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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**

**ON THE ISSUE OF THE PROHIBITION  
OF SO-CALLED “PROPAGANDA OF HOMOSEXUALITY”  
IN THE LIGHT OF RECENT LEGISLATION  
IN SOME OF COUNCIL OF EUROPE MEMBER STATES  
INCLUDING**

**THE REPUBLIC OF MOLDOVA, THE RUSSIAN FEDERATION  
AND UKRAINE**

**On the basis of comments by**

**Ms Finola FLANAGAN (Member, Ireland)**  
**Mr Jan VELAERS (Member, Belgium)**  
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## TABLE OF CONTENT

<b>I. Introduction .....</b>	<b>3</b>
<b>II. Background information on domestic laws .....</b>	<b>3</b>
A. The Russian Federation:.....	3
B. Ukraine .....	4
C. The Republic of Moldova .....	5
<b>III. Preliminary Remarks .....</b>	<b>6</b>
<b>IV. Standards .....</b>	<b>7</b>
<b>V. Analysis .....</b>	<b>9</b>
A. The prohibition of the so-called “propaganda of homosexuality” and the Freedom of Expression.....	9
1. Compliance with the requirement of “prescribed by law” .....	9
2. “Necessary in a democratic society” for “the protection of health or morals” and “for the protection of the rights of others” .....	11
a) Freedom of expression and sexual orientation.....	11
b) Protection of morals in a democratic society .....	13
c) Protection of the rights of minors in a democratic society.....	15
B. The prohibition of the so-called “propaganda of homosexuality” and the principle of non-discrimination.....	17
<b>VI. Conclusion .....</b>	<b>20</b>

## I. Introduction

1. By a letter dated 7 December 2012, the Chairman of the Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe requested an opinion on “the issue of the prohibition of so-called ‘propaganda of homosexuality’ in the light of recent legislation in some Council of Europe Member States, including the Republic of Moldova, the Russian Federation and Ukraine”.
2. A working group of Rapporteurs was set up, composed of Ms Finola Flanagan, Mr Jan Velaers and Mr Vladimir Djeric.
3. By a letter of 18 April 2013, the Venice Commission invited the authorities of the above-mentioned States to provide, if they so wished, any observation or additional elements of fact or law that they deemed relevant for the Commission’s upcoming opinion. No observation has been transmitted to the Venice Commission.
4. The present opinion is based upon unofficial translations of statutory provisions, or excerpts thereof, containing prohibitions of “propaganda of homosexuality” which have been adopted or proposed to be adopted in the Republic of Moldova, the Russian Federation and Ukraine.
5. *The present opinion was drawn up on the basis of the comments provided by the Rapporteurs and adopted by the Venice Commission at its ...nd Plenary Session in Venice, 14-15 June 2013.*

## II. Background information on domestic laws

### A. The Russian Federation:

6. According to Article 6.13.1 of the Draft Federal Law no. 44554-6(2012) on Introducing Amendments to the Code on Administrative Offences submitted by the Legislative Assembly of the Novosibirsk Region together with an explanatory note “*Propaganda of homosexuality among minors warrants an administrative fine ranging between 4,000 and 5,000 rubles for citizens; 40,000 and 50,000 rubles for officials; or 400,000 and 500,000 rubles for legal entities*”. Also, Section 3.10 of the Ryazan Region Law on Administrative Offences of 4 December 2008 (“Ryazan Region Law”) reads as follows in the relevant part: “*Public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism) among minors shall be punished with an administrative fine between one thousand five hundred and two thousand rubles*”.
7. The Explanatory Note to the Draft Federal Law explains that administrative responsibility is created not for the fact of a person’s homosexuality but only for propaganda of homosexuality among minors. It is explained that the purpose of the bill is to “*protect the younger generation from the effects of homosexual propaganda*”, which information if uncontrolled in its dissemination could “*harm the health and moral and spiritual development, as well as form misperceptions about the social equivalence of conventional and unconventional sexual relationships, among individuals who, due to their age, are not capable to independently and critically assess such information (...)*”. It is also noted that “*traditional*” family values require special protection from the state.

8. Another Ryazan Regional Law on the Protection of Morality and Health of Minors, adopted by the Ryazan Region Duma on 22 March 2006, contains similar provisions<sup>1</sup>. In addition, parallel prohibitions of “homosexual propaganda” have been adopted in nine other regions of the Russian Federation<sup>2</sup>.

## B. Ukraine

9. Draft Law no. 8711 (subsequently no. 0945) (together with an Explanatory Note) “On the Introduction of Changes to Certain Legislative Acts of Ukraine (regarding the protection of the right of children to a safe information environment)” was introduced before the Parliament in 2011.

10. A similar draft was submitted to the Parliament in February 2012 (Draft No. 10290) “On the Prohibition of Propaganda of Homosexuality Aimed at Children” but it was subsequently revoked before the elections and resubmitted as Draft no. 1155 in December 2012. Neither of these two drafts has been enacted nor has either entered into force to date.

11. Draft no. 0945 (former Draft no. 8711) proposes amendments to a number of Laws, as well as to the Criminal Code of Ukraine, aiming at prohibiting the “promotion of homosexuality” in different fields. The Draft proposes to amend:

- Article 2 of the Law on the Protection of Public Morality and to introduce a prohibition on production and dissemination of products which “promote homosexuality”;
- Article 3 of the Law on the Print Media (Press) in Ukraine and Article 6 of the Law on Television and Radio, with the effect of prohibiting the use of media, TV or radio broadcasting for the “promotion of homosexuality”;
- Article 28 of the Law on Publishing, with the aim of prohibiting the publishing of products which promote the cult of violence, cruelty, and homosexuality;
- Article 300 of the Criminal Code of Ukraine, with the effect of criminalising import into Ukraine of products which “promote homosexuality” for sale or distribution purposes, or storage, transportation or other movement of such products with severe penalties, including fines ranging from 100 to 300 times the net minimum income or imprisonment up to five years.

12. Draft no. 1155 (former Draft no. 10290) proposes measures to ensure the “*healthy moral, spiritual and psychological development of children, to promote the idea that a family consists of a union between a man and a woman*” and “*to overcome the demographic crisis*”. It prohibits “propaganda of homosexuality” as “*an activity that aims and/or manifests itself in the deliberate dissemination of any positive information about homosexuality which may impair physical and mental health of the child, his moral and spiritual development, including*”

<sup>1</sup> Human Rights Report on “Discrimination on grounds of sexual orientation and gender identity in Europe”, Commissioner for Human Rights of the Council of Europe, Council of Europe Publishing, 2<sup>nd</sup> edition, 2011, p. 77, note: 256.

<sup>2</sup> According to a submission of the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA Europe) to the Committee of Ministers of the Council of Europe on 15 February 2013, in the context of the execution of the judgment of the European Court of Human Rights in the case of *Alekseyev v. Russia* (no. 4916/07) (DH-DD(2013)194), those regions are: Bashkortostan (August 2012), Krasnodar (July 2012), Kostroma (February 2012), Magadan (June 2012), Novosibirsk (July 2012), Samara (July 2012), Saint Petersburg (March 2012), Arkhangelsk (September 2011) and Kaliningrad (2013). The Moscow regional parliament rejected a similar prohibition in November 2012 on the grounds that it was in conflict with the Federal Law (Article 19’s Report, *Traditional Values? Attempts to censor sexuality, Homosexual propaganda bans, freedom of expression and equality*, Article 19, 2013, p. 29. Available at <http://www.article19.org/data/files/mediabrary/3637/LGBT-propaganda-report-ENGLISH.pdf>).

