Конституции Российской Федерации").

39 See Volkov, A.M. and Lyutyagina E.A, "On the role and the place of the Administration of the President of the Russian Federation", *Administrative Law and Procedure*, Vol. 3, 2012, pp. 34-39 (Волков А.М., Лютягина Е.А. К вопросу о роли и месте Администрации Президента Российской Федерации // Административное право и процесс. - М.: Юрист, 2012, № 3. - С. 34–39).

40 In accordance with the Decree of the President of Russia of 12 May 2008, No. 724, the Ministry of Defence, Ministry of Internal Affairs, Ministry of Foreign Affairs, Ministry of Justice, Federal Security Services and some other "power" agencies directly report to the President (Указ Президента Российской Федерации от 12 мая 2008 года № 724).

41 See Zuikov, A.V. "Administration of the President of the Russian Federation: Yesterday, Today and Tomorrow", *Constitutional and Municipal Law*, Vol. 8, 2009, pp. 21–29 (Зуйков А.В. Администрация Президента Российской Федерации: вчера, сегодня, завтра // Конституционное и муниципальное право. - М.: Юрист, 2009, № 8. - С. 21–29).

42 Law of the Russian Federation, 30 December 2008, No. 6-FKZ, amending the Federal Constitution (Закон Российской Федерации от 30 декабря 2008 года "О поправке к Конституции Российской

Of particular relevance to this report, recent years have seen the adoption of increasingly authoritarian laws and policies, virtually outlawing any foreign connections with civil society and limiting the promotion of human rights values.[43]

The Russian Orthodox Church, persecuted during Soviet times, has become a close ally of the State in promoting the alienation of Russia from the "intrusive" influence of the West, seen as "detrimental" to Russian mentality and political independence.[44] Church leaders have been vocal in supporting nationalist rhetoric and anti-LGBT initiatives.[45] The discrimination faced by the LGBT community, including recent legislative changes, will be discussed in the next section of the report.

1.5 Discrimination against LGBT Persons in Russia

The first time Russian law contained provisions which discriminated against LGBT individuals was during Peter the Great's rule of the Russian Empire when, in 1716, he enacted a ban on sodomy (men having penetrative sex with men) in the army.[46] In 1832, Nicholas I outlawed sodomy altogether: persons convicted were to be stripped of their rights and relocated to Siberia for between four and five years.[47] These Tsarist laws were repealed following the October Revolution in 1917.[48] However, this did not mean that the authorities were indifferent towards same-sex relationships. Although such relationships were tolerated, it

Федерации"). See, "Russia Analysis of Foreign Office: 'An authoritarian state in almost every respect'" ("Russland-Analyse des Auswärtiges Amtes: 'Ein fast in jeder Hinsicht autoritärer Staat'"), *Der Spiegel*, 21 September 2014, available at: http://www.spiegel.de/politik/ausland/russland-unter-putin-auswaertiges-amt-spricht-von-autoritaerem-staat-a-992768.html; Zimmerman, W., *Ruling Russia: Authoritarianism from the Revolution to Putin*, Princeton University Press, 2014, p. 220.

43 These include the "foreign agents" law, Federal Law, 20 July 2012, No. 121-FZ, amending the Law on Non-Commercial Organisations and the Code of Administrative Offences (Федеральный закон от 20 июля 2012 года № 121-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации в части регулирования деятельности некоммерческих организаций, выполняющих функции иностранного агента"), and the law on "undesirable organisations", Federal Law of 23 May 2015, No. 129-FZ, amending the Criminal Code and other laws (Федеральный закон от 23 мая 2015 года № 129-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации").

44 Tincq, H., "Cyril, the religious arm of the nationalism of Putin" ("Cyrille, le bras religieux du nationalisme de Poutine"), *Slate.fr*, 8 December 2014, available at: http://www.slate.fr/story/95027/cyrille-patriarche-poutine.

45 See *The Principles of the Social Concept of the Russian Orthodox Church*, adopted in 2000 by the Bishops' Council of the Russian Orthodox Church, available at: http://www.patriarchia.ru/db/text/141422.html ("Основы социальной конепции Русской Православной Церкви", приняты Освященным Архиерейским Собором Русской Православной Церкви). The Principles denounced the attempts to "normalise homosexuality", which is considered "sinful" and "perversive".

46 Military Regulations of Tsar Peter I, "On the Sodomy Sin, on Violence and Fornication" ("О содомском грехе, о насилии и блуде") in Kon, I.S., *Faces and Masks of Same-Sex Love*, 2003 (Кон И.С. Лики *и* маски однополой любви, 2003).

47 *Ibid.,* Kon, I.S.

48 *Ibid*.

was a topic that came under strict censorship and a person attracted to someone of their own sex was seen as having a disorder.[49]

During Stalin's rule, Article 154-a was added to the Criminal Code of the RSFSR of 1926, prohibiting sexual intercourse between men, with up to five years of hard labour in prison as punishment.[50] Article 154 became Article 121 in the new Criminal Code of the RSFSR of 1960. There was no prohibition on sexual acts between women. There is no accurate data on the number of persons convicted under Article 121 but it has been reported that there were thousands, if not more.[51] Some historians have noted that it was during this time that Soviet propaganda began to depict being gay as a sign of fascism, and that Article 121 may have been a political tool which played upon public prejudice against sexual minorities and was used against dissidents, irrespective of their true sexual orientation, as well as to solidify Russian opposition to Nazi Germany.[52]

It was not until 27 May 1993 that Article 121 was repealed under then-President Yeltsin's rule.[53] In 1999, Russia endorsed the 1990 International Classification of Diseases (ICD-10).[54] This formally removed "homosexuality" from the list of mental disorders. Despite this fact, many psychiatrists and other professionals in Russia continued to label being gay as a mental disorder.[55]

In recent years, several legislative initiatives to outlaw same-sex relationships have been rejected by the State Duma.[56] One of the recent initiatives was a bill which proposed to punish (by imposing a fine) "public expression of unconventional sexual relationships", which was defined as "a pub-

49 Sereisky, M., *Great Soviet Encyclopedia*, 1930, p. 593 (Серейский М.А. Гомосексуализм // Большая Советская Энциклопедия, 1930, с. 593). See also Healey, D., *Russia: An Encyclopedia of Gay, Lesbian, Bisexual, Transgender, and Queer Culture*, available at: http://www.glbtqarchive.com/ssh/russia_S.pdf.

50 Decision of the All-Russian Central Executive Committee, 17 December 1933 (Решение Всероссийского центрального исполнительного комитета от 17 декабря 1933 года).

51 Gessen, M., *The rights of lesbians and gay men in the Russian Federation: An International Gay and Lesbian Human Rights Commission report,* International Gay and Lesbian Human Rights Commission, 1994.

52 Tolts, V. "Red on the 'Blue'. Soviet Power against Homosexuals", 10 March 2002, available at: http://www.svoboda.org/content/transcript/24204207.html (Владимир Тольц. "Красным" по "голубому". – Советская власть против гомосексуалистов).

53 Law of the Russian Federation "On Amending the RSFSR Criminal Code, the RSFSR Code of the Criminal Procedure and the RSFSR Penitentiary Code" 29 April 1993, No. 4901-1 which entered into force on 27 May 1993 (Закон Российской Федерации от 29 Апреля 1993 года № 4901-1 "О внесении изменений и дополнений в Уголовный кодекс РСФСР, Уголовно-процессуальный кодекс РСФСР и Исправительно-трудовой кодекс РСФСР").

54 Order of the Health Ministry of Russia "On Adopting by the health care organisations of the Russian Federation health facilities of the International Statistical Classification of Diseases and Related Health Problems, 10th revision" of 27 May 1997, No. 170 (Приказ Минздрава России от 27 мая 1997 года № 170 "О переходе органов и учреждений здравоохранения Российской Федерации на Международную статистическую классификацию болезней и проблем, связанных со здоровьем X пересмотра").

55 Kochatyan, G.S., "Normalisation of Homosexualism as Medical and Social Problem", *Independent Psychiatric Journal*, Vol. 4, 2006, available at: http://npar.ru/journal/2006/4/homosexuality.htm (Г.С. Кочарян Нормализация гомосексуализма как медико-социальная проблема).

56 A draft law which proposed re-criminalising "homosexual relations" was rejected in 2004, although it received 58 votes in favour.

lic demonstration of their distorted sexual preferences in public places".[57] The explanatory study to the bill states that "scientific" studies confirm that the "homosexual movement always tries to support paedophilia", without citing any such studies.[58]

In 2006, so-called "propaganda of homosexuality" was outlawed in some regions. This was followed by a ban at the federal level in 2013. The ban on "propaganda of homosexuality" has been characterised as the effective re-criminalisation of same-sex relationships. The adoption of these laws has contributed to a recent rise in stigmatisation of LGBT people in Russia. The actions of LGBT activists are routinely prohibited on the basis of these laws, and many advocacy organisations have had to restrict their activities, fearing prosecution.[59]

Studies by two leading LGBT advocacy groups in Russia, the Russian LGBT Network and Coming Out, provide detailed information on the systematic discrimination faced by the LGBT community in Russia, including hate crimes and violence, hate speech by state officials, the failure of the police to investigate hate crimes, the prosecution of LGBT activists and restrictions on their freedom of speech, association and ability to hold public assemblies.[60]

In August and September 2015, the Russian LGBT Network carried out a survey relating to discrimination and violence, including a set of questions focused on interaction with law enforcement agencies. The survey was completed by 1,346 respondents and covered the experiences of respondents in the previous year. Less than 6% of the respondents (76 people out of 1,346) in the period from October 2014 to August 2015 made a complaint to law enforcement authorities when faced with discrimination and violence. Seventeen percent of respondents reported that they had experienced physical violence, with 5% reporting that they had experienced sexual violence. Thirty-two percent of the respondents reported discrimination in the workplace and workplace harassment. Theft and destruction of property was reported by 12% of the respondents. Nine percent of respondents stated that they faced restricted access to goods and services and 8% that they experienced restricted access to health care. A violation of parental rights was alleged to have occurred in 3% of cases. Twenty-one percent of respondents stated their personal data had been used illegally. Respondents reported varying treatment by the police when they sought to make a complaint. Investigations were said to have been carried out

57 Draft Law "On Amending the Code of Administrative Offences of the Russian Federation" 29 October 2015, No. 916716-6 (Законопроект от 29 октября 2015 года №. 916716-6 "О внесении изменений в Кодекс Российской Федерации об административных правонарушениях").

58 *Ibid*., Explanatory Note.

59 See below, Part 2.5.4.

60 See, for example, Coming Out, *Report on Monitoring Cases of Discrimination and Violence Based on Sexual Orientation and Gender Identity in St. Petersburg in 2014*, 2014, p. 25, available at: http://comingoutspb.com/publikatsii/prava-cheloveka/ (Доклад по мониторингу случаев дискриминации и насилия по признакам сексуальной ориентации и гендерной идентичности в Санкт-Петербурге за 2014 год); and Russian LGBT Network, *Hate crimes motivated by victim's gender identity or sexual orientation committed in Russian Federation in 2014*, 2014, available at: http://www.lgbtnet.org/en/reptseng.

in only eight cases (just over 10% of the 76 complaints to law enforcement agencies). In 19 cases, the police made a record of the complaint, but the complainant did not know anything about the further course of the investigation. In 26 cases, the complaint was accepted by the police, but the complainant reported being scoffed or laughed at, insulted or harassed. In only 12 cases, the complainant's police statement was taken.[61]

There has been no official acknowledgement of discrimination against LGBT persons or of the need to adopt measures to combat hate crimes at the federal level. Former Russian Ombudsman Vladimir Lukin publicly supported the concerns of LGBT activists in relation to violations of LGBT individuals' human rights, although the support was limited to acknowledging the importance of the activists' work.[62] Ella Pamfilova, who became the federal human rights Ombudsperson in 2014 and was in office until March 2016, did not publicly express support for the rights of LGBT individuals in Russia. On the contrary, on a number of occasions, she has stated that she is unaware of any discrimination against LGBT persons in Russia as no complaints have been lodged with her office, and has instead simply stated that "discrimination based on sexual orientation is prohibited in Russia".[63] She criticised same-sex marriage[64] and in her 2014 report referred to the rights of LGBT individuals as an "ambiguous" issue which faces "natural resistance" in countries with a "developed system of traditional values and a demographic policy aimed at increasing the birth rate".[65] Furthermore, Ms Pamfilova took a number of steps which could be seen as hostile to the rights of LGBT persons. For example, she supported the closure of the Children 404 Project, which was aimed at helping LGBT teenagers.[66]

The newly appointed Ombudsperson, Tatyana Moskalkova, has faced criticism for her lack of human rights experience.[67] In her role as Ombudsperson, she has not yet commented on LGBT rights in Russia, although her office invited the Russian LGBT Network to submit the Network's report on violence and

61 Russian LGBT Network, *Results of Quantitative Research*, December 2015. Access to this Russian language research database may be made available by the Equal Rights Trust on request.

62 Russian LGBT Network**, "**Russian Ombudsman made his first appearance in defense of LGBT-activists rights", 18 March 2011 (Российская ЛГБТ-Сеть. Россиский омбудсман впервые выступил в защиту прав ЛГБТ-активистов, 18 марта 2011 года).

63 High Commissioner for Human Rights in the Russian Federation, *Report 2014*, 2015, p. 23 (Уполномоченный по правам человека в Российской Федерации. Доклад за 2014 год, 2015, С. 23).

64 See "Business breakfast" with Ella Pamfilova, High Commissioner for Human Rights in the Russian Federation ("Деловой завтрак" с Эллой Памфиловой), *Rossiyskaya Gazeta*, 20 October 2014, available at: https://rg.ru/2014/10/20/pamfilova-dz.html.

65 See above, note 63.

66 Plyusnina, M., "Pamfilova comments on the situation with the shut down of the project for support of LGBT-teenagers", *Znak*, 15 April 2015, available at: https://www.znak.com/2015-04-15/ (Плюснина М. "Там все на грани фола". Памфилова прокомментировала ситуацию с блокировкой проекта помощи ЛГБТ-подросткам "Дети-404" // Знак, 15 Апреля 2015 года).

67 Nechepurenko, I., "Russia's New Human Rights Ombudsman Is Former Police General", *The New York Times,* 22 April 2016, available at: http://www.nytimes.com/2016/04/23/world/europe/russias-new-human-rights-ombudsman-is-former-police-general.html?_r=0.

discrimination because of sexual orientation and gender identity.[68] As a member of the State Duma, she criticised the Strasbourg judgment in *Alekseyev v Russia,*[69] stating that it was contrary to "the norms of morality and ethics (…) Russian cultural and religious traditions".[70] The situation at the regional level also offers little comfort. Among regional Ombudspersons, only the St. Petersburg Ombudsman has expressly acknowledged that discrimination on the basis of sexual orientation occurs and has issued recommendations to combat homophobic violence.[71]

Apart from medical standards in the sphere of HIV prevention, very few official documents refer to LGBT individuals in a neutral or unbiased way. The 2012 State Study on the Status of Youth, which took place in one of Russia's 22 republics, the Republic of Udmurtia, concluded that only 33.6% of the respondents to social studies in this region expressed a tolerant attitude towards "sexual minorities".[72]

1.6 Overview of the Russian Judicial System

There are four types of court proceedings identified in the Law "On the Judicial System of the Russian Federation" (Law on the Judicial System): constitutional; civil; administrative; and criminal.[73] In addition to the Law on the Judicial System, there are also separate procedural rules for commercial courts, and separate rules for proceedings in relation to administrative offences.[74] Proceedings relating to administrative offences must be distinguished from administrative proceedings; the latter involves cases challenging administrative decisions of various state bodies (for example, challenging denial of permission to hold a public assembly), and also special proceedings involving state powers (for example, involuntary placement in a medical facility). As of 15 September 2015,

68 Letter of Ms. O. Noyanova, Head of the International Relations Department, High Commissioner for Human Rights in the Russian Federation, 23 May 2016, No. 14794-52 (Письмо О. Нояновой, начальника отдела международных отношений аппарата Уполномоченного по правам человека в Российской Федерации от 23 мая 2016 года № 14794-52).

69 *Alekseyev v Russia*, Application No. 4916/07, 25924/08 and 14599/09, 21 October 2010.

70 Regions.ru, "Moscow should not cave in to Strasbourg (Opinions of MPs)", 10 November 2010, available at: http://regions.ru/news/2323218/ (Москва не должна прогибаться перед Страсбургом (мнения парламентариев)).

71 See above, note 63.

72 Decision of the Government of the Republic of Udmurtia of 25 June 2012, No. 523-r, on the State Report of the Status of Youth in the Republic of Udmurtia in 2011 (Распоряжение Правительства УР от 25.06.2012 N 523-р "О государственном докладе о положении молодежи в Удмуртской Республике в 2011 году").

73 Federal Constitutional Law, "On the Judicial System of the Russian Federation", 31 December 1996, No. 1-FKZ, Article 1(3) (Федеральный конституционный закон от 31 декабря 1996 года № 1-ФКЗ "О судебной системе Российской Федерации", пункт 3 статьи 1).

74 Administrative offences cover a broad range of violations and, unlike crimes, apply both to natural and legal persons. Although some administrative sanctions are quite harsh and may include up to 15 days of custody, they are distinguished from criminal offences on a formal basis – only those offences listed in the Criminal Code are regarded as crimes and lead to a criminal record.

administrative proceedings are governed by separate legislation, the Code on Administrative Proceedings.[75]

The Russian judicial system follows the federal structure of the State.[76] Each of the 85 regions recognised by Russia is divided into administrative districts and each district has its own district court.[77] Justices of the peace are appointed within each district by the regional authorities.[78] In every region there is also one higher court (in republics these are called supreme courts, in other regions these are called oblast courts or regional courts).[79] Both district and higher courts are formally considered to be federal courts; for example, the Supreme Court of the Republic of Karelia is a federal appeal court. The appointment of judges in these courts is done at a federal level and the courts follow federal procedural rules. Justices of the peace are formally considered part of the regional judicial system because although their jurisdiction is defined by federal laws and they act in the role of lower courts for district courts, they are appointed by regional legislative bodies and their budget is the responsibility of regional authorities.

The Russian judicial system includes:

i. courts of general jurisdiction (justices of the peace, district courts, courts of the constituent entities of the Federation). The highest court with general jurisdiction is the Supreme Court of the Russian Federation;
ii. state arbitration courts (also known as commercial courts). This includes state arbitration courts of the regions, appeal courts, and circuit courts. Before the judicial reform of 2014, the highest arbitration court was the Supreme Arbitration Court. However, following its dissolution in 2014, the highest arbitration court is the Supreme Court of the Russian Federation, which has a special chamber dedicated to commercial cases;
iii. the Constitutional Court of the Russian Federation; and
iv. constitutional courts of the regions (known as statutory courts in some regions).

The system is illustrated in the chart on page 17.

1.6.1 Courts of General Jurisdiction

Courts of general jurisdiction deal with the majority of civil and criminal cases, as well as administrative disputes outside of economic activities. Thus, the

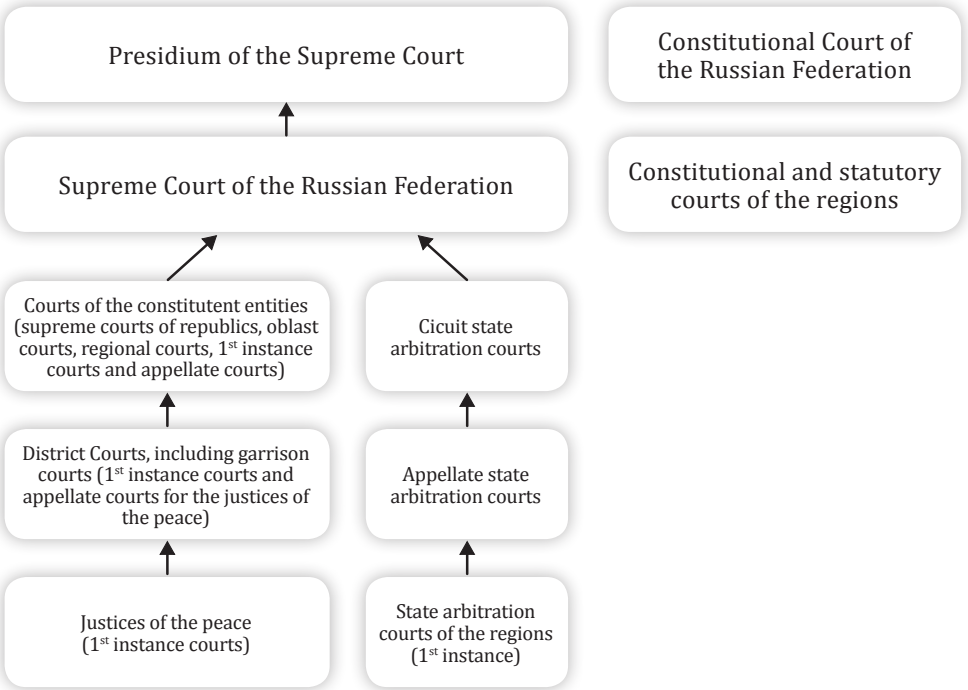
75 Federal Law "On the Procedure of Enforcement of The Code for Administrative Proceedings of the Russian Federation" 8 March 2015, No. 22-FZ, Article 1 (Статья 1 Федерального закона от 8 марта 2015 года № 22-ФЗ "О введении в действие Кодекса административного судопроизводства Российской Федерации").

76 See above, note 73, Article 4(3).

77 Federal Constitutional Law, "On Courts of General Jurisdiction in the Russian Federation", 7 February 2011, No. 1-FKZ, Article 32 (Федеральный конституционный закон от 7 февраля 2011 года № 1-ФКЗ "О судах общей юрисдикции в Российской Федерации").

78 *Ibid*., Article 3(2).

79 *Ibid.,* Article 24.



overwhelming majority of cases referred to in this report are those decided by courts of general jurisdiction, in particular by district courts. The term "general jurisdiction" may be misleading as it covers all criminal cases, but not all civil or administrative cases (commercial disputes or administrative cases involving commercial entities fall under the jurisdiction of the state arbitration courts).[80] Moreover, military courts are also considered part of the courts of general jurisdiction.[81]

From a historical perspective the term "general jurisdiction" was introduced to distinguish commercial and constitutional proceedings from all other (general) proceedings.[82] Until 2014, when the Supreme Arbitration Court of the Russian Federation was dissolved and merged with the Supreme Court of the Russian Federation, courts of general jurisdiction and state arbitration courts acted independently with each having developed its own body of case law.

Within the system of the courts of general jurisdiction, either district courts or justices of the peace act as courts of first instance. Justices of the peace have limited jurisdiction.[83] They hear certain civil cases, minor criminal cases and the majority of cases involving administrative offences. District courts act as courts of first instance in the majority of civil and criminal cases and as appellate courts

80 Code of State Arbitration Procedure of the Russian Federation, 24 July 2002, No. 95-FZ Article 1 (Арбитражный процессуальный кодекс Российской Федерации от 24 июля 2002 года № 95-ФЗ).

81 See above, note 77, Article 1(2).

82 See above, note 27, Article 126.

83 There are approximately 7,500 justices of the peace across Russia.

with regard to decisions of justices of the peace. District courts serve as first instance courts in relation to some administrative offences.[84] Therefore, depending on the nature of a civil, administrative or criminal case, either a justice of the peace or a district judge will hear the case at first instance. For example, an administrative case under Article 6.21 of the Code of Administrative Offences (propaganda of non-traditional relationships among minors) is within the jurisdiction of a justice of the peace.[85] However, if a case involves alleged propaganda with the use of the internet or other media, it may fall under the jurisdiction of a district judge because the latter aspect, if found, may result in the imposition of a suspension of activities of a legal entity, which is a punishment that can only be ordered by a district judge.[86]

1.6.2 Courts of the Constituent Entities (Regions)

As noted above, courts of the constituent entities (the higher courts of each region)[87] are federal appellate courts for the majority of decisions in civil and criminal cases. They may also act as first instance courts in some civil cases, for example in cases of forced dissolution of non-governmental organisations and foreign adoption cases, and in some criminal cases (including all cases involving jury trials).[88] These courts have jurisdiction to hear cases where it is alleged that regional legislation, including laws passed by regional legislative assemblies, contradicts federal legislation.[89] However, if regional legislation is challenged on the ground that it is contrary to the Federal Constitution, the Constitutional Court of the Russian Federation has exclusive jurisdiction.[90] In addition, constituent courts have special chambers acting as courts of cassation (known as "presidium"), which are courts of third instance. Cassation appeals from these chambers may then be lodged with the Supreme Court of the Russian Federation.[91]

84 There are approximately 2,400 district courts across Russia, including 119 military garrison courts.

85 Russian Federation Code of Administrative Offences, Article 23.1(3) (Кодекс Российской Федерации об административных правонарушениях, пункт 3 статьи 23.1).

86 *Ibid.*

87 These are oblast courts, regional courts and supreme courts in the republics, and provincial courts or city courts in Moscow, St. Petersburg and Sevastopol. The term "courts of the constituent entities of the Russian Federation" is designed to denote courts within the single federal system of courts.

88 Code of Administrative Proceedings of the Russian Federation, 30 December 2001, No. 195-FZ, Article 20(5) (Кодекс Российской Федерации об административных правонарушениях, от 30 декабря 2001 года № 195-ФЗ, пункт 5 статьи 20);
Criminal Procedure Code of the Russian Federation, 18 December 2001, No. 174-FZ, Article 32 (Уголовно-процессуальный кодекс Российской Федерации от 18 декабря 2001 года № 174-ФЗ, статья 32).

89 *Ibid.*, Code of Administrative Proceedings of the Russian Federation, Article 20(2).

90 Federal Constitutional Law, "On the Constitutional Court of the Russian Federation", 21 July 1994, No. 1-FKZ, Article 3 (Федеральный конституционный закон от 21 июля 1994 года № 1-ФКЗ "О Конституционном Суде Российской Федерации").

91 Civil Procedure Code of the Russian Federation, 14 November 2002, No. 138-FZ, Article 377(1)(3) (Гражданский процессуальный кодекс Российской Федерации от 14 ноября 2002 года № 138-ФЗ).

1.6.3 Commercial Courts

Commercial courts deal with disputes between commercial entities, including private entrepreneurs, as well as with cases involving administrative sanctions that are being imposed on commercial legal entities. Commercial courts also hear cases challenging administrative decisions in the economic sphere.[92] For example, both a limited liability company and a non-commercial legal entity would challenge the decision of a tax agency in a commercial court.

1.6.4 Regional Constitutional Courts

Sixteen of the 85 regions have their own regional constitutional courts (known as statutory courts in some regions).[93] Each constitutional (statutory) court is a separate judicial body and does not act as an appeal court for any other court.[94] The jurisdiction of these courts is limited to cases of an alleged contradiction between a regional law and a regional constitution (in republics) or a regional statute (in other regions). In 2012, a Russian activist utilised this avenue to challenge St. Petersburg's ban on "propaganda of homosexuality, lesbianism, bisexuality and transsexuality among minors".[95] The need for these courts has been questioned as they handle so few cases due to their limited jurisdiction.[96]

1.6.5 Precedent

Russia is a civil law country and judicial decisions are not formally recognised as binding precedents, at least in the general jurisdiction.[97] However, legal findings of the Russian Supreme Court are considered by lower courts to provide guiding (and *de facto* binding) interpretation of existing law.[98] In addition, decisions of the Plenary Sessions of the Russian Supreme Court explain how courts should

92 See above, note 80, Article 29(1).

93 These courts are called constitutional courts in the republics (for example, the Constitutional Court of the Republic of Karelia) and statutory courts in other constituent entities (for example, the Statutory Court of St. Petersburg). The 16 regions are St. Petersburg, Sverdlovskaya Oblast, Kaliningrad Oblast, the Republics of Adygeya, Bashkiria, Dagestan, Kabardino-Balkaria, Ingushetia, Karelia, Komi, Marii-El, Yakutia, North Ossetia, Tatarstan, Tyva, and Chechnya.

94 This means that a decision of a regional statutory or constitutional or statutory court cannot be appealed.

95 The case was suspended by the St. Petersburg Statutory Court as one of the judges disqualified himself from sitting on the bench and the Court therefore lacked necessary quorum. In 2014, a new judge was appointed and the proceedings were resumed, however, the regional law was repealed by the St. Petersburg City Legislative Assembly following the introduction of the federal ban on propaganda of non-traditional sexual relations and the case was therefore discontinued on procedural grounds. See Decision of the St. Petersburg Statutory Court, 16 October 2014, No. 001/14-5 (Определение Санкт-Петербургского уставного суда от 16 Октября 2014 года по делу № 001/14-5).

96 Sobol, L., "Constitutional (statutory) courts of the constituent entities of the Russian Federation: no one knows about them, but they exist!" *Open Russia*, 15 April 2015 (Конституционные (уставные) суды субъектов РФ. Никто о них не знает, а они есть!), available at: https://openrussia.org/post/view/4243. The Statutory Court of the Chelyabinsk Oblast was dissolved for this reason in 2014.

97 See Musin, V.A., Kropachev N.M., *Russian Law in Brief: Digest for Investors*, St. Petersburg University Press, 2014, p. 18.

98 *Ibid*.

apply law and are therefore a unique way of providing lower courts with mandatory guidance on how to apply laws in specific spheres.[99]

Decisions of the Russian Constitutional Court are binding and may be considered as sources of law.[100] In addition to hearing individual petitions, the Constitutional Court is vested with the power to interpret the Federal Constitution at the request of the President, the Federal Parliament, the Federal Government and each of the regional legislatures.[101] It decides cases concerning the constitutional validity of laws and cases concerning international treaties which have not yet entered into force.[102] Most cases decided by the Constitutional Court are initiated by private persons through a system of individual petitions.[103]

1.6.6 Appointment

The Russian judicial system is highly dependent on the administrative branch of government. The President of Russia has the final decision on the appointment of all federal judges.[104] Judges of the Russian Constitutional Court and the Supreme Court of Russia are appointed by the Council of the Federation (upper house of the Federal Parliament) but must first be proposed by the President.[105] Presidents of courts, who are appointed by the President of Russia at the proposal of the Supreme Court, have vast administrative powers over ordinary judges and over justices of the peace. This includes the power to distribute cases among judges. The lack of transparency and the dominance of the administrative branch in the appointment of judges has been rightly criticised by the UN Special Rapporteur on the independence of judges and lawyers as undermining the independence of the Russian judiciary.[106]

99 See, for example, Decision of the Plenary Session of the Supreme Court of the Russian Federation, "On the Application by Courts of General Jurisdiction of Generally Recognised Principles and Norms of International Law and International Treaties of the Russian Federation", 10 October 2003, No. 5 (Постановление Пленума Верховного Суда Российской Федерации от 10 октября 2003 года № 5 "О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации").

100 See above, note 90, Article 6.

101 *Ibid*., Article 3.

102 *Ibid*.

103 Constitutional Court of the Russian Federation. *Overview of the applications*, available at: http://www.ksrf.ru/ru/Petition/Pages/Statistic.aspx (Обзор поступающих обращений *в* Конституционный Суд Российской Федерации).

104 Law of the Russian Federation "On the Status of Judges in the Russian Federation", 26 June 1992, No. 3132-1, Article 6 (Закон Российской Федерации от 26 июня 1992 года № 3132-1 "О статусе судей в Российской Федерации", статья 6).

105 *Ibid.,* Article 6 and 6.1; and see above, note 90, Article 2.

106 Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, 30 April 2014. UN Doc. A/HRC/26/32/Add.1, Paras 17–20, 24–26.

1.7 Legal Framework Related to Discrimination

1.7.1 Major United Nations Treaties Related to Equality

Russia has a good record of ratifying the major UN human rights treaties relating to equality. It has ratified seven of the nine core UN human rights treaties: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);

the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD). Russia has allowed for individual complaints to be made to some of the relevant treaty bodies, having ratified the first Optional Protocol to the ICCPR, made a declaration under Article 14 of the ICERD and ratified the Optional Protocol to the CEDAW.

Instrument	Signed	Ratified / Acceded (a)
International Covenant on Civil and Political Rights (1966)	18 March 1968	16 October 1973
Optional Protocol to the International Covenant on Civil and Political Rights (1976)	–	01 October 1991 (a)
Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty (1989)	–	–
International Covenant on Economic, Social and Cultural Rights (1966)	18 March 1968	16 October 1973
Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008)	–	–
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	07 March 1966	04 February 1969
Declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (allowing individual complaints)		01 October 1991
Convention on the Elimination of All Forms of Discrimination against Women (1979)	17 July 1980	23 January 1981
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999)	08 May 2001	28 July 2004
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	10 December 1985	03 March 1987

Instrument	Signed	Ratified / Acceded (a)
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)	–	–
Convention on the Rights of the Child (1989)	26 January 1990	16 August 1990
Optional Protocol I to the Convention on the Rights of the Child (2000) (involvement of children in armed conflict)	15 February 2001	24 September 2008
Optional Protocol II to the Convention on the Rights of the Child (2000) (sale of children, child prostitution and child pornography)	26 September 2012	24 September 2013
Optional Protocol III to the Convention on the Rights of the Child (2011) (communication procedure)	–	–
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	–	–
Convention on the Rights of Persons with Disabilities (2006)	24 September 2008	25 September 2012
Optional Protocol to the Convention on the Rights of Persons with Disabilities (2006)	–	–
International Convention for the Protection of All Persons from Enforced Disappearances (2006)	–	–

In the most recent treaty body reporting cycles, Russia has complied with its reporting obligations without substantial delays; reports are submitted on average within two to three months of the due date.[107] However, there are increasing examples of Russia's failure to engage with recommendations on equality and non-discrimination issues relating to LGBT individuals, through its insistence that discrimination against the LGBT community is not taking place. For example, a recommendation was made in the second cycle of reporting for the Universal Periodic Review for Russia to:

> *Rescind regional laws and regulations which favour and tolerate discrimination based on sexual orientation, and refrain from adopting similar laws at the federal level, as well as take measures to prevent the arbitrary use of existing regulations against LGBT rights, including their rights to freedom of expression and peaceful assembly.*[108]

107 United Nations Office of the High Commissioner for Human Rights, "Reporting status for Russian Federation", available at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/countries.aspx?CountryCode=RUS&Lang=EN.

108 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Russian Federation* A/HRC/24/14/Add.1, 8 July 2013, Recommendations 140.86-140.91.

Rejecting this and a number of similarly phrased recommendations, Russia replied that:

> *The law does not discriminate against lesbian, gay, bisexual and transgender (LGBT) persons (…) The law contains no measures whatsoever aimed at prohibiting or officially censuring homosexuality, or any indications of a discriminatory nature. Nor does it allow for excessive action by the authorities. It cannot, therefore, be said that it places undue restrictions on the freedoms of speech or assembly.*[109]

A similar stance was taken in response to the list of issues adopted in the most recent reporting cycle for the ICCPR, where Russia was asked to:

> *Comment on reports that the laws adopted at regional and federal level banning "promotion of non-traditional sexual relations between minors" are systematically used to restrict the freedom of expression and peaceful assembly of LGBT individuals.*[110]

Russia noted in its reply that:

> *Overall, the Russian authorities are convinced that the legislation currently in force is not being used to arbitrarily restrict the freedom of expression and peaceful assembly of LGBT individuals. Russian laws and their application are fully consistent with the country's obligations under the Covenant.*[111]

This is despite the laws in question themselves being clearly discriminatory.[112] Additionally, despite recommendations to take steps to prevent the harassment and persecution of lawyers, journalists and human rights defenders,[113] Russia has begun blacklisting "undesirable" foreign organisations, adversely impacting the ability of these organisations to undertake advocacy work in the field of equality and non-discrimination.[114]

109 Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Russian Federation, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, Un Doc. A/HRC/24/14/Add.1, 2 September 2013, Recommendations 140.86-140.91.

110 Human Rights Committee, *List of issues in relation to the seventh periodic report of the Russian Federation*, CCPR/C/RUS/Q/7, 19 August 2014, Para 25(b).

111 Human Rights Committee, *List of issues in relation to the seventh periodic report of the Russian Federation, Addendum: Replies of the Russian Federation to the list of issues*, Un Doc. CCPR/C/RUS/Q/7/Add.1, 18 December 2014, Para 157.

112 Human Rights Committee, *Concluding observations on the seventh periodic report of the Russian Federation*, UN Doc CCPR/C/RUS/CO/7, 28 April 2015, Para 10(d). These laws are discussed in detail in Part 2.3.1 of this report.

113 *Ibid.*, Para 18; and Human Rights Committee, *Concluding observations on the fifth periodic report of the Russian Federation, adopted by the Committee at its forty ninth session (29 October–23 November 2012),* UN Doc CAT/C/RUS/CO/5, 11 December 2012, Para 12.

114 Amnesty International, "Russia begins blacklisting 'undesirable' organizations", 28 July 2015, available at: https://www.amnesty.org/en/latest/news/2015/07/russia-begins-blacklisting-undesirable-organizations.

1.7.2 Other Treaties Related to Equality

Russia has a good record of ratification of other international treaties that have a bearing on the enjoyment of all of the rights to equality and non-discrimination. However, notable exceptions are the two conventions on the status of stateless persons and reduction of statelessness. Furthermore, Russia has shown itself reluctant to submit to international legal scrutiny by failing to ratify the Rome Statute and accept the jurisdiction of the International Criminal Court.

Instrument	Signed	Ratified / Acceded (a)
Convention Relating to the Status of Refugees (1951)	–	2 February 1993 (a)
Convention Relating to the Status of Stateless Persons (1954)	–	–
Convention on the Reduction of Statelessness (1961)	–	–
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)	7 September 1956	12 April 1957
UN Convention against Transnational Organized Crime (2000)	12 December 2000	26 May 2004
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)	12 December 2000	26 May 2004
Rome Statute on the International Criminal Court (2002)	13 September 2000	–
UNESCO Convention against Discrimination in Education (1960)	–	01 August 1962
Forced Labour Convention (1930) (ILO Convention No. 29)	–	23 June 1956
Equal Remuneration Convention (1951) (ILO Convention No. 100)	–	30 April 1956
Discrimination (Employment and Occupation) Convention (1958) (ILO Convention No. 111)	–	04 May 1961
Worst Forms of Child Labour Convention (1999) (ILO Convention No. 182)	–	25 March 2003
Indigenous and Tribal Peoples Convention (1989) (ILO Convention No. 169)	–	–

1.7.3 Regional Human Rights Treaties

The Russian Federation became the 39th member state of the Council of Europe on 28 February 1996. It is currently party to a total of 60 international agreements

under the Council of Europe, including several key human rights instruments.[115] Most importantly, Russia is party to the European Convention on Human Rights (ECHR), having signed the Convention on 28 February 1996 and ratified it on 5 May 1998. Russia has signed and ratified both amending protocols (No. 11 and 14) to the ECHR. It has ratified supplementary Protocols 1, 4 and 7, but has not ratified the protocols in relation to the abolition of the death penalty (Protocol 6 was signed, whereas Protocol 13 was neither signed nor ratified). Russia signed Protocol 12, which provides a free-standing right to non-discrimination, on 4 November 2000 but has yet to ratify it. Consequently, Protocol 12 is not yet in force in Russia.[116] As acceptance of the jurisdiction of the European Court of Human Rights (ECtHR) became compulsory for members of the ECHR in 1998 (when Russia ratified), Russia is subject to the Court's jurisdiction by virtue of that membership.[117]

Other regional human rights instruments Russia is party to include the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (signed: 28 February 1996, ratified: 5 May 1998), the Framework Convention for the Protection of National Minorities (signed: 28 February 1996; ratified: 21 August 1998), the European Social Charter (revised) (signed: 14 September 2000, ratified: 16 October 2009), and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (signed: 1 October 2012, ratified: 9 August 2013).[118]

1.7.4 Status of International Obligations in Domestic Law

Throughout the Soviet era, international human rights law was not incorporated into domestic law.[119] This changed in 1993 with the adoption of the Federal Constitution. Article 15(4) of the Federal Constitution states that commonly recognised principles and norms of international law and international treaties ratified by Russia form part of the Russian legal system.[120] Article 15(4) further provides that if an international treaty ratified by the Russian Federation establishes rules different from those envisaged by law, the rules of the international treaty take precedence.[121] It should be noted that, while incorporating both international treaties and norms, Article 15(4) only refers to the supremacy of treaties and does not provide for the supremacy of commonly recognised principles of international law. Article 17 states that the "rights

115 See above, note 5.

116 Council of Europe, "Chart of signatures and ratifications of Treaty 177", available at: http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/177/signatures.

117 European Convention on Human Rights, Article 32.

118 Council of Europe, "Statistics on signatures and ratifications: Russia", available at: http://www.coe.int/en/web/conventions/search-on-states/-/conventions/chartStats/RUS.

119 Although Article 29 of the 1977 Constitution stated that relations between the USSR and other states should be based on the "fulfilment in good faith of obligations arising from the generally recognised principles and rules of international law, and from international treaties signed by the USSR", this was not interpreted as incorporating international law into domestic law. See, Danilenko, G.M., "The New Russian Constitution and International Law" *American Journal of International* Law, 88, 1994, p. 458.

120 Federal Constitution, Article 15(4).

121 *Ibid.*

and freedoms of man and citizen" shall be recognised in accordance with the "commonly recognised principles and norms of international law". Arguably, this may be read as requiring that customary international law in relation to human rights also takes precedence over domestic law. Such a reading may find support in the approach of the Russian courts, with the Constitutional Court having previously found local regulations to be unconstitutional by reference not only to human rights treaties but also to the "generally recognised principles and norms of international law".[122]

In respect of international treaties, Article 5(3) of the Law on International Treaties of 1995[123] distinguishes between the application of self-executing and non-self-executing treaties, by providing that:

> *[T]he provisions of officially published international treaties of the Russian Federation, which do not require the promulgation of domestic acts for application, shall operate in the Russian Federation directly. In order to effectuate other provisions of international treaties of the Russian Federation, the relevant legal acts shall be adopted.*

In 2003, the Supreme Court of Russia explained that:

> *In accordance with Part 3 of Article 5 of Federal Law "On International Treaties of the Russian Federation", the provisions of officially published international treaties of the Russian Federation that do not require the adoption of national acts for their application have direct effect in the Russian Federation (…) if an agreement obliges the participating states to amend their national legislation, this is one of the signs that the provisions of such an international agreement of the Russian Federation cannot be applied directly.*[124]

The Court further noted that the approach to interpretation of treaties should follow that set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, specifically noting that the subsequent practice of states and the con-

122 Judgment of the Constitutional Court, 4 April 1996, No. 9-P, (Постановление Конституционного Суда РФ от 4 апреля 1996 года № 9-П). Danilenko, G.M., "Implementation of International Law in CIS States: Theory and Practice", *European Journal of International* Law, 10, 1994, p. 64. Within the system of commercial courts, international customary rules have often been applied. See, for example, Judgment of the State Commercial Court of the St. Petersburg and the Leningrad Oblast, 9 February 2015, No. A56-48129/2014 (Решение Арбитражного суда города Санкт-Петербурга и Ленинградской области от 9 февраля 2015 года по делу № А56-48129/2014).

