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## Testing Constitutional Pluralism in Strasbourg: Responding to Russia's "Gay Propaganda" Law

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# TESTING CONSTITUTIONAL PLURALISM IN STRASBOURG: RESPONDING TO RUSSIA’S “GAY PROPAGANDA” LAW

*Jesse W. Stricklan\**

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## INTRODUCTION

In 2013, the Russian Federation amended Federal Law No. 436-FZ, “On Protection of Children from Information Harmful to Their Health and Development” (2013 law), introducing language making illegal the public discussion—or, in the law’s words, “propagandization”—of what it called “non-traditional sexual relationships.”<sup>1</sup> Undertaken during a period of increasing domestic and international hostility, the law was intended by the government to be a bold, two-fold rejection of supposedly “European” values: first, as resistance to the gay rights movement, which is presented as unsuitable for Russia; and second, as a means of further weakening the freedom of expression in Russia. On both accounts, the 2013 law defies the European Convention on Human Rights (the ECHR) as interpreted by the European Court of Human Rights in Strasbourg (the ECtHR or the Court).

As prosecutions under the 2013 law make their way through the Russian court system, a direct confrontation of authority between the Constitutional Court of the Russian Federation in St. Petersburg (the CCRF or the Constitutional Court) and the ECtHR seems inevitable. Perhaps recognizing this, the ECtHR has issued a series of rulings over the last several years that have placed it squarely in opposition with the direction of the Russian government in a variety of high-profile cases. In addition to accepting cases concerning Russia’s prohibition on the public discussion of homosexual relationships, analyzed in this note, the ECtHR has recently ruled against Russia concerning the sensitive Yukos affair<sup>2</sup> and on the treatment of those detained in protest of Vladimir Putin’s return to the presidency.<sup>3</sup> Given the inevitability of a large conflict, the ECtHR should move forward deliberately and rule the 2013 law to be a violation of the ECHR.

In contrast to other disputes between Russia and the ECtHR, the 2013 law seems designed to highlight the question of who, the ECtHR or the CCRF, has the final say on defining the meaning and scope of human rights in Russia. The 2013 law represents a special case through which the relationship between the ECHR and Russian Constitution can be analyzed. Four major factors, considered together, illustrate why this case is particularly relevant. First, the nature of the 2013 law is an obvious affront not only to domestic human rights protections but also, in the context of

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1. Federal’nyi Zakon RF o vnechenii izmenenii v stat’yu 5 Federal’nogo zakona “O zashchite detei ot informatsii, prichinyayushchei vred ikh zdorov’yu i razvitiyu” [Federal Law of the Russian Federation on the Amendment of Statute 5 of the Federal Law “On the protection of children from information harmful to their health and development”], ROSSIS-KAYA GAZETA [ROS. GAZ.] July 2, 2013, <http://www.rg.ru/2013/06/30/deti-site-dok.html>.

2. A final judgment required the Russian Federation to provide compensation to the former shareholders of the Yukos oil corporation in the amount of nearly two billion Euros. *OAO Neftyanaya Kompaniya Yukos v. Russia*, App. No. 14902/04, Eur. Ct. H.R. (2014), <http://hudoc.echr.coe.int/eng?i=001-145730>.

3. *Frumkin v. Russia*, App. No. 74568/12, Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-159762>.

recent rulings of the CCRF, a deliberate challenge to the Russian constitution's unusual openness to international human rights law. Second, the ECtHR has marked out an unmistakable path of protecting the freedom of assembly from limitation due to discrimination against LGBT Europeans.<sup>4</sup> Third, unlike some of the other cases arriving before the ECtHR, the Russian LGBT community has even less of a natural constituency to defend it, meaning that help will likely need to come from outside of Russia. Finally, if the ECtHR leaves unanswered Russia's increasingly hostile rejection of its rulings, Russia may encourage other members of the ECHR to openly defy the Court. In this context, while the 2013 law might at first seem like just another Russian violation of the treaty, the pattern of resistance takes on more significance as an open challenge to the binding—and possibly constitutional—legal order of the ECHR.

The ECtHR's response to this open challenge depends on whether the web of interdependence between national and ECHR legal systems is sufficiently strong to give the Court leverage over the situation. I argue that the systems are indeed sufficiently interwoven to give the ECtHR the ability to bring significant force to its holdings, and that systems pluralism can help describe that interdependence. A systems pluralism description of the Russia-ECHR relationship explains why states do not simply ignore the ECtHR when it sues them, even though the Court cannot directly enforce its rulings. With this interdependence in mind, the ECtHR can demonstrate that its rulings are more than suggestions by presenting Russia with a choice: to protect LGBT Russians on the one hand, or risk the consequences of total or partial withdrawal from an important European institution on the other. By making a firm statement, the Court can fortify the binding effect of its rulings and send a message across Europe about the continued vitality of the ECHR. Ultimately, while the ECtHR cannot force Russia to live up to its responsibilities under international law, it can bring serious costs to bear for the violation of those responsibilities by simply continuing to assert that states cannot limit ECHR rights on the basis of gender identity.

## I. THE ECHR AND RUSSIA

From the beginning, the ECtHR has pursued a step-by-step development of its authority, slowly increasing its binding power and its ability to influence member states. In some ways, however, Russia is the clearest example of a general problem with determining the scope of the ECHR's purpose: is the ECHR really equipped to help lift post-communist states

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4. For the purposes of this paper, the term "LGBT" is intended to be inclusive of the wide spectrum of sexual orientations and gender identities subject to discriminatory government policies, particularly as they have been treated by the ECtHR. See FRÉDÉRIC EDEL, *CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS RELATING TO DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION OR GENDER IDENTITY 7* (Council of Europe 2015), <https://book.coe.int/usd/en/human-rights-and-democracy/6472-case-law-of-the-european-court-of-human-rights-relating-to-discrimination-on-grounds-of-sexual-orientation-or-gender-identity.html>.

into governance that respects the rule of law and human rights? It should not be surprising that Russia's relationship with the Court has been at times extremely difficult, but Russia has until recently trended toward increasing integration. Given the challenge presented by Russia's 2013 law and the legal context in which the case comes to the ECtHR, the more pressing question is whether the Court is ready to do what needs to be done in relation to Russia.

Proposed on the heels of the passage of the Universal Declaration of Human Rights, the ECHR was conceived of as "a type of collective pact against totalitarianism" and perhaps as a means of European integration.<sup>5</sup> Immediately after the ECHR treaty was concluded, however, many considered it "a major disappointment" due perhaps to the lack of a court able to declare binding interpretation of the treaty's lofty, sometimes imprecise language.<sup>6</sup> Since then, the ECHR has developed slowly, first by adding the ECtHR in 1959, and then by developing the Court's authority to interpret the treaty. After the end of the Cold War, the Court's development proceeded more quickly as its workload was expanded to meet the needs of new member states. Roadblocks to applying its jurisdiction were removed in 1999, pilot judgments were introduced in the 2000s, and the structure of the Court was reformed through Protocol 14 in 2010. Today, the ECtHR enjoys a great deal of authority, even as it attempts to cope with a case backlog currently standing at hundreds of thousands.

At its core, the controversy over the role of the ECHR may stem from the higher risk—and perceived futility—associated with international human rights documents that state a lofty ideal which signatories do not reach. Hypothetically, the entire purpose of a regional human rights document is to enjoin deep rather than broad commitment. Others might argue that a broad commitment makes use of the attractiveness of European institutions, not only increasing the spread of human rights but also improving the security situation in Europe as a whole through increased European integration. The ECHR has essentially attempted to pursue both broad and deep commitment from the beginning, which is why it has continued to work with what is probably its most problematic member: Russia.

#### A. *Russian Resistance to the ECHR System as a Test Case for Binding Authority*

Given the variety of states consistently found in violation of the ECHR by the Court, the first question is why this case—and this country—should be the center of a discussion about the binding power of the ECHR. First, the case of LGBT expression in Russia provides a particularly clear example of a collision between a member state's interpretation of rights and the

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5. Ed Bates, *The Birth of the European Convention on Human Rights*, in *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 41 (Jonas Christofferson & Mikael Rask Madsen eds., 2011).

6. *Id.* at 29.

ECtHR's position. Unlike some challenges to the ECHR, the Russian government has always framed the 2013 law as a deliberate challenge to the binding power of the Court and to supposedly foreign "European" values. Second, the case falls squarely within a jurisprudence that is technically undecided but practically inevitable—in contrast to issues less settled at the ECtHR, such as gay marriage. Finally, and importantly, the CCRF has continued to couch its resistance to the Court in terms of legal argumentation. This means that the conflict between Russia and the ECtHR can play out at least partially on the legal plane instead of purely on the level of politics.

At the same time, because resistance to the ECtHR is ultimately a policy choice, Russia's political influence on other states matters. While other states, for example Turkey, Romania, and Hungary, continue to struggle against applying the Court's opinions, none have the same likelihood as Russia in succeeding in a campaign of resistance, thanks to Russia's unique standing in the international legal system: As an important geopolitical center, as an economic force to be reckoned with, and as a member of the United Nations Security Council, Russia's treatment of international law matters a great deal. Therefore, Russia's interaction with the ECHR may determine the range possibilities available to other member states. If even Russia is in practice bound by the ECtHR's rulings, all member states are. However, if Russia is not bound, the question remains whether other member states can also safely shirk their duties under the treaty with similar impunity.

#### B. *A History of Russian Resistance to the ECHR*

Russia joined the Council of Europe in 1996, but it has never achieved full integration into the ECHR system. Even at the time of Russia's admission, the Council of Europe looked past an unfavorable Eminent Lawyers report from 1994 that strongly suggested that Russia was unprepared to meet ECHR obligations,<sup>7</sup> and despite efforts in that direction, Russia has unevenly applied ECtHR rulings in its legal system.<sup>8</sup> For example, even though the Russian courts continue to maintain a long-standing moratorium on the death penalty,<sup>9</sup> Russia is unable to ratify ECHR Protocols 6 or 13 until it formally outlaws the practice. The Russian Constitution allows the death penalty under narrow circumstances, at least "until its abo-

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7. "In sum, the experts have. . . come to the conclusion that the legal order of the Russian Federation does not, at the present moment, meet the Council of Europe standards as enshrined in the Statute of the Council and developed by the organs of the European Convention on Human Rights." Rudolf Bernhardt et al., "Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards." *HUMAN RIGHTS LAW JOURNAL* 15:7, 287 (1994).

8. "To date [2006], the impact of the Convention on the Russian legal system in terms of its implementation by domestic courts is unsatisfactory. There is a manifest and visible imbalance between the normative provisions and the jurisprudence." ANTON BURKOV, *THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON RUSSIAN LAW* 83 (2007).

9. *Russia won't overturn death penalty ban—Chairman of Human Rights Council*, RAPSIS (Jan. 30, 2015), [http://rapsinews.com/legislation\\_news/20150130/273068258.html](http://rapsinews.com/legislation_news/20150130/273068258.html).

lition,”<sup>10</sup> but proposals to return to the death penalty remain popular.<sup>11</sup> Another particularly painful example lies in Russia’s refusal to ratify updates to the ECtHR in Protocol 14 until 2010, four years later than any other member of the Council of Europe, stymieing reform of the ECtHR and blocking EU entry into the treaty organization for years.<sup>12</sup> Furthermore, Russia frequently fails to implement the Court’s rulings: it has over 1,000 insufficiently-resolved cases under enhanced supervision by the Committee of Ministers.<sup>13</sup>

As we shall see, domestic institutional resistance to the ECHR system has also been strong, particularly from the CCRF. Constitutional courts and international courts frequently have deep disagreements about the nature and effect of international court rulings, so the CCRF’s discomfort with the ECtHR supremacy should not be surprising. However, the Court’s recent ruling in *Markin v. Russia*<sup>14</sup> represents a landmark in the deterioration of the relationship between the CCRF and the ECtHR and helps set the stage for the increasingly difficult relationship between the two courts. In the *Markin* case, Russian courts rejected the applicant’s claims as a single parent of young children to a right to three years of family leave from work as an army radio operator. The Russian courts based their decision on two factors: first, that such family leave is granted by law only to women; and second, that the government had a right to discriminate based on gender in order to pursue the vital government goal of maintaining discipline within the armed forces.<sup>15</sup>

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10. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 20, translated in WILLIAM BURNHAM, PETER MAGGS & GENNADY M. DANILENKO, *Law and Legal System of the Russian Federation* 652 (5th ed. 2012).

11. In 2013, one poll indicated a majority of Russians were in favor of reinstating the death penalty. LEVADA TSENTR, BORBA S PRESTUPNOST’YU I SMERTNAYA KAZN’ [LEVADA POLLING CTR., THE FIGHT AGAINST CRIME AND THE DEATH PENALTY] (June 28, 2013), <http://www.levada.ru/28-06-2013/borba-s-prestupnostyu-i-smertnaya-kazn>. See also *Bolye poloviny Rossiyan za vozvrashenie smertnoi kazni* [More than half of Russians in favor of the return of the death penalty], IZVESTIA (July 1, 2013), <http://izvestia.ru/news/552802>.

