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Fear and Loathing in the Iron Closet

The right to freedom of assembly for LGBT rights activists
in the Russian Federation, Ukraine and the Republic of
Moldova, and the role of the Moscow Patriarchate
in the invention of “gay propaganda” legislation

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Psalm 139:14 (ESV)

“I praise you, for I am fearfully and wonderfully made.
Wonderful are your works; my soul knows it very well.”

John 8:31-32 (ESV)

“If you abide in my word, you are truly my disciples, and you will know the
truth, and the truth will set you free.”

Jesus of Nazareth

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Abstract

The Iron Closet has always been deep, and although never leading to Narnia it has on occasions had the potential to be a one-way ticket to a forced labour camp. After the decline of the Soviet Union, however, the Western world rejoiced; the second parenthesis had been set out and we now lived in the main narrative again where everything ought to make sense. Countries in the post-Soviet space would by necessity catch up and go through their transitional phases towards market economies, rule of law and the reign of human rights; Russia, Ukraine and Moldova all decriminalised the Soviet anti-sodomy statute to be able to gain access to the Council of Europe.

For the Russian LGBT community, the status quo can be regarded to have been re-established with the invention of the “gay propaganda” legislation, starting with a number of Russian regions adopting regional laws according to which undefined “gay propaganda” would render fines higher than the normal monthly income. This development culminated on 30 June 2013, when President Vladimir Putin signed into law a federal “gay propaganda” law, previously lobbied for in the Duma by an alliance of Orthodox priests and neo-conservative politicians.

The Moscow Patriarchate is deeply entrenched with the Russian state and has lobbied for “gay propaganda” legislation, as well as making joint efforts together with Russian representatives in the Council of Europe and in the United Nations. However, the goal is not only to curb LGBT rights, but to change the entire civilisational discourse on public morals. This thesis is therefore concerned with analysing the human rights agenda of the Moscow Patriarchate and its implications for Russia, Ukraine and Moldova. However, what I find is that the Orthodox view on human rights is incompatible with the whole concept of human rights law.

With this in mind, the purpose of this thesis is to evaluate the provisions of the ECHR and jurisprudence of the ECtHR, with a focus on the right to freedom of assembly for LGBT rights activists. My concern with this particular right is that securing public visibility constitutes a major part of safeguarding other rights for LGBT persons. I think that LGBT persons may be compared to the canary birds that the miners used to bring with them into the coal mines to detect high levels of carbon monoxide: when the birds stopped singing, this implied danger. With this I mean that if this right is stifled, I think that this is not only a sign that other rights for this group are also going down the drain, but of where the rest of society is headed as well.

What I find is that, from 2007 onwards, the ECtHR has crystallised its view that “real pluralism” is an inherent part of democracy, which is the only political model compatible with the ECHR, and that banning LGBT rights demonstrations under the pretext that they encourage violent counter-demonstrations is not a valid claim if the State has resources to safeguard these events.

In this thesis, I examine how the legal framework of the ECHR has ameliorated the situations in Ukraine and Moldova, and what implications this has had also for the situation in the Russian Federation. When I lived in Moldova in 2018 and worked as an intern at the Embassy of Sweden in Chişinău, I participated in Moldova Pride on the first-ever occasion that the Pride march could be held without being interrupted early. I find that there have been incredible developments in Ukraine and Moldova in recent years due to their closer associations to Europe, and that in the context of the right to freedom of assembly, Pride marches are recurring events in these countries and the authorities seem to have learned from their experiences and have become more able to neutralise violent counter-demonstrators.

Preface

When concluding my writing on this essay, there are some people that I want to extend my thanks to for their kindness and invaluable support, that have helped me to complete this thesis:

First of all, I want to thank my supervisor, Vladislava Stoyanova, for providing me with invaluable comments and inspiration. Furthermore, I want to thank Mikhail Suslov from the University of Copenhagen, who in 2018 held two guest lectures on Russian conservatism and Orthodoxy that cleared the fog for me, and who also sent me invaluable reading material from an upcoming book on the Russian Orthodox Church and its conservative agenda.

I also want to, once again, thank the former Ambassador of Sweden to the Republic of Moldova, Signe Burgstaller, and my supervisor during my internship at the Embassy of Sweden in Chişinău in 2018, Anja Jahn-Günther. As I mentioned in the preface to my paper *Rainbow over the Dniester*, they provided me with sharp comments and a rewarding work experience.

Finally, I want to thank my mom for sustaining me both economically and mentally during the time that I have written this thesis. Of my friends, whom I love and enjoy invaluable support from, there is one in particular that I would like to thank when concluding my studies: Jennifer Kyllergård, for being such a good friend and support since the first day on the law programme in January 2013, and for joining me on a field trip to the *de facto* republic of Transdnistria.

Ни пуха ни пера!

Simon Andersson

Lund in March 2019

Introduction

"The sodomite had been a temporary aberration;
the homosexual was now a species"

Michel Foucault – *The History of Sexuality, volume 1* (1976)

1. Introduction

Public attitudes towards LGBT people have significantly improved in the West since the turn of the millennium and same-sex marriage has been legalised in several states around the world. However, it is important to remember that the progress is not linear but cyclical. The American drag show entertainer RuPaul Charles, famous for hosting the TV show *RuPaul's Drag Race*, expressed in an interview that:

“We had a very hostile period after 9/11, especially in America, that was very fear based. And right now, we are enjoying an open window, politically and culturally. But don't be fooled – all of this is cyclical. I've seen the window open in my lifetime and I've seen it close. [...] I don't think one creates the other: I don't think that, because Obama got into office, the window opened. I think it's all part of a much broader picture. I don't know specifically why that happens. I do know that humans feel more comfortable in fear than they do in love. They feel more comfortable in their smallness than they do in their greatness, and that's very sad but it's just a fact.”¹

While in recent years the LGBT rights movement has been successful in abolishing discriminatory legislation in several countries, the actualisation of LGBT rights is contested, not least in countries previously under the umbrella of the Soviet Union.

I. Background

In the 2000s and 2010s, Pride marches became an increasingly frequent subject of public contestation over LGBT rights and visibility in Russia and Eastern Europe. Francesca Stella has described that Pride marches in post-Soviet space were “understood as a temporary but also highly visible and politicized appropriation of urban space by the LGBT community”.² Catherine Baker made the comparison that while 21st-century Western activists often criticised their own cities' Pride events for “de-politicisation”, “commodification” and “liability to co-option by the state”, this kind of critique has not been relevant regarding LGBT rights events in Russia and Eastern Europe. There, the main issues continue to be that municipal authorities may issue bans on arranging these marches and also the constant risk of violent attacks by mainly far-right groups towards the participants, either during or after the events.³

When some Eastern European states gradually started to accord protection after having received criticism from the international community, LGBT rights activists were subjected to heavy police protection that isolated them from everyday city space, being forced for security reasons into marginal urban areas with little symbolic significance, or being cancelled on last-minute notice under the pretext that the state would be incapable of securing the marches from violent counter-demonstrations by mainly far-right groups.⁴

Still, by drawing on the march as an established campaign model, organisers knowingly inserted their cities and nations into what Baker has defined as “the core imaginary of a global 'politics of pride'”. Drawing on Stella's research, she describes that the symbolic association between LGBT equality and the concepts of ‘Europe’ and ‘the West’ could be made “not only to write one's city or nation into that imagined geopolitical-ideological space” but also to distance one's

¹ Article: *The Subversive Genius of RuPaul*, London: Dazed (2015). Available: <http://www.dazeddigital.com/artsandculture/article/24914/1/the-subversive-genius-of-rupaul> (Obtained on 2019-03-10)

² Stella, Francesca: *Queer Space, Pride, and Shame in Moscow*. *Slavic Review*, 72(3) (2013), 458-480, p. 461.

³ Baker, Catherine: *Gender in 20th Century Eastern Europe and the USSR*, Basingstoke: Palgrave (2017), p. 234.

⁴ *Ibid.*, p. 234.; Stella, *op. cit.* 2, p. 469.

nation from such an idea of ‘Europe’ altogether.⁵ I think that this last part is relevant especially when viewing national churches and socially conservative governments, and the relationship between the two in setting the boundaries for allowed and forbidden action in the public sphere.

Regional laws banning LGBT rights advocacy or “gay propaganda” were enacted in Russia between 2006-2014, and there has been a growing opposition towards LGBT rights in the political sphere. Since the federal “gay propaganda” law was adopted in 2013, there has been an upsurge in state actions countering LGBT rights events.

The Russian Orthodox Church (legally known as the Moscow Patriarchate; I use these names interchangeably) has also become a stronger voice on family and social matters after the fall of the Soviet Union. During the Soviet period, the Church was treated in an extremely hostile way by Soviet authorities, one prominent example being the destruction in 1931 of the Cathedral of Christ the Saviour in Moscow, on the order of Soviet leader Joseph Stalin. After the Soviet decline, the Church seems to have played an important role in sustaining a faith-based collective identity for the peoples previously identifying with the star, hammer and sickle.

Today, the Church has regained its property, grown in numbers of adherents and has also developed a public profile as an institution promoting moral conservatism, including in political debates and lobbying politicians. Church clerics played a huge role in the creation of the laws banning LGBT rights advocacy at the regional and federal levels from 2006 through 2013.⁶

Similar “gay propaganda” laws have been drafted and proposed in Ukraine and the Republic of Moldova, but have so far been stifled by the international community, most notably the Council of Europe and the European Union. Clerics from what has until recently been called the Ukrainian Orthodox Church of the Moscow Patriarchate (UOC-MP), and the Metropolis of Chişinău and All Moldova (or the Moldovan Orthodox Church) have played prominent roles in the political debates in both countries, in the same manner as in the Russian Federation.

The primacy of the Moscow Patriarchate has been contested by the previously unrecognised Ukrainian Orthodox Church of the Kyiv Patriarchate (UOC-KP) since the decline of the Soviet Union. This has intensified in the last five years after the Euromaidan demonstrations in central Kyiv in 2013-14 and Russia’s annexation of the Crimean Peninsula in 2014.

Today, we are experiencing the biggest Eastern Orthodox Schism in a millennium, driven by geopolitics, and on 6 January 2019, the elected primate Epiphanius of the newly-established Orthodox Church of Ukraine, together with Ukrainian President Petro Poroshenko, visited the Ecumenical Patriarch of Constantinople to receive the *Tomos* (formal decree of autocephaly) for church independence.

The Council of Europe plays an important role in the Russian Federation, Ukraine and the Republic of Moldova. In the recent years, the European Court of Human Rights (ECtHR) has decided in two landmark decisions that concern LGBT applicants against Russia:

⁵ Baker, *op. cit.* 3., p. 234.; Stella, *op. cit.* 2, pp. 469, 471-5.

⁶ Hill, Caroline: *Framing “Gay Propaganda”: Morality Policy Arguments and the Russian Orthodox Church*, p. 1. In: Suslov, Mikhail, Uzlaner, Dmitry (eds.): *Contemporary Russian Conservatism: Problems, Paradoxes and Dangers*, (Brill, forthcoming 2019).

1. *Bayev and Others v. Russia* (judgment on 20 June 2017; final on 13 November 2017), in which the Court held that there had been a violation of Article 10 alone, and of Article 14 (prohibition of discrimination) in conjunction with Article 10;
2. *Alekseyev and Others v. Russia* (judgment on 27 November 2018; request for referral to the Grand Chamber pending), in which the Court held unanimously that there had been a violation of Article 11 alone, and of Article 14 in conjunction with Article 11.

As I wrote about in my previous paper *Rainbow over the Dniester* (see Supplement A to this thesis) following my internship during the spring semester of 2018 at the Embassy of Sweden in Chişinău, tremendous work has been done for LGBT rights in recent years and this has reached results. The 17th Edition of Moldova Pride, which I participated in together with my colleagues, was a success and the march with the theme “Fără Frică de Iubire” (“Without Fear of Love”) was the first time in history that a Pride march could be held without interruption in Moldova. I see this as an indicator that Moldovan society, with its closer association with Europe in recent years, is gradually accepting that LGBT rights are human rights.⁷

II. Purpose and research questions

The purpose of this thesis is to assess the realisation of the right to freedom of assembly for LGBT rights activists in the Russian Federation in comparison with the situations in Ukraine and the Republic of Moldova. I examine the invention of so-called “gay propaganda” legislation in the Russian Federation and to what extent this legislation is in conflict with Russia’s obligations under the European Convention on Human Rights (ECHR).

My main focus is, therefore, to examine the provisions of Article 11 (freedom of association and assembly) of the ECHR in the context of LGBT rights. Article 10 (freedom of expression) is relevant since Article 11 can be regarded as *lex specialis* to Article 10. I evaluate the ECtHR’s case-law that has evolved its jurisprudence on Articles 10 and 11 in the context of LGBT rights.

I also examine some case-law in relation to Article 9 (freedom of thought, conscience and religion) to analyse whether the freedom of assembly can be curtailed in order to protect the feelings of religious believers, which is an argument that has been used by the Russian Federation when inventing “gay propaganda” legislation.

Another important aspect I examine is the influence of the Moscow Patriarchate in the creation of this kind of legislation. The Russian Federation and the Russian Orthodox Church have jointly elaborated the “traditional values” agenda, which they have lobbied for e.g. in the United Nations Human Rights Council between 2008-12.

While this thesis is not focussed on United Nations’ treaties, it is still of relevance to examine these joint efforts, that I think demonstrate how the long-term idea is to change the dominant narrative in the ‘civilisational discourse’ concerning the role of public morals in society. I think that this is the main motivating factor that drives the invention of anti-LGBT legislation.

⁷ Andersson, Simon: *Rainbow over the Dniester: Paper on the actualisation of the right to freedom of assembly for LGBT rights activists in the Republic of Moldova* [Supplement A], Lund: Lund University (2018), p. 25.

For the purpose of this thesis, the main research questions and sub-questions are:

What is the stance of the Council of Europe and the European Court of Human Rights concerning freedom of assembly for LGBT rights activists?

- How has the Court's jurisprudence developed concerning the right to freedom of assembly for LGBT rights activists?
- How has the Court perceived the importance of the protection of the feelings of religious believers *vis-à-vis* the actualisation of the right to freedom of assembly for LGBT rights activists?

What role has the Moscow Patriarchate played in the Russian Federation, Ukraine and the Republic of Moldova in shaping anti-LGBT legislation?

How is the right to freedom of assembly of LGBT rights activists realised in the Russian Federation, Ukraine and the Republic of Moldova?

- How has the legal and factual situation of LGBT rights activists developed in these countries since the decline of the Soviet Union?
- What has been the impact of the ECtHR (the "Strasbourg effect") in these countries in respect of the implementation of the right to freedom of assembly of LGBT rights activists?
- Taking into account that the Russian government has refused to take measures to implement the ECtHR's judgments, what implications does this have for Russia's membership in the Council of Europe?

III. Perspective

My perspective when writing this thesis is based on the idea developed by Michel Foucault in *The History of Sexuality* that sexuality, including homosexuality, is a social construction, and on masculinities theory as elaborated by Nancy Dowd in her book *The Man Question*.

I use the first part on sexuality as a social construction as theoretical basis when elaborating on how "the homosexual" has been constructed as a subject that can claim rights under the ECHR. I further relate to this theoretical basis and to masculinities theory when reviewing legislation invented in Russia. Regarding the contemporary Russian situation, Valerie Sperling has stated:

In the contemporary Russian case, the Kremlin deployed a legitimization strategy that included stressing Putin's machismo—a strategy that bled over into popular cultural productions of the same ilk. [...] Traditional masculinity, therefore, enables male political leaders (and some female ones as well) to assert their power over others who can be identified or characterized as traditionally feminine. [...] Political actors employ widely familiar cultural notions of masculinity, femininity, and homophobia (heteronormativity) as political tools in their performance of legitimacy.⁸

The notions of "homosexuality", *muzhelozhstvo* (literally, "man lying with mankind") and "non-traditional sexual relationships" are the expressions mainly used by Russian legislators and clerics, who seem to construct non-heterosexual sexual identities as political statements, originating in how the Soviet Union viewed non-heterosexual citizens as "sexual dissidents". I describe the development of these expressions in the historical background.

⁸ Sperling, Valerie: *Sex, Politics, and Putin: Political Legitimacy in Russia*, New York City: Oxford University Press (2014), p. 3.

1. Sexuality as a social construction

1.1. The construction of sexuality in Foucauldian social theory

Michel Foucault published *The History of Sexuality* in 1976, criticising psychoanalysis and rigid academic views of sexuality. His main idea is that sexuality is a social construction created through discourse.

In the first volume, Foucault elaborated on and criticised the “repressive hypothesis”, which is the dominant story about sex in society. According to this hypothesis, during the Middle Ages and the Renaissance people mainly held an easy attitude towards sexuality, but “twilight soon fell upon this bright day”.⁹ With the rise of the bourgeois class in society, new public morals were developed that led to the repression of sex and it being enclosed in the private sphere, regarded only as a means of procreation.¹⁰

The “repressive hypothesis” is a teleological concept, since it established an idea of a collective striving towards a sexually liberated society, without the baggage of Christian morality and Victorian prudishness. This narrative has been embraced by the sexual liberation movement, which works to bring back the “bright day” when “sex will be good again”.¹¹

Foucault criticised this hypothesis because it is a universalising history of sex, assuming that the sexuality that became repressed was always already there. For Foucault, sex is a socially constituted phenomenon that depends in each society on the forms of knowledge/power. He meant that the sexual liberation movement has extended rather than escaped this false hypothesis. He thought that it is odd that society believes in this narrative, but that “this discourse on modern sexual repression holds up well, owing no doubt to how easy it is to uphold”.¹² The “repressive hypothesis” is easy to uphold for two reasons: (1) the Marxist explanation, that by placing the dawn of sexual repression in the beginning of the 17th century, it corresponds with the rise of capitalism; and (2) that the hypothesis in itself is gratifying and creates a “speaker’s benefit”, because when a person speaks about sex he feels that:

“[...] he upsets established law; he somehow anticipates the coming freedom... [W]e are conscious of defying established power, our tone of voice shows that we know we are being subversive, and we ardently conjure away the present and appeal to the future, whose day will be hastened by the contribution we believe we are making.”¹³

Foucault raised three concerns about the “repressive hypothesis”: (1) whether it is “truly an established fact”; (2) whether repression is really how power functions; and (3) as quoted:

“Did the critical discourse that addresses itself to repression come to act as a roadblock to a power mechanism that had operated unchallenged up to that point, or is it not in fact part of the same historical network as the thing it denounces (and doubtless misrepresents) by calling it ‘repression’?”¹⁴

⁹ Foucault, Michel: *The History of Sexuality Volume 1: An Introduction* (New York: Vintage Books, 1990), p. 3.

¹⁰ Ibid., p. 6.

¹¹ Ibid., p. 7.

¹² Ibid., p. 5.

¹³ Ibid., pp. 6f.

¹⁴ Ibid., p. 10.

Foucault did not, however, mean that sex has never been censored, but criticised the construction of the “repressive hypothesis” as a narrative that explains the whole history of sex:

“Let there be no misunderstanding: I do not claim that sex has not been prohibited or barred or masked or misapprehended since the classical age; nor do I even assert that it has suffered these things any less from that period on than before. I do not maintain that the prohibition of sex is a ruse; but it is a ruse to make prohibition into the basic and constitutive element from which one would be able to write the history of what has been said concerning sex starting from the modern epoch. All these negative elements – defences, censorships, denials – which the repressive hypothesis groups together in one great central mechanism destined to say no, are doubtless only component parts that have a local and tactical role to play in a transformation into discourse, a technology of power, and a will to knowledge that are far from being reducible to the former.”¹⁵

Foucault’s argument is that the relationship between sex and power in the last few centuries has been a much more complicated dynamic than can be explained by this one hypothesis. He pointed out that censorship, or repression, does not negate desire, but produces more and new forms of desire. Therefore, the relationship between sex and power is not fundamentally characterised by negation and silence, and what we should rather attend to is the proliferation of new practices and discourses about sex, which Foucault meant have *created* sexualities rather than prohibiting them.¹⁶

For power to get a hold on sex, it required data and sexual confessions, which ironically is exactly what is provided by the sexual liberation movement. Because this movement has misunderstood the relation between sex and power as repressive, it has therefore incited us to be “coming out of the closet” and to tell the secrets of our sex. This, in Foucault’s view, is the prerequisite for power to control our bodies and the population.¹⁷

Sexuality was socially constructed out of compulsory medical confessions and its power effects. Foucault provided the example story of Charles Jouy who lived in Lapcourt, France in the middle of the 19th century. Jouy had “received caresses” from a young girl and – while he would in today’s social climate be understood as a child molester or paedophile – he suffered consequences that were extraordinary in the historical context: he was reported to the village mayor by the girl’s parents, arrested by the police and then turned over to psychiatrists. In the psychiatric ward, he was regarded as a danger to society and spent the rest of his life in a psychiatric asylum. He was obliged to confess his sexual desires at length to doctors, who then wrote medical studies on his case. This procedure, according to Foucault, is a product of a juridico-medical model and demonstrated a new, scientific will to know about sex.¹⁸ As Chloe Taylor explains, this point that Foucault made is that Jouy’s sexual acts were regarded as an expression of his essential being, which was a novel invention in this historical context.¹⁹

Regarding the construction of homosexuality, the “practice of sodomy” and other “perversions” had previously been regarded as essentially different from each other,²⁰ and in the 19th century became interpreted as acts revelatory of identities. Foucault expressed that:

¹⁵ Ibid., p. 12.

¹⁶ Ibid., pp. 8f.

¹⁷ Ibid., pp. 9f; Taylor, Chloë: *The Routledge Guidebook to Foucault's The History of Sexuality*, London: Routledge (2017), p. 21.

¹⁸ Foucault, *op. cit.* 9, pp. 31f.

¹⁹ Taylor, *op. cit.* 17, p. 34.

²⁰ Foucault, *op. cit.* 9, p. 39.

“It is possible that the West has not been capable of inventing any new pleasures, and it has doubtless not discovered any original vices. But it has defined new rules for the game of powers and pleasures. The frozen countenance of the perversions is a fixture of this game.”²¹

Foucault argued that previously, the perpetrator of a forbidden act was “nothing more than the juridical subject of them”. In contrast, taking the example of homosexuality, he stated:

“The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. It was consubstantial with him, less as a habitual sin than as a singular nature.”²²

Therefore, what we now call “homosexuality” was previously “characterised [...] less by a type of sexual relation than by a certain quality of sexual sensibility, a certain way of inverting that masculine and feminine in oneself”. The newly constructed “homosexual” was defined by desires, and, as Foucault famously remarked, “the sodomite had been a temporary aberration; the homosexual was now a species”.²³ From the 19th century onwards, “homosexuality began to speak in its own behalf, to demand that its legitimacy or ‘naturalness’ be acknowledged, often the same vocabulary, using the same categories by which it [had been] disqualified”.²⁴

1.2. Homosexuality as a legal construction in the ECtHR

Paul Johnson, drawing on Michel Foucault’s theories in *The History of Sexuality*, described that the essential utility of human rights towards gay liberation is “its capacity to discursively construct sexuality as an innate and inalienable characteristic of human beings and claim recognition for this as a ‘right’”.²⁵ Law is an integral part of the “great surface network” through which sexuality is socially constructed and is “significant because it is one of the most authoritative mechanisms through which the normative ‘truths’ of sexuality are established”.²⁶ When viewing this social construction through the jurisprudence of the ECtHR, he quoted Grigolo who said that the “homosexual as a legal subject was introduced into the Convention using traditional essentialist narratives”.²⁷

However, Johnson has emphasised that it is important to recognise that sexual essentialism is also a relatively newly-invented discourse and that the ECtHR has stabilised and perpetuated it. The ECtHR has provided what Foucault would call a “reverse discourse”, through which its construction of homosexuality has provided applicants with a toolkit to resist dominant discourses on sexuality, and to change not only the legal regulation of same-sex practices but also to shape social conceptions of homosexuality. Therefore, Johnson holds the view that the ECtHR is “one of the most important performative sites at which discourses on sexuality are

²¹ Ibid., p. 48.

²² Ibid., p. 43.

²³ Ibid.

²⁴ Ibid., p. 101.

²⁵ Johnson, Paul: *Homosexuality and the European Court of Human Rights*, London: Routledge (2013), p. 8.

²⁶ Ibid., p. 9.

²⁷ Grigolo, Michele: *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, *European Journal of International Law* 14, 2003, 1023-1044, p. 1027.

given ontological effect” and is therefore “preeminent in shaping the global discourse on homosexuality”.²⁸

The public/private binary is also of relevance in how homosexuality is constructed. The binary was originally defined by the German sociologist and philosopher Jürgen Habermas. He described the public sphere as “a virtual or imaginary community which does not necessarily exist in any identifiable space”, while the private sphere is separate from the rest of society and is the sphere for domestic life.²⁹

According to Johnson, the Court provides for access to privacy rights for homosexuals but also reiterates the idea that maintaining a strict exclusion of expression of homosexuality from the private sphere is desirable as well as necessary. This, in Johnson’s view, has reinforced the social relations of the “closet”.³⁰

To prove his point, Johnson made references to Article 8 (right to respect for private life, family life, correspondence and home) cases that are not relevant in this thesis. What is relevant is that he also criticised the 2010 case of *Alekseyev v. Russia* from this viewpoint. He stated that although the ECtHR upheld the applicant’s complaint about a refusal to permit a public assembly for the purposes of holding a ‘gay pride’ event, in the case it stressed that any such events should not involve any “graphic demonstration of obscenity”, “nudity”, or “sexually provocative behaviour” that might “criticise public morals or religious views”. This, in Johnson’s view, “separates aspects of ‘homosexual conduct’ from the public sphere to protect the ‘morals’ and ‘views’ of the heterosexual majority”.³¹

What I do agree with Johnson on is that the “closet” may easily be constructed through legislation as well as societal behaviours, and that this is important to always have in mind when discussing LGBT rights within human rights law. However, while he may be correct in that the ECtHR’s reasoning in *Alekseyev* does separate aspects of “homosexual conduct”, I do not at all agree with him that this line of reasoning held by the ECtHR necessarily reinforces the social relations of the “closet”.

My arguments are: (1) there exists an idea within LGBT rights activism that extreme public expressions (such as the public display of nudity or BDSM, etc.) should be used to provoke the heterosexual majority and to therefore “advance the LGBT rights agenda”, but which I instead think hypersexualises LGBT people and that this is inherently negative; and (2) that the ECtHR did not in *Alekseyev* protect any specific morals or views of the heterosexual majority, that cannot be held by LGBT people as well without thwarting the progression of LGBT rights. My point is that I do not think that obscene or pornographic expressions define anybody, and that we should be able to discuss the right to freedom of assembly in respect of LGBT without demanding that these kinds of expressions should constitute a necessary part of this freedom.

²⁸ Johnson, *op. cit.* 25, pp. 10-11.

²⁹ Habermas, Jürgen: *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, Massachusetts: MIT Press (1989), p. 30.

³⁰ Johnson, *op. cit.* 25, p. 104.

³¹ *Ibid.*, p. 112.

2. Masculinities theory

2.1. Overview

Masculinities theory developed as a discipline in the 1970s and 1980s. It derives directly from feminist theory and was also early influenced by lesbian/gay/queer studies in the 1970s, especially after Michel Foucault's *The History of Sexuality* was published in 1976.³²

According to Harry Brod and Michael Kaufman, there are three main reasons why gay and lesbian rights and queer theory have contributed so much to masculinities theory:

- 1) Heterosexism is critical to masculinity
- 2) Gay men have unique insight on masculinity
- 3) The historical relationship between the two fields³³

The core of feminism in its many forms is to ask the woman question. However, by focussing on women, feminists have constructed men largely as unidimensional.³⁴ Dowd means that feminist analysis has generally not studied men as men. One example is that men have not been analysed as a group other than for how they benefit from the gender system, i.e. excluding the price men pay for privilege. She means that feminism has left an undifferentiated picture of men as a group and that without a proper intersectional analysis considering intersections of race, class and sexual orientation, we are left only with an essentialist picture of masculinity.³⁵

Masculinities theory derives from feminism but is focused on studying men as gendered beings, or asking the man question. This concerns exploring the construction of masculinity, questioning the real circumstances of men, exploring the construction of gender privilege and also what price is paid to uphold privilege. For example, men are disproportionately victims of violence by other men, and this violence is integral to the definition of masculinity.³⁶

Masculinities theory differs from feminism in that the emancipatory project is not as clear.³⁷ According to Dowd, the basis for masculinities theory is its linkage to the reality of gender privilege, to work with masculinities theory in a strife for gender justice.³⁸

2.2. Hegemonic masculinity

A primary orientation of masculinity is a negative definition: it is critical not to be a woman and not to be gay. This negative definition seems to be critical to issues of power and hierarchy. Intersections of race and class add to the definitional parts of which men are empowered, and which belong to subordinate or subversive masculinities. It is also important to remember that there are multiple masculinities within race, class and sexual orientation identities.³⁹

³² Dowd, Nancy: *The Man Question: Male Subordination and Privilege*, New York: New York University Press (2010), pp. 17-19.

³³ Ibid., p. 18.

³⁴ Ibid., p. 3.

³⁵ Ibid., pp. 14-16.

³⁶ Ibid., p. 3.

³⁷ Ibid., p. 6.

³⁸ Ibid., p. 10.

³⁹ Ibid., pp. 26ff.

Although masculinity is associated with power, many men feel powerless. Men as a collective are in power but individual men are defined in their power relations by their intersecting characteristics. Although masculinities theory implies that there are multiple masculinities, it does not imply that they are all equal. According to several scholars, there exists a preferred dominant masculinity labelled as hegemonic masculinity. This hegemony is achieved by authority, not by violence.⁴⁰

2.3. Masculinities theory and sexual orientation

Queer theory presents sound critique of the hegemonic masculinity norm that defines manhood as heterosexual. It exposes how all men are limited living up to gendered expectations. The obvious example given by Dowd is limitation of marriage to opposite-sex couples, although this has changed dramatically in many Western countries in the recent decade. Another example is that men overall have to behave according to the straight masculine template in their workplace in order not to suffer harassment. This not only includes non-straight men re-entering the “closet”, but all men irrespective of sexual orientation.⁴¹

Gay men are identified by sexuality and not by masculinity.⁴² This is because being “not gay” is such a defining part of masculinity and implies that undermining negative perception of a behaviour towards homosexuality liberates all men. However, the focus of gay and lesbian rights and queer theory has been on reconstructing sexuality and not masculinity, since sexuality has been the characteristic being condemned and regulated, even though the common denominator for inciting hatred and violence has been toxic masculinity.⁴³

2.4. Conclusion

Dowd concludes that just as feminism is not limited to women, masculinities theory is not limited to subjects we identify as male. Instead of analysing competing claims of rights between men and women, whenever women are the presumed objects of a policy or rule it is proper to ask the man question: what are we assuming about men when we implement this policy or rule? Asking the man question is a constant reminder of bringing the perspective of masculinities theory in, and infusing masculinities theory to feminist analysis is important to diminish or end gender inequality. This, however, also means that asking the man question must include returning to the woman question.⁴⁴

IV. Methodology and materials

The first part of this thesis focusses especially on the European Convention on Human Rights and the jurisprudence and case law of the European Court of Human Rights. In doing this research, I have mainly used the legal doctrinal method, which encompasses examining legislation and jurisprudence in order to identify the law and what it prescribes. I have also referred to statements and documents by other organs of the Council of Europe that have been working with the relevant issues. Other sources include literature on the subject, especially Paul Johnson’s *Homosexuality and the European Court of Human Rights*, and academic articles.

⁴⁰ Ibid.

⁴¹ Ibid., p. 5.

⁴² Ibid., p. 17.

⁴³ Ibid., pp. 49f.

⁴⁴ Ibid., p. 10.

The second part, which is incorporated into the country sections, consists of an analysis of the human rights concept of the Moscow Patriarchate, and of how church representatives connected to the Moscow Patriarchate have lobbied for “gay propaganda” legislation in the Russian Federation, Ukraine and the Republic of Moldova. In doing this research, I first-hand look at literature and academic articles to understand the structure of the organisation, a short historical overview and how, since the decline of the Soviet Union, the Patriarchate has developed a public profile as an institution promoting moral conservatism and entangled itself closely with the political spheres in the respective countries. From my point of view, I am treating the Patriarch as the spokesperson of the Moscow Patriarchate, while it should be noted that a different theological interpretation is possible.

The third part concerns an assessment of the legal and factual situation for LGBT persons and LGBT rights activists in the Russian Federation, Ukraine and the Republic of Moldova, with a focus on the actualisation of the right to freedom of assembly. When conducting this research, my main sources are reports from LGBT rights NGOs working in the respective countries with ameliorating the legal and factual situations. Other sources include Council of Europe reports, literature and academic articles.

V. Delimitations

While there are many pressing issues concerning the actualisation of LGBT rights in the world, I have decided to focus on the right to freedom of assembly. I reason that public visibility is the first step for sexual minorities in achieving equal rights, and it is also relevant since I think that Russia is creating a dangerous precedent by banning the promotion of “gay propaganda”, i.e. on disseminating information about LGBT issues.

I also decided to use the European Convention on Human Rights as my main legal source, disregarding, e.g. UN treaties and official documents. All three target countries are members of the Council of Europe and the institution enjoys a high reputation in all countries. However, I do take a look at how the Moscow Patriarchate and the Russian Federation have jointly advanced their “traditional values” agenda in the UN, but this is conducted only to examine the agenda itself and not to relate it to any particular UN treaties.

In the case of the Russian Federation, I have excluded analysing the situation for sexual minorities in the Chechen Republic, where kidnappings, torture and murders on the basis of perceived sexual orientation were conducted by the authorities from February 2017⁴⁵ and were resumed again in December 2018.⁴⁶ My reasons are that the realisation of the right to freedom of assembly could not constitute the main part of such an analysis in today’s situation, but rather the right to life; that there is a very complex situation in Chechnya after the two civil wars; and that the Orthodox Church is not a dominant actor in the area, which is mainly Islamic.

Concerning Ukraine, I exclude the situation in territories that the government in Kyiv does not have control over after the military conflict broke out in eastern Ukraine and the Crimean Peninsula was annexed by the Russian Federation in 2014. I assume that these parts, to the extent that they are not lawless, are in some amount controlled under Russian federal law.

⁴⁵ Report: *LGBT Persecution in the North Caucasus: a Report*, St. Petersburg: Russian LGBT Network (2017). Available: https://lgbtnet.org/sites/default/files/doklad_web.pdf (Obtained on 2019-03-10)

⁴⁶ Article: *Chechen authorities resume homophobic crackdown*, London: Amnesty International. Available: <https://www.amnesty.org/en/latest/news/2019/01/chechnya-crackdown-renewed/> (Obtained on 2019-03-10)

In the section on the Republic of Moldova, I exclude the situation in the break-away region or *de facto* republic of Transdniestria. For a detailed description of the dissolution of the USSR and the Moldovan-Transdniestrian conflict over the region of Transdniestria, and on the presence of the army of the Russian Federation and its personnel in Transdniestria after the agreement of 21 July 1992, the ECtHR has described all this thoroughly in the case of *Ilașcu and Others v. Moldova and Russia*.⁴⁷

Regarding the situation for human and LGBT rights in Transdniestria, in my previous paper I have analysed the 2013 Hammarberg Report of the Council of Europe and also reported from my meeting with Mr. Thomas Hammarberg in Chișinău in 2018.⁴⁸ My reason for excluding Transdniestria is that, as I stated in my previous paper, I do not see how rights for sexual minorities could be approached in the region neither in the short nor in the long run, except for if the Russian forces are driven out of the region.⁴⁹

VI. Current research

Several researchers have recently studied the “gay propaganda” legislation and whether it is compatible with the ECHR. I have especially drawn on Paul Johnson, who has written both a book and an article where this topic is discussed.

Some researchers have analysed the human rights concept of the Russian Orthodox Church. Kristina Stoeckl and Irina Papkova have analysed the general human rights approach of the Church. Lauri Mälksoo and Wolfgang Benedek have focussed on the Orthodox human rights concept in the Russian political setting, and how it has been in conflict with the ECHR. Vebjørn Horsfjord has also conducted research on the Orthodox human rights concept in the UNHRC.

While the literature on Russian conservatism and the Russian Orthodox Church in relation to LGBT rights is not abundant, the edited volume *Contemporary Russian Conservatism: Problems, Paradoxes and Dangers*, to be published in 2019, is trying to make up for it. Mikhail Suslov, who is an editor of the book, sent me the chapter *Framing “Gay Propaganda”: Morality Policy Arguments and the Russian Orthodox Church* written by Caroline Hill, which examines the role of the Russian Orthodox Church in promoting conservative values and lobbying for the adoption of the “gay propaganda” laws.

VII. Terminology

1. Autocephaly

The Orthodox theologian John Meyendorff has described that, according to Orthodox canon law, the term “autocephaly” stands for the right, enjoyed by a group of diocese, of electing their own primate. The boundaries of the various autocephalies often coincide with the frontiers of a state, although this is not always true.⁵⁰

⁴⁷ ECtHR, Judgment of 8 July 2004, *Ilașcu and Others v. Moldova and Russia*, no. 48787/99, § 112.

⁴⁸ Andersson, *op. cit.* 7, pp. 11-14.

⁴⁹ *Ibid.*, p. 24.

⁵⁰ Meyendorff, John: *The Orthodox church: its past and its role in the world today*, New York: St. Vladimir's Seminary Press (1981), p. 96.

2. Blasphemy and moral harm

The sociologist Saba Mahmood has explained that the difference between ‘blasphemy’ and ‘moral harm’ lies in that the sense of moral injury or offense experienced by the believer is:

“quite distinct from [what] the notion of blasphemy encodes. The notion of moral injury [...] entails a sense of violation, but this violation emanates not from the judgment that the “law” has been transgressed but from the perception that one’s being, grounded as it is in a relationship [with the divine], has been shaken.”⁵¹

3. LGBT

I mainly use the term “LGBT” as the acronym encompassing individuals identifying as lesbian, gay, bisexual, and transgender. The acronym is constantly developing in light of developments in the study of sexual orientation and gender identity (SOGI), and my intention is that the term is to be understood expansively when used in this master’s thesis.

4. Patronalism

Henry Hale has defined patronalism as “a social equilibrium in which individuals organise their political and economic pursuits primarily around the personalized exchange of concrete rewards and punishments, and not primarily around abstract, impersonal principles such as ideological belief or categorisations that include many people one has not actually met in person”. It tends to feature patrimonial (or neo-patrimonial) forms of rule and low levels of social capital.⁵²

5. Post-secularism

The term “post-secular” has been defined by Jürgen Habermas and his idea of the “complementary learning process”. Habermas’ point is that secularism as a political ideology is discriminatory against religious citizens, because all citizens must in principle be free to enter into public debates from the framework or viewpoint of their “comprehensive doctrines”, as long as they are ready to deliberate over political norms within principles valid to all.⁵³

This societal agreement on “principles valid to all” may emerge in the process of communication and deliberation, through a mutual learning process and general consent. Habermas described this kind of reasoning as “post-metaphysical”, because it affirms the validity of moral and political principles not by reference to any transcendental reference point, but via an immanent deliberation process. This process is threatened when the secular public discourse becomes dominant and makes it difficult for religious citizens to participate fully in public debates.⁵⁴

Habermas’ solution is that religious citizens have to “translate” their claims into the language of secular public discourse, but also that non-religious citizens have to scale down secularism

⁵¹ Mahmood, Saba: *Religious Reason and Secular Affect: An Incommensurable Divide?*. In: Asad, Talal, Brown, Wendy, Butler, Judith. and Mahmood, Saba (eds.): *Is Critique Secular? Blasphemy, Injury and Free Speech*, CA: Townsend Center for the Humanities (2009), 64-100, p. 78; Stoeckl, Kristina: *The Russian Orthodox Church and Human Rights*, London: Routledge (2014), p. 104f.

⁵² Hale, Henry: *Patronal Politics: Eurasian Regime Dynamics in Comparative Perspective*, Cambridge: Cambridge University Press (2014), p. 48.

⁵³ Habermas, Jürgen: *Religion in the Public Sphere*, *European Journal of Philosophy* 14(1) (2006), pp. 1-25.