*forming a misconception that the traditional and non-traditional marital relationships are socially equal (...)*". According to Article 4 of the Draft, promotion of same sex sexual relationship that may affect physical and mental health, moral and spiritual development of children can occur in the following forms :

- Holding rallies, parades, actions, pickets, demonstrations and other mass gatherings aimed at/or reflected in the deliberate dissemination of any positive information about same sex sexual relationship;
- Training lessons, thematic discussions, interactive games, educational hours, other activities of educational nature on same sex sexual relationship (...);
- Spreading reports and activities in the media about same sex sexual relationship and calls in any form to the same sex sexual relationship lifestyle (...);
- Spreading of information in any form on same sex sexual relationship in the secondary schools and calls to same sex sexual relationship lifestyle<sup>3</sup>;

13. Draft no. 1155 (former Draft no. 10290) proposes also to introduce amendments to Article 180 of the Code of Ukraine on Administrative Offences, to add a new Article 150-2 to the Criminal Code and a new Article 32-1 to the Law on Protection of Childhood with the aim of prohibiting the "promotion of homosexuality which could adversely affect the physical and mental health of children", and to impose on the authorities the obligation "to take the necessary measures to protect children from promotion of homosexuality".

### **C. The Republic of Moldova**

14. On 23 February 2012, the city of Bălți has adopted a resolution concerning the proclamation of support for the Moldovan Orthodox Church and inadmissibility of aggressive propaganda of non-traditional sexual orientations. The Preamble of the Resolution #02/16 of the City Council of Bălți declares:

*"Considering particular importance and historic role of the Moldovan Orthodox Church as a state-establishing institute of the Republic of Moldova; considering traditional values of Moldovan society; incompatibility with modern democratic standards of aggressive intrusion of sexual behaviour forms on the majority, which are characteristic for the most insignificant part of population; bearing responsibility for security (including ethical and moral one) of Bălți city residents".*

15. In the first paragraph of the Resolution, Bălți is proclaimed zone of particular support for Moldova Orthodox Church. In the second paragraph, the particular importance and the paramount role of the Moldovan Orthodox Church in the life, history and culture of Bălți city residents are recognized. The third paragraph prohibits the aggressive propaganda of non-traditional sexual orientation in any of its manifestation within the city of Bălți. In the fourth paragraph it is recommended that local councils of Elizaveta and Sadovoe consider at their next meeting the issue related to "the proclamation of the Bălți municipality as a zone of particular support for Moldova Orthodox Church and the refusal of aggressive propaganda of non-traditional sexual orientation in the municipality of Bălți". Finally, in the fifth paragraph, "other public authorities and citizen associations" are called upon "to support the above mentioned initiative".

16. Similar resolutions were adopted in a number of localities. These included the cities of Cahul, Ceadr Lunga, Drochia, Rîșcani, Glodeni and Soroca, the districts of Anenii Noi, Fălești and Basarabeasca and the villages of Hiliuți (Fălești district), Chetriș (Fălești district), Bocani and Pîrlița.

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<sup>3</sup> In the new draft (no. 1155), the word "homosexuality" was replaced with the "same sex sexual relationship". The provision in the former Draft no. 10290 that "It is not propaganda of homosexuality to promote ideas of tolerance towards people of non-traditional sexual orientation" has been removed from the new draft no. 1155.

17. On 28 February 2013, the Court of Appeal of Bălți annulled the first and third paragraphs of the above-mentioned decision taken by the city of Bălți on 23 February 2012. On 24 April 2012, the first instance tribunal of Făleşti overturned a similar decision taken by the village of Hiliuți. A number of other localities (i.e. the cities of Rîșcani, Glodeni and the villages of Chetriș, Bocani and Pîrlița) have withdrawn voluntarily their decisions on the prohibition of homosexual propaganda<sup>4</sup>.

18. The Venice Commission commends the decisions taken by domestic courts annulling the prohibitions on “aggressive propaganda of homosexuality” adopted by local authorities, and the voluntary withdrawal by a number of other localities of similar decisions previously adopted by their local councils. The Venice Commission observes in this regard that the Court of Appeal of Bălți based its decision of 28 February 2013 on Article 16 (2) of the Constitution of the Republic of Moldova on the prohibition of discrimination and Articles 18 and 19 of the Universal Declaration of Human Rights, concerning respectively the right to freedom of thought, conscience and religion and the right to freedom of opinion and expression. Having said that, the Venice Commission notes that the above-mentioned decision of the Court of Appeal does not contain a structured analysis of the prohibition of “aggressive propaganda of homosexuality” in the light of the rights and freedoms that it mentions. The decision is mostly focused on the incompatibility of the proclamation of the city of Bălți as a zone of particular support for Moldova Orthodox Church with the general principles of equality of citizens and equal treatment of churches. The issue of sexual orientation and the related forms of expression are not addressed.

### III. Preliminary Remarks

19. The provisions under consideration in this opinion are examples of a wider phenomenon manifested by attempts at both local and central level of government in several Council of Europe Member States, especially in Central and Eastern Europe, to introduce prohibition of “propaganda of homosexuality.”<sup>5</sup> They raise concerns as to whether the international standards safeguarding freedom of expression, freedom of assembly and the principle of non-discrimination are met.

20. The constitutions of the above mentioned states guarantee, amongst many other rights and freedoms, the freedoms of expression<sup>6</sup> and assembly<sup>7</sup> as well as equality<sup>8</sup>. These states have ratified the European Convention on Human Rights (herein after “ECHR”) (amongst

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<sup>4</sup> There have been attempts in other Member States to introduce legislation that would restrict the freedom of expression on issues related to sexual orientation. In Lithuania, on 14 July 2009 the Parliament approved amendments to the Law on the Protection of Minors against Detrimental Effects of Public information which came into force on 1 March 2010. The initial draft of the Law had included the prohibition of dissemination to minors of “public information whereby homosexual, bisexual or polygamous relations are promoted”, because such information was considered as having a “detrimental effect on the development of minors” (Article 4-14 of the initial draft). It appears that no distinction was made between information disseminated in public and in private. The final draft which was adopted and entered into force did not include this provision. Nevertheless, under Article 4-16 of the Law in force, public information encouraging the concept of entry into a marriage and creation of a family other than that stipulated in the Constitution and the Civil Code are still being addressed as “detrimental to minors”. According to Article 38 § 3 of the Constitution of the Republic of Lithuania, “Marriage shall be concluded upon the free mutual consent of man and woman”.

In Hungary, two amendments to the Constitution were proposed (Bills nos. 6719 and 6720) that would prohibit assemblies and public speeches that “propagate disorders of sexual behaviour – especially sexual relations between members of the same sex”. The bills were not supported in the Hungarian Parliament (see, Article 19’s Report, *Traditional Values? Attempts to censor sexuality, Homosexual propaganda bans, freedom of expression and equality, op. cit.*, p. 32).

<sup>5</sup> For an overview of prohibition of “propaganda of homosexuality” see Article 19’s report, *op. cit.*, p. 27 et seq.

<sup>6</sup> Article 32 of the Constitution of the Republic of Moldova; Article 29 of the Constitution of the Russian Federation and Article 34 of the Constitution of Ukraine.

<sup>7</sup> Article 40 of the Constitution of the Republic of Moldova; Article 31 of the Constitution of the Russian Federation and Article 39 of the Constitution of Ukraine.