12. Chart of signatures and ratifications of Treaty 194, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, Council of Europe Treaty Office, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=194&CM=2&DF=19/02/2010&CL=ENG> (last visited Nov. 29, 2015). Although the CJEU has recently declined once again to approve accession to the ECHR under current conditions, Russia’s resistance to Protocol 14 could also be seen as an attempt to complicate the European Union’s requirement to accede to the ECHR in order to meet the requirements of the Lisbon Treaty.

13. Execution of Judgments of the European Court of Human Rights, Pending cases: current state of execution, COUNCIL OF EUROPE, COE.int, [http://www.coe.int/t/dghl/monitoring/execution/reports/pendingcases\\_EN.asp?CaseTitleOrNumber=&StateCode=RUS&SectionCode=ENHANCED+SUPERVISION](http://www.coe.int/t/dghl/monitoring/execution/reports/pendingcases_EN.asp?CaseTitleOrNumber=&StateCode=RUS&SectionCode=ENHANCED+SUPERVISION) (last visited Nov. 29, 2015) (listing that as of November 29, 2015, Russia had 1,062 cases in enhanced supervision.).

14. *Markin v. Russia*, App. No. 30078/06, Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-109868>.

15. *Id.* ¶¶ 33-34.

The ECtHR rejected Russia's argument in a sixteen-to-one vote and ruled that Article 14 of the ECHR prohibits discrimination where "other persons in an analogous or relatively similar situation enjoy preferential treatment," applying its longstanding standard that "treatment is discriminatory if it has no objective and reasonable justification."<sup>16</sup> Because "equivalent posts in the applicant's unit were often held by servicewomen," who were provided three years of parental leave, and because the applicant was denied similar leave only because he was a man, "he was therefore subjected to discrimination on the grounds of sex" without sufficient justification.<sup>17</sup>

Dissatisfied by the Court's conclusion, the military court appealed the ECtHR ruling to the CCRF. In its decision issued on December 6, 2013, the Constitutional Court ruled that lower courts are in fact bound by the rulings of the ECtHR, and that any concerns about the constitutionality of a ruling must be referred to the CCRF.<sup>18</sup> The Constitutional Court noted that the ECHR and the Russian Constitution share the same fundamental values and therefore a similar competence. But because the Russian Constitution is supreme over the treaty regime, the CCRF also strongly implied that it retains the authority to interpret human rights provisions in the constitution in contradiction of an ECtHR ruling as it sees fit. Because the Constitutional Court did not go on to clarify entirely whether it can override the ECtHR's interpretation of rights—and if so, by what criteria—the ruling avoided a clear statement as to how to resolve the discord in relations between Russia and the ECtHR.<sup>19</sup>

On its own, the *Markin* CCRF decision represents more a shift in tone than it does a major shift in policy. However, in context, the ruling seems to be a harbinger of an open challenge. When the 2013 law was first passed, shortly before the *Markin* CCRF decision, it was still unclear what effect it would have, and whether the government would go further to restrict expression. Over the tumultuous course of 2014, however, Russia's rights record continued to deteriorate even as its relationship with international law worsened due to the events in Crimea and Eastern Ukraine. The CCRF has continued to express its opinion that it is not bound by

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16. *Id.* ¶ 125.

17. *Id.* ¶ 149.

18. See *Postanovlenie Konstitutsionogo Suda RF ot 6 dekabrya 2013 g. N 27-P* [Ruling of the Constitutional Court RF of 6 Dec. 2013 N 27-P], *ROS. GAZ.*, Dec. 8, 2013, <http://www.rg.ru/2013/12/18/ks-dok.html> [hereinafter *Markin* CCRF decision]. See generally *Novosti: 6 dekabrya 2013 goda Konstitutsionnii sud RF provozglasil Postanovlenie po delu o proverke konstitutsionnosti punktov 3 i 4 chasti chetvertoi stat'i 392 Grazhdanskogo protsessual'nogo kodeksa RF* [News: 6 December 2013 the Constitutional Court of the RF announced a Ruling in the case of the constitutionality of points 3 and 4 of the fourth part of statute 392 of the Citizen's procedural codex of the RF] (executive summary), KONSTITUTIONNII SUD ROSSISKAIA FEDERATSIA (KONST. SUD RF), KSRF.ru (May 3, 2014), <http://www.ksrf.ru/ru/News/Pages/ViewItem.aspx?ParamId=3137>.

19. Ekaterina Mishina, *A Rubik's Cube from Russia's Constitutional Court*, INSTITUTE FOR MODERN RUSSIA (May 6, 2014), <http://imrussia.org/en/rule-of-law/633-a-rubiks-cube-from-russias-constitutional-court>.

ECtHR rulings.<sup>20</sup> Now that several defendants convicted under the 2013 law have exhausted their domestic remedies, and have therefore become eligible to appeal their cases to Strasbourg, this law represents just the first wave of many potential cases which will come before the ECtHR in which the Russian government will contend that ECtHR rulings do not apply to it. What makes convictions under the 2013 law unusual is how blatantly they violate the Court's legal precedent.

In this context, it should be clear that the 2013 law is a direct confrontation of the ECtHR's meaningful work to protect LGBT Europeans through the application of ECHR Articles 14 (non-discrimination) and 11 (freedom of assembly). The Court's reasoning in Article 11 cases—particularly in *Alekseyev v. Russia* (hereinafter *Alekseyev I*)<sup>21</sup> regarding gay pride parades in Moscow—does not allow states to wiggle out of providing basic assembly rights to their LGBT citizens by claiming any exception “necessary in a democratic society.”<sup>22</sup> The 2013 law does not directly affect assembly rights, but it reasserts the same public morals arguments as do the governments in *Bączkowski v. Poland* and *Alekseyev I*.<sup>23</sup> Although these concerns for public morals serve as the central legal justification for the law (given the weakness of the propaganda argumentation), the 2013 law makes no attempt at addressing the ECtHR's emphatic statements<sup>24</sup> that fears for public safety are not sufficient to justify suppression of rights on grounds of gender identity issues.

## II. THE 2013 LAW PROHIBITING PROPAGANDA PROMOTING NON-TRADITIONAL SEXUAL RELATIONSHIPS

Over the course of recent years, Russian authorities have passed measures to the effect of slowly stifling the ability of Russians to communicate dissent, from the introduction of heightened legal reporting duties for individual bloggers, to indirect controls exercised on media outlets, to the recent imposition of onerous requirements on Internet search providers regarding the Russian version of the right to be forgotten.<sup>25</sup> In some ways,

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20. See, e.g., Postanovlenie Konstitutsionogo Suda RF ot 14 iulya 2015 g. N 21-P [Ruling of the Constitutional Court RF of 14 July 2015 N. 21-P], vos. Gaz., ¶ 5.3, July 27, 2015, <http://www.rg.ru/2015/07/27/ks-dok.html> (reasserting that the Constitution and the ECHR are based in the same principles of human rights but that if the ECtHR interprets the ECHR in such a way as to conflict with the Constitution, the ruling “cannot be carried out [не может быть исполнено]”).

21. *Alekseyev v. Russia*, App. Nos. 4916/07, 25924/08 and 14599/09, Eur. Ct. H.R. (2011) [hereinafter *Alekseyev I*], <http://hudoc.echr.coe.int/eng?i=001-101257>.

22. *Id.* ¶ 69.

23. *Bączkowski v. Poland*, App. No. 1543/06, Eur. Ct. H.R., ¶¶ 56-57, 86-89, (2007), <http://hudoc.echr.coe.int/eng?i=001-80464>; *Alekseyev I*, ¶¶ 56-63.

24. *Alekseyev I*, ¶¶ 66-69 (finding a breach of Article 11 right to assembly and suggesting, but not confirming, an inappropriate application of proportionality in balancing rights according to the “democratic necessity” requirement); *id.* ¶¶ 93-97, 100-01 (finding a violation of Article 14, discrimination).

25. This requirement in particular could pose serious problems to the basic functioning of the Internet by requiring Internet providers to delete links to any personal information a

this process began in 2013 with the law proscribing public discussion of so-called "non-traditional sexual relationships." Targeting both individuals and media organizations, the law imposes a fine for public discussion on homosexual relationships, calling such speech "propaganda" that is harmful to minors. In form, the law parodies international standards for the suspension of the freedom of expression: by declaring the public discussion of "nontraditional sexual relationships" deleterious to the health of Russian youth, the law gestures at legitimate government ends (protection of health and public morals) that might allow the suspension of certain rights under international law—for example, under Article 10 of the ECHR.<sup>26</sup> In practice, however, the Russian government is on notice that the legal theory of the restriction's necessity due to a threat to "health or morals" is strongly out of line with the currents of interpretation of the ECHR.<sup>27</sup> Indeed, the government seems to invite a direct conflict with international law.

In practice, the law has been very effective at limiting the discussion of homosexuality in public: though seldom used for prosecution, the vague definition of the outlawed behavior has created a widespread chilling effect on speech.<sup>28</sup> The law has also had the secondary effect of defining LGBT Russians as enemies of the state. This new trope designates certain groups as "undesirable" because they represent some type of "fifth column" of a dangerous European influence intent on destroying Russia.<sup>29</sup> While LGBT Russians are far from the only group to suffer from this kind of distinction, they are thereby turned into a political enemy of Russia

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user requests. At time of writing, the effects of implementation of the law are still unclear. See Olga Razumovskaya, *Russia Relaxes its Right to be Forgotten*, WALL ST. J.: DIGITS BLOG (June 30, 2015, 12:20 PM), <http://blogs.wsj.com/digits/2015/06/30/russia-relaxes-its-right-to-be-forgotten/>.

26. "The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society . . . for the protection of health or morals . . ." European Convention on Human Rights, art. 10, Nov. 4, 1950, C.E.T.S. 005 [hereinafter ECHR].

27. See, e.g., *Alekseyev I*, ¶¶ 78-81 (addressing government invocation of public morals as a ground to suspending Article 11 rights); see also Venice Commission, *Opinion 707/2012, Opinion on the Issue of the Prohibition of So-Called "Propaganda of Homosexuality" in the Light of Recent Legislation in Some Member States of the Council of Europe*, ¶ 51, CDL-AD(2013)022 (June 18, 2013), <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29022-e> ("As already mentioned, the existence of a European wide consensus on the right to freedom of expression to campaign for the recognition of sexual minorities' rights narrows the state's margin of appreciation concerning the necessary measures for the protection of public morality.").

28. See, e.g., Joshua Keating, *The Chilling Effects of Russia's Anti-Gay Law, One Year Later*, SLATE (Oct. 9, 2014, 2:00 PM), [http://www.slate.com/blogs/outward/2014/10/09/russian\\_lgbt\\_activists\\_on\\_the\\_effects\\_of\\_gay\\_propaganda\\_law.html](http://www.slate.com/blogs/outward/2014/10/09/russian_lgbt_activists_on_the_effects_of_gay_propaganda_law.html) ("[M]any Russian journalists don't like to cover LGBT questions. They fear being punished by this homophobic law.").

29. Such rhetoric has become almost commonplace among Russian officials and media. See, e.g., President Vladimir Putin, Address by President of the Russian Federation (Mar. 18, 2014), <http://en.kremlin.ru/events/president/news/20603> (speech to the State Duma on the annexation of Crimea, in which Putin suggests that Western governments may be behind domestic discontent by creating a "fifth column" and "national traitors.").

without the requirement of having any particular political views at all. The rise in homophobic attacks on LGBT Russians suggests that some see the 2013 law as implicit license to attack LGBT Russians with virtual impunity.<sup>30</sup>

#### A. *Interpreting the 2013 Law*

The history and overt purpose of the law deliberately run afoul of the ECtHR position on rights under the ECHR. The 2013 law was introduced as an amendment to the 2010 Federal Law No. 436-FZ, “On Protection of Children from Information Harmful to Their Health and Development,” which introduced stringent new standards for communication deemed “harmful” to children.<sup>31</sup> The original 2010 law contains a list of information that is “prohibited from dissemination among children,” among which is information that contains pornographic material, encourages children to hurt themselves or to engage in unlawful behavior or violence, or “contradicts family values or encourages disrespect to parents and (or) other family members.”<sup>32</sup> In 2012, the law was amended to require Internet and broadcast media to indicate the age-appropriateness of material.<sup>33</sup> Because both the 2010 and 2012 laws ostensibly pursued legitimate state interests, they faced little direct challenge, but even at this stage some expressed discomfort that regulators seemed to be heading toward restricting speech.<sup>34</sup>

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30. See, e.g. *License to Harm: Violence & Harassment Against LGBT People & Activists in Russia*, HUMAN RIGHTS WATCH, 1, 23-25, 36-40 (2014) [hereinafter *License to Harm*], [https://www.hrw.org/sites/default/files/reports/russia1214\\_ForUpload.pdf](https://www.hrw.org/sites/default/files/reports/russia1214_ForUpload.pdf) (documenting “an increase in attacks by vigilante groups and individuals against LGBT people . . . that has taken place in the lead-up to and aftermath of the adoption of the 2013 anti-LGBT law . . . [and] the authorities’ overall lack of a proper response to such violence,” as well as statements by President Putin and others suggesting that acceptance of homosexuality is deviant and is related to European values inappropriate for Russia).