⁵⁴ *Ibid.*

and translate their claims – as I understand it, to meet half-way with the religious citizens. This reciprocal translation process is what Habermas called the “complementary learning process”. The demands on a democratic society, then, is to treat religious and non-religious citizens equally, which would entail the inclusion of religious arguments into public discourse.⁵⁵

6. *Symphonia*

The ideal of *symphonia* in church-state relations emerged in the Byzantine Empire. The Orthodox theologian John Meyendorff has described that “[t]he great dream of Byzantine civilisation was a universal Christian society administered by the emperor and spiritually guided by the Church”⁵⁶ and provides a description of the symphonic ideal accredited to Emperor Justinian I (AD 527-565), who wrote in his treatise on Byzantine civil law:

“There are two greatest gifts which God, in his love for man, has granted from on high: the priesthood and the imperial dignity. The first serves divine things, the second directs and administers human affairs; both, however, proceed from the same origin and adorn the life of mankind. Hence, nothing should be such a source of care to the emperors as the dignity of the priests, since it is for the [imperial] welfare that they constantly implore God. For if the priesthood is in every way free from blame and possesses access to God, and if the emperors administer equitably and judiciously the state entrusted to their care, general harmony will result, and whatever is beneficial will be bestowed upon the human race.”⁵⁷

Symphonia is not possible in a modern democratic state for two principal reasons: (1) it makes one confession the sole repository of faith; and (2) it elevates the temporal leader to the position of God’s representative. Zoe Knox points out that according to the symphonic ideal, the church is not part of civil society and does not co-exist with other organisations in this sphere. Rather, it is situated in the political sphere and is interdependent with the secular authorities.⁵⁸

VIII. Disposition

Chapter 2 provides an overview of the European Convention on Human Rights and the jurisprudence and case law of the European Court of Human Rights, including relevant documents from other organs within the Council of Europe. In Chapter 3, I have provided a short historical background on the emergence of LGBT identities and masculinities ideals, which is mainly related to my perspective based on masculinities theory. This is intended to cast a light on the later sections. In chapters 4-6, I have provided country analyses on the Russian Federation, Ukraine and the Republic of Moldova in that respective order. This includes overviews of the relevant domestic laws, legal and factual situations for LGBT people, and with a focus on experiences of holding LGBT rights demonstrations. In each country section, I have also provided an analysis of the church/state relations and how the Orthodox Churches have opposed the realisation of the right to freedom of assembly for LGBT rights activists. My main emphasis is on the section on the Russian Orthodox Church in chapter 4, in which I explain the human rights concept of the Moscow Patriarchate, that is relevant also for the later chapters. In chapter 7, I provide some conclusions and answers to the research questions based on the material I have provided in this thesis.

⁵⁵ Ibid.

⁵⁶ Meyendorff, John: *Byzantine Theology: Historical Trends and Doctrinal Themes*, New York: Fordham University Press (1979), p. 213.

⁵⁷ Quoted in *ibid.*

⁵⁸ Knox, Zoe: *Russian Society and the Orthodox Church: Religion in Russia after communism*, London: Routledge (2005), p. 107f.

International legislation

“As a matter of necessity, homosexuals must be stoned to death”

Head Muslim authority of Nizhny Novgorod
Case of *Alekseyev v. Russia* § 62

2. International legislation

In this section, I evaluate the ECtHR's case-law that has evolved its jurisprudence on Articles 10 (freedom of expression) and 11 (freedom of association and assembly) in the context of LGBT rights. I also examine some case-law in relation to Article 9 (freedom of thought, conscience and religion) to analyse whether the freedom of assembly can be curtailed in order to protect the feelings of religious believers.

The law of treaties is based on two principles: the first, that treaties need to be based on the free consent of states; the second, that once consent to be bound has been expressed and the treaty has entered into force, the treaty shall be kept by the parties in good faith – *pacta sunt servanda*, codified in Article 26 VCLT.⁵⁹

Once a treaty enters into force, it has to be interpreted in line with the rules of interpretation to be successfully applied. In short, Article 31 VCLT stipulates that treaties shall be interpreted in accordance with the ordinary meaning to be given to the words in their context, and in light of the treaty's object and purpose.⁶⁰

I. The European Convention on Human Rights

The main focus of this chapter will be on Article 11 on the freedom of assembly and association. However, in the case of *Ezelin v. France*, the ECtHR explained that Article 10 on the freedom of expression may be regarded as *lex generalis* in respect of Article 11, which then constitutes *lex specialis*. The ECtHR reasoned that the “protection of personal opinions, secured by Article 10 [...], is one of the objectives of freedom of peaceful assembly as enshrined in Article 11”.⁶¹

Therefore, in this chapter I present an overview of the jurisprudence relating to Articles 10 and 11. I have also provided a short overview on Article 9 on freedom of thought, conscience and religion, since I discuss the protection of the feelings of religious believers in the context of the right to freedom of assembly for LGBT rights activists.

1. Freedom of thought, conscience and religion

Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 9 is one of four provisions of the ECHR with a restrictions or limitations clause, in its paragraph 2. There are similar but not identical clauses in articles 8, 10, and 11.⁶² Further, the ECtHR has “frequently emphasised the State's role as the neutral and impartial organiser of the

⁵⁹ Klabbers, Jan: *International Law*, Cambridge: Cambridge University Press (2013), p. 43.

⁶⁰ *Ibid.*, pp. 53f.

⁶¹ ECtHR (Chamber), Judgment of 26 April 1991, *Ezelin v France*, no. 11800/85, § 35.

⁶² Schabas, William A.: *The European Convention on Human Rights: a commentary*. Oxford, United Kingdom: Oxford University Press (2015), p. 435.

exercise of various religions, faiths and beliefs, and stated that this role is conducive to public order, religious harmony and tolerance in a democratic society”.⁶³

2. Freedoms of expression, assembly and association

From a LGBT rights perspective, the rights to freedom of expression and to freedom of assembly and association are important to address and combat inequalities. In 2010, the European Union Agency for Fundamental Rights issued a report stating that LGBT people continue to meet considerable – often violent – opposition when exercising these rights in several EU Member States:

“In the past decade, bans or administrative obstacles have created problems for the organisation of lawful and peaceful LGBT demonstrations in several EU Member States [...] [M]any incidences of hate speech and hate crime occur in the context of counter-demonstrations against LGBT people when exercising their freedom of expression and assembly through these events. In some Member States, public authorities have not been able to ensure the safety of participants in LGBT demonstrations from attacks by counter-demonstrators.”⁶⁴

Although the above statement concerned EU Member States, I think that this is also relevant for the situations in the Russian Federation, Ukraine and the Republic of Moldova, since demonstrations have been banned on several occasions with reference to the probability of violent counter-demonstrations and the difficulty of protecting demonstrators. This is, for the most part, due to the authorities’ lack of interest in protecting LGBT rights demonstrations but has been a frequent excuse for inaction from the authorities. I describe these experiences of LGBT rights activism in detail in the later sections of this thesis.

2.1. Freedom of expression

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Freedom of expression is regarded as constituting “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”.⁶⁵ It is safeguarding information and ideas no matter whether they are regarded favourably or indifferently, or whether they are offending, shocking or disturbing to the rest of

⁶³ Ibid., p. 438; ECtHR (Grand Chamber), Judgment of 13 February 2003, *Refah Partisi (the Welfare Party) and Others v. Turkey*, nos. 41340/98, 41342/98, 41343/98, and 41344/98, §§ 90-95.

⁶⁴ Report: *Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Summary of Findings, Trends, Challenges and Promising Practices*, Vienna: European Union Agency for Fundamental Rights (2010), p. 17. Available: https://fra.europa.eu/sites/default/files/fra_uploads/1659-FRA-homophobia-synthesis-report-2011_EN.pdf (Obtained on 2019-03-10)

⁶⁵ ECtHR (Grand Chamber), Judgment of 12 September 2011, *Palomo Sánchez and Others v. Spain*, nos. 28955/06, 28957/06, 28959/06, and 28964/06, § 53; ECtHR (Plenary), Judgment of 8 July 1986, *Lingens v. Austria*, no. 9815/82, § 41.

society. Especially the latter are regarded as important to defend, since they may challenge the established order in society. The ECtHR has held on numerous occasions that pluralism, tolerance and broadmindedness are constitutional parts of a democratic society.⁶⁶

Article 10 specifies that a public authority may only interfere with an individual's right to freedom of expression when it is prescribed by law, pursues one of a number of legitimate aims and is necessary in a democratic society. Contracting states have a margin of appreciation which is determined by an assessment of whether the reasons provided by a government for any interference are relevant and sufficient. However, the ECtHR has repeatedly stated that freedom of expression is a vital element of a democratic society and includes the right to convey ideas that may be unpopular and offensive to others.⁶⁷ Therefore, freedom of expression is vital for the development of LGBT rights and protecting the public voices of such individuals, whether expressed alone or collectively, is essential for the improvement of their social and private lives.

The right to freedom of expression puts positive obligations on the State, that is obliged to make sure that there are "true pluralism", e.g. in the audio-visual sector. The ECtHR determines whether measures undertaken by the State are: (1) reasonable and appropriate; and (2) do not impose an impossible or disproportionate burden on the authorities. In fulfilling the positive obligations under Article 10, the State needs to strike a "fair balance" between the general interests of society and the interests of the individual person. Schabas describes that the ECtHR, when striking a "fair balance", would take into account the "nature of the freedom in question, its contribution to the public debate, the nature and scope of restrictions on freedom of expression, the existence of alternatives, and the weight to be given to the rights of others".⁶⁸

2.2. Freedom of association and assembly

Article 11 – Freedom of Assembly and Association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

As mentioned above, the ECtHR has stated that Article 11, while it does have an "autonomous role and particular sphere of application", may constitute *lex specialis* in relation to Article 10, and that in these cases Article 11 should be seen in the light of article 10.⁶⁹

Freedom of association, although most frequently discussed in the ECtHR's case law in respect of the membership of political parties and trade unions, has been interpreted to provide a right for individuals to form groups with the aim of advancing common objectives that include the assertion of a "minority consciousness",⁷⁰ as is stated in *Gorzelik and Others v. Poland*:

"While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes,

⁶⁶ Schabas, *op. cit.* 62, pp. 450f.

⁶⁷ Johnson, *op. cit.* 25, pp. 164ff.

⁶⁸ Schabas, *op. cit.* 62, pp. 453f.

⁶⁹ *Ezelin v France*, *op. cit.* 63, § 37.

⁷⁰ Johnson, *op. cit.* 25, pp. 181f.

including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, proclaiming or teaching religion, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy.

For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively.”⁷¹

The right to association is fundamentally linked to the right to assemble, in both public and private, for the purposes of holding meetings of demonstrations. In principle, a state should not ban a demonstration entirely on the basis that it could attract violent counter-demonstrations. Further, the right to demonstrate is not only a negative right, so a state may be under the duty to ensure its realisation. This means that the state is obliged to protect demonstrators against violent counter-demonstrators.

“A demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11.”⁷²

When assessing the restrictions or limitations clause set out in paragraph 2 of Article 11, the ECtHR: (1) initially considers whether there has been an infringement; then (2) proceeds to examine whether the infringement is subject to an acceptable restriction. The right to freedom of association and assembly is closely associated with democracy, which the ECtHR has emphasised is the only political model compatible with the ECHR.⁷³ More precisely, the ECHR is only compatible within the framework of a ‘liberal democracy’, and as the ECtHR has stated:

“individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority should always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.”⁷⁴

In the context of public demonstrations, where the expression of controversial views may create public disturbances, this raises important questions about the extent to which public authorities may justifiably interfere with assembly in the interests of national security or public safety; for the prevention of disorder or crime; for the protection of health or morals; or for the protection of the rights and freedoms of others. The right to freedom of association and assembly is of vital importance to sexual minorities. Association is the foundation on which LGBT people may cultivate and maintain private and political relationships. Assembling in public is a key instrument in working towards a better social and political climate for sexual minorities,

⁷¹ ECtHR (Grand Chamber), Judgment of 17 February 2004, *Gorzelik and Others v. Poland*, no. 44158/98, § 92.

⁷² ECtHR (Chamber), Judgment of 21 June 1988, *Plattform 'Ärzte für das Leben' v. Austria*, no. 10126/82, § 32.

⁷³ Schabas, *op. cit.* 62, pp. 490f.

⁷⁴ ECtHR (Grand Chamber), Judgment of 29 April 1999, *Chassagnou and Others v. France*, nos 25088/95 and 28443/95, § 112.

especially in the context of LGBT rights or ‘gay pride’ events, which at the same time is very controversial in several member states to the Council of Europe.⁷⁵

In a 2008 report, the International Lesbian and Gay Association (ILGA-Europe) outlined the difficulties encountered by LGBT groups when attempting to gain permission for and organise such events:

“The right of LGBT people to freedom of assembly has met with wide-spread opposition in many countries in Central, Eastern and South Eastern Europe in recent years. This opposition has manifested itself in a number of ways, particularly the banning of marches, the use of intolerant or derogatory language by leading politicians and faith representatives, violent attacks on demonstrators, and failure by the police to provide adequate protection.”⁷⁶

II. The Council of Europe and the ECtHR

In this part, I focus on the impact of the Council of Europe and its relevant bodies, including the Parliamentary Assembly of the Council of Europe (“PACE”), the European Commission for Democracy Through Law (the Venice Commission), the Committee of Ministers, and the Council of Europe Commissioner for Human Rights. Then I examine the relevant case-law of the ECtHR regarding Articles 9, 10 and 11, in the context of LGBT rights and the protection of feelings of religious believers.

1. Parliamentary Assembly of the Council of Europe (“PACE”)

The resolution 1948 of the PACE, adopted on 27 June 2013 and entitled “Tackling discrimination on the grounds of sexual orientation and gender identity”, states that:

“7. The Assembly particularly deplores the unanimous approval by the Russian Duma of the bill on so called propaganda for non-traditional sexual relationships among minors which, if approved also by the Council of the Federation, would be the first piece of legislation on the prohibition of homosexual propaganda to be introduced at national level in Europe.

8. In this context, the Assembly takes note of the Opinion of the European Commission for Democracy through Law (Venice Commission) on the issue of the prohibition of so-called homosexual propaganda in the light of recent legislation in some member States of the Council of Europe; it shares its analysis and endorses its findings, notably that “the measures in question appear to be incompatible with the underlying values of the [European Convention on Human Rights]”, in addition to their failure to meet the requirements for restrictions prescribed by Articles 10, 11 and 14 of the European Convention on Human Rights.”⁷⁷

2. The European Commission for Democracy Through Law (the “Venice Commission”)

The opinion 707/2012 of the Venice Commission⁷⁸ examined the statutory provisions

⁷⁵ Johnson, *op. cit.* 25, p. 183.

⁷⁶ Ibid.

⁷⁷ PACE: Resolution 1948 “On Tackling Discrimination on Grounds of Sexual Orientation and Gender Identity”, Strasbourg: Council of Europe (27 June 2013). Available: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=20010&lang=EN&search=MTk00A> (Obtained on 2019-03-10)

⁷⁸ Venice Commission: *Opinion 707/2012 “On the Issue of the Prohibition of So-Called ‘Propaganda of Homosexuality’ in the Light of Recent Legislation in some Member States of the Council of Europe”*, Venice: European Commission for Democracy Through Law (95th Plenary Session, 14-15 June 2013) Available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)022-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)022-e) (Obtained on 2019-03-10)

containing prohibitions of “propaganda of homosexuality” which had been adopted or was proposed to be adopted in the Russian Federation, Ukraine and the Republic of Moldova.

In the opinion, the Venice Commission argued that the scope of the terms such as “propaganda” and “promotion” are fundamental to these laws but are also rather ambiguous and vague. Some provisions also use unclear terms such as “among minors” and “aimed at minors”.⁷⁹ According to the Commission, the Russian Supreme Court and Constitutional Court have not given a precise definition to the notion of “propaganda of homosexuality”⁸⁰ and it is unclear whether the term “prohibition of homosexual propaganda” should be interpreted restrictively or whether any information attempting to change homophobic attitudes or counterbalancing deeply rooted prejudices could be disseminated.⁸¹

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.⁸²

The first asserted justification of the prohibition of “propaganda of homosexuality” is the “protection of morals”.⁸³ 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.⁸⁴

The second asserted justification of the prohibition of “propaganda of homosexuality” is the protection of children. 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.⁸⁵ 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.⁸⁶ Since this ground for justification does not constitute the focus of this thesis, I will not elaborate further on it. However, I would argue that the “protection of children” is a common argument for stifling LGBT rights, but that the real objective rather seems to be the protection of the feelings of religious believers and heterosexist “traditional” family values as opposed to the rights of sexual minorities.

The Commission also elaborated on the notion of “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. The main problem is that 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 Commission reiterated that homosexuality as

⁷⁹ Ibid., § 28.

⁸⁰ Ibid., § 31.

⁸¹ Ibid., § 34.

⁸² Ibid., § 41.

⁸³ Ibid., § 50.

⁸⁴ Ibid., § 56.

⁸⁵ Ibid., § 59.

⁸⁶ Ibid., § 65.

a variation of sexual orientation, is protected under the ECHR and cannot be deemed contrary to morals by public authorities, in the sense of Article 10 § 2 of the Convention.⁸⁷

The Commission took into account the democratic requirement of a fair and proper treatment of minorities, and stated that 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.⁸⁸ The legislative 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.⁸⁹

In the light of the above, the Venice Commission considered that the statutory provisions prohibiting “propaganda of homosexuality”, are incompatible with the ECHR and international human rights standards, and therefore recommended that these provisions be repealed.⁹⁰

3. The Committee of Ministers

In its ‘Recommendation CM/Rec(2010)5’⁹¹ the Committee of Ministers of the Council of Europe recognised that safeguarding freedom of expression is an essential element in reaching the full potential of human rights for sexual minorities and especially stated that:

“Member states should take appropriate measures to ensure, in accordance with Article 10 of the Convention, that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, including with respect to the freedom to receive and impart information on subjects dealing with sexual orientation or gender identity.”⁹²

“Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression and peaceful assembly resulting from the abuse of legal or administrative provisions, for example on grounds of public health, public morality and public order.”⁹³

“Public authorities at all levels should be encouraged to publicly condemn, notably in the media, any unlawful interferences with the right of individuals and groups of individuals to exercise their freedom of expression and peaceful assembly, notably when related to the human rights of lesbian, gay, bisexual and transgender persons.”⁹⁴

Further, at the 1273rd meeting of the Committee of Ministers in December 2016, in the context of the case of *Alekseyev v. Russia* discussed below, a statement⁹⁵ was adopted in which the Ministers’ Deputies expressed serious concern that the number of LGBT public events allowed is continuously very limited in the Russian Federation.

⁸⁷ Ibid., § 80.

⁸⁸ Ibid., § 81.

⁸⁹ Ibid., § 82.

⁹⁰ Ibid., § 83.

⁹¹ Committee of Ministers: ‘Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity’, Strasbourg: Council of Europe (2010). Available: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a (Obtained on 2019-03-10)

⁹² Ibid., § 13.

⁹³ Ibid., § 16.

⁹⁴ Ibid., § 17.

⁹⁵ Meeting protocol: *The 1273rd meeting of the Committee of Ministers CM/Del/Dec(2016)1273/H46-23*, Strasbourg: Council of Europe (2016). Available: <https://rm.coe.int/16806c9710> (Obtained on 2019-03-10)

The Committee urged the authorities to adopt all necessary measures to ensure that local authorities and courts work to ensure the respect of the rights to freedom of assembly and to be protected against discrimination, including by ensuring that the gay propaganda law does not pose any undue obstacle to the effective exercise of these rights.⁹⁶

Furthermore, the Committee invited the Russian authorities to address these questions with a view to achieving concrete results, including taking further measures to address continued widespread negative attitudes towards LGBT persons. On the subject of freedom of assembly and association, the Committee has explicitly stated that contracting states must provide adequate protection to sexual minorities who participate in public demonstrations:

“Member states should ensure that law enforcement authorities take appropriate measures to protect participants in peaceful demonstrations in favour of the HR of lesbian, gay, bisexual and transgender persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to freedom of expression and peaceful assembly.”⁹⁷

Furthermore, the Committee urged contracting states to pro-actively denounce those who seek to disrupt the public assembly of sexual minorities:

“Public authorities at all levels should be encouraged to publicly condemn, notably in the media, any unlawful interferences with the right of individuals and groups of individuals to exercise their freedom of expression and peaceful assembly, notably when related to the human rights of lesbian, gay, bisexual and transgender persons.”⁹⁸

4. Council of Europe Commissioner for Human Rights

There are two principal issues raised under Article 11 in respect of LGBT rights demonstrations and these encompass both the negative and positive obligations of contracting states: (1) the direct interferences by public authorities with demonstrations in the form of actions designed to disrupt them or prevent them from taking place; and (2) where such events do take place, public authorities often fail to meet their positive obligations to ensure the protection of participants from counter-demonstrations. Thomas Hammarberg – then Council of Europe Commissioner for Human Rights – stated in June 2010:

“More than 20 gay pride events were organised in European cities during the month of May [2010]. In most cases there were no major problems reported. However, almost without exception, there were some incidents of disturbance or violence targeting these events – a fact which underlines the need for competent police protection.”⁹⁹

In 2011, Thomas Hammarberg published a report on discrimination on grounds of sexual orientation or gender identity (SOGI) in Europe, in which he stated that:

“Interference in the exercise of freedom of expression of LGBT persons is not frequent in Council of Europe member states. If it happens, it is usually directed at impeding expressions, opinions

⁹⁶ Committee of Ministers, *op. cit.* 91, § 15.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, § 17.

⁹⁹ Hammarberg, Thomas: *'Pride Events Are Still Hindered – This Violates Freedom of Assembly'*, Strasbourg: Council of Europe (2 June 2010). Available: https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/pride-events-are-still-hindered-this-violates-freedom-of-assembly (Obtained on 2019-03-10)

and information concerning sexual orientation or gender identity from being circulated because of possible negative reception by the majority population.”¹⁰⁰

Paul Johnson agrees with Hammarberg’s statement that direct interference by public authorities with freedom of expression for LGBT persons is infrequent, but means that this analysis is faltering in that it fails to capture the subtle ways in which law continues to be used to suppress expressions relating to sexual orientation. According to Johnson, heterosexist rhetoric on nuclear families has made room for the introduction of legislation in a number of contracting states that is designed to curb public expressions relating to sexual orientation.¹⁰¹

5. European Court of Human Rights

5.1. The freedom of religion and the protection of the feelings of religious believers in the context of the freedom of expression

The scope of Article 9 is very broad, and to some extent the “protection of religious feelings” as an aspect of religious freedoms seems to be protected under this article. On the one hand, the ECtHR has held the believers have to tolerate and accept the denial of their religious beliefs, and also that others have the right to propagate doctrines hostile to the faith. On the other hand, in some cases the State may have a positive obligation to ensure the peaceful enjoyment of the freedom of religion by protecting the feelings of religious believers.¹⁰²

5.1.1. *Otto-Preminger Institute v. Austria*

In the case of *Otto-Preminger Institute v. Austria*, the ECtHR reversed a finding by the Commission that the seizure of the film “*Das Liebeskonzil*” (Council in Heaven), intended to be shown to a paying adult audience in the applicant’s “art cinema”, and the subsequent forfeiture of the film, unjustifiably interfered with the freedom of expression. The ECtHR explained that it could not disregard the fact that “the Roman Catholic religion is the religion of the overwhelming majority of Tyroleans” and that “Austrian authorities acted to ensure religious peace [...] and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner”.¹⁰³

The ECtHR held that “the respect for the religious feelings of believers [...] can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration”,¹⁰⁴ and accepted that the ECHR permits States to limit freedom of expression to avoid expressions that are “gratuitously offensive to others” and which do not therefore contribute to any form of public debate capable of furthering progress in human affairs.¹⁰⁵

¹⁰⁰ Report: *Discrimination on grounds of sexual orientation and gender identity in Europe*, Strasbourg: Council of Europe (2011), p. 76. Available: https://www.coe.int/t/commissioner/source/lgbt/lgbtstudy2011_en.pdf (Obtained on 2019-03-10)

¹⁰¹ Johnson, *op. cit.* 25, pp. 166ff.

¹⁰² European Court of Human Rights: *Overview of the Court’s case-law on freedom of religion*, Strasbourg: Council of Europe (2013), § 40. Available: https://www.echr.coe.int/Documents/Research_report_religion_ENG.pdf (Obtained on 2019-03-10)

¹⁰³ ECtHR, Judgment of 20 September 1994, *Otto-Preminger Institute v. Austria*, no. 13470/87, § 56.

¹⁰⁴ *Ibid.*, § 47.

¹⁰⁵ *Ibid.*, § 49.

5.1.2. *Wingrove v. United Kingdom*

In the case of *Wingrove v. United Kingdom*¹⁰⁶ Mr. Wingrove, a film director, complained that the British Board of Film Classification had refused him a certificate to allow him to publically broadcast his video, *Visions of Ecstasy*, depicting an actress dressed as a nun who experienced powerful ecstatic visions of Jesus Christ. The Board explained its refusal on the basis that “the public distribution of such a video could outrage and insult the feelings of believing Christians” and also constitute blasphemy.¹⁰⁷ Because there was insufficient common ground across the Council of Europe, the ECtHR explained that it felt itself unable to rule that the offence of blasphemy violated Article 10.¹⁰⁸

As explained in the terminology section, the main difference between blasphemy and moral harm is whether the act is regarded to insult the divine itself or the feelings of other human beings that believe in the divine. Regarding the “protection of feelings of religious believers”, the ECtHR pointed out that there must be a “high degree of profanation” connected to the insult of religious feelings, so as to constitute a “safeguard against arbitrariness”.¹⁰⁹

5.1.3. *İ.A. v. Turkey*

The case of *İ.A. v. Turkey*¹¹⁰ concerned that the applicant had published a novel and was prosecuted for blaspheming against “God, the Religion, the Prophet and the Holy Book.” He was convicted of blasphemy in the domestic courts. The ECtHR followed the reasoning in the above cases of *Otto-Preminger* and *Wingrove* and allowed Turkey a wide margin of appreciation because “believers may legitimately feel themselves to be the object of unwarranted and offensive attacks”¹¹¹ and that there was a pressing social need to provide protection against offensive attacks of matters regarded as sacred by Muslims.¹¹²

The joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert referred to a passage in the case of *Handyside v. the United Kingdom* (see below) that recognised that Article 10 protects information and ideas that “shock, offend or disturb the State or any sector of the population”. They recognised that the novel did contain insulting statements, but meant that these statements should not be taken in isolation as a basis for condemning an entire book and imposing criminal sanctions, and that “a democratic society is not a theocratic society”.

5.1.4. *E.S. v. Austria*

The recent case of *E.S. v. Austria*¹¹³ originated in an application in which the applicant complained that her criminal conviction for disparaging religious doctrines had violated her right to freedom of expression under Article 10. The applicant had held several seminars entitled “Basic Information on Islam” (*Grundlagen des Islams*) at the right-wing Freedom Party Education Institute (*Bildungsinstitut der Freiheitlichen Partei Österreichs*). The seminars were

¹⁰⁶ ECtHR, Judgment of 25 November 1996, *Wingrove v. United Kingdom*, no. 14719/90.

¹⁰⁷ *Ibid.*, § 15.

¹⁰⁸ *Ibid.*, § 57.

¹⁰⁹ *Ibid.*, § 60.

¹¹⁰ ECtHR (Second section), Judgment of 13 September 2005, *İ.A. v. Turkey*, no. 42571/98.

¹¹¹ *Ibid.*, § 29.

¹¹² *Ibid.*, § 30.

¹¹³ ECtHR (Fifth section), Judgment of 25 October 2018, *E.S. v. Austria*, no. 38450/12.

open not only to the members of the Freedom Party or invited guests, but were also publicly advertised on its website.¹¹⁴

The Vienna Regional Court found her guilty of publicly disparaging an object of veneration of a domestic church or religious society, namely Muhammad, the Prophet of Islam, in a manner capable of arousing justified indignation.¹¹⁵ The Supreme Court of Austria dismissed the applicant's request for renewal of the proceedings.¹¹⁶ The ECtHR considered that the criminal conviction amounted to an interference with the applicant's right to freedom of expression, and assessed whether the interference had been prescribed by law; pursued the aim of preventing disorder by safeguarding religious peace, as well as protecting religious feelings; and could be regarded as necessary in a democratic society.¹¹⁷

The ECtHR explained that the Regional Court had “carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected, and to have religious peace preserved in Austrian society”, but reiterated that a religious group must tolerate the denial of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite hatred or religious intolerance.¹¹⁸

The ECtHR stated that the applicant's statements “had not been made in an objective manner aiming at contributing to a debate of public interest, but could only be understood as having been aimed at demonstrating that Muhammad was not a worthy subject of worship”¹¹⁹ and that presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a “malicious violation of the spirit of tolerance, which was one of the bases of a democratic society”.¹²⁰

5.2. Freedom of expression in the context of LGBT rights

Prior to the case of *Bayev and Others v. Russia* in 2017, the ECtHR has never found in favour of a LGBT applicant who has lodged an Article 10 complaint. There exist only two cases involving discussions of homosexuality by journalists and one case relating to the regulation of ‘hate speech’ (but where the applicant did not identify as a LGBT person).¹²¹ However, I will elaborate a bit on freedom of expression and obscenity before examining the *Bayev* case.

5.2.1. *Handyside v. the United Kingdom*

The case of *Handyside v. the United Kingdom* concerned the freedom of expression and obscenity. The United Kingdom authorities had deemed the publishing of a book called *The Little Red Schoolbook* as falling under the country's obscenity laws. Among other chapters, the book contained a section talking about homosexuality in positive terms.¹²² The ECtHR did not find a violation of Article 10 of the Convention. However, what is relevant from *Handyside* in

¹¹⁴ Ibid., § 7.

¹¹⁵ Ibid., § 12.

¹¹⁶ Ibid., § 22.

¹¹⁷ Ibid., § 39.

¹¹⁸ Ibid., § 57.

¹¹⁹ Ibid., § 52.

¹²⁰ Ibid., § 53.

¹²¹ Johnson, *op. cit.* 25, p. 168

¹²² ECtHR, Judgment of 7 December 1976, *Handyside v. the United Kingdom*, no. 5493/72, §§ 14-15.

the context of this thesis, as stated previously, is that the ECtHR held that Article 10 protects information and ideas that “shock, offend or disturb the State or any sector of the population”.¹²³

According to Maria Sjöholm, the case also signalled that the ECtHR had not identified any uniform European conception of morals and deemed that national authorities were better equipped to give an opinion on the content on such questions. Although freedom of expression usually warrants for a narrow margin of appreciation, the state interest in protecting morals indicated a wide margin of appreciation in this case.¹²⁴

5.2.2. *X. Ltd. and Y. v. the United Kingdom*

Another case relating to freedom of expression and obscenity, which was deemed inadmissible by the ECtHR, is *X. Ltd. and Y. v. the United Kingdom*. This is interesting since it touches upon the feelings of religious believers. The case originated in the last blasphemy law case in the United Kingdom, *Whitehouse v. Lemon*. Mary Whitehouse had sued the magazine *Gay News* for publishing a poem, which described Jesus Christ engaged in homosexual acts with the Apostles and others, including an illustration, and won after appealing the original sentence.¹²⁵

The magazine and its publicist applied to the ECtHR, but the European Commission of Human Rights deemed the application inadmissible, stating that if:

“it is accepted that the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offence triable at the request of the offended person.”¹²⁶

My impression is that the poem was deemed to have a “high degree of profanation” and therefore could be regarded as having such a strong connection to the moral harm towards Christian believers. I think that it is regrettable that the Commission did not deem the case admissible, so as to clarify to what extent moral harm is protected under the ECHR.

5.2.3. *Bayev and Others v. Russia*

The recent case of *Bayev and Others v. Russia*¹²⁷ originated in separate applications by three Russian nationals:

1. Mr Nikolai Viktorovich BAYEV (“the first applicant”), on 9 November 2009 (the first application);
2. Mr Aleksei Aleksandrovich KISELEV (“the second applicant”), and
3. Mr Nikolai Aleksandrovich ALEKSEYEV (“the third applicant”), on 2 July 2012 (the second and the third applications).¹²⁸

¹²³ Ibid., § 49.

¹²⁴ Sjöholm, Maria: *Gender-sensitive norm interpretation by regional human rights law systems*, Leiden: Brill Nijhoff (2017), p. 140.

¹²⁵ Johnson, *op. cit.* 25 170f.

¹²⁶ European Commission of Human Rights, Decision of 7 May 1982, *X. Ltd and Y. v the United Kingdom*, no. 8710/79, § 12.

¹²⁷ ECtHR (Third section), Judgment of 20 June 2017 (Final on 13 November 2017), *Bayev and Others v. Russia*, nos. 67667/09, 44092/12 and 56717/12.

¹²⁸ Ibid., § 1.

The applicants are LGBT rights activists. They were each found guilty of the administrative offence of “public activities aimed at the promotion of homosexuality among minors”.¹²⁹ Note that Russia had not yet adopted its federal “gay propaganda” law (see section 4(I) of this thesis) and that the applicants were prosecuted under regional laws.

On 30 March 2009 the first applicant held a static demonstration in front of a school in Ryazan, holding two banners which stated “Homosexuality is normal” and “I am proud of my homosexuality”. He was charged with an administrative offence for doing so.¹³⁰

On 11 January 2012, the second and the third applicants held a picket in front of the children’s library in Arkhangelsk. The second applicant was holding a banner stating “Russia has the world’s highest rate of teenage suicide. This number includes a large proportion of homosexuals. They take this step because of the lack of information about their nature. Deputies are child-killers. Homosexuality is good!” The third applicant was holding a banner stating “Children have the right to know. Great people are also sometimes gay; gay people also become great. Homosexuality is natural and normal”. They were taken to the police station, where administrative offence reports were drawn up.¹³¹

On 12 April 2012, the third applicant held a picket in front of the St Petersburg City Administration, holding up a banner with a popular quote from a famous Soviet-era actress Faina Ranevskaya: “Homosexuality is not a perversion. Field hockey and ice ballet are.” He was arrested by the police and escorted to the police station, where an administrative offence report was drawn up.¹³²

On an unspecified date, the third applicant and two other persons brought proceedings before the Constitutional Court of the Russian Federation. They challenged the compatibility of Article 6.21 of the Code of Administrative Offences with the provisions of the Constitution of the Russian Federation.¹³³ On 23 September 2014, the Russian Constitutional Court examined the complaint on the merits and dismissed it, arguing, *inter alia*, that “citizens’ enjoyment of the right to disseminate information concerning the question of an individual’s sexual self-determination ought not to infringe the rights and freedoms of others”.¹³⁴

The Russian Government accepted that the administrative liability imposed on the applicants for holding demonstrations constituted an interference with their right to freedom of expression. However, they considered that the restrictions on the promotion of homosexuality in general and the enforcement of these restrictions against the applicants in particular had been in accordance with law and had been necessary in a democratic society for the protection of health and morals and the rights of others. Therefore, the Government claimed to have enjoyed a wide margin of appreciation generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.¹³⁵

¹²⁹ Ibid., § 7.

¹³⁰ Ibid., § 10.

¹³¹ Ibid., § 14.

¹³² Ibid., § 17.

¹³³ Ibid., § 24.

¹³⁴ Ibid., § 25.

¹³⁵ Ibid., § 45.

The applicants specified that their applications concerned two issues: (1) they challenged the use of the legislation banning the promotion of homosexuality among minors in order to suppress an open expression of protest against the same legislation, and alleged that regardless of whether there had been any legitimate considerations for introducing the ban on “gay propaganda”, there was no justification for a restriction on the right to protest against the laws in question; and (2) they alleged that the prohibition of “gay propaganda” constituted a blanket ban on the mere mention of homosexuality in the presence of minors, irrespective of the content of the message. They challenged the Government’s claim that dissemination of information about homosexuality should be limited to an adult audience. Therefore, they argued that the margin of appreciation was narrow, given that the subject matter of the expression at stake was an innate personal characteristic, and also because campaigning for LGBT rights constituted political speech or debate on matters of public interest, for which there is little scope for restrictions under Article 10 § 2 ECHR.¹³⁶

The applicants referred to the ECtHR’s case-law to the effect that a wider margin of appreciation is generally available to the contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion. They relied on the ECtHR’s case-law to affirm that neither homosexuality nor homosexual behaviour contradicts the notion of public morals even in their broadest understanding and pointed out that the ECtHR had criticised “predisposed bias on the part of a heterosexual majority against a homosexual minority” and held that “these negative attitudes [could not] of themselves be [...] sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour”.¹³⁷

The ECtHR’s assessment

- (a) Whether there was interference with the exercise of the applicants’ freedom of expression

The ECtHR observed that the central issue is the existence of a legislative ban on promotion of homosexuality or non-traditional sexual relations among minors, which the applicants contested as inherently incompatible with the ECHR.¹³⁸ As admitted by the Government, there had been an interference with the applicants’ freedom of expression.¹³⁹

- (b) Whether the interference was justified

The measures taken against the applicants were based on the legislative provisions specifically adopted to outlaw the promotion of homosexuality and non-traditional sexual relations among minors. While there is no dispute about the authorities’ compliance with domestic law, the question of lawfulness arises in relation to the applicants’ allegations that the law itself was inappropriately vague and was unforeseeable in its application.¹⁴⁰ The ECtHR shared the view of the Venice Commission, which, as stated in section II(2) above, “argued that the scope of the terms such as “propaganda” and “promotion” are fundamental to these laws but are also rather ambiguous and vague”, and the ECtHR therefore considered that the broad scope of the

¹³⁶ Ibid., § 51.

¹³⁷ Ibid., § 55.

¹³⁸ Ibid., § 61.

¹³⁹ Ibid., § 62.

¹⁴⁰ Ibid., § 63.

“gay propaganda” laws should be taken into account in the assessment of the Government’s justification of enforcing these laws.¹⁴¹

The ECtHR further examined justification on the grounds of protection of morals, protection of health, and protection of the rights of others, and noted that there is a clear European consensus about the recognition of individuals’ right to openly self-identify as belonging to a sexual minority, and to promote their own rights and freedoms.¹⁴²

Regarding the issue of morals, the Government advanced the alleged incompatibility between maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality. The ECtHR did not find any reason to consider these elements as incompatible and added that – far from being opposed to family values – many persons belonging to sexual minorities manifest allegiance to the institutions of marriage, parenthood and adoption, as evidenced by the steady flow of applications to the ECtHR from members of the LGBT community who wish to have access to. The Government therefore failed to demonstrate how freedom of expression on LGBT issues would devalue or otherwise adversely affect actual and existing “traditional families” or would compromise their future.¹⁴³

Also, the ECtHR noted the Government’s assertion that the majority of Russians disapprove of homosexuality and resent any display of same-sex relations. The ECtHR reiterated that it would be incompatible with the underlying values of the Convention if the exercise of rights by a minority group were made conditional on its being accepted by the majority. This would otherwise imply that a minority group’s rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective.¹⁴⁴

The ECtHR rejected the Government’s claim that regulating public debate on LGBT issues may be justified on the grounds of the protection of morals.¹⁴⁵ The ECtHR did not find a justification on the grounds of protection of health¹⁴⁶ or on the grounds of protection of the rights of others.¹⁴⁷ Therefore, the conclusion was that the Russian authorities had overstepped the margin of appreciation provided by Article 10. Accordingly, there had been violations of Article 10¹⁴⁸ and of Article 14 taken in conjunction with Article 10.¹⁴⁹

Dissenting opinion of Judge Dedov

In his dissenting opinion, Judge Dedov explained why he voted against finding a violation of Article 10. While his thoughts on “protecting children” from “gay propaganda” are not relevant in this thesis, it is interesting that he also argued that states should enjoy a wider margin of appreciation in respect of public morals, decency and religion. Owing to its wide margin of appreciation and its positive obligation towards children and their families, the Russian Federation concluded that the measure was necessary in a democratic society. Dedov regretted that the ECtHR refused to apply the proportionality test in full. He further stated that perhaps

¹⁴¹ Ibid., § 76

¹⁴² Ibid., § 66.

¹⁴³ Ibid., § 67.

¹⁴⁴ Ibid., § 70.

¹⁴⁵ Ibid., § 71.

¹⁴⁶ Ibid., §§ 72-73.

