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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)

DRAFT OPINION

ON THE FEDERAL LAW ON COMBATING EXTREMIST ACTIVITY

OF

THE RUSSIAN FEDERATION

On the basis of comments by

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Ms Finola FLANAGAN (Member, Ireland)
Mr Christoph GRABENWARTER (Member, Austria)

TABLE OF CONTENT

I. Introduction

1. By a letter of 19 December 2011, the Chair of the Parliamentary Assembly's Monitoring Committee requested the opinion of the Venice Commission on the Russian Federation Federal Law on Combating Extremist Activity (CDL-REF(2012)012 , hereinafter "the Extremism Law").

2. The Opinion is based on the assessment of the English translation of the consolidated version of the Extremism Law as provided to the Venice Commission by the Parliamentary Assembly's Monitoring Committee. The translation may not accurately reflect the original version on all points, which may have created misunderstandings of the Law at certain points. Moreover, the Law is not accompanied by any explanatory note or "rationale".

3. Mr Dimitrijevic, Ms Flanagan and Mr Grabenwarter acted as rapporteurs. The present Opinion was based on their comments and the very limited information provided to the delegation of the Venice Commission during its visit to Moscow on 9 -10 February 2012.

4. The present Opinion was adopted by the Venice Commission at its … Plenary Session (Venice, …).

II. Preliminary remarks

5. The Federal Law on Extremism (Federal Law No. 114 FZ on Combating Extremist Activity) was originally adopted on 25 July 2002, with the aim of defining extremism and extremist activities and providing the authorities of the Russian Federation, at all levels, with legislation for the detection, prevention and suppression of extremist activities. Since 2002, three rounds of amendments were made to the Law (in July 2006, July 2007 and April 2008). The Law is applicable both to organisations - public, religious and other organisations - and to physical individuals and needs to be read in conjunction with related provisions of other important laws of the Russian Federation, such as the Criminal Code and the Code of Administrative Offenses or the Law on the Federal Security Service (FSB), as well as media and information-related legislation.

6. As it now stands, in addition to the provisions devoted to the measures available to the authorities for combating and punishing extremism, it contains definitions of the main extremism-related notions ("extremist organisation", "extremist materials") and an inventory of the main actions or purposes qualifying an activity as being "extremist" , which has evolved over time.

7. The broad interpretation of the notion of "extremism" by the enforcement authorities, the increasing application of the Law in recent years and the pressure it exerts on various circles within civil society, as well as alleged human rights violations reported in this connection have raised concerns and drawn criticism both in Russia and on the international level.[1]

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[1] "[t]*he Law on fighting extremist activity (the Extremism law) continues to raise concern. It was adopted in 2002, but over the last years it has allegedly been increasingly used by the authorities to harass NGOs, journalists, human rights groups, and, in particular some religious groups. We were approached by the representatives of the Jehovah's Witnesses who presented us with a number of documented cases of disruption of religious meetings and other forms of harassment. Criticism about the law stems mainly from the vague definition of key words such as extremism, terrorism and social groups, thus giving enforcement authorities broad latitude in determining which organisations, individuals, and activities are covered by the law".*
("http://assembly.coe.int/CommitteeDocs/2011/amondoc09rev_2011.pdf).

8. This Opinion is limited in scope and should not be seen as a comprehensive and detailed review of all the provisions of the Extremism Law. As suggested by the Monitoring Committee in its request, its main purpose is to assess, in the light of the applicable international standards, the definition of "extremism" and the means which are at the disposal of the authorities, under the Law, to deal with activities considered "extremist". Nonetheless, since the analysis of the above-mentioned issues cannot disregard the more general context of the Law, the Opinion also addresses other related provisions of the Law that may raise concern in the light of human rights standards.

9. The Venice Commission is fully aware of the challenges faced by the Russian authorities today in their legitimate efforts to counter extremism and related threats and has taken this fact into account in preparing this Opinion. However, the Commission wishes to underline the critical importance it attaches to the need to ensure full compliance in the adoption, interpretation and implementation of any anti-extremism policies and measures, with international standards in the field of the protection of fundamental rights and freedoms of individuals. It recalls that *"[an] individual, his rights and freedoms are the supreme value*" and that "*[r]ecognition, observance and protection of rights and freedoms of individual and citizen shall be an obligation of the state"* according to the Constitution of the Russian Federation (Article 2).

10. Since its adoption, the Extremism Law has been amended several times, reflecting the efforts of the Russian legislator to provide stronger means to combat extremism. The Extremism Law defines conduct and activities considered as extremist and provides for administrative and penal measures to be applied against natural and legal persons involved in extremism.

III. International and European standards related to combating extremism

11. The Law regulates and affects a number of human rights enshrined in customary law and international treaties binding the Russian Federation: the Universal Declaration of Human Rights of 10 December 1948, the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) with its Protocols. These rights are freedom of thought, conscience and religion (Article 18 ICCPR and Article 9 ECHR), freedom of expression (Article 19 ICCPR and Article 10 ECHR) and freedom of assembly and association (Article 22 ICCPR and Article 11 ECHR).

12. The Shanghai Convention on Combating Terrorism, Separatism and Extremism, and the International Convention on the elimination of all forms of racial discrimination of 21 December 1965 are also of relevance[2].

13. The rights and freedoms guaranteed by Articles 9, 10 and 11 ECHR are qualified and each article contains a limitation clause. No restrictions are permitted other than those expressly listed and such restrictions must have a legitimate aim. Article 18 ECHR prohibits restrictions from being applied for any purpose other than those for which they have been prescribed. Even if the restriction corresponds to one of the specified reasons in the limitations clause, it must also be "prescribed by law" i.e. have a basis in domestic law, be accessible and sufficiently foreseeable. Both the nature and the quality of domestic legislation are important, as are the interpretation and the application of the law. Furthermore, any limitation must also be "necessary in a democratic society" [3], i.e. according to the long-established jurisprudence of the

[2] See also Parliamentary Assembly Recommendation 1933 (2010) on the "Fight against extremism: achievements, deficiencies and failures".
[3] See *Chassagnou and Others v France*, No. 25088/94, 28331/95 and 28443/95, Judgment of 29 April 1999.

