Department for the Execution
of Judgments of the ECtHR
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Council of Europe
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March 25th 2013.

Communication to the Committee of Ministers of the Council of Europe concerning *Alekseyev v. Russia* (application no. 4916/07)

Dear Sir!

In view of the decisions made by the Committee of Ministers of the Council of Europe at its 1144th, 1150th, and 1164th DH meetings, and in accordance with Rule 9(2) of the *Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements*, the Family and Demography Foundation and the Interregional Public Organization "For Family Rights" are pleased to submit to the Committee this Communication concerning the implementation of the ECtHR judgement on *Alekseyev v. Russia* (application no. 4916/07).

The Family and Demography Foundation and the Interregional Public Organization "For Family Rights" are Russian non-governmental organizations working to support the family, the "natural and fundamental group unit of society" entitled to "protection by society and the State" (Article 16(3) of UDHR), which includes protecting the relevant fundamental human rights. Both are independent NGOs and receive no public funding.

We hope that in its deliberations on the execution of the aforementioned judgement the Committee will find this Communication useful.

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Content

Summary

This Communication deals primarily with the issue of the compatibility of laws on prohibiting propaganda of homosexuality to minors adopted in different regions of the Russian Federation with the ECtHR judgement on *Alekseyev v. Russia* (application no. 4916/07), as raised by the Committee of the Ministers of the Council of Europe supervising the execution of the Court's judgements. It demonstrates that the laws under consideration are fully compatible with both the judgement and the norms of international human rights law.

The Communication shows that these laws pursue legitimate aims (protecting the physical and psychological well-being of children, protecting the family "in the traditional sense", as part of maintaining the public order (*ordre public*) and protecting the public morals), are free from legal uncertainty, and are proportionate to said aims. This analysis takes into account interpretations given to the laws in question by superior courts of the Russian Federation (the Constitutional Court and the Supreme Court) in their judgements.

The Communication also expresses concern as regards judgements made by ECtHR in a number of cases, including *Alekseyev v. Russia.* Its authors argue that in some of its judgements ECtHR has disregarded the need to protect the social morals, as well as the rights and interests of children. Moreover, the Court unreasonably regarded recent European trends and its own case-law as constituting a binding "European consensus", thus undermining the sovereignty of ECHR signatories, with some of its judgements being explicitly ideological in their nature. This may lead ECtHR to passing untenable and *ultra vires* decisions, which poses a grave threat to the authority, effectiveness, and sustainability or the European human rights framework.

I. Introduction

1. Essence of ECtHR's judgement on Alekseyev v. Russia (application no. 4916/07)

In the *Alekseev v Russia* (application no. 4916/07) case a claimant, a Russian national, appealed to the European Court of Human Rights against Moscow authorities having banned a number of so-called "Gay Pride marches". The Court in its judgement of 21 October 2010 interpreted this as a violation of the claimant's rights as provided under Article 11 of the European Convention on Human Rights, and Articles 13 and 14 in reference to Article 11.

2. Committee of Ministers' concern and its inquiry regarding Russian laws on prohibiting propaganda of homosexuality to minors

In accordance with Article 46 of the Convention, as amended by Protocol No. 11, the Committee of Ministers supervises the execution of judgments of the European Court of Human Rights.

Individual and general measures undertaken by the Russian Federation to implement the Court's judgement were examined at the 1144th, 1150th, and 1164th DH meetings on, respectively, 6 June 2012, 26 September 2012, and 5-7 March 2013.

Apart from questions pertaining to the implementation of the judgement itself, the Committee has also made a number of comments on the "regional laws prohibiting propaganda of homosexuality to minors".

Paragraph 5 of the Decisions made at the 1144th meeting states that the Committee "expressed concerns with regard to different laws on prohibiting propaganda of homosexuality to minors adopted in different regions of the Russian Federation and invited the Russian authorities to clarify how these laws could be compatible with the Court's conclusions made in the present judgment".

In Paragraph 3 of the Decisions made at the 1150th meeting the Committee has "reiterated in this context their concerns as regards the use of regional laws prohibiting propaganda of homosexuality to minors to refuse events similar to those concerned by the judgment".

This Communication is aimed at clarifying some of the issues raised with these regional laws and with ECtHR's judgement on *Alekseyev v. Russia*.

3. Overview of laws prohibiting propaganda of homosexuality to minors

Laws prohibiting propaganda of homosexuality to minors were first passed in the Russian Federation by the Ryazan (2006)[1] and Archangel (2011)[2] regional legislatures, followed by the Kostroma[3], St.

[1] Закон Рязанской области от 3 апреля 2006 года N 41-ОЗ "О защите нравственности детей в Рязанской области" (Ryazan Regional Law N 41-OZ *"On the protection of morals of children in the Ryazan region"* passed by April 3rd 2006).

[2] Закон Архангельской области от 30.09.2011 N 336-24-ОЗ "О внесении изменений и дополнения в областной закон "Об отдельных мерах по защите нравственности и здоровья детей в Архангельской области" (Archangelsk Regional Law N 226-24-OZ *"On specific means of protection of health and morals of children in the Archangelsk region"* passed by September 30th 2011).

Petersburg[4], Novosibirsk[5], Magadan[6], Samara[7], Republic of Bashkortostan[8], Krasnodar Territory[9], and Kaliningrad[10] regional legislatures (2013)[11]. Similar laws are currently under consideration in other Russian regions. A draft federal bill[12] of similar nature had been introduced by the Novosibirsk regional legislature in the Russian State Duma and was adopted on its first reading on 25 January 2013.

This legislation is aimed at protecting the children from information posing threat to their health and development. It is being introduced in accordance with the federal laws aimed at protecting the rights and

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[3] Закон Костромской области от 15 февраля 2012 г. N 193-5-ЗКО «О внесении изменений в Закон Костромской области "О гарантиях прав ребенка в Костромской области" и Кодекс Костромской области об административных правонарушениях» (Kostroma Regional Law N 193-5-ZKO *"On amending the Kostroma regional law "On safeguards of the rights of the child in the Kostroma region"* passed by February 15th 2012 and *the Kostroma regional Administrative Offences Code*).

[4] Закон Санкт-Петербурга от 07.03.2012 N 108-18 «О внесении изменений в Закон Санкт-Петербурга "Об административных правонарушениях в Санкт-Петербурге"» (St. Petersburg Law N 108-18 *"On amending the St. Petersburg law "On administrative offences in St. Petersburg"* passed by March 7th 2012).

[5] Закон Новосибирской области от 14.06.2012 N 226-ОЗ "О внесении изменений в отдельные законы Новосибирской области" (*Novosibirsk Regional Law N 226-OZ "On amending specific laws of the Novosibirsk region"* passed by June 14th 2012).

[6] Закон Магаданской области от 9 июня 2012 г. N 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" (Magadan Regional Law N 1507-OZ *"On amending specific Magadan regional laws as regards the protection of minors from factors affecting their physical, intellectual, psychological, spiritual, and moral developlent"* passed by June 9th 2012).

[7] Закон Самарской области от 10 июля 2012 г. N 75-ГД "О внесении изменений в Закон Самарской области "Об административных правонарушениях на территории Самарской области" (Samara Regional Law N 75-GD *"On amending the Samara regional law "On administrative offences in the Samara region"* passed by July 10th 2012).

[8] Закон Республики Башкортостан от 23 июля 2012 года №581-з "О внесении изменения в Закон Республики Башкортостан «Об основных гарантиях прав ребенка в Республике Башкортостан» (Republic of Bashkortostan Law N 581-z *"On amending the Republic of Bashkortostan law "On fundamental safeguards of the rights of the child in the Republic of Bashkortostan"* passed by July 23rd 2012).

[9] Закон Краснодарского края от 03.07.2012 N 2535-КЗ "О внесении изменений в отдельные законодательные акты Краснодарского края в части усиления защиты здоровья и духовно-нравственного развития детей" (Krasnodar Territory Law N 2535-KZ *"On amending specific legislative acts of the Krasnodar Territory as regards the stepping up of the protection of health and the moral and spiritual development of children"* passed by July 3rd 2012).