31. Federalny zakon RF o zashite detei ot informatsii prichinyayushey vred ikh zdorov’yu i razvitiyu [Federal law of RF on the protection of children from information harmful to their health and development], ROS. GAZ. (Dec. 3, 2010) art. 1, § 1, <http://www.rg.ru/2010/12/31/deti-inform-dok.html>.

32. *Id.* art. 5, § 2.

33. See *Recomendatsii Federalnoi sluzhby po nadzoru v sfere svyazi informatsionnykh tekhnologii i massovykh kommunikatsii (Roskomnadzor)* [Recommendations of Federal service for the supervision in the sphere of information technologies and mass communications (Roskomnadzor)], ROS. GAZ. Sept. 5 2014, <http://www.rg.ru/2012/09/05/informacia-site-dok.html>.

34. See, e.g., *Russia: Internet Legislation Merits Greater Scrutiny Before Passage*, HUMAN RIGHTS WATCH (July 11, 2012), <http://www.hrw.org/news/2012/07/11/russia-internet-legislation-merits-greater-scrutiny-passage>.

After the protests surrounding the deeply flawed 2011 parliamentary election<sup>35</sup> and the 2012 presidential election,<sup>36</sup> the government increasingly pursued the means to suppress dissent. A variety of bills were proposed to confront supposed threats of Western influence, including the prohibition of U.S. citizens from adopting Russian children,<sup>37</sup> the listing of NGOs with international funding as "foreign agents,"<sup>38</sup> and criminal sanctions for people who do not register dual Russian-foreign citizenship.<sup>39</sup>

It was in this context that the 2013 law was proposed. It modified the 2010 law by adding the phrase "by propagandizing non-traditional sexual relations" after "family values,"<sup>40</sup> opening a great deal of speech to possi-

35. See Org. for Sec. and Cooperation in Eur. Parliamentary Assembly [OSCE PA], *International Election Observation—Preliminary Findings and Conclusions*, at 1 (Dec. 5, 2011), <http://www.osce.org/odihr/85757> ("[The] lack of a level playing field during the electoral process . . . did not provide the necessary conditions for fair electoral competition."); *Kratkoe zayavlenie assotsiatsii "GOLOS" po itogam vyborov nablyudeniya khoda vyborov deputatov Gosudarstvennoi dumi Rossii, naznachenykh na 4 dekabrya 2011 g.* [Short announcement of the association "GOLOS" on the results of election observation of voting for members of the Government Duma of Russia.], GOLOS, <http://archive.golos.org/asset/5223> (last visited Nov. 29, 2015). See also Michael Schwirtz and David M. Herszenhorn, *Voters Watch Polls in Russia, and Fraud Is What They See*, N.Y. TIMES (Dec. 5, 2011), <http://www.nytimes.com/2011/12/06/world/europe/russian-parliamentary-elections-criticized-by-west.html>.

36. See, e.g., *Russia's Presidential Election Marked by Unequal Campaign Conditions, Active Citizens' Engagement, International Observers Say*, OSCE NEWSROOM (Mar. 5, 2012), <http://www.osce.org/odihr/elections/88661>; Press Release, GOLOS, 5 March Statement (Mar. 6, 2015), <http://archive.golos.org/news/5239> ("The Elections of the President of the Russian Federation were not free and fair, and did not meet the requirements imposed by Russian legislation and international electoral standards."); Ellen Barry and Michael Schwirtz, *After Election, Putin Faces Challenges to Legitimacy*, N.Y. TIMES (Mar. 5, 2012), <http://www.nytimes.com/2012/03/06/world/europe/observers-detail-flaws-in-russian-election.html>.

37. See "A Law on Sanctions for Individuals Violating Fundamental Human Rights and Freedoms of Russian Citizens Has Been Signed," KREMLIN.RU (Dec. 28, 2012) (administration press release on signing of adoption ban), <http://en.kremlin.ru/events/president/news/17233>; *Russia: Reject Adoption Ban Bill*, HUMAN RIGHTS WATCH (updated Dec. 28, 2012), <http://www.hrw.org/news/2012/12/21/russia-reject-adoption-ban-bill> ("It's wrong to make vulnerable children pawns in a cynical act of political retribution."). See also HUMAN RIGHTS WATCH, *LAWS OF ATTRITION: CRACKDOWN ON RUSSIA'S CIVIL SOCIETY AFTER PUTIN'S RETURN TO THE PRESIDENCY* 42-45 (2013) (describing the law's effects on NGO operation) [hereinafter *Laws of Attrition*].

38. *Laws of Attrition* at 12-20 (outlining the law and its operation in suppressing NGO activity). The foreign agent law has been responsible for closing a several Russian NGOs, including groups whose funding is provided solely by Russian citizens through foreign bank accounts. See generally *Russia: Government Against Rights Groups*, HUMAN RIGHTS WATCH (July 8, 2015), <http://www.hrw.org/news/2015/07/08/russia-government-against-rights-groups>. See also Vladimir Polkrovsky, *Russia's only private science funder closes its doors*, SCIENCE MAGAZINE (July 9, 2015), <http://news.sciencemag.org/europe/2015/07/russias-only-private-science-funder-closes-its-doors>.

39. Alissa de Carbonnel, *Russia Moves to Make Failure to Declare Dual Citizenship a Crime*, REUTERS (May 20, 2014), <http://www.reuters.com/article/2014/05/20/us-russia-bill-dual-citizens-idUSBREA4J0MJ20140520>.

40. For the textual changes, see the 2013 law, *supra* note 1, art. 1, (adding language to the 2010 law), *supra* note 31, art. 5, § 2.4.

ble sanction.<sup>41</sup> The banning of “homosexual propaganda” had been piloted in several Russian regions prior to the national legislation, and the CCRF had given its blessing to the theory that these laws protected vulnerable minors.<sup>42</sup> The ambiguous wording of the law and the definition by negative provides a broad range of available definitions for “non-traditional sexual relations.” The administrative code was updated to include a section on appropriate punishment for such propaganda, with fines ranging from 5,000 rubles (about \$160 in early 2013) for individuals to one million rubles for corporations. Immediately, government authorities who sought contrast with Europe had a social cause to fight for (halting the supposed spread of homosexuality from the decadent West), as well as a flexible assertion of independence from the international legal order and the legal means to enforce general control over opponents through an open-ended statute.

### 1. Effects of the Law

The most widespread consequence of the 2013 law has been the abrupt end of discourse about gay rights for fear of being prosecuted for spreading some kind of ill-defined “propaganda.” As one U.S. State Department official has noted, policies based on the 2013 law are “not just a limitation of speech for LGBT people, they’re a limitation for all Russians” because all Russians—not just LGBT Russians—are banned from discussing “non-traditional” relationships in public.<sup>43</sup> This incentive for self-regulation of liberal-leaning members of civil society may in fact have been the main intent of the law.<sup>44</sup>

At the same time, hateful rhetoric about LGBT people runs unchecked on state-sponsored media, including a memorable observation by popular commentator Dmitry Kiselyov that LGBT people should not be allowed to donate blood, and that “their hearts, in case of a car accident, should be buried in the ground or burned as unsuitable for the continuation of life.”<sup>45</sup> Although certain well-known members of the media criticized the law—including a memorable and very public exchange between an irreverent socialite and the law’s main sponsor about the applicability of the law to oral sex between heterosexual spouses<sup>46</sup>—the criticism of the

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41. Maria Issaeva & Maria Kiskachi, *Immoral Truth vs. Untruthful Morals? Attempts to Render Rights and Freedoms Conditional Upon Sexual Orientation in Light of Russia’s International Obligations*, 2 Russ. L.J. 82, 86 (2014).

42. *Id.* at 88-90.

43. Khristiana Narizhnaya, *Russia’s Assault on ‘Gay’ Free Speech*, GLOBAL POST (Mar. 18, 2012, 8:00 AM), <http://www.globalpost.com/dispatch/news/regions/europe/russia/120316/gay-rights-russia-battle-free-speech>.

44. Rebecca Favret, *Comment: Back to the Bad Old Days: President Putin’s Hold on Free Speech in the Russian Federation*, 12 RICH. J. GLOB. L. & BUS. 299, 315 (2012-13).

45. *License to Harm*, *supra* note 30, at 24-25.

46. See Masha Lipman, *The Battle over Russia’s Anti-Gay Law*, THE NEW YORKER (Aug. 10, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/08/the-battle-over-russias-anti-gay-law.html>.

law has been muted by widespread public support for the measure and increasing pressure on the media to conform to government control.

The lack of robust public discussion about or legal analysis of the law increases the difficulty of assessing how many people have been charged with its violation, but a handful of gay rights activists and journalists have been convicted and fined under the 2013 law.<sup>47</sup> Because lower courts in Russia are not required to publish their reasoning, it is not clear how the law is being interpreted.

At least one defendant, Elena Klimova, was initially acquitted of charges brought under the law,<sup>48</sup> but she has since been convicted on charges similar to the first.<sup>49</sup> Her case may be instructive as to what the government is willing to do with the law. Klimova was charged based on her work with a website called Children-404, which is named as a reference to the error browsers return for non-existent web addresses. The purpose of the site is to provide a forum in which LGBT children can express their identity and find support as they attempt to navigate the complexities of gender identity in Russia today.<sup>50</sup> It is therefore unclear under a plain reading of the law whether Children-404 can reasonably be considered to propagandize "non-traditional sexual relations" by trying to normalize LGBT identity.

Vitaly Milonov, member of the St. Petersburg Legislative Assembly, author of the city's anti-gay propaganda ordinance, and an anti-gay activist, has said that he believes Children-404 "should be closed, destroyed, wiped away from all of the social networks of Russia," and believes it is in clear violation of the 2013 law.<sup>51</sup> However, the law is not necessarily interpreted as broadly as Milonov would like. Even Milonov's allies seem unsure of how the law should be applied. Shortly after the 2013 law was passed, the law's author, Elena Mizulina, stated her opinion that the 2013 law does not affect Children-404. "Such a project doesn't relate to propaganda about non-traditional sexual relations," she explained. "Information that explains, describes, but doesn't call for action, is not provocative, and doesn't depict non-traditional sexual relations is not propaganda and, ac-

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47. Laura Mills, *How Russia Enforces Its Ban on Gay 'Propaganda'*, AP (Feb. 6, 2014), <http://bigstory.ap.org/article/how-russia-enforces-its-ban-gay-propaganda>.

48. *Russian Journalist Accused of Anti-gay Propaganda Defeats Charges*, AMNESTY INT'L (Feb. 24, 2014), <http://www.amnesty.ca/our-work/good-news/russian-journalist-accused-of-anti-gay-propaganda-defeats-charges>.

49. *LGBT Community Blacklisted on Charges of Propagating Suicide and Homosexuality*, MEDUZA (Feb. 2, 2015), <https://meduza.io/en/news/2015/02/02/lgbt-community-blacklisted-on-charges-of-propagating-suicide-and-homosexuality>.

50. Kirill Artëmenko, "Etot zakon ub'yt kakoe-to kolichestvo detei" ["This law will kill some number of children"], LENTA.RU (June 4, 2013, 5:11 PM), <http://lenta.ru/articles/2013/06/04/gaykids/>; 404 NOT FOUND, <http://www.deti-404.com/> (last visited Oct. 29, 2015).

51. "Dolzha byt' zakryta, unichtozhena, sterta nasvegda" ["It should be closed, destroyed, wiped away forever"], MEDUZA (Jan. 26, 2015, 10:46 AM), <https://meduza.io/feature/2015/01/26/dolzha-byt-zakryta-unichtozhena-sterta-navsegda>.

ording to the law, can be made available to adolescents.”<sup>52</sup> The CCRF has also proposed an ‘information-campaigning’ distinction, though it has not fleshed out the legal structure of such a difference.<sup>53</sup> This nuanced reading of the law seems designed to make a legal distinction between facts and opinions, a legal doctrine that is not demanded by the text but which softens its application. However, Klimova was later convicted on a different count for her work on Children-404.<sup>54</sup> The back-and-forth over Klimova’s case seems to have thrown into doubt even the Constitutional Court’s vague ‘information-campaigning’ distinction. Shortly after the first court rescinded the fine it had imposed, a court in St. Petersburg announced that it had found against Klimova under the 2013 law.<sup>55</sup> Worse, law enforcement appears to interpret the 2013 law very broadly. Among the provided examples of propaganda is publishing “lists of famous living or deceased gay individuals” or “out of context” statistics suggesting that gay couples “are ‘no worse than straight couples at coping with parental responsibilities.’”<sup>56</sup> Without a clearer sense of the legal limits of “propaganda,” it is unclear what kinds of information violate the law.