ECtHR these must correspond to a pressing social need, be proportionate and be relevant and sufficient. The Extremism Law has to be examined in the light of permitted restrictions.

14. According to Article 9 ECHR, any limitations to the freedom of thought, conscience and religion may only be motivated by the interests of public safety, by the protection of public order, health or morals, and by the rights and freedoms of others. Article 18 ICCPR is very similar: the freedom of thought, conscience and religion may be restricted if this is necessary to protect "public safety, order, health, morals or the fundamental rights and freedoms of others". It should be noted that both instruments only address limitations regarding "the freedom to manifest one's religion or beliefs" and not the substance or contents of such religion or beliefs. According to Article 18.2 ICCPR, "*no one shall be subject to coercion which would impair his freedom to adopt a religion or belief of his choice*".

15. Under Article 10.2 ECHR, to fulfil the "legitimacy" requirement, limitations to freedom of expression shall only be: *"in the interests of the 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*".

16. Restrictions on the exercise of freedom of assembly and association under Article 11 ECHR are allowed if they are "*in the interests of the 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 11(2) states that the article does not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces and the police and on the administration of the state.

IV. Constitutional background

17. The Constitution of the Russian Federation states in Article 2 that "*An individual, his rights and freedoms, shall be the supreme value*" and guarantees that "[*r]ecognition, observance and protection of rights and freedoms of individual and citizen shall be an obligation of the state*". Article 17 provides that "…*the rights and freedoms of individual and citizen shall be recognised and guaranteed according to the generally accepted principles and rules of international law and according to the…Constitution*". The basic rights and freedoms are said to "…*be inalienable and belong to every person from birth*". However "[*t]he exercise of rights and freedoms of individual and citizen shall not infringe upon the rights and freedoms of other persons*".

18. Under Article 19 of the Constitution, the State guarantees equal human and civil rights and freedoms irrespective of gender, race, ethnicity/nationality, language, origin, property or employment status, place of residence, religion, convictions, membership of public associations or any other circumstances. Any restrictions of citizens' rights on social, racial, ethnic/national, linguistic or religious grounds are prohibited.

19. Specific guarantees are enshrined in Article 28 for the right to freedom of conscience, freedom of religion, including the right to profess, either alone or together with others, any or no religion, to freely choose, have and disseminate religious or other convictions and to act according to them.

20. Article 29 guarantees freedom of thought and speech. In this context, however, the Constitution of the Russian Federation prohibits propaganda or agitation arousing social, racial, ethnic/national or religious hatred and enmity as well as propaganda of social, racial, ethnic/national, religious or linguistic supremacy.

21. Article 30 provides that "[*e]very person shall have the right to freedom of association, including the right to establish trade unions to protect his interests. Free activity of public associations shall be guaranteed*".

22. Article 31 provides that *"[c]itizens of the Russian Federation shall have the right to meet peacefully, without arms, and to organise discussions, meetings and demonstrations, as well as processions and pickets*".

23. At the same time, as stated in Article 13 of the Constitution, the creation and activity of public associations, whose aims and actions are directed at forcibly changing the foundations of constitutional governance, violating the integrity of the Russian Federation and undermining state security, creating armed formations and instigating social, racial, ethnic/national and religious discord, are prohibited.

24. A general restriction clause can be found in Article 55: human and civil rights and freedoms may be restricted by federal law only to the extent needed for certain constitutionally significant purposes, i.e. the foundations of its constitutional system, morals, health, rights and legitimate interests of other persons, and ensuring the defence of the nation and security of the state. Moreover, Article 55 stipulates that the enumeration of fundamental rights and freedoms in the Constitution of the Russian Federation shall not be interpreted as denial of or derogation from other universally recognised rights and freedoms of individual. It is important to point out that, as stipulated by Article 15.4 of the Russian Federation Constitution, *"[t]he universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied*".

25. Finally, Article 118 provides that "[j]ustice in the Russian Federation shall be administered by courts alone"

V. Specific remarks

A. The definition of "extremism"

26. As the ECtHR said in a number of cases, the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the ECHR not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question[4]. The law should be both adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual to regulate his or her conduct[5]. The level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed[6]. In the case of the Extremism Law, this requirement is extremely important, since infringements of this

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[4] *Hasan and Chaush v. Bulgaria*, App. No. 30985/96, Judgment of 26 October 2000, para 84.
[5] Ibid. See also: *Sunday Times v. the United Kingdom* (no. 1) judgment of 26 April 1979, Series A no. 30, p. 31, § 49; the *Larissis and Others v. Greece* judgment of 24 February 1998, *Reports* 1998-I, p. 378, § 40; *Hashman and Harrup v. the United Kingdom* [GC], no. 25594/94, § 31, ECHR 1999-VIII; and *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000 -V. ; see also *Maestri v. Italy* ,no. 39748/98, Judgment of 17 February 2004, para. 30
[6] *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A no. 173, p. 26, para. 68. See also see *Kruslin*, 24 April 1990, §§ 24-25; 5. 5. 2011, *Editorial Board of Pravoye Delo u. Shtekel*, 5 May 2011, §§ 63-64

Law are punished by criminal sanctions and hence the highest degree of certainty is needed in accordance with the principle *nullum crimen, nulla poena sine lege*.