[10] Закон Калининградской области от 30 января 2013 г. N 199 "О внесении изменений и дополнений в Закон Калининградской области "О защите населения Калининградской области от информационной продукции, наносящей вред духовно-нравственному развитию" (Kaliningrad Regional Law N 199 *"On amending and adding to the Kaliningrad regional law "On the protection of the population of the Kaliningrad region from information harmful to moral and spiritual development"* passed by January 30th 2013).

[11] As of 30 January 2013.

[12] Законопроект № 44554-6 «О внесении изменений в кодекс Российской Федерации об административных правонарушениях» (Draft Bill N 44554-6 *"On amending the Administrative Offences Code of the Russian Federation"*) (Draft Bill passport: http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=44554-6&02).

interests of children, specifically Article 14(1) ("Protecting the child from information threatening his health, moral and spiritual growth, its promotion and propaganda") of the 1998 Federal Law *On Fundamental Safeguards of the Rights of the Child* (no. 124-FZ of 24 June 1998) which charges Russian authorities with taking "action to protect the child from information threatening his health, moral and spiritual growth, its promotion and propaganda". It should be noted that among types of information threatening health and/or development of children Article 5(4) of the law lists information undermining family values.

Therefore, regional laws prohibiting propaganda of homosexuality to minors were introduced in compliance with the federal law and in explication of Article 38(1) of the Constitution of the Russian Federation, which states that in Russia "[m]aternity and childhood, and the family shall be protected by the State".

As a result, restrictions introduced under these laws are consistent with the law of the Russian Federation.

4. Examination of laws prohibiting propaganda of homosexuality to minors by superior courts of the Russian Federation

Superior courts of the Russian Federation have on more than one occasion examined the laws in question. For example, in 2010 the Constitutional Court considered[13] an appeal against the relevant Ryazan regional law, finding it neither discriminatory nor in any way violating the constitutional rights and freedoms of the citizens.

The Supreme Court of the Russian Federation has repeatedly reached the same conclusion. It examined regional laws prohibiting propaganda of homosexuality to minors on three occasions[14], and its opinions are reflected in its judgements on cases №1-АПГ12-11 (1-APG12-11, 15 August 2012)[15] (concerning the Archangel regional law), №78-АПГ12-16 (78-APG12-16, 3 October 2012)[16] (concerning the St. Petersburg regional law), and №87-АПГ12-2 (87-APG12-2, 07 November 2012)[17] (concerning the Kostroma regional law). In all of these cases the Court found that implementing said laws did not violate the rights and freedoms of the citizens.

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[13] Определение Конституционного Суда РФ от 19.01.2010 N 151-О-О "Об отказе в принятии к рассмотрению жалобы граждан Алексеева Николая Александровича, Баева Николая Викторовича и Федотовой Ирины Борисовны на нарушение их конституционных прав статьей 4 Закона Рязанской области "О защите нравственности детей в Рязанской области" и статьей 3.10 Закона Рязанской области "Об административных правонарушениях" (Constitutional Court of the Russian Federation Judgment N 151-O-O of January 19th 2010 *On the refusal to take cognizance of a complaint by Alekseyev et al. about an alleged violation of their constitutional rights by Article 4 of the Ryazan regional law "On administrative offences"*).

[14] As of 30 January 2013.

[15] http://www.vsrf.ru/stor_pdf.php?id=501100 (retrieved 30 January 2013).

[16] http://www.vsrf.ru/stor_pdf.php?id=508846 (retrieved 30 January 2013).

[17] http://www.vsrf.ru/stor_pdf.php?id=512110 (retrieved 30 January 2013).

II. Russian laws prohibiting propaganda of homosexuality to minors do not contradict ECtHR's judgement on *Alekseyev v. Russia*

It should be noted that there clearly is no incompatibility between ECtHR's judgement on *Alekseyev v. Russia* and Russian regional laws prohibiting propaganda of homosexuality to minors read in the light of the previously mentioned interpretation given in the superior courts' judgements.

Specifically, ECtHR in its judgement (para. 86) thinks banning Gay Pride marches is unreasonable, as "[t]here is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or 'vulnerable adults'".

The Court, therefore, completely overlooks the issue of purposeful propaganda of homosexualism targeted at children, which clearly exceeds mere mention of homosexuality, or open public debate about sexual minorities' social status, whereas the laws in question are specifically aimed against such propaganda. The nature and extent of this prohibition were made clear in superior courts' judgements on the relevant laws.

Namely, the Supreme Court in its judgement of 15 August 2012, having given the legal definition of *propaganda*, specifies that:

> "[S]ince not any public action can be regarded as such [propaganda], prohibiting propaganda of homosexuality does not mean preventing the citizens from disseminating information on the subject of homosexuality of general or neutral character, or holding duly authorised public events, including open public debates about sexual minorities' social status, without imposing the homosexual lifestyle on minors who, due to their age, are not fit to critically evaluate such information."

Similar arguments are set forth in the Court's judgements of 3 October 2012 and 7 November 2012. It is, therefore, clear that between the ECtHR's judgement on *Alekseyev v. Russia* and the norms contained in the laws in question there is no incompatibility whatsoever.

This was specifically emphasized in the Supreme Court of the Russian Federation's judgement of 15 August 2012:

> "The contested norms contain no prohibition of actions ruled as permissible by ECtHR in its judgement on Alekseyev v. Russia, namely, of the mere mention of homosexuality or open public debates about sexual minorities' social status, of unbiased and open public discussuion of these issues".

III. The laws were enacted to address actual social needs

That the right to freedom of expression, freedom to receive and impart information and ideas provided under Article 10(1) of ECHR and other international legal instruments are somewhat restricted by the laws in questions is not called into question.

However, by their nature these rights are not unrestricted. Article 10(2) of the said Convention rightly notes:

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

The Convention, therefore, acknowledges that in a democratic society the exercise of said freedoms carries with it certain duties and responsibilities, and can be subject to certain legal restrictions necessary for the society to achieve specific legitimate aims.

The existence of the legitimate aims listed in the Convention, and the fact that the laws in question pursue these aims, makes it impossible to call them unreasonable or discriminatory, or the restrictions introduced by them disproportinate. We are of the opinion that to pursue these aims is necessary in a democratic society.

1. Protecting the health of the children

Protecting the children from information and actions threatening their health and development, the laws in question, among other things, pursue as its aim *the protection of health*.

a. Homosexual lifestyle is linked to increased health risks

Extensive scientific data reliably links homosexual lifestyle to increased risks to one's physical and mental health, even if contemporary specialists generally do not regard the behaviour itself as a pathological condition.

In particular, men who have sex with men (MSM) are known to be significantly more likely to get HIV/AIDS than heterosexual males. In fact, according to 2012 official US statistics, while MSM constitute less than 4% of male Americans, they form 52% of all HIV infected persons, with 62% of all new cases of HIV occurring to the same category.[18] In other countries the situation is similar. [19] In Russia

[18] CDC Fact Sheet "HIV and AIDS among Gay and Bisexual Men", June 2012, http://www.cdc.gov/nchhstp/newsroom/docs/2012/CDC-MSM-0612-508.pdf (retrieved 30 January 2013)

[19] Baral S, Sifakis F, Cleghorn F, Beyrer C, 2007 Elevated Risk for HIV Infection among Men Who Have Sex with Men in Low- and Middle-Income Countries 2000–2006: A Systematic Review. PLoS Med 4(12): e339

in 2011 cases of HIV diagnosis among MSM were 15.2 times above the national average (3826.5 per 100 000). [20]

MSM are more likely to get infected with sexually transmitted diseases[21] such as syphilis and gonorrhoea[22], are at risk of contracting hepatitis A[23] and hepatitis B, as well as anal and rectal cancer. [24]

Other serious menal health conditions such as suicidal tendencies, depressions, anxiety disorders, and substance abuse are also significantly more present among practicing homosexuals. [25]

Scientific data, therefore, proves that, compared with the heterosexual lifestyle, the homosexual one is linked to significantly higher risks to one's physical and mental health.