123 Federal Law "On international treaties of the Russian Federation", 15 July 1995, No. 101-FZ, Article 5(3) (Федеральный закон от 15 июля 1995 года № 101-ФЗ "О международных договорах Российской Федерации", статья 5(3)).

124 Decision of the Plenary Session of the Supreme Court of the Russian Federation, "On the Application by Courts of General Jurisdiction of Generally Recognised Principles and Norms of International Law and International Treaties of the Russian Federation", 10 October 2003, No. 5, Para 3 (Постановление Пленума Верховного Суда Российской Федерации от 10 октября 2003 года № 5 "О применении судами общей юрисдикции общепризнанных принципов и норм международного права и международных договоров Российской Федерации", п. 3).

text of the treaty should be taken into account in interpretation.[125] The Court later noted that courts should also make reference to the "the acts and decisions of international organisations, including the United Nations and its specialised agencies" when faced with difficulties interpreting international treaties and also principles and norms of international law.[126] In relation to principles and norms of international law, the Court noted that these "should be understood as the basic imperative norms of international law, accepted and recognised by the international community of states as a whole, deviation from which is inadmissible." The Court continued on to state that "the contents of the said principles and norms of international law may be construed, in particular, in the documents of the United Nations and its specialised agencies."[127]

The Constitutional Court has held that Russia is under an obligation to implement in good faith the views of the Human Rights Committee (HRC) in relation to individual complaints brought against the Russian Federation.[128] However, the Court did not specifically determine whether the general case law of the HRC is binding on Russia. Despite this clear statement of the binding nature of HRC jurisprudence in relation to Russia, it is notable that in its decisions regarding the laws banning the "propaganda of homosexuality", the Constitutional Court did not refer to the views of the HRC in *Fedotova v Russia,*[129] which had unequivocally criticised such legislation as discriminatory.[130]

Similarly, although there is clear jurisprudence from the Supreme Court that the case law of the ECtHR must be applied by courts, the approach of the courts appears to increasingly be moving away from the implementation and application of ECtHR jurisprudence. In 2013, the Supreme Court stated that, in accordance with Article 46(1) of the ECHR and Article 1 of the Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto" (Law on Ratification),[131] final judgments of the ECtHR in respect of Russia must be applied by the courts. In addition, the Supreme Court stated that courts must take into consideration decisions of the ECtHR in respect of other states "if the circumstances of the case under examination are

125 *Ibid.,* Para 10.

126 *Ibid.,* Para 16.

127 *Ibid.,* Para 2.

128 Decision of the Constitutional Court of the Russian Federation, 28 June 2012, No. 1248-O (Определение Конституционного Суда Российской Федерации от 28 июня *2012 № 1248-О*). See also a similar finding in regard to the opinions of the UN Working Group on Arbitrary Detention, Decision of the Constitutional Court of the Russian Federation, 9 June 2015, No. 1276-O (Определение Конституционного Суда Российской Федерации от 9 июня 2015 № 1276-О).

129 *Fedotova v Russia,* Communication No. 1932/2010, CCPR/C/106/D/1932/2010, 19 November 2012.

130 See, for example, Decision of the Russian Constitutional Court, 19 January 2010, No. 151-O-O (Определение Конституционного Суда Российской Федерации от 19 января 2010 № 151-О-О). In its most recent Concluding Observations, the Human Rights Committee noted its concern in relation to Russia's failure to implement its views despite the decision of the Constitutional Court of 28 June 2012. See, Human Rights Committee, *Concluding observations on the seventh periodic report of the Russian Federation*, UN Doc CCPR/C/RUS/CO/7, 28 April 2015, Para 5.

131 Federal Law "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto", 30 March 1998, No. 54-FZ.

similar to those which have been the subject of analysis and findings made by the European Court."[132] The Constitutional Court has relied on decisions of the ECtHR in its own jurisprudence.[133]

Despite the unequivocal acceptance of the Supreme Court of the binding force of ECtHR case law, the application of the case law by the Court remains problematic in practice, frustrating the expectations of human rights advocates.[134] Furthermore, in July 2015, although declining to find the Law on Ratification to be unconstitutional, the Constitutional Court ruled that in the event of a conflict between a finding of the ECtHR and a finding of the Constitutional Court, the ultimate jurisdiction to decide which of the decisions prevails lies with the Constitutional Court. The Court also stated that "law" in Article 15(4) shall be understood as referring to ordinary laws only, and not the Federal Constitution (that is, international treaties do not have supremacy over the Federal Constitution).[135] Following this, in December 2015, an amendment to the Law "On the Constitutional Court of the Russian Federation" was made, allowing the Constitutional Court to find that a decision of an international human rights body cannot be implemented on the basis that it conflicts with the Federal Constitution.[136]

The first (and to date, the only) case relating to the resolution of such a conflict was brought before the Constitutional Court in 2016 by the Ministry of Justice, which challenged the need to implement the ECtHR judgment in *Anchugov and Gladkov v Russia*.[137] In that case, the ECtHR had found that the blanket ban on voting for all prisoners established in Article 32(3) of the Federal Constitution was disproportionate and therefore violated the right to free elections guaranteed by Article 3 of Protocol No. 1.[138] The ECtHR noted that:

> *[I]t is open to the respondent Government to explore all possible ways in that respect and to decide whether their compliance with Article 3 of Protocol No. 1 can be achieved through some form of political*

132 Decision of the Plenary Session of the Supreme Court of the Russian Federation, "On the Application by Courts of General Jurisdiction of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto", 27 June 2013, No. 21 (Постановление Пленума Верховного Суда № 21 от 27 июня 2013 года "О применении судами общей юрисдикции Конвенции о защите прав человека и основных свободот 4 ноября 1950 года и Протоколов к ней"). Para 2.

133 See, for example, Judgment of the Constitutional Court, 27 February 2009, No. 4-P (Постановление Конституционного Суда Российской Федерации от 27 февраля 2009 года № 4-П).

134 See the presentation by the President of the Russian Constitutional Court, Zorkin, V.D., "Challenges of Implementation of the Convention on Human Rights", 2012, available at: http://www.ksrf.ru/en/News/Documents/Report%20for%2022%20October.docx (Чернышев И.А. Правовые позиции Конституционного Суда России и Европейского Суда по правам человека: генезис и взаимовлияние).

135 Judgment of the Constitutional Court of the Russian Federation, 14 July 2015, No. 21-P (Постановление Конституционного Суда Российской Федерации от 14 июля 2015 № 21-П).

136 Federal Constitutional Law "On amending the Federal Constitutional Law on the Constitutional Court of the Russian Federation", 14 December 2015, No. 7-FKZ (Федеральный конституционный закон от 14 декабря 2015 года № 7-ФКЗ "О внесении изменений в Федеральный конституционный закон "О Конституционном Суде Российской Федерации").

137 *Anchugov and Gladkov v Russia,* Application No. 11157/04 and 15162/05, 4 July 2013.

138 *Ibid.,* Paras 101–112.

> *process or by interpreting the Russian Constitution by the competent authorities – the Russian Constitutional Court in the first place – in harmony with the Convention in such a way as to coordinate their effects and avoid any conflict between them.*[139]

The Constitutional Court held that the decision of the ECtHR could not be implemented in so far as it required recognition of the voting rights of prisoners as this would contradict the imperative prohibition on voting for prisoners set out in the Federal Constitution, which has supreme legal force in the Russian legal system.[140] However, the Court went on to note that the decision could be implemented, in so far as it relates to "ensuring justice, proportionality and differentiation of application of the restriction of electoral rights", noting that disenfranchisement only happened when a custodial sentence was given to an offender, and this was only done where a lesser penalty would not suffice.[141] This second line of reasoning is questionable given that the ECtHR had already concluded that sentencing decisions do not take into account possible disenfranchisement or assess the proportionality of disenfranchisement.[142]

The Constitutional Court made it clear that the Federal Constitution has supremacy in the national legal system.[143] The Court went further, questioning the ECtHR's "evaluative" interpretation of Article 3 of Protocol No. 1 and stating that Russia had the "right to insist" on the understanding of Article 3 as at the time it came into effect in the Russian legal system, given that the Federal Constitution does not allow Russia to conclude international treaties which contradict constitutional provisions.[144] Any previous arguments that provisions of international treaties or norms and principles of international law may have supremacy over Constitutional norms have clearly now been extinguished by the Court.[145]

1.7.5 National Law

1.7.5.1 Power to Legislate on Matters Relating to Human Rights

In accordance with Article 15(1) of the Federal Constitution, the Federal Constitution has supreme legal force in the entire territory of Russia. The provisions of the Federal Constitution therefore prevail over federal and regional legislation. Article 76(5) of the Federal Constitution provides that in the event of a conflict between federal and regional laws, federal law prevails if the sub-

139 *Ibid.,* Para 111.

140 Judgment of the Constitutional Court of the Russian Federation, 19 April 2016, No. 12-P (Постановление Конституционноо Суда Российской Федерации от 19 апреля 2016 года № 12-П), Operative Part, Para 1.

141 *Ibid.*, Para 2.

142 See above, note 137, Para 106.

143 See above, note 140, Paras 2.1 and 4.2.

144 *Ibid.,* Paras 4.2 and 4.3.

145 A discussion of this issue can be found in Maggs, P.B., Schwartz, O., and Burnham, W., *Law and Legal System of the Russian Federation*, Juris, 2015, p. 33.

ject matter of the law either falls within the sphere of exclusive competence of the federation, or within a sphere in which the federation and the regions have joint competence.

In accordance with the Federal Constitution, the state has the duty to respect and protect the rights and freedoms of man.[146] In accordance with Article 71, the Federation has jurisdiction to *regulate and protect* the rights and freedoms of man.[147] Consequently, regions only have residual powers in this area. However, the Federal Constitution provides for joint jurisdiction of the federation and the regions regarding the *protection* of the rights and freedoms of man.[148] The Federation may therefore regulate and protect rights through legislation, whereas the regions may only legislate to protect rights in accordance with federal law (or where federal law is silent).

In 2008, the Constitutional Court held that this joint jurisdiction of the federal and regional government means that the regions share responsibility for the realisation of human rights with the Federation.[149] The Court stated that, in accordance with Articles 15(1) and 76(5) of the Federal Constitution, regional legislation in this sphere must accord with federal legislation and the Federal Constitution, and is therefore of a "secondary" nature. However, where federal law is silent, the regions may legislate to protect human rights. The Court therefore refused to find the first regional law which prohibited "propaganda of homosexuality" among minors unconstitutional because federal law was silent on the issue at the time (and the law was therefore not in contradiction with any federal legislation in the same field).[150]

Regions are therefore able to adopt laws in specific areas aimed at overcoming existing discrimination provided that they do not contradict federal law or the Federal Constitution. Accordingly, regional laws to protect LGBT persons from discrimination may be passed pursuant to the equality guarantee enshrined in Article 19(2) of the Constitution (which, as is discussed in Part 1.7.5.2 below, encompasses discrimination on the basis of sexual orientation, and possibly gender identity). However, the only example identified by this report of a regional law being passed to this end is the 1995 Law of the Krasnoyarsk Region "On Protection of Public Morals", which acknowledges that "the right to sexual orientation belongs to every human being" (although the Law explicitly notes

146 Article 2 of the Federal Constitution.

147 Article 71(c) of the Federal Constitution provides that the jurisdiction of the federation includes the "regulation and protection of the rights and liberties of the human being and citizen."

148 Article 72(b) of the Federal Constitution. This provision has been interpreted by the Constitutional Court as authorising regions to introduce administrative sanctions for "propaganda of homosexuality," although restrictions of human rights are allowed only by a federal law (Article 55(3) of the Constitution). Also see above, note 130.

149 Judgment of the Constitutional Court of Russia, 11 March 2008, No. 4-P (Постановление Конституционного Суда Российской Федерации от 11 марта 2008 года № 4-П).

150 See above, note 130, Decision of the Constitutional Court of Russia. The federal law which banned "propaganda of homosexuality" was passed in 2013.

that the exercise of this right can be restricted by a federal law with the aim of protecting public morals).[151]

Similarly, regions may adopt laws in pursuance of the aims of federal laws relating to discrimination. For example, a region may adopt a law promoting social support measures with the purpose of overcoming disability-related discrimination in accordance with the federal law establishing the framework for social care for people with disabilities.[152] Regions may also introduce additional guarantees for social support of children or families. However, regions may only define conditions for marriage or regulate other family matters where this is explicitly provided for in the Family Code of the Russian Federation (Family Code) or where federal law is silent on the matter.[153] A region could not therefore adopt a law which allowed for legal recognition of same-sex relationships, as Article 12(1) of the Family Code provides that "the voluntary consent of the man and of the woman entering into" a marriage is required before it can be registered, and Article 1(2) provides that civil marriage is the only legally recognised form of relationship.

It should be noted that, in practice most – if not all – areas relating to the legal status of an individual are regulated by federal law.[154] Most regions therefore act on the basis of federal laws establishing certain guarantees or delegating certain matters to regions (and thus imposing financial obligations on regions).[155] Depending on the availability of finances, with many regional budgets allocated by the federation, regions are often reluctant to introduce additional guarantees to protect human rights beyond those minimums required by federal laws.[156]

1.7.5.2 Federal Constitution

Article 19 of the Federal Constitution provides for a right to equality as follows:

> *1. All people shall be equal before the law and in the court of law.*
> *2. The state shall guarantee the equality of rights and liberties regardless of sex, race, nationality, language, origin, property*

151 Law of the Krasnoyarsk Region "On Protection of Public Morals", 20 June 1995, No. 6-129, Article 3 ("Об охране общественной нравственности"). See Part 1.7.5.4 for non-legislative measures taken in this regard.

152 See, for example, the Law of St. Petersburg "On Special Transportation Services for Selected Categories of Citizens in St. Petersburg", 5 July 2006, No. 397-60 (Закон Санкт-Петербурга от 5 июля 2006 года № 397-60 "О специальном транспортном обслуживании отдельных категорий граждан в Санкт-Петербурге").

153 The Family Code of the Russian Federation, Article 3(2) (Семейный кодекс Российской Федерации, статья 3(2)).

154 Nikitina, E., *Limitation of Constitutional Human Rights in Legislations of Subjects of the Russian Federation*, Zhurnal rossijskogo prava. 2015. V. 3, I. 11 (Никитина Е.Е. Ограничения конституционных прав человека законодательством субъекта Российской Федерации // Журнал российского права. 2015. № 11).

155 For example, in accordance with the Federal Law "On Basic Principles of Social Care in the Russian Federation", 28 December 2013, No. 442-FZ (Федеральный закон от 28 декабря 2013 года № 442-ФЗ "Об основах социального обслуживания граждан в Российской Федерации").

156 However, in "wealthier" regions, such as Moscow or St. Petersburg, there are many social programmes going beyond the federal minimum.

or employment status, residence, attitude to religion, convictions, membership of public associations or any other circumstance. Any restrictions of the rights of citizens on social, racial, national, linguistic or religious grounds shall be forbidden.

3. *Man and woman shall have equal rights and liberties and equal opportunities for their pursuit.*

Whereas the first sentence of Article 19(2) of the Constitution guarantees equality regardless of certain grounds provided in a non-exhaustive list, the second sentence of Article 19(2) prohibits "[a]ny restrictions of the rights of citizens" on the basis, exhaustively, of "social, racial, national, linguistic or religious affiliation".

The case law of the Constitutional Court does not shed light on how these clauses relate to each other. The Court often refers to several constitutional clauses as the basis for its findings without specifically explaining why it has found that a particular article has been breached. Nor does the Court explain why a particular characteristic or status of an applicant falls under the constitutional guarantee of equality. However, an examination of the Court's jurisprudence indicates that the general equality provision prohibits discrimination based on a non-exhaustive list of grounds. For example, in its judgment concerning plenary guardianship over persons with mental disabilities, the Constitutional Court acknowledged that a failure of the law to accommodate persons with mental disabilities when establishing protective measures amounted to a violation of the equality principle. The Court did not specify whether this was pursuant to Article 19(1) or (2) or both, but simply noted both provisions in brackets.[157]

In 2014, in considering the federal law banning "propaganda of non-traditional sexual relationships", the Constitutional Court held that Article 19 prohibits discrimination on the basis of sexual orientation. The Court explained this in the following way:[158]

> *In its turn, the state is called upon to take measures aimed at exclusion of possible encroachment upon rights and lawful interests of persons because of their sexual orientation and ensure effective possibilities for protection and restoration of their violated rights on the basis of the principle of equality of all before the law and the court, fixed in Article 19 (Section 1) of the Constitution of the Russian Federation. This constitutional principle, contemplating, among other things, inadmissibility of limitation in rights and freedoms or establishment of any advantages depending on belonging to some or other social groups, which may be understood also as groups of persons with certain sexual orientation, is rendered concrete in the norms of branches of legislation.*[159]

157 Judgment of the Constitutional Court of the Russian Federation, 27 June 2012, No. 15-P (Постановление Конституционного Суда Российской Федерации от 27 июня 2012 года № 15-П).

158 See, Judgment of the Russian Constitutional Court, above, note 37, Para. 2.1.

159 *Ibid.*, Para. 2.1.

The Court also noted that:

> *Article 19 (Section 2) (…) guarantees protection equally to all persons, irrespective of their sexual orientation, and sexual orientation as such cannot serve as a lawful criterion for establishment of distinctions in the legal status of human and citizen.*

Although it did not explicitly mention it, presumably the Court proceeded from the assumption that the "other circumstances" referred to in Article 19(2) included sexual orientation. The Constitutional Court has not yet considered whether gender identity may also be encompassed by Article 19 as this question has not yet arisen in a case before it. However, it is arguable that persons with a particular gender identity, such as transgender individuals, could be considered a social group and thus also be protected from discrimination on the basis of Article 19(1), and also that their circumstances would fit within "other circumstances" in Article 19(2) by analogy with sexual orientation.

The case law of the Constitutional Court demonstrates that its approach to analysis of allegations of discrimination generally follows the approach established by the ECtHR:

> *As has been reiterated by the Constitutional Court of the Russian Federation any differentiation of legal regulation leading to differences in the rights and obligations of subjects of law must be carried out by the legislature in compliance with the requirements of the Constitution of the Russian Federation, including those deriving from the principle of equality (Article 19, part 1), by virtue of which differences are acceptable if they are objectively justified, warranted and pursue constitutionally meaningful goals, and the legal means used to achieve these objectives commensurate with them; observance of the principle of guaranteeing protection from all forms of discrimination in the enjoyment of rights and freedoms presumes, among other things, a ban on introducing such differences in the rights of persons belonging to the same category, which do not have an objective and reasonable justification (prohibition of different treatment of persons placed in the same or similar situations).*[160]

Despite the commonalities in the approaches to the legal analysis of discrimination by the ECtHR and the Russian Constitutional Court, the outcomes of their analysis can vary dramatically. This variance is usually the result of different approaches being taken to striking the balance between various competing interests, public or private. Part Two of this report explores this in detail.

In accordance with Article 56(3) of the Federal Constitution, equality is not included as a non-derogable constitutional guarantee. This means that it can be

160 Judgment of the Constitutional Court of the Russian Federation, 28 May 2010, No. 12-P (Постановление Конституционного Суда Российской Федерации от 28 мая 2010 года № 12-П).

limited in times of public emergency. However, the Law "on a State of Emergency" provides that any measures adopted during a state of emergency cannot be discriminatory:

> 1. *Measures applied in the conditions of a state of emergency entailing the alteration (limitation) of powers of federal executive authorities, legislative (representative) and executive bodies of authority of the subjects of the Russian Federation, local self-administration bodies, the rights of organisations and societal associations, the rights and freedoms of people and citizens established by the Constitution of the Russian Federation, federal laws and other statutory acts of the Russian Federation shall be carried out within such limits as may be required by the seriousness of a given situation.*
>
> 2. *Measures specified in Part One of this Article shall correspond to the international obligations of the Russian Federation ensuing from international agreements of the Russian Federation in the field of human rights and shall not entail any discrimination against individual persons or groups of the population exclusively on the basis of sex, race, nationality, language, origin, property and official position, place of residence, attitude towards religion, convictions, affiliation with societal associations and also by virtue of other circumstances.*[161]

1.7.5.3 National Laws with Anti-Discrimination or Equality Provisions

Russia has no comprehensive anti-discrimination legislation and there have been no initiatives taken to legislate on this matter by the Federal Parliament or the Government.[162] However, many legislative acts regulating specific areas of life or defining the status of certain vulnerable groups contain provisions prohibiting discrimination. Most often, such provisions declare equality in exercising rights and freedoms and prohibit any restrictions of human rights and freedoms based on certain characteristics. For example, Article 9 of Federal Law "On Trade Unions, their Rights and Guarantees of their Activities"[163] prohibits discrimination based on affiliation or non-affiliation with trade unions. However, other than the 1995 Law of the Krasnoyarsk Region "On Protection of Public Morals" noted above, no such specific laws exist to provide protection from discrimination on the basis of sexual orientation or gender identity.

161 Federal Constitutional Law "On a State of Emergency" 30 May 2001, No. 3-FKZ, Article 28(2) (Федеральный конституционный закон от 30 мая 2001 года № 3-ФКЗ "О чрезвычайном положении"). The law does not explain how it relates to Article 56(3) of the Federal Constitution.

162 See, The State Duma of the Russian Federation, "Automated system for legislative activities", available at: http://asozd.duma.gov.ru (Государственная Дума Российской Федерации. Автоматизированная система обеспечения законодательной деятельности).

163 Federal Law "On Trade Unions, their Rights and Guarantees of their Activities", 19 January 1996, No. 10-FZ (Федеральный закон "О профессиональных союзах и гарантиях их деятельности" от 19 января 1996 года № 10-ФЗ0.

In other cases, laws may contain a non-discrimination clause similar to the general equality provision in the Constitution. These general clauses may be interpreted to include protection from discrimination on the basis of sexual orientation or gender identity due to the protection they offer to "social groups" or in relation to "other circumstances". For example, Article 5 of the Federal Law "On the Fundamentals of Health Care of Citizens in the Russian Federation"[164] reads as follows:

> *The state provides citizens with health care regardless of sex, race, age, ethnicity, language, presence of disorders, conditions, origin, material or official status, place of residence, religious or other beliefs, affiliation with nongovernmental organisations, or other circumstances. The State guarantees to citizens protection from all forms of discrimination based on the existence of any disorders.*

The Criminal Code of the Russian Federation (Criminal Code) makes discrimination by persons acting in their official capacity (as a state or municipal official, or director of a commercial or other non-governmental entity) a crime. Article 136 of the Criminal Code provides that:

> *Discrimination, that is, a violation of the rights, freedoms and legitimate interests of man and citizen based on gender, race, nationality, language, origin, property or official status, place or residence, attitude to religion, convictions, or affiliation with public associations or any social groups, made by a person through the use of the official position thereof – shall be punishable with a fine in the amount of 100 thousand to 300 thousand roubles, or in the amount of a wage/salary or any other income of the convicted person for a period of one year to two years, or by deprivation of the right to hold specified offices or engage in specified activities for a term of up to five years, or by obligatory labour for a term of up to 480 hours, or by corrective labour for a term of up to two years, or by deprivation of liberty for the same term.*

The list of prohibited grounds for discrimination provided in Article 136 of the Criminal Code is exhaustive and includes sex, race, ethnicity, language, origin, material or official status, place of residence, religious attitudes, beliefs, affiliation with non-governmental organisations or certain social groups.

Unlike the Criminal Code, Article 5.62 of the Code of Administrative Offences penalises any act of discrimination regardless of the official capacity of the perpetrator. Compared to the Criminal Code, the list of prohibited grounds for discrimination in the Code of Administrative Offences is broader and includes such characteristics as skin colour, family status and social status as well as age:

164 Federal Law "On the Fundamentals of Health Care of Citizens in the Russian Federation", 21 November 2011, No. 323-FZ (Федеральный закон "Об основах охраны здоровья граждан в Российской Федерации" от 21 ноября 2011 года № 323-ФЗ).

Discrimination, that is, a violation of human and civil rights, freedoms and legitimate interests depending on gender, race, skin colour, family status, social status, age nationality, language, origin, property and official status, attitude to religion, convictions, affiliation with public associations or any social groups – shall entail the imposition of an administrative fine on citizens in the amount of one to three thousand roubles and on legal entities in the amount of 50 thousand to 100 thousand roubles.

As noted above in Part 1.6, the Russian legal system makes a clear distinction between criminal offences (crimes) and administrative offences. The latter are not considered to be crimes and do not affect an individual's criminal record. Only those offences explicitly listed in the Criminal Code are considered crimes. Thus, when an offence is decriminalised, it may become an administrative offence. This was the case in relation to discrimination, which was decriminalised (except for those acting in an official capacity) in 2011 to become an administrative offence.[165] Unlike crimes, administrative offences are normally punishable with fines, however, a maximum penalty of fifteen days of administrative detention can be imposed for some of administrative offences.[166] Moreover, in some cases, fines are extremely high and comparable with criminal offences. The ECtHR has held on a number of occasions that administrative liability provided for in Russian law may amount to a criminal charge within the meaning of the ECHR.[167]

As demonstrated by the subsequent parts of the present report, the jurisprudence of the Russian courts provides limited, if any, clarification as to the legal scope of the general anti-discrimination provisions contained in the Criminal Code and the Code of Administrative Offences or of the legal tests used for establishing discrimination under these Codes. At the time of publishing this report, there were no known cases in Russia of criminal or administrative prosecution for violation of anti-discrimination provisions and so these provisions remain dormant.[168] However, the Constitutional Court has confirmed that sexual orientation is included in the notion of a "social group" for the purposes of both the Criminal Code and also the Code of Administrative Offences.[169] Nonetheless, as is

165 As amended by Federal Law "On Amending the Criminal Code of the Russian Federation and Certain Legislative Acts of the Russian Federation", 7 December 2011, No. 420-FZ (Федеральный закон от 7 декабря 2011 года № 420-ФЗ "О внесении изменений в Уголовный кодекс Российской Федерации и отдельные законодательные акты Российской Федерации"). Before this amendment, discrimination was a crime regardless of the capacity of the perpetrator, however, official status was an aggravating factor.

166 As is the case for the administrative offence of "propaganda of non-traditional sexual relationships among minors", introduced by Federal Law, 29 June 2013, No. 135-FZ (Федеральный закон от 29 июня 2013 года № 135-ФЗ).

167 See, for example, *Mikhaylova v Russia*, Application No. 46998/08, 19 November 2015, Paras 50–75.

168 A search of the State automated system "Justice", which is an official database of the courts of general jurisdiction, did not reveal any offences under these articles. However, the database does not contain copies of all decisions since it was introduced fairly recently. See Part 2.1 below for a discussion of decisions not to prosecute on the basis that the LGBT community is not a "social group".

169 See Judgment of the Constitutional Court of the Russian Federation, 23 September 2014, above note 37. See also Part 2.1 and Part 2.2 where LGBT were not considered as a social group.

explored in Part 2.1, this is not always recognised by lower courts or the authorities more broadly.

The Constitutional Court has also recognised that "social group" in Article 3 of the Russian Labour Code[170] includes those of a certain sexual orientation.[171] Article 3 recognises the prohibition of discrimination as a general principle of labour relations and contains an open-ended list of prohibited grounds of discrimination:

> *Everyone shall have equal opportunities to realise his/her labour rights.*
>
> *No one can be constrained in his/her labour rights and freedoms or get any advantages irrespective of sex, race, colour of skin, nationality, language, origins, property, social or position status, age, domicile, religious beliefs, political convictions, affiliation or non-affiliation with public associations as well as other factors not relevant to the professional qualities of the employee.*
>
> *Establishment of distinctions, exceptions, preferences as well as limitations of employees' rights which are determined by the requirements inherent in a specific kind of work as set by federal laws or caused by the special attention of the state to the persons requiring increased social and legal protection shall not be deemed discrimination.*
>
> *Persons considering themselves to be discriminated against in the sphere of labour shall be entitled to petition the federal labour inspectorate bodies and/or courts applying for restoration of their violated rights, compensation for the material loss and redress for the moral damage.*

Despite the clear statement from the Constitutional Court that discrimination on the basis of sexual orientation is prohibited under Article 3, the report was not able to identify a case alleging discrimination that had been brought under Article 3 on this basis. This is perhaps symptomatic of the lack of litigation that has been brought in relation to the application of Article 3 more broadly.[172]

In the leading case before the Constitutional Court in the labour context the applicant, a man, challenged as discriminatory the guarantee in Article 261 of the Labour Code against dismissal of a woman who has a child below the age of three. The Constitutional Court held that the application of this guarantee to women only did not violate the Federal Constitution as it was aimed at achiev-

170 Labour Code of the Russian Federation, 30 December 2001, No. 197-FZ, Article 3 (Трудовой кодекс Российской Федерации, от 30 декабря 2001 года, № 197-ФЗ).

171 See Judgment of the Constitutional Court of the Russian Federation, 23 September 2014, above note 37.

172 For an overview of discrimination cases in the labour context see: Batsvin, N., "Analysis of Case Law of Work-Related Discrimination", *Trudovoe Pravo*, Vol. 4, 2013, pp. 19–38 (Бацвин Н. Анализ судебной практики по делам, связанным *с* дискриминацией на работе*).*

ing factual equality and equal opportunities for women as compared to men.[173] However, the Court found this norm in violation of the Constitution to the extent that it excluded fathers who are the sole breadwinners in the family. The Court explained that this second difference in treatment lacked an objective and reasonable explanation.

As is the case with the equality provision provided by the Federal Constitution, there has been no clarification from the Constitutional Court or the Supreme Court that either of the general prohibitions on discrimination contained in the Criminal Code, the Code of Administrative Offences or the Labour Code apply to discrimination on the basis of gender identity. However, again, it is arguable that this would be included within the "social group" ground. In addition, in respect of the Labour Code, it is difficult to see how discrimination on the basis of gender identity would not be considered as within the ambit of "other factors not relevant to the professional qualities of the employee."

1.7.5.4 Official Recognition of Sexual Orientation and Gender Identity as Prohibited Grounds for Discrimination

While it is clear from the above analysis that there are no explicit references to sexual orientation as a prohibited ground of discrimination in federal law or regional law (with the exception of the 1995 Law of the Krasnoyarsk Region "On Protection of Public Morals" noted above), this idea has been slowly penetrating at the official level through government departments and bodies. For example, the guidelines on prevention of HIV-infection among various social groups issued by the Russian Ministry of Health and Social Development in 2006 explicitly acknowledge that:

> *[R]especting a regime of tolerance towards MSM [men who have sex with men] should be a prerequisite for the success of prophylaxis measures aimed at preventing the spread of HIV. Stigma and discrimination against MSM (homophobia) are frequently encountered obstacles to effective prevention. Any elements of homophobia penetrating the informational material can lead to the fact that MSM will react negatively to useful materials. Elements of aggression on the part of the heterosexual majority, which are often not perceived as aggressive by heterosexuals, can be inferred, for example, from the statement that "homosexual relations threaten you with AIDS." Accordingly, information about how to prevent HIV infection among MSM should be neutral, such as "condoms protect against infection both in homosexual and heterosexual contacts".*[174]

173 Judgment of the Constitutional Court of the Russian Federation, 15 December 2011, No. 28-P (Постановление Конституционного Суда Российской Федерации от 15 декабря 2011 года № 28-П).

174 Ministry of Health and Social Development, *Organisation of Prevention of HIV Infection among Different Population Groups. Practical Guidelines*, 20 December 2006, No. 6834-РХ ("Организация профилактики ВИЧ-инфекции среди различных групп населения. Методические рекомендации").

Based on these non-binding guidelines, which are still in force, the Federal AIDS Centre publishes information on the prevalence of AIDS, and this information is free from stereotyped or biased language about sexual minorities.[175] A further example is the 2013 order of the Russian Ministry for Regional Development "On Setting-up a Working Group for Improving Investments and Attractiveness of the Regions of the Russian Federation". This order stipulates that investment projects seeking state or municipal support cannot be considered if, *inter alia*, they involve activities that may lead to discrimination on the ground of sexual orientation.[176]

In addition to measures taken at the federal level, some non-legislative measures (which are legally binding as official decrees) have been taken at the regional level in relation to protecting persons from discrimination based on sexual orientation. However, such measures have also been limited:

- The 2014 order of the Committee for Town-Planning and Architecture of the St. Petersburg Government "On Approval of Architectural and Artistic Regulations for Displaying Information and Standard Objects for Displaying Information in St. Petersburg" explicitly prohibits any information constituting an insult on the basis of sexual orientation from being displayed.[177]

- The 2007 Ordinance of the Head of the Kumenskiy District of the Kirov Oblast, which approved the Internal Code of Labour Conduct in the municipal bodies of the Kumenskiy Municipality, prohibits municipal employees from discriminating against, and intimidating, anyone based on their sexual orientation as well as on any other grounds unrelated to the official functions of an organisation.[178]

- An official letter the Ministry of Education and Science of the Republic of Tatarstan, "On Sending the Provisions of the Republican Charity Action 'Spring Goodness Week'" in 2015 suggested that possible activi-

175 The Federal AIDS Centre, *Information notice: HIV-infection in the Russian Federation as of 31 December 2014*, 2014, available at: http://www.hivrussia.org/files/spravkaHIV2014.pdf, (Федеральный центр СПИД. СправкаВИЧ-инфекция в Российской Федерации на 31 декабря 2014 г.).

176 Order of the Ministry of Economics of the Republic of Mordovia, "On approving the Scheme for interaction while implementing state-supported projects", 30 April 2014, No. 67-p, (Приказ Минэкономики Республики Мордовия от 30 апреля 2014 года № 67-п "О схеме взаимодействия при реализации инвестиционных проектов с государственной поддержкой/государственным участием") .

177 Decision of the Committee for Architecture and Urban Development of the St. Petersburg Government, "On Approval of Architecture and Artistic Rules for Objects for Displaying Information and Standard Objects for Displaying Information in St. Petersburg", 30 April 2014, Para. 1.7.3.1 (Распоряжение Комитета по градостроительству и архитектуре Правительства Санкт-Петербурга от 30.04.2014 N 4-н "Об утверждении архитектурно-художественного регламента объектов для размещения информации и типовых объектов для размещения информации в Санкт-Петербурге").

178 Decision of the Head of the Kumenskiy District of the Kirov Oblast, "On Approval of Internal Labour Rules in Local Government Bodies of the Kumenskiy Municipal District", 6 February 2007, No. 2, Para 3.2.4 (Распоряжение Главы Куменского района Кировской области от 6 февраля 2007 года № 2 "Об утверждении Правил внутреннего трудового распорядка в органах местного самоуправления Куменского муниципального района").

ties during this week could include a donor day with the aim of raising awareness of problems of discrimination based on grounds including sexual orientation.[179]

It is therefore clear that progress has been very slow indeed, particularly in the legislative sphere. Furthermore, any regional and municipal acts must be interpreted in light of the federal legislation prohibiting "propaganda of non-traditional sexual relationships", which, as discussed in Part 2 below, *de facto* legitimises discrimination based on sexual orientation. This law has had a chilling effect on the regions' willingness to take measures aimed at prohibiting discrimination against LGBT individuals.[180]

In addition to legislation and other official measures at both the federal and regional level, professional ethical standards in medicine and psychology provide examples of an explicit prohibition of discrimination based on sexual orientation. While not forming part of law, these standards provide examples of the way in which a prohibition of discrimination on the basis of sexual orientation is slowly finding its way into formal standards and regulations. The Code of Professional Ethics of a Physician of the Russian Federation approved by the First National Congress of Medical Doctors of Russia in 2012 proclaims in its preamble that a doctor will not allow any considerations based on sexual orientation, amongst other factors, to prevent him or her from exercising his or her duties to a patient.[181] Likewise, the 2012 Code of Ethics of the Russian Psychological Society, a nationwide professional body which unites leading psychologists, stipulates that one the core ethical principles of psychologists is respect for individual, cultural and role differences, including those involving age, disability, education, ethnicity, gender, language, national origin, race, religion, sexual orientation, marital or family status and socio-economic status.[182]

It is particularly significant to note that the report did not identify measures taken in relation to discrimination on the basis of gender identity, although there is legal recognition of a change in gender.[183]

179 Letter of the Ministry of Education and Science of the Republic of Tatarstan, on Sending the Provisions of Republican Charity Action Spring Goodness Week, 3 March 2015, No. 3199/15 ("О направлении Положения Республиканской благотворительной акции "Весенняя неделя добра").

180 See Part 2.3.1.

181 See First National Conference of Russian Doctors, *The Code of Professional Ethics of Doctor of the Russian Federation*, 5 October 2012, Preamble ("Кодекс профессиональной этики врача Российской Федерации"). The Code was incorporated in normative acts in several regions, for example, Order of Health Care Department of the Vladimir Oblast, "On establishing an advisory council on medical ethics and medical deontology at the Health Care Department of the Administration of the Vladimir Oblast", 19 June 2013, No. 1105 ("О создании Общественного совета по медицинской этике и медицин-ской деонтологии при департаменте здравоохранения администрации Владимирской области").

182 Russian Psychological Society, *The Ethics Code of Psychologists*, 14 February 2012 (Российское психологическое общество, Этический кодекс психологов, принят 14 декабря 2012 года).

183 See Part 2.3.5.

2. ADDRESSING DISCRIMINATION AGAINST LGBT PERSONS IN COURTS: JUDICIAL PRACTICE

This Part of the report examines the jurisprudence of the Russian courts in relation to discrimination against lesbian, gay, bisexual and transgender (LGBT) persons. It is divided into six parts: hate-motivated violence against LGBT persons; hate speech against LGBT persons; violations of the rights to freedom of expression and assembly of LGBT persons; restrictions on the right to freedom of association of LGBT organisations; family and private life; and the right to work and education. Despite the research seeking to cover all areas of life, the majority of the cases identified fall within the first four parts of this Part. LGBT activists and organisations have been very active in seeking the protection of the courts when their rights to expression, assembly and association in particular have been violated. The dearth of jurisprudence in the areas of family and private life, work and education is likely a combination of a number of factors: a reluctance by individuals to initiate legal proceedings which would require them to reveal that they are LGBT and discuss their private life, due to a strong perception that this may expose them to risk; a perception by individuals that courts will fail to vindicate their rights; and the fact that there may be cases in the private and family sphere in relation to which the publication of judgments has been restricted due to their containing sensitive personal information (see Part 1.3 of this report).

As is clear from this Part, the jurisprudence of the courts in relation to LGBT rights tells a mixed tale. While there have been a number of positive judgments, the overall approach of the courts to cases involving LGBT persons is more often negative. A result of this inconsistency is that there is no clear judicial position on the application of a number of basic rights to the LGBT community in Russia, leaving members of the community with uncertainty in matters which affect their everyday lives.

2.1 Hate-Motivated Violence against LGBT Persons

International human rights law requires states to take legislative and other measures to protect LGBT persons from hate-motivated violence. This includes prohibiting, investigating and prosecuting such violence, and also providing remedies for such violence when it occurs.[1] States must also exercise due dili-

1 International Covenant on Civil and Political Rights (ICCPR), Articles 6 and 9; Human Rights Committee, *General Comment No. 35: Liberty and security of person,* 16 December 2014, UN Doc. CCPR/C/GC/35, Para 9; and Human Rights Council, *Report submitted by the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity*, UN Doc. A/HRC/29/23, 4 May 2015, Paras 11–12.

gence in preventing LGBT persons from facing torture and other ill-treatment, including prohibiting, investigating, prosecuting and punishing acts of torture and other ill-treatment carried out by private individuals.[2] A failure to take adequate measures to protect people from hate-motivated violence falls short of the requirement to prevent ill-treatment of LGBT persons. As has been noted by High Commissioner for Human Rights, due diligence "requires States to ensure the protection of those at particular risk of violence – including (…) those targeted because of their sexual orientation and gender identity."[3] Various United Nations mechanisms have repeatedly noted that states must enact legislation addressing hate crimes committed on the grounds of sexual orientation and gender identity.[4] The High Commissioner for Human Rights recommended in 2015 that states address violence by enacting hate-crime laws that establish homophobia and transphobia as aggravating factors for purposes of sentencing.[5] In his first report for 2016, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment noted that:

> *States fail in their duty to prevent torture and ill-treatment whenever their laws, policies or practices perpetuate harmful gender stereotypes in a manner that enables or authorizes, explicitly or implicitly, prohibited acts to be performed with impunity.*[6]

The European Court of Human Rights (ECtHR) has long been clear that states must provide adequate protection from violence, including violence perpetrated by private individuals, in order to meet their obligation to uphold the right to freedom from torture and inhuman and degrading treatment under Article 3 of the European Convention on Human Rights (ECHR).[7] The Court has repeatedly emphasised, including in cases involving homophobic violence, that:

> *When investigating violent incidents, such as ill-treatment, State authorities have the duty to take all reasonable steps to unmask possible discriminatory motives (…) The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced*

2 ICCPR, Article 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 3 and 16; and *Ibid.*, Human Rights Council, Paras 13 and 14.

3 *Ibid.*, Human Rights Council, Para 20.

4 United Nations, Office of the High Commissioner for Human Rights, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, 2012, p. 19; United Nations Human Rights Committee, *Concluding Observations: United States of America*, UN Doc. CCPR/C/USA/CO/3, 18 December 2006, Para 25; Committee against Torture, *Concluding Observations: Mongolia*, UN Doc., CAT/C/MNG/CO/1, 20 January 2011, Para 25; and Committee against Torture, *Concluding Observations: Poland*, UN Doc. CAT/C/POL/CO/4, 16 July 2007, Para 20.

5 See Human Rights Council, above, note 1, Para 78.

6 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 January 2016, UN Doc. A/HRC/31/57.

7 *MC v Bulgaria*, Application no. 39272/98, 4 December 2003.