## 2. The 2013 Law under the Russian Constitution

The 2013 law represents a growing tendency of the Russian legal system to challenge the fundamental human rights on which its authority rests. The Constitution of the Russian Federation<sup>57</sup> was designed to reflect international human rights law both in substance and by integrating international law directly into the domestic legal order. Four sections of the Constitution require attention in connection with the 2013 law: Article 29, which provides for the freedom of speech (but allows the prohibition of propaganda); Article 19, which provides protection against discrimination; and Articles 15 and 46, which incorporate international law into the Russian legal system.

Although the CCRF seems unlikely to review the 2013 law, the Constitution includes provisions for the incorporation of international human rights standards into the legal system, undermining the law’s basic thrust. Article 15 provides that treaties and “[g]enerally recognized principles and

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52. Ekaterina Vinokurova, “*Liudei ved’ razdrazhaiut ne gei, a propaganda*” [“After all, people are irritated not by gays, but by propaganda”], GAZETA.RU (June 10, 2013, 8:36 PM) [http://www.gazeta.ru/politics/2013/06/10\\_a\\_5375845.shtml](http://www.gazeta.ru/politics/2013/06/10_a_5375845.shtml).

53. Issaeva & Kiskachi, *supra* note 41, at 91. The basic idea seems to be that to share information is one thing, running a social campaign (trying to convince others) is another.

54. Jeff Stone, *Founder of ‘Children-404’ LGBT Support Group Convicted Under Russia’s Anti-Gay Propaganda Law*, INT’L BUS. TIMES (Jan. 24, 2015, 4:17 PM), <http://www.ibtimes.com/founder-children-404-lgbt-support-group-convicted-under-russias-anti-gay-propaganda-1793890>.

55. Christopher Plummer, *A Revolving Door of Court Verdicts Against Children-404*, HUM. RTS. FIRST (Mar. 25, 2015), <http://www.humanrightsfirst.org/blog/revolving-door-court-verdicts-against-children-404>.

56. Issaeva & Kiskachi, *supra* note 41, at 95.

57. KONST. RF, *supra* note 10, at 652.

norms of international law . . . constitute an integral part of [the] legal system" and should therefore exercise a measure of direct effect by overriding domestic law in the event of conflicting standards.<sup>58</sup> Article 17 provides that "[t]he rights and freedoms of the individual and citizen shall be recognized and guaranteed in the Russian Federation in conformity with generally recognized principles and norms of international law and in accordance with this Constitution."<sup>59</sup> It has been the responsibility of the Constitutional Court to interpret what qualifies as a "[g]enerally recognized principle of international law," and to do so the CCRF has consistently relied on the decisions of the ECtHR, of which Russia is a member.<sup>60</sup>

The direct integration of international law into the Russian system is further bolstered by Article 46 Section 3, which provides that "everyone shall have the right, in accordance with international treaties of the Russian Federation, to apply to inter-state organs concerned with the protection of human rights and freedoms if all available domestic remedies of legal protection have been exhausted."<sup>61</sup> This reference to "inter-state organs" appears to be a deliberate reference to an international court system very much like the ECtHR, and was likely drafted with the Court in mind.<sup>62</sup>

These provisions provide a vital backstop for the protection of human rights in the Russian legal system. The Constitution demonstrates a remarkable commitment to the infrastructure of international law and naturally leads to the conclusion that the ECHR provisions and the decisions of the ECtHR should have a strong influence on the interpretation of the 2013 law. Legal scholars generally have accepted that, by one mechanism or another, ECtHR rulings are automatically binding law in Russia.<sup>63</sup> However, Constitutional Court Chairman Valery Zorkin first suggested several years ago that the role of the ECtHR in the Russian legal system

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58. *Id.* at 690, art. 15, § 4.

59. *Id.* at 691, art. 17, § 1. It is important to note that the actual wording of this provision does provide space for the interpretation that the Constitution would govern in the event of a conflict; however, until recently, the consensus was that international law should have binding effect on national law. This point is discussed in more detail below. *See also* Angelika Nussberger, *The Reception Process in Russia and Ukraine*, in *A EUROPE OF RIGHTS* 603, 617 (Alec Stone Sweet & Hellen Keller eds., 2008). Given the other provisions in the Constitution it seems clear that international law should have some sort of binding effect in the Russian legal order.

60. BURNHAM ET AL., *supra* note 10, at 33.

61. KONST. RF, *supra* note 10, at 696, art. 46, § 3.

62. BURNHAM ET AL., *supra* note 10, at 253-55.

63. *See, e.g.*, Nussberger, *supra* note 59, at 617 ("The primacy of the ECHR in relation to statutory law is generally not called into doubt. The status of the Convention in the hierarchy is, however, controversial, that is whether it ranks on a par with the Constitution or with constitutional laws or whether it occupies an intermediate rank between constitutional laws and statutory laws.") (footnote omitted). *See also* BURNHAM ET AL., *supra* note 10, at 17.

should be more narrowly construed.<sup>64</sup> The CCRF's response to the ECtHR *Markin v. Russia* ruling asserts the CCRF's supreme power of review over the application and interpretation of all law in Russia, which leaves the authority of ECtHR rulings in an indeterminate position.<sup>65</sup> That line of reasoning has continued in recent cases, culminating in the Constitutional Court's response to a request from the Duma concerning ECtHR rulings.<sup>66</sup> That ruling notes Russian law's surface resemblance to the rulings of other European constitutional courts regarding the primacy of the supranational body of law over the national constitution, but the context of the cases in which these assertions are made clearly assert a resistance to the pull of international law. Whether such resistance will have an effect on the law's fate depends largely on how binding the ECtHR can make its rulings in Russia.

### 3. Freedom of Expression

Article 29 of the Constitution of the Russian Federation provides that “[e]veryone shall be guaranteed freedom of thought and speech”<sup>67</sup> and that “[e]veryone shall have the right to freely seek, receive, transmit, produce and disseminate information in any lawful way.”<sup>68</sup> Article 29 only explicitly allows the limiting of free speech in terms of “[p]ropaganda or agitation inciting social, racial, national or religious hatred or enmity,”<sup>69</sup> which is not protected.<sup>70</sup> Article 29.5 provides that media shall be free and that censorship shall be prohibited.<sup>71</sup>

Based on the official title of the 2013 law, it seems that the propaganda exception is the provision from which the legislature derives its authority to limit public expressions of support for LGBT relationships. Since the categories of constitutionally prohibited propaganda do not seem to apply, it is unclear what the term “propaganda” actually achieves

64. BURNHAM ET AL., *supra* note 10, at 18. See also Press Release, CCFR Chairman Valery Zor'kin, “Predel ustupchivosti” [The limit of compliance], ROS. GAZ. Oct. 29, (2010) <http://www.rg.ru/2010/10/29/zorkin.html>.

65. Postanovlenie Konstitutsionnogo Suda RF ot 6 dekabrya 2013 g., N 27-P [Ruling of the Russian Federation Constitutional Court of Dec. 6, 2013, No. 27-P], ROS. GAZ. Dec. 18, 2013, § 3.2, <http://www.rg.ru/2013/12/18/ks-dok.html>. При этом, если в ходе конституционного судопроизводства рассматриваемые законоположения будут признаны не противоречащими Конституции Российской Федерации, Конституционный Суд Российской Федерации. . . в рамках своей компетенции определяет возможные конституционные способы реализации постановления Европейского Суда по правам человека.

66. Postanovlenie Konstitutsionnogo Suda RF ot 14 iulia 2015 g., N 21-P [Ruling of the Russian Federation Constitutional Court, No. 21-P], ROS. GAZ. July 27, 2015, § 5.3, [rg.ru/2015/07/27/ks-dok.html](http://www.rg.ru/2015/07/27/ks-dok.html). Of course, the CCRF is short on specifics as to why conforming to the ECtHR rulings in relation to LGBT rights or paying shareholders from forcibly privatized oil companies (the impetus of the question by the Duma members) might threaten Russian constitutional rights.

67. KONST. RF, *supra* note 10, at 693, art. 29, § 1.

68. *Id.* art. 29, § 4.

69. *Id.* art. 29, § 2.

70. *Id.*

71. *Id.*

in the law in terms of legal reasoning. Discussing positive views on sexual relationships does not presuppose any enmity or hatred of any other group. Even assuming the government's argument that the expression of LGBT normalcy could somehow corrupt the minds of children at all (let alone to the level of requiring federal legal intervention), if the mere expression of support for LGBT relationships might incite "social or religious hatred," it seems that the constitution would allow the limitation of a virtually limitless range of opinions. Such a broad reading of the propaganda provision would essentially render the constitutional protections for expression a dead letter.

If the law is not designed to prevent any of the prohibited types of propaganda, it is not clear how it justifies itself under the explicit provisions of the Constitution. Without this basis, the law rests on an evaluation by the legislature that the expression of the normalcy of LGBT sexual relationships is a greater threat to public morals than it is valuable as free speech, and that the danger to the public is so great that a suspension of the freedom of expression is appropriate. The perceived threats to children behind the 2013 law are unverified by the law and left unsupported by hard evidence.<sup>72</sup> The supposed danger is assumed by the 2013 law, leaving the necessity and proportionality of the measure in doubt. In evaluating the appropriateness of limiting speech under the purported danger, the law also presents a notice problem by way of its uncertain scope, leaving a good deal of discretion in the hand of courts and law enforcement. In short, instead of presenting means for a proportionality analysis, the 2013 law presumes its own conclusion in order to achieve its intended result: to limit speech on a topic that the government has found politically useful.

#### 4. Non-Discrimination

The Russian Constitution protects citizens against discrimination in Article 19, requiring that the state guarantee "the equality of rights" without regard to various categories such as sex, nationality, language, attitude to religion, and "other circumstances."<sup>73</sup> The CCRF has not interpreted "other circumstances" to explicitly include sexual orientation, but there is nothing in the Constitution to suggest that sexual orientation would naturally be excluded—and much to suggest that the European definition should be followed, based on the language of Articles 15 and 17 of the ECHR. Indeed, even in its 2014 ruling in *Alekseyev v. Russia* (hereinafter *Alekseyev II*), rejecting the necessity to protect the freedom of expression concerning "non-traditional sexual relationships," the CCRF seems to ges-

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72. There has been no new evidence presented by the Russian government since *Alekseyev I*, in which the ECtHR noted, "There is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children." *Alekseyev I*, ¶ 86.

73. KONST. RF, *supra* note 10, at 691, art. 19.

ture toward minority sexual identities as being a natural part of Article 19 of the Russian constitution.<sup>74</sup>

In any event, as with the suspension of the freedom of expression, the law presumes its own conclusions to prove the necessity for discriminating on the basis of gender identity. In a legal environment that takes rights seriously, it would be a simple matter to point out the failure to balance the right to non-discrimination and strike down the law. That balancing seems unlikely to occur in Russian courts for the same reasons that the law has not been struck down on free expression concerns.

### III. ECHR PROTECTIONS: FREEDOM OF EXPRESSION AND NON-DISCRIMINATION

The legal implications of the 2013 law demonstrate why the freedom of expression is critical to the maintenance of democratic principles. ECHR Article 10 allows for the limitation of the freedom of expression under a variety of circumstances not explicitly allowed under the Russian Constitution, including protecting individual reputations, preserving confidential information, and preserving public morals. It is the last criteria on which the 2013 law depends, with the intent of protecting speech in opposition to the interests of children or vulnerable adults. But Article 10 prefaces the justifications for speech limitations by requiring them to be “necessary in a democratic society.”<sup>75</sup> As will be made clear, previous ECtHR case law establishes that these restrictions do not meet the criteria of democratic necessity.

While the rights to expression and assembly are not identical, the Court’s emphatic defense of LGBT persons in relation to Article 11’s freedom of assembly has been constructed broadly and should also apply to the 2013 law’s restriction of expression. The Court’s reasoning in *Bączkowski* and *Alekseyev I* made clear that governments will not be allowed to invoke public safety or morality concerns to discriminate against supporters of LGBT rights.

#### A. *Laying the Groundwork: Article 11*

The ECtHR’s recent Article 11 jurisprudence lays out a clear case against the restriction of assembly rights due to issues of sexual identity.