Moreover, a number of authors go as far as describing propaganda of homosexuality to minors, with some justification, as a form of "cruel and degrading treatment of children".[26]

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[20] Информационный бюллетень «ВИЧ-инфекция» № 36 (2012), http://www.hivrussia.ru/files/bul_36.pdf (retrieved 30 January 2013).

[21] Fluker, J. L. (1976). A 10-year study of homosexually transmitted infection. British Journal of Venereal Diseases, 55, 155–160; Fluker, J. L., & Cross, C. (1981). Homosexuality and sexually transmitted diseases. British Journal of Hospital Medicine, 26, 265–267; Laumann, E. O., Gagnon, J. H., Michael, R. T., & Michaels, S. (1994). The social organization of sexuality. Chicago: University of Chicago Press; Handsfield, H. H. (1981). Sexually transmitted diseases in homosexual men. American Journal of Public Health, 71, 989–990.

[22] See, *inter alia*, 2010 Sexually Transmitted Diseases Surveillance, http://www.cdc.gov/std/stats10/gonorrhea.htm (retrieved 10 January 2012); Ibid., http://www.cdc.gov/std/stats10/syphilis.htm (retrieved 10 January 2012); J. Vincelette et al., "Predicators of Chlamydial Infection and Gonorrhea among Patients Seen by Private Practitioners," Canadian Medical Association Journal 144 (1995): 713–721; Gonorrhea Among Men Who Have Sex with Men -- Selected Sexually Transmitted Diseases Clinics, 1993-1996, MMWR Weekly, September 26, 1997 / 46(38), 889-892, etc.

[23] "Health Professionals Should not Miss an Opportunity to Vaccinate Men Who Have Sex with Men against hepatitis A and hepatitis B," Centers for Disease Control National Center for Infectious Diseases (March 3, 2003)

[24] Joel Palefsky, Anal HPV infection, AIN and anal cancer, Presentation at ACIP meetingm, February 24, 2011, http://www.cdc.gov/vaccines/recs/acip/downloads/mtg-slides-feb11/11-3-hpv-infection.pdf (retrieved 10 January 2012); CDC, HPV and Men - Fact Sheet, http://www.cdc.gov/std/hpv/STDFact-HPV-and-men.htm (retrieved 10 January 2012).

[25] Mental disorders, suicide, and deliberate self harm in lesbian, gay and bisexual people: a systematic review, National Institute for Mental Health in England, 2008: http://www.nmhdu.org.uk/silo/files/mental-disorders-suicide-and-deliberate-selfharm-in-lesbian-gay-and-bisexual-people.pdf (retrieved 10 January 2012); see also a review in James E. Phelan, Neil Whitehead, Philip M. Sutton, "What Research Shows: NARTH's Response to the APA Claims on Homosexuality," Journal of Human Sexuality Vol. 1 (National Association for Research and Therapy of Homosexuality, 2009), p. 57-60, 68-72, 75-80; See also King, M., & McKeown, E. (2003). Mental health and social wellbeing of gay men, lesbians, and bisexuals in England and Wales. London: Mind (National Association for Mental Health); Joanne Hall, "Lesbians Recovering from Alcoholic Problems: An Ethnographic Study of Health Care Expectations," Nursing Research 43 (1994): 238–244; Theo G.M. Sandforte et al., "Same-Sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence," Archives of General Psychiatry 58, 10 (2001): 85-91; de Graaf, R., Sandfort, T.G.M., & ten Have, M. (2006). Suicidality and sexual orientation: Differences between men and women in a general population-based sample from the Netherlands. Archives of Sexual Behavior, 35, 253-262; etc.

b. Laws in question cannot be considered discriminatory owing to the objective circumstances of homosexual lifestyle

A difference in treatment, as ECtHR has repeatedly noted, "is discriminatory if it has no objective and reasonable justification" (cf. para. 37 of its judgement on *Karner v. Austria*, application no. 40016/98, 24 July 2003).

The objective data linking homosexual behaviour to heightened physical and mental health risks is, in our view, sufficient to show that the different way in which the laws in question treat the issue of the minors being exposed to propaganda of homosexuality specifically (as contrasted with the heterosexual lifestyle) has entirely objective and reasonable justifications. Such difference, therefore, must not be considered discriminatory under Article 14 of ECHR.

2. Protecting the family

As follows from the judgement by the Constitutional Court of the Russian Federation cited previously, among the aims pursued by the laws in question are the protection of the family as a social institution, its values and the role it plays in the upbringing and development of children.

The first paragraph of Item 3 of the opening part of its judgement states:

> "The Constitution of the Russian Federation, as, according to its preamble, adopted by its multinational people proceeding from the responsibility for their Fatherland before present and future generations, proclaims that maternity and childhood, and the family shall be protected by the State (Article 38(1))".

Expounding the meaning of this provision in the second paragraph, the Court indicates:

> "[I]t follow from this that it is the family, maternity and childhood in their traditional ancestral meaning that constitute the values securing the continuous succession of generations and enabling

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[26] See *Понкин И.В., Кузнецов М.Н., Михалева Н.А.* О праве на критическую оценку гомосексуализма и о законных ограничениях навязывания гомосексуализма. Доклад. (pages 26-27) http://www.state-religion.ru/files/Doc.pdf (retrieved 10 March 2013):
"Propaganda of homosexuality among children is a form of cruel and degrading treatment of children violating norms of international law and the law of the Russian Federation, including Article 5 of UDHR proclaiming that no one should be subjected degrading treatment, Article 7 of ICCPR, Article 3 or ECHR, UNCRC (20 November 1989), and SPCSESA (25 October 2007), and contradicting the principles set forth in *Resolution 1530 (2007) on child victims: stamping out all forms of violence, exploitation and abuse* (23 January 2007), *Recommendation 1371 (1998) on abuse and neglect of children* (23 April 1998), *Recommendation 1065 (1987) on the traffic in children and other forms of child exploitation* (06 October 1987), *Resolution 1307 (2002) on sexual exploitation of children: zero tolerance* (27 September 2002), *Resolution 1099 (1996) on the sexual exploitation of children* (25 September 1996), and *Recommendation 874 (1979) on a European Charter on the Rights of the Child* (04 October 1979) of the Parliamentary Assembly of Council of Europe, as well as *Recommendation R (91) 11 to member states concerning sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults* (09 September 1991), and *Recommendation Rec(2001)16 to member states on the protection of children against sexual exploitation* (31 October 2001) by the Committee of Ministers of the Council of Europe"; see also the French version of the report: http://moral-law.ru/library/doc-fr.pdf (retrieved 10 March 2013).

the preservation and development of our multinational people, and that, accordingly, they require protection by the State".

The Constitutional Court, therefore, points out that these laws are aimed at protecting the family *in its traditional meaning.* Moreover, in the last paragraph of the same Item the Court explains that they are to prohibit deliberate attempts to make children form "perverted notions of traditional and non-traditional conjugal relations being socially equivalent". In other words, one of the aims of this law is to protect the family in its child care and upbringing aspect.

a. The family as the "natural and fundamental group unit of society" is entitled to protection

In its Preamble, the *Convention for the Protection of Human Rights and Fundamental Freedoms* states that the states parties to it had signed it "[c]onsidering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948" and "[b]eing resolved . . . to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration".

In view of this fact, any interpretation of the Convention must be made with UDHR provisions in mind.

Article 16(3) of UDHR states:

> "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

This provision has been cited in numerous binding norms of international human rights law. In particular, it is quoted verbatim in Article 23(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

That the family is the "natural and fundamental group unit of society" is likewise acknowledged in Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and in the Preamble to the UN *Convention on the Rights of Persons with Disabilities*. The Preamble to the UN *Convention on the Rights of the Child* (CRC) also states its conviction that the family is the "fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children".

Any interpretation of the norms of international human rights law, including ECHR, must therefore proceed from the notion that *the family is the natural and fundamental group unit of society and is entitled to protection by society and the State*, being a principle universally recognized in international law.

b. In international human rights law the term 'family' means a marital union between a man and a woman

The term *family* is clearly and unequivocally associated with a marital union between a man and a woman in both UDHR and ICCPR, which form its meaning on the basis of it being *the natural and fundamental group unit of society and is entitled to protection by society and the State*:

> "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family" (Article 16(1) of UDHR).