27. The only definition of "extremism" contained in an international treaty binding on the Russian Federation is to be found in the Shanghai Convention on Combating Terrorism, Separatism and Extremism of 15 June 2001. In its Article 1.1.1.3), "extremism" is defined as "*an act aimed at seizing or keeping power through the use of violence or changing violently the constitutional regime of a State, as well as a violent encroachment upon public security, including organization, for the above purposes, of illegal armed formations and participation in them, criminally prosecuted in conformity with the national laws of the Parties*". The latter clause allows signatory states to prosecute such "extremist" actions according to their national laws.

28. This is done by the Russian legislator in the Extremism Law though the range of "*extremist actions"* defined in the Extremism Law goes beyond what is covered by the Shanghai Convention which only includes acts involving the use of violence. Certain of the activities defined as "extremist" in the Extremist Law do not require an element of violence (see further comments below.) It is to be noted that the definitions of "terrorism" and "separatism" in the Shanghai Convention also require violence as an essential element. The definitions in Article 1 of the Law of the "basic notions" of "extremism" ("extremist activity/extremism", "extremist organisation' and "extremist materials") do not set down the general characteristics of extremism as a concept. Instead, the Law lists a very diverse array of actions that are deemed to constitute "extremist activity" or "extremism". This should mean that, according to the Law, only activities defined in Article 1.1 are to be considered extremist activities or fall within the scope of extremism, and that only organisations defined in Article 1.2 and materials defined in Article 1.3 should be deemed extremist. Nevertheless, as stressed by representatives of civil society, the list of such actions may be changed and has already been changed twice, which raises concern with respect to legal certainty[7]. Although the title of the Law contains the word "extremist", the term "extremism" used by the legislator does not refer to the meaning of the words "extremism" or "extremist" in its ordinary, common or political usage.

"Extremist actions"

Article 1 of the Extremism Law provides the following list of extremist activity/extremism[8]:

1. *forcible change of the foundations of the constitutional system and violation of the integrity of the Russian Federation;*
2. *public justification of terrorism and other terrorist activity;*
3. *stirring up of social, racial, ethnic or religious discord;*
4. *propaganda of the exceptional nature, superiority or deficiency of persons on the basis of their social, racial, ethnic, religious or linguistic affiliation or attitude to religion;*
5. *violation of human and civil rights and freedoms and lawful interests in connection with a person's social, racial, ethnic, religious or linguistic affiliation or attitude to religion;*
6. *obstruction of the exercise by citizens of their electoral rights and rights to participate in a referendum or violation of voting secrecy, combined with violence or threat of the use thereof;*
7. *obstruction of the lawful activities of state authorities, local authorities, electoral commissions, public and religious associations or other organisations, combined with violence or threat of the use thereof;*

[7] According to the information received by the Rapporteurs, the initial list established by the 2002 version of the law (Federal Law No. 114 FZ on Counteraction of Extremist Activities) was expanded in 2006 (Federal Act 27 July 2006 No. 148-FZ) and subsequently shortened in 2007.
[8] Numbers (1 to 13) added for the purpose of the present Opinion).

8. *committing of crimes with the motives set out in indent "f" ["e" in the original Russian] of paragraph 1 of article 63 of the Criminal Code of the Russian Federation;*
9. *propaganda and public show of nazi emblems or symbols or of emblems or symbols similar to nazi emblems or symbols to the point of confusion between the two;*
10. *public calls inciting the carrying out of the aforementioned actions or mass dissemination of knowingly extremist material, and likewise the production or storage thereof with the aim of mass dissemination;*
11. *public, knowingly false accusation of an individual holding state office of the Russian Federation or state office of a Russian Federation constituent entity of having committed actions mentioned in the present Article and that constitute offences while discharging their official duties;*
12. *organisation and preparation of the aforementioned actions and also incitement of others to commit them;*
13. *funding of the aforementioned actions or any assistance for their organisation, preparation and carrying out, including by providing training, printing and material/technical support, telephony or other types of communications links or information services;*

Article 1.1 point 1

29. Some of these definitions refer to notions that are relatively well defined in comparative law or in other legislative acts of the Russian Federation. Such references are clear in points 1 and 6. Nevertheless, these relatively reliable terms are combined with expressions that could be subject to different interpretations, such as "*the violation of the integrity of the Russian Federation*" (under point 1). The inclusion of such phrase in the definition of an "extremist activity" may affect persons advocating a different territorial arrangement within the country, as well as the advocacy of the right to self-determination of peoples. These are generally not considered to be criminal actions, and may on the contrary be seen as a legitimate expression of a person's views[9].

Article 1.1 point 2

30. As concerns the extremist activity listed under point 2 of Article 1.1 of the Law, an already vague term, "extremism", is defined by reference to another vague term, "terrorism". It is not clear whether the word "terrorism" is used in its general ordinary meaning or whether it refers to the term defined or as used in other domestic laws or in international law. If these terms are to be interpreted in this Extremism Law according to definitions contained in other laws no such indication is given in the Extremism Law. This is particularly problematic since the Law introduces criminal offences and criminal liability for those who have carried out the extremist activity in question.

31. There is no universally accepted definition of "terrorism" in international law, except by reference to some international treaties, such as the International Convention of the Suppression of the Financing of Terrorism[10]. The Extremism Law seems not to use the term

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[9] See in this respect *Guidelines on political party regulation by OSCE/ODIHR and Venice Commission,* CDL-AD(2010)024, 15-16 October 2010, para. 96*: "[…] where allowed at all, prohibition and dissolution are applicable only in extreme cases including the following : threat to the existence and/or sovereignty of the state, threat to the basic democratic order, violence which threatens the territorial integrity of the state, inciting of ethnic, social, or religious hatred, and the use or threat of violence.[…] Even where such reasons for prohibition or dissolution are listed in legislation it is important to note that prohibition must meet the strict standards for legality and proportionality discussed above in order to be justified"; see also Batasuna v. Spain*, application nos. 25803/04 and 25817/04,Judgment of 30 June 2009).