<sup>8</sup> Article 16 of the Constitution of the Republic of Moldova; Article 24 of the Constitution of Ukraine and Article 19 of the Constitution of the Russian Federation.

other international human rights conventions) and, in accordance with Article 1 of ECHR, have guaranteed to secure to everyone within their jurisdictions the rights and freedoms defined in the ECHR. Homosexuality has been decriminalized in the Federation of Russia (1993), Ukraine (1991) and the Republic of Moldova (1995)<sup>9</sup>.

21. Among these states, the Republic of Moldova has also adopted specific anti-discrimination legislation for the prevention of and combating against discrimination<sup>10</sup>. The Parliament adopted Law no. 121 on Ensuring Equality on 25 May 2012, which entered into force recently on January 1, 2013. This Law aims to ensure equality in many spheres of life, including political, economic, social, cultural etc., regardless of race, colour, nationality, ethnic origin, language, religion or belief, sex, age, disability, opinion, political affiliation or any other similar criterion.

22. Moreover all the above mentioned states have signed Protocol no. 12 to the ECHR on the prohibition of discrimination. Ukraine ratified the Protocol no. 12 on 27 March 2006, which entered into force on 1<sup>st</sup> of July 2006 in respect of this country<sup>11</sup>.

23. The statutory provisions under consideration have different wordings, from the simple formulae sanctioning “propaganda of homosexuality among minors” as a punishable administrative offence<sup>12</sup> to more elaborate ones which outline various activities in which “propaganda” or “promotion” of “homosexuality” would be prohibited and punishable<sup>13</sup>. Regardless of these differences, all of them seem to start from the same underlying premise: that “homosexuality” is something that corrupts youth, undermines society and the state and should therefore be resisted<sup>14</sup>. Consequently, “propaganda of homosexuality” needs to be prohibited and limited.

#### IV. Standards

24. In this opinion, the Venice Commission will examine the compliance of the provisions in question with the rights to freedom of expression and freedom of assembly and association and with the prohibition of discrimination on the basis of sexual orientation, from the point of view of applicable **international human rights standards**, in particular:

- Article 10 of the ECHR concerning the right to freedom of expression, which include, according to paragraph 1, freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 10 (2) provides scope for restrictions on the right to freedom of

<sup>9</sup> See the Report of the Commissioner for Human Rights on “Discrimination on grounds of sexual orientation and gender identity in Europe”, *op.cit.*, p. 24.

<sup>10</sup> In its Resolution 1728 (2010) on “Discrimination on the basis of sexual orientation and gender identity”, the Parliamentary Assembly of the Council of Europe called on Member States to adopt and implement anti-discrimination legislation, including sexual orientation and gender identity among the prohibited grounds for discrimination.

<sup>11</sup> Source : Treaty Office of the Council of Europe, on <http://conventions.coe.int>

<sup>12</sup> For example, the Russian Draft Federal Law simply declares: “Propaganda of homosexuality among minors (...) warrants an administrative fine (...)”, while the Ryazan Law states that “Public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism) among minors shall be punished (...)”

<sup>13</sup> For example draft law no. 0945 (former draft law no. 8711) proposed in Ukraine would amend various laws in order to prohibit “promotion of homosexuality” in the print media, broadcasting, publishing, as well as prohibiting production, distribution, and import of products that “promote homosexuality.” See para. 11.

<sup>14</sup> For example, according to Explanatory note to the draft law no. 8711 (no. 0945) proposed in Ukraine: “The spread of homosexuality is a threat to national security, as it leads to the epidemic of HIV/AIDS and destroys the institution of family and can cause a demographic crisis.” Similarly, the Explanatory Note to the Russian Draft Federal Law states that “[p]ropaganda of homosexuality in Russia took a wide sweep. This propaganda is delivered both through the media and through active social action that promote homosexuality as a behavioural norm.” Further, the Explanatory Note states that “propaganda of homosexuality” could “harm the health and moral and spiritual development, as well as form misperceptions about the social equivalence of conventional and unconventional sexual relationships.”

expression. This right may be subject to such restrictions “as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

- Article 11 of the ECHR concerning the freedom of assembly and association. Article 11(2) provides that “no restrictions shall be placed on the exercise of these rights other than such are prescribed by law and necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others”.

- Article 14 of the ECHR which provides that “the enjoyment of the rights and freedoms set forth in the ECHR shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

- Case-law of the European Court of Human Rights (herein after “ECtHR”) concerning the right to freedoms of expression and assembly and the prohibition of discrimination, in particular, the cases of *Alekseyev v. Russia*<sup>15</sup>, *Genderdoc v. Moldova*<sup>16</sup> and *Bącykowski and others v. Poland*<sup>17</sup>.

- Article 19 of the International Covenant on Civil and Political Rights (herein after “ICCPR”) which states in the first paragraph that everyone shall have the right to hold opinions without interference. According to the second paragraph, the right to freedom of expression shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. Paragraph 3 lists the legitimate purposes for which restrictions on the freedom of expression can be justified: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

- Article 26 of the ICCPR on the prohibition of discrimination: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

- Case-law of the United Nations Human Rights Committee, in particular the case of *Fedotova v. Russian Federation*<sup>18</sup> concerning the administrative responsibility for “public actions aimed at propaganda of homosexuality among minors” in Ryazan Region of the Russian Federation.

- Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe to member states on measures to combat discrimination on grounds of sexual orientation or gender identity.

<sup>15</sup> *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010.

<sup>16</sup> *Genderdoc v. Moldova*, no. 9106/06, judgment of 12 June 2012.

<sup>17</sup> *Bącykowski and others v. Poland*, no. 1543/06, judgment of 3 May 2007.

<sup>18</sup> United Nations Human Rights Committee, *Fedotova v. Russian Federation*, Communication no. 1932/2010, views adopted by the Committee at its 106th session (15 October-2 November 2012), UN doc. CCCPR/C/106/D/1932/2010 (30 November 2012).



- Resolution 1728 (2010) of the Parliamentary Assembly of the Council of Europe on “Discrimination on the basis of sexual orientation and gender identity”.
- Council of Europe-Commissioner for Human Rights of the Council of Europe, Human Rights Report on Discrimination on grounds of sexual orientation and gender identity in Europe<sup>19</sup>.
- Recommendation 211 (2007)<sup>1</sup> of The Congress of Local and Regional authorities on Freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons.

## V. Analysis

### A. The prohibition of the so-called “propaganda of homosexuality” and the Freedom of Expression

25. The provisions under consideration constitute interference with the right to freedom of expression (both the freedom to impart and receive information and ideas) and with the closely related freedom of assembly. It is of key importance to examine whether the interference is in compliance with the provisions of Articles 10 and 11 of the ECHR.

26. According to the well-established case-law of the ECtHR (see below), the exercise of the right to freedom of expression (Art. 10 of the ECHR) (and the freedoms of assembly and association -Art. 11-), may be subjected to formalities, conditions, restrictions or penalties as are “**prescribed by law**”, pursue one of the **legitimate aims** identified in an exhaustive manner in the second paragraphs of both Articles, and as “**necessary in a democratic society**”.

#### 1. Compliance with the requirement of “prescribed by law”

27. Any restriction on the freedom of expression should be “prescribed by law”. Two requirements flow from this expression. (1) The law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. (2) The law must be foreseeable: a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his/her conduct: s/he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”<sup>20</sup>

28. Whilst any analysis of the compatibility of the provisions under consideration with the standard of being “prescribed by law” would be tentative since it would be made without reference to the original texts, the scope of the terms such as “propaganda” and “promotion” which are fundamental to these laws does not only seem to be very wide, but also rather ambiguous and vague, taking into account the application of the provisions in the case-law (§§29-33). Some of those provisions also use unclear terms such as “among minors”/ “aimed at minors” (§ 35) or “aggressive propaganda” (§36).