> *by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination.*[8]

The ECtHR has stated that to treat violence that has a discriminatory motive on an equal footing with violence that has no such motive "would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights."[9] Failing to make a distinction in the way such cases are handled may amount to a violation of the right to non-discrimination contained in Article 14 of the ECHR.[10]

Hate-motivated violence against LGBT persons and the failure by the authorities to address the discriminatory grounds for crimes against LGBT persons have been regularly reported by human rights organisations in Russia.[11] However, few such cases have reached courts for a number of inter-related reasons. Firstly, the investigation of such crimes often disregards any hate motive as central to the case. Secondly, the victims of homophobic violence are reluctant to report such instances to police, considering this to be an ineffective remedy.[12] Thirdly, intimidation of victims of homophobic crimes by law enforcement bodies, including through disclosure of their sexual orientation and through other harassment, discourages LGBT individuals from reporting or pursuing their cases.[13]

The Criminal Code of the Russian Federation (Criminal Code) contains several legal avenues that may be used for tackling hate motivated crimes. Article 63(1)(e) of the Criminal Code contains a list of circumstances for the purpose of imposing aggravated punishment for all crimes:

> *The following circumstances shall be deemed as aggravating: (…) commission of a crime for reason of political, ideological, racial, national or religious hatred or enmity or by reason of hatred or enmity with respect to some social group.*

The Constitutional Court has confirmed that LGBT persons are a "social group" for the purposes of this provision.[14] In addition, for certain crimes, the commis-

8 *Identoba and Others v Georgia*, Application No. 73235/12, 12 May 2015, Para 67; and *MC and AC v Romania,* Application No. 12060/12, 12 April 2016, Para 113. See also, *Nachova and Others v Bulgaria*, Application No. 43577/98 and 43579/98, 6 July 2005, Para 160.

9 *Ibid.*

10 See, *Nachova and Others v Bulgaria*, above, note 8; See, *Members of the Gldani Congregation of Jehovah's Witnesses and Others v Georgia*, above, note 7, Paras 138–142; See, *Mudric v Moldova,* above, note 7, Paras 60–64; See, *Identoba and Others v Georgia*, above, note 8, Para 67; and see, *MC and AC v Romania,* above, note 8, Para 113.

11 Marzullo, M.A. and Libman, A.J., *Hate Crimes and Violence Against LGBT People*, Human Rights Campaign, 2009; and Russian LGBT Network, *Monitoring of human rights violations and discrimination based on sexual orientation and gender identity in 2014*, 2014 (Мониторинг нарушений прав человека и дискриминации по признаку сексуальной ориентации и гендерной идентичности в 2014, году); Human Rights Watch, *License to Harm. Violence and Harassment against LGBT People and Activists in Russia*, 2014.

12 *Ibid*.

13 *Ibid*.

14 Judgment of the Russian Constitutional Court, 23 September 2014, No. 24-P (Постановление Конституционного Суда Российской Федерации от 23 сентября 2014 года, № 24-П), Para 2.1.

sion of the crime "for reason of political, ideological, racial, national or religious hatred or enmity or by reason of hatred or enmity with respect to some social group" increases the proscribed minimum and maximum sentence (or other penalty) for the crime. For example, pursuant to Article 105 of the Criminal Code murder is punishable by imprisonment of between six and 15 years, but when committed by reason of hatred carries a minimum penalty of eight years' imprisonment and a maximum penalty of life imprisonment. The same is true (with differing penalties) for the following crimes: deliberate infliction of bodily harm (Articles 111, 112 and 115), battery (Article 116), torture (Article 117), threat of murder or infliction of grave bodily harm (Article 119), involvement of minors into commission of a crime (Article 150), and vandalism (Article 214). Finally, it is noteworthy that the Criminal Code prohibits both the incitement of hatred or enmity and the abasement of a person's dignity. These provisions are discussed in Part 2.2 below.

Despite the Criminal Code allowing for the prosecution of hate-motivated violence against LGBT groups and for the imposition of higher sentences in such cases, there has been a limited number of criminal cases against individuals or groups whose activities specifically targeted LGBT persons. In 2015, nine members of a criminal group were convicted of a number of crimes, including the threat of murder, infliction of grave bodily harm, torture, battery and deliberate infliction of bodily harm. As noted above, all of these crimes carry a higher sentence when found to be hate-motivated. In this case, all of the crimes were found to have a hate motive towards a social group, which the Court referred to as "persons of non-traditional sexual orientation". The members of the group were also convicted of participation in an extremist group. The criminal group used online dating systems to arrange to meet gay men, and then would torture and beat them.[15]

In 2012, a man used tear gas to attack participants at an LGBT public assembly. He shouted "sodomy is a mortal sin" and later argued in his defence that the LGBT assembly was unlawful and contrary to public morals. He was convicted of hooliganism with the use of a weapon under Article 213(1)(a), the Court having found that there was no hate motive for his offence which would allow a conviction for hooliganism on the basis of hatred.[16] When one of the victims of the attack later brought a civil action against the offender arguing that his actions had been discriminatory because they were motivated by hatred against LGBT persons, a different District Court dismissed the discrimination argument as "ungrounded" without providing further explanation.[17]

15 Verdict of the Sinarskiy District Court of the Sverdlovsk Oblast, 14 October 2015, No. 1-16/2015 (Приговор Синарского районного суда Свердловской области от 14 осктября 2015 года, по делу № 1-16/2015).

16 Verdict of the Petrogradskiy District Court of St. Petersburg, 11 November 2013, No. 1-354/2013 (Приговор Петроградского районного суда Санкт-Петербурга от, 11 ноября 2013 года, по делу № 1-354/2013).

17 Judgment of the Nevskiy District Court of St. Petersburg, 26 May 2015, No. 2-2757/2015 (Решение Невского районного суда Санкт-Петербурга от, 26 мая 2015 года, по делу № 2-2757/2015). The case is pending on appeal.

On 12 June 2012, in St. Petersburg, activists from the group "Alliance of Straights for LGBT Equality" were attacked by a group of young men. The young men knocked posters, banners, and rainbow-coloured umbrellas out of the activists' hands, beat the activists and then fled. Four activists were physically injured and filed reports with the police. The police initially classified the case as disorderly conduct and refused to classify it as a hate crime on the basis they did not consider LGBT persons a "social group" protected from hate crime under the law. One of the attackers was later charged by the police with "hooliganism" by reason of hatred under Article 213(1)(b) of the Criminal Code. However, these charges were subsequently changed to battery because the investigator, relying on an expert's opinion, concluded that "persons of non-traditional sexual orientation" cannot be considered as a social group. In Court, the attacker stated that he "was opposed to homosexual propaganda that contradicts [his] religious principles". He explained that when he saw a group of people holding umbrellas and flags with rainbow colours in their hands and a banner stating "Alliance for LGBT freedom", he considered this to be an open form of "homosexual propaganda" and so he decided to take the banner away. Despite these comments, the Court did not identify the motive for the crime as a qualifying circumstance and instead found the perpetrator guilty of battery under Article 116(2)(a) of the Criminal Code.[18]

On 29 June 2013, the annual Gay Pride rally was held in a specially designated place for public assemblies in St. Petersburg. About 200 opponents came to the rally with the aim of disrupting it, including bringing their children with them in order file reports of "propaganda." The opponents threw eggs, stones, and smoke bombs at the participants while shouting homophobic slogans. Some also broke through the police cordon and hit participants in the rally, knocking posters and flags out of their hands. The police took almost no steps to stop the opponents' attacks, and instead put the participants onto buses to take them to police stations purportedly for their own safety. Four friends participating in the rally did not get on the bus as one of them felt sick. When they moved a few meters away from the bus, they were surrounded by a crowd who started to beat, kick and whip them. The police only intervened to stop the attack after a few minutes had passed. The police initially refused to instigate criminal proceedings in relation to this attack despite information about the injuries inflicted being provided to the police by doctors who examined the victims after the attack. The police were also provided with statements from the victims, which stated that the attacks against them were motivated by hatred against them as LGBT. Without interviewing the victims, the police came to the conclusion that there had been a simple act of battery, which is classified as a "private prosecution", i.e., it must be proven in court by the victims, without the participation of the public prosecutor and without any investigation having taken place.[19] The police refused

18 Decision of the Justice of the Peace of Judicial District No. 201 in St. Petersburg, 24 December 2013 (Постановление мирового судьи судебного участка № 201 Санкт-Петербурга от 24 декабря 2013 года).

19 Decision of the Investigating Officer of the Police Department of St. Petersburg, 9 July 2013, No. 76 (Постановление дознавателя отдела полиции Санкт-Петербурга от 9 июля 2013 года, № 76).

to recognise the attack as a crime as they considered that there was enmity on both sides in light of the "the steady hostile relationships between persons of traditional sexual orientation and the participants of the St. Petersburg LGBT Pride and individuals supporting them".[20] The decision not to initiate criminal proceedings was later reversed by the prosecutor after a successful appeal to the Dzerzhinsky District Court of St. Petersburg.[21] In addition, the victims also successfully sought a court order requiring that an investigation be carried out.[22] However, over three years after the incident, no investigation has yet been carried out.[23]

These cases indicate the inadequacy in the approach taken by the authorities in investigating and prosecuting hate crimes against LGBT persons, and the failure of courts to address these inadequacies when cases come before them. It is also clear that courts are largely failing to recognise or acknowledge homophobic hatred as either an aggravating factor in sentencing, or as an element in the commission of hooliganism. These failings of both the authorities and the courts have rightly been criticised as falling short of human rights obligations.

The Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT Committee) has voiced its concern over the failure of the Russian authorities to investigate and prosecute hate-motivated crimes against LGBT persons. In 2012, the Committee noted its concern "at reports that police have failed to promptly react to, or to carry out effective investigations and bring charges against all those responsible for violent attacks against (…) (LGBT) persons, such as alleged regarding the recent attacks on the '7 Free Days Club' in Moscow and the 'Parisian Life Club' in Tyumen".[24] It went on to recommend that Russia take effective measures to ensure the protection of all persons at risk, including LGBT persons. The Committee stated that "all acts of violence and discrimination (…) should be promptly, impartially and effectively investigated."[25] The Committee further recommended that Russia compile statistics on all crimes against members of vulnerable groups, including figures on the investigation and prosecution of such crimes. The Committee also recommended that Russia should "[p]ublicly condemn attacks against (…) LGBT persons (…), and organise awareness-raising campaigns, including among the police, promoting tolerance and respect for diversity."[26]

20 *Ibid*.

21 Decision of the Prosecutor of the Central District of St. Petersburg, 20 November 2013 (Постановление Прокурора центрального района Санкт-Петербурга от 20 ноября 2013 года).

22 Judgment of the Dzerzhinskiy Distict Court of St. Petersburg, 18 December 2013 (Постановление Дзержинского районного суда Санкт-Петербурга от 18 декабря 2013 года).

23 Information provided by Dmitri Bartenev, the victims' lawyer, 15 May 2016.

24 Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Concluding observations on the fifth periodic report of the Russian Federation*, UN Doc. CAT/C/RUS/CO/5, 11 December 2012, Para 15.

25 *Ibid*., Para 15(a).

26 *Ibid.*, Para 15(b).

Following its examination of the periodic report of the Russian Federation in 2015, the Human Rights Committee (HRC) also expressed its concern about reports of violence against LGBT persons.[27] The Committee went on to note that it was concerned that Article 63(1)(e) of the Criminal Code, which requires that hate motivation be treated as an aggravating circumstance in sentencing, did not appear to have ever been applied in cases involving violence against LGBT individuals. Accordingly, the Committee recommended that Russia:

> *[S]hould clearly and officially state that it does not tolerate any form of social stigmatization of homosexuality, bisexuality or transsexuality, or hate speech, discrimination or violence against persons based on their sexual orientation or gender identity. It should also (…) take all the steps necessary to strengthen the legal framework protecting LGBT individuals from discrimination and violence and ensure the investigation, prosecution and punishment of any act of violence motivated by the victim's sexual orientation or gender identity and apply the provisions of Article 63(1)(e) of the Criminal Code to such acts.*[28]

2.2 "Hate Speech" against LGBT Persons

The right to freedom of expression generally protects discriminatory statements that "offend, shock or disturb".[29] However, there is a recognition in international human rights law that states must protect people from "hate speech". This is most widely defined in accordance with Article 20(2) of the ICCPR namely "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".[30] Accordingly, international human rights law does not explicitly prohibit incitement to discrimination, hostility and violence on the basis of sexual orientation or gender identity. However, in order to fully realise the right to non-discrimination, a prohibition of certain forms of hate speech is arguably required. Indeed, there is some indication that UN mechanisms are recognising the need to protect LGBT persons from hate speech.[31]

27 Human Rights Committee, *Concluding observations on the seventh periodic report of the Russian Federation*, UN Doc. CCPR/C/RUS/CO/7, 28 April 2015, Para 10.

28 *Ibid*.

29 See, for example, *Handyside v United Kingdom,* Application no. 5493/72, 7 December 1976, Para 49; and *Vejdeland and Others v Sweden*, Application No. 1813/07, 9 February 2012, Para 53. See also, Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34, 12 September 2011, Para 11.

30 The same approach is adopted in Principle 12 of the *Camden Principles on Freedom of Expression and Equality*, April 2009.

31 See Article 19, *Responding to Hate Speech against LGBTI People*, October 2013, pp. 12, 25 and the discussion of the concluding observations of the HRC therein. See also, Committee on the Elimination of Racial Discrimination*, Concluding observations of the Committee on the Elimination of Racial Discrimination: Romania*, UN Doc. CERD/C/ROU/CO/16-19, 13 September 2010, Para 4, in which the Commitee welcomes a prohibition on broadcasting speech that amounts to incitement of hatred, including on the basis of sexual oritentation; and Article 19, *'Hate Speech' Explained: A Toolkit*, 2016, p. 86.

The ECHR does not contain an obligation to prohibit "hate speech" (against any group). However, in a case related to comments made in respect of religious, racial and regional differences of people, the ECtHR has recognised that:

> *[I]t may be considered necessary in democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including intolerance religious), if it is ensured that the "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued.*[32]

The ECtHR has approached the issue of hate speech in two ways. The first is through Article 17 of the ECHR, which provides that the Convention cannot be interpreted as giving any "group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms" provided for in the Convention. This approach appears to be used when hate speech reaches such a level that it is considered as aimed at the destruction of Convention values.[33] The second approach, utilised when hate speech does not reach such a level, is not to mandate a prohibition on hate speech but rather to explore whether a restriction on expression, where it exists, is permitted under Article 10(2).[34] In order to be permissible, any restriction must be provided for by law, pursue one of the legitimate aims set forth in Article 10(2) and be necessary in a democratic society.[35] The ECtHR has found restrictions on homophobic speech to be valid pursuant to Article 10(2), even in instances where the expression in question did not reach the level of incitement to hatred.[36]

While the Court has not gone as far as to hold that the ECHR mandates that states protect people from hate speech on grounds of sexual orientation or gender identity, the Committee of Ministers has recommended that homophobic hate speech be prohibited. It has defined such speech broadly:

> *[A]ll forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons.*[37]

The nature of the speech which should be prohibited remains a matter of contention. It is clear that, given the importance of ensuring the right to freedom of

32 *Erbakan v Turkey*, Application No. 59405/00, 6 July 2006, Para 56 (unofficial translation from French).

33 See, European Court of Human Rights, *Fact Sheet – Hate Speech*, June 2016; and Weber, A., *Manual on Hate Speech*, Council of Europe, 2009, pp. 19–31.

34 *Ibid*.

35 ECHR, Article 10(2). See, for example, *Handyside v United Kingdom*, above note, 29, Paras 48–49; *Jersild v Denmark,* Application No. 15890/89, 23 September 1994, Paras 25–28; and *Vejdeland v Sweden*, Application No. 1813/07, 9 February 2012, Paras 49, 50.

36 *Ibid., Vejdeland v Sweden*, Paras 49–60.

37 See, for example, Council of Europe, *Committee of Ministers Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity*, 31 March 2010.

expression – including the right to offend – what is required to protect LGBT persons should be limited to what is necessary in a democratic society. It is also clear that some limitation on freedom of expression is necessary to ensure respect for the rights of LGBT persons, though the content of such limitation remains to be settled. In the absence of settled law on this matter, the Declaration of Principles on Equality sets a necessary minimum standard in providing adequate protection for protected groups, by stating clearly that all acts of incitement to violence must be prohibited. Principle 7 states:

> *Any act of violence or incitement to violence that is motivated wholly or in part by the victim having a characteristic or status associated with a prohibited ground constitutes a serious denial of the right to equality. Such motivation must be treated as an aggravating factor in the commission of offences of violence and incitement to violence, and States must take all appropriate action to penalise, prevent and deter such acts.*

In summary, there remains a lack of clear consensus at the international and regional levels as to the extent to which hate speech against LGBT persons must or can be prohibited without impinging on the right to freedom of expression. In this context, it is unsurprising that there is significant variance between the approaches states take in their national laws.

In the Russian context, Article 29 of the Federal Constitution provides for freedom of expression, but also provides that:

> *Propaganda or campaigning inciting social, racial, national or religious hatred and strife is impermissible. The propaganda of social, racial, national, religious or language superiority is forbidden.*

Our research did not identify any cases in which this provision had been argued in a case of homophobic hate speech, or referenced by a court in such a case. However, hate speech may also be tackled through legislation at the federal level. The Criminal Code prohibits both the incitement of hatred or enmity and the abasement of a person's dignity in its Article 282(1):

> *Incitement of hatred or enmity, as well as abasement of dignity of a person or a group of persons on the basis of sex, race, nationality, language, origin, attitude to religion, as well as affiliation to any social group, if these acts have been committed in public or with the use of mass media.*

Article 282(2) provides for an increased penalty if such actions include violence or the threat of violence. In order to be convicted of hooliganism ("gross violation of the public order") under the Criminal Code, it must be proved either that the violation of public order was carried out with weapons (Article 213(1)(a)) or "by reason of political, ideological, racial, national or religious hatred" (Article 213(1)(b)), which may include hatred towards LGBT persons.

The Criminal Code also prohibits a number of "extremist offences", which may apply to actions (including violent actions) taken towards LGBT persons, including participating in or financing an extremist community, organisation or activity (Articles 282.1 to 282.3). The Federal Law "On Countering Extremist Activities", defines extremism for the purposes of Articles 282.1 to 282.3 as including, *inter alia*, incitement of social, racial, national or religious discord, and propaganda of the superiority or inferiority of a person based on his social, racial, national or religious affiliation.[38] It prohibits the dissemination of extremist materials and also allows for notices to be issued preventing the dissemination of extremist materials.

Prosecutions for "hate speech" against LGBT persons are extremely rare although instances of openly homophobic speech have become routine in Russia.[39] In 2010, an author was charged under Article 282(1) for publishing an article entitled "Think, Reader: Do we need authorities that give state awards to Chechen bandits and homosexuals", in which the author criticised the granting of state awards to people whom he considered to be gay.[40] However, the author was not convicted as the case was terminated by the Court on the basis that it was time-barred.[41] Another criminal case concerned the distribution of leaflets which suggested that "homosexuals" were inferior to others during a public assembly in Moscow.[42] The Court held that the leaflets were aimed at inciting negative attitudes towards "Jews and homosexuals"[43] and explicitly stated that the defendant incited hatred against, or debased the human dignity of, the social group of "homosexuals" contrary to Article 282(1) of the Criminal Code.

We have identified only one case where the Law "On Countering Extremism" was applied to prevent homophobic speech. In 2012, a public prosecutor in St. Petersburg sought a judicial ban under the Law to prevent the printing and distribution of certain materials produced by a nationalist group because the materials included statements which the public prosecutor argued were homophobic and debased the human dignity of sexual and gender minorities.[44] The Court

38 Federal Law, "On Countering Extremist Activities", 25 July 2002, No. 114-FZ, Article 1 (Федеральный закон от 25 июля 2002 года № 114-ФЗ "О противодействии экстремистской деятельности").

39 See, for example, Russian LGBT Network, *Monitoring of Discrimination and Violence Based On Sogi In Russia in 2015*, 2015.

40 The title of the article in Russian is "Задумайся, читатель: нужна ли нам власть, раздающая государственные награды чеченским бандитам и гомосексуалистам?". The text of the article was published in Russkoe Zabaikailie (Русское забайкайлье) newspaper, which is no longer available as the paper was closed due to being considered as extremist media.

41 Decision of the Tsentralnyi District Court of Chita, 26 August 2010, No. 1-461/2010 (Постановление Центрального районного суда Читы от 26 августа 2010, года по делу № 1-461/2010).

42 The criminal case was eventually terminated on the basis of the defendant's insanity, Decision of the Ostankinskiy District Court of Moscow, 6 February 2013, No. 1-62/2013 (Постановление Останкинского районного суда Москвы от 6 февраля 2013, года по делу № 1-62/2013).

43 The decision of the Court does not provide actual text of the leaflets and instead refers to the conclusions of the expert assessment of these leaflets finding that they promoted the "inferiority of homosexuals".

44 Judgment of the Vasilieostrovskiy District Court of St. Petersburg, 8 June 2012 (Решение Василеостровского районного суда Санкт-Петербурга от 8 июня 2012 года).

granted the ban but did not specify the basis upon which it concluded that the contents of the publication amounted to extremist material.[45]

Complaints about discriminatory speech in the media may also be made by any person to the Panel for Complaints about the Media, an independent ethics body for journalists, which has found that such statements amounted to incitement to hatred. The Panel does not have remedial powers but is able to declare that media content is discriminatory. During a TV news programme in September 2014, which covered QueerFest, an annual festival in St. Petersburg that promotes LGBT human rights through arts and culture, the commentator made several statements characterising participants in the festival as "perverts". The organisers of the festival complained to the Panel, which concluded that the TV programme incited hatred and indicated that such hate speech is unacceptable.[46]

These above examples are the only examples we found where findings of hate speech were made. By contrast, we identified over 20 unsuccessful attempts to seek a remedy for hate speech against LGBT individuals. On 16 May 2008, one of Russia's leading newspapers, *Komsomolskaya Pravda*, published an interview with Oleg Betin, at that time Governor of the Tambov Oblast. According to the article, when the journalist remarked on the need for tolerance towards sexual minorities, Mr Betin used language which many will find extremely offensive when he stated: "[t]olerance? Damn it! Faggots must be torn into pieces. And throw their pieces down wind!" Two LGBT rights activists lodged a complaint with the Prosecutor's office maintaining that the Governor's statement amounted to the incitement of hatred using mass media, an offence under Article 282(1) of the Criminal Code.

On 2 July 2008, the investigating authority of Tambov refused to initiate criminal proceedings against Mr Betin on the basis that, according to sociology, "homosexuals" are not a "classic social group" and so are not protected under Article 282(1). Additionally, the investigator considered that Mr Betin's statement was not addressed to anyone and so could not incite hatred. The applicants appealed against this decision in the Leninskiy District Court of Tambov. However, on 6 October 2008, the District Court held that the decision of the investigator did not impinge on the rights of the applicants and therefore they had no right of appeal, a decision which was upheld by the Tambovskiy Oblast Court the following month.[47] In giving its reasoning for upholding the District Court decision, the Oblast Court stated that Article 282 of the Criminal Code did not apply as "persons cannot be

45 The text of the book available online contains numerous "proofs" of the inferiority of Jews, including that they engage in immoral behaviour like LGBT relationships.

46 Lesbian gay bisexual and transgender (LGBT) Group "Coming Out", *Report on Monitoring Cases of Discrimination and Violence based on Sexual Orientation and Gender Identity in St. Petersburg in 2014*, 2014, available at: http://comingoutspb.com/publikatsii/prava-cheloveka, p. 25 (Доклад по мониторингу случаев дискриминации и насилия по признакам сексуальной ориентации и гендерной идентичности в Санкт-Петербурге за 2014 год).

47 Decision of the Leninskiy District Court of Tambov, 2 October 2008 (Постановление Ленинского районного суда Тамбова от 2 июля 2008 года).

considered as a separate social group on the basis of sexuality or on the basis of satisfying one's sexual needs".[48]

There have been a number of unsuccessful attempts to bring cases against the well-known political figure Vitaly Milonov, a member of the St. Petersburg Legislative Assembly and the author of Russia's infamous anti-propaganda law. The first of these related to an incident in September 2013 in which Mr Milonov insulted participants during the opening ceremony of the International Queer Culture Festival by calling them "animals", "perverts", and "sodomites". Subsequent requests by some participants to institute administrative proceedings against him for insult and discrimination under Article 5.62 of the Code of Administrative Offences were denied on the basis of the immunity afforded to him by his office. Likewise, a tort action brought against him was rejected by the court on the same basis.[49]

Secondly, in November 2013, following a violent attack on the office of La-Sky, a St. Petersburg-based LGBT organisation, Mr Milonov referred to LGBT persons as "paedophiles" and "perverts" and endorsed the violent attacks against LGBT individuals in a number of statements made in an interview posted on the internet.[50] Subsequent attempts by one of the victims of the attack to institute criminal proceedings and a tort action against Mr Milonov for hate speech were unsuccessful. Although two experts in sociology provided opinions to the criminal investigating body, in which they concluded that Mr Milonov's statements amounted to hate speech under Article 282(1) of the Criminal Code, the body preferred a third expert opinion which stated that "homosexuals" are not a "social group" and that, accordingly, Article 282 of the Criminal Code did not apply.[51] The body's decision was upheld in court.[52] The tort claim against Mr Milonov was also unsuccessful. The Court rejected it on the basis that Mr Milinov's "critical comments" were a lawful expression of his personal opinion.[53]

48 Decision of the Tambovskiy Oblast Court, 13 November 2008 (Определение Тамбовского районного суда от 13 ноября 2008). On 5 May 2009, the Judge of the Presidium of the Tambov Oblast Court refused to initiate supervisory review of the 6 October 2008 decision which provided the judicial endorsement of the decision of the investigator, Decision of the Judge of the Tambovskiy Oblast Court, 5 November 2009 (Определение судьи Тамбовского районного суда от 5 ноября 2009).

49 Judgment of the Kirovskiy District Court of St. Petersburg, 29 April 2014, No. 2-1617/2014 (Решение Кировского районного суда Санкт-Петербурга от 29 апреля 2014 года по делу № 2-1617/2014). The Judgment was upheld on appeal by the decision of the St. Petersburg City Court, 14 October 2014, case no. 33-12999/2014 (Определение Санкт-Петербургского городского суда от 14 октября 2014 года по делу № 33-12999/2014).

50 In his interview Mr Milonov called guests of an LGBT film festival guests "paedophiles" and "perverts", see: http://www.fontanka.ru/2013/11/06/163.

51 Decision of the Investigator of the Central District of the St. Petersburg Main Investigating Department of the Investigating Committee of Russia, 11 December 2014 (Постановление следователя Центрального района Главного следственного управления Следственного Комитета России по Санкт-Петербургу от 11 декабря 2014 года).

52 Decision of St Petersburg City Court, 17 September 2015, No. 3/10-332/2015 (Постановление Санкт-Петербургского городского суда от 17 сентября 2015 года по делу № 3/10-332/2015).

53 Judgment of the Kirovskiy District Court of St. Petersburg, 26 June 2015, No. 2-2341/2015 (Решение Кировского районного суда Санкт-Петербурга от 26 июня 2015 года по делу № 2-2341/2015).

Although not in the context of seeking a remedy for hate speech, the approach of the Tushinskiy District Court of Moscow to an attempt by a gay rights activist to sue a famous Russian actor for defamation is indicative of the failure of courts to recognise a clear instance of hate speech. The case related to a comment made by the actor on 8 December 2013 during a talk that he gave in Novosibirsk, which many will find extremely offensive, was that:

> *I would have them all stuffed alive inside an oven. This is Sodom and Gomorrah, and as a believer, I cannot remain indifferent to this, it is a living danger to my children! I do not want my children thinking that faggots are normal. This is a gay fascism! If a man cannot choose the opposite sex for reproduction, it is a clear sign of mental abnormality, then he needs to be deprived of that right to choose.*[54]

The defamation case was rejected on the basis that the plaintiff was not personally affected, but the Court also noted that it did not consider that the statement made was harsh or incited hatred.[55]

As discussed at the outset of this Part, discriminatory speech which reaches the level of severity such that it can be properly called hate speech should be prohibited. It is apparent from the above discussion that both the Russian authorities and also the courts are refusing to recognise clear incidents of hate speech. The HRC, in its latest concluding observations on Russia's periodic report under the ICCPR, expressed concern about reports of hate speech against LGBT individuals and activists and recommended that Russia "should clearly and officially state that it does not tolerate (…) hate speech (…) against persons based on their sexual orientation or gender identity".[56] Even more concerning is the refusal to recognise LGBT persons as a "social group", thereby excluding the LGBT community from the protections against hate speech afforded by Russian legislation. Such findings have far-reaching consequences for LGBT persons in Russia, as they allow people to think that hate speech against LGBT persons is permitted.

2.3 Discrimination in the Enjoyment of Freedom of Expression and Assembly

This Part of the report overs violations of both the right to freedom of expression and the right to freedom of assembly. These two rights are considered together as, in many of the cases before the Russian courts, interferences with the actions of LGBT persons or activists often involve a violation of both rights simultane-

54 Judgment of the Tushinskiy District Court of Moscow, 17 March 2014 (Решение Тушинского районного суда Москвы от 17 марта 2014 года).

55 *Ibid.*

56 See above, note 27.

ously. For example, activists are often denied the right to stage pride marches on the basis of the ideas that they may express during these marches.

The right to freedom of expression is guaranteed by Article 19(2) of the ICCPR and by Article 10(1) of the ECHR. Both provisions allow for restrictions to freedom of expression to be made in limited circumstances. Restrictions on the freedom of expression provided by Article 19(2) are permitted under Article 19(3) only when they are: prescribed by law; in pursuance of one of the legitimate aims listed in Article 19(3); and necessary and proportionate.[57] Restrictions of freedom of expression under the ECHR must meet the requirements set out in Article 10(2), namely that the restriction is: prescribed by law; in pursuance of one of the legitimate aims provided for in Article 10(2); and necessary in a democratic society.[58] This last requirement requires an examination of whether the restriction was proportionate to the aim sought to be achieved and also whether the reasons put forward by the State to support the restriction are "relevant and sufficient".[59] Both the HRC and the ECtHR have made it clear that any restrictions must be strictly necessary, and that speech which shocks or offends is protected by the right to freedom of expression.[60]

The right to freedom of assembly is guaranteed, and restrictions permitted, on similar terms to the right to freedom of expression. Both Article 21 of the ICCPR and Article 11(1) of the ECHR provide for the right of peaceful assembly. In accordance with Article 21:

> *No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

Article 11(2) similarly provides that:

> *No restrictions shall be placed on the exercise of these rights other than such as 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.*

57 See, Human Rights Committee, above, note 29, Para 22.

58 See above, note 29, Paras 48–49; See, *Jersild v Denmark,* above, note 35, Paras 25–28; and *Vejdeland v Sweden*, Application No. 1813/07, 9 February 2012, Paras 49, 50.

59 *The Sunday Times v The United Kingdom (No 2)*, Application No. 13166/87, 26 November 1991 Para 50. See also, *Handyside v United Kingdom,* above, note 29, Paras 48–49; *Jersild v Denmark,* Application No. 15890/89, 23 September 1994, Paras 25–28; and *Vejdeland v Sweden*, Application No. 1813/07, 9 February 2012, Paras 49 and 50.

60 See, for example, *Handyside v United Kingdom* and *Vejdeland and Others v Sweden*, above, note 29. See also, Human Rights Committee, above, note 29.

Both provisions require that restrictions imposed on the right of peaceful assembly are necessary and proportionate to the aim sought to be achieved.[61] As with the right to freedom of expression, both the HRC and the ECtHR have repeatedly reiterated the importance of protecting the right to freedom of assembly and limiting any restrictions on it. The ECtHR has spoken of the positive obligations of states to protect the right to peaceful assembly:

> *[A]lthough individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (…) Genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms. This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation.*[62]

In Russia, the Federal Constitution provides for protection of both the right to freedom of expression and the right to freedom of assembly. Article 29(1) provides that "everyone shall have the right to freedom of thought and speech." Article 29(4) further provides that "Everyone shall have the right to seek, get, transfer, produce and disseminate information by any lawful means." Article 31 provides for a right to peaceful assembly in the following terms:

> *Citizens of the Russian Federation shall have the right to gather peacefully, without weapons, and to hold meetings, rallies, demonstrations, marches and pickets.*

In accordance with Article 55(3) of the Federal Constitution, both the right to freedom of expression and assembly:

> *[M]ay be restricted by the federal law only to the extent required for the protection of the fundamentals of the constitutional system, morality, health, rights and lawful interests of other persons, for ensuring the defence of the country and the security of the state.*

Despite these guarantees of Constitutional rights aligning with those set out in international and European human rights law, in practice, these rights are severely restricted for LGBT persons and activists in Russia. These restrictions,

61 See, for example, *Christian Democratic People's Party v Moldova*, Application no. 28793/02, 14 February 2006, Para 70; *Alekseyev v Russia*, Application No. 4916/07, 25924/08 and 14599/09, 21 October 2010, Paras 69 and 70; and Human Rights Committee, *Sergey Praded v Belarus*, Communication No. 2029/2011, UN Doc. CCPR/C/112/D/2029/2011, 10 October 2014, Paras 7.4 and 7.5.

62 *Bączkowski and Others v Poland,* Application No. 1543/06, 3 May 2007, Paras 63–64.

such as those imposed on the basis of the anti-propaganda laws, have been rightly criticised at both the international and European level as clear violations of both international and European human rights law.[63]

2.3.1 Overview of Laws Banning Propaganda of "Non-Traditional Sexual Relationships"

Since 2006, there has been an increasingly widespread attack on the freedom of expression of LGBT individuals by Russian legislatures, with thirteen regions of the Russian Federation adopting laws banning "propaganda of homosexuality" or "propaganda of non-traditional sexual relationships". These laws were followed by a ban at the federal level in 2013. The laws also provide the basis upon which a number of assemblies have been prevented from going ahead.

The first such law was introduced in the Ryazan Oblast. Its 2006 Law "On Protection of Morals and Health of Children in the Ryazan Region" prohibited "public actions aimed at propaganda of homosexuality (sodomy and lesbianism) among minors".[64] From 2011, similar laws were introduced in Arkhangelsk,[65] Kostroma,[66] Magadan,[67] Novosibirsk,[68] Samara,[69] Vladimir,[70] Kaliningrad[71] and

63 See Part 2.3.2.

64 Ryazan Oblast Law, "On the protection of children's health and morality in the Ryazan Oblast", 3 April 2006, No. 41-OZ, Article 4 ((Закон Рязанской области "О защите здоровья и нравственности детей в Рязанской Области", от 3 апреля 2006 года, № 41-ОЗ). статья 4).

65 Arkhangelsk Oblast Law, "On Introducing Amendments and Additions to the Regional Law for the Protection of Morals and the Health of Children in the Arkhangelsk Region", 30 September 2011, No. 336-24-OZ (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").

66 Kostroma Oblast Law, "On Amendments to the Law of the Kostroma Region on Guarantees of Child Rights in the Kostroma Region and the Code of Administrative Offences of the Kostroma Region", 15 February 2012, No. 193-5-ZKO, (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").

67 Magadan Oblast Law, "On Amendments to Certain Laws of the Magadan region in terms of the protection of minors from the factors that negatively affect their physical, intellectual, mental, spiritual and moral development", 9 June 2012, No. 1507-OZ (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").

68 Novosibirsk Oblast Law, "On amending Novosibirsk Oblast laws", 14 June 2012, No. 226-OZ (Закон Новосибирской области от 14 июня 2012 г. № 226-ОЗ "О внесении изменений в отдельные законы Новосибирской области").

69 Samara Oblast Law, "On administrative offences in the Samara Oblast", 10 July 2012, No. 75-GD (Закон Самарской области от 10 июля 2012 г. № 75-ГД "О внесении изменений в Закон Самарской области "Об административных правонарушениях на территории Самарской области").

70 Vladimir Oblast Law, "On Amendments to Article 5 of the Law of Vladimir region on measures for the protection of morals and health of children in the Vladimir region", 13 November 2012, No. 145-OZ (Закон Владимирской области от 13 ноября 2012 г. № 145-ОЗ "О внесении изменения в статью 5 Закона Владимирской области "О мерах по защите нравственности и здоровья детей во Владимирской области").

71 Kaliningrad Oblast Law, "On Amendments to the Law of the Kaliningrad region "Kaliningrad Region Code of Administrative Offences", 30 November 2013, No. 196 (Закон Калининградской области от

Sverdlovsk Oblasts,[72] the Krasnodar Region,[73] Bashkiria,[74] Dagestan[75] and St. Petersburg.[76] A number of the regional laws banned not only "propaganda about homosexuality", but also about "bisexual relationships" and "transsexualism". In all cases, the laws prohibited "propaganda" among minors.[77] In the majority of the regions, a violation of the legal prohibition was considered as an administrative offence punishable by a fine, both for individuals and for legal entities.

The federal law, which followed in 2013, made amendments to three pre-existing laws.[78] Firstly, it amended the Law "On Basic Guarantees of the Rights of the Child in the Russian Federation", to include a provision according to which, in order to "protect children from information, propaganda and agitation harmful to their health, moral and spiritual development", measures must be taken to protect them from propaganda relating to "non-traditional sexual relationships".[79] Secondly, it amended the Law "On protection of children from information harmful to their health and development" to include a prohibition on the dissemination of information to children (those under 18) that "denies family values, promotes non-traditional sexual relationships and develops disrespect for parents and (or) other members of the family".[80]

30 января 2013 г. № 196, "О внесении дополнений в Закон Калининградской области "Кодекс Калининградской области об административных правонарушениях").

72 Sverdlovsk Oblast Law, "On amendments to the regional law on protection of rights of the child", 17 October 2013, No. 96-OZ (Закон Свердловской области от 17 октября 2013, г. № 96-ОЗ, О внесении изменений в Областной закон "О защите прав ребенка").

73 Krasnodar Kray Law, "On Amendments to Certain Legislative Acts of the Krasnodar Territory in the strengthening of the protection of health and spiritual and moral development of children", 3 July 2012, No. 2535-KZ (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").

74 Law of the Republic of Bashkortostan, "On Amending the Law of the Republic of Bashkortostan on Basic Guarantees of Children's Rights in the Republic of Bashkortostan", 23 July 2012, No. 581-Z (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").

75 Law of the Republic of Dagestan, "On Amendments to the Law of the Republic of Dagestan on Protection of Children's Rights in the Republic of Dagestan", 19 March 2014, No. 17 (Закон Республики Дагестан от 19 марта 2014 г. № 17 "О внесении изменений в Закон Республики Дагестан "О защите прав ребенка в Республике Дагестан").

76 Law of St. Petersburg, "On Amendments to the Law of St. Petersburg on Administrative Offences in St. Petersburg", 7 March 2012, No. 108-18 (Закон Санкт-Петербурга от 7 марта 2012 г. № 108-18, "О внесении изменений в Закон Санкт-Петербурга "Об административных правонарушениях в Санкт-Петербурге").

77 The Kaliningrad Region Code of Administrative Offences was later amended to extend the reach of propoganda provisions to adults. See below p. 58.

78 Federal Law "On Amending Article 5 of the Federal Law "On protection of children from information harmful to their health and development" and certain legislative acts in order to protect children from the information propandasing the denial of family values", 29 June 2013, No. 135-FZ (Федеральный закон от 29 июня 2013 года № 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").

79 Federal Law, "On Basic Guarantees of the Rights of the Child in the Russian Federation", 24 July 1998, No. 124-FZ, Article 14(1) (Федеральный закон от 24 июля 1998 года, № 124-ФЗ, "Об основных гарантиях прав ребенка в Российской Федерации").

80 Federal Law, "On protection of children from information harmful to their health and development", 29 December 2010, No. 436-FZ, Article 5(2)(4) (Федеральный закон от 29 декабря 2010 года, № 436-ФЗ "О защите детей от информации, причиняющей вред их здоровью и развитию").

Thirdly, on 29 June 2013, in order to ensure compliance with the above prohibitions, Federal Law No. 135-FZ introduced Article 6.21 of the Code of Administrative Offences, providing administrative liability for "propaganda of non-traditional sexual relationships among minors":[81]

> *1. Propaganda of non-traditional sexual relationships among minors in the form of dissemination of information aimed at forming non-traditional sexual conceptions in minors, raising the attractiveness of non-traditional sexual relationships, misrepresenting the social equivalence of traditional and non-traditional sexual relationships, or imposing information about non-traditional sexual relationships raising interest in such relationships, unless such acts constitute a criminal offence – shall be punishable by an administrative fine of: between 4,000 roubles to 5,000 roubles; or of between 40,000 roubles to 50,000 roubles if perpetrated by a public official; or of between 800,000 roubles to 1,000,000 roubles if perpetrated by a legal entity, or a suspension of its activity for up to 90 days.*
>
> *2. Actions envisaged in part 1 of this article, committed with the use of the media and (or) information and telecommunications networks (including the "Internet" network), unless these actions constitute a criminal offence – shall be punishable by an administrative fine on citizens in the amount of 50,000 to 100,000 roubles; on officials from 100,000 to 200,000 roubles; for legal entities from 1,000,000 roubles or administrative suspension of their activity for up to 90 days.*
>
> *3. Actions envisaged in part 1 of this article, committed by a foreign national or a stateless person, unless these actions constitute a criminal offence – shall be punishable by an administrative fine of 4,000 to 5,000 roubles with administrative deportation from the Russian Federation or administrative arrest for up to 15 days with administrative deportation from the Russian Federation.*
>
> *4. Actions envisaged in part 1 of this article, committed by a foreign national or a stateless person with the use of the media and (or) information and telecommunications networks (including the "Internet" network), unless these actions constitute a criminal offence – shall be punishable by an administrative fine of 50,000 to 100,000 roubles with administrative deportation from the Russian Federation or administrative arrest for up to 15 days with administrative deportation from the Russian Federation.*

After the adoption of the federal law, a number of regional laws were repealed in order to avoid double liability. However, in Kaliningrad Oblast, the Code of the

81 Russian Federation Code of Administrative Offences (Кодекс Российской Федерации об административных правонарушениях), Article 6.21.