[10] The relevant treaty is the 1999 International Convention of the Suppression of the Financing of Terrorism, which defines as acts of terrorism acts that are described in one of the treaties listed in the annex of the

"terrorism" as it has been defined in international instruments, which is understandable since international instruments seem to require a transnational component in order for an act to be considered an act of terrorism. For these reasons, one must turn to the definitions of "terrorism" in Russian laws.

32. The Russian Federation's Federal Law No. 35-FZ on Countering Terrorism (2006) defines terrorism very broadly as "*the ideology of violence and the practice of influencing the adoption of a decision by state power bodies, local self-government bodies or international organisations connected with frightening the population and (or) other forms of unlawful violent actions*". The major feature of this - rather vague - definition seems to be its focus on "terrorist purpose", as the subjective element of the definition of terrorism. This is at least partially remedied by the definition of terrorist acts, by the same Law, where the *actus reus* element is significantly improved. In any event, it is not stated that the definition of "terrorism" in Law No. 35-FZ provides the relevant definition for the purposes of the Extremism Law.

33. The importance of the subjective element of the crimes of terrorism and extremism has been reconfirmed by the Supreme Court of the Russian Federation in its 2011 Resolution (see paragraphs 53-54 below). Reliance on a terrorist purpose is not a problem in itself. On the contrary, it serves the purpose of securing that "ordinary" acts of violence are not treated as terrorist or extremist acts and hence punished with harsher sentences[11].

34. Nevertheless, even if it were clear which activities are to be considered terrorist, the Law does not indicate what is meant by "justification" of terrorism nor makes reference to any definition provided by any another law of the Russian Federation[12]. As the provision (extremist activity under point 2) now stands, it is rather concerning that even scientific work on the root causes of terrorism could be considered to be a "justification" of "terrorism" in general, or of "terrorist activities" in particular.

Article 1.1 point 3

35. Extremist activity under point 3 is defined in a less precise manner, which allows for a broader interpretation, than was the case in a previous version of the Law (2002) in which it was "associated with violence or calls to violence". The latter clause has now been removed, and the definition now echoes criminal offences in Article 282[13] of the Russian Criminal Code.

Convention. These treaties are generally believed to be "anti-terrorist", but do not use the term "terrorist" in their titles. However, the Convention for the Suppression of the Financing of Terrorism is relatively clear when it defines terrorism as "*any other act intended to cause death or serious bodily injury to a civilian or any other person not taking an active part in the hostilities in the situation of armed conflict, when the purpose of such act in its nature or context is to intimidate a population or to compel a government or international organisation to do or abstain from doing any act*" (Article 2 § 1 b). See also Article 11 § 1 of the Shanghai Convention on Combating Terrorism, Separatism and Extremism.

[11] It would, however, appear that international obligations imposed by certain anti-terrorist treaties require the states to treat certain acts as terrorist, regardless of their "terrorist" purpose. For example, the Terrorist Bombing Convention requires states to criminalize any bombing against a place of public use, a state or government facility, a public transportation system or an infrastructure system (committed with the intent to cause death, serious bodily injury or extensive damage resulting or likely to result in major economic loss), whether committed for political or purely private purposes. It would seem that a more carefully tailored approach should be taken (see International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, United Nations, *Treaty Series* , vol. 2149, p. 256, ratified by the Russian Federation on 8 May 2001. Russia made no reservation upon ratification relating to the issue of terrorist purpose). The treaties listed in the Annex to the 1999 International Convention on the Financing of the Suppression of Terrorism do not generally address terrorist purpose.

[12] According to a "Note" to article 205.2 of the Russian Criminal Code, "*a public justification of terrorism means a public declaration of acceptance of the ideology and practices of terrorism as right and in need of support and imitation*."

[13] Article 282 of Russia's Criminal Code prohibits"[*a]ctions aimed at the incitement of hatred or enmity, as well as abasement of dignity of a person or a group of persons on the basis of sex, race, nationality, language, origin,*

According to the information provided to the rapporteurs, this has led in practice to severe punishment measures under the Extremism Law - such as closure of publications - for actions that do not constitute a basis for criminal charges under the Criminal Code.

Article 1.1 point 4

36. As concerns extremist activity under point 4, at first sight, this is a provision that reiterates the usual non-discriminatory clauses in international treaties and national laws, which prohibit a difference in treatment of persons on the basis of their inherent or inherited qualities, such as race, ethnic origin, religion or language.
37. Practice has shown, however, that there has been a tendency to declare as extremist those who preach or write that their religion, as a spiritual experience and the way to understand the world, is superior to other religious interpretations or to agnosticism or atheism. In fact, the imposition of superiority of religious views can often be found in the very name of a church[14]. This is in the nature of religious teachings and is not necessarily linked to discrimination of persons and their rights.

38. To proclaim as extremist any religious teaching or proselytising activity aimed at proving that a certain worldview is a superior explanation of the universe and could lead to individual happiness or satisfaction, may affect the freedom of conscience of many persons and could easily be abused in an effort to suppress a certain church, thereby affecting not only the freedom of conscience, but also the freedom of association. The ECtHR protects proselytism and the freedom of the members of any religious community or church to "try to convince" other people through "teachings": it is hard to see how this would be possible without asserting superiority of some form of one's religious view over another[15]. The freedom of conscience and religion is of an intimate nature and is therefore subject to fewer possible limitations in comparison to other human rights: in fact, only manifestations of this freedom can be limited, but not the teachings themselves[16].

39. It therefore appears that under the extremist activity in point 4, not only religious extremism but also the protected expressions of freedom of conscience and religion would be punishable. This seems to be confirmed by worrying reports of extensive scrutiny measures of religious literature having led, in recent years, to the qualification of numerous religious texts as "extremist material" (see below para 49).

40. Any form of "propaganda" under the headings contained in this provision, whether or not they are associated with violence or calls to violence are deemed "extremism ".