¹⁴⁷ Ibid., §§ 74-82.

¹⁴⁸ Ibid., § 84.

¹⁴⁹ Ibid., § 92.

the Russian authorities are the only ones who would like to protect private life in this way, and regretted that no comparative research was carried out in the present case.

5.3. Freedom of association and assembly in the context of LGBT rights

In recent years, the ECtHR has significantly evolved its interpretation of Art 11 in respect of matters relating to sexual orientation, and has clearly and decisively upheld the rights of LGBT people to engage in peaceful public demonstrations.

5.3.1. *Dudgeon v. the United Kingdom*

The first occasion Art 11 was considered in a complaint relating to sexual orientation was in *Dudgeon v. the United Kingdom*.¹⁵⁰ Whilst the applicant did not invoke Article 11 himself, the Commission decided to examine, during the admissibility stage of the application, whether the criminalisation of male homosexual sex interfered with either Article 10 or 11 rights.¹⁵¹

“In view of the applicant’s submissions concerning the scope of these offences, the Commission has considered ex officio whether this part of the application discloses any appearance of a violation of the applicant’s right to freedom of expression, as guaranteed by Article 10, or of his right to freedom of association with others, as guaranteed by Article 11 [...] The Commission finds no indication whatsoever that the scope of these offences is such that they could render illegal advocacy of changes in homosexual laws and thus restrict the applicant’s freedom of expression.

Furthermore, whilst the applicant suggests that ‘explicit association’ in groups, clubs or societies by homosexuals could be illegal and that counselling activities, befriending agencies and the like are of uncertain legal status, the Commission finds that the material submitted does not disclose that the scope of the offences is in fact such that their mere existence could restrict the exercise of the applicant’s freedom of association in a manner contrary to Article 11.”¹⁵²

The case of *Dudgeon* is significant since it is the first case in the ECtHR which successfully challenged the criminalisation of male homosexuality. As I stated in section 1(III)(1.2), the ECtHR has gradually become more and more a tool to change not only the legal regulation of same-sex practices but also to shape social conceptions of homosexuality, and this development relates back to *Dudgeon*.

In the context of the right to freedom of association, I think that it is positive that the Commission, while stating that “explicit association” could be illegal, still questioned whether the mere existence of the offences could motivate a blanket ban on the applicant’s freedom of association.

5.3.2. *Bączkowski and Others v. Poland*

*Bączkowski and Others v. Poland*¹⁵³ is the first case in which the ECtHR ruled unanimously that the banning of an LGBT Pride parade in Warsaw in 2005 was in violation of articles 11, 13 and 14 of the ECHR. The judgment was delivered on May 3 2007 and affirmed that banning such events goes against the right to freedom of assembly and association.

¹⁵⁰ ECtHR, Judgment of 22 October 1981, *Dudgeon v. the United Kingdom*, no. 7525/76.

¹⁵¹ Johnson, *op. cit.* 25, p. 185.

¹⁵² European Commission of Human Rights, Decision of 3 March 1978, *Dudgeon v. the United Kingdom*, no. 7525/76, p. 131.

¹⁵³ ECtHR (Fourth Section), Judgment of 3 May 2007 (Final on 24 September 2007), *Case of Bączkowski and Others v. Poland*, no. 1453/06.

In *Bączkowski*, the ECtHR stated that democracy is the only political model compatible with the Convention,¹⁵⁴ and that in a democracy a balance must be achieved which ensures fair and proper treatment of minorities.¹⁵⁵ Further, the ECtHR stated that whilst it had often referred to the essential role of assemblies by political parties in ensuring the pluralism that is essential for democracy, it reiterated that it was also important to recognised the contribution of “associations formed for other purposes” because:

“[...] pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion.”¹⁵⁶

I think that this recognition of the importance of freedom of assembly on the grounds of “cultural identity”, and its centrality for achieving the “harmonious interaction of persons”, in respect of sexual orientation seems to have been an important first step in expanding the ECtHR’s Article 11 jurisprudence in the context of LGBT rights.

5.3.3. *GenderDoc-M v. Moldova*

The case of *GenderDoc-M v. Moldova* concerned that local authorities in Chişinău had denied the applicant, the LGBT rights organisation GenderDoc-M, the right to hold a Pride demonstration outside the Parliament on 27 May 2005. The applicant complained of a violation of its right to hold a peaceful assembly.¹⁵⁷

On 15 September 2008, the Government agreed that there was an interference with the applicant’s right to freedom of assembly but that authorities had pursued a legitimate aim, since 98 % of the Moldovan population were Christian Orthodox, and that this religion does not tolerate same-sex sexual relations or marriage.¹⁵⁸ However, on 1 April 2010 the Government agreed that there had been a violation of Article 11 of the Convention.¹⁵⁹

Therefore, the ECtHR ruled that the Republic of Moldova had acted in breach of the freedom of assembly and association of the applicant. The ECtHR also ruled that this ban had been discriminatory of sexual minorities, under Article 14 of the Convention, in conjunction with the breach of the freedom of assembly.¹⁶⁰

I return to this case in section 6(II)(2), where I note that the judgment in this case has had a huge impact in the Republic of Moldova, since the case allowed for LGBT rights events to be held with full police protection and has ameliorated the situation in Moldova in this regard.

5.3.4. *Alekseyev v. Russia*

The case of *Alekseyev v. Russia* is based on three applications against the Russian Federation by a Russian national, Mr. Nikolai Aleksandrovich Alekseyev, on 29 January 2007, 14 February

¹⁵⁴ Ibid., § 61.

¹⁵⁵ Ibid., § 63.

¹⁵⁶ Ibid., § 62.

¹⁵⁷ ECtHR (Third Section), Judgment of 12 June 2012, *Case of GenderDoc-M v. Moldova*, no. 9106/06.

¹⁵⁸ Ibid., § 23.

¹⁵⁹ Ibid., § 24.

¹⁶⁰ Ibid., § 55.

2008 and 10 March 2009. It concerned an alleged violation of the applicant's right to assembly due to the banning of public events he attempted to organise in Moscow.

The Russian government argued that the public authorities had acted lawfully and within their margin of appreciation when refusing permission for the event. The government argued that the authorities were pursuing the legitimate aims of the protection of public safety and the prevention of disorder, the protection of morals, and the protection of the rights and freedoms of others. The government referred to a number of statements made by religious organisations:

- 1) The Union of Orthodox Citizens, who advised the Mayor of Moscow of their intention to conduct a mass protest in response to any pride march in Moscow;
- 2) the objection of the Orthodox Church to a gay parade on the grounds that it was "propaganda promoting sin";
- 3) the promise by the Supreme Mufti for Russia that Muslims and other "normal people" in Russia would demonstrate against any pride march;
- 4) and the head of the Muslim authority of Nizhny Novgorod who argued that "as a matter of necessity, homosexuals must be stoned to death".¹⁶¹

The Russian government argued that the "ideas of the event organisers were not neutral to the rest of society, but had actually encroached on the rights [and] lawful interests" of religious believers because "the gay parades would be perceived by believers as an intentional insult to their religious feelings and a 'terrible debasement of their human dignity'".¹⁶² The Russian government further stated, *inter alia*, that:

"Any form of celebration of homosexual behaviour should take place in private or in designated meeting places with restricted access [...] It was thus the authorities' duty to demonstrate sensitivity to the existing public resentment of any overt manifestation of homosexuality..."¹⁶³

"The Government admitted, in particular, that the authorities would reach their limit of tolerance towards homosexual behaviour when it spilt over from the strictly private domain into the sphere shared by the general public..."¹⁶⁴

The ECtHR rejected the claim that protecting the rights and freedoms of religious believers provides an adequate justification for limiting the right to freedom of assembly for LGBT rights activists, and accorded religion no special status in the 'balance' of interests that characterise a democratic society.¹⁶⁵

The ECtHR cited its judgment in *Bączkowski*, where it stated that democracy is the only political model compatible with the Convention, and that in a democracy a balance must be achieved which ensures fair and proper treatment of minorities.¹⁶⁶ The ECtHR also stated that the risk of a violent counter-demonstration is insufficient for banning an event, especially when the numbers of protesters would be manageable by the authorities.¹⁶⁷

¹⁶¹ Ibid., § 62.

¹⁶² ECtHR (First section), Judgment of 21 October 2010 (Final on 11 April 2011), *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, § 60.

¹⁶³ Ibid., § 61.

¹⁶⁴ Ibid., § 82.

¹⁶⁵ Ibid., § 63.

¹⁶⁶ ECtHR (First Section), Judgment of 21 October 2010, *Case of Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, § 70.

¹⁶⁷ Ibid., § 75.

In *Alekseyev*, we can identify a development towards recognising that LGBT rights must by necessity encompass civil and social participation. Most important, the ECtHR rejected the claim that protecting the rights and freedoms of religious believers provides a justification for discriminating towards LGBT persons.¹⁶⁸

The ECtHR established that “public safety” cannot provide an automatic justification to curtail assemblies based on sexual orientation. The ECtHR rejected the Russian government’s claim that, in light of the statements made by religious groups, it had not been possible for the authorities to guarantee the safety of those taking part in the events. The ECtHR stated that it could not accept that argument that “the threat was so great as to require such a drastic measure as banning the event altogether, let alone doing so repeatedly over a period of three years”.¹⁶⁹

The ECtHR stated that it is the duty of the state to take reasonable and appropriate measure to enable lawful demonstrations to proceed peacefully and that the public authorities failed to do this by not undertaking an adequate assessment of the risks posed. Giving considerable weight to the ‘Recommendation CM/Rec(2010)5’ of the Committee of Ministers, the ECtHR stated:

“As regard any statements calling for violence and inciting offences against the participants in a public event, such as those by a Muslim cleric from Nizhny Novgorod, who reportedly said that homosexuals must be stoned to death [...] as well as any isolated incidents of threats of violence being put into practice, they could have adequately been dealt with through the prosecution of those responsible. However, it does not appear that the authorities in the present case reacted to the cleric’s call for violence in any other way than banning the event he condemned. By relying on such blatantly unlawful calls as grounds for the ban, the authorities effectively endorsed the intentions of persons and organisations that clearly and deliberately intended to disrupt a peaceful demonstration in breach of the law and public order.”¹⁷⁰

I think that the most obvious and significant aspect of *Alekseyev* is the clear message that it sends to contracting states regarding the importance of respecting the freedom of assembly of LGBT rights activists, in that the ECtHR condemned the confining of “every mention of homosexuality to the private sphere and to force gay men and lesbians out of the public eye, implying that homosexuality was a result of a conscious, and antisocial, choice” and instead held that “on the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case”.¹⁷¹ Therefore, the ECtHR upheld the applicant’s complaints, finding a violation of Article 11 alone and Article 14 taken in conjunction with Article 11.

5.3.5. *Identoba v. Georgia*

The case of *Identoba and Others v. Georgia*¹⁷² concerned that the Georgian government had failed to effectively protect a LGBT rights demonstration in Tbilisi. On 17 May 2012, the Georgian LGBT organisation Identoba arranged a march on the International Day against Homophobia which was the first public march in support of LGBT equality in Georgia.

The event was disturbed by religious counter-demonstrators, including representatives of the Georgian Orthodox Church and radical Christian groups, who claimed that nobody was entitled

¹⁶⁸ Ibid., §§ 78-79.

¹⁶⁹ Ibid., § 77.

¹⁷⁰ Ibid., § 76.

¹⁷¹ Ibid., § 86.

¹⁷² ECtHR (Fourth section), Judgment of 12 May 2015 (Final on 12 August 2015), *Identoba and Others v. Georgia*, no. 73235/12.

to hold a ‘gay pride’ parade or to promote “perversion”, as it was against moral values and Georgian traditions. The marchers tried calmly to explain that it was not a ‘gay pride’ parade but a public event dedicated to supporting the fight against homophobia.¹⁷³

Due to violence from counter-demonstrators, the march had to be discontinued.¹⁷⁴ Georgian police did not intervene until after fighting had broken out and also arrested some of the victims instead of the violent counter-demonstrators.¹⁷⁵ The Court considered that domestic authorities failed to ensure that the march could take place peacefully by sufficiently controlling violent counter-demonstrators, and concluded that the authorities fell short of their positive obligations under Article 11 alone and Article 14 taken in conjunction with Article 11.

5.3.6. *Alekseyev and Others v. Russia*

The recent case of *Alekseyev and Others v. Russia*¹⁷⁶ concerned 51 joined cases brought by various applicants to Strasbourg. As of March 2019, a request for referral to the ECtHR’s Grand Chamber is pending. In the period 2009-14, the applicants lodged notices of holding LGBT public assemblies to local authorities. In each instance the local authorities refused to approve the dates and locations proposed by the applicants, who challenged these decisions in the domestic courts. The domestic courts upheld the decisions of the local authorities.¹⁷⁷

In the leading case of *Alekseyev*, the Court has already found a violation in respect of issues similar to those which the present case concerns.¹⁷⁸ The Court considered that in the present case the ban on holding LGBT public assemblies imposed by the domestic authorities did not correspond to a pressing social need and was thus not necessary in a democratic society.¹⁷⁹ The Court concluded that there had been violations of Article 11, Article 13 in conjunction with Article 11, and Article 14 in conjunction with Article 11 in respect of each applicant.

Concurring opinion of Judge Dedov

In his concurring opinion, Judge Dedov mentioned that in *Alekseyev v. Russia*, the Court disregarded security and safety reasons put forward by the Russian Government for banning LGBT rights events. He referred to the case of *Identoba and Others v. Georgia* and stated that the case showed that those concerns were real and needed to be addressed by the Court. He also referred to the case of *Bayev and Others v. Russia* and stated that those deficiencies in the case-law created the impression that promotion of homosexual relationships, especially to minors, could be considered an issue for public debate.

However, he reasoned that compromise and social harmony is derived from a basis of mutual respect for human rights and the rights of minorities who do not seek to promote their lifestyle. In the present case, some of the events organised by the applicants were devoted to the protection of their rights to create family relationships and not to the promotion of sexual relationships. Therefore, Judge Dedov voted together with the majority in the present case.

¹⁷³ *Ibid.*, § 12.

¹⁷⁴ *Ibid.*, § 15.

¹⁷⁵ *Ibid.*, § 17.

¹⁷⁶ ECtHR (Third section), Judgment of 27 November 2018 (Request for referral to the Grand Chamber pending), *Alekseyev and Others v. Russia*, nos. 14988/09 and 50 others.

¹⁷⁷ *Ibid.*, § 6.

¹⁷⁸ *Ibid.*, § 20.

¹⁷⁹ *Ibid.*, § 21.

Historical background

«Уничтожьте гомосексуалистов — фашизм исчезнет»

“Destroy the homosexuals – Fascism will disappear”

**Maxim Gorky (1868-1936), Russian and Soviet writer,
in his article “Proletarian Humanism” on 23 May 1934**

3. Historical background

In this part, I provide a historical background on the development of masculinities and LGBT identities in what now constitutes post-Soviet space, compared with how societal attitudes and legal measures in this space have been based on masculinity ideals. Note that although Russia is the centre of focus, I think that this is highly applicable to the contemporary situations in today's nation states of the Russian Federation, Ukraine and the Republic of Moldova, all constituting part of today's post-Soviet space.

I. The occurrence of *muzhelozhstvo* in pre-Petrine Russia

Foreign visitors to pre-Petrine Muscovy have reported that the widespread practice and talk of *muzhelozhstvo* (literally “man lying with mankind”; I use this term interchangeably with the term “sodomy”) were disassociated from religious sensibilities and civic dignity. They regarded the formal penalties for committing sodomy prescribed by Russian Orthodoxy as rather indulgent, compared to canon and secular law in Western Europe. The penances were equal to those for adulterous male-female relations.¹⁸⁰

It is interesting that while Western and Eastern Europeans shared the Catholic prohibition of the “sodomitical sin” (*sodomskaa grekh*) developed since the 12th century, the Russian Orthodox Church did not express such a punitive view. One reason is the problem of enforcing sexual norms, since the task of Christianisation of Rus' only began in the 10th century in a vast and underpopulated territory, compared with West Europe.¹⁸¹

II. Tsar Peter's anti-sodomy statute, masculinity ideals and the emergence of homosexual identities in Imperial Russia

The traditional periodisation of Russian history distinguishes between pre-Petrine Russia and Imperial Russia. While Peter I [the Great] became Tsar of Russia in 1682, the dividing mark between these two periods is that he assumed the title of Emperor of the Russian Empire in 1721.¹⁸² Already in 1716, Peter introduced an anti-sodomy statute, outlawing *muzhelozhstvo*, applicable within the military to instil new forms of discipline. In 1835, Tsar Nicholas I extended this statute to the civilian male population to instil religious sensibilities and civic virtues in the male population.¹⁸³

Dan Healey writes that in the late Imperial era, an urban, male homosexual subculture developed from indigenous patterns of a traditional mutual masculine sexuality. Male homosexuals that were identified as *tetki* (singular, *tetka*, meaning literally “auntie”, but translatable as “queen”) frequented parts of St. Petersburg and Moscow.¹⁸⁴ According to

¹⁸⁰ Healey, Dan: *Homosexual Desire in Revolutionary Russia: The Regulation of Sexual and Gender Dissent*, Chicago, IL: University of Chicago Press (2001), p. 21.

¹⁸¹ *Ibid.*, p. 78f.

¹⁸² Martin, Russell E.: *The Petrine Divide and the Periodization of Early Modern Russian History*, *Slavic Review*, 69(2) (2010), 410-425, p. 411.

¹⁸³ Healey, *op. cit.* 180, p. 22.

¹⁸⁴ Healey, Dan: *The Disappearances of the Russian Queen, or How the Soviet Closet Was Born*. In: Evans Clements, Barbara, Friedman, Rebecca, Healey, Dan (eds.): *Russian Masculinities in History and Culture*, Basingstoke: Palgrave (2002), 152-166, p. 152.

Healey, this subculture was not alien to the national body and claiming that it was imported from abroad is a claim based on heterosexist and nationalist chauvinism.¹⁸⁵

A proposed penal code in 1813 included the vague formulation “unnatural shamelessness” (*protivoestestvennoe stydodeianie*). The proposal included that offenders would be required to make “a public church confession” (*publichnoe tserkovnoe pokaianie*). Healey writes that this inclusion of the Church into moral redemption of sexual outlaws coincided with the extension of the Church’s responsibilities for regulating social matters in the post-Napoleonic reaction.¹⁸⁶

In Nicholas’ code 1835 and later 1845 code, the requirement that Orthodox subjects seek penance for sodomy consolidated a moral/religious link. Consensual sodomy was punished with exile to Siberia (under what became article 995 of the penal code); aggravated sodomy, i.e. with minors or with the use of force or abuse of a position of authority, was punished with exile and hard labour (article 996). This legislation remained in Imperial Russia until 1917.¹⁸⁷

III. The emergence of Soviet masculinities, the decriminalisation of the Imperial anti-sodomy statute and the recriminalisation of *muzhelozhstvo* in the Soviet Union

In the revolutionary year of 1917, the imperial anti-sodomy statute was abolished along with the rest of imperial legislation and in the first Soviet Russian Criminal Code of 1922, sodomy and incest were not named at all. In 1926, a revised Criminal Code was issued, in which a ban on consensual same-sex relations was absent.¹⁸⁸ However, the medicalisation of sexual offense that followed the new legislative regime provided opportunities for legal and medical officials to uphold a *de facto* regulation of what came to be regarded as sexual and gender dissent.¹⁸⁹

In 1934, during Joseph Stalin’s reign, a Soviet anti-sodomy statute was adopted in Article 121 of the Soviet Criminal Code. According to the Russian LGBT NGO “Wings”, this article was used by the police authorities and KGB to improve the statistics of criminal investigations and as a pretext to imprison political dissidents.¹⁹⁰ Compared to the loud rhetoric towards homosexuals in Nazi Germany, the Soviet anti-sodomy statute was imposed without public discussion.¹⁹¹ However, the secret police did not really have to concern itself with legal provisions and conducted extra-legal arrests already in 1933 of male homosexuals.¹⁹²

Stalin’s cultural spokesman Maxim Gorky published an article called “Proletarian Humanism” in *Pravda* and *Izvestiia* on 23 May 1934, which was the regime’s first public explanation of the recriminalisation of male homosexuality. Gorky dismissed any claim that homosexuals might constitute a social minority to which the workers’ state should accord protection, publishing his since notorious slogan, “Destroy the homosexuals – Fascism will disappear” (*unichtozh’te*

¹⁸⁵ Healey, *op. cit.* 180, p. 48.

¹⁸⁶ *Ibid.*, p. 80.

¹⁸⁷ *Ibid.*, p. 81.

¹⁸⁸ *Ibid.*, p. 122.

¹⁸⁹ *Ibid.*, p. 125.

¹⁹⁰ Report: *Study on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: sociological report: Russian Federation*, Council of Europe (2010), p. 6. Available: http://www.coe.int/t/Commissioner/Source/LGBT/RussiaSociological_E.pdf (Obtained on 2019-03-10)

¹⁹¹ Healey, *op. cit.* 180, p. 183.

¹⁹² *Ibid.*, p. 187.

gomoseksualistov–fashizm ischeznet). According to Healey, Gorky’s slogan has often instead been translated as ”Destroy homosexuality – Fascism will disappear”.¹⁹³

The leadership’s expectations and measures reconstructed the previous subculture of the *tetka* as a disreputable and illegal masculinity, which led to the construction of the “Soviet Closet”,¹⁹⁴ or the “Iron Closet” as I prefer to call it. Brian Baer further emphasises that this enforced invisibility of homosexuals and the communist rhetoric that presented homosexuality as a symptom of bourgeois decadence (that in Gorky’s words led directly to fascism) created the persistent belief that homosexuality was something imported from abroad, i.e. from the West.¹⁹⁵

After Stalin’s death in March 1953, the process of de-Stalinisation slowly commenced with positive developments, such as the release of an estimated 4.5 million Gulag inmates. This did not, however, lead to any liberalisation regarding homosexuality, but instead led to increased surveillance and incarceration for men and women who expressed same-sex desire.¹⁹⁶

In 1983, in Gorbachev’s age of *perestroika*, the initiative “Gay Laboratory” appeared in Leningrad, undertaken by a group of about thirty men and women under the leadership of Aleksandr Zaremba. The group had contacts with Finnish LGB organisations and with the International Gay Association. They sought to examine implications for Russians of the ideals of ‘gay liberation’ and to consider the threat of HIV/AIDS. Under increased KGB surveillance and threats, the group disbanded in 1984 and the members either emigrated or fell silent.¹⁹⁷

IV. Post-Soviet masculinities, sexual citizenship and decriminalisation of homosexuality in post-Soviet Russia, Ukraine and Moldova

The collapse of the Soviet Union accelerated contradicting tendencies in society, important from the LGBT perspective: (1) it gave rise to “neo-traditionalism” and the strengthening of the patriarchy within gender regimes, which enabled religious institutions to influence state policy and define the rhetoric towards LGBT persons; but on the other hand, (2) the freedoms of expression, association and assembly enabled visibility actions and rights advocacy.¹⁹⁸

Some scholars have discussed the topics of marriage equality, public protest and gender recognition, that are all pertained to the state-individual relationship, and labelled them as falling under the notion of “sexual citizenship”. Catherine Baker describes that sexual citizenship is a concept that started to develop when the presumptions that it was “normal” for everyone to be heterosexual and cis-gendered were being challenged in the late 20th century.¹⁹⁹

¹⁹³ Ibid., 189; Gessen, Masha: *The Rights of Lesbians and Gay Men in the Russian Federation*, San Francisco: International Gay and Lesbian Human Rights Commission (1994), p. 8; Essig, Laurie: *Queer in Russia: A Story of Sex, Self and the Other*, Durham: Duke University Press (1999), p. 5.

¹⁹⁴ Healey, *op. cit.* 180, p. 165f.

¹⁹⁵ Baer, Brian J.: *The New Visibility: Representing Sexual Minorities in the Popular Culture of Post-Soviet Russia*. In: Stulhofer, Aleksandar, Sandfort, Theo (eds.): *Sexuality and Gender in Postcommunist Eastern Europe and Russia*, Austin: University of Texas Press (2005), 193-204, p. 195

¹⁹⁶ Healey, *op. cit.* 180, p. 237.

¹⁹⁷ Ibid., p. 248.

¹⁹⁸ Baker, *op. cit.* 3, p. 228f.

¹⁹⁹ Ibid., p. 230.

The first book to approach sexuality from the perspective of citizenship is David Evans' *Sexual Citizenship* from 1993, in which he defines sexual citizenship as a matter of "partial, private and primarily leisure and lifestyle membership".²⁰⁰ David Bell and Jon Binnie have clarified that they hold true the notion that "all citizenship is sexual citizenship", because they mean that all foundations of being a citizen intersect with sexuality.²⁰¹ Catherine Baker writes that the transformation of sexual citizenship in the Russian Federation, Ukraine and the Republic of Moldova and the decriminalisation of same-sex activities in these countries were potentially linked to gaining access to the Council of Europe; at least the gaining of access influenced the time-scales on decriminalisation.²⁰²

The anti-sodomy statute in Article 121 in the Russian Criminal Code was repealed by Boris Yeltsin through a presidential decree in 1993. Yeltsin did not take particular interest in LGBT issues, but this was a demand from the Council of Europe to admit Russia into the organisation.²⁰³ Russia was admitted in 1996 and ratified the European Convention on Human Rights in 1998.²⁰⁴ However, as Masha Gessen has pointed out, while Article 121 was abolished, the newly-introduced Article 132 specifically punished homosexual and lesbian rape, and maintained a separateness between homosexuality and heterosexuality in Russian legislation.²⁰⁵

Same-sex relations between consenting adults has been legal in the Republic of Moldova since 1995, which was a prerequisite to join the Council of Europe in July 1995.²⁰⁶ I think that the case of Ukraine is the most interesting, since the country already in 1991 revised its old Criminal Code from the Soviet times and scrapped the blanket ban on same-sex sexual activity.²⁰⁷ Still, Ukraine did not join the Council of Europe until in November 1995, even later than Moldova. My estimation is that Baker is correct in all cases, but that in the case of Ukraine, other factors than only accession might have influenced this decision, since it did not gain access until several years after the anti-sodomy statute was abolished in the Verkhovna Rada.

Brian Baer writes that it is typical of contemporary Russian writing on homosexuality to put emphasis on sex roles and associate them with masculinity/femininity. According to Baer, homosexuality is no longer understood as a symptom of bourgeois decadence, but is now used to represent the critical state of masculinity in post-Soviet space.²⁰⁸ He further means that there

²⁰⁰ Evans, David: *Sexual Citizenship*, London: Routledge (1993), p. 64.

²⁰¹ Bell, David, Binnie, Jon, *The Sexual Citizen: Queer Politics and Beyond*, Cambridge: Polity Press (2000), p. 10.

²⁰² Baker, *op. cit.* 3, p. 230.

²⁰³ Essig, *op. cit.* 193, pp. 13f; Healey, *op. cit.* 184, pp. 183ff; Sleptcov, Nikita: *Political Homophobia as a State Strategy in Russia*, Journal of Global Initiatives, Policy, Pedagogy, Perspective: Vol. 12 : No. 1, Article 9 (2018), p. 148.

²⁰⁴ Federal Law of the Russian Federation 'On the Ratification of the Convention on the Protection of Human Rights and Fundamental Freedoms', 30 March 1998, No. 54-FZ. Available: <http://www.echr.ru/documents/doc/12011157/12011157.htm> (Obtained on 2019-03-10); Hallinan, Dara: *Orthodox Pluralism: Contours of Freedom of Religion in the Russian Federation and Strasbourg Jurisprudence*. In: Mälksoo, Lauri (ed.): *Russia and European Human-Rights Law: The Rise of the Civilizational Argument*, Leiden: Brill Nijhoff (2014), 151-205, p. 165; Rimestad, Sebastian: *The Interaction between the Moscow Patriarchate and the European Court of Human Rights*, Review of Central and East European Law, Issue 1 (2015), 31-56, p. 32.

²⁰⁵ Gessen, *op. cit.* 193, p. 24.

²⁰⁶ Report: *State-sponsored Homophobia: A world survey of laws prohibiting same sex activity between consenting adults*, Geneva: ILGA (2010), p. 44. Available: https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2010.pdf (Obtained on 2019-03-10)

²⁰⁷ Article: *History of LGBT-movement in Ukraine*, Kyiv: National LGBT-portal of Ukraine, Available: https://www.lgbt.org.ua/en/materials/show_4230/ (Obtained on 2019-03-10)

²⁰⁸ Stulhofer, Sandfort, *op. cit.* 195, p. 18.

is an ambivalence within post-Soviet society regarding the place of homosexuality²⁰⁹ and that the “homosexual”, as the concept had been constructed in the 1990s, in certain ways represented a threat, especially with the new “gay visibility”:

“The new gay visibility in Russia can perhaps be explained as an effect not of American-style activism but of the discursive complexity of homosexuality, that is, its symbolic resonance in post-Soviet culture. Located on the contested borders of the public and private spheres, homosexuality raises questions about private bodies and the body politic, as well as the possibilities and the dangers of sexual freedom and political pluralism.”²¹⁰

An important aspect is that Russians often use the connotations “homosexuality” and “lesbianism” compared to their usage of the term “heterosexuality”, and that the suffix “-ism” is utilised to imply ideological concepts. Nikita Sleptcov has argued that this ‘mistranslation’ of homosexuality aims at “showing political nature of the homosexual practices as if homosexuality was an ideology”.²¹¹

To understand the driving factors behind the neo-traditional gender regimes, the Inglehart–Welzel cultural map of the world²¹² provides some food for thought. The map establishes a two-dimensional system of cultural coordinates. On one axis, values of self-expression are opposed to values of survival (individual or collective); the second axis puts traditional values as opposed to secular-rational values. Russia, Ukraine and Moldova all rank high on secular-rational and survival values, e.g. compared with Sweden that ranks exceptionally high on secular-rational and self-expression values.

I think that it is interesting that Russia, Ukraine and Moldova still receive high rankings on secular-rational values, while at the same time the Orthodox Churches within these countries hold strong positions and have constructed the concept of “traditional values” within these countries’ political discourses. I suspect that the fact that these three countries also rank among the highest on survival values makes room for traditionalism, and that Orthodoxy is a culture-bearer that reproduces culture and collective identities, although at the same time people retain secular-rational views, however paradoxical this might seem.

Basically, I think that the notion of “traditional values”, at least as used by the Russian Orthodox Church, is a euphemism for reinforcing patriarchal structures, and that this strategy is used by the Russian state and the Moscow Patriarchate in order to weaken democracy in Russia and other post-Soviet countries, including in Ukraine and the Republic of Moldova. I therefore agree with the Russian sexologist Igor Kon, who has stated that the current anti-sexual crusade is a cover behind which the Russian Orthodox Church and its allies within the political sphere are trying to restore Soviet censorship and administrative control over the private sphere.²¹³

²⁰⁹ Baer, *op. cit.* 195, p. 199.

²¹⁰ *Ibid.*, p. 204.

²¹¹ Sleptcov, *op. cit.* 203, p. 150.

²¹² World Values Survey: *Findings and Insights*, Vienna: Institute for Comparative Survey Research. Available: <http://www.worldvaluessurvey.org/WVSCContents.jsp> (Obtained on 2019-03-10)

²¹³ Stulhofer, Sandfort, *op. cit.* 195, p. 121.

Russian Federation

Умом — Россию не понять,
Аршином общим не измерить:
У ней особенная стать —
В Россию можно только верить.

Russia cannot be understood with the mind alone,
No ordinary yardstick can span her greatness:
She stands alone, unique —
In Russia, one can only believe.

**Fyodor Ivanovich Tyutchev (1803-73),
Russian poet and statesman**

“In a closed society where everybody's guilty, the only crime is getting caught. In a world of thieves, the only final sin is stupidity.”

Hunter S. Thompson, *Fear and Loathing in Las Vegas* (1971)

4. Russian Federation

In this section, I discuss the situation for LGBT rights activists in the Russian Federation in relation to the right to freedom of assembly. This includes an analysis of the relevant domestic legislation, with a focus on the regional and federal “gay propaganda” laws. I further provide analyses of the Russian church-state relation and of the human rights concept that has been developed by the Moscow Patriarchate. The reason that this is important is that there is a strong religious/political intersection in the Russian Federation and that this constitutes a main driving factor behind the adoption of “gay propaganda” legislation, and that the Russian Federation and the Moscow Patriarchate also attempt to change the civilisational discourse on the role of morals in society, not least in the context of LGBT rights, on the international political arena.

I. Domestic legislation

I provide an overview of the domestic legislation that is relevant in the context of freedom of assembly for LGBT rights activists. Regional “gay propaganda” laws were enacted between 2006-2014 and the federal “gay propaganda” law was signed into law by the President of the Russian Federation, Vladimir Putin, on 30 June 2013. Legislation protecting the special status of the Orthodox church and the feelings of religious believers are also relevant in this context.

1. The 1993 Constitution of the Russian Federation

The Constitution of the Russian Federation²¹⁴ was adopted on 12 December 1993. Article 13 provides for political pluralism and Article 14 for the secular and neutral nature of the state. Dara Hallinan has remarked that the language constructs a model with close resemblance to the ECHR, the case-law of the ECtHR and Council of Europe statements on church-state relations.²¹⁵ Article 28 is also relevant here, since it forms the foundation for individual and collective manifestation of religious or other beliefs, including the right to profess no religion, and the right to freedom of conscience. According to Hallinan, the right is based in individual terms but retains the collective element demanded by the principle of pluralism.²¹⁶

Article 29 provides for the freedom of expression and Article 31 that citizens “shall have the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets”. Hallinan has explained that the inherent logic in these articles is that there are strong parallels with the idea of the state as a neutral organiser of the pluralism within the public sphere, which means that the state’s role is to arrange for freedom of expression on the one hand but also to secure tolerance between groups on the other hand.²¹⁷

Article 55 establishes the link to international human rights law, stating that “no laws shall be adopted cancelling or derogating human rights and freedoms”, and also mentions how rights and freedoms may be limited by federal law, most notably for the protection of morality.

²¹⁴ Constitution of the Russian Federation. Available in Russian: <http://www.gov.ru/main/konst/konst0.html> (Obtained on 2019-03-10); Translated into English, Legislationline. Available: <https://www.legislationline.org/documents/section/constitutions/country/7> (Obtained on 2019-03-10)

²¹⁵ Hallinan, *op. cit.* 204, p. 161.

²¹⁶ *Ibid.*, p. 161.

²¹⁷ *Ibid.*, p. 162.

2. The 1997 law ‘*On Freedom of Conscience and Religious Associations*’

With the new freedom of religion in post-Soviet Russia, a range of religious groups, domestic and foreign, established themselves and began to spread. The Orthodox Church responded by launching a campaign against “foreign interlopers”, which was successful and led to a more restrictive religious law in 1997, ‘*On Freedom of Conscience and Religious Associations*’.²¹⁸ John Basil writes that prior to the adoption of the law, it was presented as necessary for clarifying the few references made to religion in the Constitution of the Russian Federation, and to control the chaos the seemed to be threatening Russian society.²¹⁹

According to the law, religious organisations could register and obtain official status only after a 15-year period of proven activity on the territory of the Russian Federation, which excluded *de facto* all religious communities that had established themselves in Russia after the decline of the Soviet Union. Also controversial is the preamble to the law, which established an ethnic understanding of religious pluralism with Russian Orthodoxy at the top of the hierarchy:

“Confirming the right of each to freedom of conscience and freedom of creed, and also to equality before the law regardless of his attitudes to religion and his convictions / basing itself on the fact that the Russian Federation is a secular state / recognising the special contribution of Orthodoxy to the history of Russia and to the establishment and development of Russia’s spirituality and culture/respecting Christianity, Islam, Buddhism, Judaism and other religions which constitute an inseparable part of the historical heritage of Russia’s peoples / considering it important to promote the achievement of mutual understanding, tolerance and respect in questions of freedom of conscience and freedom of creed; hereby adopts this federal law.”²²⁰

Both the 15-year provision and preamble received criticism from human rights activists within and outside Russia, who feared an infringement of individual religious liberty as well as the quiet promotion of the Russian Orthodox Church to a state church. It has been criticised by the U.S. Commission on International Religious Freedom since 2003,²²¹ by the Council of Europe in 2002,²²² and by the ECtHR in its case of *The Moscow Branch of the Salvation Army v. Russia*. It is interesting that the ECtHR did not find that the 15-year provision was a direct violation of Article 9, but “a violation of Article 11 of the Convention read in the light of Article 9”.²²³

According to Irina Papkova, some scholars have stated that the effects of the legislation have not been as detrimental to religious freedom in Russia as was initially feared, while she has emphasised that “the passage of the law and subsequent continuing efforts by some Russian

²¹⁸ Federal Law of the Russian Federation “On freedom of conscience and religious associations”, 24 September 1997, No. 125-FZ. Available: https://www.legislationline.org/download/action/download/id/4379/file/RF_Freedom_of_Conscience_Law_1997_am2008_en.pdf (Obtained on 2019-03-10); Knox, Zoe, Mitrofanova, Anastasia: *The Russian Orthodox Church*. In: Leustean, Lucian N.: *Eastern Christianity and Politics in the Twenty-First Century*, London: Routledge (2014), 38-59, p. 43; Rimestad, *op. cit.* 208, p. 37.

²¹⁹ Basil, John D.: *Church-state relations in Russia: Orthodoxy and Federation law, 1990-2004*, Religion, State & Society, 33(2) (2005), 151–163, p. 154.

²²⁰ Stoeckl, *op. cit.* 51, p. 29f.

²²¹ Ibid., p. 30; Report: *2013 Annual Report*, Washington D.C.: United States Commission on International Religious Freedom (2013). Available: [https://www.uscirf.gov/sites/default/files/resources/2013%20USCIRF%20Annual%20Report%20\(2\).pdf](https://www.uscirf.gov/sites/default/files/resources/2013%20USCIRF%20Annual%20Report%20(2).pdf) (Obtained on 2019-03-10)

²²² Stoeckl, *op. cit.* 51, p. 30; Parliamentary Assembly of the Council of Europe: *Resolution 1278: Russia’s Law on Religion*, Strasbourg: Council of Europe (2002). Available: <http://assembly.coe.int/nw/xml/xref/xref-docdetails-en.asp?fileid=16992&lang=en> (Obtained on 2019-03-10)

²²³ Stoeckl, *op. cit.* 51, p. 30; ECtHR (First Section), Judgment of 5 October 2006, *Case of the Moscow Branch of the Salvation Army vs. Russia*, no. 72881/01.

parliamentarians to introduce further limitations on religious freedom remain the central factors contributing to the widespread reception of the ROC's inordinate influence on Russian politics". Papkova pointed out that the adoption of the 1997 law was not only the result of the Patriarchate's direct lobbying or political clout but was a result of three factors: (1) the growth of the Russian anti-cult movement; (2) a xenophobic and nationalist Russian State Duma; and (3) the Russian state's recognition that it needed to control religious life.²²⁴

Yeltsin, who signed the law, of course also understood that showing support for the Orthodox Church was a way to gain votes in upcoming elections.²²⁵ Then-Metropolitan Kirill (Gundyayev) of Smolensk and Kaliningrad (who became Patriarch Kirill in 2009) regarded the law as a result of the inability of human rights activists to understand that "Western values cannot be transposed directly to Russia" because of Russia's different value system.²²⁶

Kristina Stoeckl writes that the position the Moscow Patriarchate has taken on the question of religious freedom is indicative of its suspicion towards liberalism and international human rights and that the law also indicates a strengthened religious/nationalist agenda based on Orthodoxy. Russian nationalists have never regarded Orthodoxy as just one religion among others on Russian territory, and the Church was considered to represent the majority and should therefore enjoy privileges, rather than rights.²²⁷

According to Papkova, the 1997 law marked "the height of *symphonia*" in church-state relations in Russia.²²⁸ Stoeckl means that it demonstrated that neither government nor Church had any intention to abide by human rights law in matters of religious freedom, but were developing a political strategy of "managed pluralism" and a selective regulation of church-state relations.²²⁹

According to John Anderson, the terms "managed democracy" and "managed pluralism" were in common usage amongst commentators seeking to capture the essence of Putin's political vision.²³⁰ I understand "managed pluralism" as more or less being a euphemism for having a controlled political opposition and adjusting the political system according to the political interests of the main patron. Also, I think that "managed pluralism" as a secular political term in the Russian context seems to be related to the Orthodox concept of *sobornost'*, defined as "unity in multiplicity".²³¹ The concept of *sobornost'* entails three dimensions: (1) volunteerism; (2) abandonment of self-interest; and (3) subordination to common values, and love of church, nation and state. It underlines co-operation between people on the expense of individualism.²³²

²²⁴ Papkova, Irina: *The Orthodox Church and Russian Politics*, New York: Oxford University Press and Washington, DC: Woodrow Wilson Center Press (2011), pp. 75f.