Kaliningrad Oblast of Administrative Offences was retained and its scope was also extended to encompass "propaganda" directed at adults.[82]

2.3.2 Application of the Laws Banning "Propaganda of Non-Traditional Sexual Relationships" at the Regional Level

Although a number of the regional propaganda laws have now been repealed, the approach of the courts is nonetheless discussed in this Part as it demonstrates the ongoing reluctance of the Russian courts to recognise that such laws are blatantly discriminatory. These cases also demonstrate the courts' failure to strictly regulate the restrictions on freedom of expression and assembly that have been imposed through the application of these laws.

i. The Ryazan Oblast

As noted above, on 15 June 2006, the Ryazan Oblast became the first Russian region to introduce the ban on "propaganda of homosexuality" among minors. Section 3.10 of the Ryazan Oblast Law on Administrative Offences provided that "public actions aimed at propaganda of homosexuality (sexual acts between men or lesbianism) among minors shall be punished with an administrative fine ranging from 1,500 to 2,000 roubles".[83]

On 30 March 2009, two LGBT rights activists, Irina Fedotova and Nikolay Bayev, displayed posters that declared "homosexuality is normal"[84] and "I am proud of my homosexuality"[85] near a secondary school building in Ryazan, with the intention of promoting tolerance towards gay and lesbian individuals. On 6 April 2009, they were convicted by a justice of the peace of an administrative offence under section 3.10 for having displayed the posters.[86]

The activists appealed the conviction arguing that it breached Articles 29 (freedom of expression) and 19 (equality) of the Federal Constitution. They contended that the term "propaganda of homosexuality" was insufficiently clear and impinged their right to express their views to encourage acceptance of gay people, and their right to equality regardless of their sexual orientation. Moreover, they argued that Article 55(3) of the Federal Constitution required any limitation of their rights to freedom of expression and equality to be made through federal (as opposed to regional) law.[87]

82 Law of the Kaliningrad Oblast, 20 February 2014, No. 300 (Закон Калинградской области от 20 февраля 2014 года, № 300).

83 Ryazan Oblast Law on Administrative Offences, Section 3.10 (статья 3.10 Закона Рязанской области "Об административных правонарушениях").

84 The original text in Russian read as follows: "Гомосексуализм – это нормально".

85 The original text in Russian read as follows: "Я горжусь своей гомосексуальностью".

86 Judgment of the Justice of the Peace of the Judicial District No. 18 of the Oktyabrskiy District of Ryazan, 6 April 2009 (Постановление мирового судьия судебного участка № 18 Октябрьского района Рязани от 6 апреля 2009 года).

87 Appeal against the judgment of the Justice of the Peace of the Judicial District No. 18 of the Oktyabrskiy District of Ryazan, 6 April 2009.

On 14 May 2009, the Oktyabrsky District Court rejected their appeal.[88] The Court agreed that any limitation on the rights of freedom of expression and equality must comply with Article 55(3) of the Federal Constitution and be made through a federal law. However, the Court found that the Ryazan Oblast Law on Administrative Offences formed part of federal law pursuant to Article 1.1 of the federal Code of Administrative Offences, which states that "legislation on administrative offences consists of this Code and the laws on administrative offences of subjects of the Russian Federation adopted in compliance with it." Having therefore established the restrictions provided for in the Ryazan Oblast Law formed part of federal law, the District Court went on to hold that section 3.10 of the regional law did not offend the Constitution as it constituted a legitimate limitation of rights necessary "for the protection of the basis of the constitutional order, morality, health, rights and lawful interests of other people".[89]

Fedotova and Bayev appealed the decision to the Russian Constitutional Court. They argued that the assertion that "homosexuality" is immoral was insufficient and could not constitute an objective justification for the restriction on their Article 19 and 29 constitutional rights caused by the ban. Sexual orientation was an innate characteristic – not a choice. They noted that there was no restriction on distributing information regarding same-sex orientation and argued that the prohibition on "homosexual propaganda" stigmatised the gay and lesbian community, leaving them exposed to a risk of abuse.[90]

The Constitutional Court also dismissed the case.[91] The Court found that the protection of family, childhood and motherhood "in their traditional understanding" was a joint responsibility of the Russian Federation and regions, and that the Ryazan Oblast legislature acted with the aim of protecting these values, specifically by protecting children from propaganda which would harm their "health or moral and spiritual development".[92] The Court defined "propaganda of homosexuality" as the:

> *[T]argeted and uncontrolled dissemination of information capable of harming the health or moral and spiritual development, including by creating a deformed understanding of the social equivalence of traditional and non-traditional family relationships – among persons who are unable due to their age to independently critically assess such information.*[93]

88 Judgment of the Oktyabrskiy District Court of Ryazan, 14 May 2009, No. 12-46/2009 (Решение Октябрьского районного суда Рязани от 14 мая 2009 года по делу, № 12-46/2009).

89 *Ibid.*

90 *Ibid*.

91 Decision of the Constitutional Court of Russia, 19 January 2010, No. 151-O-O (Определение Конституционного Суда Российской Федерации от 19 января 2011 года, № 151-O-O).

92 *Ibid*.

93 *Ibid*.

On this basis, the Court concluded that the prohibition was justified and did not violate the Article 29 rights to freedom of thought and freedom to freely disseminate information. The Court did not address the Article 19 equality argument in any detail. Instead it noted, in a summary fashion, that section 4 of the Ryazan Oblast Law "On the protection of children's health and morality in the Ryazan Oblast" and section 3.10 of the Ryazan Oblast Law on Administrative Offences did not set forth any measures aimed at the prohibition of "homosexuality" or at its official condemnation, had no discriminatory characteristics and did not allow state authorities to take excessive actions.[94]

The failure of the Russian courts in this case to protect the rights of the activists was confirmed after one of the activists, Irina Fedotova, lodged a communication with the HRC arguing that her rights to freedom of expression and freedom from discrimination under the ICCPR (Articles 19(2) and 26 respectively) had been violated by the decisions of the justice of the peace and the Constitutional Court, and also alleged that the provisions of the Ryazan law were discriminatory. On 31 October 2012, the HRC adopted its views, finding a violation of her rights under Article 19(2) and 26 of the ICCPR. The HRC noted that section 3.10 was aimed only at the "propaganda of homosexuality" and not at the propaganda of heterosexuality or sexuality more broadly, later referring to it as "ambiguous and discriminatory".[95] It noted that although the Russian Federation invoked the aims of protecting the health, morals and rights of minors, it advanced no reasonable and objective criteria to justify imposing a ban on "propaganda of homosexuality" but not a ban on sexuality more broadly.[96] The HRC went on to note that the Russian Federation had not demonstrated why it was necessary, in order to achieve one of the legitimate aims in Article 19(3), to restrict freedom of expression in this case, even if Fedotova had intended to engage children in a discussion about "homosexuality".

Following the adoption of the views of the HRC, the Presidium of the Ryazan Oblast Court accepted Ms Fedotova's application to set aside the decision of the justice of the peace.[97] The Court referred to the definition of "propaganda of non-traditional sexual relationships among minors" under federal law (presumably in order to identify the elements of unlawful propaganda).[98] It stated that the prohibition did not affect the "right to receive and impart information of a general, neutral content about non-traditional sexual relationships or the holding of public events (…) without imposing such attitudes on minors"[99] and held that the justice of the peace had not properly assessed whether Ms Fedotova's actions constituted propaganda. In reaching its decision, the Presidium neither referred to the views of the HRC nor considered the discrimination argument,

94 *Ibid.*

95 Human Rights Committee, *Irina Fedotova v Russian Federation*, Communication No. 1932/2010, UN Doc. CCPR/C/106/D/1932/2010, 19 November 2012, Paras 10.5 and 10.8.

96 *Ibid.,* Para 10.6.

97 Judgment of the Ryazan Oblast Court, 26 September 2013, No. 4A-144/2013 (Решение Рязанского областного суда от 26 сентября 2013 года, по делу № 4А-144/2013).

98 See above, note 81.

99 See above, note 97.

which Ms Fedotova raised with reference to those views. The Court discontinued further administrative proceedings as time barred. Ms Fedotova unsuccessfully appealed this decision to the Supreme Court, who rejected her argument that the case should have been discontinued on the basis that she had not committed propaganda and in light of the HRC findings. The Supreme Court held that the failure of the first instance court to assess the factual circumstances of the case was sufficient ground for reversing its decision and did not prejudice her guilt.[100]

ii. St. Petersburg

St. Petersburg's anti-propaganda law was passed on 7 March 2012 through the amendment of the St. Petersburg Region Law on Administrative Offences of 31 May 2010 to include a new section 7.1, as follows:

> *Public actions aimed at propaganda of sodomy, lesbianism, bisexuality or transgenderism among minors shall be punishable by an administrative fine of RUB 5,000; or of RUB 50,000 roubles if perpetrated by a public official; or of between RUB 250,000 and RUB 500,000 if perpetrated by a legal entity.*
>
> *Explanatory note: public actions aimed at propaganda of sodomy, lesbianism, bisexuality or transgenderism among minors shall be understood, in this Section, as activity aimed at purposeful and uncontrolled dissemination of information capable of causing damage to the health, moral and spiritual development of minors, in particular by forming warped perceptions that traditional and non-traditional marital relationships are socially equal.*

On its entry into force, St. Petersburg-based non-governmental organisation (NGO), Coming Out, filed an action with the St. Petersburg City Court arguing that section 7.1 violated federal legislation because of its lack of clarity, and the lack of official definitions of the terms used within it ("sodomy", "bisexuality", "transgenderism", "traditional and non-traditional marital relationships"). In addition, Coming Out argued that section 7.1 violated Article 1.1 of the federal Code of Administrative Offences, which declares that international legal norms take priority over Russian legislation on administrative liability.

The City Court rejected the case, noting that the terms in the law were well defined concepts. The Court considered that the term "traditional and non-traditional marital relationships" was well understood in light of the traditional understanding of the values of family, motherhood and childhood.[101] As to the argument about the lack of clarity in the definition of "propaganda", the Court noted that the Model Law "On the Protection of Children from Information

100 Decision of the Supreme Court of Russia, 6 December 2013, No. 6-AD13-1 (Определение Верховного Суда Российской Федерации от 6 декабря 2013 года, по делу № 6-АД13-1).

101 Judgment of the St. Petersburg City Court, 24 May 2012, No. 3-97/12 (Решение Санкт-Петербургского городского суда от 24 мая 2012 года, по делу № 3-97/12).

Harmful to their Health and Development" provides a definition of propaganda that may be referred to:

> *[T]he activities of individuals and (or) legal entities for the dissemination of information aimed at creating in the minds of children attitudes and (or) behavioural patterns, or having the purpose to encourage or incite persons to whom it is addressed, to commit any action or to refrain from its commission.*[102]

The Court went on to note that the terms "lesbianism", "bisexuality", and "transgenderism" are included in the full name of the applicant organisation and therefore did not accept the argument that there was any arbitrary uncertainty in relation to these concepts.[103]

The Court did not accept the applicant organisation's argument that the contested law was aimed at creating negative and intolerant attitudes among the public, including among minors, towards individuals on the grounds of their sexual orientation. In the Court's view, the law did not contain any measures aimed at the prohibition, or the official condemnation, of "homosexual relationships", but rather aimed at adopting measures to protect children from information and propaganda that could harm their moral and spiritual development, in connection with which administrative responsibility was reasonably established.[104]

Finally, the Court dismissed the argument that the law was incompatible with international human rights standards.

> *The Court considers that the contested provision in no way undermines the citizens' right to respect for private and family life, does not contain any evidence of discrimination, and therefore, does not limit the applicant organisation's right to carry out its activities in accordance with its statute.*
>
> *Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, along with the proclamation of the right of everyone to freedom of expression, comes from the fact that the exercise of this freedom carries with it duties and responsibilities and may be subject to such formalities, conditions, restrictions or penalties as are prescribed in law and are necessary in a democratic society, including for the protection of health or morals.*

102 Model Law, "On the Protection of Children from Information Harmful to their Health and Development", adopted by the Inter-Parliamentary Assembly of the Member States to the Commonwealth of the Independent States (CIS), Decision of 3 December 2009, No. 33-15 (Модельный закон о защите детей от информации, причиняющей вред их здоровью и развитию, Принят на тридцать третьем пленарном заседании Межпарламентской Ассамблеи государств-участников СНГ Постановлением от 3 декабря 2009 года, № 33-15). A model law is a recommendation issued by the Inter-Parliamentary Assembly of the CIS for adoption at local level.

103 See above, note 101.

104 *Ibid*.

> *In this connection, the adoption of rules aimed at establishing administrative responsibility for the protection of morality among minors is objectively justified.*

The judgment of the St. Petersburg City Court was upheld on appeal by the Supreme Court on the same grounds.[105] The Supreme Court noted that the:

> *[P]rohibition of propaganda of sodomy, lesbianism, bisexuality, and transgenderism does not prevent the realisation of the right to receive and impart information of a general, neutral content about non-traditional sexual relationships, or to hold public events in the manner prescribed by law, including open public debates about the social status of sexual minorities, without imposing attitudes on minors who are not able to critically assess such information independently because of their age.*[106]

A well-known Russian LGBT rights activist, Nikolai Alekseyev, was also convicted by a justice of the peace under section 7.1 of the St. Petersburg Law on Administrative Offences.[107] His conviction in May 2012, related to an incident on 12 April 2012, when he stood in front of the St. Petersburg City Administration holding a banner read: "Homosexuality is not a perversion. Grass hockey and ice ballet are."[108] Mr Alekseyev went on to challenge both his conviction and the law itself unsuccessfully.[109]

In his challenge before the Russian Constitutional Court, Mr Alekseyev argued that the law undermined human dignity, discriminated against persons of non-heterosexual orientation and was arbitrarily vague. In an important finding which acknowledged that Russian law protected people from discrimination on grounds of their sexual orientation, the Constitutional Court stated that:

> *[A]ll persons irrespective of their sexual orientation are protected by the Constitution of the Russian Federation, which guarantees equality of rights and freedoms of man and citizen (Article 19(2)), as well as by the European Convention on Human Rights, which Article 14 implies, as interpreted by the European Court of Human Rights, different treatment based exclusively on sexual orientation*

105 Decision of Supreme Court of the Russian Federation, 3 October 2012, No. 78-АПГ12-16 (Определение Верховного Суда Российской Федерации от 3 октября 2012 года по делу № 78-АПГ12-16).

106 *Ibid*.

107 Judgment of the Justice of the Peace of Circuit No. 208 of St Petersburg, 5 May 2012, No. 5-444/2012-208 (Постановление мирового судьи участка № 208 Санкт-Петербурга от 5 мая 2012 года, по делу № 5-444/2012-208).

108 This was a well-known quote from a famous actress from Soviet times.

109 On 6 June 2012, the Smolninskiy District Court of St Petersburg dismissed Mr Alekseyev's appeal against his conviction. Proceedings he brought challenging the law itself before the St. Petersburg Statutory Court were also ultimately discontinued. Decision of the St. Petersburg Statutory Court, 16 October 2014, No. 001/14-5 (Определение Уставного суда Санкт-Петербурга от 16 октября 2014 года, по делу № 001/14-5).

is discriminatory (Judgement of the 21 October 2010, case Alekseyev v Russia).[110]

However, the Court went on to state that this did not exclude limiting the realisation of rights in order to protect the rights and freedoms of others in accordance with Articles 17(3)[111] and 55(3) of the Federal Constitution. This was a matter of balancing competing constitutional values. The Court therefore upheld the law as constitutional.[112]

The St. Petersburg law was repealed when the federal law banning propaganda came into force.

iii. The Arkhangelsk Oblast

The Arkhangelsk Oblast law prohibiting public actions aimed at "propaganda of homosexuality" among minors was passed on 30 September 2011,[113] and on 21 November 2011 the regional law on administrative offenses was amended to include liability for such actions.[114]

In November 2011, LGBT rights activists tried to hold a public assembly to protest against this law and to distribute information about discrimination against LGBT minors and which explained the nature of being LGBT. However, all of the 11 events proposed for the assemblies in the centre of Arkhangelsk were banned by the Arkhangelsk City authorities on the basis of the law against "propaganda of homosexuality". In particular, the authorities noted that the proposed locations of the events covered educational facilities for children and therefore an assembly on Sunday during day time would violate the law.[115] The decision was upheld by the Oktyabrskiy District Court.[116]

In December 2011, LGBT activists were denied permission to hold assemblies with slogans stating, "There are no less gays and lesbians among children than among adults". The assemblies were to be held in front of a children's library and

110 Decision of the Constitutional Court of Russia, 24 October 2013, No. 1718-O (Определение Конституционного Суда Российской Федерации от, 24 октября 2013 года, № 1718-О). The European Court decision referenced by the Court here related not to these proceedings, but to attempts to hold pride marches.

111 Article 17(3) of the Federal Consitution provides that, "[t]he exercise of rights and liberties of a human being and citizen may not violate the rights and liberties of other persons."

112 See above, note 110.

113 See above, note 65.

114 *Ibid.*

115 GayRussia, "Mayor of Arkhangelsk banned gay pickets near children's institutions, Arkhangelsk court began to consider complaints about the ban of gay events", 15 December 2011 (Мэрия Архангельска запретила гей-пикеты около детских учреждений, архангельский суд приступил к рассмотрению жалоб на запрет ранее заявленных гей-мероприятий), available at: http://www.gayrussia.eu/russia/3269.

116 Judgment of the Oktyabrskiy District Court of Arkhangelsk, 4 April 2012 (Решение Октябрьского районного суда Архангельска от 4 апреля 2012 года).

an art centre for children and the activists intended to distribute information about discrimination against LGBT minors and international scientific studies about the nature of sexual orientation. Again, permissions were denied on the basis of the regional law, with the decisions again being upheld in court.[117] In January 2012, the Arkhangelsk City authorities denied permission to hold two more public assemblies, again by reference to the regional law. These decisions were endorsed by the courts.[118]

On 11 January 2012, LGBT activists protested in front of the regional children's library. They displayed banners with the following slogans:

> *"Russia holds first place in the world for suicides of teenagers. Among them, a huge proportion are homosexuals. They take such steps because of the lack of information about their nature. Deputies are child-killers. Homosexuality is good!"*
>
> *"Children have a right to know by virtue of Art. 13 of the Convention on the Rights of the Child. Great people were gay too. Gays can also become great. Homosexuality is normal."*
>
> *"Homosexuality – is a healthy form of sexuality. This should be known to both children and adults!"*

The activists were convicted of an administrative offence by the Court. The Court dismissed the activists' arguments that their actions were not propaganda and that the ban on assemblies was discrimination.[119]

On 22 May 2012, the Arkhangelsk Oblast Court dismissed an action brought by the head of the Arkhangelsk LGBT NGO Rakurs challenging the regional law on the same grounds as in St. Petersburg.[120] In addition, the head of Rakurs, at that time a university professor, argued that it was impossible for her to foresee how to comply with the law when holding educational discussions aimed at creating tolerant attitudes towards minorities, and at overcoming homophobia and transphobia. The decision of the Court was largely based on the same grounds as the one of the St. Petersburg City Court with regard to the similar law in St. Petersburg.[121] In particular, the Oblast Court held that the legal terms used in the law were sufficiently clear and the law complied with international norms protecting children's rights.

117 *Ibid*.

118 See above, note 5.

119 Verdict of the Justice of the Peace of Judicial District No. 6 of the Oktyabrskiy District of Arkhangelsk, 3 February 2012 (Постановление мирового судьи судебного участка № 6 Октябрьского округа города Архангельска от 3 февраля 2012 года).

120 Judgment of the Arkhangelsk Oblast Court, 22 May 2012, No. 3-0025 (Определение Архангельского областного суда от 22 мая 2012 года по делу № 3-0025)).

121 See above, note 101.

The Supreme Court upheld the judgment of the Oblast Court on 15 August 2012.[122] The Court disagreed with the applicant that the contested law violated the principle of legal certainty due to the lack of clarity of the notions "propaganda" and "homosexuality", stating that these terms are common. The Court noted that the Model Law "On the Protection of Children from Information Harmful to their Health and Development" provided a definition of propaganda.[123]

With reference to the ECtHR judgment in *Alekseyev v Russia*,[124] the Supreme Court further emphasised that the mere mentioning of "homosexuality" is not "negative".[125] The Court held that the contested law did not prohibit actions which should be allowed in accordance with *Alekseyev v Russia*:

> *[P]rohibition of propaganda of homosexuality does not prevent the realisation of the right to receive and impart information of a general, neutral content about non-traditional sexual relations, or to hold public events in the manner prescribed by law, including open public debates about the social status of sexual minorities, without imposing attitudes on minors who are not able to critically assess such information independently because of their age.*[126]

Accordingly, the Court concluded that the law was sufficiently clear as "propaganda of homosexuality" means "active public actions (…) aimed at forming an attractive image of non-traditional sexual orientation, and a distorted perception of the social equivalence of traditional and non-traditional marital relations." The Court went on to state that the contents of the contested law did not allow for any other interpretation.[127]

Referring to the Convention on the Rights of the Child (CRC), the Supreme Court concluded that the contested law was in line with the international obligations of Russia. The Court explained that:

> *[F]ree development of a child, as an individual lacking sufficient physical and mental maturity, should be secured, including by establishing restrictions on interference with his private life, which may include propaganda, as a public, active imposition of homosexuality and information about it, the contents of which could have a negative impact on the formation of the personality of the child, including in relation to his sexual identity, and generate interest in non-traditional sexual relationships which is not objectively based*

122 Decision of the Supreme Court of Russia, 15 August 2012, No. 1-АПГ12-11 (Определение Верховного Суда Российской Федерации от 15 августа 2012 года по делу № 1-АПГ12-11). See above, note 102.

123 *Ibid.*

124 See above, note 99.

125 *Ibid.*

126 *Ibid.*

127 *Ibid.*

on the physiological characteristics of such a child because of his inability to critically assess the peculiarities of various kinds of sexual relationships between people.

However, the Court noted that the contested law did not restrict the right of a child to receive information, including about "homosexuality", in an age-appropriate manner and based on the needs of the child. The Court added that the law was aimed at protecting children from harmful information, such as information denying family values or promoting "homosexuality". In conclusion, the Court held that the law did not contain any measures aimed at the prohibition, or the official condemnation of "homosexual" relationships, that it was not discriminatory and that it could not be regarded as an arbitrary interference with freedom of speech.[128]

The Arkhangelsk Oblast law providing for administrative liability has now been repealed. However, the law prohibiting public actions aimed at "propaganda of homosexuality" among minors has remained in force.

iv. The Kostroma Oblast

The Kostroma Oblast Law, adopted on 15 February 2012, prohibited "propaganda of homosexuality (sodomy and lesbianism), bisexuality and transgenderism" among minors. The law provided for administrative liability for such actions.[129]

On 12 March 2012, LGBT rights activists notified the Kostroma City administration of their plans to hold a gay pride march in the city centre in support of tolerance and respect for the rights and freedoms of LGBT persons in Russia. They also planned to hold two meetings in front of the regional legislature and the city administration to condemn the regional law against "propaganda of homosexuality", and two assemblies in front of the children's library with slogans saying, "There are no less gays and lesbians among children than among adults", aiming to provide scientific information to minors about the nature of sexual orientation, and to draw attention to discrimination against LGBT children. The permissions to hold all five assemblies were denied by the city administration with reference to the regional law against "propaganda of homosexuality". The denial for permission was upheld by the first instance court.[130] However, this judgment was reversed on appeal by the Kostroma Oblast Court with regard to the gay pride march, but not with regard to the meetings in front of the children's library.[131] The Oblast Court held that there had been no evidence presented that the planned march would violate the prohibition of propaganda under the oblast law.

128 *Ibid.*

129 See above, note 66.

130 Judgment of the Sverdlovskiy District Court of Kostroma, 4 December 2012, No. 2-1880/2012 (Решение Свердловского районного суда Костромы от 4 декабря 2012 года по делу № 2-1880/2012).

131 Decision of the Kostroma Oblast Court, 20 March 2013, No. 33-284/2013 (Определение Костромского областного суда от 20 марта 2013 года, по делу № 33-284/2013).

While the cases were pending before the courts, and despite the refusal to permit the assemblies, the same activists held protests in front of the children's library. They held banners saying: "Heterosexuality, homosexuality, bisexuality. This is the norm"; "Sexual orientation is not chosen"; and "Who will protect gay teenagers?". All of them were charged with the administrative offence of "propaganda of homosexuality". However, the justice of the peace acquitted the activists having found that their actions were not aimed at the propaganda of homosexuality. The justice of the peace stated that prohibited propaganda covers only targeted and uncontrolled dissemination of information that is capable of causing harm to the health, morals or mental development of children, or which causes them to think "traditional and non-traditional sexual relationships" are socially equivalent.[132] The decision was unsuccessfully appealed by the police.[133]

At the same time, in a separate case, the regional law was challenged in the Kostroma Oblast Court by another LGBT activist. The applicant argued that the law violated Article 8 (right to private life), Article 11 (freedom of assemblies) and Article 14 (non-discrimination) of the ECHR, as well as Articles 13 and 29 of the CRC and a number of the Council of Europe recommendations. On 6 July 2012, the Kostroma Oblast Court dismissed the case finding that the law was clear and that it complied with international law.[134] However, the Court emphasised that the law:

> *[D]oes not contain any provisions preventing juveniles from developing equally tolerant attitudes to all persons regardless of their sexual orientation and gender identity, since the formation of such an attitude is possible without promotion of certain phenomena. The law does not establish any measures aimed at banning, or official censure of, homosexuality, bisexuality, or transgenderism.*[135]

The Court further explained that the law, "does not provide for the prohibition of, or liability for, the general mentioning of homosexuality or debate about the social status of sexual minorities, as evidenced by inter alia the practice of its application".[136] On 7 November 2012, the Supreme Court upheld this judgment repeating its reasoning from its earlier decision in relation to the Arkhangelsk Oblast Law.[137]

The law in Kostroma was repealed when the federal law banning propaganda came into force.

132 Judgment of the Justice of the Peace of District No. 8 of Kostroma, 23 March 2012, (Постановление мирового судьи участка № 8 Костромы от 23 марта 2012 года).

133 Judgment of the Leninskiy District Court of Kostroma, 2 May 2012, (Решение Ленинского районного суда Костромы от 2 мая 2012 года).

134 Decision of the Kostroma Oblast Court, 6 July 2012, No. 2-5/2012 (Определение Костромского областного суда от 6 июля 2012 года по делу № 2-5/2012).

135 *Ibid.*

136 *Ibid.*

137 Decision of the Supreme Court of Russia, 7 November 2012, No. 87-АПГ12-2 (Определение Верховного Суда Российской Федерации от 7 ноября 2012 года по делу № 87-АПГ12-2).

v. The Samara Oblast

Administrative liability for "public actions aimed at propaganda of sodomy, lesbianism, bisexuality and transgenderism among minors" was introduced in the Samara Oblast on 10 July 2012. The law was challenged in the Samara Oblast Court on similar grounds as in other regions. On 12 November 2012, the Samara Oblast Court dismissed the challenge and on 27 February 2013, the decision was upheld by the Supreme Court of Russia, again repeating its reasoning from previous cases relating to regional propaganda laws.[138]

2.3.3 Application, and Judicial Review, of the Laws Banning Propaganda of "Non-Traditional Sexual Relationships" at the Federal Level

Since its introduction in June 2013, Article 6.21 of the Code of Administrative Offences has been used on a number of occasions to convict persons of "propaganda of non-traditional sexual relationships" both through the dissemination of information at public assemblies (Article 6.21 (1)) and through the media and internet (Article 6.21(2)). The latter carries a higher penalty. The Constitutional Court has also had occasion to hear a challenge to the constitutionality of Article 6.21, holding the law to be in accordance both with the Federal Constitution and with Russia's international and European human rights obligations.

2.3.3.1 Prosecutions Pursuant to Article 6.21(1) of the Code of Administrative Offences

In December 2013, three LGBT rights activists were each convicted under Article 6.21(1) of the Code of Administrative Offences. In Arkhangelsk, Nikolai Alekseyev and Yuri Yevtushenko were charged with propaganda of non-traditional sexual relationships to minors on account of holding standing assemblies in front of a children's library with banners saying, "Gay-propaganda does not exist" and "They do not become gays, they are born gays!"[139] In Kazan, Dmitry Issakov was prosecuted for displaying a banner saying "To be gay and to love gays is normal. To beat up gays and to kill gays is a crime".[140]

The three activists jointly petitioned the Constitutional Court, arguing that Article 6.21 of the Code of Administrative Offences violated their rights under the Federal Constitution. They argued that the law violated the supremacy of international law over laws of the Russian Federation (Article 15(4)), the protection of human rights in accordance with international human rights standards (Article 17(1)), equality before the law (Article 19), protection of human dignity

138 Decision of the Supreme Court of Russia, 27 February 2013, No. 46-АПГ13-2 (Определение Верховного Суда Российской Федерации от 27 февраля 2013 года по делу *№ 46-АПГ13-2*).

139 Judgment of the Justice of the Peace of Judicial District No. 5 of Arkhangelsk, 3 December 2013 (Постановление мирового судьи судебного участка № 5 Октябрьского судебного района города Архангельска от 3 декабря 2013 года).

140 Judgment of the Justice of the Peace of Judicial District no. 3 of the Sovetskiy Judicial District of Kazan, 19 December 2013 (Постановление мирового судьи судебного участка N 3 Советского судебного района города Казани от 19 декабря 2013 года).

(Article 21(2)), freedom of expression (Article 29(1)), the prohibition of incitement of social hatred (Article 29(2)), and the right to disseminate information freely (Article 29(4)). They argued that the law excluded dissemination among minors of any information about LGBT, including information about the social equivalence of close relationships between persons of the same or different sexes. They further contended that the declared aim of protecting public morals and the development of children was not legitimate as being LGBT could not be regarded as immoral. They submitted that the ban was based on prejudice, by virtue of which non-heterosexual relationships are condemned as immoral and, consequently, that the ban infringed on the dignity of LGBT persons and also amounted to discrimination on the basis of sexual orientation.[141]

On 23 September 2014, the Constitutional Court issued its judgment on the case in closed proceedings.[142] In the operative part of its judgment, the Court held that Article 6.21 of the Code of Administrative Offences does not contradict the Federal Constitution because it has the aim of "protecting such constitutional values as family and childhood", as well as the aim of "preventing harm to the health and moral and spiritual development of minors". The Court further held that Article 6.21 does not "imply an interference in the sphere of individual autonomy, including the sexual self-determination of a person", does not have the aim of "prohibiting, or official rapprochement, of non-traditional sexual relationships", and does not prevent "impartial public discussion of questions related to the legal status of sexual minorities, or the use (…) of all lawful ways of expressing their position on such questions and protection of their rights and lawful interests, including the organisation and holding of public assemblies". The Court concluded that law only prohibits public actions which have the aim of "disseminating information which popularises non-traditional sexual relationships among minors or imposes such relationships on them".

To reach this conclusion, the Constitutional Court analysed the applicants' arguments in several stages. Firstly, the Court considered the applicants' argument that sexual orientation is an aspect of human dignity. The Court agreed and, with reference to its earlier case law,[143] reiterated that human dignity is a non-derogable value, which includes the freedom from any unfounded interference in the sphere of individual autonomy. The Court noted that one of the dimensions of individual autonomy is everyone's right to have a certain lifestyle and define their own preferences, including the right to "freedom of sexual self-determination", including where this determination may be disapproved of by the majority.[144] Accordingly, sexual conduct not falling under the criminal law ban on actions of a sexual nature with a person under the age of 16, and which occurs by mutual agreement between persons of the same sex, is not prohibited under either international law nor under the equality clause of the Federal Constitu-

141 See above, note 14, Para. 1.2. The petition challenged the law only and not the convictions of the activists.

142 See above, note 14.

143 See, for example, udgment of the Constitutional Court of 20 April 2006, No. 4-P (Постановление Конституционного Суда Российской Федерации от 20 апреля 2006 года № 4-П).

144 See above, note 14, Para. 2.1.

tion, which according to the Court guarantees equal protection to all persons "irrespective of their sexual orientation".[145]

The Court went on to note that the State must take measures to exclude possible limitations of the rights and lawful interests of persons because of their sexual orientation and ensure effective opportunities for their protection. In the Court's view, this obligation derived from the constitutional equality clause, which prohibits restrictions based on the fact of affiliation with a social group, which may comprise a group of persons with a specific sexual orientation.[146] This became the first judgment of a higher court to explicitly recognise that "homosexuals" are a social group.

Having established that sexual orientation is covered by the constitutional equality clause, the Court then set general boundaries on the constitutional protection of free speech in the context of sexual issues. The Court explained that the principles of pluralism of opinions and freedom of speech imply that no one can be denied the right to publicly discuss issues related to sexual self-determination, or denied the freedom to advocate lawfully for the rights of social groups or to raise awareness of violations of their rights through public assemblies or in the media.[147] This was the case even where such ideas were offensive to the "moral norms" of the majority. However, the Court noted that this freedom was not absolute and was subject to certain limitations due to the need to respect the rights and freedoms of others and the need to strike a balance between constitutional values. Noting those constitutional values which are "predetermined by the historic, cultural and other traditions of the multi-national population of Russia", in particular the importance of marriage and family, the Court went on to state that dissemination of one's "beliefs or preferences with regard to sexual orientation or concrete forms of sexual relationships shall not impinge on others' dignity or challenge public morals as understood by Russian society".[148]

The Constitutional Court then turned to trying to define the scope of the prohibited propaganda. In order to draw the boundaries of prohibited propaganda in response to the applicants' argument that the law lacked sufficient clarity, the Court formulated criteria of lawful dissemination of information about "homosexuality". Firstly, the provision of such information to children shall not be aimed at "forming preferences related to choice of non-traditional forms of sexual identity". Thus, only "targeted, aggressive and uncontrolled" dissemination of information capable of harming children is prohibited. Secondly, age-appropriate information about non-traditional relationships may be presented in a "neutral (educational, artistic or historical) context" by specialists, i.e. teachers, medical professionals or psychologists as long as it is based on an individualised approach.[149]

145 *Ibid*.

146 *Ibid.*

147 See above, note 14, Para. 2.2.

148 *Ibid.*

149 *Ibid*., Para 3.2.

Following this, the Court turned to provide explanation as to why the ban on propaganda is justified in pursuance of the aim of protecting children from information that may be harmful to their moral or spiritual development. In this regard, the Court recalled the need to protect public morals, emphasising the aim of the protection of traditional (that is heterosexual) notions of family based on traditional ideas in the social and historical context of Russian society, including the universally recognised ideas of marriage, family, maternity, fatherhood and childhood, which are formally recognised as legal notions in the Constitution.[150] The Court held that "maternity, childhood and family" require "special protection" by the State, noting that it is on the basis of these ideas that:

> *[T]he Russian Federation has the right to decide individual questions of legislative regulation in these fields, broaching sexual and inter-personal relationships connected with them, not denying the necessity to take into account the requirements of the Constitution and international law both with regard to the individual autonomy of a person and with regard to the freedom of dissemination of information.*[151]

Following this, the Court explained that the ban on "propaganda of homosexuality" is justified in view of the need to protect the child from the "influence of information able to urge them on to unconventional sexual relationships, adherence to which hinders the establishment of family relationships as they are traditionally understood in Russia and as they are expressed in the Constitution."[152] At the same time, the Court acknowledged that the influence of such information on children is not unconditionally proven. Nevertheless, the Court considered that, bearing in mind the aim of protecting children, who having not attained their age of majority were in a vulnerable position, the federal legislator had the right to introduce restrictions which were based on the presumption of a threat to children's interests, especially as those restrictions only concerned the targeted direction of information at children, and were not a general restriction on freedom of expression.[153] In the Court's view, protecting children from such information correlated with the provisions of the CRC, which proceeds from the idea that family is the fundamental group in society and should be protected, and also that children must be protected from all forms of sexual exploitation and abuse.[154]

Having discussed the aspects relating to the protection of children, the Court then considered the applicants' allegation of the discriminatory nature of the prohibition. In the Court's view, the fact that the ban only extended to "non-traditional sexual relationships" and not to "traditional sexual relationships" did not violate the equality principle in the Federal Constitution. The Court acknowledged

150 *Ibid.*, Para 3.

151 *Ibid.*, Para 3.

152 *Ibid.*, Para 3.2.

153 *Ibid.*

154 *Ibid.*, Para 3.1.

the existence of negative stereotypes and prejudices against the "homosexual minority in Russian society" but reiterated that the aim of overcoming such attitudes cannot justify "imposition of social views departing from those generally recognised in the Russian society".[155] Moreover, the imposition on minors of views about social orientations that are not generally accepted could lead to a child's alienation and hinder family relationships. Thus, in the Court's view, the constitutional guarantee of equality did not imply equal attitudes towards sexual minorities in everyday life and therefore the ban on dissemination of information included those instances which had the aim of overcoming such negative attitudes regarding "non-traditional" individuals.[156] At the same time, the Court emphasised that the law in question did not imply a negative evaluation of "homosexual relationships" nor did it prevent LGBT individuals from lawful expression of their position through public actions.[157]

The decision of the Constitutional Court on the meaning of Article 6.21 is binding on all representative, executive and judicial authorities as well as on organisations and individuals.[158] Although the operative clause of the Court's judgment recognises the right of LGBT persons and advocates to freedom of expression and assembly, the discussion of the limits of this right in the Court's judgment is such that it is difficult to envisage circumstances in which such rights could be exercised when speaking about LGBT issues. This difficulty has been borne out in practice, as the remainder of this Part will demonstrate. In addition, as will be discussed below, the legal analysis of the "propaganda of non-traditional relationships" in the judgment of the Court is problematic in many respects.

First, the Court's approach is inconsistent. On the one hand, the term "non-traditional sexual relationships" is used by the Court to denote sexual (physical) relations only, the approach that is line with the literal wording of the law. On the other hand, by using this term interchangeably with sexual orientation, sexual identity, or lifestyle, and by opposing "non-traditional" relationships as against family values, the Court implicitly states that such relationships are not only about sexual conduct. This leads to a lack of clarity about whether the Court considers that the law is protecting children from sexually explicit and age inappropriate information or from information about LGBT relationships more broadly (such as emotional ties). Moreover, it is virtually impossible to draw a clear line between information about LGBT relationships which refers to sexual relations only and information which refers to the emotional affection of an individual to a person of the same sex.[159] The approach of the Constitutional Court fails

155 *Ibid,* Para 3.2.

156 *Ibid.*

157 *Ibid*., Para 3.3.

158 This is in accordance with the Federal Constitutional Law, "On the Constitutional Court of the Russian Federation".

159 See Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2008; and The Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients, adopted by the APA Council of Representatives, 18–20 February 2011, available at: http://www.apa.org/pi/lgbt/resources/guidelines.aspx.

to take into account these important aspects and therefore proceeds from the simplified presumption that the ban on "propaganda of non-traditional sexual relationships" serves the legitimate aim of protecting minors from obscene or age-inappropriate information about LGBT relationships.[160]

Second, the failure of the Court to tackle the openly discriminatory nature of the law sends a strong message that public information about being LGBT is illegal, and as demonstrated in the Part below, the interests of the child have become no more than a pretext for restricting any public speech regarding LGBT issues. The finding of the Court that the law does not imply a negative evaluation of LGBT relationships sits ill with the overall conclusion of the Court that the restriction of freedom of speech on account of "homosexual propaganda" pursues a legitimate aim: if being LGBT is not immoral or harmful, there is no need to protect children from receiving any information about being LGBT nor can such information infringe on another's dignity. Similarly, the findings of the Court that the ban on propaganda does not interfere with individual autonomy or prevent the use by sexual minorities of all lawful ways of expressing their position on questions of their legal status and protection of their rights, including through the organisation and holding of public assemblies, in reality become merely theoretical because they cannot be reconciled with the key findings of the Constitutional Court that restrictions on minors' exposure to information about sexual minorities is justified because one cannot challenge the "traditional", i.e. different-sex relationships, understanding of public morals. Moreover, the wording of the federal law does not leave any doubts about the legislator's reproach of "non-traditional" (same sex) sexual relationships: it prohibits propaganda of such relationships on the pretext of preventing minors from forming a "distorted understanding of the social equivalence of traditional and non-traditional sexual relationships".[161] The failure of the Constitutional Court to address this point sends a strong message to society by labelling LGBT relationships of "lesser social equivalence" to different-sex relationships.

The Constitutional Court did not explain why an additional ban on dissemination of information about same-sex sexual relationships is necessary when children are already protected from receiving sexually explicit information by the Criminal Code.[162] The Constitutional Court also failed to explain why the prohibition of "propaganda of homosexuality" is essential for protecting the traditional family and why other measures, unrelated to sexual orientation, are not sufficient.

As will be discussed below, the approach of the Constitutional Court (and other courts) to the interpretation of the ban, and the ban itself, contravenes the rights to freedom of expression and assembly guaranteed in international and European human rights law, and also the prohibition on discrimination.

160 See above, note 14, Para 3.2.

161 *Ibid*., Para 3.2.

162 Article 135 of the Criminal Code prohibits lecherous actions against minors and Article 242 prohibits the dissemination of pornography to minors.

2.3.3.2 Prosecutions Pursuant to Article 6.21(2) of the Code of Administrative Offences

Since 29 June 2013, when administrative liability for "propaganda of homosexuality" among minors with the use of the media and the internet was introduced under Article 6.21(2) of the Code of Administrative Offences, there have been a limited number of cases of prosecution under this law of non-LGBT specific media resources. As noted above in Part 2.3.3, Article 6.21(2) provides that propaganda (dissemination of information in line with the definition set out in 6.21(1)) "committed with the use of the media and (or) information and telecommunications networks (including the "Internet" network), unless these actions constitute a criminal offence – shall be punishable by an administrative fine". One such case was initiated by the Federal Service for Supervision of Communications, Information Technology, and Mass Media (Roskomnadzor), the official government body responsible for overseeing the media.[163] The proceedings were instituted following the publication of an article online about a geography teacher who had been forced to resign because of his LGBT rights advocacy.[164] The newspaper did not include a notice that it was prohibited for persons under 18 (the majority of printed materials in Russia, including books and periodicals, must include a notification specifying what reading age they are suitable for). On 30 January 2014, the justice of the peace in Khabarovsk found the Editor-in-Chief of the regional newspaper in which the article appeared liable under Article 6.21(2). The justice of the peace took into account the opinion of a Professor of Pedagogics who stated that the article drew "attention to the problem [of non-traditional sexual relationships] of teenagers, and as the age-related features [of teenagers] do not allow them to yet have completely developed their sexual identity, it is possible that this situation could make them to doubt their sexual identity." In her view, the article was a "violation of the freedom to choose sexual identity." The justice of the peace did not analyse the content or the aims of the article, and ordered the Editor-in-Chief to pay a fine of 50,000 roubles.[165]

The decision was upheld on appeal by the Central District Court of Khabarovsk. The Court relied on the opinion of the same expert that:

> *[T]he text presented (…) contains a number of positive statements (…) aimed at creating a positive attitude to the hero of publication – the gay teacher – and towards non-traditional sexual relationships in general. The author systematically and consistently*

163 For more information, see their website, available at: http://government.ru/en/department/58.

164 The article was an interview with the ex-teacher who explained that he had once participated in an LGBT public action on the day against homophobia and that he was attacked after it. The interviewee claimed that his sexual orientation did not affect his professional performance and that he had never behaved in an openly gay manner in public. He argued that hatred has its roots in the family. See: "A Story with Gayography" (История с гейографией), On-Line Magazine "Molodoy Dalnevostochnik" (Молодой Дальневосточник), 20 September 2013, available at: http://www.mdgazet.ru/?module=articles&action=view&id=299.