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74. Postanovlenie Konstitutsionnogo Suda RF ot 23 sentiabria 2014 g. po delu o proverke konstitutsionnosti chasti 1 stat’i 6.21 Kodeksa Rossiiskoi Federatsii [Ruling of the Russian Federation Constitutional Court of Sept. 23, 2014 in the case of the testing of the constitutionality of article 1 section 6.21 of the Codex of the Russian Federation], ROS. GAZ. Oct. 3, 2014, § 2.1, [rg.ru/2014/10/03/sud-dok.html](http://rg.ru/2014/10/03/sud-dok.html) [hereinafter *Alekseyev II*] (“This given constitutional principle [of equality before the law], presuming also the inadmissibility of the restriction of rights and freedoms or the creation of any privileges based on membership within one or another social group, which term may be understood to include groups of persons of particular sexual orientation, is made concrete in the norms of statute. . . .”) (emphasis added). Of course, the Court later uses this equality of all groups to cut against the right of expression of LGBT persons and their supporters if such expression is “capable of causing harm to the rights and legal interests of other persons, primarily minors.” *Id.* § 2.2.

75. ECHR, *supra* note 26, art. 10, § 2.

State policies disallowing gay rights parades have consistently been defeated in the Court, which has developed a strong jurisprudence that LGBT rights are protected by European consensus and are not available for public policy or margin of appreciation exceptions. In 2007, the ECtHR ruled in *Bączkowski* that city administrators failed to meet the requirements of the law on road safety, sidestepping their arguments on the grounds of public morals and public safety.<sup>76</sup> However, on its way to recognizing an Article 14 non-discrimination violation under its "other status" criteria, the Court went further, noting that the Mayor's publicly expressed opinions—that homosexuality is immoral and the parade is "propaganda"—were sufficient to convince the court that the procedural process to obtain a parade permit was discriminatory.<sup>77</sup>

*Bączkowski* set the stage for an even more forceful ruling in *Alekseyev I*, where the Court rejected the government's claims to a margin of appreciation and ruled that the exclusion of a gay pride parade in Moscow was not justified under proportionality.<sup>78</sup> The Court then engaged with the government's arguments concerning public safety, finding that the government could not disallow the protest simply because some of their citizens might violently oppose it (noting instead that it was the duty of the government to protect the protesters and prosecute perpetrators).<sup>79</sup> The Court also observed that, in its view, Russian law did not provide for any limitation on gay rights parades due to public morals, and the Mayor's resistance to the parades on that account was therefore illegitimate.<sup>80</sup> The Court additionally recognized a broad European consensus rejecting the restriction of basic rights through discrimination based on sexual orientation.<sup>81</sup> Accordingly, the Court found a violation of Articles 11, 13, and 14, as it had in *Bączkowski*, but under even more emphatic terms.

In response to the ECtHR's conclusions, Moscow continued a campaign of intransigence against gay pride parades, even after a change in administration.<sup>82</sup> In 2012, Moscow enacted a one-hundred-year ban on any such demonstrations.<sup>83</sup>

#### 1. European Consensus against LGBT Status as Legitimate Criterion of Discrimination

*Bączkowski* and *Alekseyev I* strongly suggest that European consensus has been reached on the issue of assembly rights for LGBT activists. Al-

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76. See *Bączkowski*, ¶¶ 71-72.

77. *Id.* ¶ 100.

78. *Alekseyev I*, ¶¶ 69, 85-87.

79. *Id.* ¶¶ 76-77.

80. *Id.* ¶¶ 78-79.

81. *Id.* ¶ 83.

82. See Kristen L. Thomas, Note, *We're Here, We're Queer, Get Used to It*, 14 OR. REV. INT'L L. 472, 505 (2012).

83. Daniel DeFraia, *Moscow Bans Gay Pride Events for 100 Years*, GLOBALPOST (Aug. 17, 2012, 3:46 PM), <http://www.globalpost.com/dispatch/news/regions/europe/russia/120817/moscow-bans-gay-pride-events-100-years>.

though Paul Johnson expresses concern that *Alekseyev I* continues the ECtHR's unclear and uneven reliance on European consensus in relation to unsettled sexual orientation issues (like gay marriage),<sup>84</sup> European consensus on the issue of assembly is not in serious doubt. Beyond *Bączkowski* and *Alekseyev I*, evidence of a European consensus may be found in statements made by the Council of Europe, which do not represent binding law but do serve as a succinct expression of the European position. The Council's Recommendation CM/Rec(2010)5, cited by the ECtHR in *Alekseyev I* as evidence of the European position,<sup>85</sup> calls on states to redress "direct or indirect" discrimination based on sexual orientation and to "ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them."<sup>86</sup> In section 16 of the appendix, the Council argues explicitly that "Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression . . . for example on grounds of public health, public morality and public order."<sup>87</sup> Unlike in the religious expression cases, the Court and the Council do not hesitate to assert a bold line on the connection between non-discrimination and the right of assembly.

## 2. The Necessity Test

Article 11, like many other articles of the ECHR, provides for situations in which a citizen's assembly rights can be limited by her or his state as long as the restriction is "prescribed by law" and "necessary in a democratic society" under specific criteria, including "for the health or morals . . . of others."<sup>88</sup> These doctrines set outlines for what this clause encompasses, but are not immediately clear. The contours of the necessity requirement have shifted over time, but least in relation to LGBT Europeans' assembly rights, the ECtHR has made itself very clear. In *Alekseyev I*, the Court ruled that a Moscow city ordinance banning gay pride parades violated the ECHR because "irrespective of the . . . domestic lawfulness of the ban, [the ban] fell short of being necessary in a democratic society."<sup>89</sup> The Court makes a distinction between "substantive rights" for LGBT Europeans and "their right to campaign for such rights," suggesting that

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84. Paul Johnson, *Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v. Russia*, 11 HUM. RTS. L. REV. 578, 593 (2011).

85. *Alekseyev I*, ¶ 51.

86. Council of Europe, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, in COMBATING DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION OR GENDER IDENTITY 7, 8 (2011).

87. *Id.* at 10.

88. ECHR, *supra* note 26, art. 11, § 2.

89. *Alekseyev I*, ¶ 69.

there is no room for a margin of appreciation in the latter due to a settled European consensus.<sup>90</sup>

Paul Johnson argues that the centrality of the necessity test in *Alekseyev I* is significant because it clarifies that "in those States that continue to enact legislation with the intention of restricting the freedom of expression and assembly of homosexuals . . . [and even though] such restriction [might] be in accordance with the law, it will now be less likely to meet the necessity test of the Court."<sup>91</sup> While Johnson laments the ECtHR's lack of consistency on issues like gay marriage, he notes a "progressive narrowing of the margin of appreciation afforded to States in respect of sexual orientation issues."<sup>92</sup> Thus, while *Alekseyev I* does not solve all LGBT rights issues—let alone questions of the workings of the application of the margin of appreciation—it nonetheless strengthens the theory of a shrinking margin of appreciation, absorbed into the necessity test at least as it relates to Article 11 rights.

Even before *Alekseyev I*, the Court indicated that, at least as far as the assembly rights of LGBT Europeans go, the margin of appreciation relies directly on European consensus, prescription of the action by law, and the necessity test. In *Bączkowski*, the ECtHR held in that case that Poland failed to apply its restriction "as prescribed by law," but also implied that the restriction would not have met the necessity test in any event.<sup>93</sup> In *Alekseyev I*, the Court again did not balance the intervention according to democratic necessity, noting that a clear European consensus already exists on the question of the right of LGBT Europeans to march.<sup>94</sup> While the mysterious workings of the margin of appreciation continue to be unclear, the necessity test seems to create a strong limitation for its application. Alec Stone Sweet goes even further, arguing that the already-narrow margin of appreciation has essentially been absorbed into the necessity test, having been subsumed under the proportionality analysis, and "thus shrinks as consensus on higher standards of rights protection emerges within the regime."<sup>95</sup> While Stone Sweet's assessment might be an overstatement on the general state of the margin of appreciation, his observation resonates with the subtext of recent LGBT cases. From a certain point of view, the necessity test portion of proportionality analysis has become so important in these cases that the margin of appreciation no longer has any independent effect.

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90. *Id.* ¶ 84.

91. Johnson, *supra* note 84, at 583-84.

92. *Id.* at 589-90.

93. *Bączkowski* ¶¶ 69-71.

94. *Alekseyev I*, ¶¶ 83-84.

95. Alec Stone Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court*, FAC. SCHOLARSHIP SER, Paper 71, at 20 5-6, (2009) [http://digitalcommons.law.yale.edu/fss\\_papers/71](http://digitalcommons.law.yale.edu/fss_papers/71) [hereinafter Stone Sweet].

### 3. Inapplicability of the Margin of Appreciation

The relationship between the margin of appreciation and Article 10 has its roots in *Handyside v. United Kingdom*.<sup>96</sup> In a case where the defendant had been convicted on an obscenity charge, the Court noted that the freedom of expression “constitutes one of the essential foundations” of democratic societies, “applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.”<sup>97</sup> The ECtHR interpreted the necessity requirement of Article 10 in such a way as to give state governments some ability to define an appropriate level of free expression, as long as they defined Article 10’s “necessary in a democratic society” somewhere between “reasonable” and “absolutely necessary.”<sup>98</sup> Even so, the Court immediately noted that “the domestic margin of appreciation goes hand in hand with European supervision,” leaving for itself the final say in what kinds of situations it would be willing to defer to states, “both as to the aim of the measure challenged and to its ‘necessity.’”<sup>99</sup> The court also introduced the principle of European consensus (noting the lack of “a uniform European conception of morals”).<sup>100</sup>

The seeds of a narrow interpretation of the margin of appreciation were already sown in *Handyside*: although in practice the UK was allowed to set the definition of public morals, the ECtHR reserved to itself the final say on what “necessary” means.<sup>101</sup> In theory at least, the margin of appreciation represents a balance between the Court and contracting states: it is a recognition by the Court that it will not use its authority to “encroach upon the primary duty of Member States to protect the rights and freedoms enshrined in the European Convention.”<sup>102</sup> This deference “is also consistent with the principle of subsidiarity, an inherent quality of the European system.”<sup>103</sup> In practice, the scope of the margin of appreciation varies considerably depending on the context and the type of activity being restricted. For example, the margin of appreciation on the freedom of expression varies dramatically between the right to criticize the government, where the margin is narrow, and the right to engage in hateful speech, where the margin granted to state discretion is wide.<sup>104</sup>

An illustration of one area where the margin of appreciation is still quite active—the relationship between the state and religious expres-

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96. *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737, ¶ 48 (1976), <http://www.refworld.org/docid/3ae6b6fb8.html>.

97. *Id.* ¶ 49.

98. *Id.* ¶¶ 47-48.

99. *Id.* ¶ 49.

100. *Id.* ¶ 48.

101. *See id.* ¶ 49.

102. Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, 8 GERMAN L.J. 711, 717 (2007).

103. *Id.* at 717.

104. *Id.* at 723, 726.

sion—should be helpful in demonstrating why the margin of appreciation will not provide state discretion in granting basic expression rights to LGBT persons. In its *Lautsi v. Italy* ruling—decided the same year as *Alekseyev I*—the ECtHR left standing an Italian law requiring the display of crosses in public classrooms, but only under narrow criteria.<sup>105</sup> The core of the ruling allows a state to make use of the margin of appreciation in “the decision whether or not to perpetuate a tradition” as long as rights are substantially protected.<sup>106</sup> The Court bases its evaluation on the idea that “a crucifix on a wall is an essentially passive symbol” that imposed no “compulsory teaching about Christianity.”<sup>107</sup> This may sound like broad permission, but the Court suggests that the margin of appreciation is still not a blank check: the state must respond in some measure to the necessity test when imposing restrictions on religious expression, even where the margin of appreciation should apply.

*Lautsi* was decided in the context of several cases where the Court afforded the state considerable flexibility in denying public school employees the ability to wear religious apparel while at work.<sup>108</sup> The Court emphasized the role of the margin of appreciation in another of these cases, noting in *Dogru v. France* that “in France, as in Turkey or Switzerland, secularism is a constitutional principle . . . . [A]n attitude which fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention.”<sup>109</sup> Here, the ECtHR seems to invoke a local constitutional principle as a legitimate reason to apply the margin of appreciation, but not just any constitutional principle would apply. It appears that the Court, recognizing that there is no European consensus on the appropriate relationship between religion and the state, simultaneously recognizes that secularism passes the necessity test.

It is relatively clear, based on the use of the margin of appreciation in religious expression, that the conditions necessary for the application of the margin of appreciation are present in *Lautsi*—namely, a lack of European consensus and the requirement that the restrictions on rights be necessary in a democratic society. The same criteria are not present in the case of the restriction of expression as it relates to gender identity and acknowledging the existence of same-sex relationships. This difference is crucial for understanding the operation of the margin of appreciation and

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105. *Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=001-104040>.