29. Firstly, this vagueness appears from domestic case law applying these provisions. In its judgment of 19 January 2010 (no. 151-O-O), the Constitutional Court of the Russian Federation, examining the constitutionality of the provisions adopted in Ryazan region, concerning the administrative ban on “homosexual propaganda”, formulated a definition of

<sup>19</sup> Human Rights Report on “Discrimination on grounds of sexual orientation and gender identity in Europe”, Commissioner for Human Rights of the Council of Europe, Council of Europe Publishing, 2<sup>nd</sup> edition, 2011.

<sup>20</sup> ECtHR, *Sunday Times v. United Kingdom*, judgment of 26 April 1979, § 49.

the notion of “propaganda of homosexuality among minors”. According to the Constitutional Court, homosexual propaganda is “*the activity aimed at purposeful and uncontrolled dissemination of information which is able to cause damage to moral and spiritual development or to the health of minors, inducing them to form warped perceptions that traditional and non-traditional marital relations are socially equal, bearing in mind that minors due to their age are not able to estimate such information critically and indecently*”<sup>21</sup>.

30. Similar provisions adopted in different regions of the Russian Federation were also appealed against to the Supreme Court which construed a more restrictive notion of “homosexual propaganda” and considered that “*such prohibition does not prevent from holding public events, including public debates on the social status of sexual minorities, without dictating homosexual lifestyle to minors who are not able to critically estimate such information due to their age*”<sup>22</sup>.

31. Despite the attempts made by the above mentioned decisions of the Russian High Courts to give a precise definition to the notion of “propaganda of homosexuality”, the notion still remains vague as the Constitutional Court and the Supreme Court did not give further indication on what is to be considered as “*information which is able to cause damage to moral and spiritual development or to the health of minors*” or “*dictating homosexual lifestyle to minors*” in the implementation of the provisions in question.

32. In its assessment of the standard of “prescribed by law”, the ECtHR also takes into account the consistency of domestic case-law in the implementation of a legal provision. The existence of contradictory domestic court decisions in the application of domestic laws has led the European Court to conclude in the past that a particular interference was not “prescribed by law”<sup>23</sup>, whereas a uniform and consistent jurisprudence in the interpretation of domestic provisions was considered to allow the applicants to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail<sup>24</sup>.

33. It appears from the NGO submissions and the action plans/reports submitted by the Russian authorities before the Committee of Ministers in the context of the execution of *Alekseyev* judgment that there are divergent decisions on the application of provisions concerning “homosexual propaganda” in different regions<sup>25</sup>. In a decision of 23 March 2012, the justice of the peace of the judicial district no. 8 of the city of Kostroma considered that single picketing with a poster “*Who will protect gay teenagers?*” in the proximity of children’s library did not constitute “homosexual propaganda”. However, the same demonstrator was convicted under Saint Petersburg law (propaganda of homosexuality) for having held up a sign that read: “*Homosexuality is not perversion. Grass hockey and ice ballet are*”<sup>26</sup>. Similarly, whereas a demonstrator was convicted by the Oktyabrskiy District Court of Arkhangelsk on 22 March 2012 for having picketed with a poster that said “*Among children there are no less gay and lesbian than among adults*”, Leninskiy District Court of Kostroma acquitted another demonstrator on 12 May 2012, who had displayed a poster with the same content during a demonstration. It should also be noted that the applicant in the case of

<sup>21</sup> See also the Draft Law no. 10290 of Ukraine which defines the propaganda of homosexuality in an analogous way as “*an activity that aims and/or manifests itself in the deliberate dissemination of any positive information about homosexuality, which may impair physical and mental health of the child (...)*”. The draft law does not give any indication on what kind of positive information about homosexuality would be harmful to children’s health.

<sup>22</sup> See, Communication from the Russian Federation before the Committee of Ministers concerning the case *Alekseyev v. Russian Federation* (4916/07) for the 1164<sup>th</sup> meeting of the Committee of Ministers (5-7 March 2013).

<sup>23</sup> See *mutatis mutandis* case of *Goussev and Marenk v. Finland* (35083/97), judgment of 17 January 2006, §§ 53-57.

<sup>24</sup> See *mutatis mutandis* Case of *Markt Intern Verlag GMBH and Klaus Beermann v. Germany* (10572/83), judgment of 20 November 1989, §§ 28-30.

<sup>25</sup> See the assessment of the Committee of Ministers of the Council of Europe on the state of execution of the case of *Alekseyev v. Russia* at the 1164<sup>th</sup> meeting of the Committee (5-7 March 2013) [<http://www.coe.int/t/dghl/monitoring/execution/reports/pendingcases>].

<sup>26</sup> A citation from a Russian actress.

*Fedotova* before the UN Human Rights Committee was convicted under the Ryazan law for holding up posters stating: “*Homosexuality is normal*” and “*I am proud of my homosexuality*”<sup>27</sup>.

34. It is thus not clear from the case law applying these provisions, whether the terms “prohibition of homosexual propaganda” have to be interpreted restrictively, or whether they cover any information or opinion in favour of homosexuality, any attempt to change the homophobic attitude of a part of the population towards gays and lesbians, any attempt to counterbalance the sometimes deeply rooted prejudices, by disseminating unbiased and factual information on sexual orientation.

35. Secondly, it is unclear whether, by the formulation “propaganda of homosexuality among minors” (e.g. the Russian Draft Federal Law no. 44554-6(2012)) or “propaganda of homosexuality aimed at children” (e.g. the Ukrainian Draft Federal Law no. 10290), the drafts under examination intend to prohibit “propaganda of homosexuality” directed at minors, or “propaganda of homosexuality” involving (“among”) minors. Further, according to the United Nations Human Rights Committee, the Ryazan Law<sup>28</sup> is ambiguous as to whether the term “‘homosexuality (sexual act between men or lesbianism)’ refers to one’s sexual identity or activity, or both.”<sup>29</sup>

36. Finally, the resolution adopted by the city of Bălți in the Republic of Moldova prohibits the “aggressive propaganda of non-traditional sexual orientation”. Although this prohibition appears to be narrower than the ones observed in Ukraine and the Russian Federation on account of the use of the qualifier “aggressive”, this qualification does not suffice to disperse the ambiguity that surrounds the notion of “propaganda of homosexuality”. This is mainly because the resolution in question does not provide any criteria to enable a distinction between “aggressive propaganda” and “non-aggressive propaganda” of homosexuality. In other words, it is not clear whether the Moldovan local authorities, by adopting a resolution prohibiting “aggressive propaganda”, aim only at prohibiting obscene or pornographic display of homosexuality or any “energetic expression” thereof, such as public demonstrations to promote the rights and freedoms of sexual minorities.

37. In the Venice Commission’s opinion, the provisions in question concerning the prohibition of “homosexual propaganda” in the above-mentioned countries are not formulated with sufficient precision as to satisfy the requirement “prescribed by law” contained in the paragraphs 2 of Articles 10 and 11 of the ECHR respectively and the domestic courts have failed to mitigate this through consistent interpretations.

## **2. “Necessary in a democratic society” for “the protection of health or morals” and “for the protection of the rights of others”**

### **a) Freedom of expression and sexual orientation**

38. The prohibition of “homosexual propaganda” primarily concerns the right to freedom of expression of the persons involved. In this context, the obvious and indispensable starting point of discussion is the Court’s well-known pronouncement in *Handyside v United Kingdom*:

*“The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterising a “democratic society”. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10*

<sup>27</sup> United Nations Human Rights Committee, case of *Fedotova v. Russian Federation*, cited above, § 2.2.