"The right of men and women of marriageable age to marry and to found a family shall be recognized" (Article 23(2) of ICCPR).

It is clear from these provisions that the possibility of "founding a family" is linked with a marriage of a man and a woman. The family is entitled to special protection because it is the natural environment for the birth and upbringing of children. Accordingly, Article 10(1) of ICESCR requires that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children". Special protection by society and the state enjoyed by the family results, first and foremost, from the paramount importance of its procreative function, which necessitates the mutual complementarity of the spouses' sexes and a degree of stability of the marital union itself.

It is entirely obvious that it is not because of the mutual sympathy or intimate relationships between the spouses *per se* that the dedicated provisions of these international instruments entitle the family to special protection (such private feelings and relationships are, after all, already subject to protection from arbitrary interference (cf. Article 12 of UDHR)), but by virtue of the special value the society places on the family as the primary natural establishment for its reproduction. International norms protect the family as the natural origin of mankind, of each and every society, whose "preservation and development", as the Constitutional Court rightly notes, it "enables". Only a stable union of a man and a woman can fulfil this role.

The fact that, dealing with the right to marry and found a family, all major international legal instruments stress the mutual complementarity of men and women merits particular attention. It should be noted that nearly all of the rights, both positive and negative, proclaimed by UDHR were presented as individual rights, beginning with either "everyone has the right to" or "no one shall be subjected to". Similar wording is found in nearly all human rights provided for in ICCPR and ECHR. However, speaking of the right to marry and found a family, to stress the special character of this right all of these international legal documents employ an entirely different formula: "[m]en and women . . . have the right to marry and to found a family" (Article 16(1) of UDHR), "[t]he right of men and women . . . to marry and to found a family shall be recognized" (Article 23(2) of ICCPR), "[m]en and women . . . have the right to marry and to found a family" (Article 12 of ECHR). Hence, the right to marry and found a family is by its nature not individual, belonging not to any one person but, through the mutual complementarity of the sexes, specifically to *men and women*. This explicit indication, along with UDHR and other international instruments' references to the "natural" character of the family, would have made no sense were their use of the term *family* taken to mean anything other than the marital union of a man and a woman.

This shows that the only type of union acknowledged by universally recognized norms of international law, including ECHR, as a family is the marital union of a man and a woman.

c. It is necessary and legitimate for a democratic society to restrict individual rights to protect the family

It has already been mentioned that Article 10(2) of the *European Convention on Human Rights and Fundamental Freedoms* expressly acknowledges that right to freedom of expression and freedom to receive and impart information and ideas carry with them "duties and responsibilities, may be subject to .

. . formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society".

Such rights as the right to freedom of expression, freedom to impart information, and the right to freedom of association can under ICCPR Articles 19 (3) (b) and 21 be lawfully restricted, in particular, "[f]or the protection of . . . public order" (*ordre public*)

Although Article 10 of the Convention does not explicitly list "public order" (*ordre public*) among the aims pursuit of which justifies limiting the rights proved by it, we must acknowledge that the possibility of such limitation is either implicitly contained in the Convention or, at the very least, cannot be seen as contrary to it. UDHR, which it was largely based upon, in its Article 29(2) indicates that the rights proclaimed within it, the right to freedom of expression (Article 19) and freedom of association (Article 20) included, can be subject to lawful limitation "for the purpose of . . . meeting the just requirements of . . . public order". Moreover, ICCPR, adopted in 1966, that is, after UDHR (1950), and sharing almost all of its states parties, contains explicit references to the possibility of such limitation. According to Paragraphs 3 and 4 of Article 30 and Paragraph 3 (c) of Article 31 of the 1969 Vienna Convention on the Law of Treaties this means that the relevant ECHR provisions must either be interpreted with ICCPR in mind, or not applied insofar as they contradict ICCPR.

This makes subjecting the right to freedom of expression, as provided under ECHR Article 10, to limitation for the protection of public order (*ordre public*) compatible with ECHR provisions and therefore cannot be regarded as being in breach thereof.

Although binding international treaties do not give a unified definition of *public order*, it is nearly universally acknowledged that the term encompasses fundamental principles enabling the continuous existence of a society. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (U.N. Doc. E/CN.4/1985/4, Annex (1985)), for example, specifies:

> "The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded." (Principle 22)

Principle 66 of the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* suggests a similar interpretation.

According to previously cited universally recognized international norms, the family based on a marital union of a man and a woman is the "natural and fundamental group unit of society", which means that it is one of the universally acknowledged fundamental principles underpinning any society, including a democratic one. Therefore the protection of the family must certainly be viewed as an integral part of the protection of the public order *(ordre public).*

This interpretation is reflected in, among others, ECtHR's own case-law. For example, in *Karner v. Austria* the Court noted that, considering whether there are indications of discrimination in a treatment, it

> "can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment" (*Karner v. Austria*, application no. 40016/98, 24.07.2003, para. 40).

To this the Court furthermore acknowledged:

> "The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it" (Ibid., para. 41).

Concrete measures used by a state to protect the family as its fundamental social institution may vary and be determined by specific features of its established public order.

Judging, however, to what point protection of the public order does demand the corresponding restriction of rights and freedoms, as legal writers duly observe, lies outside the Court's jurisdiction.[27]

Legitimate aims necessitating the restriction of individual rights, stipulated for the most part in findamental international human rights treaties, such as the interests of national security or public order, are necessary for the very survival and continuous existence of a democratic state. Deliberate actions aimed against the public order, national security, public health, etc. are regarded criminal or transgressive and are prosecuted in most of the countries. It is obvious that actions or propaganda deliberately aimed to impair or dismantle the family as a marital union of a man and a woman, depriving it of its proper unique social status, are undermining the foundations of any society, including a democratic one. We are of the opinion that as such they may justifiably be regarded as comparable with propaganda for war, advocacy of national, racial or religious hatred, or incitement to discrimination prohibited under Article 20 of ICCPR.

3. Protecting the public morals

"[T]he protection of . . . morals" is, according to Article 10(2) of EHCR, another of the legitimate aims that can justify the restriction of the right to freedom of expression and freedom to impart ideas.

Among other aims pursued by Russian regional laws prohibiting propaganda of homosexuality to minors is *the protection of morals.* It follows from the very title of the Ryazan regional law ("On the protection of morals of the children in the Ryazan region"). Superior courts of the Russian Federation have likewise found them to pursue the selfsame aim. The Constitutional Court, for example, in Article 3 of its judgement on the Ryazan regional law cited above indicated that the prohibition of propaganda is aimed against "dissemination of information that can harm . . . the moral development" of children. Similarly, the Supreme Court also indicated that the laws in question are aimed at protecting the morals. Namely, the Court's judgement of 7 November 2012 cited previously indicates that the norm had been adopted "[to] protect the rights of children and to protect them from harm to their moral development". Previously

[27] "The public order to which the ECHR and the ICCPR refers is an external public order to that articulated in these treaties, not one created by them, this also applies to the morals, health, public security and rights and duties of other. The Court of Human Rights and the Committee on Human Rights are not qualified to determine or decide with respect to what constitutes the common good or the general welfare or public order in Spain, France or Germany, because it is not their task to apply the corresponding national legislation. In consequence, the Court of Human Rights and the Committee on Human Rights are not qualified to judge to what point the public order of a particular country demands the restriction of a fundamental right or public freedom". *José M. González del Valle*, The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in Spain, 19 EMORY INT'L L. REV. 1033 (2005), p. 1043.

cited Supreme Court's judgement of 3 October 2012 on the similar St. Petersburg regional law found the same.

a. It is necessary and legitimate for a democratic society to restrict individual rights to protect the morals

A number of universally recognized international human rights norms recognize the protection of morals as a legitimate justification for restricting the right to freedom of expression.

In particular, Article 29(2) of UDHR acknowledges that in the exercise of his rights and freedoms a person can be "subject . . . to such limitations as are determined by law . . . for the purpose of . . . meeting the just requirements of morality".

Article 19(3)(b) of ICCPR accepts that the right to freedom of expression, including the freedom to impart information and ideas, can be subject to restrictions provided by the law necessary for, among other things, "the protection . . . of public . . . morals".