²²⁵ Knox, Mitrofanova, *op cit.* 218, p. 43.

²²⁶ Rimestad *op cit.* 204, p. 37.

²²⁷ Stoeckl, *op cit.* 51, pp. 28f.

²²⁸ Papkova, *op cit.* 224, p. 74.

²²⁹ Stoeckl, *op cit.* 51, p. 29.

²³⁰ Anderson, John: *Putin and the Russian Orthodox Church: Asymmetric Symphonia?*, Journal of International Affairs, vol. 61 no. 1 (2007), 185-201, p. 187.

²³¹ Naydenova, Natalia: *Holy Rus: (Re)construction of Russia's Civilizational Identity*, Slavonica 21:1-2, 37-48, p. 41.

²³² Haugen, Hans M.: *Menneskerettigheter og Den russisk-ortodokse kirke: opportunisme, autoritarianisme eller ortodoks nasjonalisme?* (Norwegian) [Human Rights and the Russian Orthodox Church: Opportunism, Authoritarianism or Orthodox Nationalism?], Nordisk Østforum, Vol 31 (2017), 45-61, p. 56.

3. “Gay propaganda” legislation

3.1. Regional “gay propaganda” laws

The first law banning “propaganda of homosexuality” was introduced in Ryazan Oblast in 2006 with following amendments of the law on administrative offences in 2008.²³³ Between 2011 to 2014, similar laws were adopted in twelve regions of the Russian Federation:²³⁴ Arkhangelsk,²³⁵ Kostroma,²³⁶ Magadan,²³⁷ Novosibirsk,²³⁸ Samara,²³⁹ Vladimir,²⁴⁰ Kaliningrad,²⁴¹ Sverdlovsk Oblast,²⁴² the Krasnodar Region,²⁴³ Bashkiria,²⁴⁴ Dagestan,²⁴⁵ and St. Petersburg.²⁴⁶

In 2010, the UNHRC stated that “the Ryazan Law is ambiguous as to whether the term “homosexuality (sexual act between men or lesbianism)” refers to sexual identity or sexual activity or both”.²⁴⁷ Some regional laws also banned “bisexual relationships” and “transsexualism”. All these laws prohibited “gay propaganda” towards minors; the Kaliningrad law later extended the prohibition to “gay propaganda” towards adults.²⁴⁸

²³³ Ryazan Oblast Law ‘*On the Protection of Morality and Health of Children in Ryazan Region*’, 3 April 2006, Law No. 41-OZ; Law of the Ryazan Region No. 182-O3 ‘*On Administrative Offences*’, 4 December 2008; Venice Commission, *op. cit.* 78, p. 3.

²³⁴ Report: *Justice or Complicity? LGBT Rights and the Russian Courts*, London: Equal Rights Trust (2016), pp. 56f. Available: https://www.equalrightstrust.org/ertdocumentbank/Justice%20or%20Complicity%20LGBT%20Rights%20and%20the%20Russian%20Courts_0.pdf (Obtained on 2019-03-10)

²³⁵ Arkhangelsk Oblast Law, ‘*On Introducing Amendments and Additions to the Regional Law for the Protection of Morals and the Health of Children in the Arkhangelsk Region*’, 30 September 2011, No. 336-24-OZ.

²³⁶ Kostroma Oblast Law, ‘*On Amendments to the Law of the Kostroma Region on Guarantees of Child Rights in the Kostroma Region and the Code of Administrative Offences of the Kostroma Region*’, 15 February 2012, No. 193-5-ZKO.

²³⁷ Magadan Oblast Law, ‘*On Amendments to Certain Laws of the Magadan Region in Terms of the Protection of Minors from Factors that Negatively Affect Their Physical, Intellectual, Mental, Spiritual and Moral Development*’, 9 June 2012, No. 1507-OZ.

²³⁸ Novosibirsk Oblast Law, ‘*On Amending Novosibirsk Oblast Laws*’, 14 June 2012, No. 226-OZ.

²³⁹ Samara Oblast Law, ‘*On Administrative Offences in the Samara Oblast*’, 10 July 2012, No. 75-GD.

²⁴⁰ Vladimir Oblast Law, ‘*On Amendments to Article 5 of the Law of Vladimir Region on Measures for the Protection of Morals and Health of Children in the Vladimir Region*’, 13 November 2012, No. 145-OZ.

²⁴¹ Kaliningrad Oblast Law, ‘*On Amendments to the Law of the Kaliningrad Region ‘Kaliningrad Region Code of Administrative Offences’*’, 30 November 2013, No. 196.

²⁴² Sverdlovsk Oblast Law, ‘*On Amendments to the Regional Law on Protection of Rights of the Child*’, 17 October 2013, No. 96-OZ.

²⁴³ Krasnodar Kray Law, ‘*On Amendments to Certain Legislative Acts of Krasnodar Territory in Strengthening the Protection of Health and Spiritual and Moral Development of Children*’, 3 July 2012, No. 2535-KZ.

²⁴⁴ Law of the Republic of Bashkortostan, ‘*On Amending the Law of the Republic of Bashkortostan on Basic Guarantees of Children’s Rights in the Republic of Bashkortostan*’, 23 July 2012, No. 581-Z.

²⁴⁵ Law of the Republic of Dagestan, ‘*On Amendments to the Law of the Republic of Dagestan on Protection of Children’s Rights in the Republic of Dagestan*’, 19 March 2014, No. 17.

²⁴⁶ Law of St. Petersburg, ‘*On Amendments to the Law of St. Petersburg on Administrative Offences in St. Petersburg*’, 7 March 2012, No. 108-18.

²⁴⁷ Venice Commission, *op cit.* 78, p. 11; Communication: *Fedotova v. Russian Federation*, New York: ICCPR (15 October – 2 November 2012), § 10.2. Available:

<https://www2.ohchr.org/English/bodies/hrc/docs/CCPR.C.106.D.1932.2010.doc> (Obtained on 2019-03-10)

²⁴⁸ Bartenev, Dmitry: *LGBT rights in Russia and European human rights standards*. In: Mälksoo, Lauri, Benedek, Wolfgang: *Russia and the European Court of Human Rights: The Strasbourg Effect*, Cambridge: Cambridge University Press (2018) 326-351, p. 335f; Johnson, Paul: ‘*Homosexual Propaganda*’ Laws in the Russian Federation: Are They In Violation of the European Convention of Human Rights?, York: University of York, 2015, p. 41.

The Kostroma, Samara and St. Petersburg laws used the most excessive language of all regional laws, explicitly banning “the propaganda of homosexuality and paedophilia among minors” under the same article of their respective laws, i.e. directly linking LGBT to the abuse of minors.²⁴⁹ Sperling noted that the St. Petersburg law’s supporters echoed its sponsor, Vitaly Milonov, in arguing that the bill was “simply defending children”.²⁵⁰

Regional laws were also contemplated in several parts of the Russian Federation: in the oblasts of Leningrad, Kirov, Primorye, Komi, Sverdlovsk, Rostov, Tyumen, Voronezh, Irkutsk, Kurgan, Kursk, Murmansk, Omsk, Krasnoyarsk, Astrakhan, Penza, Vladimir; in the City of Moscow; and in the Republics of Sakha (Yakutia) and Mari El.²⁵¹ Before any of them were adopted, the federal “gay propaganda” law entered into force in 2013.

3.2. Federal “gay propaganda” law

The Russian federal law *‘For the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values’* was introduced to the Russian State Duma by MP Yelena Mizulina and was unanimously approved on 11 June 2013; it was signed into law on 30 June 2013 by President Vladimir Putin.²⁵² The federal law made amendments to three laws:

- 1) it amended the law *‘On Basic Guarantees of the Rights of the Child in the Russian Federation’* to include a provision protecting children from information “harmful to their health, moral and spiritual development”,²⁵³
- 2) it amended the law *‘On Protection of Children from Information Harmful to their Health and Development’* to include a prohibition on dissemination to minors of information that “denies family values, promotes non-traditional sexual relationships and develops disrespect for parents and/or other members of the family”,²⁵⁴
- 3) Article 6.21 was introduced in the Code of Administrative Offences providing administrative liability for “propaganda of non-traditional sexual relationships among minors” and imposed an administrative fine.²⁵⁵

According to Lauri Mälksoo and Wolfgang Benedek, the protection of children has only been a pretext, while in reality the law “constituted a reaction by the state to claims of visibility by Russian LGBT activists and their rights-based language to justify such claims”. They point out the irony in that Russian legislators contradict the ECHR, but at the same time have argued for the introduction of the law by using the language of the ECtHR. The legislators have assessed “the need to restrict homosexual practices in a democratic society”, referring to the protection

²⁴⁹ Report: *The Situation of Lesbian, Gay, Bisexual and Transgender People in the Russian Federation (Last Three Months 2011 – First Half 2012)*, St. Petersburg: Russian LGBT Network (2013), pp. 34-38. Available: https://www.lgbtnet.org/sites/default/files/mhg_eng_bez_glossariya_0.pdf (Obtained on 2019-03-10)

²⁵⁰ Sperling, *op cit.* 8, p. 161.

²⁵¹ Report, *op cit.* 249, pp. 40-51.

²⁵² Federal Law of the Russian Federation *‘On Amendments to Article 5 of the Federal Law ‘On Protection of Children from Information Harmful to Their Health and Development’, and Some Legislative Acts of the Russian Federation in Order to Protect Children from Information that Promotes the Negation of Traditional Family Values’*, 29 June 2013, No. 135-FZ.

²⁵³ Federal Law of the Russian Federation *‘On Basic Guarantees of the Rights of the Child in the Russian Federation’*, 24 July 1998, No. 124-FZ, Article 14(1).

²⁵⁴ Federal Law of the Russian Federation *‘On Protection of Children from Information Harmful to their Health and Development’*, 29 December 2010, No. 436-FZ, Article 5(2)(4).

²⁵⁵ Russian Federation Code of Administrative Offences, 30 December 2001, No. 195-FZ, Article 6.21.

of children from the consequences of homosexuality as a pressing social need, also pointing out the lack of unanimity within the Council of Europe regarding the “moral climate”.²⁵⁶

3.3. The Russian Constitutional Court’s interpretation of the “gay propaganda” legislation

The Russian courts have relied on the kinds of arguments mentioned above,²⁵⁷ and the Supreme Court of the Russian Federation has even tried to reconcile the restriction imposed by the ECtHR in *Alekseyev v. Russia* with upholding the legislation:

“Prohibition of propaganda of homosexuality does not prevent realisation of the right to receive and impart information of a general, neutral content about non-traditional sexual relations, or to hold public events in the manner prescribed by law, including open public debates about the social status of sexual minorities, without imposing attitudes on minors who are not able to critically assess such information independently because of their age.”²⁵⁸

The Supreme Court answered to the criticism that the law is vague, and concluded that the law is instead crystal clear in that it prohibits “active public actions [...] aimed at forming an attractive image of non-traditional sexual orientation, and a distorted perception of the social equivalence of traditional and non-traditional marital relations”. The Supreme Court held that the law did not in any way prohibit or condemn homosexual relationships, therefore was not discriminatory, and that it was a justified interference with the freedom of expression.²⁵⁹

Three petitions have been heard against the regional laws (since then abolished) and the federal law by the Constitutional Court of the Russian Federation. The applicants’ main arguments have been that: (1) the legislation excluded dissemination among minors of any information about homosexuality, including information about the social equivalence of close relationships between persons of the same sex; (2) the aim of protecting public morals and the development of children was not legitimate as homosexuality is not immoral; (3) the ban was based on prejudice towards non-heterosexual relationships, infringed on the dignity of LGBT persons and amounted to discrimination on the basis of sexual orientation.²⁶⁰

The Constitutional Court judged that such legislation (here referring to Article 6.21 of the Code of Administrative Offences) does not contradict the Russian Constitution, because it has the aims of “protecting such constitutional values as family and childhood” and “preventing harm to the health and moral and spiritual development of minors”. The Court continued by stating that it does not “imply interference in the sphere of individual autonomy, including the sexual self-determination of a person” nor has the aim of “prohibiting, or official rapprochement, of non-traditional sexual relationships” or to stifle “impartial public discussion of questions related to the legal status of sexual minorities, or the use [...] of all lawful ways of expressing their position on such questions and protection of their rights and lawful interests, including the organisation and holding of public assemblies”. In conclusion, the law prohibits public actions that have the aim of “disseminating information which popularises non-traditional sexual

²⁵⁶ Bartenev, *op cit.* 248, p. 336f.

²⁵⁷ For a detailed overview, see the report *Justice or Complicity?*, *op cit.* 234.

²⁵⁸ Bartenev, *op cit.* 248, p. 338; Judgment of the RF Supreme Court, 15 August 2012, No. 1-A11112-11.

²⁵⁹ *Ibid.*, p. 339; Judgment No. 1-A11112-11, *op cit.* 258.

²⁶⁰ *Ibid.*, p. 339; Judgment of the Russian Constitutional Court [Russian CC], 19 January 2011, No. 151-O-O (regarding the Ryazan Oblast law); Judgment of the Russian CC, 24 October 2013, No. 1718-O (regarding the St. Petersburg law); and Judgment of the Russian CC, 23 September 2014, No. 24-II (regarding the federal law).

relationships among minors or imposes such relationships on them.” This interpretation of the law is binding on the lower domestic courts.²⁶¹

The Constitutional Court also explained that the principles of pluralism of opinions and freedom of speech mean that no one can be denied the right to publicly discuss issues or to raise awareness of violations of their rights through public assemblies or in the media. This includes situations when the ideas professed contradict the “moral norms” of the majority. However, the Court also determined that constitutional values are “predetermined by the historical, cultural and other traditions of the multi-national population of Russia” and that the dissemination of “beliefs or preferences with regard to sexual orientation or concrete forms of sexual relationships shall not impinge on others’ dignity or challenge public morals as understood by Russian society”.²⁶² In order to protect “public morals” and “traditional” notions of family “based in the social and historical context of Russian society”, the Court stated that:

“[...] the Russian Federation has the right to decide individual questions of legislative regulation in these fields, broaching sexual and inter-personal relationships connected with them, not denying the necessity to take into account the requirements of the Constitution and international law both with regard to the individual autonomy of a person and with regard to the freedom of dissemination of information.”²⁶³

The Constitutional Court further explained that imposing restrictions to protect children’s interests does not constitute a general restriction on freedom of expression. The Court then considered the allegation of the discriminatory nature of the legislation, acknowledging the existence of prejudices towards the “homosexual minority in Russian society” but reiterating that the aim of overcoming negative attitudes cannot justify “imposition of social views departing from those generally recognised in Russian society”.²⁶⁴

The term “non-traditional sexual relationships” was originally used by the Constitutional Court to describe physical relations only, but the Court has then started using this term to also describe sexual orientation, sexual identity, and by creating what I mean is a false dichotomy between these “non-traditional relationships” and “traditional family values”. Another issue is that the Court’s statement demonstrates that public information about LGBT issues is *de facto* illegal, by using children’s interests as a pretext for this ban, and at the same time stating that one cannot publically challenge “traditional” understandings of public moral, because this would “impinge on others” a contradicting moral view.

4. Other legislation

4.1. The 2012 ‘Law on Foreign Agents’

On July 20 2012, the ‘Law on Foreign Agents’²⁶⁵ was adopted, according to which organisations that receive foreign funding and engage in ‘political activities’ need to register as “foreign agents”, and which stipulates “extensive annual audits, quarterly financial reporting

²⁶¹ Bartenev, *op cit.* 248, p. 340.

²⁶² Ibid., p. 341; Judgment of the Russian CC, 23 September 2014, No. 24-II, para. 2.2.

²⁶³ Bartenev, *op cit.* 248, p. 341; Judgment No. 24-II, para. 3.

²⁶⁴ Judgment No. 24-II, para. 3.2.

²⁶⁵ Federal Law of the Russian Federation ‘On Making Amendments to Certain Legislative Acts of the Russian Federation Regarding the Regulation of Activities of Non-Commercial Organisations Performing the Functions of Foreign Agents’, 13 July 2012, No. 121-FZ.

and voluminous reporting on all activities every half year”. Failure to respect these regulations can lead to the closing of an organisation.²⁶⁶

Kerttu Mäger writes that this law has mainly affected human rights NGOs in Russia that encounter more administrative difficulties, especially for receiving foreign funding.²⁶⁷ The Russian LGBT Network has reported that the activities of LGBT rights organisations in Russia have been severely complicated by the “foreign agents” law, which impose legal restriction on activities such as distributing materials, organising events, providing assistance to teenagers, and with the latter also to receive funding, especially foreign funding.²⁶⁸

4.2. The 2013 draft law ‘*On the protection of religious feelings*’ and the subsequent amendment to the Criminal Code

In 2013, a law ‘*On the protection of religious feelings*’ was drafted by the majority party United Russia in the Duma following the Pussy Riot incident (see section IV(2.4) below). The aim of the law was to introduce harsher punishment for actions against “religious feelings and objects”. The first reading of the bill was passed in the State Duma on 11 April 2013 but received harsh criticism both on the domestic and international arena.²⁶⁹

The law was reworked and, when approved in its final reading on 15 April 2013, no longer introduced a new “blasphemy” paragraph in the penal code. Instead, it added new provisions to article 148 on “the violation of the right to freedom of conscience and freedom of religion”. On 1 July 2013, this amendment to the 1996 Criminal Code entered into force which provides that “acts in public, demonstration of clear disrespect (*iavnnoe neuvazhenie*) for society and committed with the intent to insult the religious feelings of believers” are illegal and punishable by fines of up to 300,000 roubles or prison sentences of up to one year.²⁷⁰ If such acts are committed “in a specially designated place of worship”, they may be punishable by fines of up to 500,000 roubles or prison sentences of up to three years.²⁷¹

II. The relationship between the Russian Constitutional Court and the ECtHR

The Russian Constitutional Court has displayed an ambivalent approach towards the authority of the ECtHR. The Russian Constitutional Court ruled on 5 February 2007 that:

²⁶⁶ Venice Commission: *Opinion on Federal Law N. 121-FZ on Non-Commercial Organisations (“Law on Foreign Agents”)*, Venice: European Commission for Democracy Through Law (99th Plenary Session, 13-14 June 2014), 10ff. Available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdlad\(2014\)025-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdlad(2014)025-e) (Obtained on 2019-03-10)

²⁶⁷ Mäger, Kerttu: *Russia’s Illiberal Ideology and Its Influences on the Legislation in the Sphere of Civil and Political Rights*, Baltic Yearbook of International Law 15(1) (2016), 148-168, p. 159f.

²⁶⁸ Report: *Monitoring of Discrimination and Violence Based on Sexual Orientation and Gender Identity in Russia in 2016-17*, St. Petersburg: Russian LGBT Network (2018), p. 32. Available: <https://lgbtnet.org/sites/default/files/discrimination.pdf> (Obtained on 2019-03-10)

²⁶⁹ News article: ‘*Blasphemy Bill*’ *Passes Duma Unanimously*, Moscow: The Moscow Times (11 June 2013). Available: <https://www.themoscowtimes.com/2013/06/11/blasphemy-bill-passes-duma-unanimously-a24862> (Obtained on 2019-03-10)

²⁷⁰ Mälksoo, *op. cit.* 204, p. 26.; Amendment to Art. 148(1) RF Criminal Code, 2 July 2013, No. 6117.

²⁷¹ Amendment No. 6117., *op. cit.* 270.

“[...] the decisions of the European Court of Human Rights [...] are an integral part of the Russian legal system, and as such must be taken into account by the federal legislator in regulating social relations and by the law-application authorities when applying the relevant law provisions.”²⁷²

On 14 July 2015, the Constitutional Court stated that the Russian Constitution has precedence over the ECHR, and that it does not have to follow the ECtHR’s decisions when they contradict the Constitution.²⁷³ Usually, the Russian approach has been to not follow the ECtHR’s decisions when it has disagreed with the outcome, but to only pay compensation to applicants when they have succeeded in court hearings. The reason has been that the price tags are usually low. This was not the case when the ECtHR decided in *OAO Neftyanaya Kompaniya Yukos v. Russia*²⁷⁴ and the price tag was very high. Following the *Yukos* case, the Constitutional Court prohibited the Russian government to enforce the decision of the ECtHR, i.e. to pay compensation.²⁷⁵

Mälksoo and Benedek reasoned that the Council of Europe’s room for persuading the Russian government to follow through on the ECtHR’s decisions may sometimes be narrow, no matter however well-reasoned the decisions are if they are not convincing for the recipient country. Russia has previously reacted to cases related to the Second World War in the *Kononov* case,²⁷⁶ and to the conflict in Transdnistria in the *Ilaşcu* and *Catan* cases.²⁷⁷ The authors concluded that Moscow has interpreted the Court’s decisions in these cases as political.²⁷⁸

The Constitutional Court has never explicitly questioned the legitimacy of ECtHR judgments relating to LGBT rights, and has cited the *Alekseyev v. Russia* judgment on occasions to emphasise the importance of the freedom of assembly for minority groups²⁷⁹ and the positive duty on the state to ensure the realisation of the right to freedom of assembly.²⁸⁰ The Court has

²⁷² Judgment of the Russian CC, 5 February 2007, No 2-II, ‘*On the Matter of Constitutionality Test of the Provisions of Articles 16, 20, 112, 336, 376, 377, 380, 381, 382, 383, 387 and 389 of the Civil Procedure Code in Connection with an Enquiry from the Cabinet of the Republic of Tatarstan, Complaints from the Open Joint-Stock Companies Nizhnekamskneftekhim and Khakasenergo, as well as Complaints from a Number of Persons*’, section 2.1, para. 2 of the ruling; Motoc, Iulia and Ziemele, Ineta (eds.): *The Impact of the ECHR of Democratic Change in Central and Eastern Europe: Judicial Perspectives*, Cambridge University Press, 2016, p. 357.

²⁷³ News article: *14 iyulya 2015 goda Konstitutsionnyy Sud RF postanovil, chto resheniya YESPCH dolzhny ispolnyat'sya s uchetom verkhovnstva Konstitutsii RF* (Russian) [On July 14, 2015, the Constitutional Court of the Russian Federation ruled that the decisions of the ECHR should be implemented taking into account the supremacy of the Constitution of the Russian Federation], St. Petersburg: Russian CC (2015). Available: <http://www.ksrf.ru/ru/News/Pages/ViewItem.aspx?ParamId=3244> (Obtained on 2019-03-10)

²⁷⁴ ECtHR (Former First Section), Judgment of 31 July 2014 (Final on 15 December 2014), *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04.

²⁷⁵ Philippov, Ivan: *Russian Constitutional court denies enforcement of ECHR decision on Yukos*, CIS Arbitration Forum (2017). Available: <http://www.cisarbitration.com/2017/01/25/russian-constitutional-court-denies-enforcement-of-echr-decision-on-yukos/> (Obtained on 2019-03-10)

²⁷⁶ ECtHR (Grand Chamber), Judgment of 17 May 2010, *Kononov v. Latvia*, no. 36376/04; ECtHR (Third section), Judgment of 24 July 2008, *Kononov v. Latvia*, no. 36376/04. In the third section, a majority found that Latvia had violated a Soviet war veteran’s human rights by convicting him of war crimes, but this decision was later repealed by the Grand Chamber.

²⁷⁷ *Ilaşcu and Others v. Moldova and Russia*, *op. cit.* 46; ECtHR (Grand Chamber), Judgment of 19 October 2012, *Catan and Others v. Moldova and Russia*, nos. 43370/04, 8252/05, and 18454/06. In both these cases, the ECtHR decided that the Russian Federation had jurisdiction within Transdnistria (that is *de jure* part of the Republic of Moldova) because it has armed forces posted in the region.

²⁷⁸ Bartenev, *op. cit.* 248, p. 22f.

²⁷⁹ Judgment of the Russian CC, 14 February 2013, No. 4-II, section 1.2; Judgment of the Russian CC, 10 February 2017, No. 2-II, section 2.

²⁸⁰ Judgment of the Russian CC, 18 May 2012, No. 12-II, section 2.

even referred to the *Alekseyev* case to state that discrimination on the basis of sexual orientation is unlawful²⁸¹ while at the same time approving of the “gay propaganda” legislation.²⁸²

One example mentioned by Dmitry Bartenev is that Professor Nikolai Bondar – who is a judge of the Constitutional Court – has criticised “juridification” (by which he seems to be referring to rights-based litigation to change social realities) which ignores:

“the active influence of socio-cultural, moral, ethical and national, ethnic or religious factors on the legal life of a society” [and which may result in] “losing centuries-old cultural, including Christian, traditions of the West, and thus proclamation of new ‘unconstitutional’ values of same-sex families, absolute priority of sexual minorities’ rights, and freedom of propaganda of non-traditional sexual relations among minors.”²⁸³

According to Dorothea Schönfeld, admitting Russia to the Council of Europe was seen as a means to integrate Russia into the human rights regime and to support domestic liberal forces in Russia. However, she also identifies that the inherent problem is that Russia was admitted without meeting the formal standards. She quotes William D. Jackson who stated that:

“Once a state has been granted admission without having met the Council’s formal standards, it often faces less pressure to complete the array of reforms necessary to substantively achieve the standards. The implications of Russia’s premature admission [...] have been [...] apparent.”²⁸⁴

Schönfeld continued by stating that the stronger a state becomes, the less incentive will it have to implement external proposals. The Council of Europe can then either: (1) suspend the voting rights of the Russian representatives; and/or (2) ask the Committee of Ministers to expel Russia from the Council of Europe under Article 8 of the Treaty of London.²⁸⁵ She points out that expulsion has only been used once, after the military coup in Greece in 1967, and it is not in the interest of the Council of Europe and some of its members to lose the influence on Russia.²⁸⁶

III. The situation for LGBT rights activists in the Russian Federation in relation to the right to freedom of assembly

In this section, I provide statistics on attitudes towards LGBT people; an overview of experiences of organising LGBT rights events; and information on cases of hate speech and manifestations of intolerance and prejudice by public officials and religious leaders, to evaluate how the legal situation for LGBT rights has developed in context of the freedom of assembly.

1. Statistics

According to ILGA Europe’s Rainbow Europe Map 2018 (based on the situation in the previous year), which ranks 49 countries in Europe on their LGBTI equality laws and policies, the

²⁸¹ Judgment of the Russian CC, 24 October 2013, No. 1718-O, section 2.1.

²⁸² Bartenev, *op. cit.* 248, p. 347.

²⁸³ *Ibid.*, p. 349.

²⁸⁴ Mälksoo, *op. cit.* 204, p. 121; Jackson, William D.: “*Russia and the Council of Europe: The Perils of Premature Admission*”, *Problems of Post-Communism* 51(5) (2004), 23-33, at 24ff.

²⁸⁵ *Statute of the Council of Europe*, Strasbourg: Council of Europe (1949). Available: <https://rm.coe.int/1680306052> (Obtained on 2019-03-10)

²⁸⁶ Mälksoo, *op. cit.* 204, p. 121.

Russian Federation achieved rank 45, with an overall score of 11 %.²⁸⁷ The scores for the five preceding years (in per cent) are: 6 (2017);²⁸⁸ 7 (2016);²⁸⁹ 8 (2015);²⁹⁰ 6 (2014);²⁹¹ 7 (2013).²⁹²

Levada-Center is the only independent non-governmental polling and sociological research centre in Russia. In March 2015, Levada conducted a survey on homophobic attitudes. The survey was conducted on among 800 people over the age of 18 in both urban and rural settings, in 134 localities of 46 of the country's regions.²⁹³

It is notable that 37 % considered homosexuality to be “an illness, which must be medically treated”, compared to 34 % in February 2013. Only 11 % regarded it as a “sexual orientation from birth, which merits the same rights as heterosexual orientation”, compared to 16 % in 2013. Regarding their views of how homosexuals should be treated: 18 % advocated for prosecution (13 % in April 2013); 37 % medical treatment (38 % in 2013); 7 % thought that homosexuals should be “helped so they can live with dignity” (8 % in 2013); 25 % that they “should be left in peace” (31 % in 2013); and 13 % did not have a clear opinion (10 % in 2013). Regarding attitudes towards transsexuals: 36 % related indignantly; 30 % irritably; 23 % without any particular motion; 6 % tolerably; and only 2 % favourably.

On the topic of whether adults have the right to engage in mutual relations with someone of the same gender: only 2 % answered “definitely yes” (5 % in February 2013); 17 % “probably yes” (18 % in 2013); 23 % “probably no” (25 % in 2013); 35 % “definitely no” (same in 2013); and 23 % did not have a clear opinion (17 % in 2013).

On the topic of whether “meetings and rallies in defence of rights for sexual minorities” constituted “homosexual propaganda”: 50 % answered “definitely yes” (47 % in February 2013); 34 % “probably yes” (same in 2013); 7 % “probably no” (9 % in 2013); 4 % “definitely no” (same in 2013); and 5 % did not have a clear opinion (same in 2013). On whether “gay pride” constituted “homosexual propaganda”: 59 % answered “definitely yes” (56 % in 2013); 28 % “probably yes” (27 % in 2013); 6 % “probably no” (7 % in 2013); 3 % “definitely no” (4 % in 2013); and 4 % did not have a clear opinion (6 % in 2013).

The majority (63 %; compared to 52 % in February 2013) was in favour of “gay propaganda” legislation. On the topic of what is the primary motivation behind “gay propaganda” legislation: 67 % answered “concern for the population's morals; strengthening moral values” (compared to 60 % in 2013); 14 % answered “an attempt to divert public attention from corruption scandals; reduce confidence in the authorities; and increase opposition activity” (18 % in 2013); 7 % answered “an attempt to divide society; ignite hostile sentiments in people against those who are different” (8 % in 2013); and 12 % that it is difficult to say (14 % in 2013).

²⁸⁷ Index: *Rainbow Europe*, Brussels: ILGA Europe (2018). Available: <https://www.ilga-europe.org/resources/rainbow-europe/rainbow-europe-2018> (Obtained on 2019-03-10)

²⁸⁸ Index: *Rainbow Europe*, Brussels: ILGA Europe (2017). Available: <https://www.ilga-europe.org/resources/rainbow-europe/rainbow-europe-2017> (Obtained on 2019-03-10)

²⁸⁹ Index: *Rainbow Europe*, Brussels: ILGA Europe (2016). Available: <https://www.ilga-europe.org/resources/rainbow-europe/2016> (Obtained on 2019-03-10)

²⁹⁰ Index: *Rainbow Europe*, Brussels: ILGA Europe (2015). Available: <https://www.ilga-europe.org/resources/rainbow-europe/2015> (Obtained on 2019-03-10)

²⁹¹ Index: *Rainbow Europe*, Brussels: ILGA Europe (2014). Available: <https://www.ilga-europe.org/resources/rainbow-europe/rainbow-europe-2014> (Obtained on 2019-03-10)

²⁹² Index: *Rainbow Europe*, Brussels: ILGA Europe (2013). Available: <https://www.ilga-europe.org/resources/rainbow-europe/rainbow-europe-package-2013> (Obtained on 2019-03-10)

²⁹³ Statistics: *Homophobia*, Moscow: Levada-Center (2015). Available: <https://www.levada.ru/en/2015/06/10/homophobia/> (Obtained on 2019-03-10)

2. Experiences of organising LGBT rights demonstrations in Russia

Masha Gessen explained in 1995 that prior to the repeal of the anti-sodomy statute by Yeltsin in 1993, the law was used to deny registration to gay and lesbian organisations. She holds the view that the system is designed to grant large groups with many resources greater access than poorer, smaller organisations, especially when representing marginalised groups such as the LGB community. According to Gessen, the biggest threat to the freedom of association and assembly for LGB people is violence, referring to violent incidents committed by or with the complicity of the police. A few gay venues opened in Moscow and St. Petersburg in the 1990s, and the organisers had to advise their guests not to leave the events until they had ended, due to the risk of violence occurring right outside gay and lesbian discotheques.²⁹⁴

Authorities in the early 1990s refused the LGB organisation Tchaikovsky Foundation the right to hold peaceful assemblies, after the repeal of the statute. On two occasions in the summer of 1993, the St. Petersburg City Council denied the Tchaikovsky Foundation's requests for permits for public events. On the first occasion the Foundation had asked for a permission to hold a public march in conjunction with its June Christopher Street Days Festival and had explained in its request that "the march will be conducted with the purpose of attracting public attention to the issue of AIDS and the rights of people with HIV. It is also a statement in favour of the rights of homosexuals and against homophobia in our society".²⁹⁵

According to St. Petersburg's local regulations, they should have received an answer within a month, but only two months after their request they received a reply forbidding the march with reference to that it would disrupt the traffic. On the second occasion, the Tchaikovsky Foundation filed an application to receive a permit for an outdoor concert of an American square-dancing group, and received a reply from the Mayor's office saying: "Thank you for your offer of a charitable concert, but I consider them to be expedient".²⁹⁶

In the 21st century, the main conflict between the Russian state and LGBT community has taken place since 2006, when Moscow Pride was first to be held. The event was organised by the LGBT rights organisation Gayrussia.ru, headed by Nikolai Alekseyev, with other key persons being Nikolai Bayev, Irina Fet, Anton Sutyagin and Yuri Gavrikov. Then-Mayor of Moscow Yuri Luzhkov decided to ban the event, stating in 2007 that such an event is a "satanic act".²⁹⁷

Moscow City Hall continued to uphold the ban. When trying to hold marches anyway, the organisers were attacked by violent mobs in 2006-08, and in 2009 changed the location at last minute to avoid being attacked by "counter-demonstrators".²⁹⁸ In June 2012, Moscow's city and district courts decided to ban gay pride parades in Moscow until at least the year 2112.²⁹⁹ The British LGBT rights activist Peter Tatchell, director of the LGBT rights NGO Peter Tatchell Foundation, participated in Moscow Pride between 2006-2011, and states on the Foundation's website that he has "been bashed and arrested for participating in successive

²⁹⁴ Gessen, *op. cit.* 193, pp. 40-44.

²⁹⁵ *Ibid.*, p. 42f.

²⁹⁶ *Ibid.*

²⁹⁷ News article: *Moscow Mayor Vows To Ban 'Satanic' Gay Parade*, Prague: Radio Free Europe/Radio Liberty (2007). Available: <https://www.rferl.org/a/1074362.html> (Obtained on 2019-03-10)

²⁹⁸ Report, *op. cit.* 190, pp. 12-14.

²⁹⁹ News article: *Not the Onion: Moscow Bans Gay Pride for Next 100 Years*, Boston: The Atlantic (2012). Available: <https://www.theatlantic.com/international/archive/2012/06/not-the-onion-moscow-bans-gay-pride-for-next-100-years/258296/> (Obtained on 2019-03-10)

Moscow Gay Pride parades, from 2006 to 2011 – my worst assault being in 2007 when I was beaten almost unconscious and was left with minor brain and eye injuries”.³⁰⁰

The Russian LGBT Network started in 2006 and is headed by Igor Kochetkov. The organisation has published reports on the situation for LGBT people in Russia since 2008 and today has 13 regional branches. In its first report, the Network asserted that the ban in 2006-08 on LGBT rights demonstrations in Moscow was motivated from the authorities’ side with statements that the goals of the events were unacceptable and by referring to “religious dogmas as if they were binding norms”.³⁰¹

On 25 April 2008, the Moscow Pride organisers received a refusal, in which the deputy head of the Moscow Directorate for Security Activity Coordination, Vasily Oleinik, had referred to Article 11 ECHR “according to which the right to peaceful assembly can be restricted in the interests of public order, in order to prevent disturbances, to protect health and morals, as well as the rights and freedoms of other people, I would like to inform you that the mentioned marches are not authorised”.³⁰² This is interesting since this was after the *Bączkowski* case and the ECtHR had already explained that Article 11 is not to be interpreted in this manner.

On 28 April 2008, the organisers appealed in Tver District Court and on 16 May sent a letter to President Dmitry Medvedev, asking him to intervene against the Mayor of Moscow, attaching an application to the federal authorities to arrange a march in Alexandrovsky Garden. On 28 May, they received information from the Administration of the President’s office that they could carry out a demonstration that was to be protected by the police. On 1 June, they instead gathered on Bolshaya Nikitinskaya Street which was not the announced place, and managed to hold a demonstration for about 20 minutes.³⁰³

The Russian LGBT Network also reported that two NGOs working with LGBT issues, Rainbow House in Tyumen and Favourite in Omsk, were refused state registration on several occasions between 2005-07, mainly with reference to that their activities would be “promoting non-traditional sexual orientation [that] could result in the subversion of Russian society and the state”. Aleksandr Zhdanov, president of Rainbow House, brought his case to the Central District Court of Tyumen, where his claims were dismissed. He appealed to Tyumen Oblast Court that upheld the district court’s decision. Zhdanov then brought the case to Strasbourg in September 2008, and asserted to the ECtHR that Rainbow House was denied a fair trial, that its freedom of association was restricted in an unlawful manner, and that the denial had been done in a discriminatory manner by the authorities. The case is still pending in the ECtHR.³⁰⁴

On 30 March 2009, Irina Fedotova and Nikolai Bayev displayed posters that declared “Homosexuality is normal” and “I am proud of my homosexuality” near a school building in Ryazan. On 6 April 2009, they were convicted of an administrative offence under the Ryazan

³⁰⁰ Article: *Russian Anti-Gay Law Condemned*, London: Peter Tatchell Foundation (2013). Available: <https://www.petertatchellfoundation.org/russian-anti-gay-law-condemned/> (Obtained on 2019-03-10)

³⁰¹ Report: *The situation of LGBT people in the Russian Federation, 2008*, St. Petersburg: Russian LGBT Network (2008), p. 50. Available: <https://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/situation-lgbt-people-russian-federation-2008> (Obtained on 2019-03-10)

³⁰² Ibid.

³⁰³ Ibid., p. 51.

³⁰⁴ Ibid.; ECtHR (First Section), Statement of Facts, lodged on 3 March 2008, *Aleksandr Zhdanov and Rainbow House against Russia*, no. 12200/08; Report: *An Uncivil Approach to Civil Society: Continuing State Curbs on Independent NGOs and Activists in Russia*, New York: Human Rights Watch (2009), p. 31. Available: <https://www.hrw.org/sites/default/files/reports/russia0609web.pdf> (Obtained on 2019-03-10)

Law on Administrative Offences for displaying the posters. They appealed the case and was rejected by the Oktyabrsky District Court on 14 May 2009, then appealed to the Constitutional Court that dismissed their case.³⁰⁵ In 2017, the ECtHR decided in favour of the applicants in the case *Bayev and Others v. Russia* following this incident (see international law section).

In the late 2000s through 2010, Russian LGBT activists discussed their views on whether organising LGBT Pride marches was the right way to go in Russia. Representatives of some LGBT rights NGOs reasoned, *inter alia*, that: (1) according to the Rainbow Association, because of the violent counter-demonstrations “the whole LGBT community becomes being seen as the one creating troubles”; (2) a representative from the NGO “FtM Phoenix” reasoned that holding Pride marches is a way to confront and provoke other people instead of building social cohesion; (3) according to the organisation “Wings”, such provocation [from the LGBT community] has made the situation worse and worse, compared to before 2006; and (4) in 2010, the Russian LGBT Network and the organisation “Coming Out” reasoned that “it is too soon for Russia to have Gay Pride, it is not the time yet”.³⁰⁶

In 2010, Igor Kon assumed an intermediate position, stating that Moscow Pride might be problematic, but also reminding that:

"The first Pride in 2006 was a result of growing homophobia - more and more attacks, and nothing was being done. And it is important to remember that the growth of political homophobia happened before the Pride."³⁰⁷

Also in 2010, Mr. Alekseyev – at the time director of the Russian LGBT human rights project “GayRussia” – stated that:

“The Moscow Pride has been and is still today, the only LGBT event which makes it possible to discuss our issues in the media. The repeal of the MSM [Men who have Sex with Men, my note] blood-ban, the campaign for same-sex marriage, the campaign against hate speech, the campaign for freedom of association and freedom of expression that we all launched during these years have all hit the media because of Moscow Pride. Saying that Moscow Pride increased homophobia is not only contradicting a recent opinion poll published after 5 years of Moscow Pride but it is also a re-write of the history.”³⁰⁸

In 2010, the ECtHR decided in favour of Nikolai Alekseyev against the Russian state in the case *Alekseyev v. Russia*. Still, the Mayor of Moscow banned Moscow Pride again in 2011.³⁰⁹ Also, in May 2012, Mr. Alekseyev was convicted under the St. Petersburg law on Administrative Offences, for an incident on 12 April 2012. He had stood in front of the city administration holding a banner that stated: “Homosexuality is not a perversion. Grass hockey and ice ballet are” and was convicted of an administrative offence. He appealed his case up to the Constitutional Court, which judged that “although Russian law protects people from discrimination on grounds of their sexual orientation” it went on to say that “this did not exclude limiting the realisation of rights in order to protect the rights and freedoms of others in

³⁰⁵ Report, *op. cit.* 234, p. 59f.