165 Judgment of the justice of the peace of judicial district no. 26 of the Central District of Khabarovsk, 30 January 2014 (Постановление мирового судьи судебного участка № 26 Центрального района Хабаровска от 30 января 2014 года).

generates a positive image in the reader of the teacher; depicts the teacher as a champion of the idea that, in spite of harassment, he was ready to defend his right to a different sexual orientation (…) The bright and positive (…) as opposed to heartless and aggressive world of heterosexuals. The hero of the material, the teacher, enjoys prestige among adolescent students. The private, and especially the sexual, life of the teacher is therefore the subject of increased interest of the students. (…) The article can form in adolescents negative feelings towards heterosexuals in general, to their family and their parents in particular. The author of the article uses manipulative techniques to attract attention to the problem, giving it weight and importance.[166]

In another instance involving a non-LGBT specific media source in March 2014, the justice of the peace in Moscow dismissed a case instituted by the Roskomnadzor against the Editor-in-Chief of a TV channel for airing a French movie, "Les chansons d'amour" ("Love Songs"), which had been show at the Cannes Film Festival in 2007. The Roskomndazor alleged that the movie promoted "non-traditional relationships" because the main character "finds consolation by having a relationship with a person of the same sex after the death of another."[167] The justice of the peace ordered an assessment of the movie by a psycho-linguistic expert, who concluded that there were no elements identified in the film which promoted LGBT relationships or which denied or disrespected traditional relationships.

On 16 March 2015, a publishing house in Vladivostok was found liable under Article 6.21(2) for publishing an article in a magazine discussing three lesbian relationships. The article, "When Like Charges Get Attracted", discussed the different experiences of lesbian relationships and was accompanied by photographic illustrations.[168] The judge ordered the publishing house to pay a fine of 1,000,000 roubles (approximately USD 15,000). The judge did not analyse the contents of the article but referred to the findings of a linguistic expert's report. This report concluded that the article contained "information that creates an image of the attractiveness of non-traditional sexual relationships", and contained "statements with respect to non-traditional relationships which could form unconventional sexual attitudes among minors." The judge noted

166 Judgment of the Central District Court of Khabarovsk of 7 April 2014, case no. 12-145/14 (Решение Центрального районного суда Хабаровска от 7 апреля 2014 года по делу № 12-145/14).

167 Judgment of the justice of the peace of judicial district no. 412 of the Odintsovskiy District of Moscow, 24 March 2014, No. 5-69/14 (Постановление мирового судьи судебного участка № 412 Одинцовского района Москвы от 24 марта 2014 года по делу № 5-69/14).

168 Judgment of the Frunzenskiy District Court of Vladivostok of 16 March 2015, No. 5-25/2015. (Решение Фрунзенского районного суда Владивостока от 16 Марта 2015 года по делу № 5-25/2015). The article "When Like Charges Get Attracted" described three stories of lesbian couples: how they met, what it felt like to be attracted to a girl, what intimate relationships meant to them. One of the stories covered a couple who met when they were 16. The stories contained descriptions of sexual experiences, such as (in the most explicit parts): "We were very young, beautiful, sexual, plastic. We were kissing each other, giggling (…) our excitement grew. Forget Internet porn – everything was much more attractive in the mirror in front of us."

that the magazine only had a notification that it was restricted to those aged 16 and over (such that is it was not prohibited for those between 16 and 18), and took into account the "importance of sexual education of children and their proper orientation."[169]

The decision was upheld on appeal by the Primorsky Regional Court, which held that the article formed an image of the attractiveness of "non-traditional" (lesbian) relationships.[170] The Court referred to the legal reasoning of the Constitutional Court in relation to Article 6.21[171] to support its finding that the goal of the legislative ban on propaganda is to protect children from the "influence of information able to urge them on to unconventional sexual relationships".[172]

Proceedings have also been instituted pursuant to Article 6.21(2) against LGBT specific media. The following case demonstrates that the authorities and courts consider that dissemination of information includes a failure by those moderating online platforms to remove information that amounts to propaganda. In February 2014, the police in Nizhny Tagil instituted proceedings under Article 6.21(2) against Elena Klimova, the administrator of a well-known online support group for LGBT teenagers, "Children-404". Ms Klimova has run Children-404 since 2012 together with several other volunteers and psychologists. The idea of the group is to offer LGBT teenagers an opportunity to request support, including peer support or professional advice, on an anonymous basis. Teenagers can publish letters detailing their personal stories to seek comments from others, or they can request private consultations. Ms Klimova, together with the other moderators of the website, reviewed letters before posting them on the website and also reviewed comments (which could be published without being reviewed by a moderator first) to ensure that the information published did not discuss issues of sexual conduct or dating and to ensure that no obscene or offensive language is used. Ms Klimova and the other administrators did not post comments or materials themselves.

In bringing the case against Ms Klimova, the police did not rely on any specific information on the website but instead alleged that its contents in general amounted to prohibited propaganda. Before the Dzerzhinskiy District Court of Nizhniy Tagil, Ms Klimova argued that the Children-404 project was set up to support LGBT teenagers and to prevent suicides among them. She argued that the online content did not promote any sexual conduct, and further that the prosecution violated international human rights standards. On 24 February 2014, the Court discontinued the case due to a lack of a criminal act having taken place. The Court referred to an expert statement from a local psychologist and explained that the materials of the website were aimed at providing emotional and psychological support to young people who experience emotional distress

169 *Ibid*.

170 Judgment of the Primorskiy Krai Court, 30 April 2015, No. 7-12-168 (Решение Приморского краевого суда от 30 апреля 2015 года по делу № 7-12-168).

171 Judgment of the Constitutional Court of the Russian Federation, 23 September 2014, No. 24-P (Постановление Конституционного Суда Российской Федерации от 23 сентября 2014 года № 24-П).

172 See above, note 170.

due to their sexual orientation and gender identity, as well as who suffered from hate speech and homophobic acts.[173]

However, on 18 November 2014, the Roskomnadzor instituted proceedings against Ms Klimova on the basis of Article 6.21(2). The proceedings were prompted by a complaint to the Roskomnadzor from the Young Guard, a patriotic movement affiliated with the United Russia, the political party currently holding the majority of seats in Parliament. The Roskomnadzor alleged that:

> *The community "Children-404 LGBT teenagers" is a group freely accessible on the Internet which publicly discusses stories of children with non-traditional sexual orientation and gives a range of advice and well-wishing sentiments to its users. In the Community there is no (…) warning about the restrictions on the distribution of this kind of information among children. In general the materials posted in the Community are directed toward the formation among minors of non-traditional sexual attitudes, attraction to non-traditional sexual relationships, and the distorted representation of social equality between traditional and non-traditional sexual relationships.*[174]

According to the Roskomnadzor, the information contained in the online community was mainly focused on the creation of a:

> *Positive image of non-traditional sexual relationships in the eyes of children, their equivalence to, and in some cases superiority over, traditional relationships. Such relationships are strongly endorsed, supported and receive endorsing positive user comments. At the same time, in this community there is almost no information about how these relationships are non-traditional in the understanding of the regulations, customs and practices of the Russian Federation. Thereby creating an increased concentration of attention by minors on the issues of non-traditional sexual relationships, which could significantly deform children's ideas about constitutional values such as family, motherhood, fatherhood, and childhood, and have a negative impact not only on the child's mental state and development but also on his social adaptation.*[175]

To support this conclusion, the Roskomnadzor cited excerpts from the letters posted by users of the online community. These included a contribution titled, "More often than not I'm proud that I'm gay," which contained the statements:

173 Judgment of the Dzerzhinskiy District Court of Nizniy Tagil, 28 February 2014, No. 5-18/2014 (Постановление Дзержинского районного суда города Нижнего Тагила от 28 февраля 2014 года по делу № 5-18/2014).

174 Record of administrative proceedings of 18 November 2014 no. 01-1-41-14-1610 (Протокол об административном правонарушении от 18 ноября 2014 года № 01-1-41-14-1610).

175 *Ibid.*

> *Sometimes I'm proud to be gay, sometimes I think I'm bi, and then I think that, maybe, it was when I was a child I had a shift in mentality and I became like that. But more often than not I'm proud to be gay, and it sounds good (…) And I have something to be proud of, I have a boyfriend.*[176]

> *The "Pride" of the LGBT community – from the philosophy of which stems the tradition of "Pride" parades or "Prides" – is a pride not associated with sexual orientation itself, but with the fact that, through a path of total destruction, imprisonment, discrimination and humiliation, the people of the LGBT community showed courage, solidarity and perseverance, having defended their historical right to human dignity.*[177]

The Roskomnadzor also referred to a video-message posted in the community in which a man states that he is proud to be gay, that he became a confident person after he realised his sexual orientation, and that LGBT teens are special and beautiful like no other. The Roskomnadzor stated that these materials, in general, are designed to inspire in children the idea that to be LGBT means to be a courageous, strong, self-assured, resilient person with a sense of dignity and self-worth, and that same-sex relationships are superior to traditional ones.[178] Referring to comments such as the following, the Roskomnadzor considered that such comments openly express a negative attitude toward a mother who condemned a gay teenager and encouraged him to ignore and ridicule her complaints about his sexual orientation:

> *Conflicts [with your mother] can be resolved by the "smile and wave" method (we nod and let things fly past our ears, we do not respond) or by the "boggart-style": think of your mother looking ridiculous (there's no prompt: you have to think it up yourself, just envision her with a clown nose), so that you do not wound her.*

> *Yeah (…) so your parents got to you! Wipe your tears, you hear? You have great perspective, your life has just begun and soon your troubles will end. You will start a new life, have new sensations, new appointments and a lot of other new things! The author of the comment above is right: your mom was being a fool, she will die a fool, and she shouldn't think that in her old age people will crawl on their knees before her and fork out money!*[179]

In the view of the Roskomnadzor, such comments were contrary to Article 38(1) and (2) of the Constitution and Article 63(1) of the Family Code of the Russian

176 Anonymous, Comment made on online platform Children-404, 20 October 2014. All the letters and comments were originally available at: http://vk.com/deti404_vk. However, since 20 September 2015 this page is blocked by a court order (see Part 2.3.3.3 below).

177 Anonymous, Comment made on online platform Children-404, 20 October 2014.

178 See above, note 174.

179 Anonymous, Comment made on online platform Children-404, 20 October 2014.

Federation, which states that motherhood, childhood and the family are under the protection of the state and parents have the primary responsible for the upbringing and development of their children, and must take care of their children's health and physical, mental, spiritual and moral development.[180]

The following comment was considered by the Roskomnadzor to create a positive attitude towards non-traditional relationships, treating them as though they are equivalent to traditional relationships, and possibly as a more attractive type of relationship.

> *On March 26th, when we went for a walk, it was in the forest, we romped around with each other, we flung each other in the snow banks, laughing (this is the first time we touched each other!) and in the evening of this memorable day I decided to ask (…) to be my girlfriend, and she accepted my offer *-* God, I was so afraid to do it, I could not even imagine that I would hear a positive response :D IT IS THE ONLY DAY THAT STILL MAKES ME SMILE, MY HEART BEATING FASTER THAN USUAL!!!!*[181]

Another post on the community was headed, "The Phrase 'It Is Not A Choice, We Are What We Are' From The Lips Of A Teacher At A Grade School Sounds Unfamiliar And Weird", had the following comments posted:

> *Happiness to you, author, and find new, good friends. I'm sure for us, too, sooner or later things will change for the better. Because we are the future, each of us. There is equality in the U.S., yes, but it did not fall out of the sky – people fought for it and got it.*[182]

> *The phrase "it's not a choice, we are what we are" sounds like you are being absolved of guilt. Like, it's not my fault, it's all nature, I'm made like this. But there's no need to be absolved. It doesn't matter whether it's a choice or not: what's most important is that it's your private life, and anyone who wants to see you as something else, they can get lost. When people accuse me of making a choice or something, decided to be gay or bi or whatever – instead [of asking for absolution] I want to tell them: "Yes, I made a choice because I have the full right, this is my life!" (even if you did not make a choice, and were born [the way you are]). Because those who dare to reproach me for daring to be different from the majority can go to hell.*[183]

In the view of the Roskomnadzor, this commentary contained an assertion designed to create among children the false impression that LGBT relationships

180 See above, note 174.

181 Anonymous, Comment made on online platform Children-404, 24 October 2014.

182 Anonymous, Comment made on online platform Children-404, 1 November 2014.

183 Anonymous, Comment made on online platform Children-404, 1 November 2014.

were superior and exceptional to traditional ones and also contained information about the social equivalence of "homosexual" and traditional relationships. Finally, they considered that the following comments urged the teenage religious believer to whom they were addressed, to refuse God in favour of "homosexual relationships", which they consider to violate the religious freedom of citizens and put "non-traditional relationships" above the religious beliefs of the child.[184] The comments were posted in response to a post titled, "I hate myself. I Believe in God and Believe that Sodomy is a Sin, even worse than suicide":

> *If religion makes you unhappy and makes you feel like damaged goods, isn't it better to give it up? I understand giving up God is not easy, but trust me, being an atheist is much easier. I myself decide what is good and what is bad and don't think about whether God approves of my actions. You can change your religious beliefs, but to change your [sexual] orientation is not in your power. I don't need a God who forbids me love. And you?*[185]

> *Dear (...). People have written so many words of support that I think it unnecessary to repeat what has already been said. I'll make a note about only one. If your God is ready to punish you for what you love, are you sure you need such a God?*[186]

During the proceedings before the justice of the peace in Nizhniy Tagil, the Roskomnadzor provided an expert opinion by Professor of Psychology Lidia Matveeva from the Moscow State University, which had been commissioned by the Young Guard. She concluded that the contents of the online community promoted "non-traditional sexual relationships", stating that:

> *1. The materials submitted for evaluation (as well as the page itself in the social network VKontakte and site of Children-404) have a general humanistic orientation. Their aim is to encourage people with non-traditional sexual orientations to accept themselves as they are, to install in them the hope of a full, dignified life and the assurance of support from the group. Such a goal contributes to the prevention of suicide attempts and suicides, common in this community (according to surveys conducted by the authors of the site Children-404, more than 30% of children and adolescents, once they become aware of their homosexual orientation, have seriously thought at least once about committing suicide). In addition, the site indirectly calls to society as a whole to be more tolerant of people who differ from the majority.*

> *2. The goal of the creators of the internet resource is virtuous, but the means they use are not adequate for this purpose, insofar as*

184 See above, note 174.

185 Anonymous, Comment made on online platform Children-404, 29 October 2014.

186 *Ibid*.

they contain elements of both covert and overt propaganda of non-traditional sexual relationships. Therefore, it is necessary to involve medical professionals, psychologists and psychotherapists in the work on this problem in order to develop state-sponsored programs to support children and adults with pathological forms of sexual identity.

3. Alongside this, placement of such materials containing elements of hidden propaganda of homosexual relationships is very dangerous, because in fact there is an attempt to present non-traditional sexual orientation as a norm (a variant of the norm), and thus to "legitimise sin." Of course, such a paradigm of social medium will create a certain orientation in the formation of the psychological needs and behavioural patterns of children and adolescents with a psychologically immature gender identity.

4. In addition, it is clear there is the encouragement of the social need of people with a non-traditional sexual orientation to expand the community in order to feel more confident in society (to resist social exclusion). However, calls to a "sexually traditional majority" to be more tolerant toward gay minorities can and should be formulated differently.[187]

Based on these findings, her conclusion was that the materials may contribute to the emergence of an interest in children about "non-traditional forms of sexual behaviour" and that they amounted to propaganda. She also concluded that the materials provided a "distorted picture of the social equivalence of traditional and non-traditional sexual relationships".[188]

Having referred to this opinion, on 3 February 2015, the justice of the peace found Elena Klimova liable for "propaganda of homosexuality" to minors on the internet pursuant to Article 6.21(2) and ordered her to pay a fine of 50,000 roubles.[189] Ms Klimova argued in her defence that the Children-404 project was set up to support LGBT teenagers and did not promote any sexual conduct. To support her position she provided expert statements by a child psychologist from St. Petersburg Medical Academy and a psychiatrist, a member of the local commission on minors' issues. She also referred to the position of the Constitutional Court, which had provided a restrictive interpretation of what

187 *Report of the expert assessment of text materials and a video in the community "Children-404" with regard to identifying characteristics of propaganda of non-traditional sexual realtionships among minors,* 6 December 2014 *(Заключение экспертизы текстовых материалов и видеоролика в сообществе "Дети 404" социальной сети "ВКонтакте" на предмет наличия в нем признаков пропаганды нетрадиционных сексуальных отношений среди несовершеннолетних, от 6 декабря 2014 года)*, available at: https://rkn.gov.ru/docs/JEkspertiza_Deti_404.pdf.

188 *Ibid.*

189 Judgment of the justice of the peace of the judicial district no. 5 of the Dzerzhinskiy District of Nizniy Tagil of 3 August 2015, case no. 5-7/2015 (Постановление мирового судьи судебного участка № 5 Дзержинского районного суда города Нижнего Тагила от 3 февраля 2015 года по делу № 5-7/2015).

amounted to prohibited propaganda. However, the justice of the peace disregarded all these arguments.[190]

The decision was appealed to the Dzerzhinskiy District Court of Nizhniy Tagil, which reversed it on procedural grounds because the justice of the peace did not specify which of Ms Klimova's acts amounted to propaganda. The Court remitted the case for a fresh hearing.[191] However, on 28 July 2015, following a new hearing, the justice of the peace again found Ms Klimova liable and ordered her to pay the same fine. As earlier, the justice of the peace based this decision exclusively on the expert's report by Matveeva, this time disregarding the opinions of five other professors, including from the Moscow State University, who denounced her findings.[192] On 30 November 2015, the Dzerzhinskiy District Court of Nizhniy Tagil upheld the conviction.[193] The Court found that the materials posted to the website amounted to propaganda, again referring to the expert opinion:

> *In accordance with the said expert opinion, in the materials submitted to the expert there is information aimed at forming among minors non-traditional sexual attitudes, the contents of the video-clip and textual materials may encourage the development of an interest among minors in non-traditional forms of sexual behavior. The influence is on the cognitive, emotional, semantic and behavioural levels, therefore it can be concluded that there is propaganda of non-traditional sexual attitudes in the video-clip and texts. In addition, in these materials there is information forming a positive image of a man with non-traditional sexual orientation. Belonging to this community increases the self-esteem of an individual, makes his life more comfortable, diverse, joyful, while the negative sides existing in these communities are silenced. The information contained in the materials examined forms an impression of the necessity of the social equivalence of traditional and non-traditional sexual relations: it contains a call for being proud of non-traditional sexual relationships, it creates an illusory attractiveness of the LGBT-community in which normal, clever and educated people interact, it describes this world which is better and more comfortable than the ordinary (…) Thus, it distorts the notion of the social equivalence of traditional and non-traditional sexual relationships.*[194]

190 *Ibid*.

191 Judgment of the Dzerzhinskiy District Court of Nizniy Tagil, 25 March 2015, No. 12-44/2015 (Решение Дзержинского районного суда города Нижнего Тагила от 25 марта 2015 года по делу № 12-44/2015).

192 Judgment of the justice of the peace of the judicial district no. 2 of the Dzerzhinskiy District of Nizniy Tagil, 3 August 2015, No. 5-549/2015 (Постановление мирового судьи судебного участка № 2 Дзержинского районного суда города Нижнего Тагила от 3 августа 2015 года по делу № 5-549/2015).

193 Judgment of the Dzerzhinskiy District Court of Nizniy Tagil, 30 November 2015, No. 12-215/2015 (Решение Дзержинского районного суда города Нижнего Тагила от 30 ноября 2015 года по делу № 12-215/2015).

194 *Ibid.*

The Court then went on to determine that Ms Klimova could not have failed to understand that the materials amounted to propaganda and that her posting of them, and her failure to remove comments, amounted to dissemination:

> *As the justice of the peace correctly held the criterion for Klimova's guilt in committing the said offence is the inadequate performance of her functions as the community's administrator: Elena Klimova deliberately placed on the community's page the users' letters and did not delete from the page comments containing propaganda of non-traditional sexual relations. She could not not understand that this trivial, from her viewpoint, informing in this particular situation may have characteristics of agitation (propaganda), however she reacted indifferently, having disseminated (placed) information of the specific contents on her page, accessible to Internet users, including minors.*[195]

2.3.3.3 Prohibition of information: Federal Law "On protection of children from information harmful to their health and development"

In addition to Article 6.21(2) of the Code of Administrative Offences, which allows for individuals to be prosecuted for disseminating propaganda, Russian law also allows the Roskomnadzor or the courts to declare that certain information cannot be disseminated, which includes requiring websites to be shut down. In accordance with Article 15.1 of the Federal Law "On Information, Information Technologies and Protection of Information" (Federal Law on Information),[196] the Roskomnadzor maintains a registry of domains and URLs that contain information prohibited for dissemination in the Russian Federation. Websites listed in this registry must be deleted by the domain owner within one day of being listed. In the event that the domain's owner does not comply with the request, the service provider must restrict access to the website. The Roskomnadzor has discretionary powers to list certain types of information, such as pornographic images of minors, in the registry, a decision which can be challenged in court.[197] However, in all other instances, a court order is needed to include information in the registry.[198] Using this second avenue, in a case of alleged propaganda, the Roskomnadzor or public prosecutor can seek a court order that the website containing the propaganda must be shut down on the basis that dissemination of propaganda is prohibited by the Federal Law "On protection of children from information harmful to their health and development".[199]

195 *Ibid.*

196 Federal Law, "On Information, Information Technologies and Protection of Information", No. 149-FZ, 27 July 2006 (Федеральный закон от 27 июля 1996 года № 149-ФЗ "Об информации, информационных технологиях и о защите информации").

197 A list of the information which falls within the discretionary powers is provided in Article 15.1 and includes pornographic images of minors, explanations of how to manufacture narcotics and information on methods of committing suicide.

198 See above, note 196, Article 15.1.

199 See above, note 80. The law prohibits information which "denies family values, promotes non-traditional sexual relationships and forms disrespect for parents and (or) the other members of the family" among children regardless of their age.

Using this legal avenue, the public prosecutor in Barnaul initiated proceedings seeking a court order declaring four pages of a social network "VKontakte" as prohibited information. The prosecution followed a complaint made by a member of the local legislature to the prosecutor's office. Three of the pages included explicit sexual content on gay dating relating to teenagers. However, the request also concerned the page of "Children-404" which, as noted above, is monitored so as not to contain any sexual content, among other things.[200] The proceedings to close down the website of Children-404 were unrelated to the proceedings instituted by the Roskomnadzor against Elena Klimova, the administrator of Children-404, although they were happening at the same time.

On 7 August 2015, the Central District Court of Barnaul declared the four domains to contain prohibited information that could be placed on the registry of domains banned for dissemination. The Court utilised a special procedure for establishing facts of legal significance, which allows it to make an order without summoning the owners of the domains when it considers that the proceedings are non-contentious.[201] Accordingly, Children-404 learned about the court order only when the Roskomnadzor notified VKontakte that it had a duty to shut down the page. The judgment of the Court was not provided to Children-404. Although after Elena Klimova, the administrator of Children-404, appealed the judgment to the Altayskiy Regional Court, the Children-404 website was immediately shut down.

The Regional Court acknowledged the standing of Ms Klimova to appeal the judgment as the administrator of Children-404. In her appeal, Ms Klimova argued that the judgment of the District Court violated her right to defend the freedom to disseminate information and that the failure of the District Court to summon her to the proceedings was unlawful. She further argued that the court failed to assess the actual contents of the Children-404 pages and to give due weight to the goals of the Children-404 project. She referred to the decision of the Constitutional Court of 23 September 2014 which limited the scope of the propaganda law. However, the appeal was rejected by the Regional Court. The Regional Court did not analyse the contents of the Children-404 web pages, instead referring to the general provisions of the law prohibiting propaganda of "non-traditional sexual relationships". Moreover, the case file did not contain any information about the contents of the internet pages of Children-404.[202]

In parallel to these proceedings, the public prosecutor in St. Petersburg filed a request to the Oktyabrskiy District Court of St. Petersburg to have the contents of the pages of Children-404 declared to be prohibited information pursuant

200 For more information about Children-404, see above, Part 2.3.3.3.

201 Judgment of the Central District Court of Barnaul, 7 August 2015, No. 2-5816/15 (Решение Центрального районного суда города Барнаула от 13 апреля 2016 года по делу № 2-5816/15).

202 Decision of the Altayskiy Regional Court, 13 January 2016, No. 33-198/2016 (Определение Алтайского краевого суда от 13 января 2016 года по делу № 33-198/2016).

to the Federal Law on Information.[203] The prosecution came following a complaint from the Young Guard, who also provided the prosecutor with the expert opinion issued by Lidia Matveeva. As occurred in the Barnaul proceedings, Children-404 was not notified of the proceedings. In a judgment delivered on 25 March 2015, the District Court declared the pages of Children-404 to be prohibited information. This judgment was made on the sole basis of the expert opinion and without any analysis of the contents of the pages themselves.[204] The judgment was appealed by Ms Klimova to the St. Petersburg City Court, arguing the same points that she had made in the proceedings in Barnaul. On 1 October 2015, the City Court quashed the judgment on the basis of the District Court's failure to summon Ms Klimova to the proceedings. However, the City Court then discontinued the proceedings with reference to the 7 August 2015 judgment of the Barnaul court as issued on the same matter. Accordingly, the Court did not assess any arguments relating to the substantive merits of the appeal.[205]

On 21 September 2015, following the Barnaul court's judgment of 7 August 2015, Children-404 launched a new version of its platform (which was the same platform simply moved to a new web address). In November 2015, the public prosecutor filed a new action with the Central District Court of Barnaul seeking a court declaration that this new version of Children-404, which was launched following the entry into force of the 7 August 2015 judgment, disseminated prohibited information. The prosecutor provided copies of the general description of the aims of the project and several letters of teenagers published on it as the proof of propaganda of "non-traditional sexual relationships". The prosecutor's request did not analyse the contents of these letters or the aims of the project. On 13 April 2016, the District Court upheld the prosecutor's request without assessing the contents of any materials on Children-404.[206] The Court ignored the expert opinions of a psychiatrist and a professor in psychology of the Moscow State University, both of which explained that the project contained no elements of prohibited propaganda. On 22 June 2016, the judgment was upheld on appeal by the Altayskiy Regional Court.[207]

2.3.4 Denial of Permission to Hold Public Assemblies

Whereas the previous parts considered cases in which individuals in public assemblies were prosecuted for "propaganda of homosexuality" because of their participation in LGBT assemblies, this Part considers cases in which permission

203 Prosecutors are able to initiate proceedings in their own jurisdiction which may overlap with proceedings for the same matter instituted in another jurisdiction as there is no official co-operation between the different regional prosecutors' offices.

204 Judgment of the Oktyabrskiy District Court of St. Petersburg, 25 March 2015, No. 2-1551/2015 (Решение Октябрьского районного суда Санкт-Петербурга от 25 марта 2015 года по делу № 2-1551/2015).

205 Decision of the St. Petersburg City Court, 1 October 2015, No. 33-12546/2015 (Определение Санкт-Петербургского городского суда от 1 октября 2015 года по делу № 33-12546/2015).

206 Judgment of the Central District Court of Barnaul, 13 April 2016, No. 2-644/16 (Решение Центрального районного суда города Барнаула от 13 апреля 2016 года по делу № 2-644/16).

207 Decision of the Altayskiy Regional Court, 22 June 2016, No. 33-6785/2016 (Определение Алтайского краевого суда от 22 июня 2016 года по делу № 33-6785/2016).

was denied to hold the assemblies themselves. Pursuant to the Federal Law "On Assemblies, Meetings, Demonstrations, Marches and Picketing"[208] (the Law on Assemblies), the organiser of a public assembly must notify local authorities of their intention to hold an assembly and provide the authorities with information about the assembly, including its goals, time, place or route and number of participants.[209] This applies to all public assemblies other than in the case of a protest (assembly or picket) by one person.

Since the first attempt to organise an official[210] public assembly advocating for LGBT rights in 2006 by the leader of the Moscow advocacy group GayRussia,[211] there have been numerous attempts to organise such assemblies in various cities in Russia, including Moscow, St. Petersburg, Kostroma, Ryazan, Arkhangelsk, Tyumen and Kazan. In the overwhelming majority of instances, the authorities refused permission to hold the proposed assemblies.[212]

These refusals were made on various grounds. In some cases, these grounds were openly related to the LGBT theme of the event, such as when the authorities considered that an LGBT themed public assembly could not proceed because of its disapproval by others, possible clashes between the activists and opposing protesters, because such an assembly would cause offence to religious feelings or violate public morals or because it would be harmful to children and violate the prohibition of "homosexual propaganda".[213] In other cases, discriminatory motives were covert as the authorities used other –

208 Federal Law, "On Assemblies, Meetings, Demonstrations, Marches and Picketing" 19 June 2004, No. 54-FZ of (Федеральный закон от 19 июня 2004 года № 54-ФЗ "О собраниях, митингах, демонстрациях, шествиях и пикетированиях").

209 *Ibid*., Article 7.

210 Official is used here to refer to a public assembly held in accordance with the notification procedure provided in the Law on Assemblies.

211 "Moscow Gay Pride" (Московский гей-прайд), available at: www.gayrussia.eu/gayprides/moscow.

212 TopNews Agency, "The first LGBT assembly was permitted in Russia in 2010 in St. Petersburg", 21 November 2010 (В Санкт-Петербурге прошел первый санкционированный властями пикет представителей сексуальных меньшинств), available at: http://www.topnews.ru/news_id_39182.html; Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, "Pending cases: current state of execution – Alekseyev v Russia", available at: http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=alekseyev&StateCode=RUS&SectionCode; and Council of Europe, Department for the Execution of Judgments of the European Court of Human Rights, "H/Exec(2014)5, Alekseyev v the Russian Federation", 16 September 2014, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805929b8.

213 Council of Europe, Committee of Ministers, "Communication from NGOs (GayRussia and Moscow Pride) (15/05/2015) in the case of Alekseyev against Russian Federation (Application No. 4916/07)", DH-DD(2015)564, 29 May 2015, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804a7b5f; Council of Europe, Committee of Ministers, "Communication from NGOs ("Coming Out", Russian LGBT Network, ILGA-Europe) (04/02/2014) in the case of Alekseyev against Russian Federation (Application No. 4916/07)", DH-DD(2014)228, 13 February 2014, Paras 28 and 29, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804a1d42; and Council of Europe, Committee of Ministers, "Communication from NGOs (International Lesbian, Gay, Bisexual, Trans and Intersex Association ('ILGA-Europe') and "Coming Out") (15/05/2015) in the case of Alekseyev against Russian Federation (Application No. 4916/07)", DH-DD(2015)565, 29 May 2015, available at: https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2756047&SecMode=1&DocId=2273324&Usage=2.

ostensibly LGBT-neutral – pretexts for denying permission for an assembly, such as that it would distract drivers and landscaping works.[214] For example, in 2010 LGBT activists in St. Petersburg were denied permission to hold a Gay Pride march due to various security or administrative reasons, including the unsuitability of the location. However, in the same year the Young Guard, the youth wing of pro-government party United Russia, was allowed to organise a meeting in support of "family and traditional family values" in the same location.[215] Following the adoption of regional laws banning propaganda in numerous Russian regions in 2011 and 2012, and eventually the federal law banning so called "homosexual propaganda" in 2013, these laws have been routinely used as the only, or the leading, legal ground for denying LGBT activists permission to hold assemblies.

Our research identified over 70 court cases challenging refusals to permit LGBT public assemblies. In most cases, the applicants raised discrimination arguments. However, despite the fact that in at least 10 cases the courts accepted that the refusal of permission to hold an assembly was unlawful, in no case was it found that the authorities' actions were discriminatory. The below overview provides an analysis of the judicial reasoning in the cases concerning denial of permission to hold LGBT public assemblies since the emergence of the majority of regional and federal laws against "propaganda of homosexuality" in 2011. The cases described are exemplary of the reasoning seen in most of these cases.

Between 2012 and 2013, the Mayor of the City of Arkhangelsk denied permission to hold eight public assemblies on the basis that the assemblies would violate either the Arkhangelsk Oblast Law "On certain measures of protection of morals and health of children of the Arkhangelsk Oblast" or the Federal law "On Protection of Children from Information Harmful to their Health and Development". Each of the assemblies sought to advance similar aims: disseminating information about discrimination against LGBT persons: informing the public about the social equivalence of LGBT relationships and heterosexual relationships; criticising the federal anti-propaganda law; and/or disseminating the President's statement that there should be no homophobia against LGBT persons.[216] In each

214 See, for example, Judgment of the Khimnkinskiy District Court of the Moscow Oblast, 22 May 2013, No. 2-4078/2013 (Решения Химкинского городского суда Московской области от 30 ноября 2012 года по делу № 2-5868/2012 и от 22 мая 2013 года по делу № 2-4078/2013). Judgment of the Khimnkinskiy District Court of the Moscow Oblast, 22 May 2013, No. 2-4078/2013 (Решение Химкинского городского суда Московской области от 22 мая 2013 года по делу № 2-4078/2013). For a description of four such cases in St. Petersburg see: *Lashmankin and Others v Russia*, Application No. 57818/09, 22 January 2013, Statement of Facts, available at: http://hudoc.echr.coe.int/eng?i=001-116762.

215 *Ibid.*, *Lashmankin and Others v Russia.*

216 See Judgment of the Oktyabrsky District Court of Arkhangelsk, 27 January 2012, No. 2-938/2012 (Решение Октябрьского районного суда города Архангельска от 27 января 2012 года по делу № 2-938/2012); Judgment of the Lomonosovskiy District Court of Arkhangelsk, 24 January 2013, No. 2-424/2013 (Решение Ломоносовского районного суда города Архангельска от от 24 января 2013 года по делу № 2-424/2013); Judgment of the Oktyabrsky District Court of Arkhangelsk, 30 January 2014, No. 2-1496/2014 (Решение Октябрьского районного суда города Архангельска от 30 января 2014 года по делу № 2-1496/2014); and Judgment of the Oktyabrsky District Court of Arkhangels, 23 January 2014, No. 2-1045/2014 (Решение Октябрьского районного суда города Архангельска от 23 января 2014 года по делу № 2-1045/2014).

case, the organiser of the assembly challenged the refusal of permission in the courts, and each refusal was upheld, with the courts variously noting that the goal of "dissemination of information about the nature of homosexuality" is prohibited under the Arkhangelsk Oblast Law,[217] and that the organisers had failed to prove that they sought to disseminate information about LGBT persons in a scientific way and without forming "an attractive image of non-traditional sexual orientation" or a "distorted notion of social equivalence of heterosexual and homosexual relations".[218] In one case, the court did not accept that the refusal to allow the assembly was discriminatory because the "contested decisions [of the City Administration] are lawfully motivated by the need to secure public interests and protection of public morals, including those of the minors".[219] In another, the Court concluded that "the applicant's arguments of discrimination, based on the sexual orientation of the participants in the assemblies and those whom they sought to support, are unfounded."[220]

In May 2013, the St. Petersburg City Court upheld a decision to refuse permission to hold an assembly protesting against the federal law on propaganda, noting that:

> *An attempt to disseminate leaflets calling for tolerance towards gays and lesbians (…) shall be considered undesirable because of its potential threat to the moral and mental development of children.*[221]

This was despite the initial refusal of the assembly being based on the fact that other public assemblies were scheduled for the same time (and not on the basis of purported possible harm to children).

In 2014, courts in both Sevastopol and Moscow upheld decisions to prevent assemblies from going ahead. In Sevastopol, an assembly proposed to raise public awareness on homophobia and discrimination against LGBT persons and also on fascism and xenophobia. The Leninsky District Administration of the City of Sevastopol refused permission for the assembly on the basis that it would violate Article 16 of the Federal law "On Protection of Children from Information Harmful to their Health and Development". On 20 May 2014, the Golovinskiy District Court of Moscow upheld this decision, noting that, "[a]n attempt by the organiser to call for tolerance towards sexual minorities (…) in places of traditional leisure of citizens with children violates prohibitions established in the legislation".[222]

217 *Ibid.,* Judgment of the Oktyabrsky District Court of Arkhangelsk, 27 January 2012.

218 See Judgment of the Oktyabrsky District Court of Arkhangels, 23 January 2014 and Judgment of the Oktyabrsky District Court of Arkhangelsk, 30 January 2014, above, note 216.

219 *Ibid.,* Judgment of the Oktyabrsky District Court of Arkhangelsk, 30 January 2014.

220 See Judgment of the Oktyabrsky District Court of Arkhangels, 23 January 2014, above, note 216.

221 Appellate Decision of the St. Petersburg City Court, 22 May 2013, No. 33-18289/13 (Апелляционное определение Санкт-Петербургского городского суда от 22 мая 2013 года по делу № 33-18289/13).

222 Judgment of the Golovinskiy District Court of Moscow, 30 May 2014, No. 2-2754/14 (Решение Головинского районного суда Москвы от 30 мая 2014 года по делу № 2-2754/14).

The assembly in Moscow aimed to call for repeal of the Ryazan Oblast Law on propaganda following the decision of the HRC in the case of *Irina Fedotova v Russia*.[223] The assembly was refused on the basis that its notification gave grounds to believe that its goals violated the prohibition of propaganda of "non-traditional sexual orientation". On 22 January 2014, the Tverskoy District Court of Moscow upheld this refusal, noting that the proposed assembly would violate public morals. The Court noted that it was clear that the organisers intended to influence the public, including minors, in relation to gay culture, given that they only proposed to hold the assembly in a place that was open and freely accessible and which was used for the leisure activities of families and children. Finally, the Court concluded that the decision of the Moscow authorities demonstrated no discriminatory motives on the basis of sexual orientation, and that the organisers had incorrectly interpreted the judgment of the ECtHR in *Alekseyev v Russia*.[224]

A recent case concerned the denial of authorisation of a meeting to be held in St. Petersburg in May 2016 on the basis that the city authorities considered that the aim of the assembly – to call for tolerant attitudes to LGBT individuals and to demonstrate the peaceful intentions of LGBT individuals and their positive attitude towards society – violated the ban on propaganda.[225] The Sestroretskiy District Court of St. Petersburg agreed and rejected the organisers' argument that the assembly would not involve any form of dissemination of information among minors and that the assembly's goals did not even mention any involvement of minors. The Court held that because the assembly was planned to take place in public, and that public spaces are open to children, this could not "exclude propaganda by LGBT of their lifestyle to an unidentified number of people, including children".[226] The Court added that the information which would be promoted was not based on accepted traditional notions of family and marriage. In the Court's view, the legislative ban on such propaganda was not discriminatory because it "applies to everyone on an equal basis".[227]

As can be seen from the above discussion, in a number of cases, even a protest against legislation prohibiting "homosexual propaganda" was itself regarded as such propaganda. The courts appear to act on a presumption that any public reference to LGBT issues is immoral and that all information about such issues is harmful. Two cases in Kostroma, in which judges made a distinction between dissemination of information as part of the advocacy efforts of LGBT activists and the prohibited "propaganda of homosexuality", are an exception to the usual approach which equates dissemination of information with propaganda.

223 See discussion above, Part 1.7.4.

224 Judgment of the Tverskoy District Court of Moscow, 22 January 2014, No. 2-1002/14 (Решение Тверского районного суда Москвы от 22 января 2014 года по делу № 2-1002/14).

225 Judgment of the Sestroretskiy District Court of St. Petersburg, 18 May 2016, No. 2a-925/2016 (Решение Сестрорецого районного суда Санкт-Петербурга от 18 мая 2016 года по делу № 2а-925/2016).

226 *Ibid.*

227 *Ibid.*

On 25 May 2014, gay rights activists notified the City Administration of Kostroma of their intention to hold a Gay Pride march and a subsequent meeting on 1 June 2014. The march and the meeting were scheduled to take place in the centre of Kostroma, with 50 people expected to attend. The aim was to raise public awareness about homophobia and discrimination against LGBT individuals, and also about fascism and xenophobia. On 27 May 2014, the Kostroma City Administration refused to agree to the meeting and the march. It noted that the proposed event was to take place on 1 June 2014, which is International Children's Day, and that there would be children throughout the city, where it was proposed that the march would take place. Therefore no alternative location could be proposed for the march without the risk of violating the ban on propaganda.[228] The Administration further noted that the goals of the assembly suggested that it would violate the federal ban on propaganda. In addition, the Administration emphasised that it had received numerous petitions against the proposed assemblies and that the Kostroma police had informed the Administration that protests against the proposed march could lead to violent attacks against the activists. In view of these concerns, the Administration concluded that it could not propose any alternative locations for the proposed march and meeting.[229]

The organisers of the march appealed against this decision in the Sverdlovskiy District Court of Kostroma, arguing that the purpose of the event was to attract the attention of society and the authorities to discrimination against LGBT persons and to the issue of homophobia. These aims could not be considered to violate the requirements of morality. The organisers therefore believed that the contested decision discriminated against LGBT persons, including against the organisers of the planned public event. The organisers further alleged that the authorities had a duty to propose an alternative location if the original location was not suitable.[230]

The District Court allowed the complaint in part on 3 July 2014. The Court held that because the decision of the Acting Head of the Administration of Kostroma to refuse to allow the event had not proposed a change of place or time to hold the event, the decision was illegal and violated the organisers' right under Article 31 of the Federal Constitution to assemble peacefully, without weapons, and to hold processions.[231] However, the Court found that the part of the decision that notified the organisers of their responsibility not to promote non-traditional sexual relationships among minors did not violate the organisers' rights. The Court explained that it was impossible to establish from the notification to hold the march what kind of specific tools would be used to attract attention in the course of the march, therefore the warning was preventive in nature and met the objectives of the rule of law and public order during public events. The notification by the authorities referred to potential violations of the prohibition

228 Judgment of the Sverdlovskiy District Court of Kostroma, 3 July 2014, No. 2-2904/2014 (Решение Свердловского районного суда Костромы от 3 июля 2014 года по делу № 2-2904/2014).