Article 13(2)(b) of CRC recognizes that the right of the child to freedom to seek, receive and impart information and ideas can be subject to certain restrictions provided by the law necessary for, in particular, the "protection . . . of public morals".

Finally, Article 10 of UCHR explicitly acknowledges that the exercise of freedoms provided therein "may be subject to . . . restrictions . . . prescribed by law and are necessary in a democratic society . . . for the protection of . . . morals"

Said principle can therefore be regarded as universally recognized by international law.

Listing the legitimate aims justifying the restriction of this right, the Convention, moreover, speaks that these restrictions are "necessary . . . in a democratic society". In other words, the Convention implies and specifies that it is not merely the protection of "national security . . . or public safety" or "the reputation or rights of others", but "the protection of . . . morals" that in any democratic society forms a necessary part of its law and order, is one of its constituent elements. A democratic society must, therefore, at all times perform its duty to protect the morals without which it can hardly exist.

This is also clear from the fact that the protection of morals is strongly correlated with another legitimate aim, namely, *the protection of the rights of others*. For example, in its judgement on *Müller and others v. Switzerland* (application no. 10737/84, 24 May 1988, para. 30) ECtHR stated that "[t]here is a natural link between protection of morals and protection of the rights of others".

b. There can entirely legitimately exist differences in ECHR signatories' concepts of morality

There is, as the Court has repeatedly indicated in its case-law, no single concept of morality shared by all ECHR signatories. Such difference of opinions is entirely legitimate. Indeed, it is the national authorities alone that are qualified to decide what the requirements of morality in their specific society are:

> "The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (judgment of 23 July 1968 on the merits of the "Belgian Linguistic" case, Series A no. 6, p. 35, para. 10 in fine). The Convention

leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.

. . .

In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. (*Handyside v. UK*, application no. 5493/72, 07 December 1976, para. 48; see also *Müller and others v. Switzerland*, application no. 10737/84, 24 May 1988, para. 35).

In *Handyside v. UK* (see above, para. 48) the Court has stressed that the term *necessary* employed in Article 10(2) of ECHR is not synonymous to *indispensable*, *absolutely necessary* or *strictly necessary*. It furthermore noted that in each society according to its particular circumstances it is the authorities that take precedence in assessing the necessity of imposing specific restrictions:

> "[I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of "necessity" in this context.
>
> Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force".

Principle 27 of the preciously cited *Siracusa Principles on the Limitation and Derogation Provisions in ICCPR* indicates that "[s]ince public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights . . . [enjoys] a certain margin of discretion".

Therefore, deciding to impose restrictions to protect public morals, state authorities are given a significant margin of appreciation, though such restrictions are expected to be essential to the maintenance of respect for fundamental values of the community (cf. *Siracusa Principles*, Principle 27).

c. In Russia propaganda of homosexuality contradicts the society's concept of morals, which legitimizes the restrictions imposed by the authorities

With regard to the Russian society, the protection of public morals, as said principles show, justify restrictions on propaganda of homosexuality to minors.

Accordingly, the interpretation of Article 19 of ICCPR (on freedom of opinions and freedom of expression) given in UNHRC's *General Comment No. 34*, though not legally binding[28], cites *General Comment No. 22*:

> "[T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations . . . for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition".

Prohibition of propaganda of homosexuality to minors fully satisfies this criterion due to the fact that in Russia homosexual lifestyle is regarded immoral by all major religious traditions.

Hence on 13 April 2011, in the wake of ECtHR's judgement on *Alekseyev v. Russia*, the following statement[29] was made by the Russian Interfaith Council, an authoritative advisory body representing the joint opinion on public matters of the Russian Orthodox Church, leading figures of the Muslim and Jewish communities, and the traditional Buddhist Sangha of Russia. Representing the position of all the major religious communities in Russia, this statement, in particular, notes:

> "Human rights have always been taken as an expression of the recognition of the high value of the human person whose freedom and dignity our religious traditions have for centuries affirmed. Accordingly, we support the Council of Europe in its action against human rights violations such as abuse of power by administrative and law enforcement officials, sexual exploitation of women and children, and trafficking. Allowing such practices to spread throughout Europe and the world is, in our view, repugnant to genuine dignity of the human person. Equally repugnant, however, are actions that have always been regarded as immoral: prostitution and drug abuse, and homosexuality among them. Unfortunately, there are groups, albeit small, of people who think these sinful phenomena are normal, admissible, merit public manifestation and aggressive advertising, which provokes protests in many countries in Europe and beyond. We, however, advocate the rights of the overwhelming majority of people who regard homosexuality as a sin or a vice and do not wish to be dictated otherwise through public events, media, education, or orders of either "legal" or political nature. We petition the authorities of the Russian Federation to protect not only the interests of various minorities, but also the rights of the majority of its citizens, and not to allow public events known to prove insulting to moral sensibilities of Russian citizens who realize that only the union of a man and a woman can constitute a real family.
>
> We support our state authorities in their aspiration to protect human dignity, including within the European Convention on Human Rights and Fundamental Freedoms framework. Nevertheless, we are warning them of the danger of the Russian legal system mutating under the influence of judicial precedents that protect immoral behaviour and its propaganda. It is our conviction that accession to the Convention does not legitimize abusing the conscience of the majority of the

[28] The question of UNHRC having the right to give to relevant treaties interpretations so general in their nature falls outside the scope of this analysis. Such right, however, is not stipulated in the Committee's mandate.
[29] http://www.patriarchia.ru/db/text/1452161.html

country's citizens, especially given the fact that the Convention itself allows restricting human rights on the grounds of morals.

We call upon Russian government bodies and public organizations to start searching for a legal framework within which our relationship with the Council of Europe would rule out implementation of decisions encroaching upon the conscience and insulting to the morals of the majority of our fellow citizens."

That homosexual behaviour is immoral is held in Russia not only by members of religious traditions, but by atheists as well. This is confirmed by, among other things, the 2012 public opinion study commissioned by the Public Chamber of the Russian Federation. Reporting[30] on its finding, it observes:

"Present public opinion study shows that the absolute majority of Russian citizens regards homosexuality as unacceptable (a perversion of human nature). . . . Thus opinion is held by atheists and followers of all major religions in Russia alike." (p. 41)

"It is the open manifestation, rather than homosexuality itself, that provoked extremely negative reaction." (p.42)

"Holding Gay Pride marches faces is opposed by both atheists and followers of all major religions in Russia." (p. 50)

74% of people interviewed regard homosexuality as a 'depravation of human nature', with 87% arguing for a ban on 'Gay Pride marches'.

A number of accompanying facts provide additional insight:

"Interviewees thought Gay Pride marches to be propaganda events and voiced their concern that holding them might, above all, affect the moral and ethical condition of the youth.

. . .

Most experts have also indicated that the people view Gay Pride marches solely as propaganda events". (p. 49)

According to most Russian citizens' ideas of morality, propaganda of homosexuality to minors is definitely viewed as an action seriously violating the requirements of morals.

No wonder that the majority of Russian citizens received laws prohibiting such propaganda with unequivocal approval.

For example, a survey by the St. Petersburg Social Information Agency showed that 78% of the residents viewed the adoption of the regional law prohibiting propaganda of homosexuality to minors as a positive step. [31]

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[30] Религия в российском обществе. Традиционные религиозные и либеральные взгляды (*Religion in the Russian society: religious traditionalism and the liberal ideas*)/ Под редакцией М.В. Романова и В.В. Степанова. – М.: Общественная палата РФ, 2012 (на правах рукописи). – 98 С., 25 илл. (http://www.oprf.ru/files/dokument2011/religiya09022012.pdf - retrieved 11 March 2013).

A nationwide survey[32] by the Russian Public Opinion Research Centre showed that 86% of Russian citizens support the ban on propaganda of homosexuality to minors, with only 6% speaking against the measure.

We should emphasize that, undoubtedly, the overwhelming majority of Russian citizens hold the greatest respect for the family. Hence 97% of people interviewed by the Russian Public Opinion Research Centre for their 2010 survey[33] saying that they treasure the family above all other things. Add to this that according to traditional Russian morality propaganda of homosexuality is viewed as an attack on the family, as was illustrated by the Supreme Court judgements cited previously.