³⁰⁶ Report, *op. cit.* 190, pp. 15f.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Article: *Moscow Mayor Bans Gay Pride Parade Again*, London: Peter Tatchell Foundation (2011).

Available: <https://www.petertatchellfoundation.org/moscow-mayor-bans-gay-pride-parade-again/> (Obtained on 2019-03-10)

accordance with Articles 17(3)111 and 55(3) of the Federal Constitution” and that “this was a matter of balancing competing constitutional values”.³¹⁰

On 7 April 2012, lawyer Sergey Kondrashov staged a one-person picket in St. Petersburg to mark the “Day of Silence”. He displayed a placard with the message “A friend of our family is lesbian. My wife and I love and respect her; her way of life is as normal as ours, and her family is as socially valuable as ours”. He was arrested for promoting homosexuality (under the St. Petersburg law) and failure to obey a police order. The evidence to support his committed offence of “promoting homosexuality” was lost so he was only charged for the failure to obey a police order. Mariya Kozlovskaya sarcastically remarked that he “failed to obey a police order to stop the offence he did not commit”. On the same date, Igor Kochetkov had also staged a one-person picket holding a placard with the message “No to silencing hate crimes against gays and lesbians”. The police report stating that he had committed “promotion of homosexuality” was lost so the court dismissed the charges.³¹¹

On 1 May 2012, LGBT activists participated in an authorised march with a democratic column in St. Petersburg. They carried rainbow flags and placards with messages such as “Homophobia is against the law”. Only LGBT activists of the hundreds of participants were arrested. 17 individuals were charged with participation in an unauthorised rally. For five of them, the court dropped the cases while the court hearings for the other 12 activists never took place.³¹²

On 10 April 2013, the LGBT rights organisation “Coming Out” sent a document on the violation of the rights to freedom of assembly and freedom of expression occurring in St. Petersburg, to the Russian Ombudsman and St. Petersburg Regional Ombudsman. It contained about 30 applications, of which only two were approved by the authorities, that used formal and substantive grounds for refusing applications. In the report, “Coming Out” stated that:

“even in those rare cases where authorities permit to hold LGBT actions or when actions are held in so-called ‘Hyde Park’ areas (where public events can be held without permission), the authorities do not ensure the possibility of holding public events and either decide to terminate the event shortly after it began, or do not provide safety of an event and its participants.”³¹³

In 2013, Dmitry Isakov was arrested in Kazan within 24 hours after the federal law entered into force, and was later prosecuted under Article 6.21(1) of the Code of Administrative Offences, for displaying a banner saying “To be gay and to love gays is normal. To beat up gays and to kill gays is a crime”. Mr. Alekseyev and Yuri Yevtushenko were charged under Article 6.21(1) for standing outside a children’s library with banners saying “Gay propaganda does not exist” and “They do not become gays, they are born gays!”³¹⁴ The three activists made a joint petition to the Constitutional Court, which explained that the ban on “propaganda of homosexuality” is justified to protect children, although it acknowledged that the influence of such information on children is not unconditionally proven, and explained that the law “does not prevent LGBT individuals from lawful expression of their position through public actions”.³¹⁵

³¹⁰ Report, *op. cit.* 234, p. 64f.

³¹¹ *Ibid.*, pp. 20f.

³¹² *Ibid.*

³¹³ Report: *Alternative report*, LGBT Organisation “Coming Out”, Transgender Legal Defense Project (Rainbow Foundation), Russian LGBT Network (2014), p. 11 f. Available: <https://www.lgbt.net.org/sites/default/files/lgbtreporticcpr.pdf> (Obtained on 2019-03-10)

³¹⁴ Report, *op. cit.* 234, p. 70.

³¹⁵ *Ibid.*, p. 73f.

Regarding Mr. Alekseyev, it should be noted that he suddenly changed his tone in 2013, when on 24 August he published a piece in *Russia Today* where he opined that “Russia’s ‘horrific laws’, which are being used by a growing number of Russians to secure asylum and a better life in the West, are actually rarely applied”.³¹⁶ This is interesting since he has successfully litigated both the 2010 and now also the 2018 case in the ECtHR, against these laws that “are actually rarely applied”. Michael Lucas has discussed whether Mr. Alekseyev was threatened, mentioning that Yelena Mizulina and another Duma member brought criminal charges against him for remarks he made on Twitter and had him interrogated on 14 August 2013. Mizulina was quoted by *Izvestiia* as having said that Mr. Alekseyev should be punished with community service “somewhere where he can’t be involved in gay propaganda, like in a morgue van”.³¹⁷

In May 2015, a Rainbow flash mob with about 100 participants was held in Catherine Park in Moscow; no approval from the authorities is required to hold demonstrations there. 17 people were detained and taken to the police station. At the police station, they were encountered by men in civilian clothes that did not introduce themselves, told them that “it was not a detention, but a prophylactic talk” and asked the detainees to write “explanatory notes”.³¹⁸

A Pride parade was arranged in St. Petersburg on 12 August 2017 and had the largest turnout since 2010 of about 100 people.³¹⁹ One participant, Anna Grabetskaya, held a banner saying “I love my wife” and was detained for disobeying police orders.³²⁰ It is also worth mentioning that in September 2017, about 50 Russians crossed the border to the Norwegian town of Kirkenes to participate in Pride there, and were harassed by FSB officers when returning to Russia.³²¹

In 2018, the Russian LGBT Network stated in its annual report that “if until 2013 LGBT people were in the ‘blind zone’ for the general public, then in 2016 and 2017 the negative attention to LGBT people, initiated by the propaganda law, is quote obvious and alarming”.³²² On 4 August 2018, police broke up the Pride parade in St. Petersburg and detained up to 30 participants.³²³

³¹⁶ Alekseyev, Nikolai: *Fighting the gay fight in Russia: How gay propaganda laws actually only help*, Moscow: Russia Today (2013). Available: <https://www.rt.com/op-ed/russia-gay-rights-sochi-945/> (Obtained on 2019-03-10)

³¹⁷ Lucas, Michael: *Nikolai Alekseyev: The Kremlin’s New Pocket Gay*, Los Angeles: OUT Magazine (2013). Available: <https://www.out.com/news-opinion/2013/08/28/nikolai-alexeyev-kremlin-new-pocket-gay> (Obtained on 2019-03-10)

³¹⁸ Report: *Monitoring of Discrimination and Violence Based on SOGI in Russia in 2015: General Information*, St. Petersburg: Russian LGBT Network (2016), p. 7. Available: <https://lgbtnet.org/en/content/monitoring-discrimination-and-violence-based-sogi-russia-2015> (Obtained on 2019-03-10)

³¹⁹ Article: *St. Petersburg’s LGBTQ Pride Rally Had the Largest Turnout Since 2010*, Los Angeles: OUT Magazine (2017). Available: <https://www.out.com/pride/2017/8/15/st-petersburgs-lgbtq-pride-rally-had-largest-turnout-2010> (Obtained on 2019-03-10); Article: *Harassed LGBT Activists Rally in St. Petersburg*, Moscow: The Moscow Times (2017). Available: <https://www.themoscowtimes.com/2017/08/13/marginalized-lgbt-community-comes-out-to-protest-in-st-petersburg-a58646> (Obtained on 2019-03-10)

³²⁰ News article: *Zaderzhannuyu uchastnitsu LGBT-aktsii v Peterburge na skoroy pomoshchi uvezli v bol’nitsu* (Russian) [Detained LGBT participant in St. Petersburg was taken to hospital in an ambulance], Moscow: OVD-Info (2017). Available: <https://ovdinfo.org/express-news/2017/08/12/zaderzhannuyu-uchastnicu-lgbt-akcii-v-peterburge-na-skoroy-pomoshchi-uvezli> (Obtained on 2019-03-10)

³²¹ News article: *Pride Parade participants stopped by FSB on return to Russia*, Kirkenes: The Barents Observer (2017). Available: <https://thebarentsobserver.com/en/life-and-public/2017/09/pride-parade-participants-stopped-fsb-return-russia> (Obtained on 2019-03-10)

³²² Report, *op. cit.* 268, p. 34.

³²³ News article: *Russian police break up Gay Pride protest in St Petersburg*, Lyon: Euronews (2018). Available: <https://www.euronews.com/2018/08/04/russian-police-break-up-gay-pride-protest-in-st-petersburg> (Obtained on 2019-03-10)

Peter Tatchell was also briefly arrested in Moscow after holding a one-man picket close to the Kremlin in which he protested against the gay persecutions in Chechnya.³²⁴

Although this did not specifically concern freedom of assembly, it is noteworthy that a minor has been charged under the federal law. Maxim Neverov, a 16-year old Russian schoolboy had uploaded pictures of shirtless men hugging each other on the social network VKontakte. He had never published the images but only saved them in a private folder. He was called to the police station in his home town of Biysk in July 2018, detained on arrival, and fined 50,000 roubles (\$736) which is more than the average monthly salary in Russia. However, it is of interest that the police had previously monitored him since he had participated in Protest Biysk, a group that organises civil rights projects.³²⁵ After appealing the decision in the Biysk City Court, a judge stated there was not enough evidence to establish guilt and invalidated the fine.³²⁶

3. Hate speech and manifestations of intolerance and prejudice by public officials and religious leaders

In 2014, the Russian LGBT Network, the LGBT Organisation “Coming Out” and the Rainbow Foundation published a joint report, according to which, since 2011 there has been a growth in Russia of discussions on questions of sexual orientation and gender identity in the public sphere. Hate speech is delivered by opinion leaders, politicians, law enforcement officials and religious leaders, and remains completely unpunished.³²⁷

When speaking to the international audience, another rhetoric is employed. On 29 September 2015, Vladimir Putin was interviewed by American TV host Charlie Rose. On the topic of the “gay propaganda” law, Putin stated that:

“The problem of sexual minorities in Russia [...] has been a deliberate exaggeration aimed at making an enemy image of Russia for political considerations. I believe this is one of the lines of attack against Russia [...] We have no persecution at all. People of non-traditional sexual orientation work, they live in peace, they get promoted, they get state awards for their achievements in science and arts or other areas. I personally have awarded them medals.”³²⁸

IV. The Russian Orthodox Church

It should first of all be made clear to the reader that the head of the Russian Orthodox Church, the Patriarch of Moscow and all Rus’ (*Patriarkh Moskovskij i vseja Rusi*) Kirill, being the highest authority of the Moscow Patriarchate, is also the supreme governor of what has until recently been called the Ukrainian Orthodox Church of the Moscow Patriarchate and of the Metropolis of Chişinău and All Moldova. This means that these Orthodox Churches are self-

³²⁴ Article: *Tatchell Arrested in Russia*, London: Peter Tatchell Foundation (2018). Available: <https://www.petertatchellfoundation.org/tatchell-arrested-in-russia/> (Obtained on 2019-03-10)

³²⁵ News article: *'Not scared': Russian teen charged under 'gay propaganda' law says he'll keep protesting*, Washington: NBC News (2018). Available: <https://www.nbcnews.com/feature/nbc-out/not-scared-russian-teen-charged-under-gay-propaganda-law-says-n900566> (Obtained on 2019-03-10)

³²⁶ News article: *In LGBT+ rights victory, Russian teen wins 'gay propaganda' case*, London: Reuters (2018). Available: <https://www.reuters.com/article/us-russia-lgbt-ruling/in-lgbt-rights-victoryrussian-teenwins-gaypropaganda-case-idUSKCN1N02JY> (Obtained on 2019-03-10)

³²⁷ Report, *op. cit.* 234, p. 7.

³²⁸ Article: *Putin Talks Gay Rights on 60 Minutes*, New York: CBS News (2015). Available: <https://www.cbsnews.com/news/putin-talks-gay-rights-on-60-minutes/> (Obtained on 2019-03-10); Video: *Vladimir Putin on Gay Rights in Russia (September 29, 2015) | Charlie Rose*, YouTube. Available: <https://www.youtube.com/watch?v=NvTYMhbMbQ0> (Obtained on 2019-03-10)

governing entities, but are subjected to the authority of the Moscow Patriarchate, and therefore the sections on Ukraine and Moldova should be read in light of this section on the Moscow Patriarchate.

1. History of the Russian Orthodox Church until the Soviet decline

I first provide a short historical overview of the Russian Orthodox Church, and what later came to be known as the Moscow Patriarchate, to gain an understanding of how the church-state relations have developed until the dissolution of the Soviet Union in 1991.

1.1. The Church and the creation of the Moscow Patriarchate

The Slavs began their conversion to Orthodox Christianity when Byzantine missionaries made their way to Kievan Rus' in the ninth century. Christianity was established as state religion in the principality of Kiev with the "baptism of the Russians" following the conversions of Princess Olga (955) and St. Vladimir of Kiev (988).³²⁹

From the Orthodox perspective, contemporary Europe is false after the Great Schism in 1054 and lives according to the ideals of Sodom and Gomorrah, while the Russian world follows the ideals of God. This constitutes the idea of two Europes that is present today.³³⁰ Russia's European destiny was interrupted by the invasion of the Golden Horde in 1240, which isolated Russia from Europe. The Mongols were tolerant in religious matters so the Russians established alliances eastwards instead of adhering to the imperialism of the Holy See in Rome.³³¹

Vladimir had erected the metropolitanate of Kiev that headed the Russian church until 1448, which after 1328 resided in Moscow, canonically dependent on the Ecumenical Patriarchate of Constantinople.³³² The Moscow Patriarchate achieved autocephaly in the 15th century.³³³

With the fall of Constantinople in 1453, Moscow came to be regarded (at least in the eyes of the Russians) as the "Third Rome", since the Orthodox Christians regarded Ancient Rome as heretical and the New Rome (Constantinople) was conquered by the Ottomans. Not long thereafter, the grand dukes adopted the title of "Tsar" (a Slavic version of Caesar) and considered themselves as the legitimate successors of the rulers of the Byzantine Empire.³³⁴

In Russia, the Tsarist autocracy was established when Ivan IV [the Terrible] assumed the title of Tsar in 1547 and became ruler. The role of the autocrat built on the patriarchal family as a model. Marianna Muravyeva have held that the state and the patriarchal families had a symbiotic relationship, in which the state enhanced the patriarchs' power in the private sphere, in return strengthening the state's power.³³⁵

In 1686, after Russian victories over Poland, the Ukraine was annexed to the Muscovite empire

³²⁹ Meyendorff, *op. cit.* 50, p. 93.

³³⁰ Lecture with guest lecturer Mikhail Suslov (University of Copenhagen) on the topic of *Religion, State and Society in Russia*, 21 November 2018, Lund University.

³³¹ Meyendorff, *op. cit.* 50, p. 95.

³³² *Ibid.*, p. 94.

³³³ *Ibid.*, p. 96.

³³⁴ *Ibid.*, p. 98.

³³⁵ Muravyeva, Marianna: *'A king in his own household': domestic discipline and family violence in early modern Europe reconsidered*, *The History of the Family* Vol. 18:3, London: Routledge (2013), 227-237, p. 230.

of the Romanovs and the Metropolitanate of Kiev was attached to the Moscow Patriarchate with the formal approval of the Ecumenical Patriarch of Constantinople.³³⁶

1.2. The Orthodox Church and the dissolution of the Moscow Patriarchate in Imperial Russia

In 1721 – the year that the Imperial period started when Peter I assumed the title of Emperor of the Russian Empire – Peter I promulgated his *Spiritual Regulation* which abolished the Patriarchate and placed a collegiate body, the Holy Synod, as head of the Church. This is called the “synodal period” of Russian church history which lasted until the February Revolution.³³⁷

1.3. The re-establishment of the Moscow Patriarchate in revolutionary Russia and the role of the Orthodox Church in the Soviet Union

As a result of the first Russian Revolution of 1905, Tsar Nicholas II granted a constitution guaranteeing almost complete freedom of movement and speech in Russia. The Holy Synod agreed to hold a national council working for the re-establishment of the Patriarchate.³³⁸

The Imperial period ended with the February Revolution in 1917, when Tsar Nicholas II of Russia abdicated. Following the February Revolution in 1917, the Provisional Government of Kerensky finally allowed the Church to summon the council, which had been in preparation for twelve years. On 31 October 1917 – six days after the overthrow of the Provisional Government by the Bolsheviks – the Metropolitan of Moscow, Tikhon, was elected as the new patriarch.³³⁹

The Communist Party had resolved to combat all religion as such, with basis in Marx who had defined religion as the “opium of the people”.³⁴⁰ On 20 January 1918, the Council of Commissaries of the People approved a decree regarding the “separation of Church and State and the separation of the schools from the Church”. This implied that the government was not only separated from the Church, but it placed the Church completely “outside the law”. In the years 1921-1922 the government confiscated church valuables and 691 priests died in this process, with a much greater number of priests that were forced to submit to governmental measures and harassments, including the deprivation of civil rights. Between 1923-1926, around fifty bishops died either being shot or following deportation. The Church developed an attitude according to which it could be critical on moral issues but remained politically loyal.³⁴¹

The Cathedral of Christ the Saviour was demolished by Stalin’s government in December 1931, as an assault on Orthodoxy that was in accordance with the Soviet attitude.³⁴² Even after the end of Stalin’s reign with his death in 1952, the state had no intention of abandoning its anti-religious programme.³⁴³ Anti-religious persecutions were enacted under Nikita Khrushchev between 1958-1964. In 1960, the site of the demolished Cathedral of Christ the Saviour was used as an open-air swimming pool, which Knox and Mitrofanova means “underscored the

³³⁶ Meyendorff, *op. cit.* 50, p. 102f.

³³⁷ *Ibid.*, p. 103.

³³⁸ *Ibid.*, p. 111.

³³⁹ *Ibid.*, p. 112.

³⁴⁰ *Ibid.*, p. 113.

³⁴¹ *Ibid.*, pp. 117-19.

³⁴² Knox, Mitrofanova, *op. cit.* 218, p. 38.

³⁴³ Meyendorff, *op. cit.* 50, p. 125.

regime's attempt to obliterate Orthodoxy's physical presence from the urban landscape and to expunge religious practice from the daily rituals of Muscovites".³⁴⁴

The decisive turning point for the Church came in 1988 under the rule of Mikhail Gorbachev, who implemented the Soviet reforms of "restructuring" (*perestroika*) and "transparency" (*glasnost*), which resulted in the introduction of actual freedom of speech. The same year was the millennium of the Baptism of St. Vladimir and Kievan Rus'. A spokesman of the Soviet government qualified the millennium as a "national celebration", and this resulted in the restoration of church building and the opening of monasteries and theological schools.³⁴⁵

In June 1990, the former Metropolitan of Leningrad and Tallinn Alexii (Ridiger) was elected as Patriarch Alexii II.³⁴⁶ In 1990, the government of the Russian Soviet Federative Socialist Republic passed a law on religious organisations which guaranteed an extensive freedom of religion. This law remained valid in the Russian Federation until 1997.³⁴⁷

2. The Russian Orthodox Church in the post-Soviet era

In this part, I describe how the Russian Orthodox Church has become increasingly entangled with the Russian political sphere and that, although it does not regard itself as a state church, it enjoys a special position in which it can set the tone in some political discourses. I also identify that this relationship is utilised by the state to legitimise its neo-traditionalist gender regime and the notion of "traditional values" within which a reaction towards LGBT rights is a natural step.

2.1. Russian politics and church-state relations in the Yeltsin years

Boris Yeltsin became the first President of the Russian Federation on 10 July 1991, in one of its last few months as a Soviet republic, and ruled until 31 December 1999. According to Lilia Shevtsova, the powers of the Russian president *today* are much the same as the powers of the Russian monarch were in 1906-1917, and it was Yeltsin's post-Soviet constitution that established the institutional framework for an authoritarian, neo-patrimonial regime.³⁴⁸

Zoe Knox and Anastasia Mitrofanova write that during Yeltsin's presidency, the Cathedral of Christ the Saviour was reconstructed and consecrated in September 1997. This signified Orthodoxy's return into acceptance and appreciation by the Russian state and society.³⁴⁹ The Moscow Patriarchate has distanced itself from calls for Orthodoxy to become Russia's state religion, mainly because of the severe persecution it endured in the Soviet era.³⁵⁰

Kristina Stoeckl writes that Orthodox nationalism in the 1990s united the traditionalist and fundamentalist factions of the Church into a right/extremist wing which gained influence on the expense of the liberal faction. Her view is that while the relationship between the Moscow Patriarchate and this right/extremist wing is unclear, it is clear that the Patriarchate follows different strategies in different arenas: in the international arena it distances itself from the

³⁴⁴ Knox, Mitrofanova, *op. cit.* 218, p. 38.

³⁴⁵ Meyendorff, *op. cit.* 50, p. 216f.

³⁴⁶ *Ibid.*, p. 219.

³⁴⁷ Stoeckl, *op. cit.* 51, p. 28.

³⁴⁸ Shevtsova, Lilia: *Russia: Lost in Transition*, Washington, D.C.: Carnegie Endowment for International Peace (2007), p. 17f.

³⁴⁹ Knox, Mitrofanova, *op. cit.* 218, p. 38.

³⁵⁰ *Ibid.*, p. 43.

right/extremist wing, while in the domestic arena it accepts close association in some areas where they seek common ground.³⁵¹

When Yeltsin resigned from the presidential office on the eve of the millennium, the Church had become the most visible social or cultural institution in post-Soviet Russia. Knox and Mitrofanova highlight the fact that the Church had yet to come to terms with the complex and rapidly changing political environment where politicians and organisations on all sides of the political spectrum referred to the Orthodox tradition in the new, post-Soviet environment, and that the Church had to maintain its unity in this political climate. The Church's societal exposure and influence intensified with the beginning of the twenty-first century.³⁵²

2.2. The World Russian People's Council

The World Russian People's Council is an early indication that Orthodox nationalism was becoming increasingly influential within the Moscow Patriarchate in the 1990s. It was founded in May 1993 as a NGO and "civil society branch" of the Moscow Patriarchate, with its presidency held by the acting Patriarch of Moscow and with its seat in the Danilov Monastery on the premises of the Patriarchate. Stoeckl describes the Council as representing the "hard core of the anti-Western and anti-human rights attitudes within the Moscow Patriarchate".³⁵³

According to the Council's statute, it seeks to "promote the spiritual, cultural, social and economic revival of Russia and the Russian people", "contribute to the strengthening of Russian statehood, strengthening the role of the Orthodox Church in the life of society", "facilitate the moral improvement of Russian society" with the help of Russia's traditional religions, and "promote the peaceful and non-violent unification of the Russian people".³⁵⁴

2.3. Russian politics and church-state relations in the Putin era

Vladimir Putin was appointed acting president by Yeltsin on 31 December 1999 until the presidential election on 26 March 2000; served as president in his first period between 7 May 2000-2004; his second period 7 May 2004-2008; with an interregnum serving as prime minister between 8 May 2008-7 May 2012, with Dmitry Medvedev as president because the election law did not permit him serving a third term; after having changed the law – removing the limitation and also prolonging each presidential term to six years – serving his third term from 7 May 2012; being inaugurated for his fourth term on 7 May 2018. Henry Hale has explained that Vladimir Putin remained the most powerful man in Russia even during the Medvedev interregnum even though Putin assumed the formally subordinate post of Prime Minister, due to the functions of the patronalistic system.³⁵⁵

The Church in the beginning of the Putin era wanted, as Patriarch Aleksii II stated, "not to

³⁵¹ Stoeckl, *op. cit.* 51, p. 32.

³⁵² Knox, Mitrofanova, *op. cit.* 218, p. 44.

³⁵³ Stoeckl, *op. cit.* 51, p. 31f.

³⁵⁴ World Russian People's Council: *Zajavlenie Vsemirnogo Russkogo Sobora* (Russian) [Statute of the World Russian People's Council], Moscow: WRPC (1993). Available: <https://vrns.ru/documents/54/859> (Obtained on 2019-03-10)

³⁵⁵ Hale, *op. cit.* 52, p. 30.

restore walls of churches and monasteries, but to restore distorted souls”.³⁵⁶ The state, on the other hand, has increasingly utilised its close relation to the Church to claim moral legitimacy for its policies, and to integrate citizens into a single nation.³⁵⁷ Promoting patriotism is hard in Russia since the country consists of several political, social, ethnic and other groups without a shared vision of a common national destiny.

Robert Blitt noted in 2008 that religious practices have infiltrated Putin’s government in an unprecedented manner and that, since 2000 government officials have “deepened their contacts with the Church hierarchy”.³⁵⁸ For example, the U.S. State Department, in its 2005 Report on International Religious Freedom, held the view that “many government officials and citizens equate Russian Orthodoxy with the national identity” and criticised that during President Vladimir Putin's April State of the Nation address, Patriarch Alexii II had been “seated in a place of honor between Prime Minister Fradkov and the Chairman of the Constitutional Court”, and that the other religious leaders were seated behind him.³⁵⁹ Metropolitan Kirill sent an open letter to U.S. Secretary of State Condoleezza Rice, which stated:

“The fact that His Holiness Patriarch [Alexii II] has a seat of honour when the President of the Russian Federation addresses the Federal Assembly of the Russian Federation does not entail any concrete consequences for a church-state relationship. I would like to note that various customs are the background of protocol order in different countries. It is a long-standing tradition to give prominence to people who enjoy considerable authority and respect of their fellow citizens. They could be state heroes, persons involved in the arts and science, sportsmen, or religious leaders.”³⁶⁰

In this context, Blitt notes that KGB archive materials indicate that Kirill served as a KGB agent under the codename “Mikhailov”.³⁶¹ Alexii II also served as a KGB agent for thirty years after being recruited as a young priest in Estonia in 1958, which Blitt means demonstrates the extent of KGB infiltration of the Church and the Church’s acceptance of this infiltration.³⁶²

According to John Anderson, the relationship between Vladimir Putin personally and the Church’s leadership is rooted in a shared Soviet-era experience and has largely been characterised by their common values and vision for the future of Russia. This includes an appraisal of “traditional values” and patriotism. Although the state is officially secular, Putin upholds the role of the Russian Orthodox Church as first among equals beside other religious organisations, at least as long as the Church provides support for his policies. Anderson means that Putin is clearly the dominant partner in this relationship, and that the church-state relationship is mainly characterised by *asymmetric symphonia*.³⁶³

Lilia Shevtsova reasons that, after having decided in favour of developing a neo-patrimonial regime, Putin has isolated the liberally inclined section of society and has widened the space

³⁵⁶ Article: ‘Kazhdyi rossiyarin dolzhen znat osnovy pravoslavnoi kultury, schitaet patriarkh Aleksii’ [Each Russian National Should Know the Foundations of the Orthodox Culture, Patriarch Aleksii Thinks], Moscow: Interfax (2005) Available: <http://www.interfax-religion.ru/?act=news&div=7721> (Obtained on 2019-03-10)

³⁵⁷ Hale, *op. cit.* 52, p. 49.

³⁵⁸ Blitt, Robert C.: *How to Entrench a De Facto State Church in Russia: A Guide in Progress*, Provo, Utah: Brigham Young University Law Review (2008), 707-778, p. 739.

³⁵⁹ Report: *International Religious Freedom Report 2005*, Washington D.C.: U.S. Department of State (2005). Available: <https://www.state.gov/j/drl/rls/irf/2005/51576.htm> (Obtained on 2019-03-10)

³⁶⁰ Metropolitan Kirill: *An Open Letter to the U.S. Secretary of State Condoleezza Rice*, Europaica Bulletin No. 80 (6 December 2005). Available: <http://orthodoxeurope.org/page/14/80.aspx#5> (Obtained on 2019-03-10)

³⁶¹ Blitt, *op. cit.* 358, p. 739.

³⁶² *Ibid.*, p. 714.

³⁶³ Anderson, *op. cit.* 230, p. 198.

for reactionary forces and conformists. If he in the early 21st century believed that he could transform Russia into a modern state, Shevtsova reasons, with time he has “worried less and less about his image as a politician and has moved deeper into a mind-set of Russian traditionalism”.³⁶⁴ From Putin’s view, Russian Orthodoxy has been seen as providing an ideological source of state legitimation.³⁶⁵ Stefano Braghiroli and Andrey Makarychev have identified four nodal points of the Kremlin’s hegemonic discourse: (1) social conservatism; (2) nation state-based policies; (3) independence from U.S. influence; and (4) the glorification of Russia’s self-inflicted mission of fighting contemporary neo-fascism.³⁶⁶

Valerie Sperling has explained that the state and Church have a common interest in promoting and sustaining “traditional” gender norms. While the state’s interest lies in using Putin’s machismo as a legitimation tool for the regime, the Church has endorsed them to fuel public disapproval of abortion, contraception, and homosexuality. Therefore, they have overlapping agendas, and the Church has appeared to want Putin’s regime to remain, e.g. for supporting anti-gay initiatives, while the regime promotes the Church because it is regarded as a pillar of regime support in an ideologically confused environment.³⁶⁷

Knox’ and Mitrofanova’s estimation is that in the 21st century, the Church is neither the “handmaiden of the state” nor a junior partner in church-state affairs, but an independent institution which is carving out its own social, political and cultural role.³⁶⁸

2.4. The Pussy Riot incident

An important event that attracted international attention towards church-state relations in Russia is the Pussy Riot incident on 21 February 2012, when five female members of the feminist punk group Pussy Riot, dressed in coloured outfits and balaclavas, danced on the sanctuary platform in the Cathedral of Christ the Saviour. They explained that it was a protest against the Church’s support for Putin’s political party United Russia in the 2011 Duma elections.³⁶⁹

Their footage was made into the video for Pussy Riot’s song ‘Punk Prayer – Mother of God, Chase Putin Away’ (*Pank-moleben – Bogoroditsa, Putina progoni*) which they uploaded to YouTube. Among their critical standpoints, their “punk prayer” criticised the Church for its homophobia. Verses described the church-state fusion: The Church “blesses the rotten leaders” whose “black limousines circle the church”, and the two institutions jointly preside while “gay pride is sent to Siberia in chains”. Members of Pussy Riot have explained that the lyrics referred to the Church-supported regional laws banning homosexual propaganda. In their words, this legislation “effectively prevents the LGBT community from organising public events”, forcing LGBT persons back into the “closet”. They also objected to the laws’ association of homosexuality with paedophilia, “which is homophobic and insulting in and of itself”.³⁷⁰

³⁶⁴ Shevtsova, *op. cit.* 348, p. 68f.

³⁶⁵ Sperling, *op. cit.* 8, p. 273; Clover, Charles: *Putin and the Monk*, London: Financial Times (25 January 2013). Available: <http://www.ft.com/intl/cms/s/2/f2fcba3e-65be-11e2-a3db-00144feab49a.html#axzz2JNuBKxoc> (Obtained on 2019-03-10)

³⁶⁶ Braghiroli, Stefano, Makarychev, Andrey: *Russia and its supporters in Europe: trans-ideology à la carte?*, Southeast European and Black Sea Studies 16:2, Routledge 2016, 213-233, p. 214.

³⁶⁷ Sperling, *op. cit.* 8, p. 273;

³⁶⁸ Knox, Mitrofanova, *op. cit.* 218, p. 58.

³⁶⁹ *Ibid.*, p. 59; Stoeckl, *op. cit.* 51, p. 102.

³⁷⁰ Sperling, *op. cit.* 8, p. 235; Blog post: “*Pank-moleben 'bogoroditsa, putina progoni' v khrame khrista spasitelia*”, Pussy_riot (21 February 2012). Available: <http://pussy-riot.livejournal.com/12442.html> (Obtained on 2019-03-10)

Hale describes that the prosecution of Pussy Riot was one of the first major signs of the government's "conservative turn". One member was released on bail, while two of the members served two-year prison sentences in penal colonies in Mordovia and Perm oblasts, for the crime 'hooliganism motivated by religious hatred'. Hale writes that this new values-based approach also served to isolate supporters of the 2011-12 movement that protested against the fraudulent elections to the State Duma in 2011, effectively painting the protestors as advocates of Western liberal and moral degeneracy that threatened true Russian morality, stability, and culture.³⁷¹

The Russian sociologist Dmitry Uzlaner interpreted the Pussy Riot incident as a phenomenon of post-secularity, i.e. an example of shifting boundaries between the religious and the secular space and of a renegotiation between the two spaces.³⁷² The Church leadership, however, argued that they had engaged in an anti-religious artistic performance, not in a religious protest. Patriarch Kirill compared the performance to the religious persecution under the Bolsheviks.³⁷³ Basically, two competing claims were set against each other: the right to freedom of expression, and the right of believers not to be offended in their religious sensibilities. Uzlaner means that this is a way for the Church authorities to retain their monopoly on defining: (1) religious space; (2) the religious/secular distinction; and (3) the definition of "traditional".³⁷⁴

3. The Moscow Patriarchate and LGBT rights

The period from 2000 until 2008, which were the years when the human rights debate within the Church mainly took place, also saw the ascent of Metropolitan Kirill inside the Moscow Patriarchate. Following Patriarch Alexii II's death, Kirill became Patriarch in February 2009.³⁷⁵ The human rights debate in the Church was initiated by Kirill when, in an article published in *Nezavisimaya Gazeta* on 26 May 1999, he expressed his conviction that liberalism is a result of Western cultural development and is inherently atheistic, but that the Russian Orthodox tradition does not share this history and, therefore, cannot share the concept of human rights.³⁷⁶

However, on 16 February 2000, he changed his tone when he published a second article in the same paper. His conclusion was that Orthodoxy has to critically and creatively engage with liberal values, and that Russia should not unconditionally adhere to the Western modern and secular trajectory. At the same time, he does not identify with religious zealots, who would not even consider the question of human rights, and he wants to find a third way of confrontation.³⁷⁷ I suppose that he is referring to the right/extremist wing of the Church, which (as was mentioned previously) the Patriarchate distances itself from on the international but *not* the domestic arena.

According to Stoeckl, Kirill's second article marked a shift in attitude towards human rights, since he started formulating an "Orthodox" understanding of the concept, using rights-based language. This does not, however, mean that the Church has become less confrontational towards human rights, but that the confrontation shifts from a civilisational argument (Western

³⁷¹ Hale, *op. cit.* 52, p. 287.

³⁷² Uzlaner, Dmitry: *Delo "Pussi rayot" i osobennosti rossiyskogo postsekulyarizma* [The Pussy Riot Case and the Features of Russian Post-Secularism]. Gosudarstvo, Religiya i Tserkov' v Rossii i za rubezhom [State, Religion and Church in Russia and abroad] 2(31) (2013), 93-133. Available: http://www.religion.ranepa.ru/sites/default/files/GRC_2-2013_final.pdf (Obtained on 2019-03-10); Stoeckl, *op. cit.* 51, p. 103.

³⁷³ Stoeckl, *op. cit.* 51, p. 103.

³⁷⁴ *Ibid.*, p. 104; Uzlaner, *op. cit.* 372.

³⁷⁵ Stoeckl, *op. cit.* 51, p. 50.

³⁷⁶ *Ibid.*, p. 43.

³⁷⁷ *Ibid.*, p. 44.

values versus Russian Orthodoxy, as was the argument in Kirill's first article) to a post-secular argument (secular values versus religious values).³⁷⁸

According to Alexander Agadjanian, who is a Russian sociologist of religion, the Russian Orthodox Church is not necessarily propagating an alternative to the Western human-rights discourse. While Islamic countries have attempted to create Islamic discourses on human rights, the Moscow Patriarchate is rather negotiating with the dominant Western discourse on human rights, in order to make amendments and find a place for itself and its adherents within it.³⁷⁹ One example of this is when Patriarch Alexii II held a speech to PACE on 2 October 2007, in which he mentioned his view that in the ECHR:

“[...] there occurs a break between human rights and morality, and this break threatens the European civilisation. We can see it in a new generation of rights that contradict morality, and in how human rights are used to justify immoral behaviour. In this connection, I may note that morality, with which any human right advocacy has to count, is mentioned in the European Convention for the Protection of Human Rights and Fundamental Freedoms. I am convinced that the makers of the European Convention on Human Rights included therein morality not as something ambiguous but rather as an integral element of the whole human rights system.”³⁸⁰

Regarding LGBT rights, John Anderson describes that the Russian state and the Church “have a shared concern with the future of the traditional family and a distaste for homosexuality, seemingly shaped as much by concerns over Russia's demographic future as by theological beliefs”. In 2006 and 2007, the Church strongly supported Mayor Yuri Luzhkov's ban on gay pride marches in Moscow, and Metropolitan Kirill told a group of Moscow university students that while discrimination against gays was not acceptable, sexual minorities should not be able to dictate their views to majorities or propagate untraditional views in public demonstrations.³⁸¹

3.1. Human rights documents of the Russian Orthodox Church

3.1.1. The 2000 *Basis of the Social Concept of the Russian Orthodox Church*

The *Basis of the Social Concept of the Russian Orthodox Church*³⁸² (further referred to as the *Social Concept*) was the first Orthodox social document, comparable to the Roman Catholic Church's *Rerum novarum* encyclical of 1891. It was prepared by a working group under the direction of Metropolitan Kirill and was then adopted by the Bishops' Council in 2000.³⁸³

With the adoption of the *Social Concept*, the Church defined itself as independent from the Russian state, positioning itself as a potential counter-agent towards the government and an independent force in society. While this church-state separation is not necessarily liberal, it

³⁷⁸ Ibid., p. 43.

³⁷⁹ Agadjanian, Alexander: *Russian Orthodox Vision of Human Rights*, Erfurt: Universität Erfurt (2008), p. 15f; Rimstad, *op. cit.* 208, p. 38f.

³⁸⁰ Stoeckl, *op. cit.* 51, p. 62; Alexii II, Patriarch of Moscow and All Russia: *Address to the Parliamentary Assembly of the Council of Europe*, Europaica Bulletina No. 128 (7 October 2007). Available: <http://orthodoxeurope.org/page/14/128.aspx> (Obtained on 2019-03-10); News article: *Patriarch Alexy of Russia assails gays in speech at Council of Europe*, New York: New York Times (2007). Available: <https://www.nytimes.com/2007/10/02/world/europe/02iht-church.4.7721359.html> (Obtained on 2019-03-10)

³⁸¹ Anderson, *op. cit.* 230, p. 196.

³⁸² Document: *The Basis of the Social Concept* (Official English translation), Moscow: Moscow Patriarchate (2000). Available: <https://mospat.ru/en/documents/social-concepts/> (Obtained on 2019-03-10)

³⁸³ Stoeckl, *op. cit.* 51, p. 48.

constituted a break with the church-state model of *symphonia* that has historically been characteristic of Orthodox Christianity.³⁸⁴

Although it mainly addresses domestic questions, in its final article it touches upon international issues. It does not clearly condemn the process of globalisation, recognising it as “inevitable and natural and in many ways facilitating people’s communication, dissemination of information and more effective production and enterprise”, but also pointing out what the Church recognises as the negative effects of globalisation:

“This process, however, has been accompanied by attempts to establish the dominion of the rich elite over the rest of the people and of some cultures and worldviews over others, which is especially intolerable in the religious field ... Globalisation developing in this way is compared by many in Christendom to the construction of the Tower of Babel.” (SC XVI.3)

Especially relevant in the context of freedom of assembly for LGBT rights activists is that the *Social Concept* explicitly states that “the propaganda of vice is especially harmful for the frail souls of children and youth” (SC X.6).