<sup>28</sup> Ryazan Regional Law on the Protection of Morality and Health of Minors adopted by the Ryazan Region Duma on 22 March 2006.

<sup>29</sup> *Fedotova v. Russian Federation*, cited above, § 10.2.

(art. 10-2), it is 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.<sup>30</sup>

39. More recently, when considering restrictions of Articles 8, 9, 10 and 11 of the ECHR, the Court has repeatedly taken the position that:

*"(...) 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'."*<sup>31</sup>

40. In addition, it has been emphasized that hallmarks of "a democratic society" are pluralism, tolerance and broadmindedness, as well as the fair and proper treatment of minorities and avoidance of any abuse of a dominant position<sup>32</sup>.

41. At the outset, it should be noted that the prohibition of "propaganda of homosexuality" is obviously linked to the question of *sexual orientation*. First, the prohibition in question restricts speech propagating or promoting homosexual/lesbian sexual orientation. Secondly, it seems that the prohibition would more often, although not necessarily, affect persons of homosexual/lesbian sexual orientation, who have a personal interest in arguing for toleration of homosexual/lesbian sexual orientation and its acceptance by majority.

42. The ECtHR has addressed the issue of sexual orientation in a number of cases. It has recognized that sexual orientation is protected by Article 8<sup>33</sup> and that it is covered by the prohibition of discrimination in Article 14<sup>34</sup>. According to the Court<sup>35</sup>:

*"just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons. Where a difference of treatment is based on sex or sexual orientation the State's margin of appreciation is narrow. Differences based solely on considerations of sexual orientation are unacceptable under the Convention."*

43. The European Court's case-law reflects a European consensus on such matters as abolition of criminal liability for homosexual relations between adults<sup>36</sup>, homosexuals' access to service in the armed forces<sup>37</sup>, the granting of parental rights<sup>38</sup>, equality in tax matters and the right to succeed to the deceased partner's tenancy<sup>39</sup> and equal ages of consent under criminal law for heterosexual and homosexual acts<sup>40</sup>.

44. The existence of an increasing European consensus in these matters is accompanied by a narrow margin of appreciation accorded to member states.

<sup>30</sup> *Handyside v. United Kingdom*, judgment of 7 December 1976, § 49.

<sup>31</sup> *Bączkowski and others v. Poland*, judgment of 3 May 2007, § 61 and the cases referred therein.

<sup>32</sup> *Ibid.*, § 63.

<sup>33</sup> See, e.g., *Kozak v Poland*, judgment of 2 March 2010, § 83 and the cases quoted therein.

<sup>34</sup> See, recently, *X and Others v Austria*, judgment of 19 February 2013, § 99 and the cases quoted therein.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Dudgeon v. United Kingdom*, judgment of 22 October 1981; *Norris v. Ireland*, judgment of 26 October 1988.

<sup>37</sup> *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, judgment of 27 September 1999.

<sup>38</sup> *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, judgment of 27 December 1999.

<sup>39</sup> *Karner v. Austria*, no. 40016/98, ECHR 2003-IX, judgment of 24 July 2003.

<sup>40</sup> *L. and V. v. Austria*, nos. 39392/98 and 39829/98, judgment of 9 January 2003.

45. On the other hand, there remain issues where no European consensus has been reached, such as the right to marry for same sex couples, and the Court has confirmed the domestic authorities' wide margin of appreciation in respect of those issues, which nonetheless "goes hand in hand with European supervision".

46. This being so, according to the European Court<sup>41</sup>, "*the conferring of substantive rights on homosexual persons is fundamentally different from recognising their right to campaign for such rights*". Thus, the absence of a European consensus on the recognition of some substantive rights for persons belonging to sexual minorities (right to adopt a child for homosexual couples and right to marry), is of no relevance in the context of freedom of expression, because "*there is no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly*"<sup>42</sup> and "*demonstrations similar to the ones banned in the present case are commonplace in most European countries*"<sup>43</sup>.

47. In these circumstances, the existence of a European consensus on the right to freedom of expression to campaign for the recognition of substantive sexual minorities' rights (regardless of whether those substantive rights are widely recognised by the European countries or not) has led the Court to dismiss the Government's claim in *Alekseyev* case to a wide margin of appreciation of state authorities in the field of freedom of assembly.

48. Therefore, measures which seek to remove from the public domain promotion of other sexual identities except heterosexual, affect the basic tenets of a democratic society, characterized by pluralism, tolerance and broadmindedness, as well as the fair and proper treatment of minorities. Thus, such measures would have to be justified by compelling reasons.

49. Taking into account the wide scope of the provisions under consideration, the question arises whether they can be deemed to be necessary in a democratic society in the interest of one of the legitimate aims enumerated in article 10.2 of the ECHR. The restrictions of the freedom of expression in the provisions under consideration seem to seek their justification in two legitimate aims: the "protection of health or morals" **(b)** and "the protection of the rights of minors"**(c)**.

#### **b) Protection of morals in a democratic society**

50. The first asserted justification of the prohibition of "propaganda of homosexuality" is the "protection of morals". Although the classical position of the ECtHR is that there is no European-wide consensus on the requirements of morals and that the state has a wide margin of appreciation in assessing what measures are necessary for its protection (*Handyside v. United Kingdom*), "public morality" as a justification for bans on "homosexual propaganda" fails to pass the essential necessity and proportionality tests as required by the ECHR.

51. 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 (see § 45).

<sup>41</sup> *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, judgment of 21 October 2010, § 84.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

52. In so far as the provisions under consideration are based “*on the assumption that homosexuality is something immoral, they are clearly against modern understanding of homosexuality as a characteristic based on sexual orientation and not on someone’s conscious choice of sexual behaviour*”<sup>44</sup>. Moreover, sexual orientation is protected under the right to respect for private life, both under the ECHR (Article 8) and ICCPR (Article 17). Therefore, public authorities cannot deem homosexuality to be contrary to “morals”, in the sense of Article 10 § 2 of the ECHR<sup>45</sup>, as sexual orientation is a fundamental human right under Article 8 of the ECHR<sup>46</sup>.

53. The exercise of this right by sexual minorities does not depend on the positive/negative attitudes of some of the members of the heterosexual majority. As put forward by the Human Rights Committee in its general comment on Article 19 of the ICCPR “the concept of morals derives from many social, philosophical and religious traditions”, any limitation imposed for the “purpose of protecting morals must be based on principles not deriving from a single tradition”<sup>47</sup>.

54. In the same sense, in its judgment in the *Dudgeon v. Ireland* case on the prohibition under criminal law of homosexual relations between adults, the ECtHR has stated that:

*“the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant’s private life to such an extent.”*

55. The European Court adopted a similar approach in response to the Government observations in the case of *Alekseyev* that “any promotion of homosexuality was incompatible with the religious doctrines for the majority of the population” and that “allowing the gay parades would be perceived by believers as an intentional insult to their religious feelings”<sup>48</sup>. According to the Court:

*“[I]t would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group’s rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention.”*<sup>49</sup>

56. The Venice Commission also recalls that the prohibition of “aggressive propaganda of homosexuality” by the resolution adopted by the city of Bălți<sup>50</sup> in the Republic of Moldova seems to make a link between the “particular importance and the paramount role of the Moldovan Orthodox Church in the life, history and culture of Bălți city residents” and the public expression of a specific sexual orientation. According to the Venice Commission, the negative attitude of even a large part of the public opinion towards homosexuality as such, can neither justify a restriction on the right to respect for the private life of gays and lesbians, nor on their freedom to come true for their sexual orientation in public, to advocate for positive ideas in relation to homosexuality and to promote tolerance towards homosexuals. In

<sup>44</sup> *Fedotova v. Russia*, cited above, § 3.5.