Namely, in its judgement of 7 November 2012 the Court indicated that the Kostroma regional legislator imposed a "ban on propaganda of homosexuality . . . as a form of relationship defying family values", while the "[f]ederal legislator listing types of information harmful to the health and development of children included among them information defying family values, which . . . can be constituted by propaganda of homosexuality".

It follows from this that, given the Russian society's views of morality, prohibition of propaganda of homosexuality to minors by its legislators must be regarded as a wholly legitimate restriction imposed in pursuit of the aim of protecting the public morals.

Such a measure, undoubtedly, lies within the margin of appreciation enjoyed by the authorities of the Russian Federation as sovereign state because they "[b]y reason of their direct and continuous contact with the vital forces of their countries . . . are in principle in a better position than the international judge to give an opinion on the exact content of these requirements [of morality] as well as on the "necessity" of a "restriction" or "penalty" intended to meet them" (see *Handyside v. UK* above).

IV. The laws lack legal uncertainty

Critics of the laws in question often claim they are characterized by legal uncertainty making them incompatible with the principle of the rule of law. In particular, these laws, it is claimed, employ legally uncertain terms *propaganda* and *homosexuality*. Such claims, however, are wrong, and the laws, as is shown below, lack any legal uncertainty.

1. The term "propaganda" is used in other norms, both international and domestic

The term *propaganda* has been used in other legal norms, both Russian and international, without any serious doubts regarding its "uncertainty".

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[31] *78% горожан поддерживают закон о запрете пропаганды гомосексуализма и педофилии (78% of residents approve the homosexuality and paedophilia ban),* http://www.fontanka.ru/2012/04/08/027/

[32] *«Пропаганда гомосексуализма: призрачная угроза» (Propaganda of homosexuality: the phantom menace),* http://wciom.ru/index.php?id=459&uid=112718

[33] *«Семья и дружба – превыше всего» (Family and friendship are above all),* http://wciom.ru/index.php?id=459&uid=13608

Here are a few examples of such use in international treaties:

Article 20 of ICCRP, for example, prohibits "[a]ny propaganda for war".

Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* indicates that "States Parties condemn all propaganda" based on "ideas or theories of superiority of one race or group of persons of one colour or ethnic origin". Same Article demands to "declare illegal and prohibit . . . organized and all other propaganda activities, which promote and incite racial discrimination", and make participation in them punishable by law.

Article 6(3) of the *European Convention on the Legal Status of Migrant Workers* states that "[e]ach Contracting Party undertakes to adopt the appropriate steps to prevent misleading propaganda relating to emigration and immigration".

Article 19(1) of the *European Social Charter (revised)* contains a similar norm.

Article 19(2)(d) of the UN *Convention on the Law of the Sea* stipulates that "[p]assage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State" if in its territorial waters it engages in "any act of propaganda aimed at affecting the defence or security of the coastal State".

Domestic law of the Russian Federation likewise contains norms employing the term *propaganda* to whose legal certainly there has never been any serious doubt. Here are but a few of the all too numerous examples:

Article 29(2) of the *Constitution of the Russian Federation*, for instance, stipulates:

> "The propaganda or agitation instigating social, racial, national or religious hatred and strife shall not be allowed. The propaganda of social, racial, national, religious or linguistic supremacy shall be banned".

Article 20(2) of the *Administrative Offences Code* prohibits "propaganda . . . of Nazi emblems and symbols", with Article 6(13) of the same Code prohibiting "propaganda of narcotics, psychotropic drugs and their precursors".

Article 24(1) of the Federal Law of 6 March 2006 no. 35-FZ *On countering terrorism* prohibits the creation and activities of organizations "whose objectives and actions are aimed at propagandizing, justifying and supporting terrorism".

Article 1(1) of Federal Law of 25 July 2002 no. 114-FZ *"On countering extremist activities"* sees the definition of *extremism* encompassing activities such as "propaganda of a person's exceptionality, superiority or inferiority on the basis of his social, racial, national, religious, or linguistic affiliation or views on religion", as well as "propaganda and public display of Nazi emblems and symbols"

The term *propaganda*, therefore, is widely used in international and domestic legal documents without being regarded as legally uncertain.

2. The terms employed by the laws received interpretation by Russian superior courts

Interpretation given to the laws in question by superior courts of the Russian Federation ought to have had the legal uncertainty surrounding the terms *propaganda* and *homosexuality*, had there been any, regarded as altogether removed.

In particular, the Constitutional Court's judgement of 19 January 2010 cited earlier defined the prohibition of propaganda of homosexuality to minors as prohibition of "actions to purposefully and without supervision disseminate information able to harm the health, moral and spiritual development of persons whose age deprives them the possibility of critically evaluating such information themselves, including to make them form perverted notions of traditional and non-traditional conjugal relations being socially equivalent".

In its previously cited judgement of 15 August 2012, examining the Archangel regional law the Supreme Court clarified the relevant terms by, in particular, noting:

> "The court has rightly found . . . the claimant's argument that the terms 'propaganda' and 'homosexuality' lacked certainty untenable, as the meaning of said terms is well-known.
>
> Propaganda means activities by private persons and/or corporate bodies to disseminate information aiming either to form attitudes and/or behavioural stereotypes in the mind of the addressees or to induce or actually inducing them to perform or abstain from certain actions.[34]
>
> . . .
>
> The concept of 'homosexuality', while not being a subject regulated the federal law, nevertheless has a definite legal content, being on a number of occasions employed as a term to describe personal relationships based on one's sexual attraction to individuals of the same sex and sexual relations between such".

The Court then further clarifies the content of the term *propaganda of homosexuality* by specifying what does and what does not constitute such. In particular, the judgement contains this definition (part of which has already been quoted previously):

> "It follows from the concept of propaganda expounded above that, since not any public action can be regarded as such [propaganda], prohibiting propaganda of homosexuality does not mean preventing the citizens from disseminating information on the subject of homosexuality of general or neutral character or holding duly authorised public events, including open public debates about sexual minorities' social status, without imposing the homosexual lifestyle on minors who, due to their age, are not fit to critically evaluate such information.
>
> Consequently, we see no uncertainty of legal regulation as regards the contested norms, as propaganda of homosexuality to minors is constituted by aggressive public actions pursuant to

[34] A similar definition of *propaganda* is found in the *Model law on protection of children against information harmful to their health and development* adopted by the CIS Interparliamentary Assembly on its 33rd Plenary Meeting (Resolution no. 33-15 of 3 December 2009).

said aims, which implies presenting non-traditional sexual orientation in a favourable light and making people form perverted notions of traditional and non-traditional conjugal relations being socially equivalent.

The text of the norms under duspute leaves no room for any other use or interpretation of the terms".

Elsewhere in the same judgement the Court clarifies the scope of the term *propaganda* in relation to the law under consideration:

"[I]ndependent development of a child as an emergent individual lacking proper physical or mental maturity must be ensured by, in particular, restricting intrusion into his privacy, constituted, among other things, by propaganda, as active public imposition, of homosexuality and information thereon whose content may affect the child's emergent personality, including the issue of his sexual identity, make him take an interest in non-traditional sexual relationships that is not based on his specific physiology as, due to his age, he cannot be sufficiently critical in understanding the nuances of different forms of sexual relationships.

At the same time, the Court recognizes the fact that the disputed norms do not restrict the right of the child himself to receive information, including about homosexuality, when called for by the needs of the child, according to his age."

Commenting upon this last statement, we should stress that under Article 5 of CRC in the exercise of his rights the child had a right to appropriate "direction and guidance" by his parents, said rights including the right to receive information.

3. The purview of the law is specific and proportionate

That the laws in question, as interpreted by superior courts of the Russian Federation, are in no way contradicting ECtHR's judgement on *Alekseyev v. Russia,* their subject not pertinent to its substance, has already been clearly confirmed above (see Section II).