Article 1.1 point 5

41. Extremist activity under point 5 brings together a collection of criteria, the combination of which may or may not be required before establishing their criminality. Clarification is required of what is intended here. If violating the rights and freedoms is on its own an extremist activity, it is clearly too broad a category and is described inadequately.

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attitude to religion, as well as affiliation to any social group, if these acts have been committed in public or with the use of mass media." Article 282(1) prohibits the creation of extremist groups, organized to prepare or carry out crimes motivated by "*ideological, political, racial, national or religious hatred or enmity" and prohibits "participation in an extremist community*".

[14] E.g., a literal translation of the name of the Russian Orthodox Church in Russian does in amount to „right-teaching" (православная), thus implying in such a way that other interpretations of Christianity are imperfect or erroneous.

[15] *Kokkinakis v. Greece*, App. no. 14307/88, Judgment of 25 May 1993.

[16] Human Rights Committee, *General Comment n° 22: The right to Freedom of Thought, Conscience and Religion*, UN Doc. CCPR/C/21/Rev. 1/Add. 4, 30 July 1993, para. 3.

Article 1.1 point 10

42. Similarly, extremist activity under point 10 is a provision that criminalises incitement to extremist activity. However, this must be considered in the light of the fact that certain of the activities listed, as pointed out above, should not fall into the category of extremist activities at all.

Article 1.1 point 11

43. Extremist activity in point 11 is of a particularly convoluted nature. In ordinary words, false accusations of extremism are also considered extremism, but this only applies if the victim of the accusation is a state official, not an ordinary citizen for whom one has to rely on the general provisions that cover slander or defamation. Such an approach is contrary to the established practice of the ECtHR, according to which public officials, acting civil servants and other public officials are required to tolerate more criticism than ordinary people[17].

44. The latter principle has been reiterated by the Committee of Ministers of the Council of Europe in its Declaration on the Freedom of Political Debate in the Media, according to which "[*p}olitical figures should not enjoy greater protection of their reputation and other rights than other individuals, and thus more severe sanctions should not be pronounced under domestic law against the media where the latter criticise political figures*"[18].

45. It is entirely possible that, in the heat of a political debate, some state officials, including those of the highest rank, could be accused by their political opponents of undermining the security of the Russian Federation through, for example, the defence policy or for having committed other acts mentioned in Article 1.1 of the Extremism Law. Although such accusations might not be examples of good practice, they certainly should not be unduly criminalised. Their criminalisation would endanger the democratic debate on the performance of government officials, which is essential for the preservation of a democratic society.

"Extremist materials"

46. According to Article 1.3 of the Extremism Law, *"extremist materials"* are *"documents intended for publication or information on other media calling for extremist activity to be carried out or substantiating or justifying the necessity of carrying out such activity, including works by leaders of the National Socialist worker party of Germany, the Fascist party of Italy, publications substantiating or justifying ethnic and/or racial superiority or justifying the practice of committing war crimes or other crimes aimed at the full or partial destruction of any ethnic, social, racial, national or religious group".*

47. This provision defines extremist materials not only as documents which have been published but also as documents intended for publication or information, which call for extremist activity (to be understood, most probably, by reference to the definition of such an activity in Article 1.1) or justify such activity. The explicit mention of the " works by leaders of the National Socialist Workers' Party of Germany, the Fascist Party of Italy […]" in the second part of this provision contributes to the better understanding of its first part, provided that the works of Nazi and fascist ideologies are quoted as examples. References to Nazism and fascism are justified

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[17] *Lingens v. Austria*, 8 July 1986, App. No. 9815/82, para. 42. This principle has later been extended to acting civil servants and other public officials: *Thoma v. Luxembourg* , 29 March 2001, Application No. 38432/97, para. 47.

[18] Declaration adopted by the Committee of Ministers of the Council of Europe on 12 February 2004 at the 872nd meeting of the Ministers' Deputies (Article 4).

and understandable in view of the historical experience of Russia [19], and similar provisions can be found in the legislations of other countries that were exposed to Nazi or fascist occupation and rule.

48. According to Article 13 of the Law, information materials shall be declared as extremist by court decision, on the basis of a submission by the prosecutor or in proceedings in a corresponding administrative infringement, civil or criminal case. The relevant court decision shall be sent to the federal state registration authority, with a view to the inclusion of the material at issue in a Federal List of Extremist Materials, which is made public on the internet and in the media.

49. Considering the broad and rather imprecise definition of "extremist documents" (Article 1.3), the Venice Commission is concerned about the absence of any criteria and any indication, in the Law, on how the documents may be classified as extremist and believes that this has the potential to open the way to arbitrariness and abuse. The Commission is aware that, as it results from official sources, the court decision is systematically based on prior expert review of the material under consideration and may be appealed against in court. It nonetheless considers that, in the absence of clear criteria in the Law, too wide a margin of appreciation and subjectivity is left both in terms of the assessment of the material and in relation to the corresponding judicial procedure. According to non-governmental sources, the Federal List of Extremist Materials was in recent years one of the main instruments having led to the adoption, in the Russian Federation, of numerous disproportionate anti-extremist measures. Information on how this list is composed, amended and published is necessary for the Rapporteurs to comment fully.

"Extremist organisation"

50. The definition of an extremist organisation contained in Article 1.2 is circular. According to its provisions, an "extremist organisation" is "*a public or religious association or other organisation in respect of which and on grounds provided for in the present Federal law, a court has made a ruling having entered into legal force that it be wound up or its activity be banned in connection with the carrying out of extremist activity*". This raises problems with respect to the actions taken by state agencies against non-governmental organisations to which reference will be made later (see paragraphs 60-63 below).