<sup>45</sup> This does not preclude the right for private citizens to assess homosexuality contrary to their moral conviction.

<sup>46</sup> See e.g. *Kozak v. Poland*, 13102/02, 2 March 2010.

<sup>47</sup> General Comment No. 34, UN Doc. CCCPR/C/GC/34 (12 September 2011), § 32 (available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>).

<sup>48</sup> In the case of *Genderdoc v. Moldova*, in its initial observation before the ECtHR, the Moldovan government had put forward a similar argument that 98% of the Moldovan population was Christian Orthodox, religion that does not tolerate of sexual relations or marriage between people of the same gender, to justify the interference in the right to freedom of assembly of the applicant association. But the government did not subsequently maintain this argument and had admitted that there was a violation of the applicant’s right to freedom of assembly (art. 11 of the ECHR).

<sup>49</sup> *Alekseyev v. Russia*, cited above, § 81.

<sup>50</sup> Which was annulled by the Court of Appeal of Bălți on 28 February 2013.

this regard, the Venice Commission recalls that in its Recommendation CM/Rec(2010)5, the Committee of Ministers of the Council of Europe considered that neither cultural, traditional nor religious values, nor the rules of a “dominant culture” can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity<sup>51</sup>.

57. In its case-law, the ECtHR has accepted the protection of morals as a justification for prohibitions of obscenity. In some cases, the speech in question involved depicting explicit sexual images<sup>52</sup>. However, in *Alekseyev*, the Court explicitly distinguished the former type of cases because at no stage was it suggested that the event in question in *Alekseyev* (gay parade) would involve any graphic demonstration of obscenity of a type comparable to the exhibition in the *Müller* case<sup>53</sup>.

58. As the provisions under consideration pertain to “homosexual propaganda”<sup>54</sup> or “homosexual promotion”<sup>55</sup> as such, without limiting the prohibition to obscene or pornographic display of homosexuality, or to the demonstration of nudity or sexually explicit or provocative behaviour or material, the provisions cannot be deemed to be justified as necessary in a democratic society to the protection of morals. The same conclusion may be drawn as regards the resolution adopted by the city of Bălți in the Republic of Moldova, which prohibited the “aggressive propaganda of homosexuality”, since the resolution does not clearly limit the prohibition to obscenity or pornographic display of homosexuality and does not provide any indication of what “aggressive propaganda” may be. Such a prohibition may only be acceptable under ECHR standards if “aggressive” is understood as involving a call or incitation to violence or hatred. In this regard, the Venice Commission reiterates that freedom of expression is also applicable to information and ideas that offend shock or disturb the State or any sector of the population<sup>56</sup>.

### **c) Protection of the rights of minors in a democratic society**

59. The second asserted justification of the prohibition of “propaganda of homosexuality” is the protection of children<sup>57</sup>. The provisions under consideration claim that the protection of minors against homosexual propaganda is justified, taking into account their lack of maturity, state of dependence and in some cases, mental disability.

60. Again it has to be emphasized that the incriminations in the provisions under consideration are not limited to obscenities, to provocative incitements to intimate relations between persons of the same sex, or to what the Russian Constitutional Court called to “dictating homosexual lifestyle”, but that they also seem to apply to the dissemination of mere information or ideas, advocating a more positive attitude towards homosexuality.

61. As already noted, the statutory provisions under consideration are differently worded, but all seem to start from the presumption that “propaganda of homosexuality” may harm minors or society as a whole. This presumption was however rejected by the European Court in the case of *Alekseyev*: “*There is no scientific evidence or sociological data at the Court's*

<sup>51</sup> Recommendation CM/Rec(2010)5 of the Committee of Ministers to members states on measures to combat discrimination on grounds of sexual orientation or gender identity.

<sup>52</sup> *Müller and others v Switzerland*, 10737/84, judgment of 24 May 1988.

<sup>53</sup> *Alekseyev v. Russia*, cited above, § 82.

<sup>54</sup> See e.g. Article 6.13.1 of the Russian Draft Federal Law no. 44554-6(2012) on Introducing Amendments to the Code on Administrative Offences.

<sup>55</sup> See e.g. the Ukrainian draft no. 0945 “On the Introduction of Changes to Certain Legislative Acts of Ukraine (regarding the protection of the right of children to a safe information environment)”.

<sup>56</sup> *Handyside v. United Kingdom*, cited above, § 49.

<sup>57</sup> The draft law no. 10290 in Ukraine which was submitted to the Parliament in February 2012 is entitled “On the Prohibition of propaganda of homosexuality aimed at children”. Draft Law no. 8711 (subsequently no. 0945) aims to protect of the right of children to a safe information environment. The explanatory note to the Russian Draft Federal Law explains that the purpose of the bill is to “protect the younger generation from the effects of homosexual propaganda”.

*disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or "vulnerable adults"*<sup>58</sup>. Thus, the authorities' decisions in this case to ban the public events aiming at promoting the rights of sexual minorities under the pretext of protecting minors "were not based on an acceptable assessment of the relevant facts"<sup>59</sup>.

62. Moreover, "it is only through fair and public debate that society may address such complex issues as the one raised in the present case. Such debate backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard, including the individuals concerned. It would also clarify some common points of confusion, such as whether a person may be educated or enticed into or out of homosexuality, or opt into or out of it voluntarily"<sup>60</sup>.

63. As to the explanatory memorandums that accompany the Russian Draft Federal Law and the Ukrainian draft law no. 8711 (no. 0945) respectively, the Venice Commission observes that they do not provide any evidence of harm that may result for minors.

64. In the same vein, the UN Human Rights Committee, in the case of *Fedotova*, duly distinguished "actions aimed at involving minors in any particular sexual activity" from "giving expression to [one's] sexual identity" and "seeking understanding for it". In this case, the Committee observed that the State party failed to demonstrate why it was necessary for the protection of minors, to restrict the author's right to freedom of expression her sexual identity even if she intended to engage children in the discussion of issues related to homosexuality<sup>61</sup>.

65. Indeed, it cannot be deemed to be in the interest of minors that they be shielded from relevant and appropriate information on sexuality, including homosexuality.

66. The Venice Commission observes that international human rights practice supports the right to receive age appropriate information concerning sexuality<sup>62</sup>. For instance, in 2002, the Committee on the Rights of the Child urged the U.K. government to repeal a law in the United Kingdom that was similar to the "homosexual propaganda" bans<sup>63</sup>. Likewise, in 2007, the Special Rapporteur on the Right to Education, expressing fear that students would be denied access to sexual health information, raised concerns about proposed legislation that would ban the "promotion of homosexuality" in schools<sup>64</sup>. It is to be pointed out that the 2010 annual report of the Special Rapporteur was devoted to the right to education on sexual and reproductive health<sup>65</sup>. Finally, in 2009, the European Committee of Social Rights found that a biology textbook used in Croatia that stigmatized homosexuality was in breach of the right to non-discrimination and the right to health, both protected under the European Social Charter. The use of that text meant that Croatia had failed in its "positive obligation to ensure the

<sup>58</sup> *Alekseyev v. Russia*, cited above, § 86.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Fedotova v. Russia*, cited above, § 10.8.