Taking into account what was said concerning the aims in pursuit of which the relevant rights have been restricted, as stipulated in Article 10 of UCHR, and the sufficient legal certainty of the laws in question, it is quite clear that these laws a) pursue specific legitimate aims, b) do not exceed the margin of appreciation given to the authorities of a sovereign state, and c) are strictly limited in their operation, restricting solely and specifically the actions that must be prevented to achieve these aims.

These laws are therefore in full compliance with the universally recognized norms of international human rights law and the principles of proportionality and the rule of law.

V. Concerns regarding ECtHR's judgements on *Alekseyev v. Russia* and a number of other cases

Concluding the present Communication, we are compelled to raise a number of issues with ECtHR's judgements on *Alekseyev v. Russia*, as well as a number of other cases. It appears that these judgements contain serious flaws, which causes grave concerns. Should the Court's case-law continue to include such flaws, this might significantly undermine its legitimacy and the authority of its decisions, seriously affecting the sustainability of European human rights framework.

1. Disregard for the need to protect public morals

Universally recognized norms and principles of international law, as has already been demonstrated earlier (see Section III(3)), permit the restriction of certain rights in pursuit of legitimate aims, the protection of public morals being one of them. Moreover, the protection of public morals is recognized as integral to law and order of a democratic society.

One must also understand that divorcing norms of positive law and the substance of human rights from their moral foundation is not merely groundless but can also easily prove destructive, undermining the just law and order and the international human rights framework. Indeed, should norms of positive law lose their foundation in moral principles recognized by the society and following from the very nature of the man and the society, men themselves would, in their turn, have no reasons to obey these norms beyond mere external coercion. Such state of affairs, when law and order is based on arbitrary decisions by the authorities, whether national, European, or international, and is maintained exclusively by coercion, is hardly compatible with the basic tenets of the democratic society.

Hence, deliberating on human rights issues one must seriously consider protection of public morals, recognizing the natural priority a sovereign state and its authorities take in deciding on concrete measures to this effect.

Considering *Alekseyev v. Russia*, the European Court of Human Rights, however, failed to pay sufficient attention to this issue. As a matter of fact, it refused to take the question of whether the decision by the national authorities was justified on the grounds of protection of public morals seriously. If failed to properly take account of the argument put forward by the Government of the Russian Federation indicating that the "Gay Pride marches" was banned to protect public morals (see *Judgement*, paras. 59 and further). Instead of seriously considering the argument, and failing to take into account the views on morality inherent to the Russian society, the Court has caricatured the idea of protection of public morals as the "officials' own views on morals" (para. 85).

The Court has uncritically taken as a given that participants of the "Gay Pride march" "had not intended to exhibit nudity, engage in sexually provocative behaviour or criticise public morals or religious views" (para. 82), while failing to take into account the fact that the very content of the march was already deeply contrary to the views on morality inherent to the Russian society (see above, Section III(3)(c)).

In its judgement the Court has also failed to consider the validity of concerns about the content of the "Gay Pride march". In particular, noting that conclusions made in para. 82 of the Court's judgement on *Alekseyev v. Russia* were drawn "not from their own objective and detailed investigation of the circumstances of the case, but instead solely from unsubstantiated claims by the interested party", a group

of prominent Russian lawyers in their report *On the Right to Critical Assessment of Homosexuality and Legal Restrictions on the Imposition of Homosexuality*[35] indicates:

> "Nevertheless, the record of "Gay Pride marches" previously held in Russia – in St. Petersburg on 27 May 2006, when the event was accompanied by acts of religious vandalism and incitement to hatred (a Roman Catholic church was subjected to desecration by "Gay Pride march" participants' excrements), or in Yekaterinburg in 2004 and 2005, when "gay festivals" saw indecent scenes of outright exhibitionism grossly offending public morals – refutes ECtHR's unfounded belief in "peaceful" character of "Gay Pride marches" declared and demanded by propagandists of homosexuality". (p. 43)

Its authors also note:

> "A clear evidence of the extremist attitude towards Christianity maintained by organizers of these "Gay Pride marches", as well as the falsity of human rights rhetoric they employ to justify their admissibility, was given on 27 May 2006 in St. Petersburg, when the so-called "Love Parade" held in immediate vicinity of the St. Catherine Roman Catholic church saw blatantly extremist acts of religious vandalism, with the participants publicly excreting on its front porch and vault entrances". (p. 28)

Given that, as there always exist individuals holding views on morality different from the general public, no concrete moral issue enjoys absolute consensus in any society, the approach demonstrated by ECtHR in *Alekseyev v. Russia* enables one to reduce to personal "views" any moral principle held in any society.

Such an approach reduces the right of a sovereign state to legally restrict individual rights for protection of public morals to being merely a token clause devoid of real substance, which denies democratic law and order one of its constituent parts.

2. Disregard for the interests of the child

The fact that ECtHR's failed to properly take into account the interests of the child in some of its judgements, particularly on cases dealing with the issue of the upbringing and adoption of children in relation to the rights of so-called "sexual minorities", likewise causes grave concerns.

It has already been shown that, according to universally recognized norms of international human rights law, the term *family* means exclusively a marital union of a man and a woman aimed by its nature at the procreation and upbringing of children. Hence, speaking of the right of the child to a family and of its role as the "natural environment for the growth and well-being of . . . children" (Preamble to CRC), and that "for the full and harmonious development of his or her personality" a child should "grow up in a family environment" (ibid.), these instruments must mean the right to a family consisting of a man and a woman, a mother and a father.

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[35] *Понкин И.В., Кузнецов М.Н., Михалева Н.А.* О праве на критическую оценку гомосексуализма и о законных ограничениях навязывания гомосексуализма. Доклад. http://www.state-religion.ru/files/Doc.pdf (retrieved 10 March 2013).

Binding norms of international law stipulate that a child's best interests are served by living in a family environment with his parents, a mother and a father or, should he lose them, adoptive mother and father. This corollary to norms of international law was, however, thrown away by ECtHR in its recent judgement in *X and Others v. Austria* (application no. 19010/07, 19 February 2013) in favour of "anti-descrimination" towards so-called "sexual minorities" which, when speaking of adoption and the right to found a family, sounds like an unnatuiral construct, or an outright legal sham. While deciding that prohibiting one female member of a same-sex couple from adopting her female partner's child was discriminatory, the Court totally ignored the interests of the child. All this against the backdrop of a recent major study which found that being raised by a same-sex couple can seriously disadvantage the child. [36]

Furthermore, in this case the Court has recongized that one member of a same-sex partnership has the right to adopt another one's child notwithstanding that latter had a father neither deprived of nor waiving his parenthood. Such a decision is not only manifestly contrary to the child's interests but also contrary to the intent of the binding norm contained in Article 9(1) of CRC:

> "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."

Being adopted by his mother's female partner while having a living father neither deprived of nor waiving his parenthood means virtually depriving the child of his family, which is contrary to his interests. As seven of the judges forcibly observe in their partly dissenting opinion, "[a]doption means 'providing a child with a family, not a family with a child'". [37]

Same bias towards ideological considerations rather than the child's interests can also be observed in *Salgueiro da Silva Mouta v. Portugal* (application no. 33290/96, 21 December 1999). That case had saw the Portugese domestic court, deciding on which of the divorced parties should raise the child, grant the relevant rights to the mother rather than the father, who led a homosexual lifestyle. Considering the case, ECtHR has counterintuitively concluded that the issue of the father's homosexual lifestyle of was not pertinent to the question of securing the best interests of the child, and that the domestic court had needlessly discriminated against the former on the grounds of his sexual orientation.

All this despite ECtHR case-law and the judgement itself (para. 29) acknowledging that a difference in treatment can be considered discriminatory "only if it had no objective and reasonable justification, that is if it did not pursue a legitimate aim, or if there was not a reasonable relationship of proportionality between the means employed and the aim sought to be realised". Clearly, the domestic court in its judgement proceeded from the right of the child to grow up in a normal family environment, which forms part of his obvious interests recognized by norms of international human rights law. At the same time, it

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[36] *Regnerus M.* How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures // Social Science Research Volume 41, Issue 4 – July 2012 – P. 752–770

[37] *Joint partly dissenting opinion of Judges Casadevall, Ziemele, Kovler, Jočienė, Šikuta, de Gaetano and Sicilianos*, para. 8, quoting *Fretté v. France* (application no. 36515/97, para. 42, ECHR 2002 I)

appears that the Portugese judge was moved not so much by the "sexual orientaton" as by the actual homosexual lifestyle the father led. Having, however, found the original judgement discriminatory, the Court underasonably disregarded both this important distinction and the child's interests altogether.