51. The Law appears to apply to all types of organisations, including public, religious and mass media ones, as well as to natural persons as is shown by Articles 6, 7 and 8 on issuing "official warnings" and, respectively, "written notices" and Articles 9, 10 and 11 that deal with liability issues. Moreover, the Law imposes duties and responsibilities not only on legal and natural persons of Russian nationality, but also on foreign nationals and stateless persons (see Articles 3, 14 and 15). It appears, however, that the means provided by the Law to counteract extremist activities (written notices and official warnings) may only be directed to organisations or to their heads. According to the interpretation provided by certain sources, an individual cannot be punished for extremism *per se*, unless his or her behaviour falls under the Code of Administrative Offences or the Criminal Code. As previously indicated, all "extremist activities" listed under Article 1.1 of the Extremism Law are not punishable criminal offenses.

52. It is clear that some of the extremist actions and purposes listed in Article 1.1 have the potential of posing a serious threat to society and the public, whereas others would appear to pose little - and therefore not an extreme - threat at all. It is important that, in a law such as the

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[19] See e.g. *Refah Partisi and Others v. Turkey,* App. nos. 41340/98, 41342/98, 41343/98 and 41344/98, Judgment of 13 February 2003, para. 124*; Leyla Sahin v. Turkey, App. No. 44774/98,* Judgment of 29 June 2004, para. 109.

Extremism Law, which has the capacity of imposing severe restrictions on fundamental freedoms, a consistent and proportionate approach that avoids all arbitrariness is taken. The vagueness and lack of clarity and scope of some of the "basic notions" defined under Article 1 open the door to a very broad and discretionary application. In the light of the above comments, the Venice Commission considers that the principle of legality is not fully respected by the Extremism Law and strongly recommends that this fundamental shortcoming be addressed in relation to each of the definitions provided by the Law in order to bring it in line with the ECHR.

53. The Venice Commission notes in this connection Resolution No. 11 of 28 June 2011, of the Plenum of the Supreme Court of the Russian Federation, on judicial practice in criminal cases involving extremist offences, in which the Supreme Court, in order to help unify the judicial practice in this field, gave lower courts a number of recommendations on how to deal with such cases.

54. In its Resolution, the Court *inter alia* drew attention to the fact that criticism of political or religious associations, as well as of national or religious convictions or customs in itself should not be seen as an action intended to incite enmity or strife. The Resolution also makes reference to international law standards establishing that the limits of permissible criticism of political figures are broader than those regarding private individuals. In addition, it addresses a number of procedural issues, including the need for more complex expert analysis, involving specialists in different fields (such as psychologists, historians, religious studies specialists, anthropologists) in the assessment of information materials from the "extremist" perspective.

55. Similarly, the 15 July 2010 Resolution of the Supreme Court Plenum regarding judicial practice related to the Russian Federation Statute on the Mass Media, represents a further attempt to harmonize the relevant judicial practice and to provide more liberal and constructive guidelines, with references to the relevant ECtHR case-law, for the interpretation and the application of the anti-extremist legislation in respect of the media.

56. In the opinion of the Venice Commission, the Resolutions provide answers to some of the uncertainties which derive from the text of the Law but implicitly acknowledge the defects in the Law. As concluded above, on its face, the principle of legality is not fully respected by the Extremism Law and this fundamental shortcoming needs to be remedied within the text of the Law itself in order to bring it in line with the ECHR.

57. In any event, it is regrettable that, as reported by various sources, the Supreme Court's recommendations have only had a limited impact in practice and that the implementation of the Extremism Law, with many cases of prosecutors and judges ignoring the above-mentioned guidance, continues to raise serious concerns in the light of the applicable standards.

B. The means for counteracting extremism. Warnings and notices.

58. The means that are available to the authorities, according to the Law, in order to counteract any "extremist activity" may be "preventive" and, subsequently, may consist in the suppression or liquidation of the organisation or the temporary suspension of its activities.

59. The Law devotes considerable attention to the prevention of extremist activities. It exhorts state agencies at all levels to undertake preventive measures (including "educational and publicity measures" as it results from Article 5) as a matter of priority.

60. Under Article 6 of the Law, the Prosecutor-General may, in case there is "*sufficient and previously confirmed information on unlawful acts in preparation presenting the characteristics of extremist activity*" and in the absence of grounds for bringing criminal prosecution, send a "written warning" to the head of a public, religious or other organisation, "*to the effect that their activity is inadmissible and that there are concrete grounds for giving a warning*". In case of

failure to comply with the warning, the person to whom the warning was issued may be prosecuted for a criminal offence.

61. The Venice Commission recalls that, according to Article 11 of the ECHR and the ECtHR case law, no restrictions may be placed on the exercise of the right to freedom of association "other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, the protection of public health or morals or the protection of the rights and freedoms of others." Restrictions on the freedom of association are to be construed strictly; only convincing and compelling reasons can justify restrictions on the freedom of association.[20] Similarly, interference with freedom of expression is permissible only if it is prescribed by law and pursues one of the legitimate purposes listed by Article 10.2 ECHR. The impugned measure must also be "necessary in a democratic society" in order to fulfil that aim.

62. It is not clear to the Venice Commission how the presence of concrete grounds for issuing warnings is assessed. Moreover, the Commission finds it particularly worrying that an activity that is not criminal becomes so after a warning has been issued, unless the failure to comply represents a criminal offence in itself. It is also disturbing that there does not seem to be any procedure for the person to whom the warning is addressed to challenge the evidence upon which it is based before the Prosecutor-General, even though the decision may be appealed to a court. The Venice Commission wishes to underline that a warning which is based on a broad interpretation of vague legal provisions in itself constitutes a violation of the requirement of a transparent legal basis for interference[21].