<sup>62</sup> Article 19 of the ICCPR involves both the right to impart and to seek and receive information and ideas of all kinds. Article 13 of the Convention on the Rights of the Child specifically guarantees this right to children. In General Comment no. 3, the Committee on the Rights of the Child stated that children "require relevant, appropriate, and timely information which enables them to deal positively and responsibly with their sexuality in order to protect themselves from HIV infection". CRC, General Comment no. 3 (HIV/AIDS and the rights of the Child), UN Doc. CRC/GC/2003/3, para. 16.

A number of other treaty bodies, including the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, and the Committee on Economic, Social and Cultural Rights, have issued similar recommendations. See Report of the Special Rapporteur on the Right to Education, Vernor Munoz Villalobos, UN Doc. A/65/162, paras. 34-30 (collecting treaty body recommendations).

<sup>63</sup> CRC, Concluding Observations (United Kingdom of Great Britain and Northern Ireland), UN Doc. CRC/C/15/Add.188, at para. 44(d).

<sup>64</sup> Report of the Special Rapporteur on the Right to Education, Vernor Munoz Villalobos, UN Doc. A/HRC/8/10/Add.1, at paras. 79-84.

<sup>65</sup> Report of the Special Rapporteur on the Right to Education, Vernor Munoz Villalobos, UN Doc. A/65/162.



effective exercise of the right to protection of health by means of non-discriminatory sexual and reproductive health education which does not perpetuate or reinforce social exclusion and the denial of human dignity<sup>66</sup>.

67. Finally, although the European Court has accepted in its case law that protection of family in the traditional sense is, in principle, “a weighty and legitimate reason which might justify difference in treatment”<sup>67</sup>, if measures to implement these aims make a difference in treatment based on sexual orientation, the state’s margin of appreciation is narrow and it must show that such measures were “necessary”, and not “merely suitable”<sup>68</sup> to achieve these aims. The ECtHR has also emphasized that, in its choice of means, the state: “*must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life*”<sup>69</sup>. In the Venice Commission’s opinion, the dissemination of information and ideas that advocate for positive ideas in relation to homosexuality and that promote tolerance towards homosexuals, does not preclude that traditional family values and the importance of traditional marital relations are propagated and strengthened.

68. The blanket nature of the prohibitions of “propaganda of homosexuality”<sup>70</sup> which are the subject of the present Opinion appears to be incompatible with the above mentioned *Handyside* principles and the requirement of justification by compelling reasons of measures prohibiting expressions in support of the recognition of sexual minorities’ rights. Sweeping restrictions on the freedom of expression that target not only certain specific types of content (e.g. sexually explicit content such as in *Müller v. Switzerland*), but apply to all categories of expression, from political discussion and artistic expression to commercial speech, will certainly have serious impact on public debate on important social issues which is central to any democratic society. Thus, the ban cannot be considered “necessary in a democratic society” for the protection of family in the traditional sense.

## **B. The prohibition of the so-called “propaganda of homosexuality” and the principle of non-discrimination**

69. Although neither Article 14 of the ECHR and the Protocol no. 12, nor Article 26 of the ICCPR explicitly mention “sexual orientation” as a prohibited discrimination ground, the list set out in Article 14 of the ECHR is illustrative and not exhaustive, as is shown by the words “any grounds as such” (in French “notamment”)<sup>71</sup> and it arises from the case-law from both the ECHR and the UN Committee of Human Rights that the prohibition against discrimination comprises also discrimination based on sexual orientation.

70. The ECtHR has not so far ruled on prohibitions of “propaganda of homosexuality”. United Nations Human Rights Committee has dealt with the issue in the case of *Fedotova v. Russian Federation*. The Human Rights Committee held that punishment of Ms Fedotova for “propaganda of homosexuality” under the Ryazan Law was in violation of Article 19, paragraph 2 (freedom of expression), read in conjunction with Article 26 (right to equality and prohibition of discrimination) of the ICCPR<sup>72</sup>. On the facts of the case, it was found that the restriction of Ms Fedotova’s right to freedom of expression was not necessary for the attainment of one of the legitimate purposes of Article 19, para. 3 of the ICCPR<sup>73</sup>. Moreover,

<sup>66</sup> See the joint opinion of the International Commission of Jurists and ILGA Europe on “Homosexual Propaganda” Bans: analysis and recommendations”, June 2012, p. 13.

<sup>67</sup> *X. and others v. Austria* (19010/07), judgment of 19 February 2013, § 138.

<sup>68</sup> *Ibid.* § 140.

<sup>69</sup> *Ibid.* § 139.

<sup>70</sup> e.g. Russian Draft Law on prohibitions of extremely wide applications (e.g. Ukrainian Draft Law no. 8711 (no. 0945).

<sup>71</sup> See, *Engel and others v. Netherlands*, (5100/71; 5101/71; 5102/71; 5354/72; 5370/72), judgment of 8 June 1976, § 72.

<sup>72</sup> *Fedotova v. Russian Federation*, cited above, para. 11.

<sup>73</sup> *Ibid.*, para. 10.8.

the Human Rights Committee considered that the legislative measure in question was in itself discriminatory:

*“the State party has not shown that a restriction on the right to freedom of expression in relation to “propaganda of homosexuality” – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria.”<sup>74</sup>*

71. As already mentioned, sexual orientation is protected under Article 8 of the ECHR while any differences made solely on the basis of sexual orientation are unacceptable<sup>75</sup>. In its case-law, the Court has dealt with a number of cases concerning discrimination on account of sexual orientation under Article 14 taken in conjunction with Article 8. These included, inter alia, different age of consent under criminal law for homosexual relations<sup>76</sup>, the attribution of parental rights<sup>77</sup>, permission to adopt a child<sup>78</sup> and the right to succeed to the deceased partner's tenancy<sup>79</sup>.

72. More specifically pertaining to the protection of minors, the Venice Commission recalls the judgment of the ECtHR in the case *S.L. v. Austria*<sup>80</sup>. Assessing Article 209 of the Austrian Criminal Code which criminalizes only homosexual and not heterosexual or lesbians acts of adults with consenting adolescents between fourteen and eighteen years, the Court stated,

*“that the vast majority of experts heard in Parliament clearly expressed themselves in favor of an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty and that the theory that male adolescents were “recruited” into homosexuality had thus been disproved.”*

73. The Court concluded:

*“To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or color.”*

74. The same assessment rationale as in *S.L. v. Austria* case has therefore to be applied to the different treatment of homosexual and heterosexual “propaganda” or “promotion”: *“(…)negative attitudes cannot of themselves be considered (...) to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or color.”<sup>81</sup>*

<sup>74</sup> *Ibid.*, para. 10.6.

<sup>75</sup> *X. and others v. Austria*, cited above, § 99 : “Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, particularly convincing and weighty reasons (see, for example, *E.B. v. France*, 43546/02, 22 January 2008, § 91; *Kozak v. Poland*, 13102/02, 2 March 2010 § 92; *Karner v. Austria*, 40016/98, 24 July 2003, §§ 37 and 42; *L. and V. v. Austria*, 39392/98 and 39829/98, 9 January 2003, § 45; and *Smith and Grady*, 33985/96 and 33986/96, 27 September 1999, § 90). Where a difference of treatment is based on sex or sexual orientation the State's margin of appreciation is narrow (see *Kozak*, cited above, § 92, and *Karner*, cited above, § 41). Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *E.B. v. France*, cited above, §§ 93 and 96, and *Salgueiro da Silva Mouta v. Portugal*, 33290/96, 21 December 1999, § 36).”