106. *Id.* ¶ 68.

107. *Id.* ¶¶ 72-74.

108. See, e.g., *Leyla Şahin v. Turkey*, App. No. 44774/98, Eur. Ct. H.R. ¶ 122 (2005), <http://hudoc.echr.coe.int/eng?i=001-70956> (holding that Turkey can prohibit female students at a public university from wearing headscarves under its constitutional doctrine of secularism).

109. *Dogru v. France*, App. No. 27058/05, Eur. Ct. of H.R. ¶ 72 (2009), <http://hudoc.echr.coe.int/eng?i=001-90039>.

its seemingly shrinking scope: where there is no European consensus, there is a greater margin of appreciation, and vice versa.<sup>110</sup>

The ECtHR has also followed that line of reasoning in protecting the rights of LGBT Europeans, as demonstrated in *Baczkowski* and *Alekseyev I*, by recognizing a European consensus on at least some issues of LGBT rights. The Court made it very clear in *Alekseyev I* that the “right to campaign”—a phrase as easily applicable to the freedom of expression as to the freedom of assembly—would be protected for LGBT Europeans, even if “substantive rights” like marriage or adoption lacked a European consensus.<sup>111</sup>

Paul Johnson laments the ECtHR’s inconsistency on LGBT rights due to its reliance on European consensus and the margin of appreciation, noting “there is arguably no greater consensus across contracting states in respect of the adoption of children by homosexuals than of same-sex marriage.”<sup>112</sup> Although Johnson focuses on the incomplete suite of protections the ECtHR has provided LGBT Europeans, he also notes that the margin of appreciation afforded states on LGBT rights issues has “progressive[ly] narrow[ed]” over time.<sup>113</sup> By now, it is clear that the Court is committed to using the doctrine in a manner that reflects the current political and social conditions of Europe, and that certain LGBT rights are a settled question for the ECtHR. This pattern allows us to predict with some confidence that the Court would find against the state in a case concerning the 2013 law under Article 10.

#### 4. Applying Article 11 Jurisprudence to Article 10: Alekseyev II

In principle, Article 10 rights to expression need not automatically be protected identically to Article 11 rights to assembly and association under the ECHR.<sup>114</sup> On the other hand, taking into consideration the application of the necessity test in Article 11 cases, if Russia cannot discriminate against gay pride parades based on public morals, it almost certainly cannot discriminate more broadly against the mere public discussion of “non-

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110. Furthermore, the ECtHR does not appear to be strictly limited to a regional European consensus, taking into account the law and practice of states outside of Europe. While this expansion of the sample of states in some ways questions the European nature of the consensus required, the court seems unlikely to apply law from states where expression of sexual orientation is not protected, strengthening the case that European consensus has been reached. See, e.g., Ignacio de la Rasilla del Moral, *The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine*, 7 GER. L.J. 611, 617-18 (2006) (noting that “in some instances, as in the case of *Christine Goodwin*, the Court has gone beyond the comparison of the law and practice of European States [concerning transsexual rights] to refer to the existence of an international trend favourable to the phenomenon in question.”)

111. *Alekseyev I*, ¶ 84.

112. Johnson, *supra* note 84, at 590.

113. See *id.* at 589.

114. For a detailed discussion of ECtHR Article 11 law that parallels Article 10 concerns, see Johnson, *supra* note 84, at 583-88.

traditional sexual relations" based on Article 10.<sup>115</sup> Not only do the restrictions in the 2013 law fail to meet the requirements of Article 10 (or any other acceptable criteria under Article 29 of the Russian Constitution), but the ECtHR has also already demonstrated that European consensus and a strengthened necessity test protect the rights to assembly and expression for LGBT Europeans.<sup>116</sup> While the application of the margin of appreciation has sometimes been extremely slippery in cases where the freedom of expression and public morals conflict,<sup>117</sup> the additional feature of a recognized European consensus on what might be called "campaigning rights" for LGBT Europeans<sup>118</sup>—whose reasoning applies just as easily to Article 10 as Article 11—changes the calculus decisively against the government. When the ECtHR at length hears a case on the 2013 law, it seems inevitable that the Court will find Russia in violation of the ECHR. The remaining questions are what the CCRF will do in response, and what the conflict means for the binding power of the ECHR.

Perhaps the leading case under the 2013 law already accepted at the ECtHR is being litigated by a group of applicants which includes Nikolay Alekseyev, the same applicant as in *Alekseyev I*. In *Alekseyev II*,<sup>119</sup> the applicants were prosecuted under the 2013 law and were required to pay an administrative fine of 4,000 rubles (around \$125 at the time) after picketing in front of a children's library with signs that read "Gay propaganda doesn't exist" and "Gays aren't made, gays are born!"<sup>120</sup> Another applicant displayed a sign which read, "To be gay and to love gays is normal. To beat gays and lynch gays is criminal."<sup>121</sup> The applicants denied that their action could amount to propaganda because they were in fact sharing objective information that had no ill effect on the health, morals, or spiritual growth of adolescents.<sup>122</sup>

The CCRF found that, while sexual identity does fall under the "other protected groups" criteria of non-discrimination under the Russian Constitution, the right to discuss sexual relationships can be limited when it conflicts with the basis of authority of the Russian constitution, namely the mixture of humanist, national-traditional, and confessional moral

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115. See, e.g., *Bączkowski*, ¶ 61 (grouping the necessity test in Article 11 with Articles 8, 9, and 10, and stating "the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from a 'democratic society'").

116. See Council of Europe, *supra* note 86, at 7-8. See also *Genderdoc-M v. Moldova*, App. No. 9106/06, Eur. Ct. H.R. ¶¶ 57-58 (2012), <http://hudoc.echr.coe.int/eng?i=001-111394> (concluding that no additional examination of Article 10 rights are necessary in an Article 11 rights case, implying the same necessity test applies to both).

117. For an analysis of ECtHR decisions that reveal the Court's struggle in attempting to play a supervisory role in policing morals while respecting the margin of appreciation afforded to states, see Bakircioglu, *supra* note 102, at 727-31.

118. *Alekseyev I*, ¶ 84.

119. See *Alekseyev II*.

120. *Id.* §§ 1-1.1.

121. *Id.* § 1.1.

122. *Id.*

norms.<sup>123</sup> Noting that there is no consensus in international law concerning what might constitute information about sexuality that is harmful to children,<sup>124</sup> the Constitutional Court further found that the state's responsibility to care for the health of family formation is supported by Articles 7 and 38 of the Russian Constitution, as well as by Article 12 of the ECHR.<sup>125</sup> In pursuit of that goal, federal lawmakers can exercise broad powers of discrimination in determining what is harmful to the healthy development of children's sexuality and how it should best protect socially important values relating to motherhood, childhood, and family.<sup>126</sup>

The legal arguments in *Alekseyev II* leave little doubt as to what message the Constitutional Court intends to send. Invoking primarily the duty of the government to protect children's health, the Constitutional Court has set up a case that directly challenges the ECtHR's Article 11 doctrine concerning state duties under the ECHR in relation to public expression of sexual identity and relationships. Furthermore, the Constitutional Court appears to avoid any analysis of Russia's right-protection responsibilities under ECHR Articles 10 and 14, assuming perhaps that its granting of broad authority to the legislature suffices as appropriate proportionality analysis on Russia's duties. In this context, the Constitutional Court's rejection of Alekseyev's motion that the law be reviewed in the ECtHR for compatibility under the ECHR is more than a simple jurisdictional observation. Indeed, the Constitutional Court's invocation of supremacy, its confident citation of the *Markin* CCRF decision, and its characterization of the ECtHR as "subsidiary according to its character as an intergovernmental judicial organ for the resolution of concrete cases" (as opposed, perhaps, to an international court) tend toward an interpretation of *Alekseyev II* as a shot across the bow of the ECtHR.<sup>127</sup>

The trajectory of Russia's collision course with international legal structures has only picked up speed since the *Alekseyev II* CCRF ruling. Russia's foreign policy increasingly strikes a discordant note against other states, as demonstrated by the questionable legality of Russia's involve-

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123. *Id.* § 2.2. The exact contours of these norms are not well explained by the court.

124. *Id.*

125. *Id.* § 3.

126. *Id.* § 3.2.

127. *Id.* § 1.3.

ment in the wars in Ukraine<sup>128</sup> and Syria.<sup>129</sup> More directly concerning for the ECtHR, Russia has passed a series of laws further limiting the human rights of its citizens, including the broad criminalization of "extremism" (vaguely defined),<sup>130</sup> imposing long prison sentences for publicly supporting separatist movements within the Russian Federation,<sup>131</sup> and the labeling of a variety of human rights organizations as "foreign agents"<sup>132</sup> or disbanding them as "undesirable."<sup>133</sup>

For its part, the ECtHR has demonstrated increasing toughness against Russian violations of the treaty, ruling against Russia in a variety of cases important to the government, including those involving protests against the election of President Putin<sup>134</sup> and the forcible state acquisition of Mikhail Khodorkovsky's Yukos oil company.<sup>135</sup> In December 2015, the

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128. The legal status of Russian involvement in the war in Ukraine is muddled at best, but President Putin has admitted that some Russian forces are involved: "We've never said there are no people there who deal with certain matters, including in the military area, but this does not mean that regular Russian troops are present there. Feel the difference." *Vladimir Putin's annual news conference*, KREMLIN.RU (Dec. 17, 2015), <http://en.kremlin.ru/events/president/news/50971>. This is in contrast with President Putin's response to the same journalist the preceding year concerning the presence of Russian soldiers in Ukraine: "All those who are following their heart and are fulfilling their duty by voluntarily taking part in hostilities, including in southeast Ukraine, are not mercenaries, since they are not paid for what they do." *News conference of Vladimir Putin*, KREMLIN.RU (Dec. 18, 2014), <http://en.kremlin.ru/events/president/news/47250>.

129. UK foreign secretary Phillip Hammond openly accused Russia of deliberately targeting Syrian non-combatants in bombing raids: "The Russians are deliberately attacking civilians, and the evidence points to them deliberately attacking schools and hospitals and deliberately targeting rescue workers. . . Rescue workers are no longer marking their vehicles because they believe they are being targeted deliberately. They also told me hospitals around Aleppo and Idlib have had Red Cross symbols removed because they are becoming a target for the Russians." Patrick Wintour, *Russia accused of deliberately targeting civilians in Syria*, THE GUARDIAN.COM (Jan. 15, 2015), <http://www.theguardian.com/politics/2016/jan/15/russia-accused-of-breaching-norms-of-war-by-targeting-civilians-in-syria>.

130. UGOLOVNIY KODEKS ROSSIYSKOY FEDERATSII [UK RF] [Criminal Code], art. 280, <http://www.ugolkod.ru/statya-280>. For analysis of the government's use of the extremism law, see, e.g. Maria Kravchenko, *Inappropriate Use of Anti-Extremist Legislation from January 2014 through August 2015*, in *Brief*, SOVA CENTER FOR INFORMATION AND ANALYSIS, (10 Sept. 2015), <http://www.sova-center.ru/en/misuse/reports-analyses/2015/09/d32768/>.

131. UGOLOVNIY KODEKS ROSSIYSKOY FEDERATSII [UK RF] [Criminal Code], art. 280.1, <http://www.ugolkod.ru/statya-280-1>. For the description of one conviction for posting a sarcastic comment, see Tanya Lokshina, *Dispatches: The Crime of Speaking Up in Russia*, HUMAN RIGHTS WATCH (Dec. 22, 2015), <https://www.hrw.org/news/2015/12/22/dispatches-crime-speaking-russia>.

132. For a critical analysis of the law, including a list of organizations included as of December 9, 2015, see *Russia: Government against Rights Groups*, HUMAN RIGHTS WATCH (Dec. 9, 2015), <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle>.

133. The "undesirable organizations" law has been used to disband several organizations and to induce several others to cease operations in Russia. See *Russia: Open Society Foundation Banned*, HUMAN RIGHTS WATCH (Dec. 1, 2015), <https://www.hrw.org/news/2015/12/01/russia-open-society-foundation-banned>.

134. *Frumkin v. Russia*, App. No. 74568/12.

135. *Yukos v. Russia*, App. No. 14902/04.

Russian government passed the doctrine of the CCRF's right to review ECtHR rulings for constitutionality into Russian law, perhaps in response to these rulings.<sup>136</sup>

The argument could be made that the law only asserts the familiar notion of a dualist conception of international law, but given the structure of the Russian Constitution, the argument falls flat. The ECHR has a uniquely powerful effect, both politically and doctrinally, and the Russian legal system is unusually open to international law (at least on paper), making serious legal argumentation in opposition to the ECtHR a difficult task.