63. Under Article 7 of the Law, where there are "characteristics of extremism" within the activities of a public, religious or other organisation, a similar procedure applies. While Article 6 covers preparatory acts with characteristics of extremism, Article 7 deals with on-going extremist activities that, according to the legislator, need to cease within a strict time limit, clearly indicated by "written notice". If the breaches are not removed within the time fixed by the notice, the organisation is "liquidated", it would appear, without any further procedure. There is a possibility to appeal the "notice" to a court, however if no such appeal is made or if it is unsuccessful, liquidation of the organisation and a ban on its activities are automatic. One may conclude that, in such a case, the Prosecutor-General's notice, or that of the federal state registration authority - which is also entitled to issue such a notice - has the same effect as a court judgment on extremism. This does not seem to be in compliance with the case law of ECtHR according to which, *"[i]n matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise"*[22].

64. The Venice Commission considers such an approach to freedom of association - but also to freedom of expression – very problematic. The powers of the public prosecutor and his or her subordinates seem to be extended unnecessarily. It is unusual for a law enforcement agency to issue warnings and to examine the activity of a non-governmental organisation in the absence of its leaders and without the study of its publicly defined aims and registered statutes. A generally accepted method to prevent the freedom of association from being abused for

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[20] ECtHR, *Gorzelik and Others v. Poland*, No. 44158/98, Judgment of 17 February 2004
[21] ECtHR, *Koretskyy and Others v. Ukraine,* no. 40269/02, no. 107, Judgment of 3 July 2008; See also Venice Commission, *Opinion on the compatibility with universal human rights standards of Article 193-1 of the Criminal Code of Belarus on the rights of non-registered associations in Belarus*, CDL-AD(2011)036, 18 October 2011, para 87
[22] See *Hasan and Chaush v. Bulgaria*, no. 30985/96, § 84, ECHR 2000 XI

criminal purposes, including the violation of human rights, is to react to its real activities and to conduct proceedings which would determine whether these are prohibited by law. Constitutionally defined procedures should be used to ban an organisation, if its purposes are contrary to the constitutional order and the general interests. It is particularly disturbing that, in the current Law, the reason for prohibiting an organisation by de-registration or the suppression of its activity does not seem to rest on a determination by a court of law dealing with matters of substance, but on the mere disrespect of the orders of the prosecutor or his or her deputies or of another public agency.

65. The procedure established by the Extremism Law is problematic in two important ways. Firstly, the Prosecutor-General or other state agencies should not have the power to liquidate organisations; in principle, it is for the court to make such a decision. The Venice Commission wishes to recall in this context that, as indicated by the Committee of Minsters in its Recommendation on the legal status of non-governmental organizations, NGOs should not be subject to direction by public authorities and that "[*t]he termination of an NGO or, in the case of a foreign NGO, the withdrawal of its approval to operate should only be ordered by a court*"[23]. Moreover, such an order, which can only be based on clearly specified grounds - bankruptcy, prolonged inactivity or serious misconduct - should be subject to prompt appeal.
66. As to the role of Prosecutor-General, as the Venice Commission has already stated[24], "*there is a very strong argument for confining prosecution services to the powers of criminal prosecution and not giving them the sort of general supervisory powers which were commonly found in "prokuratura" type systems*". While fully aware that there are no commonly agreed international standards as to the tasks, functions and organisation of prosecution service outside the criminal law, the Commission further stressed that any other functions that the prosecutors may exercise must not interfere with or supplant the judicial system in any way.

67. Secondly, liquidation should only occur following a public hearing providing the possibility for the organisation or individual concerned to be aware of and challenge the evidence brought against it or him/her. None of this seems to be provided for in the Extremism Law. If such procedures are provided for elsewhere in other laws, the Commission recommends that this be explicitly stated. More generally, the Law should be much more specific as to the procedures available in order to guarantee the effective enjoyment of the right to appeal both the warning/ the notice issued, and the liquidation or suspension decision before an independent and impartial tribunal, as enshrined in Article 6 ECHR. As they stand now, its provisions only make reference to the "established procedure" (see Articles 6, 7 and 10 of the Law), without any further indication or reference to other relevant laws of the Russian Federation.

68. Finally, "liquidation" should occur, in principle, as a last resort or in particularly serious cases[25]; it should not be an automatic penalty irrespective of the gravity of the offence, as it appears to be according to Article 7 of the Law.

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[23] *Recommendation CM/Rec(2007)14 of the Committee of Ministers to member states on the legal status of non-governmental organisations in Europe*, 10 October 2007.
[24] *Report on European Standards as regards the independence of the judicial system: Part II The Prosecution service*, CDL-AD(2010)040,3 January 2011; see also CDL-JD(2008)001, for an overview of the European practice on this issue see the report by Mr. András Varga for the CCPE (CCPE-Bu(2008)4rev). See also *Recommendation Rec(2000)19 of the Committee of Minister of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System*, according to which **"[**w]*here public prosecutors are entitled to take measures which cause an interference in the fundamental rights and freedoms of the suspect, judicial control over such measures must be possible".*
[25] See *Association of Citizens Radko & Paunkovski v. the former Yugoslav Republic of Macedonia*, Application no. 74651/01, Judgment of 15 January 2009, para. 76 and *Tebieti Mühafize Cemiyyeti and Israfilov v. Azerbaijan,* Application no. 37083/03, Judgment of 8 October 2009; see also *Korneenko et al. v. Belarus*, (Human Rights Committee), 31 October 2006, Case no 1274/2004. *Belyatsky et al. v. Belarus*, (Human Rights Committee), 24 July 2007.

69. Similar treatment is reserved in Article 8 to "media outlets", which might also be liquidated for failure to eliminate the "violations" pointed out by the notice. It is not clear whether these rules apply to political parties or whether there is a separate law dealing with them, as seems to be the case for the suspension of their activities, referred to in Article 10 of the Law.