<sup>76</sup> *L. and V. v. Austria*, nos. 39392/98 and 39829/98, ECHR 2003-I.

<sup>77</sup> *Salgueiro da Silva Mouta v. Portugal*, cited above. .

<sup>78</sup> *Fretté v. France*, no. 36515/97, ECHR 2002-I, and *E.B. v. France*, cited above.

<sup>79</sup> *Karner v. Austria* cited above.

<sup>80</sup> *S.L. v. Austria*, (n° 45330/99), 9 January 2003, §§ 43 and 44.

<sup>81</sup> *S.L. v. Austria*, cited above, § 44.

75. According to the European Court's case-law, "discrimination" means "treating differently, without an objective and reasonable justification, persons in relevantly similar situations"<sup>82</sup>. In its judgment in the case of *Alekseyev v. Russia* the Court considered that the ban imposed on the events organized by the applicant on account of "the authorities' disapproval of demonstrations which they consider to promote homosexuality"<sup>83</sup> and "due to the opposition of many Moldovan citizens to homosexuality" (*Genderdoc v. Moldova*)<sup>84</sup> amounted to a discrimination under Article 14 of the Convention in conjunction with its Article 11.

76. For analogous reasons the International Committee on Human Rights in the case of *Fedotova v. Russian Federation*<sup>85</sup> equally assessed that Section 3.10 of the Ryazan Region Law which prohibits "homosexual propaganda" violates Article 26 of the ICCPR. The Committee stated:

*"10.5. (...) In the present case, the Committee observes that section 3.10 of the Ryazan Region Law establishes administrative liability for "public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism)" – as opposed to propaganda of heterosexuality or sexuality generally – among minors. With reference to its earlier jurisprudence<sup>86</sup>, the Committee recalls that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation.*

*10.6 The Committee also recalls its constant jurisprudence that not every differentiation based on the grounds listed in article 26 of the Covenant amounts to discrimination, as long as it is based on reasonable and objective criteria<sup>87</sup> in pursuit of an aim that is legitimate under the Covenant<sup>88</sup>. While noting that the State party invokes the aim to protect the morals, health, rights and legitimate interests of minors, the Committee considers that the State party has not shown that a restriction on the right to freedom of expression in relation to "propaganda of homosexuality" – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria. Moreover, no evidence which would point to the existence of factors justifying such a distinction has been advanced<sup>89</sup>.*

77. In conclusion, referring also to the conclusions of the United Nations Committee on Human Rights in the case of *Fedotova v. the Russian Federation* and the Recommendation CM/Rec(2010)5 of the Committee of Ministers<sup>90</sup>, the Venice Commission considers that the prohibition of "propaganda of homosexuality" as opposed to "propaganda of heterosexuality" or sexuality generally – among minors, amounts to a discrimination, since the difference in treatment is based on the content of speech about sexual orientation and the authors of the provisions under consideration have not put forward any reasonable and objective criteria to

<sup>82</sup> *Zarb Adami v. Malta* (17209/02), 20 June 2006, § 71.

<sup>83</sup> *Alekseyev v. Russia*, § 109. See also *Bączkowski and Others v. Poland*, § 100.

<sup>84</sup> *Genderdoc v. Moldova* (9106/06), judgment of 12 June 2012, § 54.

<sup>85</sup> *Fedotova v. the Russian Federation*, cited above, §§ 10.5 and 10.6.

<sup>86</sup> See *Toonen v. Australia*, para. 8.7.; *Young v. Australia*, para. 10.4.; and communication no. 1361/2005, *X. v. Colombia*, views adopted on 30 March 2007, para. 7.2.

<sup>87</sup> See, inter alia, communication No. 172/1984, *Broeks v. the Netherlands*, Views adopted on 9 April 1982, para. 13; communication No. 182/1984, *Zwaan-de Vries v. the Netherlands*, Views adopted on 9 April 1987, para.13; communication No. 218/1986, *Vos v. the Netherlands*, Views adopted on 29 March 1989, para 11.3; communication No. 415/1990, *Pauger v. Austria*, Views adopted on 26 March 1992, para 7.3; communication No. 919/2000, *Müller and Engelhard v. Namibia*, Views adopted on 26 March 2002, para 6.7; and communication No. 976/2001, *Derksen v. the Netherlands*, Views adopted on 1 April 2004, para. 9.2.

<sup>88</sup> See, inter alia, communication No. 1314/2004, *O'Neill and Quinn v. Ireland*, Views adopted on 24 July 2006, para. 8.3.

<sup>89</sup> See *Young v. Australia*, para. 10.4; and *X. v. Colombia*, para. 7.2.

<sup>90</sup> Paragraph 14 of the Appendix to Recommendation CM/Rec(2010)5, cited above, provides that : "Member states should take appropriate measures at national, regional and local levels to ensure that the right to freedom of peaceful assembly, as enshrined in Article 11 of the Convention, can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity".

justify the prohibition of “homosexual propaganda” as opposed to “heterosexual propaganda”.

## VI. Conclusion

78. The statutory provisions prohibiting “propaganda of homosexuality” that have been recently adopted or are considered in certain Member States of the Council of Europe including the Republic of Moldova, the Russian Federation and Ukraine are problematic from the perspective of the applicable international standards, in particular the ECHR, for several reasons.

79. First, the provisions under consideration are not formulated with sufficient precision so as to satisfy the requirement “prescribed by law”. The terms used in these provisions such as “propaganda”, “aggressive propaganda”, “promotion”, “negatively influence” etc. are too ambiguous to reach the standard of “foreseeability” and the provisions do not sufficiently define the circumstances in which they are applied. This results also from the relevant domestic case law. As such, the scope of the provisions seems not to be limited to sexuality explicit content, but to apply to legitimate expressions of sexual orientation.

80. Secondly, “public morality”, the values and traditions including religion of the majority, and “protection of minors” as justifications for prohibition on “homosexual propaganda” fail to pass the essential necessity and proportionality tests as required by the ECHR. Again, the prohibitions under consideration are not limited to sexually explicit content or obscenities, but they are blanket restrictions aimed at legitimate expressions of sexual orientation. The Venice Commission reiterates that homosexuality as a variation of sexual orientation, is guaranteed under the ECHR and as such, cannot be deemed contrary to morals by public authorities, in the sense of Article 10 § 2 of The ECHR. On the other hand, there is no evidence that expressions of sexual orientation would adversely affect minors, whose interest is to receive relevant, appropriate and objective information about sexuality, including sexual orientations.

81. Finally, the prohibition concerns solely the “propaganda of homosexuality” as opposed to “propaganda of heterosexuality” and the lack of any reasonable and objective criteria to justify the difference of treatment in the application of the right to freedom of expression and assembly amounts to discrimination on the basis of the content of speech about sexual orientation.

82. On the whole, it seems that the aim of these measures is not so much to advance and promote traditional values and attitudes towards family and sexuality but rather to curtail non-traditional ones by punishing their expression and promotion. As such, the measures in question appear to be incompatible with “the underlying values of the ECHR”, in addition to their failure to meet the requirements for restrictions prescribed by Articles 10, 11 and 14 of the Convention.

83. In the light of the above, the Venice Commission considers that the statutory provisions prohibiting “propaganda of homosexuality”, are incompatible with ECHR and international human rights standards. The Venice Commission therefore recommends that these provisions be repealed. It welcomes the fact that the provisions adopted by the local councils of Bălți and the village of Hiliuți in Moldova were already annulled by domestic courts and a number of other localities withdrew similar decisions previously adopted by their local councils.