### 5. The Cost of Conflict

Taken together, the state of Russian law, the current doctrine of the CCRF, and the particulars of the 2013 law all seem to be directly opposed to the ECHR system. But the costs of the Russian government's affront to the ECHR system do not fall solely on the ECtHR. If Russia refuses to change the law, it is left with two uncomfortable alternatives: a clear break with ECtHR's rulings (either denunciation of the treaty under Article 58 or an open statement that Russia will not recognize ECtHR rulings), or persisting in a long practice of selective non-compliance that will erode its ability to fully participate in the Council of Europe.

Officials in the Russian government are well aware of this dilemma and appear to be willing to engage in threats of withdrawal, at least rhetorically. With tensions high over the war in Ukraine, the voting rights of the Russian delegation to the Parliamentary Assembly of the Council of Europe (PACE) were suspended starting in April 2014, leading to a Russian boycott until the end of 2015, maybe longer.<sup>137</sup> In January 2015, the Speaker of the State Duma, Sergei Naryshkin, floated the idea of withdrawing from the Council of Europe by the end of the 2015.<sup>138</sup> While Russia has yet to follow through with the threat, a withdrawal from the Council of Europe would also imply a withdrawal from the ECHR system, with all the costs that withdrawal necessarily entails: political isolation from international neighbors, a loss of influence over the European deci-

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136. "The Constitutional Court of the Russian Federation may . . . decide a question concerning the possibility of fulfilling a decision of an intergovernmental organ for the protection of human rights and freedoms without carrying out a hearing, if it comes to the conclusion that the question may be decided on the basis of the contents of rights rulings in previously accepted rulings of the Constitutional Court of the Russian Federation and the carrying out of a hearing is not indispensable for the fulfilment of the rights of the parties." *Federal'nyi Zakon RF o vnesenii izmenenii v Federal'nyi konstitutsionnyi zakon "O Konstitutsionnom Sude Rossiiskoi Federatsii"* [Federal law of the Russian Federation on the amendment of Federal constitutional law "On the Constitutional Court of the Russian Federation"], *ROSSIISKAYA GAZETA* [ROS. GAZ.] December 14, 2015, art. 1, ¶ 3, <http://www.rg.ru/2015/12/15/ks-site-dok.html>.

137. *Ukraine Conflict: Russia Boycotts Europe Rights Body PACE*, BBC (Jan. 28, 2015), <http://www.bbc.com/news/world-europe-31032034>.

138. *Naryshkin: Russia May Raise the Question of its Council of Europe Membership*, TASS (Jan. 21, 2015, 11:54 PM), <http://tass.ru/en/russia/772588>.

sion-making process, possibly decreased trade relations, and a confirmation of Russia's status as a pariah in international law.

The Russian government has shown that it is willing to test the international order where it conflicts with its interests and, in the case of the annexation of Crimea, openly defy international law. Far-seeing political calculus on the part of the Russian government would suggest that the costs of non-participation in the Council of Europe and the ECHR would be heavy, leaving Russia not only isolated politically but also removing an important tool in protecting Russian interests in Europe. However, Russia's exit from the system cannot be ruled out, given recent events and its increasingly erratic relationship with international legal norms.

Even in the event that Russia is truly committed to a path of self-isolation and the breaking of its international obligations, any moves to delay that break by diluting the strength of ECtHR doctrine on LGBT rights (or any other subject) would seem to incur all costs and no benefits for the ECHR system. Any attempt on the part of the ECtHR to provide Russia with a margin of appreciation on issues like LGBTQ rights would only legitimize a deliberately bad-faith gesture on the part of Russian legislation. Given Russia's defiant tone, it seems unlikely Russia will reward leniency from the ECtHR with compliance. On the contrary, Russia might feel emboldened and heap provocation upon provocation against a weakened ECHR system either as a means of justifying its secession from the treaty, or else to undermine efforts directed toward European integration and the development of human rights law.

Worse, Russian defiance of the ECtHR might intensify a worrying trend among the ECHR member states, some of whom are increasingly drifting away from human rights protection. In Hungary, the rise of Viktor Orbán's Fidesz Party has led to a series of reforms that Orbán describes as part of "illiberal democracy,"<sup>139</sup> including a dramatic restructuring of election law and the consolidation of the media into the hands of people loyal to Fidesz.<sup>140</sup> In Turkey, the moves of President Erdogan to exert greater control over the media have raised protests from the European Union, and he openly declared that after the 2015 elections, he hoped to command a majority great enough to dramatically increase the constitutional powers of the President—likely at the expense of his political oppo-

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139. For a declaration of Orbán's definition of illiberal democracy, see *Prime Minister Viktor Orbán's Speech at the 25th Bálványos Summer Free University and Student Camp* (July 26, 2014), <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>.

140. See, e.g., *Disrespect for European Values in Hungary, 2010-2014*, HUNGARIAN HELSINKI COMMITTEE, (Nov. 21, 2014), [http://helsinki.hu/wp-content/uploads/Disrespect\\_for\\_values-Nov2014.pdf](http://helsinki.hu/wp-content/uploads/Disrespect_for_values-Nov2014.pdf). See also *Hungary: Constitutional Change Falls Short—Europe Should Act on Its Rule of Law Concerns*, HUMAN RIGHTS WATCH, <http://www.hrw.org/news/2013/09/18/hungary-constitutional-change-falls-short>.

nents.<sup>141</sup> Although the leaders of other member states may have stronger ties and public opinion in favor of European cooperation, states that would like to avoid human rights obligations might find it attractive to exploit a Russian crack in the treaty regime to ignore more of their ECHR obligations. Drawing out the conflict therefore does not benefit the ECtHR, which should prepare itself to engage the 2013 law (and other violations of the ECHR) directly and swiftly.

In response to the 2013 law, the ECtHR need do nothing beyond the obvious: apply its Article 11 and non-discrimination jurisprudence to Article 10 and remind Russia that its ECHR obligations apply. While other issues and other cases may also demand the Court's attention, the 2013 law presents unique significance, with its roots in a signature European rights issue and stemming from a law apparently designed to challenge the ECHR. At this stage, the Court cannot sidestep the 2013 law even if it wanted to.

Additionally, there might be a silver lining if Russia were to decide to withdraw from the ECHR: such an unusual event would both prove why reforms to the ECHR are so valuable and remove a major obstacle to those reforms. While Russia is inescapably part of Europe—whether or not either Europe or Russia likes to admit it—Russia has also often played spoiler to ECtHR reforms.<sup>142</sup> If Russia were to leave the ECHR, either permanently or temporarily, it might be possible to finally resolve long-standing issues regarding caseloads, enforcement of compliance, and Court composition.

Ultimately, while there may be nothing that the ECtHR can do to force Russia's compliance, the logical extension of the Court's jurisprudence on LGBT assembly rights to expression represents the best path forward. If the Court does move resolutely against the 2013 law, as it should, it will demonstrate confidence not so much in its own strength over the Russian Federation, but in the necessity of their relationship.

#### IV. MOVING FORWARD WITH CONFIDENCE: MEDIATING BETWEEN THE ECHR AND MEMBER STATES THROUGH SYSTEMS PLURALISM

The ECtHR carries a special responsibility to resist the severe limitation of the freedom of expression in Russia and to protect LGBT Russians from being sacrificed in the government's bids to impose greater control over society. If the Court decides to stand its ground, it would require Russian courts to uphold the non-discrimination and expression rights of Russian citizens. With *Alekseyev II* already on its way to the ECtHR, it is

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141. See, e.g., *Erdogan tells Europe to stop criticizing Turkey*, REUTERS (Dec. 26, 2014, 10:56 AM), <http://www.reuters.com/article/2014/12/26/us-turkey-erdogan-idUSKBN0K40U720141226>.

142. Nussberger, *supra* note 59, at 607 (outlining the way Russia has refused to ratify several Additional Protocols to the ECHR). See also *supra* note 12 and accompanying text, demonstrating the difference in dates of ratification between Russia and other Member States.

important that the ECtHR seize the opportunity to strengthen its protections of LGBT Europeans and of expression generally.

This opportunity requires a careful understanding of the somewhat paradoxical sources of the ECHR's authority. On the one hand, the CCRF observations in *Alekseyev II* about the limitations of the ECtHR are not entirely unfounded in the treaty text itself, particularly in relation to possible interference with national legal processes. Both the exhaustion requirement<sup>143</sup> and the Court's inability to independently enforce its rulings<sup>144</sup> demonstrate that the ECHR is not designed to operate entirely independently but rather hand-in-hand with national legal systems. In addition, the ECtHR is primarily authorized to address individual cases and not to overrule statutes: even in the case of pilot judgments, the Court seems to assert an administrative duty to lower its caseload rather than a doctrinal right to control national law.<sup>145</sup>

At the same time, the ECHR treaty does seem designed to provide corrective rulings to wayward state courts, suggesting at least some form of superiority or independence. The ECHR treaty claims in itself the authority to define the human rights it includes without explicit reference to state definitions of those rights.<sup>146</sup> When the ECtHR employs techniques like the margin of appreciation to give states space to maneuver, it can be argued that it does so of its own accord and not out of necessity. This argument can be bolstered by the vagueness about the operation and source of the margin of appreciation. In these ways, the ECtHR seems to operate as a constitutional court might, deriving its authority not solely as temporary grant at the consent of state sovereignty by way of a treaty, but as a court endowed with its own authority.

In support of the proposition that the ECHR should be understood to act autonomously, Alec Stone Sweet argues that the treaty can be understood at least loosely as a constitutional system based on its structure, its behavior as a court, and its relationship to member states. In the first place, the ECtHR protects fundamental rights (traditionally a constitutional domain). It does so through authoritative interpretation of the ECHR through a sustained (and growing) caseload and a "minimally robust conception of precedent."<sup>147</sup> Additionally, the ECtHR employs proportionality to interpret the ECHR, which is "a global *constitutional* standard" for evaluating rights.<sup>148</sup> Stone Sweet argues elsewhere that the development of pilot judgments amounts to the assertion that the ECtHR can make generally-applicable rulings instead of deciding only individual

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143. ECHR, *supra* note 26, art. 35.

144. The treaty has no enforcement mechanisms beyond the commitment of member states to "undertake to abide by the final judgment of the Court in any case to which they are parties." ECHR, *supra* note 26, art. 46.

145. See *The Pilot Judgment Procedure* ¶¶ 1, 6, 9, EUROPEAN COURT OF HUMAN RIGHTS, [http://echr.coe.int/Documents/Pilot\\_judgment\\_procedure\\_ENG.pdf](http://echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf).

146. ECHR, *supra* note 26, art. 32.

147. Stone Sweet, *supra* note 95, at 2-3.

148. *Id.* at 5.

petitions.<sup>149</sup> In other words, the ECtHR might be considered a constitutional court because it does what constitutional courts do.

The ECHR might also be considered constitutional in its interaction with member states, particularly through state incorporation of ECtHR rulings. Stone Sweet notes that many states which lacked judicially enforceable charters of rights—including France, the UK, and the Netherlands, among others—have incorporated the ECHR into their legal systems to fill “certain ‘gaps’ in the national constitution, enabling the [state] courts to review the lawmaking of all public authorities, including Parliaments, for their conformity with Convention rights.”<sup>150</sup> Some states, like the Netherlands, explicitly give ECtHR rulings direct effect, and with the serious exceptions outlined in this note, member states do not generally challenge the applicability of the ECHR to their law with serious force, suggesting a strong binding authority in the body. Although the degree of incorporation varies from state to state, and although the ECtHR lacks the authority to force a state to change its internal law, the weight and effectiveness of the ECtHR may be seen as sufficiently binding on member states to be in some degree constitutional.

The argument about the “constitutional” nature of the Court has engendered a great deal of legal controversy, as it implies both broad powers for the ECtHR and additional limitations on state sovereignty. Although prominent members of the Court argued in favor of a constitutional interpretation of the ECHR, that point was not settled. In discussions concerning the reformation of the ECtHR, debates about the constitutional character of the Court were possibly part of the reason why Protocol 14 was so hard won.<sup>151</sup>

Critics of the idea of constitutional courts outside of sovereign states might object that the ECtHR lacks the features necessary to claim any sort of binding constitutionality. Dieter Grimm, for example, demands both that a constitution be representative of a specific people and that it assert pure primacy in and of itself<sup>152</sup>—two features the ECtHR lacks. For these reasons, perhaps, *Alekseyev II* describes the ECtHR as a “subsidiary” and “intergovernmental” quasi-judicial “organ” as opposed to a court, let alone a court that can bind the CCRF.<sup>153</sup> Without the attachment to a national constitution with sovereign powers, the argument goes, a court

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149. Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, in *A EUROPE OF RIGHTS* 3, 11 (Alec Stone Sweet & Helen Keller eds., 2008).