Such refusal by ECtHR to take account of obvious interests of the child, widely recognized by international norms and based on biological facts, prefering to comply with artificially contrived legal concepts instead, raises grave and well-founded concerns. Such instances see children with their genuine and natural rights and interests being sacrificed to satisfy questionable ideological constructs.

3. Arbitrary substitution of trends and ECtHR case-law for European and international consensus

The way ECtHR interprets the substance of *European* or *international consensus* in its judgements also causes serious concern.

It is quite obvious that, when there is clear unanimity of case-law between either the states at large or those signatories to ECHR, the Court can consider it constituting a norm. There are, however, no legal grounds for considering as binding norms only recognized by some, even a majority, of ECHR signatories. Demanding that the minority must always agree with the majority would, in fact, dismantle the democratic principle of pluralism internationally.

The Court has, nevertheless, on a number of occasions made judgements on the basis not of actual international consensus, but of a particular "trend" or "general trend", making them, in fact, a source of legally binding norms. It repeatedly used the term *consensus* instead of *a trend*, mixing their meanings[38]. For example, in its judgement on *Christine Goodwin v. the United Kingdom* (application no. 28957/95, 11 July 2002), recent tendencies to legally recognize change of sex via reassignment surgery are considered under the heading *The state of any European and international consensus*.

Similar to these are cases where ECtHR, by its legally binding judgements, gives statutory force to documents lacking thereof – such as non-binding decisions and interpretations by UN treaties monitoring bodies, oftentimes controversial – unreasonably regarding them as part of so-called "international consensus". [39]

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[38] For details see Dzehtsiarou, Kanstantsin, European Consensus: A Way of Reasoning (May, 28 2009). University College Dublin Law Research Paper No. 11/2009. Available at SSRN: http://ssrn.com/abstract=1411063 or http://dx.doi.org/10.2139/ssrn.1411063

[39] In its binding judgements ECtHR increasingly cites non-binding recommendations, observation and comments made by UN treaty bodies. Just recently it made references to them in a whole number of cases, such as *Soltysyak v. Russia* (application no. 4663/05, 10 February 2011, para. 24); *Kiyutin v. Russia* (application no. 2700/10, 10 March 2011, paras. 28-29); *Giuliani and Gaggio [GC]* (application no. 23458/02, 24 March 2011, para. 154); *R.R. v. Poland* (application no. 27617/04, 26 May 2011, para. 85-86); *Stummer v. Austria [GC]* (application no. 37452/02, 7 July 2011, para. 47); *Bayatyan v. Armenia [GC]* (application no. 23459/03, 7 July 2011, para. 58-65); *V.C. v. Slovakia* (application no. 18968/07, 8 November 2011, para. 83); *Ergashev v. Russia* (application no. 12106/09, 20 December 2011, para. 99); *Finogenov and others v. Russia*, nos. 18299/03 and 27311/03, 20 December 2011, paras. 162-163); *Gorovenky and Bugara v. Ukraine*, nos. 36146/05 and 42418/05, 12 January 2012, para. 22);

Likewise objectionable are situations when the Court regards "European consensus" constituted by its own judgements, whose reasonableness can in some instances raise serious doubts.

A striking example is given in *Alekseyev v. Russia* (para. 83) where the Court, for instance, makes a reference to its own judgement on *Salgueiro da Silva Mouta v. Portugal*, previously mentioned by us, as "reflecting a long-standing European consensus" on granting parental rights to "sexual minorities". A single specific judgement by ECtHR can hardly prove the existence of binding "European consensus" in such a controversial sphere.

Such tendencies by ECtHR must be recognized as extremely dangerous since under the pretext of protecting human rights they are, in fact, undermining the sovereignty of states signatories by imposing on them specific legislative decisions lacking real basis in binding norms of international treaties. It appears that in these instances, instead of exercising "European supervision" under strict norms of the Convention, the Court unlawfully usurps the place and function of national legislators.

4. Deciding on the basis of ideology

That, when it comes to human rights, binding decisions must be founded in, on the one hand, obligations following from international instruments explicitly assumed by parties and, on the other hand, genuinely universal principles unrelated to controversial ideologies, such as *jus cogens* interpreted according to Article 53 of the 1969 *Vienna Convention on the Law of Treaties*, appears clear.

However, ECtHR in its judgements at times finds itself depending on controversial ideological principles applying which, to our mind, falls outside its jurisdiction.

For example, in its previously cited judgement on *Christine Goodwin v. United Kingdom*, the Court has explicitly endorsed a scientifically, even more so, legally questionable radical theory of social construction of gender identity. The Court indicated it is "not persuaded that at the date of this case it can still be assumed that these terms [*man* and *woman*] must refer to a determination of gender by purely biological criteria" (para. 100).

Clearly, the Court has no right to pass binding judgements on the validity of controversial scientific theories, much less to elevate them though its judgements to norms legally binding upon independent states. Therefore the position taken by the Constitutional Court of Malta explicitly rejecting this ECtHR judgement appears entirely reasonable:

> "The Constitutional Court further considered that the European Court's case-law was of little relevance, as the Goodwin case had been based on the fact that there had been major social changes in the institution of marriage since the adoption of the Convention. However, these social changes had not taken place in all of the States parties and could not be imposed by a judicial

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Fetisov and others v. Russia, nos. 43710/07 et al., 17 January 2012, para. 65); *C.A.S. and C.S. v. Romania* (application no. 26692/05, 20 March 2012, para. 53); *Konstantin Markin v. Russia [GC]* (application no. 30078/06, 22 March 2012, para. 51).

organ, which was not legislative, by means of "social engineering" (*Factual Report on Cassar v. Malta*, case no. 36982/11).

Similar ideological basis, as has already been said, is evident in the Court's judgement on *Alekseyev v. Russia*.

5. Danger of passing untenable and ultra vires judgements

There is a serious danger of ECtHR passing untenable and *ultra vires* judgements created by many of the aforementioned tendencies. Even more so, there is every reason to fear that a number of present judgements, such as on *Goodwin v. United Kingdom* or *Alekseyev v. Russia*, are at least partially untenable or *ultra vires*.[40]

There is no doubt that by acting in such a manner the Court inevitably diminishes its authority and the legitimacy of its judgements. Such a situation cannot but threaten the sustainability and effectiveness of the European human rights framework. It also threatens the sovereignty of ECHR signatories. This threat, to our mind, merits their utmost attention.

Were the Court to deliver judgements in such important spheres as protection of family and marriage, rights of parents and children, and public order and morals under the influence of controversial ideological concepts, this potentially might delegitimize its judgements in the eyes of at least some of sovereign European states.

Naturally, of particular concern are cases when, abusing the so-called *principle of evolutive interpretation* of the Convention, the Court, in fact, arbitrarily creates and lays on other nations new obligations neither following from its text nor undertaken by them. Such cases warrant a quote, *mutatis mutandis*, from the partially dissenting opinion of Judge Ziemele on *Andrejeva v. Latvia* (application no. 55707/00, 18 February 2009):

> "The Court should not go against the general rule of interpretation as set forth in the Vienna Convention on the Law of Treaties and thus act *ultra vires*. In international law this raises a somewhat new challenge as concerns the value of such judicial decisions. The Court should not contribute to the fragmentation of international law in the name of alleged human rights, nor

[40] Another clear example of an *ultra vires* act can, in our view, be found in ECtHR's judgement on *Women On Waves and Others v. Portugal* (application no. 31276/05, 03 February 2009), in which the Court citing Article 10 of the Convention refused to a accept the government's actions, entirely legitimate within the domestic and international law and pursuing the aim of the protection of public health and morals "necessary in a democratic society".

should it readily take decisions that may undermine State-building since the enforcement of human rights still requires strong and democratic State institutions". (para. 41)

Respectfully submitted,

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