70. The Venice Commission received worrying information on cases of particularly broad interpretation of the notion of "extremism" and reportedly disproportionate punitive measures taken under the Extremism Law, such as the liquidation of media outlets for carrying out "extremist activities" or for "disseminating "extremist materials", or adding to the Federal List of Extremist Materials literature of religious communities known to be peaceful. The Extremism Law is reportedly often used to target organisations and individuals that are critical of the Government and frequently impairs the rights and freedoms of citizens. It is worrying at the same time that, as a result of the vagueness of the Law and of the wide margin of interpretation left to the enforcement authorities, undue pressure is exerted on civil society organisations, media outlets and individuals, which undoubtedly has a negative impact on the free and effective exercise of human rights and fundamental freedoms.

71. The Venice Commission has already adopted legal opinions assessing legislation and/or practices relating to official warnings touching upon the freedoms of expression and association[26]. In this context, while stressing these rights' fundamental importance for any democratic society and their close inter-relation[27], the Commission emphasized that the freedom of expression of an association cannot be subject to the direction of public authorities, except for purposes narrowly and clearly defined by the law and necessary in a democratic society. It also recalled that any restriction of these must meet a strict test of justification: "*Any restriction of the right to freedom of association must according to Article 11.2 of the ECHR be rescribed by law and it is required that the rule containing the limitation be general in its effect, that it be sufficiently known and the extent of the limitation be sufficiently clear.*[28] *A restriction that is too general in nature is not permissible due to the principle of proportionality.*[29] *The restriction must furthermore pursue a legitimate aim and be necessary in a democratic society* [30] (see CDL-AD(2011)036, para 81).

72. It is therefore essential, in order for the warnings and notices or any other anti-extremism measures to fully comply with the requirements of Articles 10 and 11 of the ECHR, to ensure that any restrictions that they may introduce to fundamental rights stem from a pressing social need, are proportionate within the meaning of the ECHR and are clearly defined by law. The relevant provisions of the Extremism Law should thus be amended accordingly. Moreover, more adequate and detailed guarantees for the right to an effective remedy for violation of rights, in line with Article 6 of the ECHR, should be provided.

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[26] See CDL-AD(2011)0260……
Opinion on the compatibility with universal human rights standards of an official warning addressed by the Ministry of Justice of Belarus to the Belarusian Helsinki Committee (Venice, 17-18 June 2011); CDL-AD(2011)036 *Opinion on the compatibility with universal human rights standards of article 193-1 of the criminal code on the rights of non-registered associations of the Republic of Belarus* (Venice, 14-15 October 2011).

[27] See *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan* , CDL-AD (2011) 035, § 84;

[28] *See, e.g., ECtRH, Sunday Times v. UK*, *no. 6538/74*, Judgment of 26 April 1979, para. 49; ECtHR, *Silver et al. v. UK, no. 5947/72; 6205/73; 7052/75; 7061/75; 7107/75; 7113/75; 7136/75* , Judgment of 25 March 1983, para. 87-88; ECtHR, Malone v. UK, *no. 8691/79*, Judgment of 2 August 1984, para. 66; ECtHR *Groppera Radio AG* et al. v. Switzerland, *no. 10890/84* , Judgment of 28 march 1990, para. 68; ECtHR, *Autronic AG v. Switzerland*, *no. 12726/87*, Judgment of 22 May 1990, para. 57.

[29] See discussion of Wino J.M. van Veen, Negative Freedom of Association: Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in *The International Journal of Not-for-Profit Law*, Vol. 3, Issue 1, September 2000.

[30] See ECtHR, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, Judgment of 29 April 1999, para 104.

73. Article 16 of the Extremism law prohibits extremist activity during the holding of assemblies. Apart from the difficulties that arise in relation to the definition of "extremist activity" addressed above, this article imposes on organisers of assemblies the obligation of the "timely suppression" of any extremist activity. The article also imposes obligations and liabilities on organisers of an assembly to take steps to eliminate the involvement of extremist organisations, use of their symbols or emblems and the dissemination of extremist materials. Failure to do so shall involve the halting of the assembly. Where a person or organisation organises an assembly which is for extremist purposes, they may be made subject to the law under examination and to the criminal law. However, organisers who arrange a peaceful assembly which is unconnected with extremist activity should not be made liable for failure to perform their responsibilities if they have made reasonable efforts to do so and should not be made liable for the actions of individual participants or *agents provocateurs.* Enforcement of the law is in principle a matter for the police.[31]

74. The Venice Commission was informed, although not officially, that additional amendments to the Law by the Presidential administration may be under way. The Commission would welcome such an initiative and considers that the clarifications provided by the Supreme Court, in addition to the lessons learnt from the practical implementation of the Law, would help to improve its provisions substantially and bring them into full conformity with the applicable standards.

VI. Conclusions

75. The Venice Commission is fully aware of the challenges faced by the Russian authorities in their legitimate efforts to counter extremism and related threats. However, the manner in which this aim is pursued in the Extremism Law is problematic.

The lack of clarity and precision of certain key provisions of the Law - such as the definition of “extremism”, “extremist actions”, “extremist organisations” or “extremist materials” - and its potential for an overly broad interpretation by the enforcement authorities, raise concerns from the perspective of the human rights standards as enshrined in the ECHR (in particular Articles 6, 9, 10 and 11) and of the principles of legality, necessity and proportionality. The Venice Commission highly recommends that these provisions be reconsidered and amended to be brought in full compliance with the above-mentioned requirements.

76. The specific instruments that the Law provides for in order to counter extremism - the written warnings and notices - and the related punitive measures (liquidation and/or ban on the activities of public religious or other organisations, closure of media outlets) also pose serious problems in the light of the freedom of association and the freedom of expression as protected by the ECHR and need to be adequately amended.

77. The Venice Commission remains at the disposal of the Russian authorities should they require further assistance.

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[31] CDL-AD(2010)020 *OSCE/ODIHR–Venice Commission guidelines on Freedom of Peaceful Assembly* (2nd Edition p. 12