150. Stone Sweet, *supra* note 95, at 8.

151. Resistance to initiatives to expand ECtHR authority to a generally binding rulings, sometimes justified by proponents as extensions of its “constitutional mission” as opposed to providing individual remedies, required careful negotiation among the member states. See ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 500-02 (2010).

152. Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, in *THE TWILIGHT OF CONSTITUTIONALISM?* 3, 9 (Petra Dobner & Martin Loughlin eds., 2010).

153. *Alekseyev II*, § 1.3.

like the ECtHR cannot exercise anything approximating binding constitutional powers.

Traditional constitutional theory presupposes that a constitutional regime precludes all other sources of sovereign authority, and that the constitution source from which all legal authority derives, but in the modern international legal order, it seems clear that states do not exercise all legal authority. From the UN Security Council to the International Criminal Court to the complex structures of the European Union, a variety of international organs exercise what appears to be binding, permanent legal authority. While conceptually the authority of these international organs might be argued to derive from their member states, in practice, member states are unable to withdraw their authority from most of these systems once it has been granted. Indeed, the very nature of the ECHR presumes that states can cede some degree of authority over rights interpretation to an international court. If in practice the sovereign powers characteristic of a sovereign state can be permanently absorbed into an international organ, a hard line claiming states are the only source of authority in international law becomes difficult to defend: questions of the monistic or dualistic nature of international law become muddled as both states and international bodies appear capable of deriving their powers from texts which claim binding legal authority and exercising that authority simultaneously.

Constitutional pluralism helps resolve this theoretical difficulty by describing more accurately the interaction of the ECHR with the legal systems of member states. Instead of limiting the concept of constitutional authority as necessarily exclusive, constitutional pluralism claims that multiple sources can claim independence without fully resolving which claim is ultimately superior. In this way, member states recognize the ECHR as a binding treaty deriving its legal strength from their sovereign authority, while the ECtHR claims that its legal authority derives from the text of the ECHR now that it has been put into effect.

To the charge that constitutional pluralism is by definition impossible, because a constitution claims within itself all final legal authority, Stone Sweet responds that pluralism already exists *within* state constitutional systems—for example, in the federal systems of Germany and Italy—and therefore competition between member state courts and the ECtHR should not be particularly concerning.<sup>154</sup> Alternatively, if the assertion of constitutionality is too much, the powers of the ECHR could be described as something more like Andreas Voßkuhle's *europäischer Verfassungsgerichtsverbund* ("multi-level cooperation of the European constitutional courts"),<sup>155</sup> which avoids the use of the word "constitution" while describing a situation where there are multiple claims of independent and binding legal power. In a similar way, even when it dislikes the rulings of the

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154. Stone Sweet, *supra* note 95, at 10-12 (describing "pluralist," or at least unconsolidated, constitutional adjudication systems in Spain, Germany, Italy, and France).

155. Andreas Voßkuhle, *Multilevel Cooperation of the European Constitutional Courts*, 6 EUR. CONST. L. REV. 175, 183-86 (2010).

ECtHR, Russia is forced into the difficult position of defending its own sovereign authority while somehow conforming to the judgments of the ECtHR. Competing claims of final authority between the Russian Constitution and the ECHR, along with an inability to evade the legal rulings of the ECtHR, explains why a ruling like the *Markin* CCRF decision was necessary for the Constitutional Court in the first place. Whatever the origin of the ECHR's authority, the binding power of ECtHR rulings on Russian courts suggests the relationship is more than simply consensual.

#### A. *Systems Pluralism between Russia and the ECHR*

The lingering tension between the ECHR and the Russian Constitution after the *Markin* decisions and their restatement in statute presents special problems for the CCRF. If the Constitutional Court insists on its right to override ECtHR rulings, the courts will be on a collision course over the 2013 law, among others. Unfortunately, no clear hierarchy presents itself in order to resolve the conflict: on the one hand, Russia is a member of the ECHR and is bound by international law to respect its rulings; on the other hand, the Russian Constitution claims authority in and of itself to define human and civil rights and vests that power in the Constitutional Court. The only escape is to openly defy international law, which decision the Russian Constitution denies.

Thus, the tension between the CCRF and the ECtHR presents an opportunity to explore the viability of systems pluralism, where both courts claim original authority to define human rights, but neither can overpower the other and therefore must accommodate the other to protect human rights. Daniel Halberstam has described this type of constitutional pluralism as “systems pluralism,” a relationship between legal systems in which there exists “a true conflict of final legal authority,” mutually embedded openness in the one to the claim of authority made by the other, the lack of a “mutually-accepted tie-breaker,” and “a common cause among the sites of governance.”<sup>156</sup>

This type of pluralism presumes that because a final hierarchy cannot be established between certain types of legal systems, constitutions need not be entirely closed systems in order to be fully authoritative. Instead, legal systems will interact in non-hierarchical but structurally-compelled ways that deny the ability to resolve the conflict of authority. For example, inside the European Union, neither the member states nor EU institutions can fully control the other, but neither can they truly eliminate the other. Halberstam describes this situation of reciprocal dependence in the EU as “mutual embedded openness.”<sup>157</sup>

Mutual embedded openness can accurately describe the ECHR system as well: member states remain generally open to the authority of the

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156. Daniel Halberstam, *Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 85, 95 (2012).

157. *Id.* at 97-99.

ECHR, inasmuch as they feel the necessity to participate in European integration. This is especially true as it relates to Russia, where openness and adherence to international human rights law is required by the constitution and where Russia is a signatory to the ECHR treaty.

1. Acting with Binding Authority through Mutual Embedded Openness

Regardless of whether the ECtHR is officially recognized as a constitutional court, the case of the 2013 law demonstrates precisely why it should act like one, at least on certain issues. Currently, each of the factors of systems pluralism is present in the relationship between the ECHR and the Russian legal system. *Markin* and *Alekseyev II* demonstrate that there is a true conflict as to where final authority to rule on human rights cases lies. Russia insists on the final word on the application of ECtHR rulings by reserving to the CCRF the right to evaluate the constitutionality of *any* judgment having legal effect in Russia. For its part, the ECtHR presumes that Russia is bound to accept its rulings under commonly-accepted rules of international law, let alone under the Russian Constitution's special provisions, and that the ECtHR's judgments are final.

At the same time, each system is inherently open to the other through the foundational principles of its own legal system. The Constitutional Court is bound to heed the ECHR treaty and the Constitution, which privileges international law. It cannot claim authority in the constitution to deny the ECHR without undermining its own legal authority. Thus, in the *Markin* CCRF decision, the Constitutional Court accepted the ECtHR judgment but insisted on its own authority to review the rulings, demonstrating that even though it claims final authority in itself, ECtHR rulings continue to hold force. The ECtHR, on the other hand, inherently relies on member states' legal systems to both produce situations for review and to enforce its judgments.

At the same time, conflict has only arisen because the ECHR and the Russian Constitution both claim to be invested in the common project of protecting the human rights of Russian citizens. The conflict is by design: if the ECHR was designed to simply supplant constitutional courts on issues of human rights, the treaty would be designed very differently. The ratification of binding international treaties by sovereign states is a process that inherently presumes multiple claims of final authority—in other words, the operation of the ECHR is a process that presumes systems pluralism.

The entire conflict around the 2013 law illustrates why this is the case. Even when the CCRF asserts in *Alekseyev II* that the ECtHR is a subsidiary body and that only a constitutional court can review the content of human rights in a national legal system,<sup>158</sup> it still makes reference to the ECHR to define family rights, implicitly empowering the ECtHR as an interpreting body.<sup>159</sup> When it comes to defining politically sensitive rights,

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158. See *Alekseyev II*, §1.3.

159. *Id.* § 3.

this process leaves a great deal of uncertainty as to the status of the relationship between the CCRF and the ECtHR but leaves them tied together in ways that do not provide room for Russia to ignore the ECtHR with impunity.

This situation continues, however, only as long as there is no Russian exit from the ECHR system. In theory, constitutional pluralism requires lasting conflict between competing constitutional legal systems, where each system is fundamentally and inevitably tied up in the other. Because no permanent hierarchy has been established between the ECtHR and the CCRF, the systems must learn to accommodate each other. Each claims the authority of final judgment on the meaning of human rights as applied in Russia. Barring a Russian exit, both systems must interact whether they like it or not.

Current Russian cases will likely test the durability of Russia's participation in the ECHR. It is an open question as to whether such a pluralistic relationship can endure the level of conflict currently presented between Russia and the ECtHR, or whether systems pluralism is simply a transitional process from one hierarchy to another. The latter view would suggest that the current high-energy conflict between the ECtHR and the Constitutional Court must eventually resolve itself into a more stable system through a new hierarchy. It is unclear how that could occur since there is no way for the ECtHR to compel Russian courts to comply with its rulings. However, if conflicts are not resolved, the costs (in both the political and perhaps the monetary sense, in the case of fines) will continue to mount until, perhaps, Russia is presented with the choice to either make an about-face and comply, or be compelled to leave the ECHR system.

At the same time, the ECHR is a system which involves many actors beyond Russia, and the ECtHR's relationship with Russia will affect its relationship with other states. If the ECtHR chooses to appease the Russian government, it will be sending the signal to the other members of the ECHR that the pluralist system has entered a state of degradation and that the balance of power is up for negotiation. If Russia chooses to exit the ECHR system when presented with the costs of continued resistance, the relationship with other members of the system will also be tested. The degree of binding authority it would continue to exercise after a Russian exit would not necessarily be absolute—it would be clear that states can escape its authority by leaving the treaty—but for those states who see no choice but to stick with the ECHR, it would operate as if it were absolute. It is therefore important that the Court therefore send the right message: member states accepted a pluralist relationship on human rights and cannot with impunity choose when to heed the ECtHR and when to ignore it.

While the exit of one contentious partner might prove that the ECHR is not an entirely permanent system, it might also provide an opportunity to improve it. Some of the incentives which hold the rest of the ECHR together do not apply to Russia, including EU membership and greater business ties. Therefore, a show of strength on the part of the ECtHR in

confronting the 2013 Russian law can demonstrate the seriousness of the Court's jurisprudence on human rights.

The particulars of the case of the 2013 Russian law bolster the argument for the binding (or even constitutional) status of the ECHR and demonstrate the opportunity for the ECtHR to move assertively. Even if arguments about the fully constitutional nature of the ECHR are set aside, the specific provisions of the Russian Constitution, particularly Article 15, grant international law and human rights law privileged status and demonstrate one instance where its rulings take on the characteristics of systems pluralism. Thus, whether the ECHR is seen either as having been granted a special constitutional status by the Russian Constitution, or whether it is exercising a type of finally-binding authority from its inherent nature as a human rights document, it should move with confidence in asserting its interpretation of the inherent rights of Russians to speak in public concerning homosexual relationships.

### CONCLUSION

The direction the ECHR has taken in its LGBT jurisprudence is unequivocal and irreversible. Equally clear is that Russia means to challenge the ECtHR's resolve with its 2013 law outlawing "propaganda" about "non-traditional sexual relationships." Given that conflict is unavoidable, the question is what happens next. The custom and text of the ECHR gives the ECtHR great authority, and the Russian Constitution ties the hands of Russian courts by proscribing the evasion of international law, statutory rules and contrary judicial opinions notwithstanding. The alternative is to degrade the Russian Constitution as the final binding authority of the legal system.

While the ECtHR cannot force the CCRF to follow the protections its own constitution provides, nor can it require the enforcement of ECHR rights, the ECtHR's almost inevitable ruling against the 2013 law (and others in conflict with the ECHR) will create heavy pressure for the CCRF to comply. This kind of pressure might encourage the government to change course on the law rather than endure the legal and geopolitical consequences of a strong ruling from the ECtHR, but it will surely demonstrate the strength of the ECHR system. At the same time, other member states will understand that the Court considers itself a partner in defining European human rights, not a subordinate of state courts. Anything less would seem to vindicate Russia's stand against European values.

Particularly when Russia seems determined to continue to play spoiler to the ECHR system, any attempt to mollify Russia is a proposition with no benefits. On the other hand, the principled defense of ECHR rights in opposition to the 2013 Russian law provides major benefits. For Russian citizens, this would provide substantial protection in precisely the way the Russian constitution intended: by ensuring the international system will act when domestic political will is lacking. In terms of the ECHR system, a strong follow-up to the ECtHR's Article 11 jurisprudence would strengthen both the development of LGBT rights in Europe and provide a

principled defense of the freedom of expression. Finally, ruling against the 2013 law would reinforce the strength of the Court's rulings among member states and reinforce the principle of mutually embedded openness among all the members of the ECHR system. While there are risks to any action, it seems clear that recognizing the 2013 law for what it is—a brazenly egregious violation of the ECHR—is the best path to a strong and vibrant human rights system in Europe.