229 *Ibid.*

230 *Ibid*.

231 *Ibid*.

on propaganda, but did not evaluate the proposed activities as propaganda of non-traditional sexual relationships in the affirmative. As such, the ban on propaganda was not the ground for refusal. The Court did not address the argument about the discriminatory nature of such a warning.[232]

The Kostroma Oblast Court, which reviewed this judgment on appeal, did not agree with the District Court that the aims of the proposed assemblies had no bearing on the decision to refuse permission to hold them.[233] The Oblast Court held:

> *Having agreed with the arguments of the Administration that it was impossible to ensure security of the march on 1 June 2014, the court of first instance proceeded from the fact that there have been appeals of organisations and citizens to the administration of Kostroma calling for a ban on such events, as well as taking into account the fact that the personnel of law-enforcement bodies were busy to ensure the protection of public order during the festive events. (…) The mere existence of the risk is not sufficient for the prohibition of activities, and a preliminary assessment of the potential danger had not been carried out by the Administration. The Court had not been furnished with any data on the potential level of threat and the inability to neutralise it by all the methods provided for by law. The need to ensure public order during the festivities clearly did not exclude the possibility of providing the security of the march with a small number of participants (50 people).*
>
> *There are no reasons to believe that the declared aim of the event violated the prohibition established by the Federal Law of 29 December 2010 № 436-FZ "On protection of children from information harmful to their health and development" and the Federal Law of 24 July 1998 № 124-FZ "On Basic Guarantees Child Rights in the Russian Federation". (…) The objectives of the march, declared in its notification, (…) do not evidence an intent to promote non-traditional sexual relationships. A reference to people of homosexual orientation as such is not propaganda. The legislative ban on propaganda of non-traditional sexual relationships among minors does not prevent holding public events in the manner prescribed by law, including open public debate about the social status of sexual minorities and their rights, without imposing their attitudes on minors. Evidence showing that the actual purpose of the public assemblies was different from the ones specified in the notification, and that it was aimed at the violation of the prohibitions established by federal law, was not presented.*[234]

232 *Ibid.*

233 Appellate decision of the Kostroma Oblast Court, 8 September 2014, No. 33-1472/2014 (Апелляционное определение Костромского областного суда от 8 сентября 2014 года по делу № 33-1472/2014).

234 *Ibid.*

In a similar case in Kostroma in 2014, the same activists were denied permission to hold a standing assembly with the aim of disseminating the statement: "Homosexuality is not a perversion. Grass hockey and ice ballet are" in order to call for tolerance towards sexual minorities. The Sverdlovskiy District Court of Kostroma rejected the argument of the city authorities that the assembly would promote "non-traditional sexual relationships".[235] Furthermore, the Court disagreed with the Administration that possible protests against the assembly were a legitimate ground for refusing it. The Court held that the negative attitude of the public in relation to the activities of the activists did not allow the Administration to resolve the issue of the approval of public events, guided solely by motives of administrative convenience, and was not sufficient to objectively indicate that security measures were not possible. The judgment was upheld on appeal.[236]

However, in 2015, the Kostroma Oblast Court upheld a decision of the Kostroma City Administration refusing to allow an assembly aimed at raising awareness of the rights of LGBT persons, and fighting intolerance towards LGBT persons. The City Administration concluded that the assembly would violate Article 6.21 of the Code of Administrative Offences, a decision which was upheld in the Sverdlovskiy District Court of Kostroma.[237] On 19 January 2015, the Kostroma Oblast Court upheld this decision, noting that:

> *References in the [organiser's] appeal to the numerous recommendations of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe, the UN Committee on Human Rights and the European Court of Human Rights, as well as the acts of the Constitutional and Supreme Courts of the Russian Federation which recognise as impermissible discrimination on grounds of sexual orientation, do not evidence the unlawfulness of the judgment because that the declared public events were not permitted was not due to discriminatory grounds, but because the law prohibits dissemination to minors of information regarding sexual orientation, which can harm the healthy development of children, the protection of which is required not only by Russian, but also by international law.*[238]

2.3.5 Summary

Russia has a number of restrictive laws which are being used to impinge on the freedom of expression and assembly of LGBT persons and their support-

235 Judgment of the Sverdlovskiy District Court of Kostroma, 11 June 2014, No. 2-2529/2014 (Решение Свердловского областного суда Костромы от 11 июня 2014 года по делу № 2-2529/2014).

236 Appellate decision of the Kostroma Oblast Court, 1 September 2014, No. 33-1401/2014 (Апелляционное определение Костромского областного суда от 1 сентября 2014 года по делу № 33-1401/2014).

237 Judgment of the Sverdlovskiy District Court of Kostroma, 27 October 2014, No. 2-4309/2014 (Решение Свердловского областного суда Костромы от 27 октября 2014 года по делу № 2-4309/2014).

238 Appellate decision of the Kostroma Oblast Court, 19 January 2015, No. 33-51/2015 (Апелляционное определение Костромского областного суда от 19 января 2015 года по делу № 33-51/2015).

ers. Most notably, the Russian anti-propaganda laws are blatantly discriminatory and have been rightly criticised by various UN and European bodies.[239] The approach of the courts to reviewing the application of these laws by the authorities is far from being in accordance with international and European human rights standards for the upholding of the right to enjoy both freedom of expression and assembly without discrimination on grounds of sexual orientation. While the courts state that they are restricting the application of the propaganda laws by interpreting them in accordance with the Federal Constitution and also international and European human rights standards, it is clear that the courts are not properly assessing the necessity and proportionality of restrictions on expression and assembly imposed on the basis of the law. Justifications of restrictions which are based on public morals, family values and the protection of children are accepted almost without question by courts, with no or very little analysis of the links between such aims and the restrictions put in place. Many of the courts demonstrate discriminatory attitudes themselves; equating LGBT relationships with immorality or accepting justifications based on discriminatory attitudes under the guise of protecting public morals or the rights of children.

The decision of the Constitutional Court when asked to review the constitutionality of the federal anti-propaganda law is indicative of the problematic approach taken by the Russian courts. Instead of tackling stigma and prejudice, which often results in hate-motivated violence against LGBT individuals, the judgment of the Constitutional Court not only protected what is a discriminatory and pejorative law, but effectively suggested that such prejudices ("the lack of consensus in society in appraising persons with different sexual orientation") are legitimate considerations for justifying restrictions on dissemination of information about sexual minorities to minors, even when such information seeks to educate minors on how to overcome such prejudices. Such an approach fails to take into account numerous recommendations of the UN[240] and Council of Europe,[241] which call on national authorities to take positive measures in order to fight prejudices and discrimination against LGBT persons. The ECtHR addressed the issue of moral judgments in the context of the right to private life in *Smith and Grady v the United Kingdom,*[242] which concerned a policy of instant dismissal from the armed forces once a person was

239 European Parliament, Resolution on the EU's priorities for the United Nations High Commissioner for Refugees sessions in 2016, 2015/3035(RSP), 2016, Paras 45-46; Office of the High Commissioner for Human Rights, "UN rights experts advise Russian Duma to scrap bill on 'homosexuality propaganda'", 1 February 2013; Committee on the Rights of the Child, *Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation*, UN Doc. CRC/C/RUS/CO/4-5, 25 February 2014, Para 25; see above, note 27; and see above, note 95, Paras 10.5, 10.8.

240 See, for example, Committee on the Rights of the Child, above, note 239, Para 25, which notes that the Committee "recommends that the State party repeal its laws prohibiting propaganda of homosexuality and ensure that children who belong to LGBTI groups or children from LGBTI families are not subjected to any forms of discrimination by raising the public's awareness of equality and non-discrimination on the basis of sexual orientation and gender identity."

241 See above, note 33.

242 *Smith and Grady v the United Kingdom,* Applications No. 33985/96 and 33986/96, 27 September 1999, Para 97.

identified as "homosexual", and in *S.L. v Austria,*[243] which concerned a higher age of consent for sex between men. In both cases, the Court criticised legislative provisions embodying a "predisposed bias on the part of a heterosexual majority against a homosexual minority" and stated that these "negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour".[244] The HRC, in a decision concerning charges laid under the Ryazan Oblast anti-propaganda law, found that the Russian Government had not put forward any reasonable and objective criteria for restricting the right to freedom of expression in relation to "propaganda of homosexuality" as opposed to heterosexuality.[245] The Committee reiterated its view in General Comment 34 that:

> *[L]imitations (…) for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination.*[246]

Contrary to the argument of the Russian authorities, accepted by the courts, that the propaganda law protects children, in its most recent Concluding Observations on Russia, the Committee on the Rights of the Child noted its concern that the law "encourages the stigmatisation of and discrimination against (…) (LGBTI) persons, including children, and children from LGBTI families."[247] The Committee went on to note that it was:

> *[P]articularly concerned that the vague definitions of propaganda used lead to the targeting and ongoing persecution of the country's LGBTI community, including through abuse and violence, in particular against underage LGBTI- rights activists.*[248]

It is particularly concerning that the Constitutional Court was prepared to accept the protection of children as a legitimate aim of the law, when it had noted that the impact of providing children with information on LGBT relationships was not proven.[249]

The approach of the Russian authorities in restricting the right to peaceful assembly for LGBT activists outside of the context of the propaganda law has been criticised by the ECtHR. In *Alekseyev v Russia*, the ECtHR found that the repeated refusal of authorities to allow pride marches to take place in Moscow

243 *S.L. v Austria*, Application No. 45330/99, 9 January 2003.

244 *Ibid.*, Para 44.

245 See above, note 95, Para 10.6.

246 *Ibid.*, Para 10.5.

247 See Committee on the Rights of the Child, above, note 239, Para 24.

248 *Ibid.*

249 See above, Part 2.3.2.

violated the right to peaceful assembly provided for by Article 11, the right to an effective remedy pursuant to Article 13 and also the right to non-discrimination under Article 14, taken in conjunction with Article 11. Russia noted that the bans were aimed at the protection of public order given that the marches would lead to clashes with those opposed to them and the protection of public morals as allowing the parades would insult the feelings of religious believers. The Government claimed that there was no consensus among member states on the extent to which "homosexuality" should be accepted, and that celebration of it should take place in private, noting that they needed to be sensitive to the public resentment of displays of "manifestation[s] of homosexuality".[250]

The Court stated that it did not need to consider whether these aims were legitimate as the ban on pride marches was not necessary in a democratic society and therefore violated Article 11.[251] In relation to the aim of public security, the Court reiterated that states have a duty "to take reasonable and appropriate measures to enable lawful demonst/rations to proceed peacefully."[252] The Court found that Russia had not adequately assessed the security risks to participants or attempted to mitigate these, but instead had simply banned the parades. It was also evident that any security concerns were secondary to the protection of public morals.[253]

In relation to the argument that the marches would infringe on public morals, the Court noted that the exercise of the right to freedom of assembly and other ECHR rights by minority groups is not "conditional on its being accepted by the majority". If this were not the case, the rights of minority groups would become "merely theoretical".[254] The Court noted that the aim of the marches was to "promote respect for human rights and freedoms and to call for tolerance towards sexual minorities"[255] and:

> *[T]hat it was not the behaviour or the attire of the participants that the authorities found objectionable but the very fact that they wished to openly identify themselves as gay men or lesbians, individually and as a group.*[256]

The Court disagreed with the Government that there should be a wide margin of appreciation in such cases given the lack of consensus, noting that:

> *There is no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or*

250 See *Alekseyev v Russia,* above, note 61, Paras 56–63.

251 *Ibid.,* Para 69.

252 *Ibid.,* Para 73.

253 *Ibid.,* Paras 77–78.

254 *Ibid.,* Para 81.

255 *Ibid.,* Para 82.

256 *Ibid.*

any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly.[257]

The Court concluded that the decision to ban the pride marches was not based on "an acceptable assessment of the relevant facts" and that the bans were not necessary in a democratic society.[258]

In relation to Article 14, the Court noted that particularly weighty reasons must be put forward for distinctions made in relation to sexual orientation, and that the margin of appreciation afforded to the state is narrow in such cases. If the reason for the difference in treatment is based solely on sexual orientation, then this would amount to discrimination, as was the case here.[259]

It is clear that the restrictions placed on the rights to freedom of expression and assembly of LGBT persons and activists are not being reviewed by Russian courts in line with accepted human rights standards. Instead, courts are deferring to the arguments put forward by authorities and the Government, namely that such restrictions, including those enforced under the anti-propaganda law, are necessary to protect public order, public morals and the rights of children. This is despite the HRC, the CRC and the ECtHR having resoundingly rejected such arguments, finding that the restrictions facing LGBT persons and activists are neither necessary nor proportionate.[260]

2.4 Freedom of Association: Denial of Registration to LGBT Organisations

The right to freedom of association is protected in both international and European human rights law. Article 22(1) of the ICCPR provides that "everyone has the right to freedom of association with others". In the ECHR, Article 11(1) protects the right to freedom of association with others together with the right to peaceful assembly. As with the rights to freedom of assembly and expression, the right to freedom of association may be restricted only when such restrictions are provided for by law and are necessary in a democratic society.[261] The analysis of what is necessary in a democratic society incorporates an examination of whether the interference is necessary and proportionate.[262]

257 *Ibid.,* Paras 83–84.

258 *Ibid.,* Paras 86–87.

259 *Ibid.*, Paras 108–109.

260 An application has been made to the ECtHR alleging that the Russia anti-propaganda laws (both federal and regional) violate the right to freedom of expression in Article 10 and also Article 14, taken in conjuction with Article 10, of the ECHR. See *Bayev and Others v Russia*, Application No. 67667/09, 44092/12, 56717/12, Communicated Case, 10 October 2013, available at: http://hudoc.echr.coe.int/eng?i=001-128180.

261 ICCPR, Article 22(1); and ECHR, Article 11(1).

262 *Young, James And Webster v the United Kingdom,* Application Nos. 7601/76 and 7806/77, 13 August 1981, Paras 62–65; *Silver v the United Kingdom*, Application Nos. 5947/72, 6205/73, 7052/75, 7061/75, 7107/75, 7113/75 and 7136/75, 25 March 1983, Paras 97–98; and *Lingens v Austria,* Application No. 9815/82, 8 July 1986, Paras 37–41. See also Human Rights Committee, *General Comment No. 31 [80],*

The applicability of the right to freely associate with others has been recognised as including the formation of non-governmental associations.[263] States are obligated to respect and fully protect the rights of all individuals to associate, particularly persons belonging to vulnerable groups and minorities or espousing minority and dissenting views, and human rights defenders.[264] Although it has been recognised that the formation of associations embracing minority or dissenting views or beliefs may sometimes give rise to tensions, the Special Rapporteur on the rights to freedom of peaceful assembly and of association has made it clear that this does not negate the state's duty to protect against interference with the right to association.[265] Both the HRC and the Committee of Ministers have stated that states should ensure freedom of association without discrimination on the basis of sexual orientation or gender identity.[266]

The right to freedom of association is also protected in Russia through the Federal Constitution; Article 30(1) provides that "[e]veryone shall have the right to association (…) The freedom of public associations activities shall be guaranteed." As in the case of the rights to freedom of expression and assembly, the right to freedom of association may be limited only in the circumstances provided for in Article 55(3) of the Federal Constitution.[267]

Since 2005, at least seven LGBT organisations have been denied registration as legal entities in Russia. These entities are: Rainbow House (Tyumen), which made three attempts to obtain registration; LGBT Organisation "Rakurs" (Arkhangelsk); Movement for Marriage Equality (Moscow); Pride House Sochi (Krasnodar Region); and LGBT Sports Association (Moscow). On five occasions, LGBT activists appealed the denial of registration in the courts. Other than in Arkhangelsk, the cases demonstrate that, far from carefully considering whether restrictions on the right to freedom of association are strictly necessary, the approach of the courts is to apply discriminatory and, at times illogical, justifications to conclude that the formation of LGBT associations is contrary to national security and public morals – going so far as to label such organisations as extremist.

2.4.1 Rakurs (Arkhangelsk)

In 2010, an Arkhangelsk NGO "Rakurs", which was originally set up as a women's organisation, decided to change its charter to become Arkhangelsk Regional

The nature of the general legal obligation imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, Para 6.

263 *Ramazanova and Others v Azerbaijan*, Application No. 44363/02, 1 February 2007, Para 55; *Tebieti Mühafize Cemiyyeti and Israfilov v Azerbaijan*, Application No. 37083/03, 8 October 2009; and Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai,* UN Doc. A/HRC/20/27, 21 May 2012, Paras 51–52.

264 Human Rights Council, *The rights to freedom of peaceful assembly and of association,* UN Doc. A/HRC/24/L.7, 20 September 2013, Para 2.

265 See Human Rights Council, above, note 263, Para 64.

266 Human Rights Council, *Report submitted by the United Nations High Commissioner for Human Rights on discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, UN Doc. A/HRC/19/41, 17 November 2011, Para 5; see above, note 37, Paras 9–12.

267 See above, Part 2.3.

Non-Governmental Organisation of Social, Psychological and Legal Support to Lesbian, Gay, Bisexual and Transgender Persons, "Rakurs". The local Ministry of Justice[268] denied registration to the new organisation because of its "extremist nature" as defined in the Federal Law "On Countering Extremist Activities".[269] In particular, the Ministry of Justice held that the organisation's goals were aimed at the incitement of social hatred and discord between "heterosexual and homosexual individuals", propaganda of "non-traditional sexual orientation" and the denial of the role of family in society.[270]

The decision of the Ministry of Justice was upheld by the Oktyabrskiy District Court of Arkhangelsk.[271] However, the Arkhangelsk Oblast Court which subsequently heard the case on appeal quashed the District Court's judgment, finding the denial of registration unlawful. The Oblast Court found, contrary to the Ministry of Justice and the District Court, that the organisation's goals were aimed at the protection of human dignity, the protection of the rights and freedoms of victims of homophobia and discrimination, and providing social and psychological support to such victims. Further, the Court found there was no evidence that the organisation was planning to engage in propaganda of "non-traditional sexual relationships" or denial of the role of family in society.[272] Accordingly, there was no legitimate basis for restricting the right to freedom of assembly enshrined in the ECHR or the Federal Constitution.[273]

This was the first decision by a Russian court in which the freedom of association of an LGBT group was recognised. Although the Oblast Court in Arkhangelsk did not explicitly criticise the denial of registration of Rakurs as discriminatory, it *de facto* recognised that LGBT activists had the same right to association as other persons. That said, the Court qualified its finding by only recognising that right to the extent that the group did not "deny the role of family" or engage in "propaganda of non-traditional sexual relationships",[274] implying that it would be legitimate to deny registration of a NGO which did either of those things. Accordingly, while the decision is welcome, it falls short of the right to freedom of association protected under international human rights law and the ECHR.

Furthermore, unfortunately the decision of the Oblast Court has had a limited impact. As the following analysis shows, it has not led other courts to adopt the

268 The Ministry of Justice is the body responsible for the registration of all non-commercial entities in Russia.

269 See Federal Law "On Countering Extremist Activities", above, note 38.

270 Judgment of the Oktyabrskiy District Court of Arkhangelsk, 22 September 2010, No. 2-3629/2010 (Решение Октябрьского районного суда Архангельска от 22 сентября 2010 года по делу № 2-3629/2010).

271 *Ibid*.

272 *Ibid*.

273 Appellate Decision of the Arkhangelsk Oblast Court, 1 November 2010, No. 33-5258/2010 (Апелляционное определение Архангельского областного суда от 1 ноября 2010 года по делу № 33-5258/2010).

274 *Ibid*.

same approach when considering cases related to the freedom of association of LGBT organisations elsewhere in Russia.

2.4.2 Movement for Marriage Equality (Moscow)

In the same year that the Arkhangelsk Oblast Court made its decision in the Rakurs case, a different narrative developed in Moscow. In January 2010, the Moscow Department of the Ministry of Justice denied registration to the non-commercial organisation Movement for Marriage Equality. According to Article 3 of the Movement's Charter, it was set up to offer:

> *[I]formational services to overcome discrimination, defamation and violations of human rights on the basis of sexual orientation and gender identity, as well as to promote compliance with human rights in the marriage sphere and to achieve marriage equality for LGBT individuals in the Russian Federation.*[275]

The Department stated that its decision to deny registration was made pursuant to the Law "On Non-Commercial Organisations", which provides that registration may be denied if statutory or other documents submitted for registration contradict the Federal Constitution or other legislation.[276] In particular, the Department considered that the aims of the proposed organisation violated Article 2(2) of the Law "On Non-Commercial Organisations", which provides that non-commercial organisations can only be established for achieving social, charitable, cultural, educational, scientific or administrative goals, as well as for the aims of health care, development of sports, satisfying the spiritual or other non-pecuniary needs of citizens, protections of rights and lawful interests of citizens and organisations, conflict management, provision of legal aid and for other purposes aimed at achieving public good.[277] In addition, the Department explained that the aim of the organisation to achieve legal recognition of same-sex marriages contradicted Article 12 of the Family Code of Russia, which provides that one of the conditions for entering into marriage is the mutual voluntary consent of a man and woman.[278]

On 20 July 2010, the Gagarinsky District Court of Moscow upheld the Department's decision. The Court held that, while the law allows for establishing a non-commercial organisation for any purpose aimed at achieving public good, such purpose cannot seek to achieve aims known to contradict public order and public morals.[279] The Court further held that Article 10 of the Civil Code prohibited actions

275 Charter of the Movement for Marriage Equality, Article 3 (Устав Автономной некоммерческой организации правовых и социальных услуг "Движения за брачное равноправие").

276 Federal Law "On Non-Commercial Organisations", 12 January 1996, No. 7-FZ, Article 23.1 (Статья 23.1 Федеральный закон от 12 января 1996 года № 7-ФЗ "О некоммерческих организациях").

277 Decision of the Main Department for Moscow of the Ministry of Justice, 12 January 2010 (Решение Главного управления Минюста России по городу Москве от 12 января 2010 года).

278 *Ibid.*

279 Judgment of Gagarinsky District Court of Moscow, 20 July 2010, No. 2-2415/2010 (Решение Гагаринского районного суда Москвы от 20 июля 2010 года по делу № 2-2415/2010).

that had the sole purpose of harming others or abusing other's rights.[280] In the Court's view, aims such as those set out in Article 3 of the Movement's Charter contradicted public morals because "they are aimed at propaganda of support, and recognition, of same-sex unions, increase of the number of citizens belonging to sexual minorities, which violates prevalent notions of good and evil, good and bad, vice and virtue and so on."[281] The Court noted that because the organisation sought to disseminate information, it may have a "mass ideological impact" on citizens.[282] The Court did not explain why advocacy for legal recognition of same-sex marriages and against discrimination against LGBT individuals violated public order or public morals nor what the moral standard was.

The Court further noted that the achievement of the organisation's goals may "decrease [the] birth rate" because those goals contradict public morals, including traditional family values.[283] To support its finding, the Court referred to a decision of the Constitutional Court of 16 November 2006 which concluded that neither the Federal Constitution nor international legal obligations require the recognition of same-sex relationships.[284]

The applicants appealed to the Moscow City Court, arguing that the denial of registration was discriminatory. In particular, they argued that the ban on establishing an organisation advocating for LGBT rights violated Article 19 (the general equality clause) of the Federal Constitution as well as numerous international treaties which recognise the right of sexual minorities to advocate for their rights, including through freedom of assembly. However, none of these arguments were addressed by the appellate Court, which, in December 2010, upheld the judgment of the District Court.[285]

2.4.3 Pride House in Sochi (Krasnodar Region)

In 2011, the Krasnodar Regional Department of the Ministry of Justice denied registration to the non-commercial organisation, Pride House in Sochi. Pride House in Sochi aimed to promote tolerance in sports, including the need to fight homophobia in sport and to launch campaigns aimed at developing positive attitudes towards LGBT sportspersons.[286] Although its registration was denied by the Krasnodar Regional Department of the Ministry of Justice on technical grounds,[287] the Pervomaiskiy District Court of Krasnodar, which reviewed the

280 *Ibid.*

281 *Ibid*.

282 *Ibid*.

283 *Ibid.*

284 *Ibid.*

285 Appellate Decision of the Moscow City Court, 20 December 2010, No. 33-39388/2010 (Апелляционное определение Московского городского суда от 20 декабря 2010 года по делу № 33-39388/2010).

286 Charter of the Pride House Sochi, Article 3 (Устав Краснодарского краевого регионального спортивного общественного движения "Прайд хаус в Сочи").

287 The technical grounds referred to by the Ministry of Justice included the unlawful usage of a foreign term ("Pride House") and inconsistencies within the organisation's charter.

Department's decision, held that the goals of the organisation were contrary to public morals and state sovereignty.

The District Court considered that the awareness raising activities of the organisation would have a "mass ideological influence" on citizens, contradicting the fundamentals of public morals:

> *Such goals of the movement as promoting an understanding of the need to combat homophobia and the creation of positive attitudes towards LGBT sportsmen contradict the fundamental public morals because they violate the concepts of good and evil, right and wrong, vice and virtue. These goals contradict state policies in the sphere of protection of family, motherhood and childhood, the movement's activities lead to propaganda of non-traditional sexual orientation, which may undermine [the] security of Russian society and the state [and] incite social and religious hatred and strife, which is also an element of [the] extremist nature of the activities. Moreover, [these goals] can undermine [the] sovereignty of [the] territorial integrity of Russia by reducing its population.*[288]

The appeal against this judgment was rejected by the Pervomaiskiy District Court of Krasnodar on 4 April 2012 as it was made out of time.

2.4.4 Rainbow House (Tyumen)

In 2005, a group of activists in Tyumen created "Rainbow House" as a regional public association with the aim of defending the rights of LGBT individuals. It has since tried unsuccessfully on three separate occasions to become a registered organisation.

On its first attempt, in 2005, the local registration authority commissioned an expert opinion from the Tyumen Institute of Legal Studies of the Interior Ministry of Russia on the compliance of the proposed organisation's goals with anti-extremism legislation. The Institute's opinion, delivered on 31 July 2006, read in part as follows:

> *[P]ropaganda of non-traditional sexual orientation by [the second applicant] may qualify as extremist activity because the realisation of the aims mentioned above involves not only protection of rights and legitimate interests of citizens with non-traditional sexual orientation, but also attempts to increase the number of such citizens by converting those who, without such propaganda, would have retained a traditional sexual orientation.*[289]

288 Judgment of the Pervomaiskiy District Court of Krasnodar, 20 February 2012, No. 2-1161/2012 (Решение Первомайского районного суда Краснодара от 20 февраля 2012 года по делу № 2-1161/2012).

289 *Aleksander Zhdanov and Rainbow House v Russia*, Application No. 12200/08, lodged 3 May 2008, Statement of Facts, available at: http://hudoc.echr.coe.int/eng?i=001-113100.

The local registration authority accepted and endorsed the conclusions of this expert opinion and opined that Rainbow House pursued extremist goals prohibited by the Federal Law "On Countering Extremist Activities"[290] and presented a danger to Russia's national security. Accordingly, the authority refused the organisation's registration on 29 December 2006.[291] The authority's decision was unsuccessfully challenged before the Federal Registration Service of the Ministry of Justice and then the Taganskiy District Court of Moscow which, in its decision on 26 October 2007 referred to the expert opinion of the Institute and repeated verbatim the decision of the authority, finding it to have been justified, lawful and well-reasoned.[292] Rainbow House's argument that an association could only be declared extremist by a judicial decision was rejected because the Court considered that that rule applied only to registered associations, whereas Rainbow House had never been registered. The founders of Rainbow House commissioned an alternative expert opinion, which concluded that the proposed organisation did not pursue any extremist goals.[293] However, the District Court refused to consider this expert opinion because it had not been submitted to the local registration authority by Rainbow House when it applied for registration.[294] The Moscow City Court upheld the judgment on appeal.[295]

A second attempt by Rainbow House to register in 2007 was again unsuccessful, with the registration authority again citing the extremist nature of the organisation and also noting technical grounds for refusal.[296] This decision was upheld through two appeals, both of which concluded that decision of the authority was lawful as the organisation could not continue to operate without being registered. Further, although the decision of the local authority found indications of extremism in the organisation's goals but did not actually declare the organisation to be extremist and so the authority had not breached any requirement for a judicial declaration that the organisation was extremist.[297]

In 2011, an attempt was made to register the organisation for a third time. However, the Tyumen Department of the Ministry of Justice, which took over powers as the registering authority for non-commercial entities in 2008, denied registration on the basis of a number of reasons, including that the organisation's

290 See Federal Law "On Countering Extremist Activities", above, note 38. The law does not mention LGBT advocacy as falling under the definition of "extremism", even if it is interpreted in the broadest sense. It is therefore not clear which provision of this law was relied upon by the registration authority.

291 See above, note 289.

292 *Ibid*.

293 *Ibid*.

294 *Ibid*.

295 *Ibid*.

296 *Ibid*. The authority also referred to procedural irregularities with the application, including that the form had not been stapled and that the articles of association unlawfully authorised the president of the organisation to dispose of its property.

297 *Ibid.*

goals contradicted public order and public morals.[298] The founders appealed the decision arguing that the organisation's aims were in full compliance with Russian laws on non-commercial organisations, and that the refusal discriminated against persons of "homosexual orientation" contrary to Article 19 of the Federal Constitution, as it prohibited dissemination of any views with regard to "homosexuality" or advocacy for the rights of LGBT aimed at overcoming discrimination against the LGBT minority.[299]

The denial of registration on the grounds of a violation of public morals was found unlawful by the Central District Court of Tyumen, which noted the relevance of Article 11 of the ECHR.[300] The Court did not address the discrimination issue advanced by the applicants. Despite finding the organisation did not violate public morals, the Court did not allow the organisation to be registered because it accepted the argument of the Department of the Ministry of Justice that the organisation's proposed name did not specify the nature of its activities. The judgment was upheld on appeal by the Tyumen Oblast Court, which did not address the applicant's arguments that an alleged technical discrepancy in the organisation's name was upheld by the District Court as a pretext to justify *de facto* discrimination against them because LGBT individuals were the primary beneficiaries of the organisation.[301] As a result, Rainbow House has never acquired legal personhood.

2.4.5 Summary

Although there has been recognition (both explicitly and implicitly) by the courts that LGBT organisations are permitted to form, the courts have interpreted the right to freedom of association extremely narrowly to deny registration to such organisations in practice. It is particularly concerning that courts are willing to conclude that advocating for same-sex marriage or other rights for LGBT persons violates public morals, family values or risks national security – to the extent that human rights activities of LGBT organisations have been considered extremist. The denial of registration to non-governmental entities advocating the idea of recognition of same-sex marriages demonstrates the far-reaching effects of the legal reasoning of the Constitutional Court in LGBT cases. Not only are lesbian and gay couples denied legal recognition of their family relationships (see Part 2.5 below), they are banned from promoting the idea of equality and non-discrimination in respect of such relationships. Such an approach clearly contravenes the requirements of strict necessity and proportionality for any restrictions on the right to freedom of association to accord with international and European human rights law.

298 Decision of the Tyument Oblast Department of the Ministry Justice, 20 November 2010 (Решение Управления Минюста России по Тюменской области от 20 ноября 2010 года).

299 Application to the Central District Court of Tyument, 23 March 2011, No. 2-1529/2011 (Заявление в Центральный районный суд Тюмени, дело № 2-1529/2011).

300 Judgment of the Central District Court of Tyument, 1 March 2011, No. 2-1529/2011 (Решение Центрального районного суда Тюмени от 1 марта 2011 года по делу № 2-1529/2011).

301 Decision of the Tyumen Oblast Court, 20 April 2011, No. 33-1981/2011 (Определение Тюменского облатного суда от 20 апреля 2011 года по делу № 33-1981/2011).

The recent court decisions sanctioning the prohibition of Children-404 web pages, and the charges against its administrator Ms Klimova for violating the anti-propaganda law, show that the highly problematic approach of the courts to freedom of association has continued.[302]

The Special Rapporteur on the rights to freedom of peaceful assembly and of association has stated that the anti-propaganda laws "obstruct, intimidate and stigmatise the work of LGBT organisations".[303] In addition, Russia has been rightly criticised for placing restrictions on the operation of non-governmental organisations through the "Foreign Agents Law",[304] which has been enforced in such a way that the right to freedom of association is being severely limited.[305] The combination of this law together with discrimination against the LGBT community by the authorities means that LGBT organisations are particularly vulnerable to restrictions on their freedom of association. The approach of the courts has effectively reinforced this vulnerability by failing to provide redress for discriminatory violations of the right to freedom of association.

2.5 Discrimination against LGBT Persons in Private and Family Life

The right to private and family life is protected at both the international and European level. Article 17 of the ICCPR provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence" and that everyone must be protected by law from such interference. The Human Rights Committee has expressly noted the importance of non-discrimination in accessing all the rights under the ICCPR, and in a number of its concluding observations has specifically emphasised that states "have a legal obligation…to ensure to everyone the rights recognised by the Covenant…without discrimination on the basis of sexual orientation."[306] Similarly, the ECHR protects the right in a similar way, providing in Article 8(1) that "[e]veryone has the right to respect for his private and family life". This right is held by all people regardless of sexual orientation or gender identity.[307] In its jurisprudence on Article 8 in tandem with

302 These decisions are discussed in detail above, see, pp. 75–82.

303 Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, UN Doc. A/HRC/29/25/Add.3, 10 June 2015, Para 439.

304 Federal Law, "On amendments of some legislative acts of the Russian Federation", 23 May 2015, No. 129-FZ (Федеральный закон от 23.05.2015 № 129-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации").

305 United Nations, Office of the High Commissioner for Human Rights, "Russia: increasingly hostile environment for NGOs and rights defenders is unacceptable", 14 May 2013, accessible at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13323&LangID=E.

306 Human Rights Committee, *Concluding Observations: United States of America,* UN Doc. CCPR/C/USA/CO/3, 18 December 2006, Para. 25. Similar observations were made in: Human Rights Committee, *Concluding Observations: Chile*, UN Doc. CCPR/C/CHL.CO/5, Para. 16, 18 May 2007; Human Rights Committee, *Concluding Observations: San Marino*, UN Doc. CCPR/C/SMR/CO/2, 31 July 2008, Para. 7; Concluding Observations; Austria, UN Doc. CCPR/C/AUT/CO/4, Para. 8, 30 October 2007.

307 *Peck v United Kingdom*, App. No. 44647/98, 28 January 2003, Para. 58.

the prohibition of discrimination under Article 14, the Court has considered the relationship between sexual orientation and gender identity and issues such as legal recognition of relationships, custody and adoption.[308] The ECHR only allows for limitations on the right to family and private life that are necessary in a democratic society in the pursuance of a legitimate aim.[309]

The clearest statement of international best practice on the appropriate interpretation of the right to private and family life in international human rights law, is set out in the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (Yogyakarta Principles).[310] There are two principles that specifically relate to private and family life: Principle 6 and Principle 24 which respectively provide:

> *Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.*
>
> *Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.*

It is clear, therefore, that as a matter of international best practice, states must ensure the rights to private and family life for LGBT persons without discrimination. International law has, however, conferred varying levels of protection on LGBT persons in the field of private and family life, according to specific issues in question.

2.5.1 Legal Recognition of Same-Sex Relationships

As outlined above, it is clear that LGBT individuals have the right to respect for their private life and family relationships, including their same-sex relationships. However, the scope of this right in the context of the legal recognition of their relationships, unfortunately remains contentious in light of the findings of the HRC and the ECtHR.

308 *Schalk and Kopf v Austria*, Application No. 30141/04, 24 June 2010; *Salgueiro da Silva Mouta v Portugal*, App. No. 33290/96, 21 December 1999; *E.B. v France*, App. No. 43546/02, 22 January 2008.

309 ECHR, Article 8(2).

310 The Yogyakarta Principles are a set of principles developed in 2006 and endorsed by numerous experts and human rights defenders. Principle 1 states that: "All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights."

The HRC has only considered the recognition of same-sex relationships once in 2002, finding that "the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognise as marriage only the union between a man and a woman wishing to marry each other".[311] Thus, in the view of the HRC, the ICCPR neither prevents nor requires states to legislate for same-sex marriage. Elsewhere, though not advocating recognition of same-sex marriage, the Committee on Economic, Social and Cultural Rights has called on states to provide legal recognition of same-sex relationships.[312]

The ECtHR has considered the issue of legal recognition of same-sex relationships several times over the course of the last decade. Although the Court has repeatedly declined to find that same-sex couples have a right to marry under the ECHR, it has recently taken an important step in setting out the obligations of the state to enable same-sex couples to have their relationships recognised. In its recent decision in *Oliari and Others v Italy*,[313] the ECtHR reiterated that:

> *[S]ame-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to different-sex couples as regards their need for legal recognition and protection of their relationship.*[314]

The Court noted that the protection afforded to same-sex relationships in Italy lacked content, as it failed to "provide for the core needs relevant to a couple in a stable committed relationship"[315] and found that Article 8 places a positive obligation on States to provide legal recognition of same-sex relationships.[316] The Court's approach of providing same-sex couples with some recognition, but not the same recognition as different-sex couples, fails to recognise that the right to non-discrimination requires that they be treated in the same way as different-sex couples. As a matter of best practice, the right to non-discrimination does not permit differences in treatment which are only justifiable by reference to discriminatory attitudes. Accordingly, it must be a matter of time before human rights adjudicators recognise that only a legal regime of relationship recognition which creates no distinctions based solely on the sexual orientation of the individuals concerned can satisfy the obligations the state has to fulfil freedom from discrimination.

The Federal Constitution is silent on the right to marry. However, Article 12(1) of the Family Code of the Russian Federation provides that, "to enter into a marriage, the voluntary consent of the man and of the woman entering into it,

311 *Joslin v New Zealand*, Communication No. 902/1999, UN Doc. A/57/40 at 214, 17 July 2002, Para 8.2.

312 See Human Rights Council, above, note 1, Para 67.

313 *Oliari and Others v Italy*, Application Nos. 18766/11 and 36030/11, 21 July 2015.

314 *Ibid.*, Para 165.

315 *Ibid.*, Para 172.

316 See above, note 313, Para 185.

and their reaching the marriageable age, shall be necessary."[317] In addition, the Family Code provides that civil marriage, that is a marriage registered with a civil status registration department, is the only legally recognised form of family union in Russia.[318] There are no alternative forms of legal recognition of relationships available in Russia, such as domestic partnership, and therefore no ability for either same-sex or different sex relationships to be legally recognised outside of civil marriage.

This position has been confirmed by the Constitutional Court, which has explicitly explained that *de facto* relationships without state registration, regardless of their duration or the presence of mutual children, should not be considered as marriage in a legal sense.[319] The Court went on to say that cohabitation of a man and a woman therefore has no legal consequences.[320] It follows based on this reasoning of the Court that cohabitation or a stable union[321] of two persons of the same-sex has no legal consequences, including those analogous to marriage.

The lack of any legal recognition of same-sex relationships results in the inability of LGBT couples to access the significant rights and benefits which married couples are provided by the state. For example, they cannot access state housing programs and financing programs, which are available to married couples only.[322] Similarly they are not considered to be heirs under inheritance laws,[323] and they cannot benefit from certain tax privileges.[324] They also cannot obtain

317 The Family Code of the Russian Federation, No. 223-FZ, 29 December 1995 Article 12 (Семейный кодекс Российской Федерации, № 223-ФЗ, от 29 декабря 1995 г).

318 *Ibid.*, Article 1.

319 Decision of the Constitutional Court, 17 May 1995, No. 26-O (Определение Конституционного Суда Российской Федерации от 17 мая 1995 года № 26-О). This is explicitly confirmed in the Joint Order on subsidised housing payments issued by the Ministry of Regional Development of Russia, No. 58 and Ministry of Health and Social Development of Russia, No. 403, 26 May 2006, Para 41 (Приказ Минрегиона России № 58, Минздравсоцразвития России № 403 от 26 мая 2006 года "Об утверждении Методических рекомендаций по применению Правил предоставления субсидий на оплату жилого помещения и коммунальных услуг").

320 *De facto* marriage concluded before 8 July 1944 is an exception to this, see Decision of the Constitutional Court, 17 December 2009, No. 1665-O-O (Определение Конституционного Суда РФ от 17 декабря 2009 года № 1665-О-О). There is also at least one instance in which legal rights are granted to an unmarried different-sex couple, which is in the case of assisted reproductive technologies, a law which was passed several years after the decision of the Constitutional Court. See below, note 327.

321 The ECtHR has recognised that cohabitation is not a necessary pre-requisite to the existence of a stable union or such unions requiring protection. See above, note 313, Para 169.

322 Decision of the Russian Government "On Federal Targeted Programme 'Housing' for 2015 – 2020", 17 December 2010, No. 1050, Subprogramme "Provision of housing to young families", Appendix 4, Para 17 (Постановление Правительства РФ от 17 декабря 2010 года № 1050 "О федеральной целевой программе "Жилище" на 2015 - 2020 годы").

323 In accordance with Article 1142 of the Civil Code, rightful heirs include children, spouse and parents. Civil Code of the Russian Federation (Part III), 26 November 2001, No. 146-FZ (Гражданский кодекс Российской Федерации (часть третья) от 26 ноября 2011 года № 146-ФЗ).

324 Spouses pay half the state fee for obtaining a certificate of inheritance in accordance with Article 333.24 of the Tax Code of the Russian Federation (part 1), 31 July 1998, No. 146-FZ ("Налоговый кодекс Российской Федерации (часть первая)" от 31 июля 1998 года № 146-ФЗ). They are also exempt from gift tax in accoradance with Article 217 of the same code.

medical information about their partner[325] or attend as next-of-kin in an emergency room in hospital.[326] In addition, they cannot access assisted reproductive technologies as a couple, an option open only to different-sex couples.[327]

There have been a number of cases in which same-sex couples have sought to gain legal recognition of their relationship. The lack of legal recognition of same-sex marriages was first challenged in the Russian Constitutional Court as discrimination against same-sex partners in 2006. A gay couple sought to register a marriage but had their application denied. They appealed this decision to the Ostankinskiy District Court in Moscow, which upheld it, noting that the Family Code required the mutual voluntary consent of a man and a woman as a condition for entering into marriage.[328] One of the men then challenged the refusal to allow them to marry in the Constitutional Court, which dismissed his claim, stating that neither the Federal Constitution nor the international legal obligations adopted by the Russian Federation require the state to create conditions for the promotion, support or recognition of unions between persons of the same sex. The Court held (without explanation) that the denial of same-sex marriage had no influence on the level of recognition, and guarantees, of the applicant's rights and freedoms as a man and a citizen.[329]

The Constitutional Court concluded that the federal legislature acted within the scope of its competence when determining the conditions for entering into marriage, including by requiring that marriage was entered into between a man and a woman. The Court supported this conclusion by noting that the provisions of the Federal Constitution on state protection and support for family, motherhood, fatherhood and childhood,[330] and on the equal right and duty of parents to care for and raise their children, "correspond to international

325 In accordance with Article 22(3) of Federal Law "On the Fundamentals of Health Care of Citizens in the Russian Federation", 21 November 2011, No. 323-FZ, (Федеральный закон "Об основах охраны здоровья граждан в Российской Федерации" от 21 ноября 2011 года № 323-ФЗ) in case of an unfavourable prognosis health information shall be provided to the patient or his or her spouse.