Heleen Zorgdrager has also pointed out that the topic of homosexuality is discussed in the chapter on ‘Problems of Bioethics’, which indicates that the Church expels same-sex relations from the domain of love relations (marriage, family) and understands it as a sinful urge. She means that it is from this viewpoint that the Church disregards the modern discourse on same-sex relations as one of the “attempts of human beings to put themselves in the place of God by changing and ‘improving’ His creation at their will” (SC XII.1).³⁸⁵

3.1.2. The 2006 *Declaration on Human Rights and Dignity*

In 2006, the World Russian People’s Council published its *Declaration on Human Rights and Dignity*³⁸⁶ (further referred to as the *Declaration*). This is not strictly speaking a church document, but since the Council is a NGO chaired by the Patriarch with its seat in the premises of the Patriarchate, it is obvious that the *Human Rights Declaration* is a Church-made product, and that it can be interpreted as an intermediary step towards the formulation of the *Basic Teaching on Human Dignity, Freedom and Rights* in 2008, which spells out the Church’s attitudes towards human rights, including its theological reasoning.³⁸⁷

Several parts of the *Declaration* are noteworthy: it distinguishes between freedom of choice and freedom from sin; it links human dignity closely to morality and insists that human rights cannot provide protection for immoral acts; it also emphasises human obligations towards collectives such as the family and the nation.³⁸⁸ Regarding human freedom and morality, the *Declaration* states that “human rights essentially involve morality”. The *Declaration* also

³⁸⁴ Ibid., p. 54.

³⁸⁵ Zorgdrager, Heleen: *Homosexuality and hypermasculinity in the public discourse of the Russian Orthodox Church: an affect theoretical approach*, Intl. Journal of Philosophy and Theology, 74:3 (2013), 214-239, p. 223.

³⁸⁶ Document: *World Russian People’s Council: Declaration on Human Rights and Dignity* 2006 (Official English translation), Moscow: Moscow Patriarchate (2006). Available: <http://orthodoxeurope.org/page/14/93.aspx#1> (Obtained on 2019-03-10)

³⁸⁷ Stoeckl, *op. cit.* 51, p. 56.

³⁸⁸ Horsfjord, Vebjørn L: *Negotiating Traditional Values: The Russian Orthodox Church at the United Nations Human Rights Council (UNHRC)*. In: Stensvold, Anne (ed.): *Religion, State and the United Nations: Value Politics*. London: Routledge (2017), 62-75, p. 67f.

introduced a distinction between “human worth” (*tsennost*) and “human dignity” (*dostoinstvo*) by declaring that:

“Each person as image of God has singular unalienable worth, which must be respected by every one of us, the society and state. It is by doing good that the human being gains dignity. Thus we distinguish between human worth and dignity. Worth is given, while dignity is acquired.”

It is important to note that the *Declaration* contains *no* references to the Bible or to specific Church tradition. This does not imply that it is a secular document, since it makes references such as that “the eternal moral law [...] is laid down by the Creator in human nature and manifested in human conscience”. It further states that conscience “can be muffled by sin” and that “precisely for this reason the religious tradition that has God as its Origin is called to help discern between good and evil”. Note, however, that the “religious tradition” is not explicitly said to be (Orthodox) Christian. Vebjørn Horsfjord reasons that the Declaration implies that God’s revelation, which is required to clarify God’s moral law laid down in human nature, is accessible also to other religious traditions that have “God as its Origin”.³⁸⁹

The Declaration explicitly states that it is unacceptable, in pursuit of human rights, to “oppress faith and moral tradition, insult religious and national feelings, cause harm to revered holy objects and sites, jeopardize the motherland”. It states that “the ‘invention’ of such ‘rights’” is used to legitimise behaviours condemned by both “traditional morality and historical religions”.

The Declaration is unclear and does not specify what traditions or religions it refers to. In my opinion, the phrases used (“traditional”, “historical”), in combination with the statement on unacceptable oppression, makes me suspect that it advocates that the edicts of any religious or moral traditions – as long as they preach the same moral values as Orthodox Christianity – should win precedence when they are contradicted by international human rights law.

3.1.3. The 2008 *Basic Teaching on Human Dignity, Freedom and Rights*

In 2008 the Bishops' Council of the Russian Orthodox Church issued the *Basic Teaching on Human Dignity, Freedom and Rights*³⁹⁰ (further referred to as the *Basic Teaching*). In comparison with the *Human Rights Declaration*, the *Basic Teaching* paints a very different picture. Stoeckl describes that with this document, the Church is no longer involved in a civilisational or cultural clash, but engaged in what can be defined as a post-secular debate³⁹¹ which is especially shown by the last paragraph:

“Without seeking a revolutionary reconstruction of the world and acknowledging the rights of other social groups to participate in social transformations on the basis of their own worldview, the Orthodox Christians reserve the right to participate in building public life in a way that does not contradict their faith and moral principles. the Russian Orthodox Church is ready to defend the same principles in dialogue with the world community and in cooperation with people of other traditional confessions and religions.” (BT V.4)

According to Stoeckl, the term “post-secular” is relevant to contemporary debates about religion in the public sphere, compared to previous discussions on the religious-secular

³⁸⁹ Ibid., p. 68.

³⁹⁰ Document: *The Russian Orthodox Church's Basic Teaching on Human Dignity, Freedom and Rights* (Official English translation), Moscow: Moscow Patriarchate (2008). Available: <https://mospat.ru/en/documents/dignity-freedom-rights/> (Obtained on 2019-03-10)

³⁹¹ Stoeckl, *op. cit.* 51, p. 57.

divide.³⁹² I agree with this view which is also reinforced by Agadjanian, who has stated that the *Basic Teaching* conform not least to Habermas' expectation that religious actors "translate" their positions into a universally accessible language.³⁹³ Agadjanian suggested that the *Basic Teaching*, through the use of the language and concepts of international human rights discourse, has implied a *de facto* acceptance of human rights by "acceptance-through-refusal":

"In the end the Orthodox critics, *volens nolens*, do accept and master this language of rights, the 'rights talk', in order to express their own tradition in terms of, and according to the rules of, the discourse they criticise."³⁹⁴

Another interesting dividing factor between the *Declaration* and the *Basic Teaching* is how they treat the concept of human dignity. While the *Declaration* makes a distinction between "human worth" and "human dignity", no such distinction is found in the *Basic Teaching*. The entire first chapter is dedicated to the question of human dignity as a religious and moral category, and it holds the view that since human dignity is related to the act of divine creation it is inalienable: "human nature did not lose its dignity even after the fall, for the image of God in it remained indelible" (BT I.1). Therefore, the *Basic Teaching* corrects the view expressed in the *Declaration* that dignity is an acquired quality.³⁹⁵

On the topic of human freedom and morality, the *Basic Teaching* basically holds the same view as the *Declaration*, however with some shifts in language that may be indicative of the Church's positioning towards seeking dialogue. The *Basic Teaching* states as follows: "The development and implementation of the human rights concept should be harmonised with the norms of morality, with the ethical principle laid down by God in human nature and discernible in the voice of conscience" (BT III.3). I note that while the *Declaration* defines human rights as a pre-defined concept which one can either accept or reject, the *Basic Teaching* recognises the open and unfinished character of human rights.

On human dignity, the document acknowledges the divine-human likeness as the source for a precise understanding of how human beings should strive to overcome sin and "restore human life in the fullness of its original perfection" (BT I.1):

"dignified life is [...] achieved through God's grace by efforts to overcome sin and to seek moral purity and virtue. [...] what is dignified and what is not are bound up with the moral or amoral actions of a person and with the inner state of the soul. Considering the state of human nature darkened by sin, it is important that things dignified and undignified should be clearly distinguished in the life of a person." (BT I.2)

Stoeckl points out that secular documents postulate human dignity as a natural quality of human beings, while religious documents such as the *Basic Teaching* link the notion of dignity to the act of divine creation. Human dignity is in both cases regarded as an inalienable quality of being human, but according to secular documents this inalienability lies with human nature, while in religious documents it is based in the divine will. In the Orthodox Christian case, this implies that human life needs to be restored to the fullness of divine likeness, which in the Orthodox theological tradition is called *theosis* (deification).³⁹⁶

³⁹² Ibid., p. 119.

³⁹³ Agadjanian, Aleksandr: *Liberal Individual and Christian Culture: Russian Orthodox Teaching on Human Rights in Social Theory Perspective*, Religion, State and Society, Vol. 38 (2010), 97-113, p. 106.

³⁹⁴ Ibid., p. 105.

³⁹⁵ Stoeckl, *op. cit.* 51, p. 58.

³⁹⁶ Ibid., p. 71.

According to the *Basic Teaching*, morality cannot be based on human nature because of its potential for sin, described as “life according to the law of the flesh” (BT I.4). Chapter I of the *Basic Teaching* concludes: “According to the Orthodox tradition, a human being preserves his God-given dignity and grows in it only if he lives in accordance with moral norms because these norms express the primordial and therefore authentic human nature not darkened by sin”.

I think that this could be interpreted as establishing a direct link between human dignity and morality, meaning that an individual could lose his or her dignity through “immoral behaviour”. I especially agree with Vebjørn Horsfjord who stated that “obviously this line of thinking creates a theological basis for ROC’s adamant dismissal of LGBT rights”.³⁹⁷

However, Stoeckl thinks that this link was definitely present in the *Declaration*, but that it is an unfair interpretation of the *Basic Teaching*, although she admits that it is ambiguous on this issue. She means that this is a misinterpretation that comes from the translation of the word “morality”. The Russian version of the *Basic Teaching* only uses the word *moral’* three times, while the main term *nравственност’* (or *nравственnyi*) is used over 40 times.³⁹⁸

According to Agata Ładykowska, while *moral’* is defined as a “socially formed set of norms and principles, the system regulating people’s consciousness and conduct given in a concrete society”, the term *nравственност’* “primarily reflects the deep dispositions (*ustanovki*) in the consciousness of an individual”.³⁹⁹ She means that on the level of inner ethical judgment and commitment (*nравственност’*), post-Soviet Orthodox believers have maintained continuity between their Soviet and post-Soviet “moral self” despite changing frameworks of *moral’*.⁴⁰⁰

Based on this, Stoeckl interprets the usage of the term *nравственност’* as indicative of the intention of the authors of the document to define “moral behaviour” in a comprehensive, individual *and* social sense, and not only in terms of obeying rules. However, she points out that when “traditional values” are invoked as the source of public morality, the inner-outer duality of ethical judgment contained in the word *nравственност’* is lost.⁴⁰¹

In the context of LGBT rights, an especially interesting part of the *Basic Teaching* is that it introduced a discussion of “collective rights” (BT IV.9) in a sense that is not mentioned in any international human rights documents. While in human rights literature, the concept is discussed as a legal measure to empower minority groups, in the *Basic Teaching* the term is mainly used in opposition to individual rights.⁴⁰² This section on “collective rights” really concerns family rights and expresses the Church’s resistance to the empowerment of individuals inside the family through human rights: “The rights of an individual should not be destructive for the unique way of life and traditions of the family. ...” (BT IV.9).

This is unfamiliar to the human rights concept, since the family is not even discussed as a group in the literature on collective rights, and this seems mainly to have been used as battering ram to propagate for what the Church has on other occasions called “the traditional family model”.

³⁹⁷ Horsfjord, *op. cit.* 388, p. 66.

³⁹⁸ Stoeckl, *op. cit.* 51, p. 72f.

³⁹⁹ *Ibid.*, p. 73; Ładykowska, Agata: *Post-Soviet Orthodoxy in the Making. Strategies for Continuity Thinking Among Russian Middle-aged School Teachers*. In: Zigon, Jarrett (ed.): *Multiple Moralities and Religions in Post-Soviet Russia*, Oxford: Berghahn (2011), 27-47, p. 40.

⁴⁰⁰ Ładykowska, *op. cit.* 399, p. 40.

⁴⁰¹ Stoeckl, *op. cit.* 51, p. 73f.

⁴⁰² *Ibid.*, p. 83; Kyrlezhev, Aleksandr: *Relationships Between Human Rights Concept and Religious Values*, *Religion in Eastern Europe* 27(1), 41-47.

The *Basic Teaching* states that “modern law should view the family as the lawful union of man and woman in which natural conditions for raising children are created”, which I think demonstrates an inherent reference to LGBT rights and the Church’s goal to stifle them.⁴⁰³

The Church puts huge effort in lobbying law- and decision-makers. This is directly prescribed by the *Basic Teaching*, which enlists in areas of ecclesiastical human rights activism the “expertise of legal acts, legislative initiatives and actions by the authorities in order to prevent encroachment on human rights and dignity and aggravation of public morals” (BT V.2).

4. The domestic and international human rights agendas of the Moscow Patriarchate in the context of LGBT rights

In this part, I focus on the domestic and international human rights approaches of the Moscow Patriarchate, with a focus on sexuality and morality. I hold the same view as Stoeckl, who basically regards the Church as the driving force behind the moral agenda of the Russian government in both the domestic and international arena.⁴⁰⁴ In this regard, Horsfjord cited Alicja Curanović who has shown how the Russian state and Church have overlapping interests and conceptualisations of world affairs that nurture cooperation:

- (1) the state’s concern for its “near abroad” corresponds to Orthodox teaching on a canonical territory of church jurisdiction;
- (2) the state’s attention to an alleged Eurasian/Russian civilisation has a counterpart in the Russian Orthodox Church’s understanding of an Orthodox civilisation distinct from western Christendom;
- (3) Russia’s building of strategic partnerships is mirrored by the Church’s alliance-building through interreligious dialogue.⁴⁰⁵

The field of human rights is an area where the Moscow Patriarchate pursues a double strategy: on the international arena, it communicates a conservative, diplomatic and “moderate” agenda of “traditional morality and rights”; in the domestic arena, it disapproves of human rights as a foreign concept that has been imported from or imposed by the West.⁴⁰⁶

According to Agadjanian, the human rights agenda of the Moscow Patriarchate is expressed through the “inward” and “outward” orientations as defined in the *Basic Teaching*. While the “inward orientation” means that the Church provides a clear guideline to its members on how to deal with human rights issues and how to make use of human rights law to protect the right of the Church and its members,⁴⁰⁷ the “outward orientation” is characterised by addressing the human rights discourse more generally and making an Orthodox contribution in the domestic and international human rights debates.⁴⁰⁸ The “outward orientation” does not concern the right to religious freedom, as much as other questions on social welfare and family politics. This which means that this is relevant regarding the Church’s opposition to the realisation of LGBT rights within the human rights system.

⁴⁰³ Stoeckl, *op. cit.* 51, p. 83.

⁴⁰⁴ *Ibid.*, p. 91.

⁴⁰⁵ Horsfjord, *op. cit.* 388, p. 65; Curanović, Alicja: *The Religious Factor in Russia’s Foreign Policy*. Abingdon: Routledge (2012).

⁴⁰⁶ Stoeckl, *op. cit.* 51, p. 32.

⁴⁰⁷ Agadjanian, *op. cit.* 379, p. 15.

⁴⁰⁸ *Ibid.*, p. 18.

4.1. The domestic human rights agenda

On the domestic arena, the Church communicates mainly through the Synodal Department for Church-Society Relations and the World Russian People's Council, towards the "patriotic" Russian public. The message sent here is mainly hostile to secular and liberal civil society and sows mistrust for international human rights standards.⁴⁰⁹

In 2009, Patriarch Kirill designated Protoiereii Vsevolod Chaplin as head of the Synodal Department for Church-Society Relations (from which he was dismissed in 2015). He comes from the right/extremist wing of the church.⁴¹⁰ Just before the publication of the *Basic Teaching* by the Bishops' Council in 2008, he had organised a round table to discuss homosexuality. At the round table, Chaplin called civil society actors defending LGBT rights "our opponents" and equated homosexuality with prostitution and drug abuse.⁴¹¹

Irina Papkova has suggested that the Patriarchate, on the domestic arena, is less powerful in political terms than it may seem:

"Considering the high profile of the ROC in post-Soviet Russian society, and the lip service paid to the church by much of Russia's political establishment as the source of Russian culture and statehood, the Patriarchate's difficulty in influencing federal policy in the delineated areas is striking. This result also stands in contrast to the widespread images of the ROC as successfully pursuing the clericalization of Russian life – a concern highlighted particularly by Russian human rights activists and American policy makers."⁴¹²

Contrary to Papkova, Stoeckl has identified a clear increase in the Patriarchate's influence on domestic politics after 2008. She presents three hypotheses to explain this development:

- (1) the Church's lobbying for legislative ideas and proposals took a long time to implement for the state, so from 2009 onwards the Church has finally seen results of its long-time efforts to shape the domestic rights-based discourse;
- (2) after 2009, the Church's human rights discourse has shifted from mainly concerning church-state relations and religious freedom, towards topics of social morality, family and values. This development has been actively endorsed by the increasingly autocratic Russian political leadership under Putin (I would note here, however, that in the years 2008-12 there was the Medvedev interregnum before Putin's third term as president);
- (3) many of the ideas promoted by the Church has enjoyed wide support among the Russian population.⁴¹³

This is especially relevant when it comes to the topic at hand, on LGBT rights and public manifestations through LGBT rights marches or Pride parades. Before the federal "gay propaganda" law was adopted in 2013, it was justified by Russian politicians with reference to values and Orthodox traditions. One example is a statement by foreign minister Sergei Lavrov:

"Attempts to load universal approaches with one's own additional views of the human rights, as is the case, let's say, with sexual minorities, which periodically causes such a nervous reaction

⁴⁰⁹ Stoeckl, *op. cit.* 51, p. 92.

⁴¹⁰ *Ibid.*, p. 95

⁴¹¹ *Ibid.*, p. 96.

⁴¹² Papkova, *op. cit.* 224, p. 73f.

⁴¹³ Stoeckl, *op. cit.* 51, p. 98.

from the European Union to our attempts to protect our society from the propaganda of homosexuality – I believe, these attempts go beyond the universally accepted values. [...] Given that the overwhelming majority of our country's population profess the Orthodox Christian faith, or at least follow the Orthodox Christian traditions, such makeweights added to the universal values will barely produce any shoots. [...] After all, other civilizations, non-European ones too, have their own values which are unlikely to take root on the European soil.”⁴¹⁴

According to Caroline Hill, church clerics played a prominent role in discussions on “gay propaganda” legislation at the regional and federal levels between 2006 and 2013.⁴¹⁵ In the process of adopting the regional law in Saint Petersburg, clerics from the Russian Orthodox Church were present at hearings. For example, in the public hearing on 24 February 2012, participants included Hieromonk Dimitry (Pershin) of Moscow, who worked as an expert with the State Duma committee on family, women and children; archpriest and psychologist Aleksy Moroz, head of an alcohol and drug treatment program in Saint Petersburg; and Archpriest Igor Aksenov, superior of the Church of the Prophet Elijah in the Leningrad Oblast town of Vyborg.⁴¹⁶ About a month later, in March 2012, Pershin stated in an interview that:

“The law passed in St. Petersburg will help protect children from information manipulations by minorities promoting sodomy. [...] The persistence of sexual minorities and their intention to rally near children's establishments indicate that this regional law is highly needed and should be urgently given federal status. However, it's the job of State Duma deputies.”⁴¹⁷

Moroz and Archpriest Nikolai Golovkin of Saint Petersburg testified at an additional hearing on 22 June 2012 regarding how the law could be applied.⁴¹⁸ Another example mentioned by the Russian LGBT Network is that priests were engaged in extensive lobbying for the “gay propaganda” law in the Novosibirsk region.⁴¹⁹

In 2016, Hill conducted interviews with seventeen anonymous clerics of the Moscow Patriarchate, who either served in churches, monasteries, or church institutions in the cities of Moscow, Saint Petersburg and Ivanovo, and in the regions of Moscow Oblast and Leningrad Oblast. These semi-structured interviews included, *inter alia*, open-ended questions about the nature of homosexuality and definitions of “propagandising ‘homosexuality’ and non-traditional sexual relationships”, and closed-ended questions regarding the respondents’ levels of satisfaction with and opinions of the anti-propaganda laws.⁴²⁰

She found that in their argumentation for the adoption of anti-propaganda legislation, rational-instrumental frames were most common, with nine interviewees mainly using this kind of frame. Religious-moral dominant frames came in second place, with four interviewees

⁴¹⁴ News article: *Russia criticized over gay issue beyond universal values – Lavrov*, Moscow: Interfax (21 March 2012). Available: <http://interfax-religion.com/?act=news&div=9171> (Obtained on 2019-03-10)

⁴¹⁵ Hill, *op. cit.* 6, p. 1.

⁴¹⁶ *Ibid.*, p. 4;

⁴¹⁷ News article: *Law banning propaganda of homosexuality should get federal status - Russian Orthodox Church*, Moscow: Interfax: (12 March 2012). Available: <http://www.interfax-religion.com/?act=news&div=9135> (Obtained on 2019-03-10)

⁴¹⁸ Hill, *op. cit.* 6, p. 5;

⁴¹⁹ Report, *op. cit.* 249, p. 37; Article: *RPTse prodvigayet zakon o zaprete propagandy gomoseksualizma v Novosibirskoy oblasti* [ROC lobbies for a law banning the promotion of homosexuality in Novosibirsk Region], Moscow: Sib.fm (17 January 2012). Available: <http://sib.fm/news/2012/01/17/rpc-podderzhala-zakon-o-zaprete-propagandy-gomoseksualizma> (Obtained on 2019-03-10)

⁴²⁰ Hill, *op. cit.* 6, p. 10f.

predominantly using this kind of frame. The remaining four used religious-moral and rational-instrumental frames in equal measures.⁴²¹

An example of using a rational-instrumental frame is “calling attention to the negative consequences for society, or some important part of it”, such as consequences for children or families. More relevant in this thesis is the usage of religious-moral frames, which relate to religious and moral arguments both in the private sphere and in the public sphere. The clerics that used this kind of frame expressed their concerns with references to biblical and religious themes, individual sin, and standards of public morality.⁴²²

One interviewee did state that “homosexuals must have the ability to gather”, but that this should not be in the public sphere since “they should not impose their orientation on those around them”. Another argued that the rights of a conservative majority of Russians should gain precedence over the rights of sexual minorities to “propagandise”, stating that “our country is a democracy, and democracy is the power of the majority”.⁴²³

Another interviewee regarded the legislation as a case where “the state directly performs its role as an instrument of the moral majority”. It is also noteworthy that one interviewee argued that Pride marches were “an issue brought to Russia from the outside. If we look at who speaks about this more than anyone, it’s the Council of Europe [...] and the United States of America.”⁴²⁴ I think that it is also interesting that one interviewee argued that the Church has, by lobbying for “gay propaganda” legislation, actually advocated *for* the protection of an endangered group. However, his view was that the Church supported the Russian LGBT community by giving LGBT persons a chance at redemption in line with traditional morality:

“We as a Church believe that [homosexuals] are people. ... Because of this, we believe that it [was] very important to adopt this law, because these people were in a risky position, they were threatened with lynching, vigilantism. [...] The Church is for this law, because [it] is on the side of minorities, so that they won’t be hurt, and so they will understand that they are wrong, and, perhaps, they will change their lives.”⁴²⁵

I do not think that the portrayal of the Russian Orthodox Church as supporting the LGBT community in this sense does seem credible from a LGBT rights supporting viewpoint, but it can still be utilised towards critics who argue that all Church leaders hold homophobic views. Alekcander Zhdanov has also identified a prominent link between Yelena Mizulina (chief author of the federal “gay propaganda” law) of the Russian State Duma and Archpriest Dmitry Smirnov of the Russian Orthodox Church. Mizulina is senator of the Omsk Oblast to the Duma and former Chairman of the Standing Commission on the Issues of Motherhood, Childhood and Women’s Rights in the Duma from 2000-2010. Smirnov has stated that his “commission has worked closely with Mizulina's Duma committee on family policy” and that he “often advises” Mizulina, through institutional connections, by providing political and financial support and by providing policy advice.⁴²⁶

⁴²¹ Ibid., pp. 12f.

⁴²² Ibid., pp. 9-11.

⁴²³ Ibid., pp. 15-17

⁴²⁴ Ibid., p. 18.

⁴²⁵ Ibid., p. 20.

⁴²⁶ Zhdanov, Alekcander M.: *The Paradoxical Interrelationship of Church and State in Post-Communist Russia: The Rise and Manifestation of Power via the Prism of LGBTQIA Rights*, University of Oregon (2016) p. 57.

When the federal law was adopted, The Church was supportive of the legislation and promoted its view of homosexuality as a phenomenon that has been imported from abroad (i.e., from the West) and which is alien to the Russian cultural tradition. Archpriest Vsevolod Chaplin – at the time Chairman of the Synodal Department for the Cooperation of Church and Society – made a statement, saying that many regard Russia “as a defender of Christian values and traditional ethics, as a country that provides a real alternative to the cult of the golden calf and to a self-destroying understanding of what freedom is”.⁴²⁷

The Church has also been involved in lobbying for the “foreign agents” law, which, as I stated earlier, has severely complicated organising activities for LGBT rights NGOs. In February 2012, Vsevolod Chaplin – in his position as head of the Department for Church-Society Relations – called for “transparency” regarding non-profit organisations with foreign funding. His argument was that many NGOs “promoted projects that are foreign to the culture of the Russian people, such as the propaganda of sexual perversion, sexual education and the reform of the juvenile justice system”. The World Russian People’s Council also supported the law.⁴²⁸

4.2. The international human rights agenda

The influence of the Church in foreign policy is formalised through a permanent working group that was established in 2003.⁴²⁹ According to Robert Blitt, the Church and the Russian Ministry for Foreign Affairs “operate in tandem to advance the state’s foreign policy goals, including, for example, giving the ROC and ‘traditional’ religious values greater prominence within the international system”.⁴³⁰

On the international arena, the Church is represented by the Patriarchate’s Department for External Church Relations and its representations in Brussels and in Strasbourg, established in 2001 and 2004, respectively. The representations work with monitoring and lobbying the European Union and Council of Europe and its institutions.⁴³¹ In section 2.2.2. below, I take a look at the Moscow Patriarchate’s interaction with the Council of Europe and the ECtHR.

Although this thesis is concerned with European regional human rights law and the European Convention on Human Rights, it is of interest to see how the Moscow Patriarchate has been lobbying for traditional values in the United Nations Human Rights Council (UNHRC), where it has presented itself as a representative of the “voiceless” religious majority of the world.⁴³²

4.2.1. The Moscow Patriarchate in the UNHRC

Metropolitan Kirill, at the time the head of the Moscow Patriarchate’s Department for External Church Relations, addressed the delegates at the UNHRC meeting in Geneva on 18 March 2008. In his address, he praised the concept of human rights and traced it back to Christian thinking, but at the same time criticised the basic principles of the whole concept:

⁴²⁷ Chaplin, Vsevolod: ‘*Protoierei Vsevolod Chaplin: Rossiya dolzhna oshchutit’ sebia tsentrom khristianskogo mira*’, Moscow: Moscow Patriarchate (2013). Available: <http://www.patriarchia.ru/db/text/3075418.html> (Obtained on 2019-03-10)

⁴²⁸ Stoeckl, *op. cit.* 51, p. 100.

⁴²⁹ Blitt, Robert C: “*Russia’s ‘Orthodox’ Foreign Policy: The Growing Influence of the Russian Orthodox Church in Shaping Russia’s Policies Abroad*”, Philadelphia: University of Pennsylvania, *Journal of International Law*, Vol. 33 (2011), 363-460, p. 380f.

⁴³⁰ *Ibid.*, p. 382.

⁴³¹ Stoeckl, *op. cit.* 51, p. 50.

⁴³² *Ibid.*, p. 109

“First of all, the development of the human rights institution has been increasingly affected in a monopolistic way by a limited range of ideas concerning the human nature, which are not shared by most people in the world. More often than not, international organisations involved in human rights tend to draw their conclusions from the opinions of a narrow circle of experts, functionaries or noisy but well-organised minorities. Many national states appear to have fallen under the influence of these fellows, too, thus losing their ability to communicate the authentic attitude to values characteristic of their own nations.”⁴³³

According to Vebjørn Horsfjord, the above quote illustrates the following number of claims:

- (1) There should be space for an alternative understanding of “human nature”;
- (2) Current human rights norms originate in and are promoted by secular groups that, seen from a global perspective, constitute minorities;
- (3) Different cultures may have different value systems that are not necessarily reflected in the human rights; and
- (4) Some such cultures may be identified with specific nation states.⁴³⁴

The speech marked the start of a process through which the Russian Federation has strived to gain acceptance for the concept of “traditional values” at the UNHRC. The Patriarch’s address is also proof of the close relationship between the Moscow Patriarchate and the Russian Ministry of Foreign Affairs, since it was facilitated and promoted by Russia’s permanent representative to the UN in Geneva.⁴³⁵

The notion of “traditional values” was not mentioned in Kirill’s 2008 speech, but appeared for the first time in June 2009 in the title of a UN document when the Russian Federation presented a draft resolution to the UNHRC.⁴³⁶ This resolution was adopted on 2 October 2009 under the title “Promoting Human Rights and Fundamental Freedoms Through a Better Understanding of Traditional Values of Humankind”.⁴³⁷ The resolution recognised:

“that all cultures and civilisations in their traditions, customs, religions and beliefs share a common set of values that belong to humankind in its entirety, and that those values have made an important contribution to the development of human rights norms and standards.”

Among the 26 states in favour are, in addition to Russia, *inter alia* China, India and most of the UNHRC member states from Asia and the global south including all those with Muslim majorities. Among the 15 votes against are the United States, Japan, South Korea and all member states from central and Western Europe. Bosnia-Herzegovina, Argentina and Brazil are among the 6 abstentions. The “traditional values” agenda at the UNHRC has been mainly promoted by the Russian Federation and a number of Muslim countries, which Horsfjord has labelled the “‘traditional values’ bloc”. Since this bloc cannot criticise the human rights concept without resistance from liberal Western countries, it instead chose a strategy of introducing new conceptions and argumentative patterns into official UN human rights discourse, effectively questioning and relativising established human rights concepts.⁴³⁸

⁴³³ Patriarch Kirill: “*The Address of Metropolitan Kirill of Smolensk and Kaliningrad, Chairman of the Moscow Patriarchate DECR on the panel discussion on Human Rights and Inter-cultural Dialogue at the 7th session of the UN Human Rights Council*”, Moscow: Interfax Religion (2008). Available: <http://www.interfax-religion.com/?act=documents&div=121> (Obtained on 2019-03-10)

⁴³⁴ Horsfjord, *op. cit.* 388, p. 62.

⁴³⁵ *Ibid.*, p. 62f, Blitt, *op. cit.* 429, p. 408.

⁴³⁶ Horsfjord, *op. cit.* 388, p. 63f.

⁴³⁷ UNHRC: *Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind*, A/HRC/RES/12/21 (12 October 2009).

⁴³⁸ Horsfjord, *op. cit.* 388, p. 63f.

In the debate on whether to adopt the resolution, France, on behalf of the European Union, expressed that “the concept of traditional values was something that could render human rights more vulnerable [...] [and] could be used to weaken human rights, as enshrined in international instruments”. Norway abstained in the vote and contended that the initiative “could undermine the struggle for equality among men and women”.⁴³⁹

On 4 October 2010, as a follow up to the resolution the UN High Commissioner for Human Rights convened a workshop to explore how traditional values can promote and protect human rights and fundamental freedoms. The workshop was funded by the Russian Federation.⁴⁴⁰

The press service of the Moscow Patriarchate reported extensively on the resolution and the workshop, presenting it as the result of Kirill’s address to the United Nations General Assembly in 2008.⁴⁴¹ At the workshop, Hegumen Filip (Ryabykh) – who was at the time vice-chairman of the Department for External Relations⁴⁴² – held a speech in which he made direct reference to the *Basic Teaching*, stating that based on it he “would like to offer a few general propositions about the relationship between human rights and religious traditions”.⁴⁴³

Most important in this thesis is that controversies over LGBT rights were at the centre of the debate, and Ryabykh explicitly stated that religious view on matters of human rights should be taken into account in order to counteract efforts to promote a “new generation of human rights”, including the “right to sexual orientation”. Stoeckl also points out that the last phrase in his speech can be interpreted as a post-secular argument:

“From the point of view of democracy, it is important to provide an opportunity for representatives from different philosophical and moral views to participate in the development of the institution of human rights.”⁴⁴⁴

In April 2011, the UNHRC passed a resolution which requested a study on “how a better understanding and appreciation of traditional values of dignity, freedom and responsibility can contribute to the promotion and protection of human rights”.⁴⁴⁵ Vladimir Kartashkin – a Russian diplomat and professor of international law – was tasked with drafting the study.⁴⁴⁶ His draft report⁴⁴⁷ denied the possibility of a universal human rights regime⁴⁴⁸ because “each contemporary civilisation [...] has its own value systems, traditions, types of legal system and forms of religion”.⁴⁴⁹ It is also noteworthy that his draft report links dignity, freedom and morality in a way reminiscent of how the Church teaches that sin undermines dignity:

⁴³⁹ Ibid., p. 70; Blitt, *op. cit.* 429, p. 443.

⁴⁴⁰ UNHRC: *Workshop on traditional values of humankind. Report of the United Nations High Commissioner for Human Rights*, A/HRC/16/37 (13 December 2010), II.2.

⁴⁴¹ Stoeckl, *op. cit.* 51, p. 109; Ryabykh, Hegumen Filip: *V sovete OON po pravam cheloveka proshel seminar posvyashchennyi pravam cheloveka i traditsionnym tsennostyam* (Russian) [The UN Human Rights Council held a seminar on human rights and traditional values], Strasbourg: Representation of the Russian Orthodox Church in Strasbourg (2010). Available: <http://www.strasbourg-reor.org/?topicid=649> (Obtained on 2019-03-10)

⁴⁴² Stoeckl, *op. cit.* 51, p. 50.

⁴⁴³ Ibid., p. 110.

⁴⁴⁴ Ibid., p. 110.

⁴⁴⁵ UNHRC: *Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind*, A/HRC/RES/16/3 (8 April 2011).

⁴⁴⁶ Horsfjord, *op. cit.* 388, p. 71.

⁴⁴⁷ UNHRC: *Preliminary study on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind*, A/HRC/AC/8/4 (12 December 2011).

⁴⁴⁸ Ibid., § 79.

⁴⁴⁹ Ibid., § 58.

“Dignity and freedom of the individual are closely interlinked. Breaking society’s laws not only detracts from a person’s dignity and self-respect, but may also lead to deprivation of liberty.”⁴⁵⁰

The draft report assigns “historical sustainability, universal recognition” to “traditional values”, but also states that “they [traditional values] must not include practices that conflict with human dignity or violate human rights, even where these are rooted in tradition or values that may be typical of one or a few peoples or civilisations”. Therefore, human rights retain authority, but the report still provides a legitimisation of “traditional values”. However, Kartashkin’s draft report was scrapped and the final report is different in both tone and content.⁴⁵¹

In the final report, “traditional values” are assigned a different role. Instead of being envisaged as support for human rights, they are seen as a condition for human rights implementation. Horsfjord describes that they are primarily viewed from the outside and understood as something that can be instrumentalised in order to achieve the realisation of human rights.⁴⁵² The core message of the report (A/HRC/22/71) is contained in a paragraph towards the end:

“When developing programmes that introduce the concept of human rights by means of familiar traditional values, it is important that those values serve the goal of promoting and protecting human rights. As illustrated above, traditional values can be misapplied to justify discrimination or subjugation of minority or marginalised groups. Care must be taken to ensure that international human rights standards remain paramount when developing a programme of human rights education. The use of traditional values that may be more familiar to individuals and communities should be a tool for introducing and promoting the acceptability and implementation of international human rights standards; those traditional values must never, however, be presented as a substitute for international standards, given the generally subjective and unclear framing of values when compared with human rights.”⁴⁵³

In October 2012, a third resolution on “traditional values” asked the office of the High Commissioner to collect information from UN member states and other relevant parties on “best practices” in the field of “traditional values”.⁴⁵⁴ A report from this collection process was presented to the UNHRC in June 2013⁴⁵⁵ and noted that “several respondents found that some traditional values were closely related to human dignity and human rights...” whereas “some respondents were of the view that traditional values could be invoked to justify the status quo and undermine the rights of the most marginalised and disadvantaged groups”.

The report displays the weaknesses of the entire agenda and, according to Horsfjord, it seems as if Russia lost interest in the end and never submitted any own examples of best practices on the topic.⁴⁵⁶ The European Union expressed its deep distrust of the whole “traditional values” agenda.⁴⁵⁷ The Russian LGBT network made a submission, in which it voiced its concern that

⁴⁵⁰ Ibid., § 33.

⁴⁵¹ UNHRC: *Study of the Human Rights Council Advisory Committee on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind*, A/HRC/22/71 (6 December 2012).

⁴⁵² Horsfjord, *op. cit.* 388, p. 72.

⁴⁵³ UNHRC, *op. cit.* 451, § 72.

⁴⁵⁴ UNHRC: *Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind: best practices*, A/HRC/RES/21/3 (9 October 2012).

⁴⁵⁵ UNHRC: *Summary of information from States Members of the United Nations and other relevant stakeholders on best practices in the application of traditional values while promoting and protecting human rights and upholding human dignity*, A/HRC/24/22 (13-17 May 2013).

⁴⁵⁶ Horsfjord, *op. cit.* 388, p. 73.

⁴⁵⁷ UNHRC, *op. cit.* 455, § 3.

reference to “traditional values” is used to justify “severe restrictions of rights and freedoms, especially for the LGBT community”.⁴⁵⁸

After this third resolution, the terminology of “traditional values” has not appeared again in the titles of UN documents. However, Horsfjord remarks that although this initiative eventually failed, it does not mean that the conservative religious alliance behind the “traditional values” agenda cannot revive it in the future.⁴⁵⁹

4.2.2. The Moscow Patriarchate and the Council of Europe

In March 2004, the Holy Synod of the Russian Orthodox Church decided to establish a Representation of the Moscow Patriarchate in Strasbourg to conduct a dialogue with the Council of Europe and to present the Church’s position on human rights topics. Metropolitan Kirill expressed gratitude that the Council of Europe has a history of preserving cultural diversity.⁴⁶⁰ The Moscow Patriarchate does not seem to have worked as hard lobbying in the Council of Europe as it has in the UNHRC, because far less sources refer to its lobbying in Strasbourg. I suppose that a reason is that in the UNHRC, the Church has much more support from its allies in the “traditional values” bloc, while the Council of Europe consists of (more or less) democratic countries with some kind of common understanding of European values.

When Patriarch Alexii II visited Strasbourg in October 2007 to address PACE, he spoke, *inter alia*, about the problem of preservation of family values and addressed the “propaganda of same-sex marriages and gay parades”. Hegumen Filaret (Bulekov) – at the time head of the Representation of the Russian Orthodox Church in Strasbourg and since 2011 vice-chairman of the Department for External Relations – expressed in an article that accusations towards the Church about institutional homophobia are misplaced.

While he affirmed that the Patriarch supported banning Pride parades, he explained that the Church does not support “discrimination of people on the grounds of sexual orientation or restriction of their civil rights” and that it “does not bless violence against those who entertain non-traditional ideas in this area”. Concerning “gay propaganda”, Bulekov referred to the *Social Concept* and argued that “new ideas of marital relations will be implanted in the heads of children who in no way are able either to understand them, even less to take them critically”. He continued stating that threats to “traditional family values” do not come from “proponents of the homosexual way of life alone”, and named “fornication, seduction of minors, paedophilia and pornography” as vices that damage the spiritual and moral health of society as a whole.⁴⁶¹

The Moscow Patriarchate has been involved in several encounters with the ECtHR. Two interesting ECtHR cases concerning its clashes with other patriarchates are *Metropolitan Church of Bessarabia and Others v. Moldova* and *Svyato-Mykhaylivska Parafiya v. Ukraine*, which I will describe shortly in the sections on the Republic of Moldova and Ukraine.

⁴⁵⁸ Ibid., § 71.

⁴⁵⁹ Horsfjord, *op. cit.* 388, p. 63f.