326 See Letter of the Minstry of Health Care of Russia of 30 May 2016 no. 15-1/10/1-2853 "On the rules of visiting the relatives of patients in intensive care unit" (Письмо Минздрава России от 30 мая 2016 года № 15-1/10/1-2853 "О правилах посещения родственниками пациентов в отделениях реанимации и интенсивной терапии").

327 It should be noted that this is one of the few benefits that also applies to unmarried different-sex couples. In accordance with Article 55(3) of Federal Law "On the Fundamentals of Health Care of Citizens in the Russian Federation", 21 November 2011, No. 323-FZ, (Федеральный закон "Об основах охраны здоровья граждан в Российской Федерации" от 21 ноября 2011 года № 323-ФЗ) "a man and a woman, both married and unmarried, have the right to the use of assisted reproductive technology on the basis of their mutual informed consent to medical intervention. A single woman is also entitled to the use of assisted reproductive technology on the basis of her informed consent to medical intervention".

328 See Decision of the Constitutional Court of Russia, 16 November 2006, No. 496-O (Определение Конституционного Суда РФ от 16 ноября 2006 г. № 496-О "Об отказе в принятии к рассмотрению жалобы гражданина Э. Мурзина на нарушение его конституционных прав пунктом 1 статьи 12 Семейного кодекса Российской Федерации").

329 *Ibid*.

330 Federal Constitution, Article 7(2), "In the Russian Federation (…) state support for the family, maternity, paternity and childhood (…) shall be ensured"; Article 38(1), "Maternity and childhood, and the family shall be protected by the State".

treaties, which require states to protect the family as the core unit essential for the wellbeing of all its citizens, especially children."[331] The Court continued on to say that both the Federal Constitution and international legal norms provide that one of the aims of the family is "child-bearing and raising children".[332] Taking into account "national traditions, which understand marriage as a biological union of a man and a woman", the Court held that the legal protection afforded to families is based on the principles of the "voluntary nature of a marital union between a man and a woman, and the priority given to a family upbringing of children and care for the development and wellbeing of children".[333] The Court further supported its findings by noting that, in accordance with Article 23 of the ICCPR, the right to enter into marriage is recognised for men and women, and that Article 12 of the ECHR provides for the right to marry and to found a family according to the national laws governing the exercise of this right.[334]

There are two key points to note from the reasoning of the Constitutional Court. Firstly, the Court did not explicitly speak in negative terms about same-sex relationships. Rather, its decision appears to rest on an implicit reference to the margin of appreciation of the State (which it refers to as the competence of the federal legislature). Secondly, it may be assumed that in the Court's view, the State guarantees the legal recognition of marriage because this institution is aimed at protecting the family, which, in turn, exists for child-bearing and providing care to children. The Court remained silent on how such a biological conceptualisation of marriage can protect families who cannot or do not want to have children. Nor did the Court explain why granting marriage rights to same-sex couples would undermine the family role in caring for children.

Since the 2006 decision of the Constitutional Court, there have been several attempts by same-sex couples to challenge the denial of marriage licences through ordinary courts. In all such cases, the denial of registration of same-sex marriage was upheld with reference to the reasoning of the Constitutional Court. For example, in a case filed by a lesbian couple before the Gryazinskiy City Court of the Lipetsk Oblast, the plaintiffs argued that, under Russian law, being of the same sex was not listed among the obstacles for marriage and that the denial of a marriage licence to them was discrimination based on sexual orientation and in violation of Article 14 taken in conjunction with Articles 8 and 12 of the ECHR, as well as a violation of Article 23 of the ICCPR. The Court held that the allegation of discrimination was unfounded as neither Article 14 of the ECHR nor any other international legal instrument required states to provide for recognition of same-sex

331 The Constitutional Court referred to Article 16(3) of the Universal Declaration of Human Rights (UDHR), Article 10(1) of the ICESCR, and the preamble to the CRC.

332 In particular, the Court referred to Article 16(3) of the UDHR, Article 10(1) of International Covenant on Economic, Social and Cultural Rights (ICESCR), and the preamble to the Convention on the Rights of the Child.

333 See above, note 328.

334 *Ibid*.

marriages.[335] The Court cited the ECtHR decision in *Schalk and Kopf v Austria*[336] to demonstrate that the national margin of appreciation outweighs any international trends in this sphere. The decision was upheld on appeal on the same grounds.[337]

The lack of any form of legal recognition of same-sex unions (both marriage and civil partnership) in Russia is currently being challenged before the ECtHR by three lesbian couples, all of whom have been unable to have their relationships registered as marriage under Russian law.[338] The applicants are alleging various violations of Articles 8 and 12 of the ECHR and of Article 14 in conjunction with Article 8. The case was communicated to the Russian Federation on 2 May 2016.[339]

It should be noted that although there is no legal recognition of same-sex relationships in Russian law, the existence of these relationships is not completely denied by the authorities. For example, the Ombudsman of the Perm Region acknowledged in his 2008 report, "Problems of Domestic and Family Violence", that violence exists across the population regardless of class, race culture, religion and social and economic factors, and that it is possible in "heterosexual or gay and lesbian families".[340] Separately, since 2010, the Federal Service of State Statistics (Rosstat) has required census takers to collect information about "unusual" situations, including same-sex marriages or polygamous marriages.[341] As no official data has been published by Rosstat with regard to the number of same-sex marriages, it remains unclear whether such data has been collected and processed.[342] However, these two examples demonstrate that same-sex relationships are discussed.

2.5.2 Legal Recognition of Same-Sex Relationships as Family Relationships

As noted above, the ECtHR has recognised that same-sex relationships may constitute family life in the same way as a *de facto* different-sex relationships

335 Judgment of the Gryazinskiy City Court of the Lipetsk Oblast, 12 August 2013, No. 2-1011/2013 (Решение Грязинского городского суда Липецкой области от 12 августа 2013 года по делу № 2-1011/2013).

336 *Schalk and Kopf v Austria,* Application No. 30141/04, 24 June 2010. It should be noted that both this decision and the subsequent appeal were delivered prior to the ECtHR decision in *Oliari and Others v Italy*, Application Nos. 18766/11 and 36030/11, 21 July 2015.

337 Decision of the Lipetsk Oblast Court, 7 October 2013, No. 33-2656/2013 (Определение Липецкого областного суда от 7 октября 2013 года по делу № 33-2656/2013).

338 *Fedotova and Shipitko v Russia*, Application No. 40792/10, 30538/14, 43439/14, lodged 27 July 2010.

339 *Ibid.*, Communicated Case 02 May 2016, available at: http://hudoc.echr.coe.int/eng?i=001-163362.

340 Ombudsman of the Perm Region, *Problems of Domestic and Family Violence*, 30 December 2008 (ОтчетУполномоченного по правам человека в Пермском крае "Проблемы домашнего и семейного насилия).

341 Order of the Rosstat, "On approval of the documents for the Russian national census in 2010", 21 May 2010, No. 198 (Приказ Росстата от 21 мая 2010 года № 198 "Об утверждении документов Всероссийской переписи населения 2010 года"). See also the 2014 instruction of the Federal Service of State Statistics on the census in the Crimean Federal District, which required census takers to collect data on "rare situations" such as "same-sex marriage" between two persons living in one household (Приказ Росстата от 12 августа 2014 года № 512 "Об утверждении инструктивного материала федерального статистического наблюдения "Перепись в Крымском федеральном округе" со 100-процентным охватом населения").

342 Based on a review of the official website by Rosstat, available at: www.gks.ru.

do for the purposes of Article 8 of the ECHR.[343] Thus the ECtHR has found that denying same-sex couples benefits afforded to different-sex couples, such as the continuation of tenancy on a partner's death and the extension of insurance cover to a partner, may fall within the ambit of private and family life in Article 8 and amount to discrimination (in conjunction with Article 14).[344] At the international level, the HRC found a violation of the right to non-discrimination under Article 26 of the ICCPR, in a case in which a pension was denied to a same-sex partner on the basis that the relationship was a same-sex relationship.[345] Accordingly, the HRC recognises the legal consequences that may flow from same-sex relationships should be like those which flow from otherwise alike different-sex relationships.

In a similar way, it may be possible to argue in the Russian context that although same-sex couples cannot receive benefits provided by law only to married couples, they may be able to be considered as family members for the purpose of certain laws which provide benefits to family members. The Constitutional Court has explained that the notion of "family" comprises a special sphere of human life, which is regulated by means of legislative acts with special purposes,[346] However, there is no universal definition of family or family relationships in Russian law which would expressly prevent same-sex couples from being recognised as family. Moreover, although Russian law does not recognise cohabitation of different sex partners as *de facto* marriage, such relationships have been recognised by Russian courts as falling within the sphere of family life for the purposes of the ECHR.[347] This argument should logically extend to same-sex relationships. However, as noted below, such an argument has to date not succeeded.

One example of where such recognition may be possible (but which is as yet apparently untested) is in relation to the Housing Code of the Russian Federation, which guarantees certain housing rights to a tenant's family members. For example, pursuant to Article 70(1) of the Housing Code, a tenant who rents housing on the basis of a social lease (i.e. a municipal apartment) may move in additional tenants as family members with the consent of the municipality. Any such co-tenant acquires the same rights with regard to the rented housing as the lead tenant, including the right to life-long tenancy, or the right to live in the housing after the termination of the family relationship with the lead tenant.

343 *Pajić v Croatia*, Application No. 68453/13, 23 February 2016, Paras 61-68; and *X and Others v Austria*, Application No. 19010/07, 19 February 2013, Para 95 and the references cited therein.

344 See, *P.B. and J.S. v Austria,* Application No. 18984/02, 22 July 2010, Paras 33 and 42, where the extension of insurance was considered to fit within the ambit of private and family life; and *Kozak v Poland* Application No. 13102/02, 2 March 2010, Paras 83–85, 99, where the continuation of the tenancy was considered to fit within private life and also the right to respect for home.

345 *Young v Australia,* Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000, 18 September 2003, Para 10.4.

346 Decision of the Constitutional Court of Russia, 5 July 2001, No. 135-O (Определение Конституционного Суда Российкой Федерации от 5 июля 2001 года № 135-О).

347 See, for example, Appellate decision of the Sverdlovsk Oblast Court, 3 June 2015, No. 33-7597/2015 (Апелляционное определение Свердловского областного суда от 03.06.2015 по делу N 33-7597/2015).

In accordance with Article 69(1) of the Housing Code, the tenant's family members are his or her spouse, children, or parents. However, in exceptional circumstances, other persons may be acknowledged as the tenant's family members by a court. In 2009, the Supreme Court stated that a court, when determining whether a person is the tenant's "family member", must take into account a number of factors including: whether that person moved in to the house in the capacity of the tenant's family member or in another capacity;[348] whether the characteristics of a family relationship exist, such as mutual respect and mutual care for each other, whether they can be considered to be living as part of a shared household, and how long they have lived together.[349] The recognition of family members in this way could also be argued to apply to a tenant's partner of the same-sex, although the research did not identify any cases in which this argument had been raised.

The issue of whether same-sex couples may be considered as having "family ties" on the basis of their relationship arose in legal proceedings concerning a foreigner's right to reside in Russia. The case concerned a Kazakh national who came to Russia in 2006 to study at a medical college. He had been living with his same-sex partner since 2010. In 2012, he requested a residence permit, however, his request was denied by the Sverdlovsk division of the Federal Migration Service (FMS) because he was found to be HIV-positive. The FMS referred to Section 7(1)(13) of the Foreign Nationals Act, which prohibits the issue of residence permits to foreign nationals who cannot show their HIV-negative status.[350] The applicant challenged the decision to refuse to grant a residence permit in court, arguing, *inter alia*, that he had family ties in Russia because he had lived in a stable same-sex relationship. He argued that any family ties could be considered as exceptional circumstances for granting him a residence permit irrespective of his HIV-status, in line with an earlier decision of the Constitutional Court.[351] The Constitutional Court decision held that the prohibition on issuing residence permits to foreign nationals who are HIV-positive is not absolute and may be bypassed with reference to "humanitarian considerations", such as the applicant's family ties with Russian nationals.[352] On 26 July 2012, the Verkh-Issetskiy District Court of Yekaterinburg upheld the refusal to grant the residence permit, finding in particular that the applicant's HIV status amounted to an "actual threat to the health of the Russian population" and that the applicant's "living with a same-sex partner was not equivalent to having a family" and therefore not an exceptional circumstance allowing for the grant of the permit.[353]

348 Resolution of the Plenary Session of the Supreme Court of Russia "On certain issues in judicial practice with regard to the application of the Housing Code of the Russian Federation", 2 July 2009, No. 14 (Постановление Пленума Верховного Суда РФ от 02.07.2009 N 14 "О некоторых вопросах, возникших в судебной практике при применении Жилищного кодекса Российской Федерации"), Para 25.

349 *Ibid.*

350 *Novruk and Others v Russia*, Applications Nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14, 15 March 2016, Para 37 (referring to the Decision of the Federal Migration Service of 26 July 2012).

351 See Decision of the Constitutional Court of Russia, 12 May 2006, No. 155-O (Определение Конституционного Суда Российской Федерации от 12 мая 2006 года № 155-О).

352 Decision of the Constitutional Court, 12 May 2006 no. 155-O.

353 See above, note 350, Para 38 (referring to Judgment of the Verkh-Issetskiy District Court of Yekaterinburg, 26 July 2012, No. 2-2973/2012 (Решение Верх-Иссетского районного суда Екатеринбурга от 26 июля 2012 года по делу № 2-2973/2012).

The District Court's decision was reversed by the Sverdlovsk Regional Court on 21 November 2012 with reference to the ECtHR's judgment in *Kiyutin v Russia*[354] and to the binding nature of the ECtHR's judgments in respect of Russia. In *Kiyutin*, the ECtHR held that although the ECHR does not guarantee a foreign national the right to settle in the territory of a Member State of the Council of Europe, a refusal to allow such entrance violates the Convention when it prevents an individual from enjoying his or her family life or the right to be free from discrimination.[355] The ECtHR went on to find that a refusal to issue a residence permit based solely on HIV status violated Article 14 taken in conjunction with Article 8.[356] Applying this decision, the Regional Court held that the decision of the FMS was unlawful because it was based exclusively on the applicant's HIV-positive status. Accordingly, the Regional Court ordered that the residence permit application be re-examined.[357]

A separate procedure had been instituted by the Federal Consumer Protection Authority (FCPA) to have the applicant's presence in Russia declared "undesirable" in accordance with Section 25.10 of the Entry and Exit Procedures Act on account of his HIV-positive status.[358] A decision to this effect was made on 15 March 2013.[359] On 26 April 2013, the applicant travelled to Kazakhstan. He was refused entry into Russia two days later as a consequence of the decision of the FCPA, which he then challenged. On 30 May 2013, the Verkh-Issetskiy District Court allowed his appeal.[360] However, on 13 August 2013, this decision was overturned by the Sverdlovsk Regional Court. In doing so, the Court held that the applicant was single and did not have a family relationship with any Russian national.[361] The Court concluded that the decision did not violate the applicant's right to respect for his family life, his right to the protection of his health, the prohibition on discrimination or the right to personal dignity. Leave for a cassation appeal was refused on 19 February 2014 by the Sverdlovsk Regional Court, which stated that the applicant's confirmation of a sexual relationship with a Russian national did not equate to social links to Russia.[362] On 1 April 2014, an application for leave to appeal to the Supreme Court was also rejected.[363]

This approach was criticised by the ECtHR in its recent judgment of *Novruk and Others v Russia*, which concerned, among other applicants, the situation of the

354 *Kiyutin v Russia*, Application No. 2700/10, 10 March 2011.

355 *Ibid*., Para 53.

356 *Ibid*., Paras 72–74.

357 See above, note 350, Para 39 (referring to Appellate Decision of the Sverdlovsk Regional Court, 21 November 2012, 33-13906/2012 (Определение Свердловского областного суда от 21 ноября 2012 года по делу № 33-13906/2012).

358 *Ibid*., Para 40.

359 *Ibid*., Para 41.

360 *Ibid*., Para 43.

361 *Ibid.*, Para 44.

362 *Ibid*., Para 45.

363 *Ibid*., Para 46.

applicant in the above case.[364] The ECtHR held that the applicant was discriminated against on account of his HIV-status when the Russian authorities refused to issue him a residence permit and ordered his expulsion.[365] In reaching this conclusion, the ECtHR noted that the applicant lived in a "stable de facto same-sex partnership, which falls within the notion of private life and family life".[366] Notably, during the proceedings before the ECtHR the Russian Government did not contest the fact that same-sex relationships as such fall under the definition of family life but instead argued that the applicant had failed to demonstrate that he had been living in de facto stable relationship.[367] The ECtHR noted that:

> *The Government's claim that the evidence of their relationship has not been tested in the domestic proceedings sits ill with the actual findings of the Russian courts, which had taken that evidence but refused to recognise that their same-sex relationship amounted to a family or at least a social link.*[368]

2.5.3 Right to Adopt

The right of same-sex individuals and couples to adopt children, including those of their same-sex partner, has been considered on several occasions by the ECtHR with what may be described as mixed results. The ECtHR has distinguished between three different situations which may arise in this context: an LGBT individual adopting on their own; an LGBT individual wishing to adopt their same-sex partner's biological child (referred to as second-parent adoption); and a same-sex couple wishing to adopt a child together.[369] The Court has, to date, dealt with the first two situations. In relation to the first of these, the Court has found that a refusal to allow a lesbian to adopt on the basis of her sexual orientation where the law allowed for this possibility amounted to a violation of Article 14 in conjunction with Article 8.[370] In the second situation, the Court found no violation where the law did not allow for second-parent adoption for unmarried different-sex couples, as there had been no difference in treatment afforded to same-sex couples. The Court further found that the situation of an unmarried same-sex couple was not comparable to that of a married couple (who could legally adopt in this way).[371] However, in the situation in which the law allowed for second-parent adoption for unmarried different-sex couples but not for same-sex couples, the Court found a viola-

364 *Ibid.*

365 *Ibid*., Para 112.

366 *Ibid*., Para 87.

367 *Ibid*., Para 81.

368 *Ibid.,* Para 87.

369 See *X and Others v Austria*, above, note 343, Para 100.

370 See *E.B. v France*, above, note 308, Paras 94-98.

371 *Gas and Dubois v France,* Application No. 25951/07, 15 March 2012, Paras 66–70, in which the Court noted that it did not consider the former situation amounted to indirect discrimination. See also, *X and Others v Austria*, above, note 343, Paras 105–110.

tion of Article 14 taken in conjunction with Article 8.[372] The Court took the opportunity to note that Article 8 does not require states to provide a right of second-parent adoption to unmarried couples.[373] Increasingly, states are recognising the right of same sex individuals and couples to adopt children, and international best practice dictates that same-sex individuals be entitled to adopt without discrimination. This position is supported by Principle 24 of the Yogyakarta Principles states that "everyone has the right to found a family, regardless of sexual orientation or gender identity." This Principle goes on to recommend that "States take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption…without discrimination on the basis of sexual orientation or gender identity".

Under Russian law, adoption is aimed at providing care for children left without parental custody.[374] Russian law allows for adoptions to be made by individuals[375] and does not place any explicit restrictions on adoption by an LGBT individual. However, it should be noted that some politicians have recently argued in favour of removing parental custody from gay or lesbian parents and so this option may be closed in the future.[376] The Family Code allows for a simplified adoption procedure for a husband or wife to adopt the biological child of their spouse.[377] However, this simplified procedure would not apply to same-sex couples, as the terminology used in the section "step-mother" and "step-father" is considered by the Courts as requiring the parents to be married.[378] Unmarried different-sex couples may utilise the normal (non-simplified) adoption procedure to adopt their partner's biological child.[379] Whilst an LGBT individual could theoretically utilise this procedure to adopt his or her partner's biological child as a single adoptive parent, this can only be done at the expense of the biological parent giving up his or her parental rights or duties. This is because the wording of the Family Code allows for parental links to be retained only in cases of single adoption and only in regards to a parent of the opposite sex (when a single man adopts a child, the child's biological mother may retain these rights and duties, and vice versa).[380] Thus, there is no real, practical possibility for an LGBT individual to adopt his or her partner's biological child.

372 See *X and Others v Austria*, above note 343, Paras 112, 116, 130, 195.

373 *Ibid.,* Para 136.

374 See above, note 317, Article 123.

375 *Ibid*., Article 127(1).

376 "Deputy Mizulina Suggested Removing Children from Russian Gays and Lesbians" (Депутат Мизулина предложила отбирать детей у российских геев и лесбиянок), *GayRussia*, 14 June 2013, available at: http://www.gayrussia.eu/russia/6814.

377 See above, note 317, Article 127(1).

378 See, for example, Appellate decision of the St. Petersburg City Court, 25 November 2014, No. 33-19356/2014 (Определение Санкт-Петербургского городского суда от 25 ноября 2014 года № 33-19356/2014).

379 See above, note 317, Article 137.

380 *Ibid.*, Article 137.

The Family Code explicitly prohibits joint adoption by persons who are not married.[381] This automatically excludes same-sex partners as potential joint adoptive parents. It is unclear whether joint adoptions by same-sex couples made abroad can be recognised under Russian law. Theoretically, Article 163 of the Family Code allows for parental authority arising from a joint adoption effected overseas to be recognised in Russia. However, in accordance with Article 167 of the Family Code, foreign family laws shall not be applied when they contradict the *ordre public* of Russia. Although there have been no instances of denial of such recognition by Russian authorities, the legislative amendments discussed below may be argued to be a justification based on *ordre public* for denying recognition of a same-sex couple as parents of a child jointly adopted by them in a foreign country.

In 2013, the Family Code was amended to explicitly restrict the parental rights of same-sex spouses who married lawfully in other countries,[382] by introducing additional requirements for adoption and guardianship of children living in Russia.[383] Article 127 of the Family Code was amended to prevent persons in a same-sex relationship whose union is "recognised as marriage and registered in accordance with legislation of a state where such marriage is allowed", as well as single persons who are nationals of a state that recognises same-sex marriage, from adopting, children in Russia.[384] Similarly, Article 146 was amended and such persons cannot become guardians or trustees of children who are orphans or left without parental care.[385] These restrictions regarding adoption and guardianship apply to all children adopted in the territory of the Russian Federation (when an application is lodged with the Russian authorities), including those who are foreign nationals.[386] In addition, Article 165(4) of the Family Code provides that foreign adoption of a Russian child living abroad shall be recognised in Russia subject to obtaining consent of the Russian authorities prior to adoption.

On 29 August 2013, the Supreme Court provided interpretative guidelines regarding the application of the new restrictions.[387] The Court stated that these rules establish an absolute prohibition on adoption by single persons who are nationals or residents of states that allow same-sex marriages.[388] However, when married couples (of different sexes) who are nationals or residents of such states apply to

381 *Ibid.*, Article 127(4).

382 It is unclear whether joint adoptions by same-sex couples made abroad can be recognised under Russian Law. Whereas personal legal status shall be determined by the law of that person's residence (Article 163 of the Family Code) in accordance with Article 167 of the Family Code foreign family laws shall not be applied when they contradict *ordre public* of Russia.

383 Federal law on Amendments to Certain Legislative Acts of the Russian Federation concerning legal arrangements of orphans and children left without parental care, 2 July 2013, No. 167-FZ (Федеральный закон от 2 июля 2013 года № 167-ФЗ "О внесении изменений в отдельные законодательные акты Российской Федерации по вопросам устройства детей-сирот и детей, оставшихся без попечения родителей").

384 See above, note 317.

385 *Ibid*., Article 146(1).

386 *Ibid.*, Article 165.

387 The guidelines were approved by the Presidium of the Supreme Court of Russia on 29 August 2013.

388 *Ibid*.

adopt Russian children, Russian courts considering these applications must take into account whether the legislation of the state of the adopting couple allows for placing an adopted child in a different family, and whether there is a binding treaty between Russia and that state requiring the consent of the Russian authorities in the event of a child being placed with a different family. If there is no such treaty, and the domestic law allows for placing an adopted child in a different family, the Supreme Court stated that courts should reject an application for adoption.[389] The significance of this guidance is rather residual as in practice judges largely refuse adoption requests from nationals or residents of states allowing legal recognition of same-sex unions.[390]

This guidance was applied by the Supreme Court in a case of a different-sex Spanish couple who sought to adopt two Russian children.[391] The Court granted the application for adoption, noting that in case the children needed to be removed from the adopting family, any future placement must follow an undertaking provided by the Andalusian regional government to comply with Russian laws banning adoption by same-sex couples.[392]

Although the restrictions introduced by the 2013 amendments to the Family Code were adopted in order to exclude adoptions by foreigners, they may apply to a Russian national who is married to a person of the same sex under foreign laws. Such a situation has come before the courts on one occasion when a Russian national challenged a decision to terminate her guardianship. The woman had guardianship over a six-year-old child on the basis of an official decision by the guardianship office of the Sovetskiy District of the Astrakhan City of 2010. In 2014, she entered into registered life partnership (*Lebenspartnerschaftsgesetz*) with another woman under German law. When she later applied to the guardianship office to issue her a permit to move with the child to another city in Russia so that she could live with her partner, the guardianship office refused and terminated her status as a guardian.[393]

The woman challenged the decision in the Sovetskiy District Court of Astrakhan arguing that she was of a "traditional" sexual orientation and that the life partnership was an agreement aimed at arranging a joint household and mutual support with the other woman. The District Court held that the life partnership union is almost equal to same-sex marriage. Accordingly, the Court upheld the decision of the guardianship office, finding that the Article 146(1) prohibition on guardianship for those who have entered into a same-sex union

389 *Ibid*.

390 Interview conducted by Dmitri Bartenev with Ms Vorokushina, 20 May 2016, Municipal District no. 10, St. Petersburg.

391 Appellate Decision of the Supreme Court of the Russian Federation, 10 December 2013, No. 59-APG13-5 (Апелляционное определение Верховного Суда Российской Федерации от 10 декабря 2013 года по делу № 59-АПГ13-5).

392 *Ibid*.

393 Judgment of the Sovetskiy District Court of Astrakhan, 4 March 2015, No. 2-1001/2015 (Решение Советского районного суда Астрахани от 4 марта 2015 года по делу № 2-1001/2015).

recognised as marriage applied.[394] Likewise the Court rejected as irrelevant the plaintiff's argument that she had provided the child with due care, which had not been contested by the guardianship office.[395] It can be assumed that in the Court's view, the absolute nature of the prohibition outweighed any interests of the child (which is the required primary consideration pursuant to Article 3 of the CRC) and meant that it did not need to consider whether the removal of custodial rights was justified by any legitimate aim. This is the only case identified to date where the prohibition on adoption or guardianship was applied to a Russian national.

2.5.4 Gender Recognition

International best practice requires that an individual be able to identify as a particular gender and that such identification must be legally recognised.[396] Furthermore, such legal recognition of an individual's gender identity should not be conditional on any form of medical intervention; rather individuals should be empowered to receive legal recognition of their gender and gender identity on the basis of their own self-identification. This is expressly recognised in Principle 3 of the Yogyakarta Principles which provides:

> *Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity.*

Requiring transgender persons to undergo surgical or other medical intervention to secure recognition of a new gender is a serious interference with an individual's right to personal autonomy and physical integrity.[397]

That said, some international and regional human rights jurisprudence still lags behind the best practice approach. The ECtHR has recognised that the ECHR

394 *Ibid*. The judgment was upheld on appeal by the Astrakhan Oblast Court, 29 June 2015, (Апелляционное определение Астраханского областного суда от 29 июня 2015 года).

395 *Ibid*.

396 *Goodwin v the United Kingdom* [GC], Application No. 28957/95, ECHR 2002-VI; *Van Kück v Germany*, Application No. 35968/97, ECHR 2003-VII.

397 Commissioner for Human Rights of the Council of Europe, *Human Rights and Gender Identity,* 29 July 2009, available at: https://wcd.coe.int/ViewDoc.jsp?p=&id=1476365&direct=true; see also: the decision by the Constitutional Court in Germany which found that gender reassignment surgery is a "massive impairment of physical integrity" and ruled that the requirement that individuals undergo sex reassignment surgery to obtain legal recognition of their new gender was unconstitutional. Federal Constitutional Court (Bundesverfassungsgericht), "Prerequisites for the statutory recognition of transsexuals according to § 8.1 nos. 3 and 4 of the Transsexuals Act are unconstitutional, Order of January 11, 2011" Press release no. 7/2011, January 28, 2011, 1 BvR 3295/07 (German only), http://www.bundesverfassungsgericht.de/entscheidungen/rs20110111_1bvr329507.html; see also decision of the Austrian Administrative High Court which also ruled that mandatory surgical intervention as a condition for the legal recognition of gender identity was unlawful; Verwaltungsgerichtsh of no. 2008/17/0054, judgment of February 27, 2009, http://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Vwgh&Dokumentnummer=JWT_2008170054_20090227X00.

imposes an obligation on states to ensure recognition and protection of transgender persons' rights under Article 8 of the Convention.[398] The Court has stated that gender identity is a "fundamental aspect of the right to respect for private life"[399] and noted that States are required to legally recognise the gender of post-operative transsexuals. In *L. v Lithuania* the Court explained that positive obligation under Article 8 of the Convention required States "to implement the recognition of the gender change in post-operative transsexuals through, *inter alia*, amendments to their civil-status data, with its ensuing consequences."[400] The Committee of Ministers has taken the same approach, recommending that:

> *Member states should take appropriate measures to guarantee the full legal recognition of a person's gender reassignment in all areas of life, in particular by making possible the change of name and gender in official documents in a quick, transparent and accessible way; member states should also ensure, where appropriate, the corresponding recognition and changes by non-state actors with respect to key documents, such as educational or work certificates.*[401]

However, despite recognising that gender identity is "one of the most basic essentials of self-determination"[402] the Court has not, to date, found that requiring individuals to undergo medical intervention to obtain legal recognition of their gender is unlawful. In 2010 the Parliamentary Assembly of the Council of Europe issued a resolution calling on Member States to ensure the right to:

> *[O]fficial documents that reflect an individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as sex reassignment surgery and hormonal therapy.*[403]

The Commissioner for Human Rights issued a paper on Human Rights and Gender Identity that expressly noted that the requirement for medical and surgical intervention "clearly run counter to the respect for the physical integrity of the person".[404] He went on to note that such requirements "ignores the fact that while such operations are often desired by transgender persons, this is not always the case".[405] At the time of publication, there are currently two pending cases before the ECtHR which

398 *Christine Goodwin v the United Kingdom* [GC], Application No. 28957/95, ECHR 2002-VI; *Van Kück v Germany*, Application No. 35968/97, ECHR 2003-VII; and *Grant v the United Kingdom*, no. 32570/03, ECHR 2006-VII.

399 *Ibid.*, *Van Kück v Germany*, Application, Para. 75; *L. v Lithuania*, Application No. 27527/03, 31 March 2008.

400 *Ibid.*, *L. v Lithuania*, Para 56. See also, *Hämäläinen v Finland*, Application No. 37359/09, 16 July 2014, Para 68.

401 See above, note 37, Para 21.

402 See above, note 398, Para 75.

403 Parliamentary Assembly of the Council of Europe, *Resolution 1728(2010) on Discrimination on the basis of sexual orientation and gender identity*, 29 April 2010, Para. 16.11.2.

404 See Commissioner for Human Rights of the Council of Europe, above, note 397.

405 *Ibid.*

concern the ability of individuals to secure recognition of their gender identity in the absence of gender reassignment surgery.[406] In Russia, the Federal Law "On Civil Status Acts" allows transgender persons to change their legal gender following the presentation of "a medical certificate about change of sex".[407] In accordance with Article 70 of the Law, a civil registry office shall issue a decision on correcting or changing the civil status entry of a person where a document of a standard form issued by a medical organisation is presented noting that the person's gender has changed. Article 70 requires this standard form of medical document to be developed by the Health Care Ministry.[408] However, as of today, no such form has been developed. In 2005, the Ministry set up a working group for this purpose but this Group was dissolved in 2007 without achieving any result. It is currently unclear whether this Law would be interpreted to require individuals to undergo surgery or some other form of medical intervention in order to have their gender legally recognised.

A study conducted by the Transgender Legal Defence Project in 2012 revealed that there is no uniform approach to the specific requirements for the legal recognition of gender change.[409] In some regions, civil registry offices state that they require a medical certificate of diagnosed transsexuality along with a medical report stating the need for a "gender marker" change,[410] whereas others state that proof of irreversible gender reassignment surgery is needed.[411] Furthermore, the study found that in reality, civil registry offices had agreed to change a person's legal gender without a court order only in a small number of cases and only in selected regions,[412] and the ultimate decision on what kind of documents are sufficient for a court to make an order recognising a change in gender depends on judicial discretion in any given case.[413] In some cases, courts considered that legal gender could be changed following hormone therapy,[414] or mastectomy (in case of female to male transformation),[415] whereas in other cases gonadec-

406 *A.P. v France*, Application No. 79885/12 Communicated Case 18 March 2015, available at: http://hudoc.echr.coe.int/eng?i=001-153722; *Garçon v France*, Application No. 52471/13, Communicated Case 18 March 2015, available at: http://hudoc.echr.coe.int/eng?i=001-153718; *Nicot v France* Application No. 52596/13 Communicated Case, 18 March 2015, available at: http://hudoc.echr.coe.int/eng?i=001-153720; and *S.V. v Italy*, Application No. 55216, Communicated Case, 20 March 2016, available at: http://hudoc.echr.coe.int/eng?i=001-161936.

407 Federal Law on Civil Status Acts of 15 November 1997 No. 143-FZ (Федеральный закон "Об актах гражданского состояния" от 15 ноября 1997 года № 143-ФЗ), Article 70.

408 *Ibid*.

409 Kirichenko, K., "Change of Legal Gender of Citizens in Russian Judicial Practice", *Medical Law,* Vol. 3, 2012, pp. 24-34 (Кириченко К.А. Изменение гражданского пола граждан в российской правоприменительной практике // Медицинское право. 2012. N 3. С. 24–34).

410 "Gender marker" in this context connotes the identification of "male" or "female" in Russian identity documents such as passports.

411 *Ibid.*

412 See above, note 409.

413 *Ibid.*

414 Judgment of the Dorogomilovskiy District Court of Moscow, 17 October 2014 (Решение Дорогомиловского районного суда города Москвы от 17 октября 2014 года).

415 See above, note 409.

tomy was an essential condition for recognising a new legal gender.[416] The study identified over 50 cases where transgender persons challenged refusals of civil registry offices to recognise their right gender following some sort of medical intervention to change their gender. The research did not identify any attempts to have a legal change of gender recognised by someone who had not undergone any form of medical intervention. None of the identified cases explicitly raised an argument that the treatment of the individual amounted to discrimination.[417] However, in one case, the Rudnichnyi District Court of Prokopievsk referred in its decision to Article 14 of the ECHR and Article 19 of the Russian Constitution to substantiate the general basis for its decision that everyone's right to private life shall be protected on an equal basis with others.[418] The Court explained that the fact that the Health Care Ministry had not issued a standard form of medical certificate to be used to confirm a change in gender, should not prevent a civil registry office from recognising a change in gender.[419] A similar approach has been taken by other courts.[420]

One of the cases identified in the study concerned a trans woman who requested that her former employer issue her a new employment record book with her new "female" name in it.[421] She argued that having an employment record book with her former name in it crossed out and her new name added, which is a commonly accepted practice when an employee changes his or her name, violated her right to private life as every time she presented her employment record book it revealed that she had changed her "male" name to a "female" name. A Justice of the Peace rejected the case on the basis that the woman's request did not comply with the standards for filling in employment record books.[422] Such an approach contradicts human rights standards in relation to the right to privacy and non-discrimination, which would require such a change to be made.

2.5.5 Parental Rights and Gender Reassignment

There is a dearth of international jurisprudence on the parental rights of transgender persons. International best practice dictates that transgender persons may not suffer discrimination in relation to their parental rights on the grounds of their gender identity. As outlined above, Principle 24 of the Yogyakarta Prin-

416 Judgment of the Nizhegorodskiy District Court of Nizhniy Novgorod, 2011, No. 2-9631/11 (Решение Нижегородского районного суда города Нижнего Новгорода 2011 года, дело № 2-9631/11).

417 Based on the information provided by the Transgender Legal Aid Project (St. Petersburg) to Dmitri Bartenev on 15 March 2016.

418 Judgment of the Rudnichnyi District Court of Prokopievsk of the Kemerovo Oblast, 4 December 2013, No. 2-2490/2013 (Решение Рудничного районного суда города Прокопьевска Кемеровской области от 4 декабря 2013 года, дело № 2-2490/2013).

419 *Ibid.*

420 Based on the information provided by the Transgender Legal Aid Project (St. Petersburg) to Dmitri Bartenev on 15 March 2016.

421 Until recently an employment record book has been considered the main document proving one's employment record.

422 Judgment of a justice of the peace of the Ryazan City, 21 November 2007 (Решение мирового судьи города Рязани от 21 ноября 2007 года).

ciples provides that "no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members." In addition to securing legal recognition of an individual's gender identity, it is important that transgender persons are able to secure recognition and protection of their families. This was confirmed in the 2010 Resolution of the Parliamentary Assembly of the Council of Europe.[423]

The ECtHR has very limited jurisprudence on the impact of a change in gender identity on parental rights. In *X, Y and Z v United Kingdom*, the Court found that there had been no violation of Article 8 or Article 14 taken in conjunction with Article 8, in the circumstances in which it was not possible for a transgender man to be noted on the birth certificate as the parent of the biological child of his partner. The child had been born through artificial insemination during their relationship.[424] While noting that the case did fall within the scope of the right to family life, the Court found that there was no obligation under Article 8 for the state to formally recognise a non-biological father. In its more recent decision of *P.V. v Spain* the Court recognised that discrimination on the grounds of gender identity is prohibited.[425] However, in analysing restrictions placed on contact between a transgender woman and her biological son during her gender reassignment, the Court found that such restrictions were not based the fact of her transgender identity, but rather on the best interests of the child. The Court noted that the woman continued to have visitation rights to her son, which were reviewed by a judge every two months leading to increased visitation, and that the aim of this was to allow the child to become used to the gender reassignment.[426] Thus, restrictions on custody rights of biological parents will not amount to discrimination when they are made in the best interests of the child. That said, it is critical to identify the extent to which stereotypes and prejudice are being factored in to decisions about what may and may not be in the best interests of a child. There is a need evidence-based decision making to ensure that there is no discrimination on grounds of gender identity in cases such as this.

With respect to Russian law, as noted above, in principle, Russian legislation allows a person to change legal gender on the basis of "a medical certificate about change of sex".[427] However, Russian law does not regulate the legal consequences of a change in legal gender recognition, although a bill is currently before the State Duma, which, if passed, would prevent persons who have undergone gender reassignment from marrying.[428] The current absence of law in this

423 See above, note 403, Para 10.

424 *X, Y and Z v United Kingdom*, Application No. 21830/93, 22 April 1997, Paras 12–19.

425 *P.V. v Spain*, Application No. 35159/09, 30 November 2010 (in French only).

426 *Ibid.* Also see, Registrar of the Court, "Press Release: Restriction of contact arrangements between a transsexual and her six-year-old son was in the child's best interests", No. 910, 30 November 2010.

427 See above, note 407. The Law does not explicitly require a particular form of change of biological gender and refers to a "medical certificate of the change of gender issued by a medical organisation" as a basis for issuing an opinion by the civil registry office for rectifying an entry in the civil status records.

428 Bill No. 790069-6 "On amending Article 14 of the Family Code of the Russian Federation (with regard to the prohibition of entering into marriage by the persons of the same sex (as determined at the time of birth)). (Законопроект № 790069-6 "О внесении изменений в статью 14 Семейного кодекса

sphere means that transgender persons have the right to marry someone of a different sex, and this report did not identify any cases which discussed the right of transgender individuals to marry. However, the absence of law relating to the recognition of parental rights of a person who has changed their gender does lead to difficulties, as is illustrated in the following cases.

Mr. Y. was born as a woman. In 1997, Y. gave birth to a son. From 2001, Y. and Y.'s son's father lived separately and in 2006, they divorced and custody over the child was granted to Y. In the same year, the parental rights of the child's father were terminated on account of his failure to take part in raising his son. In 2010, Y. underwent gender-reassignment surgery and was subsequently issued a new birth certificate and a passport as a male. However, the child's documents continue to bear details of Y. as his mother and also the details of his biological father. Y. applied to Dzerzhinskiy District Court of Nizhniy Tagil to change these documents, arguing that he needed to disclose the fact of his gender change every time he had to prove that he had parental rights over his son. However, the Court dismissed the case, holding that there was no procedure available under Russian law to change the identity documents of the child.[429] The Court rejected Y.'s argument that this situation constituted a disproportionate interference with his right to private and family life because of the need to disclose his transgender identity.[430]

Two recent cases in the Moscow region concerned the parental rights of two transgender women.[431] In the first case in 2015, a district court rejected a request by a transgender woman's ex-wife to remove the child from the transgender woman's care on the basis of Article 73(2) of the Family Code. Article 73(2) permits a child to be removed from the care of a parent when leaving the child with the parent would place him or her in danger due to circumstances outside of the control of the parent, such as mental illness. However, this judgment was overturned on appeal to the Moscow City Court. The Court referred to the findings of a panel of psychiatrists who had met with the child and concluded that the child felt "discomfort and uncertainty" due to his "father's" change in gender, which was a result of his "father's" "mental illness" ("transsexualism"). The experts further noted that disclosure of such information could negatively affect the child's psychological state and that a "distorted understand of traditional relationships between a man and a woman" would have a negative impact on the child, leading to a "likelihood of non-traditional gender identification of the child in future, a tendency towards

Российской Федерации (в части установления запрета на заключение брака между лицами одного пола (определяемого при рождении)).