⁴⁶⁰ Metropolitan Kirill of Smolensk and Kaliningrad: *Russian Orthodox Church in Strasbourg: why are we here?*, Strasbourg: Representation of the Russian Orthodox Church in Strasbourg (2006). Available: <http://www.strasbourg-reor.org/?topicid=288> (Obtained on 2019-03-10)

⁴⁶¹ Bulekov, Hegumen Filip: *Family values and human rights*, Strasbourg: Representation of the Russian Orthodox Church in Strasbourg (2007). Available: <http://strasbourg-reor.org/?topicid=284> (Obtained on 2019-03-10)

What is most relevant here is the Moscow Patriarchate's involvement in cases related to LGBT rights, since it has been directly involved both in *Alekseyev v. Russia* (2010) and in *Zhdanov and Rainbow House v. Russia* (still pending a decision).⁴⁶² The Interreligious Council of Russia, an organisation founded in 1998 that is representing the four "traditional" religions (as defined by the 1997 'Law on Religious Freedom'), has issued harsh critique towards the pro-LGBT stance of the Council of Europe. In 2008, the Council stated in a letter to Thomas Hammarberg – at the time Council of Europe Commissioner for Human Rights – that the ECHR:

“does not and cannot determine the moral conceptions of our society. This is beyond the force of international law. We reject therefore the lawless attempt to export to Russia any amoral behaviour standards wrapped in legal form.”⁴⁶³

In 2011, Thomas Hammarberg published his Council of Europe report on discrimination⁴⁶⁴ and a following conference was held in 2012.⁴⁶⁵ In reaction to this project, three Church-associated Russian lawyers co-wrote a 52-page manifesto published in 2011, in which they stated that it is a human right to assess homosexual relations as a deviation from the norm.⁴⁶⁶ Regarding the issue of LGBT rights marches, as was the case in *Alekseyev*, the co-author Igor Ponkin stated that allowing such demonstrations would be “irresponsible in Russia since this could lead to public uprisings that the law-enforcement agencies might not be able to control”.⁴⁶⁷

Hegumen Filip (Ryabykh) was appointed as Bulekov's successor in 2011 as head of the Strasbourg Representation, and has since commented generally on moral issues. In a 2012 hallmark speech, he categorised the content of the Moscow Patriarchate's involvement in the contemporary human rights discourse and divided it into three areas: (1) a statement that secular courts should not interfere in the internal organisation of religious communities; (2) a call for protection of believers' right to openly express their values and symbols; and (3) that religious values must underpin public morality.⁴⁶⁸

The first and second statements are not relevant here, although the first statement is interesting since the Moscow Patriarchate has itself attempted to use the court against other patriarchates, which I shortly describe in the sections on Ukraine and Moldova. The third statement is relevant here and obviously follows from how the Church regards human rights, that has already been discussed at length in this thesis. In an interview with RIA Novosti from 2013, Ryabykh also emphasised that the endorsement of “alternative sexualities” implies:

⁴⁶² Rimestad, *op. cit.* 204, p. 44.

⁴⁶³ Article: *Interreligious Council of Russia: Letter to Mr. Thomas Hammarberg, Commissioner for Human Rights, Council of Europe*, Strasbourg: Representation of the Russian Orthodox Church in Strasbourg (2008). Available: <http://www.strasbourg-reor.org?topicid=424> (Obtained on 2019-03-10)

⁴⁶⁴ Report, *op. cit.* 98.

⁴⁶⁵ Article: *Conference on “Combating discrimination on the grounds of sexual orientation or gender identity across Europe: Sharing knowledge and moving forward”*, Strasbourg: Council of Europe (2012). Available: https://www.coe.int/en/web/secretary-general/speeches-2012/-/asset_publisher/gFMvI0SKOUrv/content/conference-on-combating-discrimination-on-the-grounds-of-sexual-orientation-or-gender-identity-across-europe-sharing-knowledge-and-moving-forward-?inheritRedirect=false (Obtained on 2019-03-10)

⁴⁶⁶ Ponkin, Igor, Kuznetsov, Mikhail, Mikhaleva, Nadezhda: *Doklad o prave na kriticheskuiu otsenku gomoseksualizma i o zakonnykh ogranicheniiakh naviazvaniia gomoseksualizma* [Report on the right to critique homosexuality and on legal restrictions on the imposition of homosexuality], Moscow: Gosudarstvo i Religija [State and Religion] (18 June 2011). Available: <http://www.state-religion.ru/files/Doc.pdf> (Obtained on 2019-03-10); Rimestad, *op. cit.* 204, p. 52.

⁴⁶⁷ Ponkin, Kuznetsov, Mikhaleva, *op. cit.* 466, p. 7

⁴⁶⁸ Ryabykh, Filip: *Religiia i prava chelovek* [Religion and Human Rights], Strasbourg: Representation of the Russian Orthodox Church in Strasbourg (2012). Available: <http://www.strasbourg-reor.org/?topicid=923> (Obtained on 2019-03-10)

“an attempt to commit a civilisational *coup d'état*. The idea of man, based on natural law, is replaced with a virtual anthropology. If so far state legislation on the family and the relationship between the sexes relied on the laws of nature, then it is now placed on the shaky basis of human preference and fantasy.”⁴⁶⁹

In the context of LGBT rights cases in the ECtHR, it is clear that the Church has attempted to make an indirect impact via representatives of the Russian Federation. Remember that in the case of *Bayev v. Russia* the Government claimed to have enjoyed a wide margin of appreciation to regulate freedom of expression, not to “offend intimate personal convictions within the sphere of morals or, especially, religion”.⁴⁷⁰ In the original case of *Alekseyev v. Russia*, the Court took note of the differing kinds of objections by religious believers:

“Some petitioners, such as the Orthodox Church, simply expressed their objection to the events and to the general idea of people being homosexual and identifying themselves as such. Others, such as the Supreme Mufti, informed the authorities of their intention to hold a protest against the events, whereas the senior Muslim authority in Nizhny Novgorod threatened violence.”⁴⁷¹

Having objections and protesting is, of course, within the boundaries of a democratic order. It is interesting to see, however, that the Russian government claimed the right to ban Moscow Pride and other related events because “homosexuality was incompatible with the ‘religious doctrines for the majority of the population’, as has been made clear in the statements by the religious organisations calling for the ban”. The government contended that allowing ‘gay parades’ would be an “intentional insult to their [the believers’] religious feelings and a ‘terrible debasement of their human dignity’”.

Stoeckl writes that the model of the state contemplated within the framework of the European Convention is a pluralistic democratic state, and that this model does not consider admissible the encroachment on individual rights and freedoms for the sake of the collective,⁴⁷² just as the judges in *Alekseyev v. Russia* stated when they did not accord religion a special status in the balance of interests that characterise a pluralistic democratic society. I think that this means, essentially, that no matter how hard efforts the Moscow Patriarchate puts into identifying “a more original understanding of human rights”, this would be incompatible with today’s human rights jurisprudence and, in my view, with the foundations of the whole concept.

⁴⁶⁹ News article: *Predstavitel' RPTs: legalizatsiia netraditsionnykh semei; modnaia utopiia* [Representative of the Russian Orthodox Church: legalisation of non-traditional families; fashionable utopia], Moscow: RIA Novosti (5 July 2013). Available: <http://ria.ru/interview/20130705/947796599.html> (Obtained on 2019-03-10; Rimstad, *op. cit.* 208, p. 53.

⁴⁷⁰ *Bayev and Others v. Russia*, *op. cit.* 127, § 45.

⁴⁷¹ *Alekseyev v. Russia*, *op. cit.* 166, § 72.

⁴⁷² Stoeckl, *op. cit.* 51, p. 122.

Ukraine

«Краще гей-парад на Хрещатику, ніж російські танки у центрі Києва»

“It is better to allow gay parades than to expect
Russian tanks in the centre of Kyiv”

Ukrainian politician Yuriy Lutsenko on 10 November 2015

5. Ukraine

In this section, I discuss the situation for LGBT rights activists in Ukraine in relation to the right to freedom of assembly. I also describe how the church-state relations have developed in Ukraine since its independence in 1991, and how the ongoing Eastern Orthodox schism may ameliorate the situation for LGBT persons, since the religious/political spheres in Ukraine are changing towards independence from the political influences of the Moscow Patriarchate.

I. Domestic legislation

I provide an overview of the domestic legislation that is relevant in the context of freedom of assembly for LGBT rights activists, and also of legal amendments effectively weakening the status of the Moscow Patriarchate in Ukraine.

1. The Constitution of Ukraine

The Constitution of Ukraine⁴⁷³ was adopted and ratified by the Verkhovna Rada (the Ukrainian parliament) on 28 June 1996. Article 9 states that international agreements that Ukraine is part of are part of national legislation, but also that if they conflict with the Constitution then the latter takes precedence. Article 35 provides that the state is secular and neutral.

Article 36 provides for the freedom of association and assembly. According to the U.S. Department of State's translation, the citizens of Ukraine "have a right to freedom association in political parties and public organizations for realization and defence of the rights and freedoms [...] except for the limitations, set by a law in interests of national safety and public peace, health or defence of rights and freedoms of other people care of population".

However, in freedom of assembly cases, there have been some discrepancies since the domestic judicial authorities have relied on a relevant decree on the procedure for organising and holding meetings, rallies, street marches, and demonstrations in the Soviet Union of 1988. According to Ganna Yudkivska, the 1988 Decree provided for a different procedure than the one in the Constitution of Ukraine: prior to organising peaceful demonstrations the persons had to seek permission from the responsible local administration, that could also ban any such demonstration. As Yudkivska put it, "as found by a domestic court [...] demonstrations under the 1988 Decree were considered on the basis of their compatibility with non-existent constitutions of non-existent subjects". After the decree was rendered obsolete, no new law on freedom of assembly has been adopted by the Verkhovna Rada.⁴⁷⁴

The ECtHR accepted "that it may take some time for a country to establish its legislative framework during a transitional period", but that a delay of two decades was not justifiable, especially not when it compromised a "fundamental right [such] as freedom of assembly". According to Yudkivska, in July 2013 a law '*On Peaceful Assembly*' was drafted and, in 2016,

⁴⁷³ Constitution of Ukraine. Available in Ukrainian: <https://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=254%EA%2F96%2D%E2%F0> (Obtained on 2019-03-10); Translated into English, the U.S. Department of State. Available: https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/08/constitution_14.pdf (Obtained on 2019-03-10)

⁴⁷⁴ Yudkivska, Ganna: *Ukraine on the way to democracy: Role and achievements of the European Court of Human Rights*. In: Motoc, Ziemele, *op. cit.* 272, 457-490, p. 474.

was still waiting for examination.⁴⁷⁵ However, in Freedom House's 2018 *Freedom in the World* report is stated that a law on freedom of assembly has still not been adopted in Ukraine.⁴⁷⁶

2. The law 'On International Agreements of Ukraine'

According to Article 19 of the law 'On International Agreements of Ukraine'⁴⁷⁷, "current international agreements of Ukraine, the binding nature of which has been ratified by the Verkhovna Rada of Ukraine, are a part of domestic legislation and shall be applied under the procedure provided for the norms of domestic legislation". Regarding the correlation between international agreements (ratified by the Rada) and domestic legislation the article states that:

"if the international agreement of Ukraine, which has come into force under the set procedure sets rules other than those envisaged in the respective act of Ukrainian legislation, the rules of international agreement shall apply."⁴⁷⁸

This is interesting since it contradicts Article 9 of the Constitution, which states that the Constitution first has to be changed before any international agreements that are in conflict with it can gain legal force in Ukraine. This is also relevant concerning the status of the ECHR in Ukraine. Following the Euromaidan protests in 2013-14 and Ukraine's closer relationship to Europe, the possibility to bring cases to Strasbourg has increasingly become more in demand by Ukrainians struggling for their right to live in a state adherent to the rule of law.⁴⁷⁹

3. The 2003 law 'On Protection of Public Moral'

On 26 December 2003, the Verkhovna Rada passed the law 'On Protection of Public Moral',⁴⁸⁰ which defined public moral as "the system of ethic norms, rules of behaviour, that were formed in the society on the basis of traditional spiritual and cultural values, concepts of good, honour, dignity, civil duty, conscience and justice". It prohibited, *inter alia*, to "propagandise barbarity, sacrilege, and disrespect to national and religious sacred objects" and the "distribution and circulation of any form of pornography". It was upheld by a Morality Commission,⁴⁸¹ which was abolished in 2015⁴⁸². The law was then scrapped in mid-2015.⁴⁸³

⁴⁷⁵ Ibid.; OSCE/ODIHR, Venice Commission: *Joint Opinion on Two Draft Laws on Guarantees For Freedom of Peaceful Assembly*, Venice: European Commission for Democracy Through Law (108th Plenary Session, 14-15 October 2016). Available: <https://www.osce.org/odihr/313076?download=true> (Obtained on 2019-03-10)

⁴⁷⁶ Report: *Freedom in the World 2018: Ukraine*, Washington D.C.: Freedom House. Available: <https://freedomhouse.org/report/freedom-world/2018/ukraine> (Obtained on 2019-03-10)

⁴⁷⁷ Law of Ukraine of 29 June 2004 No. 1906-IV. Translated into English, CIS-Legislation. Available: <http://cis-legislation.com/document.fwx?rgn=9402> (Obtained on 2019-03-10)

⁴⁷⁸ Yudkivska, *op. cit.* 474, p. 460.

⁴⁷⁹ Ibid., p. 458f.

⁴⁸⁰ Law of Ukraine of 20 November 2003 No. 1296-IV. Translated into English, CIS-Legislation. Available: <http://cis-legislation.com/document.fwx?rgn=18049> (Obtained on 2019-03-10)

⁴⁸¹ Report: *Study on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: sociological report: Ukraine*, Council of Europe (2010), pp. 12-14. Available: http://www.coe.int/t/Commissioner/Source/LGBT/UkraineSociological_E.pdf (Obtained on 2019-03-10)

⁴⁸² Article: *Ukraine's Parliament votes to dissolve notorious 'Morality Commission'*, Kharkiv: Kharkiv Human Rights Group (2015). Available: <http://khp.org/index.php?id=1423052539> (Obtained on 2019-03-10)

⁴⁸³ Decision: *Pro likvidatsiyu Natsional'noyi ekspertnoyi komisiyi z pytan' zakhystu suspil'noyi morali* (Ukrainian) [On the Elimination of the National Expert Commission on the protection of public morals], Kyiv: Cabinet of Ministers of Ukraine (2015). Available: <https://www.kmu.gov.ua/ua/npas/248200589> (Obtained on 2019-03-10)

My impression is that the law is quite vague on these subjects, and that depending on how it would be interpreted it could be used extensively. For example, according to the Kharkiv Human Rights Group, amendments to the law introduced under President Viktor Yanukovich “gave more scope for restrictions, closure of websites, for example, and more power to officials of the Morality Commission”.⁴⁸⁴ The organisation further reported that the Ukrainian Council of Churches and Religious Organisations has consistently opposed dissolution of the Commission and instead supported increasing its mandate.⁴⁸⁵

In January 2004, Professor Dirk Voorhoof (University of Gent, Belgium) issued critique of the law at the request of the Council of Europe. He voiced three concerns relating to Article 10 ECHR: (1) the law contains provisions which restrict freedom of expression and the distribution of media products in an imprecise way; (2) the law has a too broad scope of application; and (3) the law sets out several licensing procedures and different forms of prior restraint which can be considered as violation Article 10. This third concern especially is related to the establishing of a Morality Committee, which “holds a virtual risk for disproportionate interferences with freedom of expression”. In conclusion, he emphasised that “respect for public morals in a society cannot be enforced (solely or functionally) by prohibitions on all kinds of expressions [...] under a (licensing) control by state authorities”.⁴⁸⁶

4. Draft laws on introducing “gay propaganda” legislation

In June 2011, the draft law no. 8711 ‘*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 in the Verkhovna Rada. On 2 October 2012, the law passed in its first reading in the Verkhovna Rada.⁴⁸⁷ On 4 October 2012, a second reading was scheduled for 16 October, but the vote was never held and the law was finally scrapped in January 2015.⁴⁸⁸ It was later resubmitted as draft law no. 0945 and proposed amendments of five laws:

- 1) The introduction of a prohibition on production and dissemination of products which “promote homosexuality” into Article 2 of the law ‘*On the Protection of Public Morality*’;
- 2) Amending Article 3 of the law ‘*On the Print Media*’ and Article 6 of the law ‘*On Television and Radio*’, to include provisions on prohibiting the “promotion of homosexuality” in media, TV or radio broadcasting;
- 3) Amending Article 28 of the law ‘*On Publishing*’, to prohibit the publishing of material that would promote violence, cruelty, and homosexuality;
- 4) Amending Article 300 of the Criminal Code, to criminalise the import of products “promoting homosexuality” for sale or distribution purposes,

⁴⁸⁴ Article, *op. cit.* 482.

⁴⁸⁵ Article: *Ukraine dissolves notorious ‘Public Morality Commission’*, Kharkiv: Kharkiv Human Rights Group (2015). Available: <http://khpg.org/en/index.php?id=1433068051> (Obtained on 2019-03-10)

⁴⁸⁶ Voorhoof, Dirk: *Review and analysis of the Ukrainian Law on the protection of public morality*, Strasbourg: Council of Europe (27 January 2004), pp. 5-8. Available: <https://biblio.ugent.be/publication/8518102/file/8518104.pdf> (Obtained on 2019-03-10)

⁴⁸⁷ News article: *Ukrainian Parliament passes draft law banning ‘homosexual propaganda’ in first reading*, Brussels: ILGA Europe (2012). Available: <https://www.ilga-europe.org/resources/news/latest-news/ukrainian-parliament-passes-draft-law-banning-homosexual-propaganda-first> (Obtained on 2019-03-10)

⁴⁸⁸ News article: *“Anti-propaganda” law in Ukraine withdrawn from the Parliament agenda*, Brussels: ILGA Europe (2015). Available: <https://www.ilga-europe.org/resources/news/latest-news/anti-propaganda-law-ukraine-withdrawn-parliament-agenda> (Obtained on 2019-03-10)

storage, transportation or other movement, with penalties ranging from 100 to 300 times the net minimum income to prison sentences of up to five years.⁴⁸⁹

In 2011, Human Rights Watch commented on this draft law. Boris Dittrich – advocacy director of the lesbian, gay, bisexual, and transgender (LGBT) rights program at Human Rights Watch – commented that “the bill would deprive everyone in Ukraine of access to essential information to decide about their lives and protect their health”, continuing by stating that if Ukraine “were to adopt this discriminatory and stigmatizing legislation, Ukraine would alienate itself from the other member states of the Council of Europe [...] Lawmakers should realize that the best way to protect Ukrainians is to respect their rights and not to censor them”.⁴⁹⁰

In February 2012, the draft law no. 10290 ‘*On the Prohibition of Propaganda of Homosexuality Aimed at Children*’ was introduced in parliament. In December 2012, it was resubmitted as draft law no. 1155. It proposed the amendment of Article 180 of the Code on Administrative Offences, and the creation of Article 150(2) to the Criminal Code and Article 32(1) to the law ‘*On Protection of Childhood*’, to prohibit the “promotion of homosexuality which could adversely affect the physical and mental health of children”, and to oblige the authorities “to take the necessary measures to protect children from promotion of homosexuality”.⁴⁹¹

Draft law no. 1155 defines “propaganda of homosexuality” as “intentional activity, which aims to and is expressed in dissemination of any positive information about same-sex relations that could negatively affect [...] [the] development of the child, including forming a misconception of traditional and non-traditional marriage relations being equal, and in the future impact his or her choice of sexual orientation.”⁴⁹²

According to a 2013 report by the LGBT NGO “Insight”, church authorities and groups have aggressively campaigned to pass these draft laws, by pressuring politicians and government institutions.⁴⁹³ None of the draft laws were adopted by the Verkhovna Rada.⁴⁹⁴

5. The 2018 amendment to the Law ‘*On Freedom of Conscience and Religious Organisations*’

On 20 December 2018, following the Ecumenical Patriarch of Constantinople’s granting of autocephaly to the Kyiv Patriarchate (see section III below), the Verkhovna Rada made amendments⁴⁹⁵ to the Law ‘*On Freedom of Conscience and Religious Organisations*’,

⁴⁸⁹ OSCE/ODIHR, Venice Commission, *op. cit.* 475, p. 4.

⁴⁹⁰ Article: *Ukraine: Reject Homophobic Law*, New York: Human Rights Watch (2011). Available: <http://www.hrw.org/news/2011/10/16/ukraine-reject-homophobic-law> (Obtained on 2019-03-10)

⁴⁹¹ OSCE/ODIHR, Venice Commission, *op. cit.* 475, p. 5.

⁴⁹² Report: *Human Rights Violations of Lesbian, Gay, Bisexual, and Transgender (LGBT) People in Ukraine: A Shadow Report*, Kyiv: Insight (2013), p. 11. Available: https://www.insight-ukraine.org/uploads/files/iccpr_lgbt_shadow_report_ukraine_3.pdf (Obtained on 2019-03-10); Parliamentary Assembly of the Council of Europe: *Tackling discrimination on the grounds of sexual orientation and gender identity*, Strasbourg: Council of Europe (2013), §§ 43-45. Available: <https://www.refworld.org/docid/51c00e564.html> (Obtained on 2019-03-10)

⁴⁹³ Report, *op. cit.* 492, p. 7.

⁴⁹⁴ OSCE/ODIHR, Venice Commission, *op. cit.* 475, p. 4.

⁴⁹⁵ Verkhovna Rada of Ukraine: *Pro vnesennya zminy do stat' 12 Zakonu Ukrainy "Pro svobodu sovisti ta relihiyni orhanizatsiyi" shchodo nazvy relihiynykh orhanizatsiy (ob"yednan'), yaki vkhodyat' do struktury (ye chastynoyu) relihiynoyi orhanizatsiyi (ob"yednannya), kerivnyy tsestr (upravlinnya) yakoyi znakhodyt'sya za mezhamy Ukrainy v derzhavi, yaka zakonom vyznana takoyu, shcho zdiysnyla viys'kovu ahresiyu proty Ukrainy ta/abo tymchasovo okupuvala chastynu terytoriyi Ukrainy* (Ukrainian) [On Making Amendments to Article 12 of the Law of Ukraine ‘*On Freedom of Conscience and Religious Organizations*’ regarding the names

according to which the “Ukrainian Orthodox Church of the Moscow Patriarchate” have to change its registered name to the “Russian Orthodox Church in Ukraine”.⁴⁹⁶

On 17 January 2019, the Moscow Patriarchate reacted to the adoption of the law. Archbishop Clement of Nezhin and Priluki, chairman of the UOC-MP’s Information and Education Department, stated that the law by “introducing changes to the subordination of religious communities, is a flagrant violation of the Constitution of Ukraine and the international obligations that it took on as a law-governed democratic state”, concluding that “it is confirmed by reports of authoritative international organizations monitoring religious legislation”.⁴⁹⁷

II. The situation for LGBT rights activists in Ukraine in relation to the right to freedom of assembly

In this section, I provide statistics on attitudes towards LGBT people; an overview of experiences of organising LGBT rights events; and information on cases of hate speech and manifestations of intolerance and prejudice by public officials and religious leaders, to evaluate how the legal situation for LGBT rights has developed in context of the freedom of assembly.

1. Statistics

According to ILGA Europe’s Rainbow Europe Map 2018 (based on the situation in the previous year), Ukraine shared rank 37 together with Romania and Lithuania, with an overall score of 21 %.⁴⁹⁸ The scores for the five preceding years (in per cent) are: 19 (2017);⁴⁹⁹ 13 (2016);⁵⁰⁰ 10 (2015);⁵⁰¹ 12 (2014);⁵⁰² 12 (2013).⁵⁰³ The obvious trend is that the score has increased drastically since the Ukraine–European Union Association Agreement was ratified by the European Parliament and the Verkhovna Rada on 16 September 2014.⁵⁰⁴

The LGBT NGO “Nash Mir” conducted an opinion poll in early 2016, according to which the whole Ukrainian society still demonstrate a fairly high level of homophobia. The answers (in per cent) to the question of their attitudes towards people of homosexual orientation were as

of religious organisations (associations) that are part of a religious organisation (association), the governing center of which is the borders of Ukraine in a state that is recognized by law as having committed military aggression against Ukraine and / or temporarily occupied part of the territory of Ukraine]. Available in Ukrainian: <https://zakon.rada.gov.ua/laws/show/2662-19/sp:max25> (Obtained on 2019-03-10)

⁴⁹⁶ News article: *Ukraine passes law forcing Moscow-backed church to identify as Russian; fight erupts in parliament*, Kyiv: Kyiv Post (2018). Available: <https://www.kyivpost.com/ukraine-politics/ukraine-passes-law-forcing-moscow-backed-church-to-identify-as-russian-fight-erupts-in-parliament.html?cn-reloaded=1> (Obtained on 2019-03-10); News article: *Ukraine’s President Signs Law Forcing Russia-Affiliated Church To Change Name*, Prague: Radio Free Europe/Radio Liberty (22 December 2018). Available: <https://www.rferl.org/a/ukraine-s-president-signs-law-forcing-orthodox-church-to-change-its-name/29671193.html> (Obtained on 2019-03-10)

⁴⁹⁷ Article: *The Ukrainian Orthodox Church regards the law on subordination of religious organizations adopted by the Verkhovna Rada as a violation of the Constitution of Ukraine*, Moscow: Moscow Patriarchate (2019). Available: <https://mospat.ru/en/2019/01/17/news169089/> (Obtained on 2019-03-10)

⁴⁹⁸ Index: *Rainbow Europe* (2018), *op. cit.* 287.

⁴⁹⁹ Index: *Rainbow Europe* (2017), *op. cit.* 288.

⁵⁰⁰ Index: *Rainbow Europe* (2016), *op. cit.* 289.

⁵⁰¹ Index: *Rainbow Europe* (2015), *op. cit.* 290.

⁵⁰² Index: *Rainbow Europe* (2014), *op. cit.* 291.

⁵⁰³ Index: *Rainbow Europe* (2013), *op. cit.* 292.

⁵⁰⁴ News article: *European Parliament Ratifies EU-Ukraine Association Agreement*, Brussels: European Parliament (2014). Available: <http://www.europarl.europa.eu/news/en/press-room/20140915IPR62504/european-parliament-ratifies-eu-ukraine-association-agreement> (Obtained on 2019-09-10)

follows: less than 5 % were more or less positive; 60 % more or unambiguously negative; 5 % had not yet decided their opinion; and 30 % responded that they did not care. Nash Mir drew the conclusion that “modern Ukrainian society as a whole does not demonstrate active intolerance towards LGBT people, but demonstrates a more latent, passive rejection”.⁵⁰⁵

2. Experiences of organising LGBT rights demonstrations in Ukraine

The first public Pride parade was held in Kyiv in September 2003. In May 2008, an event planned to be held in Mykolaiv on 17 May – the International Day Against Homophobia – was cancelled last-minute, under the pretext that it would cause “friction”. Several churches, including the Union of Independent Orthodox Churches, had asked the authorities to prohibit the event. According to the Ombudsman Office in Kyiv, banning the event was ‘understandable’ since it would have taken place before a religious holiday, and that this would by necessity have sparked confrontations between the LGBT and religious groups:

“You have to understand [...] it was directly dangerous for the citizens [...] The police have said that they cannot secure the safety of the demonstrators [...] the clash between religious groups and LGBT persons will happen.”⁵⁰⁶

In May 2012, the participants themselves decided to cancel the planned Pride parade in Kyiv just before it was to be held, due to security reasons. Before they were evacuated by the police, two LGBT rights activists were beaten and tear-gassed by counter-demonstrators.⁵⁰⁷

On 23 May 2013, a Ukrainian court upheld the decision by Kyiv city authorities to prohibit any events in the centre of the capital except for the celebration of Kyiv Day, which was a pretext to indirectly prohibit the Pride parade that was planned for 25 May. Instead, 50 activists gathered to march down a narrow pathway with full police protection. About 100 counter-demonstrators assembled out of which 13 were arrested.⁵⁰⁸

On 11 January 2014, during the Euromaidan protests, a LGBT rights procession was held in central Kyiv. In May 2014, the Equality March was prohibited by the authorities that referred to the ongoing civil war. It was again cancelled in July 2014 because the authorities could not guarantee its protection, even though the event was to be held in a remote area. The Mayor of Kyiv, Vitali Klitschko, stated that “currently when battle actions take place and many people die, holding entertainment events does not match the situation existing [...] I am urging all these people not to do this. I think that this will be wrong amid these circumstances”, referring to the post-ceasefire government offensive in the Donbas.⁵⁰⁹

The Equality March was held in June 2015 because of international and domestic political pressure towards the authorities in Kyiv. Still, the police did not manage to guarantee the safety

⁵⁰⁵ Report: *A New Beginning: LGBT Situation in Ukraine in 2016*, Kyiv: Nash Mir, p. 6. Available: https://gay.org.ua/publications/lgbt_ukraine_2016-e.pdf (Obtained on 2019-03-10)

⁵⁰⁶ Report, *op. cit.* 481, pp. 9-11.

⁵⁰⁷ News article: *Kyiv hosts international LGBT forum including March of Equality on June 6*, Kyiv: Interfax Ukraine (2015). Available: <https://en.interfax.com.ua/news/press-conference/269987.html> (Obtained on 2019-03-10); News article: *Ukraine takes aim against 'gay propaganda'*, London: BBC News. Available: <https://www.bbc.com/news/magazine-19881905> (Obtained on 2019-03-10)

⁵⁰⁸ News article [archived version]: *Court bans gay pride parade in Kyiv on May 25*, Kyiv: Interfax Ukraine (2013). Available: <https://web.archive.org/web/20130927003551/http://www.interfax.co.uk/ukraine-news/court-bans-gay-pride-parade-in-kyiv-on-may-25/> (Obtained on 2019-03-10)

⁵⁰⁹ Report, *op. cit.* 505, p. 3.

which resulted in that several LGBT rights activists and police officers were beaten by right-wing radicals.⁵¹⁰

In June 2016, the city authorities had learned from last year's mistakes, and full police protection was provided so that the march could be held in the centre of the capital. President Poroshenko expressed his support, claiming that "as a Christian" he would not participate in the Equality March, but "as the president of a European state" he did not see any reason to prohibit or oppose the event.⁵¹¹ On 13 August 2016, the first Pride march was also held in Odesa with about 50 participants and the police protection of 700 police officers that detained 20 violent counter-demonstrators.⁵¹²

On 18 June 2017, the Equality March in Kyiv was held without major incidents and with six counter-demonstrators detained.⁵¹³ In August, a march was also held in Odesa without major incidents, although the march was interrupted prior to reaching its destination.⁵¹⁴

On 17 June 2018, the Equality March was held in the centre of Kyiv during which no serious incidents occurred. According to the police the march was attended by 3,500 people, while the organisers claimed that there were at least 5,000 participants.⁵¹⁵ On 19 August 2018, the march in Odesa was also held and the city authorities managed to guarantee the safety.⁵¹⁶

3. Hate speech and manifestations of intolerance and prejudice by public officials and religious leaders

In 2006 the All-Ukrainian Council of Churches and Religious Organisations, representing not only Orthodox Christians but also other Christian, Islamic and Judaic creeds, in an open letter urged the Verkhovna Rada to safeguard Ukrainian legislation from "liberalising public morals":

"The experience of countries which register same-sex marriages or partnerships shows that the process of liberalising public morals by the state ends in the abyss. Where prostitution and drug-addiction, same-sex marriages and euthanasia are legalised, there is already a question of legalising paedophilia... Already in the near future, extinction threatens the native populations of these countries. We do not want Ukraine to go this way."⁵¹⁷

⁵¹⁰ News article: *Ukraine police hurt at Kiev gay pride rally*, London: BBC News (2015). Available: <https://www.bbc.com/news/world-europe-33034247> (Obtained on 2019-03-10)

⁵¹¹ Report, *op. cit.* 505, p. 3.

⁵¹² News article: *Odesa Pride: Ukrainian City Holds First LGBTQ March*, New York: NBC News (2016). Available: <https://www.nbcnews.com/feature/nbc-out/odessa-pride-ukrainian-city-holds-first-lgbtq-march-n630571> (Obtained on 2019-03-10)

⁵¹³ News article: *Kiev hosts largely incident-free gay pride march*, London: Reuters (2017). Available: <https://www.reuters.com/article/us-ukraine-lgbt-march-idUSKBN1990IU?il=0> (Obtained on 2019-03-10)

⁵¹⁴ News article: *Odesa Pride 2017 march held without major incidents, its route cut short*, Kyiv: Kyiv Post (2017). Available: <https://www.kyivpost.com/ukraine-politics/odessa-pride-2017-march-held-without-major-incidents-route-cut-short.html> (Obtained on 2019-03-10)

⁵¹⁵ News article: *Thousands March For LGBT Rights In Kyiv*, Prague: Radio Free Europe/Radio Liberty (2018). Available: <https://www.rferl.org/a/lgbt-activists-gather-in-central-kyiv-for-march-of-equality-/29293367.html> (Obtained on 2019-03-10)

⁵¹⁶ News article: *Ukraine: Police Called on to Guard Odesa Pride Marchers*, Caracas: Telesur English (2018). Available: <https://www.telesurenglish.net/news/Ukraine-Police-Guards-Odesa-Pride-Marchers-20180819-0007.html> (Obtained on 2019-03-10)

⁵¹⁷ Report, *op. cit.* 485; Report: *Ukrainian Homosexuals and Society: A Reciprocation – Review of the Situation: society, Authorities and politicians, Mass-media, Legal Issues, Gay Community*, Kyiv: Nash Mir (2007), p. 66. Available: https://www.ilga-europe.org/sites/default/files/Attachments/ukraine_-_ukrainian_homosexuals_society.pdf (Obtained on 2019-03-10)

In a 2013 report, the LGBT rights NGO “Insight” claimed that “homophobic attitudes and policies are prevalent within the Ukrainian government, as reflected by the so-called ‘homosexual propaganda’ bills”.⁵¹⁸ “Insight” also described that Christian religious groups, in particular Orthodox and Catholic Churches, enjoy a high level of trust from citizens compared to other organisations in Ukraine and, has opposed the recognition of LGBT rights⁵¹⁹ and especially in relation to the right to freedom of assembly.⁵²⁰ Catholic and Orthodox churches have made joint statements through the organisation Religious Information Service of Ukraine (RISU), for example in 2010 with the statement that:

“[...] the society has no right to turn a blind eye at promotion of ‘homosexuality’ by considering it a private matter of those inclined to this sin [...] we strongly object that homosexual lifestyle and behaviour is regarded as normal [...] and that ‘homosexuality’ is listed as a human right, that is promoted as a normal variant of sexual life.”⁵²¹

In 2014, “Nash Mir” reported that Amnesty International had polled all candidates prior to the early presidential elections in May 2014, on their views in the field of human and civil rights and their plans on necessary reforms in Ukraine. Ten candidates replied, of which the two most prominent were Yulia Tymoshenko and Petro Poroshenko (who won the election). On the question of discrimination on ground of sexual orientation and gender identity, Yulia Tymoshenko, Anatolii Hrytsenko and Oleh Tyahnybok chose the option that “discrimination on ground of SOGI needs no special prohibition because it is already banned” and only Poroshenko answered that “discrimination on ground of sexual orientation and gender identity in Ukraine must be legally banned in all spheres of life”.⁵²²

In 2017 and 2018, no church in Ukraine except for the UOC-MP put forward any homophobic proposal, and instead support relevant initiatives contained in various petitions and appeals to the authorities by conservative religious organisations and individual activists.⁵²³

In 2018, for the first time the heads of the leading confessions in Odesa did not issue a joint appeal to prohibit the Equality March, and no corresponding requests were issued from individual churches.⁵²⁴ While other churches did support actions to “protect the traditional family”, only the UOC-MP called upon authorities not to permit holding the Equality March in Kyiv. Metropolitan Onuphrius of the UOC-MP stated that the Equality March “could cause irreparable damage to the clean hearts and souls of our children and, moreover – incur God’s

⁵¹⁸ Report, *op. cit.* 492, p. 11.

⁵¹⁹ Article: *Church Against Government’s Protection of Sexual Minorities*, Kyiv: Religious Information Service of Ukraine (2013). Available: http://risu.org.ua/en/index/all_news/state/legislation/51601/ (Obtained on 2019-03-10)

⁵²⁰ Article: *Heads of Churches Call on President to Prevent Actions of Propaganda of Homosexuality in Kyiv*, Kyiv: Religious Information Service of Ukraine (2012). Available: http://risu.org.ua/en/index/all_news/community/religion_and_society/47724/ (Obtained on 2019-03-10)

⁵²¹ Declaration: *Deklaratsiya khrystyians'kykh Tserkov Ukrayiny “Pro nehatyvne stavlennya do hrikha homoseksualizmu, yoho propahuvannya v suspil'stvi ta sprob lehalizatsiyi tak zvanykh odnostatevykh shlyubiv (reestratsiyi odnostatevykh partnerstv)”* (Ukrainian) [Declaration of the Christian Churches of Ukraine "On the negative attitude towards the sin of homosexuality, its propaganda in society and attempts to legalise so-called same-sex marriages (registration of same-sex partnerships)], Kyiv: Religious Information Service of Ukraine (2010). Available: https://risu.org.ua/ua/index/resourses/church_doc/ecumen_doc/36168/ (Obtained on 2019-03-10); Report, *op. cit.* 492.

⁵²² Report: *From Despair to Hope: LGBT Situation in Ukraine in 2014*, Kyiv: Nash Mir (2015). Available: https://gay.org.ua/publications/lgbt_ukraine_2014-e.pdf (Obtained on 2019-03-10)

⁵²³ Report: *LGBT situation in Ukraine in 2018 (January – August)*, Kyiv: Nash Mir, p. 6. Available: https://gay.org.ua/publications/Situation_of_LGBT_in_Ukraine_Jan-Aug_2018_ENG.pdf (Obtained on 2019-03-10)

⁵²⁴ *Ibid.* p. 7.

wrath upon Ukrainian land, on which the innocent blood of Ukrainians has already been shed for several years”.⁵²⁵

Patriarch Filaret of the UOC-KP stated to *Ukrayinska Pravda* that “we already have gay parades, even twice. How many participants were there? A hundred or two? And even so, many of them were foreigners. And ten thousand came to the recent march for the family”. Nash Mir concluded that the Kyiv Patriarchate “understands the importance of protecting the rights of LGBT people within the official course of the Ukrainian authorities towards European integration, and wants to appear in such circumstances as a responsible and modern social force that works to the benefit of the Ukrainian state”.⁵²⁶

Therefore, my impression is that the Kyiv Patriarchate seems to have adopted an attitude that while it does not necessarily condone LGBT rights marches, nor does it call upon the prohibition of such demonstrations. I think that the cautious attitude is probably mostly due to the fragile situation and that the newly-established Orthodox Church of Ukraine wants to secure its new position in Ukraine, but also that it is inherently positive that the Orthodox Church of Ukraine is adjusted to a more democratic setting than the Russian Orthodox Church in Ukraine.

III. The political climate and church-state relations in Ukraine

Ukraine declared its independence from the Soviet Union on 24 August 1991. The Orthodox Church divided into three religious jurisdictions: The Ukrainian Autocephalous Orthodox Church (UAOC) in 1990; the UOC-MP in 1991; and the UOC-KP in 1992. The UAOC and the UOC-KP have challenged the former state-sponsored Russian Orthodox religious monopoly in Ukraine.⁵²⁷

The UAOC was heavily represented in western Ukraine, especially in the Galician region. In June 1990, the UAOC was established when Metropolitan Mstyslav Skrypnyk was elected Patriarch at St Sophia Cathedral in Kyiv. On 28 October 1990, in the same cathedral, Russian Patriarch Alexii II proclaimed autonomy of a Ukrainian Orthodox Church under the canonical jurisdiction of the Moscow Patriarchate, and the leading Russian Orthodox hierarch of Ukraine, Metropolitan Filaret (Denysenko), became Metropolitan of Kyiv and All Ukraine.⁵²⁸

Metropolitan Filaret quickly became unpopular with the Moscow Patriarchate, when in 1991 he demanded full canonical independence (autocephaly) for the Ukrainian Orthodox Church. The Russian media and Patriarch Alexii II accused him of being affiliated with the KGB (which is interesting since Alexii II himself was a KGB agent). In April 1992, Filaret was condemned by the Moscow Patriarchate, who told him to step down and return to being a monk. Filaret refused this action and returned to Kyiv, but eventually had to resign. The new Metropolitan Volodymyr (Sabodan) assumed the leadership of the UOC-MP on 13 June 1992. He initiated a stronger Ukrainian identity for the UOC-MP, equating Kyiv to a second Jerusalem.⁵²⁹

⁵²⁵ Report: *Overcoming Obstacles: LGBT Situation in Ukraine in 2018*, Kyiv: Nash Mir, p. 25. Available: <https://gay.org.ua/publications/Situation-of-LGBT-in-Ukraine-2018-ENG.pdf> (Obtained on 2019-03-10)

⁵²⁶ *Ibid.*, pp. 26f.