429 Judgment of the Dzerzhinskiy District Court of Nizhniy Tagil, 2 June 2011, No. 2-604/2011 (Решение Дзержинского районного суда города Нижний Тагил от 2 июня 2011 года по делу № 2-604/2011).

430 *Ibid*. Y. did not explicitly argue that he had been discriminated against.

431 Information about these two cases is confidential. Copies of the judgment are retained with the researcher and futher information may be available upon request to the Equal Rights Trust. For a further description of these cases see, Gevisser, M., "The transgender woman fighting for the right to see her son. *The Guardian*, 12 November 2015, available at: https://www.theguardian.com/world/2015/nov/12/the-transgender-woman-who-may-never-see-her-son-again; and Zakharova, S., "Court's decision on transgender woman's parental rights", *Human Rights Camera,* 17 August 2016, available at: https://mrkamera.org/2016/08/17/svetlana-zakharova-courts-decision-on-transgender-womans-parental-rights.

anti-social lifestyles". Having endorsed these findings, the Court further referred to the Law "On protection of children from information harmful to their health and development" which prohibits propaganda of "non-traditional sexual relationships"[432] but provided no explanation of why this law was relevant. Consequently, the Court restricted the parental rights of the transgender woman on the basis of Article 73(2) of the Family Code, on the basis of her diagnosis of transsexualism.

In another case, the Lyuberetskiy City Court of the Moscow Oblast found that a child's sole place of residence should be with his biological mother pursuant to Article 65(3) of the Family Code.[433] The decision was made on the basis of the finding of two separate panels of psychologists and psychiatrists, one of which concluded that the child was having difficulty accepting his "father's" gender transformation and the other of which concluded that the "father" did not assist the child to understand the situation and instead emphasised the importance of "his" gender transformation. This decision was made despite the transgender woman and her child living together for four years immediately following her gender change. The judgment was upheld on appeal by the Moscow Oblast Court in 2015 and by the Supreme Court of the Russian Federation in 2016. Unlike in the previous case, the courts did not criticise the transgender woman for failing to meet the "traditional role" of the family. The Court also emphasised that the determination that the child should live with his biological mother would not prevent the transgender woman from seeing him.

The approach of the Russian courts is, at first glance, not inconsistent with the previous approach of the ECtHR as outlined above. However, the Russian cases are distinguishable from the ECtHR jurisprudence, because as emphasised in *P.V. v Spain*, distinctions between the recognition of biological parents, made solely on the basis of their gender identity, would amount to discrimination.[434] Although it is clear that distinction may be justified when made in light of other considerations, such as the best interest of the child, consideration of the best interests of the child must be a proper assessment of the needs of the child, and not revert to discriminatory stereotypes that children are best placed in a "traditional family". In the Russian context, the courts have shown that they are willing to defer to arguments that removing custody is in the best interests of the child without detailed consideration of what these interests entail, and to rely on "traditional values" in order to do so. Such an approach is discriminatory.

432 See above, note 80.

433 Article 65(3) of the Russian Family Code provides that a child's place of residence in case of his or her parents living apart shall be established by their agreement, and in the absence of such agreement it should be determined by the court taking into account a child's best interest and their opinion.

434 See *Alekseyev v Russia,* above, note 61, in which the Court noted that differences in treatment based solely on sexual orientation would amount to discrimination.

2.6 Discrimination against LGBT Persons in Education and Work

This Part of the report considers discrimination against LGBT individuals in the education and labour spheres. Although the research sought to identify cases relating to economic, social and cultural rights more broadly, no such cases were identified. There may be a number of reasons for this including: reluctance by LGBT individuals to initiate legal proceedings as this would require them to reveal their LGBT status which they believe carries risks in an environment hostile to LGBT persons; a perception on the part of LGBT individuals that courts are not likely to vindicate their rights; and the fact that cases which may exist may also remain unpublished.

2.6.1 Work

Article 6(1) of the ICESCR provides that:

> *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

Pursuant to Article 2(2), the right to work must be guaranteed without discrimination of any kind,[435] which includes discrimination on the basis of sexual orientation and gender identity.[436] The Director-General of the International Labour Organization (ILO) has recently noted that all LGBT individuals are entitled to be free from discrimination at work.[437]

Although the ECHR does not explicitly protect the right to work, the ECtHR has made it clear that dismissal from employment on the sole basis of sexual orientation will amount to a violation of the right to private life in Article 8 of the Convention.[438] In addition, the Committee of Ministers recommends that member states:

> *[S]hould ensure the establishment and implementation of appropriate measures which provide effective protection against discrimina-*

435 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: The Right to Work,* Article 6, 6 February 2006, UN Doc. E/C.12/GC/18, Para 19.

436 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights,* and Article 2(2) of ICECSR, 2 July 2009, UN Doc. E/C.12/GC/20, Para 32.

437 International Labour Organization, "LGBT workers entitled to equal rights and benefits at the workplace: Statement by International Labour Organization Director-General Guy Ryder on the occasion of the International Day against Homophobia and Transphobia", 17 May 2015, available at: http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/statements-and-speeches/WCMS_368652/lang--en/index.htm.

438 See, *Lustig-Prean and Beckett v the United Kingdom*, Application No. 31417/96 and 32377/96, 27 September 1999, Paras 64, 104–105; *Smith and Grady v the United Kingdom*, above, note 242, Paras 71, 110–112; *Perkins and R v the United Kingdom,* Application No. 43208/98 and 44875/98, 22 October 2002, Paras 38–41; and *Beck, Copp and Bazeley v the United Kingdom*, Application No. 48535/99, 48536/99 and 48537/99, 22 October 2002, Paras 51–53.

tion on grounds of sexual orientation or gender identity in employment and occupation in the public as well as in the private sector.[439]

Furthermore, as noted above, the Committee has also noted that states should pay particular attention to protecting the privacy of transgender persons in relation to employment applications and disclosure of their gender identity history.[440]

As noted in Part 1 of this report, Article 3 of the Russian Labour Code prohibits its discrimination in labour relations. The list of grounds on which discrimination is prohibited is open ended, and the Russian Constitutional Court recently explained that these grounds include sexual orientation.[441] Article 64 of the Labour Code prohibits any direct or indirect restriction or the granting of direct or indirect advantages in the conclusion of a labour contract based on sex, race, skin colour, nationality, language, origin, property, social and official status, age, place of residence, "as well as other factors not connected with the professional qualities of the employees".[442] It may be argued for the purposes of Article 64 that sexual orientation or gender identity falls within either social status or factors not connected with the professional qualities of an employee.

Legal cases challenging discrimination in the labour sphere based on sexual orientation or gender identity are almost non-existent throughout Russia, although violations of labour rights on a discriminatory basis have been reported by Russian LGBT organisations.[443] Moreover, as the below analysis demonstrates, the approach of courts to such cases may also dissuade victims from seeking a remedy, as some courts have simply disregarded allegations of discrimination on the basis of sexual orientation. The research identified four cases that have been the subject of judicial proceedings, in Khabarovsk, St. Petersburg, Moscow and Novosibirsk. A discrimination claim was explicitly raised by the victim in all but the first of these cases.

In Khabarovsk, a schoolteacher alleged that he had been forced to resign his post because the school administration had been informed that he took part in public assemblies promoting LGBT rights. The District Court rejected his claim to be restored to his post, finding his allegations unfounded because the Court determined that he had voluntarily decided to quit his job.[444] The Court did not consider his contention that he had been placed under pressure to resign. The applicant appealed this decision. However, the appellate court rejected his appeal without examining the alleged reasons for the applicant's decision, instead finding that the applicant had failed to prove any pressure on him.[445]

439 See above, note 37, Para 29.

440 *Ibid.*, Para 30.

441 See above, note 14.

442 The Article allows exceptions to be made to this prohibition by federal law.

443 See Russian LGBT Network and Human Rights Watch, above, note 11.

444 Judgment of the Central District Court of Khabarovsk, 16 May 2014, No. 2-326/14 (Решение Центрального районного суда Хабаровска от 16 мая 2014 года по делу № 2-326/14).

445 Appellate Decision of the Khabarovsk Regional Court, 30 July 2014, No. 33-4619/2014 (Апелляционное определение Хабаровского областного суда от 30 июля 2014 года по делу № 33-4619/2014).

In St. Petersburg, a music teacher was fired from her position at a school because the school administration had been informed about her alleged lesbian identity and presented with several photos showing her hugging and kissing other women. The school claimed that this was immoral behaviour incompatible with her work as a teacher. In its judgment, the District Court stated that it was not the plaintiff's sexual orientation that was the basis for her dismissal, but her "immoral behaviour".[446] The Court went on to state that it considered the photos to be "immoral" because they demonstrated "unethically intimate relationships between persons of the same sex and published on a social network on the internet".[447] On appeal, the applicant argued that her dismissal amounted to discrimination under Article 3 of the Labour Code, and also pursuant to Article 2(2) and 6 of the ICESCR because the photos were only considered "immoral" because they showed a same-sex relationship, whereas similar photos of a heterosexual couple would not be considered as contradicting public morals. The appellate court did not consider this argument and rejected her appeal.[448]

In a case before the Nagatinskiy District Court of Moscow, a young man alleged that he was rejected for a post as a coach in a professional development programme for young leaders, "Captains of Russia", on account of his sexual orientation. The man was contacted by the programme director on the basis of his CV, which he had placed on a major Russian job site. Following an interview, he was notified that he had been selected for the post. However, when the programme director looked at his personal page on a social network, she enquired about his sexual orientation. When the applicant replied that he was gay, the programme director sent him a message saying that they would not be able to hire him because the programme was based on a "traditional viewpoint on certain matters" and, she explained, it was an essential requirement that staff shared this view. The Court dismissed the man's claim that he had been discriminated against in violation of Articles 3 and 64 of the Labour Code, Article 19 of the Federal Constitution, Article 2(2) of the ICESCR and the prohibition of discrimination with regard to work found in the European Social Charter (Revised).[449] The Court held that there was not sufficient evidence that the plaintiff applied for the post and was officially rejected.[450] Accordingly, the Court did not analyse the allegation of discrimination.[451]

In a recent case in Novosibirsk, a woman challenged a refusal by a private company to hire her as sales manager due on the basis of her sexual orientation. She alleged that this amounted to discrimination under Article 64 of the

446 Judgment of the Kirovskiy District Court of St. Petersburg, 21 April 2015, No. 2-1890/2015 (Решение Кировского районного суда Санкт-Петербурга от 21 апреля 2015 года по делу № 2-1890/2015).

447 *Ibid*.

448 Appellate decision of the St. Petersburg City Court, 3 September 2015, No. 33-12750/2015 (Апелляционное определение Санкт-Петербургского городского суда от 3 сентября 2015 года по делу № 33-12750/2015).

449 The applicant did not specific which articles were referred to, but presumably this is Article 1 and Article E.

450 Judgment of the Nagatinskiy District Court of Moscow, 27 November 2015, No. 2-11405/2015 (Решение Нагатинского районного суда Москвы от 27 ноября 2015 года по делу 2-11405/2015.

451 Appellate decision of the Moscow City Court, 20 April 2016, No. 33-14156/2016 (Апелляционное определение Московского городского суда от 20 апреля 2016 года по делу № 33-14156/2016).

Labour Code. In its defence to the claim, the company argued that a "non-traditional sexual orientation does not comply with the job requirements, it can negatively affect the company's reputation and will prevent [the applicant] from performing her duties". The company further explained "the position requires a lot of work with clients. The majority of our clients support traditional values. Therefore, employment [of the applicant] could lead to financial losses."[452] In its judgment of 29 July 2016, the Zheleznodorozhnyi District Court of Novosibirsk declared that the refusal to employ the applicant because of her "non-traditional sexual orientation" was unlawful because it was not based on relevant grounds for employment.[453] The Court did not analyse the allegation of discrimination in any detail, simply noting that the defendant had failed to rebut it. The judgment requires the company to employ the applicant and pay her compensation for non-pecuniary damage. The company has appealed the decision and, at the time of this report's publication, the appeal is still pending.

Although this final case is a positive step, it remains to be seen whether it will be overturned in the higher courts. The earlier decisions show that the courts are on the whole failing to examine situations in which there is a *prima facie* or explicit case of discrimination, instead preferring to dismiss the claims on the basis of insufficient evidence. Such an approach fails to meet required standards in international and regional human rights law, which clearly prohibit discrimination in employment on the basis of sexual orientation. Nonetheless, it is positive that the courts have not outright rejected the idea that discrimination on the basis of sexual orientation may occur in the employment sphere.

2.6.2 Education

The right to education is provided for in Article 13 and 14 of the ICESCR.[454] Article 13(1) provides that:

> *Education shall be directed to the full development of the human personality and the sense of its dignity, and it shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

452 Judgment of the Zheleznodorozhnyi District Court of Novosibirsk, 29 July 2016, case no. 2-3186/2016 (Решение Железнодорожного районного суда Новосибирска от 29 июля 2016 года по делу № 2-3186/2016).

453 *Ibid.*

454 Article 14 of the International Covenant on Economic, Social and Cultural Rights provides that every state party that has not established free and compulsory primary education within its jurisdiction at the time of signing the Covenant must adopt an action plan within two years, to ensure compulsory primary education that is free for all.

The Committee on Economic, Social and Cultural Rights has stated that Article 13(2) requires education to be made accessible to all persons without discrimination, acceptable in terms of its substance, and adaptable, to meet the needs of changing societies.[455] States must closely monitor education to identify and address any discrimination in educational institutions, programmes, spending patterns and other practices.[456] As well as being a right in itself, the right to education is also a means of realising other rights. The Committee on Economic, Social and Cultural Rights recognises the right to education as a means for lifting individuals out of poverty and enabling them to fully participate in society.[457]

Article 2, Protocol 1 of the ECHR provides that no person shall be denied the right to education.[458] Any difference in treatment in relation to the right to education must therefore be in conformity with Article 14 of the ECHR on prohibition of discrimination.[459] In 2005, a case brought by a doctoral student in a case against the Moscow State University raised questions of discrimination in the education sphere. The plaintiff alleged that he was expelled from the University because the Faculty of Public Administration did not want him to pursue doctoral research on the legal status of sexual minorities and that this amounted to discrimination pursuant to Article 19 of the Federal Constitution and also Article 14 of the ECHR, together with Protocol 1. However, the District Court dismissed the claims because the plaintiff had failed to prove that the suggested research topic had any bearing on the University's decision to expel him. The Court accepted that the plaintiff was dismissed from the University because of his failure to comply with formal study requirements set forth in his individual plan, while the plaintiff contended that he had complied with the study requirements, which were in any case not clearly defined.[460] The plaintiff's argument that this was only a pretext for criticising the topic of his doctoral study was dismissed by the Court as unfounded due to the lack of evidence. Although the plaintiff presented the decision of the Faculty of Public Administration, which had refused to accept the proposed topic on legal status of sexual minorities as "not matching the department's specialisation" and his own request for termination of his studies due to discrimination on account of sexual orientation to the Court, the Court did not assess these documents and did not consider the plaintiff's discrimination claim further.[461]

455 Committee on Economic, Social and Cultural Rights *General Comment 13: The Right to Education*, 8 December 1999, E/C.12/1999/10, Para 6.

456 *Ibid.*, Para 36.

457 *Ibid.*, Para 1.

458 Council of Europe, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9.

459 See, for example, *Case "Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium" v Belgium,* Application No 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, and 2126/64, 9 February 1967; and European Court of Human Rights, *Guide on Article 2 of Protocol No. 1 to the European Convention on Human Rights*, December 2015, p. 10 available at: http://www.echr.coe.int/Documents/Guide_Art_2_Protocol_1_ENG.pdf.

460 Judgment of the Nikulinskiy District Court of Moscow, 10 June 2005, (Решение Никулинского районного суда Москвы от 10 июня 2005 года).

461 *Ibid.*

In 2003, a resident of St. Petersburg filed a lawsuit against the Oktyabrskaya Railroad Company (ORR) in the Frunzensky District Court of St. Petersburg because they did not allow him to enrol in the training courses necessary to become a train conductor. ORR's rejection was based on a decision earlier in 2003 by the Oktyabrskaya Railroad Clinic, which deemed the plaintiff unfit to work as a conductor due to a note in his military record regarding his "homosexuality".[462]

This note, made during a medical examination that the plaintiff underwent in 1992 as part of his military service, stated that he suffered from a mental disorder because he was "homosexual". At the time, homosexuality was classified as "perverse psychopathy" according to a 1987 USSR Ministry of Defence regulation,[463] and Soviet-era medical doctrine, which limited access to particular kinds of professions and the ability to perform military service. Consequently, the plaintiff was registered at a local psychiatric clinic and required to undergo periodic psychiatric assessments.[464] In 1997, the Russian Health Ministry implemented the World Health Organization's International Classification of Diseases, which does not include "homosexuality" in its list of mental and behavioural disorders.[465] On 27 January 2003, the plaintiff's name was deleted from the registry at the local psychiatric clinic. However, the military continued to classify homosexuality as a disorder and refused to withdraw the note from his military record.

On 10 August 2005, the Frunzensky District Court of St. Petersburg ruled that ORR's rejection of the plaintiff's application was illegal. The Court also confirmed that the diagnosis of the plaintiff's "perverse psychopathy" was unlawfully based exclusively on his "homosexuality", and that "homosexuality" is not a mental disorder but a variant of the normal.[466] The plaintiff did not make any allegation of discrimination and the Court did not make any finding in this regard. Nonetheless, the judgment is an important example of successful recourse to judicial remedies in fighting stigma against LGBT individuals, in particular challenging the long-standing practice of pathologising "homosexuality".

462 Judgment of the Frunzensky District Court of St. Petersburg,10 August 2005, No. 1066/05 (Решение Фрунзенского районного суда Санкт-Петербурга от 10 августа 2005 года по делу 1066/05).

463 Decree of the Ministry of Defence of the Russian Federation, concerning the Implementation of the Regulations on the medical examination in the Armed Forces (in peacetime and wartime), 9 September 1987, No. 260 (Приказ Минобороны СССР от 9 сентября 1987 г. № 260 "О введении в действие Положения о медицинском освидетельствовании в Вооруженных Силах СССР (на мирное и военное время)").

464 See above, note 462.

465 Order of the Health Ministry of Russia "On Adopting by the health care organisations of the Russian Federation health facilities of the International Statistical Classification of Diseases and Related Health Problems, 10th revision" of 27 May 1997, No. 170 (Приказ Минздрава России от 27 мая 1997 года № 170 "О переходе органов и учреждений здравоохранения Российской Федерации на Международную статистическую классификацию болезней и проблем, связанных со здоровьем X пересмотра").

466 See above, note 462.

3. CONCLUSIONS AND RECOMMENDATIONS

3.1 Conclusions

The overarching conclusion of this report is that the Russian judicial system does not effectively address cases of discrimination on the basis of sexual orientation or gender identity. In the majority of cases concerning discrimination – either explicitly or implicitly – the courts did not analyse whether discrimination had occurred in any meaningful way. The approach of the courts to cases involving lesbian gay bisexual and transgender (LGBT) individuals is also inconsistent, making it hard to determine trends in judicial reasoning, and more significantly, to ascertain when a particular case taken before the courts is likely to succeed.

As Part 1 of the report indicates, the Russian courts are operating within a society where discrimination against persons on grounds of sexual orientation and gender identity is deeply entrenched and the matter highly politicised. The process of judicial appointments compromises judicial independence, leaving judges liable to political pressure. Furthermore, the law which judges are applying is itself imperfect and in need of reform to remove provisions which discriminate directly or indirectly and provide full protection from discrimination for members of the LGBT community. That said, there is significant scope for a more progressive interpretation of Russian law by the courts and they are currently falling short.

The inconsistency of approach occurs both between courts and in the approach of individual courts. With some exceptions, courts have generally recognised that discrimination on the grounds of sexual orientation is prohibited by the Federal Constitution and through legislation which contains anti-discrimination provisions.[1] However, this recognition has little to no positive impact given the way the courts approach the question of whether differential treatment on the basis of sexual orientation in the given case is justified. At this point, courts often erroneously rely on the purported aims of protecting public morals, traditional values, religious belief and the rights of children, to hold that discrimination is justified.

The approach of the Constitutional Court, whose decisions are binding on all representative, executive and judicial authorities, is indicative of the inconsistencies that the research has identified. The Constitutional Court has recognised

1 See Part 1.6.5.

on a number of occasions that a difference in treatment based solely on sexual orientation is contrary to the general equality clause of Article 19 of the Constitution.[2] However, in each case, the Court has gone on to uphold laws that prohibit "propaganda of homosexuality".[3] As is discussed in Part 2.3, in September 2014, the Court held that the federal propaganda law was not discriminatory. The Court's judgment, while noting that members of the LGBT community have the right to freedom of expression and assembly, restricted those rights so severely in the name of "protecting children" that it is difficult to see what scope is left to the LGBT community to exercise them. Of particular concern, the Court considered the views of the majority as a legitimate reason to restrict the rights of the minority LGBT community.[4]

As discussed throughout Part 2, although the Constitutional Court has not used language that explicitly labels same-sex relationships in a negative way, its judgments still imply that such relationships are "immoral". In addition, the Court has wrongly held that clearly discriminatory measures against LGBT persons accord with international and European human rights standards. Far from holding the authorities to account for discriminatory restrictions on the rights of the LGBT community in Russia, this approach gives the green light to the authorities to continue to discriminate.

In line with the general approach of the Constitutional Court, the judicial practice of the courts of general jurisdiction demonstrates that same-sex relationships are often *de facto* considered as offensive to public morality. For example, in the context of the right to work, courts have upheld the dismissal of a teacher when photos of her kissing another woman came to light, noting that the photos were "immoral" as they demonstrated "unethically intimate relationships between persons of the same sex" and apparently ignoring arguments that this amounted to discrimination as the sharing of similar images of a different-sex couple would not be considered immoral.[5] Similarly, the courts did not find there had been any discrimination under either Russian or regional or international

2 Judgment of the Constitutional Court of the Russian Federation, 23 September 2014, No. 24-P, Para 2.1 (*Постановление Конституционного Суда Российской Федерации от 23 сентября 2014 года № 24-П*). See also Decision of the Constitutional Court of Russia, 19 January 2010, No. 151-O-O (Определение Постановление Конституционного Суда Российской Федерации от 19 января 2011 года № 151-O-O); and Decision of the Constitutional Court of Russia, 24 October 2013, No. 1718-O (Определение Постановление Конституционного Суда Российской Федерации от 24 октября 2013 года № 1718-O). In 2006, a challenge was brought to the lack of legal recognition of same-sex marriages as contradicting the equality clause of the Constitution. However, in its decision the Constitutional Court did not address the discrimination argument. See Decision of the Constitutional Court of the Russian Federation, 16 November 2006, No. 496-O (Определение Конституционного Суда Российской Федерации от 16 ноября 2006 года № 496-O).

3 *Ibid.*

4 See above, Part 2.3.5., Recommendation c(vi) and Part 3.2.2, Recommendation d.

5 See Judgment of the Kirovskiy District Court of St. Petersburg, 21 April 2015, No. 2-1890/2015 (Решение Кировского районного суда Санкт-Петербурга от 21 апреля 2015 года по делу № 2-1890/2015); and Appellate decision of the St. Petersburg City Court, 3 September 2015, No. 33-12750/2015 (Апелляционное определение Санкт-Петербургского городского суда от 3 сентября 2015 года по делу № 33-12750/2015)), discussed in Part 2.6.1.

human rights law when a young man had a job offer revoked when his potential employer found out he was gay.[6]

That said, there has also been some more positive jurisprudence in the sphere of labour rights. A refusal to employ a lesbian because of her "non-traditional sexual orientation" was found to be unlawful at the district court level because it was not based on relevant grounds for employment.[7] Similarly, a different district court found that a diagnosis of "perverse psychopathy" was unlawfully based exclusively on a gay man's "homosexuality", which the court found was not a mental disorder but a variant of the normal.[8] While these decisions are welcome, they leave little in the way of clear jurisprudence on what the right to non-discrimination entails and in neither case did the court engage with the argument that the treatment in question amounted to discrimination. Further, it is clear from the cases discussed that extremely similar fact situations can lead to opposite results before the courts leaving no legal certainty.

The same inconsistency can also be seen in decisions in other spheres examined in the report. For example, while the right to private life and to non-discrimination has been explicitly noted in cases relating to a change of legal gender,[9] a failure to implement the consequences of such a change by providing a new employment record was sanctioned by a justice of the peace.[10] Reliance has also been placed on traditional family values in deciding to remove a child from the care of a transgender parent.[11] Likewise, contradictions abound in cases involving hate-motivated violence. Although the Constitutional Court has recognised sexual orientation as one of the bases on which aggravated criminal punishment may apply in the context of hate crimes,[12] courts are largely failing to recognise or acknowledge homophobic hatred as either an aggravating factor in sentencing, or as an element of a crime where this is provided for in the Criminal Code.[13]

6 The Court instead determined that there was not sufficient proof he had applied for the job. See Judgment of the Nagatinskiy District Court of Moscow, 27 November 2015, No. 2-11405/2015 (Решение Нагатинского районного суда Москвы от 27 ноября 2015 года по делу 2-11405/2015; and Appellate decision of the Moscow City Court, 20 April 2016, No. 33-14156/2016 (Апелляционное определение Московского городского суда от 20 апреля 2016 года по делу № 33-14156/2016), discussed in Part 2.6.1.

7 Judgment of the Zheleznodorozhnyi District Court of Novosibirsk, 29 July 2016, No. 2-3186/2016 (Решение Железнодорожного районного суда Новосибирска от 29 июля 2016 года по делу № 2-3186/2016), discussed in Part 2.6.1.

8 Judgment of the Frunzensky District Court of St. Petersburg,10 August 2005, No. 1066/05 (Решение Фрунзенского районного суда Санкт-Петербурга от 10 августа 2005 года по делу 1066/05), discussed in Part 2.6.2.

9 Judgment of the Rudnichnyi District Court of Prokopievsk of the Kemerovo Oblast, 4 December 2013, No. 2-2490/2013 (Решение Рудничного районного суда города Прокопьевска Кемеровской области от 4 декабря 2013 года, дело № 2-2490/2013), discussed in Part 2.6.2.

10 Judgment of the justice of the peace of the Ryazan City, 21 November 2007 (Решение мирового судьи города Рязани от 21 ноября 2007 года), discussed in Part 2.5.5.

11 See Part 2.3.4.

12 See Judgment of the Constitutional Court of the Russian Federation, 23 September 2014, above, note 2, Para. 2.1, and as discussed in Part 2.3.3.

13 See the discussion in Part 2.1.

While many of these decisions may invoke shock, it is arguably in the sphere of freedom of expression, association and assembly that the courts have made their most egregious decisions. In addition to upholding "anti-propaganda laws", courts have repeatedly sanctioned refusals by the authorities to hold public assemblies advocating for LGBT rights, including on the basis of these laws. Even a decision by an authority to ban a march advocating for the repeal of the "anti-propaganda law" on the basis that calling for the repeal of the law amounted to propaganda has been upheld.[14] In addition, courts have allowed authorities to curtail the right to freedom of expression on the basis of justifications that, while ostensibly aimed at the protection of children, are solely discriminatory. The closing down of the website of the Children-404 project, which contained statements such as "I am proud to be gay" and "those who dare to reproach me for daring to be different from the majority can go to hell", and the prosecution of its administrator for violating the anti-propaganda law, demonstrate that courts are prepared to label harmless comments as propaganda which must be prohibited in the best interests of the child.[15] In some cases, courts have gone so far as to declare the aims of Russian organisations advocating for LGBT rights as "extremist" and a threat to national security.[16]

On the whole, the picture is one of judicial sanctioning of discrimination against the LGBT community by the Russian authorities. In addition to condoning discrimination, on many occasions courts display their own homophobic attitudes. Such case law contributes to stigmatisation of LGBT in Russian society and legitimises hatred, harassment and violence against them. It is also of note that, while the courts have recognised the right to private life for transgender persons, gender identity has not been explicitly recognised as a protected ground under Article 19 of the Federal Constitution.[17] Despite these bleak findings, the limited positive jurisprudence demonstrates that the courts are sometimes willing to play a role in combatting discrimination against LGBT individuals. In light of this, the next Part turns to recommendations, including on how to strengthen this role.

3.2 Recommendations

In light of the foregoing analysis, this Part offers a series of recommendations to the Russian authorities (including the judiciary), the regional and international community, and to Russian lawyers and activists advocating for LGBT rights. Although the recommendations relate to LGBT rights in Russia, the lessons to be drawn from the Russian context are applicable to the situation in a number of other countries. It is therefore hoped that the recommendations below will

14 Judgment of the Tverskoy District Court of Moscow of 22 January 2014, No. 2-1002/14 (Решение Тверского районного суда Москвы от 22 января 2014 года по делу № 2-1002/14). See also the wider discussion above in Part 2.3.4.

15 See the discussion in Part 2.3.3.2 and Part 2.3.3.3.

16 See the discussion in Part 2.4.3 and Part 2.4.4.

17 See the discussion in Part 2.5.5.

prove useful in combatting discrimination against the LGBT community in both Russia and beyond.

The recommendations cover both the need to interpret Russian legislation in line with international and regional human rights standards, and the need to amend the legislative framework itself. While the latter has not been the focus of the research, it is clear, given the number of discriminatory legal provisions, in the Russian framework must be amended in order to ensure protection from discrimination for LGBT individuals.

The recommendations, which are made are made on the basis of international and regional law on equality and non-discrimination, and on the Declaration of Principles on Equality, are made with the aim of assisting Russia to meet its obligations to respect, protect and fulfil the rights to equality and non-discrimination. Given the scope of the report, the recommendations focus on combatting discrimination against the LGBT community. However, such measures should also be taken in relation to all groups who face discrimination.

3.2.1 Recommendations to the Russian Government

a. Amendment of the National Legal Framework

Russia should review its national laws to remove provisions that discriminate against LGBT individuals. This should include, but not be limited to, repeal of the following laws:

i) All regional laws (in those constituent entities of the Federation where these laws have been retained) banning "propaganda of non-traditional sexual relationships", and any laws providing for administrative liability for such actions;

ii) Section 6.21 of the Code of Administrative Offences, which provides for liability for propaganda of "non-traditional sexual relationships" among minors;

iii) Article 14(1) of the Federal Law "On Basic Guarantees of the Rights of the Child in the Russian Federation" of 24 July 1998 № 124-FZ which requires measures to be taken to protect children from information that promotes "non-traditional sexual relationships";

iv) Article 5(2)(4) of the Federal Law "On protection of children from information harmful to their health and development" of 29 December 2010 № 436-FZ which prohibits dissemination among children of information which promotes "non-traditional sexual relationships"; and

v) Article 127(1)(13) and paragraph 6 of Article 146(1) of the Family Code of the Russian Federation which prohibit adoption or guardianship by persons who have entered into a same-sex union in a foreign state or by single individuals who are nationals of states where same-sex unions are recognised.

In addition to repealing discriminatory provisions, Russia should take steps to ensure that the principles of equality and non-discrimination on the basis of sexual orientation and gender identity and related characteristics are embodied in appropriate legislation. This includes amending legislation which prohibits discrimination, such as the Labour Code, Criminal Code and the Code of Administrative Offences, to explicitly cover discrimination on the basis of sexual orientation and gender identity and related characteristics. In addition, the equality guarantee in Article 19 of the Federal Constitution should be amended to provide explicit protection from discrimination on the basis of sexual orientation, gender identity and related characteristics.

In adopting and implementing laws and policies to promote equality and provide protection from discrimination, Russia should not allow any regression from the level of protection against discrimination that has already been achieved.

b. Comprehensive Anti-Discrimination Law

In addition to amending or repealing specific regional and federal legislation, Russia is urged to develop, following a wide public debate, comprehensive anti-discrimination legislation, which should explicitly prohibit discrimination on the basis of sexual orientation and gender identity in addition to providing a non-exhaustive list of protected characteristics which accords with international best practice.[18] Such legislation should, amongst other things, provide a definition of discrimination which encompasses both direct and indirect discrimination, harassment and failure to make reasonable accommodation,[19] prohibit discrimination in all areas of life regulated by law, require the state to take positive measures to ensure equality,[20] prohibit victimisation of persons alleging discrimination[21] and also provide for procedural safeguards, such as allowing for a reversal of the burden of proof.[22]

c. Implementation and Enforcement of the Existing Legal Framework

Those who have the responsibility for implementing and enforcing national laws, including the courts, should ensure that they do so in accordance with the standards established by international and regional law on the rights to equality and non-discrimination. This is of particular importance in the absence of amendments being made to the current legal framework as set out in recommendations a and b. In particular, they should:

i) Ensure that LGBT individuals are protected by existing laws which prohibit discrimination, including the constitutional equality clause,

18 *Declaration of Principles on Equality*, Equal Rights Trust, London, Principle 5.

19 *Ibid.*, Principle 5.

20 *Ibid.*, Principle 3.

21 *Ibid.*, Principle 19.

22 *Ibid.*, Principle 21.

through interpretation of these laws to encompass sexual orientation, gender identity and related characteristics. This includes recognising that LGBT persons are encompassed in notions of a "social group", "other circumstance", and "other factors";

ii) Interpret existing laws which provide protection from discrimination to encompass discrimination on the basis of perception and association to provide protection to all those who are perceived to be LGBT or who are friends, family or otherwise associated with the LGBT community who may also face discrimination;

iii) Investigate homophobic motivations behind violence and speech to ensure that hate crimes and hate speech against the LGBT community are prosecuted and sentenced as such. Facts that indicate that the perpetrator knew or perceived someone was a member of the LGBT community, should trigger an investigation of the motivation behind the crime or speech;

iv) Interpret existing laws prohibiting discrimination to encompass both direct and indirect discrimination, recognising that neutral laws, policies and practices may nonetheless put LGBT individuals at a particular disadvantage;

v) Interpret the Federal Law "On Civil Status Acts" as enabling a person to change their gender on the basis of self-identification, without having to undergo any medical intervention;

vi) Interpret justifications for a difference in treatment strictly, recognising that justifications cannot be based on the views of the majority or on tradition alone. Justifications for different treatment cannot be based on discriminatory stereotypes, such as the erroneous belief that discussion of same sex relationships is damaging to child development. Justifications must seek to achieve a legitimate aim using means which are both necessary and proportionate. Thus, measures put in place which lead to a difference in treatment must also be strictly necessary to achieve the aim for which they are put in place, and measures which are not clearly and directly linked to the aim they propose to achieve or which have a disproportionate impact on the person who is disadvantaged should not be considered as justification for a difference in treatment. In addition, the least intrusive measures which may achieve a legitimate aim must be preferred;

vii) Restrictions on freedom of expression, association and assembly must only be put in place where they seek to achieve a legitimate aim and are strictly necessary and proportionate. Restrictions should never be considered necessary when the link between the restriction and the aim it seeks to achieve is unproven. Restrictions on these rights should be considered the absolute exception, rather than the norm. Restrictions which are placed only on the LGBT community, or which disadvantage

the LGBT community, should be considered *prima facie* discriminatory and proposed justification should be scrutinised with particular care, in line with the aforementioned principles; and

viii) In civil matters, when persons who allege that they have been subject to discrimination establish facts from which it may be presumed that there has been discrimination (a *prima facie* case), the courts and authorities should then require the person against whom the allegation is made to prove that no discrimination has taken place.

d. Judicial Training

Russian authorities responsible for professional training of the judiciary, including the Russian State University of Justice, should ensure adequate training of judges on international and regional human rights standards related to sexual orientation and gender identity. Such training must promote, at the very minimum, the standards outlined above under recommendation c.

e. Adoption of other Measures to Combat Discrimination and Inequality

In addition to amending its legal framework, Russia should adopt a wide range of measures to prohibit and eliminate discrimination against the LGBT community, including:

i) Ensuring the independence of the judiciary through implementing the recommendations of the Special Rapporteur on the independence of judges and lawyers in regards to Russia;[23]

ii) Ensuring that LGBT rights issues are proactively included in the mandate of work of the regional and the federal commissioners for human rights (ombudspersons) and ensuring that these bodies are independent and able to carry out their work without interference. In particular, the annual report of the federal ombudsman should include a special section analysing the human rights issues faced by the LGBT community in Russia;

iii) Providing training to ombudspersons, the police, prosecutors, and senior public officials on preventing discrimination and discriminatory practices against the LGBT community;

iv) Implementing measures to facilitate reporting by LGBT individuals of discrimination and crimes against them in order to overcome their reluctance to disclose sensitive information or other personal data;

v) Raising public awareness about equality and ensuring that all education institutions, including private institutions, provide suitable education on

23 Human Rights Council, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, 30 April 2014, UN Doc. A/HRC/26/32/Add.1.

equality as a fundamental right, with a view to achieving the elimination of discriminatory attitudes or behaviours which are related to the idea of the inferiority or superiority of any sexual orientation or gender identity or gender expression. This should include the education of children about sexual orientation and gender identity. Children should also have the right to access support projects for LGBT children, including through informal (peer-to-peer) networks; and

vi) Extending a standing invitation to the special procedures of the human rights council to undertake country visits, including the Special Rapporteur on the rights to freedom of peaceful assembly and of association (who has made a request to visit) and the newly appointed Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity.

In implementing the above measures, Russia should ensure that sufficient financial resources are allocated, including to the judiciary and to those bodies whose role includes preventing discrimination.

3.2.2 Recommendations to the Regional and International Community

Those bodies tasked with implementing and enforcing international and regional law and policy on the rights to equality and non-discrimination, including the special procedures, treaty bodies and agencies of the United Nations, the United Nations High Commissioner for Human Rights, the Committee of Ministers of the Council of Europe and the European Court of Human Rights should take a firmer stance against discrimination against the LGBT community. In particular, these bodies should:

a) Explicitly recognise that affording the LGBT community "different but equal" treatment in respect of private life and family relationships, does not accord with the rights to equality and non-discrimination. For example, explicitly recognise that any legal regime that is available for the recognition of a different-sex relationship should also be available for same-sex relationships – including civil marriage;

b) Explicitly recognise that a transgender individual's right to a private life obliges states to recognise their gender without requiring them to undergo medical interventions. Further, explicitly recognise that requiring a person to undergo surgery in order to have their gender recognised amounts to inhuman treatment;

c) Explicitly recognise that where violence or any other criminal offence against a person occurs because of their sexual orientation or gender identity, this must be recognised as an aggravating factor when assessing the severity of the offence under law, and that incitement to violence on the basis of sexual orientation or gender identity must be prohibited by law;

d) Take a firm stance against justifications of discrimination against the LGBT community based on traditional values or religious belief, explicitly recognising that the views of the majority can never amount to a justification for discrimination against a minority;

e) Ensure that their own staff have sufficient training and knowledge on the application of international and regional human rights law and best practice in the context of sexual orientation and gender identity to engage in a dialogue with Russia on LGBT issues;

f) Provide their full support to the newly appointed Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, and encourage Russia to extend an invitation to the mandate holder and other special procedures to undertake a country visit to Russia;

g) Call on Russia to review and repeal discriminatory laws and encourage Russia to implement and enforce a comprehensive anti-discrimination law;

h) Provide support to the Russian judiciary in the execution of their role through judicial training on international and regional human rights law and best practice;

i) Engage in professional training of lawyers on anti-discrimination standards and raising awareness of LGBT rights in Russia;

j) Facilitate and encourage efforts by Russian civil society to provide evidence and submissions on LGBT rights in international and regional forums; and

k) Mainstream human rights of LGBT in their own dialogues and also in their dialogue and cooperation with the Russian authorities.

3.2.3 Recommendations to Russian Activists and Lawyers

Russian activists and lawyers are encouraged to continue in their efforts to combat discrimination against the LGBT community, including through the following steps:

a) Ensuring that violations of the prohibitions of discrimination contained in Russian law are explicitly argued before courts, including with supporting regional and international human rights law;

b) Referring courts to the decisions of the Constitutional Court which recognise that sexual orientation is protected by existing laws prohibiting discrimination, including Article 19 of the Federal Constitution;

c) Ensuring that courts are provided with medical, psychological, educational or other evidence to demonstrate the fallacy of arguments that discriminatory laws or practices are necessary in order to ensure public safety, the protection of children or on the protection of public or religious morals;

d) Continuing to take cases to the European Court of Human Rights, the United Nations Human Rights Committee and other relevant treaty bodies where Russian courts have not delivered justice;

e) Working together with each other, and with other activists and lawyers involved in combat discrimination more broadly, to identify gaps and weaknesses in jurisprudence where cases may be taken in order to develop positive jurisprudence;

f) Supporting LGBT individuals to report crimes and discrimination against them, and to take cases to court, including by seeking to ensure that they receive the psycho-social support that they may require to do so;

g) Supporting and engaging psychologists, lawyers, medical and other professionals, as well as academics in a wide debate on the human rights standards in the field of sexual orientation and gender identity. Such dialogue should foster an understanding of the detrimental impact of discriminatory legislation and policies on the human rights and wellbeing of LGBT individuals in Russia;

h) Monitoring and assessing the implementation and enforcement of discriminatory legislation by the authorities and the judiciary and reporting problems to relevant government actors, including the ombudspersons, and in relevant international and regional forums; and

i) Continuing to advocate for the repeal of discriminatory laws and the need for a comprehensive anti-discrimination law.

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The Equal Rights Trust is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

"Great people were gay too. Gays can also become great. Homosexuality is normal." In May 2012, a court in Arkhangelsk, Russia, convicted activists holding a banner with these words of breaking a newly-enacted regional law prohibiting the "propaganda of homosexuality". Later that year, the Supreme Court of Russia, while quoting the European Court of Human Rights' criticism of such laws, nevertheless upheld the decision, concluding that the Arkhangelsk law did not violate the right to freedom of expression.

This is just one of the many cases highlighted in this report where the Russian courts have sanctioned discrimination against lesbian, gay, bisexual and transgender (LGBT) persons, in the face of established international law.

This report assesses how the courts in Russia have responded in cases involving LGBT individuals, ranging from prosecution of hate crime to limitation of freedom of expression, from protection of family rights to prohibition of discrimination at work. An analysis of two decades of jurisprudence, the report finds that judicial practice is marred with inconsistencies. While there has been some positive judicial practice, the courts have repeatedly sanctioned discriminatory laws and practices. Judicial reasoning is frequently deeply flawed, and often based on homophobic and transphobic stereotypes.

The report presents stark conclusions, forcing those both in Russia and elsewhere to ask whether the Russian courts have become complicit in discrimination against LGBT persons.

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