⁵²⁷ Wasyliv, Zenon V.: *Orthodox Churches in Ukraine*. In: Leustean, *op. cit.* 218, 312-321, p. 312.

⁵²⁸ *Ibid.*, pp. 312f.

⁵²⁹ *Ibid.*, pp. 313f.

Metropolitan Filaret joined the UOC-KP, became Patriarch in 1995 and remains the Honorary Patriarch today.⁵³⁰ On 18-20 June 1992 he sought and was denied canonical recognition for the UOC-KP from the Ecumenical Patriarch Bartholomew of Constantinople. Bartholomew did not recognise an autocephalic status on this occasion. President Kravchuk later intervened on behalf of the UOC-KP to again request autocephaly from Bartholomew, who remained neutral in the matter and again did not recognise autocephaly of the UOC-KP.⁵³¹

In 2007, the Moscow Patriarchate was involved in the case of *Svyato-Mykhaylivska Parafiya v. Ukraine*⁵³² which concerned a Ukrainian parish that, in December 1999, through its highest executive body (the “Parish Assembly”) had decided to change jurisdiction from the UOC-MP to the UOC-KP. Supporters of the Moscow Patriarchate occupied the church building and local authorities in Kyiv did not acknowledge the change of jurisdiction, stating that the decision did not reflect the will of the parishioners. The ECtHR stated that the domestic court had not properly considered that the “Parish Assembly” had the right to act on behalf of the parish.⁵³³

Although Ukraine retained the same kind of patronalistic system as Russia and Moldova, following the Orange Revolution in 2005 (with the ousting of President Viktor Yanukovych) and until 2010, it became the only post-Soviet country (since the Baltic countries in the 1990s) to experience a real breakthrough to democracy. Henry Hale explains that this democracy was a highly corrupt form of political competition that “spawned seemingly permanent government instability and policy deadlock even in the face of economic calamity, the global financial crisis that wracked the region starting in 2008”.⁵³⁴

Hale’s explanation to this democratic breakthrough, however disappointing forms it took, was that the Orange Revolution produced a constitutional reform that balanced formal and informal power between President and Prime Minister, two competing pyramids that could not defeat each other. He writes that neither the country’s East-West divide, nor EU pressure, democratic values, civil society, etc. could secure this democratic development, but that each aggressive move from either the President or Prime Minister was met by “equal and opposite application of raw machine force by the other”. This logic, he means, explains why the democratic period was so unsatisfying to the Ukrainians, since the patronalistic character remained and which was restored to full power by Viktor Yanukovych from 2010 onwards.⁵³⁵

The Euromaidan revolution in 2013-14 resulted in the second ousting of Viktor Yanukovych after his refusal to sign an association agreement with the European Union.⁵³⁶ The EU had made demands for signing the agreement, which would include a visa-liberalisation regime with Ukraine, of which two are relevant here: (1) the repealing of a proposal⁵³⁷ (a direct

⁵³⁰ News article: *Poroshenko decides to award ‘hero of Ukraine’ title to Patriarch Filaret*. Kyiv: Kyiv Post (11 January 2019). Available: <https://www.kyivpost.com/ukraine-politics/poroshenko-decides-to-award-hero-of-ukraine-title-to-patriarch-filaret-2.html> (Obtained on 2019-03-10)

⁵³¹ *Ibid.*, pp. 314-17.

⁵³² ECtHR (Fifth section), Judgment of 14 June 2007 (Final on 14 September 2007), *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01.

⁵³³ Rimestad, *op. cit.* 204, p. 42.

⁵³⁴ Hale, *op. cit.* 52, p. 5

⁵³⁵ *Ibid.*, p. 13.

⁵³⁶ *Ibid.*, p. 235.

⁵³⁷ Article: *Draft law of ex-MP Kolesnichenko banning “gay propaganda” was removed from consideration in Verkhovna Rada*, Kyiv: Gay Alliance Ukraine (2014). Available: http://upogau.org/eng/inform/uaneews/worldnews_975.html (Obtained on 2019-03-10); Krejcová, Michaela: *Ukraine turns down the Russian-style anti-gay propaganda bill*, Los Angeles: GLAAD (2015). Available: <https://www.glaad.org/blog/ukraine-turns-down-russian-style-anti-gay-propaganda-bill> (Obtained on 2019-03-10)

requirement on part of the EU) in 2012 in the Verkhovna Rada that would have introduced legislation on “gay propaganda” (see section I(4) above); and (2) that the process would continue with pace in implementing anti-discrimination legislation to safeguard minorities, including sexual minorities. The European Commission concluded in its progress report in 2013⁵³⁸ that the Ukrainian government was lacking behind with introducing anti-discrimination legislation, which was then introduced a year after the ousting of Yanukovich and with Petro Poroshenko as new president. That the legislation was introduced is one of the reasons that the EU approved of a visa-liberalisation regime with Ukraine.⁵³⁹

The previous Minister of Internal Affairs Yuriy Lutsenko, who co-organised the Euromaidan, stated in 2015 that “it is better to allow gay parades than to expect Russian tanks in the centre of Kyiv”.⁵⁴⁰ Several pro-Russian elements in Ukraine have associated closer relations with the EU with the dissolving of traditional sexual and gender norms, and have applied the term “Gayromaidan” (*Geiromaidan*) to the Euromaidan. This term is derived from the concept “Gayrope” (*Geiropa*). Tatiana Riabova and Oleg Riabov described this term as signifying the “specificities of the gender order currently characteristic of contemporary West European societies, which in current Russian public discourse is associated primarily with the legalisation of same-sex marriage and the crisis of the traditional family”.⁵⁴¹ Not only are “non-traditional sexual relations” depicted as a threat to the traditional gender order in Russian anti-Western propaganda, but also to national identity, security and stability in society.⁵⁴²

They further describe that the concept of “Gayrope” is compensatory for Russian identity, because it “engenders a new version of the messianic idea of Russia as the bulwark of Christianity and bastion of traditional values, called upon to save Europe and the world”.⁵⁴³ Associating the process of euro-integration with the label “Gayrope”, and the association of the political development in Ukraine with the label “Gayromaidan”, reflects the rhetoric of de-masculinisation of Ukraine. It also reflects the broader tendency of re-masculinisation of Russia, that has been a characteristic feature of Putin’s presidency.⁵⁴⁴

Following the Euromaidan demonstrations in central Kyiv in 2013-14, the military conflict in Eastern Ukraine and Russia’s annexation of the Crimean Peninsula in 2014, the primacy of the Moscow Patriarchate in Ukraine became increasingly contested by the previously unrecognised Kyiv Patriarchate and today, we are experiencing the biggest Eastern Orthodox Schism in a millennium, driven by geopolitics.

⁵³⁸ Report: *Third report on the implementation by Ukraine of the Action Plan on Visa Liberalisation*, Brussels: European Commission (2013), p. 24. Available: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-is-new/news/news/docs/20131115_3rd_progress_report_on_the_implementation_by_ukraine_of_the_apvl_en.pdf (Obtained on 2019-03-10)

⁵³⁹ Report: *Sixth Progress Report on the Implementation by Ukraine of the Action Plan on Visa Liberalisation*, Brussels: European Commission (2015), p. 10. Available: <https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-905-EN-F1-1.PDF> (Obtained on 2019-03-10)

⁵⁴⁰ News article: *Lutsenko: Krashche hey-parad na Khreshchatyku, nizh rosiys'ki tanky u tsentri Kyyeva* (Ukrainian) [Lutsenko: It is better to allow gay parades once a year than to expect Russian tanks every day in the centre of Kyiv], Kyiv: Unian Information Agency (2015). Available: <https://www.unian.ua/politics/1179496-lutsenko-krasche-gey-parad-na-hreschatiku-nij-rosiyski-tanki-u-tsentri-kieva.html> (Obtained on 2019-03-10)

⁵⁴¹ Riabova, Tatiana and Riabov, Oleg: “Gayromaidan”: *Gendered Aspects of the Hegemonic Russian Media Discourse on the Ukrainian Crisis*. In: *Journal of Soviet and Post-Soviet Politics and Society, Russian Media and the War in Ukraine*, Vol. 1, No. 1 (2015), 83-107, p. 84.

⁵⁴² Ibid., p. 90.

⁵⁴³ Ibid., p. 89.

⁵⁴⁴ Ibid., pp. 100, 107.

An interesting aspect that is important from a geopolitical perspective is that in 2018, the Russian Orthodox Church (Moscow Patriarchate) was the world's largest church with 31,000 parishes; the second largest being the Romanian Orthodox Church (Bucharest Patriarchate) with 16,000 parishes. Of these 31,000 parishes, around 15,000 were in Russia; in Ukraine, there were 14,000 parishes under the UOC-MP. The Kyiv Patriarchate had 4,000 parishes at the time. While the Moscow Patriarchate had strong infrastructure but fewer adherents in Ukraine (\approx 30 % of the population), the Kyiv Patriarchate had weaker infrastructure but more adherents (\approx 40 % of the population). After the creation of the Orthodox Church of Ukraine, if all of the Moscow Patriarchate parishes in Ukraine instead would join the Orthodox Church of Ukraine, the result is that the Moscow Patriarchate would become the third biggest church in the world after both the Orthodox Church of Ukraine and the Bucharest Patriarchate.⁵⁴⁵ This, of course, depends heavily on whether the Ukrainian government in Kyiv manages to re-establish control over its occupied territories in Eastern Ukraine and on the annexed Crimean Peninsula.

In June 2016, the Ecumenical Patriarch Bartholomew held a 'Holy and Great Synod of the Orthodox Church' in Crete. Lucian Leustean describes that this synod demonstrated the close links between Eastern Orthodoxy, security and geopolitics. The Russian Orthodox idea of the Russian world (*Russkiy mir*), the conflict in eastern Ukraine and the issue of clarifying the canonical territory of the Moscow Patriarchate are regarded as the main driving factors behind Russian geopolitics. Leustean links "spiritual security" to state politics, i.e. that the Moscow Patriarchate's control over the Ukrainian Orthodox Church is linked to Russian (geo)political aspirations in Ukraine (and the same is of course relevant for Moldova).⁵⁴⁶

In April 2018, the President of Ukraine, Petro Poroshenko, applied for autocephaly of the UOC-KP to Ecumenical Patriarch Bartholomew. On 13 September, the Russian Foreign Ministry spokesperson Maria Zakharova said that this was "a brutal, insensitive interference in the affairs of the Church on the part of Ukrainian President Petro Poroshenko".⁵⁴⁷ On 11 October 2018, Bartholomew agreed to grant autocephaly to the UOC-KP, effectively marginalising the role of the UOC-MP in Ukraine. The Moscow Patriarchate issued a statement saying that the decision is "out of the canonical boundaries" and later announced that it will break all ties with the Ecumenical Patriarchate of Constantinople.⁵⁴⁸

Russian Foreign Minister Sergei Lavrov said that "the Ukrainian patriarchate has not turned its back to the Russian Orthodox Church because the Ukrainian Orthodox Church of the Moscow Patriarchate is against those provocations that Patriarch Bartholomew of Constantinople is plotting now with Washington's direct public support".⁵⁴⁹ On 14 December, Patriarch Kirill sent a letter to world leaders, most notably the UN Secretary General António Guterres, German Chancellor Angela Merkel, French President Emmanuel Macron, Pope Francis and the

⁵⁴⁵ Suslov, *op. cit.* 330.

⁵⁴⁶ Leustean, Lucian N.: *Eastern Orthodoxy, Geopolitics and the 2016 'Holy and Great Synod of the Orthodox Church'*, *Geopolitics*, 23:1 (2018), 201-216, p. 213.

⁵⁴⁷ Article: *Situation surrounding Ukrainian Orthodox Church in Kyiv is state's brutal interference in Church affairs – Russian Foreign Ministry*, Moscow: Interfax-Religion (13 September 2018). Available: <http://www.interfax-religion.com/?act=news&div=14473> (Obtained on 2019-03-10)

⁵⁴⁸ Metropolitan Hilarion: *Decisions taken by Constantinople run contrary to canonical Tradition of the Orthodox Church*, Moscow: Moscow Patriarchate (2018). Available: <https://mospat.ru/en/2018/10/16/news165294/> (Obtained on 2019-03-10)

⁵⁴⁹ News article: *Lavrov calls Patriarch Bartholomew's actions on Ukraine as provocation backed by U.S.*, Moscow: Interfax-Religion (12 October 2018). Available: <http://www.interfax-religion.com/?act=news&div=14569> (Obtained on 2019-03-10)

Archbishop of Canterbury, asking for help to protect clerics, believers and their faith in Ukraine from “official pressure on Moscow-appointed clerics”.⁵⁵⁰

On 15 December, bishops and delegates from all three Orthodox churches in Ukraine unified in a council.⁵⁵¹ The UOC-KP and the UAOC decided to dissolve their structures prior to the council and no longer exist. The council elected Epiphanius as Metropolitan of Kyiv and All Ukraine, i.e. the new primate of the unified Orthodox Church of Ukraine.⁵⁵² On 20 December, the Verkhovna Rada passed legal amendments (mentioned in section I(5)), changing the name of the “Ukrainian Orthodox Church of the Moscow Patriarchate” to the “Russian Orthodox Church in Ukraine” and prohibiting it from chaplaincy service in military organisations.⁵⁵³

On 6 January 2019, the newly-elected primate Epiphanius, together with President Petro Poroshenko, visited the Ecumenical Patriarch of Constantinople to receive the *Tomos* (formal decree of autocephaly) for the Orthodox Church of Ukraine.⁵⁵⁴ I think that the granting of autocephaly can be expected to have a positive effect also on the development of LGBT rights in Ukraine. While faith and believers ought to be respected, it is clear that the Moscow Patriarchate actively works with developing an Orthodox, ultra-conservative ideology and spreading this in countries where it retains a strong presence, mainly in the post-Soviet space.

⁵⁵⁰ Article: *Svyateyshiyy Patriarkh Kirill obratilsya k religioznym i gosudarstvennym deyatelyam, rukovoditelyam mezhdunarodnykh organizatsiy s poslaniyami v svyazi s davleniyem so storony ukrainskikh vlastey na Ukrainskuyu Pravoslavnyuyu Tserkov' i vmeshatel'stvom gosudarstva v tserkovnuyu zhizn' na Ukraine* (Russian) [His Holiness Patriarch Kirill appealed to religious and state leaders, heads of international organisations with messages in connection with pressure from the Ukrainian authorities on the Ukrainian Orthodox Church and state intervention in church life in Ukraine], Moscow: Moscow Patriarchate (14 December 2018). Available: <https://mospat.ru/ru/2018/12/14/news167941/> (2019-03-10); News article: *Russian Orthodox Church Asks UN, Western Leaders for Help in Ukraine*, Prague: Radio Free Europe/Radio Liberty (14 December 2018). Available: <https://www.rferl.org/a/russian-orthodox-church-asks-un-western-leaders-for-help-in-ukraine/29656026.html> (Obtained on 2019-03-10)

⁵⁵¹ News article: *Procedure of election of new Primate of Ukrainian Church announced*, Kyiv: Religious Information Service of Ukraine (15 December 2018). Available: https://risu.org.ua/en/index/all_news/orthodox/orthodox_world/73913/ (Obtained on 2019-03-10)

⁵⁵² News article: *Metropolitan Epifaniy (Dumenko) becomes Primate of One Local Orthodox Church of Ukraine*, Kyiv: Religious Information Service of Ukraine (15 December 2018). Available: https://risu.org.ua/en/index/all_news/state/national_religious_question/73918/ (Obtained on 2019-03-10)

⁵⁵³ News article: *UOC-MP urges President to veto law changing its name to ROC in Ukraine*, Kyiv: Religious Information Service of Ukraine (21 December 2018). Available: https://risu.org.ua/en/index/all_news/orthodox/uoc/74011/ (Obtained on 2019-03-10)

⁵⁵⁴ News article: *Poroshenko: Tomos for Ukraine is another act of declaring independence*, Kyiv: Unian Information Agency (6 January 2019). Available: <https://www.unian.info/politics/10400358-poroshenko-tomos-for-ukraine-is-another-act-of-declaring-independence.html> (Obtained on 2019-03-10)

Republic of Moldova

«Быть президентом для геев я не обещал»

“I did not promise to be the president for the gays”

Igor Dodon, President of the Republic of Moldova

6. Republic of Moldova

In this section, I discuss the situation for LGBT rights activists in the Republic of Moldova in relation to the right to freedom of assembly. I have previously written about the right to freedom of assembly for LGBT rights activists in my paper *Rainbow over the Dniester*. I refer to my previous research and in this thesis put emphasis on the religious/political intersection and how this is related to the developments in Russia and Ukraine.

I. Domestic legislation

I provide an overview of the domestic legislation that is relevant in the context of freedom of assembly for LGBT rights activists. In 2016 and 2017, two draft laws on outlawing “gay propaganda”, similar to the Russian federal “gay propaganda” law from 2013, were introduced in parliament by the Socialist Party but were not adopted.

1. Constitution of the Republic of Moldova

The Constitution of the Republic of Moldova⁵⁵⁵ was adopted on 29 July 1994 and entered into force on 27 August 1994. Article 4 provides that constitutional provisions on human rights and freedoms shall be interpreted and enforced in accordance with international agreements, and that wherever disagreements appear, the international agreements shall take precedence. Article 31 provides that the state is secular and neutral.

Article 32 provides that “every citizen shall be guaranteed the freedom of thought and opinion, as well as the freedom of expression in public”, as long as it does not “harm the honour, dignity or the rights of other people to have and express their own opinions or judgments” or instigate, e.g. incitement to discrimination or public violence. Article 40 states that “meetings, demonstrations, manifestations, processions or any other assembly are free and may be organised and conducted only peacefully and without the use of any kind of weapon”.

I think that depending on the interpretation of Article 32, it does not necessarily protect LGBT rights events if these would be interpreted as, e.g. harming the rights of other people. I especially consider the notion of protecting the feelings of religious believers that has taken hold in Russia and which made its way into the Russian Criminal Code in 2013.

Also, some opponents to holding LGBT rights events have made the excuse that public violence may follow, which is definitely true in Moldova where in 2017 the president even met with and congratulated violent counter-demonstrators that had disturbed Moldova Pride (see section II(2) below). Depending on whether the authorities would use the interpretation that LGBT rights events “incite” these acts of public violence, Article 32 could potentially be used as an excuse to stifle LGBT rights activism.

2. Law 26/2008 ‘On Assemblies’

The right to freedom of assembly in the Republic of Moldova is codified in the Law 26/2008

⁵⁵⁵ Presidency of the Republic of Moldova: *Constitution of the Republic of Moldova*. Available: <http://www.presedinte.md/eng/constitution> (Obtained on 2019-03-10)

'On Assemblies'.⁵⁵⁶ It modified the previous law of 1995, according to which authorisation was to be requested from local or municipal authorities prior to holding an assembly.

According to Article 4, the law applies with respect of the principles of proportionality, non-discrimination, legality, and presumption in favour of organising an assembly. I think it is noteworthy that the non-discrimination clause mentions “gender” as a discrimination ground, while neither “sexual orientation” nor “gender identity” are mentioned. While “or any other criteria” is mentioned at the end of the sentence, the law does not specifically provide for the freedom of assembly for LGBT rights activists. Also, according to Article 8(c), reasons for prohibiting an assembly include violation of public order and violation of public morality. If the “Orthodox” understanding of public morality would gain a stronger status, this formulation could in the future be used to ban LGBT rights events from taking place.

In the context of LGBT rights events, OHCHR noted in a report that requests of the LGBT community were usually rejected under the previous law, mainly under the pretext that no suitable locations were to be found.⁵⁵⁷ However, while OHCHR then remarked that “now these requests are satisfied”, it was not until 2013 that the first Pride march was held in Chişinău with full police protection, as I describe below in section II(3). Therefore, I think that this law does not necessarily protect the right to hold LGBT rights demonstrations, but does not condemn it either. Regarding how the law is formulated, I think that depending on the political will this situation could quickly change without having to amend one word in this legislation.

3. Draft laws on introducing “gay propaganda” legislation

On 28 April 2016, seven MPs from the Socialist Party co-authored draft law no. 184⁵⁵⁸ on amending and completing Article 21 of the law *'On the Rights of the Child'* and Article 88 of the Code of Administrative Offences. Article 21 concerns “protection of the family by the state” and would have provided that: “The state ensures protection of a child from the propaganda of homosexuality for any purpose and under any form”. The following provision would be added to Article 88: “Propaganda of homosexual relations among minors by means of assemblies, massmedia, Internet, brochures, booklets, images, audio-video clips, films and/or audio-video recordings, via sound recording, amplifiers or other means of sound amplification”.⁵⁵⁹

On 24 March 2017, eight MPs from the Socialist Party co-authored draft law no. 861⁵⁶⁰ on amending the law *'On Protection of Children against the Negative Impact of Information'*. The authors proposed to add to Article 1 the term “Homosexuality – asexual perversion that

⁵⁵⁶ State Registry of Legal Documents of the Republic of Moldova: *LEGE Nr. 26 din 22.02.2008*. Available: <http://lex.justice.md/md/327693/> (Obtained on 2019-03-10); Translation into English [unofficial]: *Law No. 26-XVI of 2008 on Assemblies*, Refworld. Available: <http://www.refworld.org/docid/4c3c81092.html> (Obtained on 2019-03-10)

⁵⁵⁷ Report: *Right to freedom of peaceful assembly*, Geneva: OHCHR (2012), p. 1. Available: <https://www.ohchr.org/Documents/Issues/FAssociation/Responses2012/MemberStates/Moldova.pdf> (Obtained on 2019-03-10)

⁵⁵⁸ The Parliament of the Republic of Moldova: *Moldova Draft Law No. 184*, Draft Legislative Acts (2016). Available: <http://www.parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/3206/language/en-US/Default.aspx> (Obtained on 2019-03-10)

⁵⁵⁹ Letter: *Moldova Draft Law No. 184*, New York: Human Rights Watch (2016). Available: <https://www.hrw.org/news/2016/06/20/human-rights-watch-letter-re-moldova-draft-law-no-184#> (Obtained on 2019-03-10)

⁵⁶⁰ The Parliament of the Republic of Moldova: *Moldova Draft Law No. 86*, Draft Legislative Acts (2017). Available: <http://parlament.md/ProcesulLegislativ/Proiectedeactelegislative/tabid/61/LegislativId/3682/language/en-US/Default.aspx> (Obtained on 2019-03-10)

constitutes a sexual attraction towards individuals of the same sex; pederasty, sexual inversion”; to complete Article 3 with terms such as “of homosexual character” and “homosexual” after “pornographic”; and to Article 4 add the term “images that promote homosexuality”. The aim with the draft law was to censor public dissemination of information about non-heterosexual relationships and/or identities, especially targeting mass media outlets and NGOs that work with organising LGBT rights events.⁵⁶¹

None of these draft laws were adopted, but similar legislative changes may be proposed again in the future. In a 2018 report, the European Commission against Racism and Intolerance (ECRI), which is an organ within the Council of Europe, commented on the draft laws that if they were to be adopted “the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the values of equality, pluralism and tolerance”.⁵⁶²

II. The situation for LGBT rights activists in the Republic of Moldova in the context of the right to freedom of assembly

In this section, I provide statistics on attitudes towards LGBT people; an overview of experiences of organising LGBT rights events; and information on cases of hate speech and manifestations of intolerance and prejudice by public officials and religious leaders, to evaluate how the legal situation for LGBT rights has developed in context of the freedom of assembly.

1. Statistics

According to ILGA Europe’s Rainbow Europe Map 2018 (based on the situation in the previous year), the Republic of Moldova shared rank 43 together with Belarus, with an overall score of 13 %.⁵⁶³ The scores for the five preceding years (in per cent) are: 13 (2017),⁵⁶⁴ 14 (2016),⁵⁶⁵ 16 (2015),⁵⁶⁶ 17 (2014),⁵⁶⁷ 10 (2013).⁵⁶⁸

The difference between 2013 and 2014 depends on the ECtHR’s judgment in *GenderDoc-M v. Moldova* in 2012, which paved the way for the first legally recognised LGBT rights march in 2013 (see section II(3) below). In 2013, the Equality Council also began its activity, following the adoption of the law ‘*On Ensuring Equality*’, which the EU had made a precondition for establishing a visa liberalisation regime.⁵⁶⁹

⁵⁶¹ Report: *Report on the state of LGBT people’s rights in Moldova*, Chişinău: GenderDoc-M (2017), p. 1. Available: https://gdm.md/files/untitled%20folder/report_GENDERDOC-M_2017_eng.pdf (Obtained on 2019-03-10)

⁵⁶² Report: *ECRI Report on the Republic of Moldova (fifth monitoring cycle)*, Strasbourg: Council of Europe (2018). Available: <https://rm.coe.int/fifth-report-on-the-republic-of-moldova/16808de7d7> (Obtained on 2019-03-10)

⁵⁶³ Index: *Rainbow Europe* (2018), *op. cit.* 287.

⁵⁶⁴ Index: *Rainbow Europe* (2017), *op. cit.* 288.

⁵⁶⁵ Index: *Rainbow Europe* (2016), *op. cit.* 289.

⁵⁶⁶ Index: *Rainbow Europe* (2015), *op. cit.* 290.

⁵⁶⁷ Index: *Rainbow Europe* (2014), *op. cit.* 291.

⁵⁶⁸ Index: *Rainbow Europe* (2013), *op. cit.* 292.

⁵⁶⁹ Info: *Moldova: Council on Preventing and Eliminating Discrimination and Ensuring Equality*, Brussels: European Network of Equality Bodies (2019). Available: <http://www.equineteurope.org/Council-on-Preventing-and-Eliminating-Discrimination-and-Ensuring-Equality-1327> (Obtained on 2019-03-10); Andersson, *op. cit.* 7, p. 6.

In January 2011, Soros Foundation Moldova published the results of a survey covering about 1 200 respondents. The survey found that only about 14 % of respondents were willing to accept LGBT people as neighbours, 13 % as a work colleague, 10 % as a friend, and just 4 % as a family member. This represented among the highest rates of intolerance recorded in Europe.⁵⁷⁰

In 2015, the Study on Equality Perceptions and Attitudes in the Republic of Moldova was published by the Equality Council and the Office of the UN High Commissioner for Human Rights (OHCHR), in consultation with the UN Development Programme (UNDP) Moldova.

According to the study, Moldovan society is very categorical towards LGBT persons. Over 40 % of the answers included definitions such as “immoral”, “abnormal”, “foolery”; 33.4 % regarded LGBT people as sick; around 16-18 % related LGBT people to etiquettes such as “prostitution”, “dangerous”, “paedophiles”, “perverse”. Answers with positive perceptions did not exceed 2 % of the study group. According to this study, LGBT persons are the *most* rejected social group in Moldovan society.⁵⁷¹

Both group discussions had respondents who associated LGBT people with the adoption of the Law on Ensuring Equality. Some participants condemned that the EU demanded that the Republic of Moldova adopted the law, which they perceived as the “law of sexual minorities”.⁵⁷²

Several respondents during the group discussions had mentioned that as long as LGBT people do not manifest their sexuality publically, e.g. by holding Pride events, they could be accepted in society. However, the majority of respondents tried to convince these respondents that accepting sexual minorities would make them equally guilty of “degradation of the society”.⁵⁷³

2. Experiences of organising LGBT rights demonstrations in Moldova

For a more detailed description of previous Pride marches in Moldova, see my paper *Rainbow over the Dniester*.⁵⁷⁴ The first Moldova Pride was held in Chişinău by the LGBT rights organisation GenderDoc-M in 2002. In 2005, municipal authorities in Chişinău banned LGBT rights demonstrations for the first time, and until 2013 they were banned or otherwise prevented when attempted to be held, under the pretext that there was an impending threat of counter-demonstrations by religious organisations.⁵⁷⁵

From 2013, Pride marches have been legally held in Chişinău with full police protection, following the ECtHR’s judgment in 2012 in the case of *GenderDoc-M v. Moldova*. Between 2013-2017, far-right and Orthodox groups have held violent counter-demonstrations, and although the police have protected the events the counter-demonstrators have managed to

⁵⁷⁰ Report: *Perceptions of the Population of the Republic of Moldova on Discrimination: Sociological Study*, Soros Foundation Moldova (2011), p. 31. Available: http://soros.md/files/publications/documents/Studiu_sociologic_EN.pdf (Obtained on 2019-03-10); Report: *Report on homophobic speech by members of Moldova's parliament*, GenderDoc-M and ILGA-Europe (2011), p. 4. Available: https://nanopdf.com/download/report-on-homophobic-speech-by-members-of_pdf (Obtained on 2019-03-10)

⁵⁷¹ Report: *Study on Equality Perceptions and Attitudes in the Republic of Moldova*, Chişinău: Equality Council, OHCHR and UNDP (2015), p. 29. Available: http://md.one.un.org/content/dam/unct/moldova/docs/pub/ENG-Studiu%20Perceptii%202015_FINAL_2016_Imprimat.pdf (Obtained on 2019-03-10)

⁵⁷² Ibid., p. 31

⁵⁷³ Ibid., p. 32.

⁵⁷⁴ Andersson, *op. cit.* 7, pp. 2-6.

⁵⁷⁵ Ibid., p. 3.

shorten the planned march routes. In 2017, following the Moldova Pride event with the theme “Fără Frică” (Without Fear), President Dodon met and congratulated the group of counter-demonstrators. Nobody was held accountable for organising the counter-demonstration.⁵⁷⁶

On 19 May 2018, I participated in Moldova Pride with the theme “Fără Frică de Iubire” (Without Fear of Love), together with my colleagues at the Swedish Embassy. This was the first time that the Pride march could be held in Chişinău from start to finish without any early interruption, due to the police’s deployment of tear gas against violent demonstrators.⁵⁷⁷ My impression was that approximately 200 people participated in the march, and that the number of police could have been about the same, but also that it was very positive that the march was held on the central Strada Bucureşti and not in some remote location.

On 28 January 2019, a GenderDoc-M representative staged a one-man picket outside the Russian Embassy in Chişinău, protesting against the renewed persecution and extra-judicial murders of people perceived to be gay in the Chechen Republic.⁵⁷⁸ He is originally from the autonomous Moldovan republic of Gagauzia, and received several threats when he was the first Gagauz to openly identify as gay in 2018.⁵⁷⁹ I regard the fact that he managed to hold his picket in the capital in 2019 as a sign of a positive development.

That the Republic of Moldova joined the Council of Europe in 1995 has provided legal means to strengthen human rights in the country, which in the context of LGBT rights is proved by the fact that LGBT rights events can be arranged with police protection, instead of previous police inaction and other means that have been employed to hinder such events from taking place.

3. Hate speech and manifestations of intolerance and prejudice by public officials and religious leaders

According to the Moldovan human rights NGO “CreDO” in 2010, the Moldovan Orthodox Church is utilising LGBT topics in its lobbying for a strengthened position of the Church and for “traditional” family values:

“In terms of homophobia, there is a strong trend among the religious community to increase its presence in the public debate. The issue at present is a proposed introduction of compulsory orthodox religious class in public schools, for which the church is actively lobbying. Together with a strong and very outspoken stand against LGBT, which is being seen as a disease and a threat to Moldova’s long-term survival (assuming that same-sex couples do not get children), the situation is critical.”⁵⁸⁰

⁵⁷⁶ Ibid., p. 4f.

⁵⁷⁷ Ibid., p. 5f.

⁵⁷⁸ News article: *Pervyi otkrytyi gei gagauzii piketiruet posolstvo Rossii. Chego on trebuet?* (Russian) [First open gay Gagauz held a picket towards the Russian Embassy. What Does He Want?], Chişinău: Newsmaker Moldova. Available: <http://newsmaker.md/rus/novosti/pervyy-otkrytyy-gey-gagauzii-piketiruet-posolstvo-rossii-chego-on-trebuet-41416> (Obtained on 2019-03-10)

⁵⁷⁹ Report: *Raport Privind Situația Drepturilor Persoanelor LGBT În Republica Moldova* (Romanian) [Report on the state of LGBT people’s rights in Moldova], Chişinău: GenderDoc-M (2018), p. 22. Available: https://www.gdm.md/files/untitled%20folder/Raport-GENDERDOC-M-2018_romana.pdf (Obtained on 2019-03-10)

⁵⁸⁰ Report: *Study on homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity: sociological report: Moldova*, Council of Europe (2010), p. 12. Available: http://www.coe.int/t/Commissioner/Source/LGBT/MoldovaSociological_E.pdf (Obtained on 2019-03-10)

According to a 2011 report co-authored by GenderDoc-M and ILGA Europe, intolerant language was in several cases expressed by high profile politicians and these cases of intolerant statements were often transmitted widely through broadcast media.⁵⁸¹

Igor Dodon is the leader of the Socialist Party and the current President of Moldova. He has made several statements contravening LGBT rights. In 2011, when he was candidate of the Communist Party for the 2011 mayoral election in Chişinău, he stated in an interview that:

“One of the steps to strengthen the birth rate is to strengthen our healthy Moldovan traditions, especially the cult of the family. The divorce statistics in Moldova are alarming. And even more alarming are all sorts of morbid initiatives which suggest legalisation and promotion of sexual relations which exceed normality and traditional Moldovan ethics.”⁵⁸²

In the context of LGBT rights, on 27 April 2016, Metropolitan Vladimir stated that “we are a Christian country, according to surveys 98% said they are Christians, and 2% support sexual minorities; it is humiliating for us to be equal with these 2%.”⁵⁸³ Dodon applauded this statement together with several members of parliament, and submitted an appeal to parliament to repeal the law on ensuring equality, which was adopted in 2013 as a prerequisite for Moldova to enter the association agreement with the EU in 2014, although the law was never repealed.⁵⁸⁴

The presidential election in 2016 was the first time since 1996 that the president was elected by popular vote. Igor Dodon defeated Maia Sandu from the Action and Solidarity Party. On the campaign trail, Dodon had branded himself as a “defender of Orthodoxy” and stated that:

“We [the Socialist Party] are categorically against these gay-parades and against the law on equality of opportunities that was adopted by the pro-European government. In this law, Article 7.1 says discrimination based on sexual orientation in employment is forbidden. This means that gays and other sexual minorities could be teachers in schools for our children, could work in hospitals and so on. These politicians, journalists who support this go to church and say they are Christian. But church law says those who promote homosexuality should not work in institutions that grow and educate the new generation. We should not allow this.”⁵⁸⁵

The frequent use of hate speech surrounding the 2016 election was criticised by the election observers from OSCE/ODIHR, with the suggestion that a mechanism should be introduced by the authorities to properly address this in the future:

⁵⁸¹ Report: *Report on homophobic speech by members of Moldova's parliament*, op. cit. 570, p. 1.

⁵⁸² Ibid., p. 12; Ciorici, Dumitri: *Dodon, împotriva relațiilor sexuale ce depășesc “cadrul normalității”* (Romanian) [Dodon, against sexual intercourse beyond the “normality framework”], Unimedia (2011). Available: <https://unimedia.info/stiri/dodon--impotriva-relatiilor-sexuale-ce-depasesc-cadrul-normalitatii-31336.html> (Obtained on 2019-03-10)

⁵⁸³ News article: *Mitropolitika: Vystuplenie glavy moldavskoy tserkvi v parlamente stalo povodom dlya politicheskogo demarsha* (Russian) [Metropolitan: Speech of the head of the Moldovan church in parliament became a pretext for political demarche], Chişinău: Newsmaker Moldova (2016). Available: <http://newsmaker.md/rus/novosti/mitropolitika-vystuplenie-glavy-moldavskoy-tserkvi-v-parlamente-stalo-povodom-dlya-24490>. (Obtained on 2019-03-10)

⁵⁸⁴ Report: *Challenging hate: Monitoring anti-LGBT “hate speech” and responses to it in Belarus, Kyrgyzstan, Moldova, Russia and Ukraine*, London: Article 19 (2018), p. 55. Available: https://www.article19.org/wp-content/uploads/2018/03/LGBT-Hate-Speech-Report-Central-Asia_March2018.pdf (Obtained on 2019-03-10)

⁵⁸⁵ Ibid., p. 53; News article: *Sotsialisty poobeshchali otvetit na voskresnyy marsh LGBT soobshchestva* (Russian) [Socialists promised to respond to the Sunday march of the LGBT community], Chişinău: Newsmaker Moldova (2016). Available: <http://newsmaker.md/rus/novosti/sotsialisty-poobeshchali-otvetit-na-voskresnyy-marsh-lgbt-soobshchestva-25203> (Obtained on 2019-03-10)

“The authorities, upon consultation, should consider the introduction of an effective mechanism against instances of intolerant rhetoric, such as sexist and homophobic language and gender stereotyping, including in the campaign period. The general Code of Ethics and the internal codes of broadcasters could include provisions on avoiding discriminatory, sexist and homophobic language.”⁵⁸⁶

The European Network of Election Monitoring Organisations specifically criticised “homophobic and hate speech” by Bishop Marchel of the Moldovan Orthodox Church:

“Homophobic and hate speech by Bishop Marchel of the Moldovan Orthodox Church at the press conference against the presidential candidate Maia Sandu, was not properly prosecuted; even though, the law prohibits the church from being involved in the electoral campaign.”⁵⁸⁷

President Dodon used homophobic rhetoric in reaction to GenderDoc-M’s arranging of Moldova Pride on 21 May 2017:

“I did not promise to be the president for the gays... You know my opinion. I am categorically against marches of sexual minorities and their registration in the Republic of Moldova. I am for our traditions, traditional families, Orthodox faith.”⁵⁸⁸

Between 13-16 September 2018, the World Congress of Families was held under President Dodon’s auspices in Chişinău.⁵⁸⁹ Previously, the president had arranged a festival celebrating the traditional family in May; it was held just a few hundred meters from where I lived and my impression was that it was a kind of surreal event.⁵⁹⁰

Regarding the World Congress of Families, the U.S. NGO Southern Poverty Law Center has pointed out connections to Russian academia and religious right, mentioning that it was founded in 1997 after a meeting between founder Allan Carlson and Russian academics, and that its Russian representative Alexei Komov has forged bonds between the U.S. evangelical lobby and the Russian Orthodox Church.⁵⁹¹

The World Congress of Families in 2018 was arranged together with activists from the U.S. religious right, most notably Brian Brown who has previously been supportive of Russia taking

⁵⁸⁶ Report: *Republic of Moldova Presidential Election 2016, OSCE/ODIHR Election Observation Mission Final Report*, Warsaw: OSCE/ODIHR (2017). Available: <https://www.osce.org/odihr/elections/moldova/300016> (Obtained on 2019-03-10)

⁵⁸⁷ Report: *Election Observation Mission to Moldova Presidential Elections 2016 Final Report*, Podgorica: European Network of Election Monitoring Organizations (2016), p. 32. Available: <http://www.e-democracy.md/files/elections/presidential2016/final-report-enemo-elections-2016-en.pdf> (Obtained on 2019-03-10)

⁵⁸⁸ Report, *op. cit.* 588, p. 54; Video: *Igor Dodon: byt prezidentem dlya geev ya ne obeshchal* (Russian) [Igor Dodon: I did not promise to be president for the gays], Actualitati.MD (2017). Available: <http://actualitati.md/ru/vnutrennyaya-politika/video-igor-dodon-byt-prezidentom-dlya-geev-ya-ne-obeshchal> (Obtained on 2019-03-10)

⁵⁸⁹ Info: *About the Congress*, World Congress of Families (2018). Available: <http://worldcongress.md/en/home/> (Obtained on 2019-03-10); News article: *Moldovan president takes part in march in support of traditional family*, Moscow: TASS Russian News Agency (2018). Available: <http://tass.com/society/1003976> (Obtained on 2019-03-10)

⁵⁹⁰ Andersson, *op. cit.* 7, p. 8.

⁵⁹¹ Article: *Anti-LGBT hate group World Congress of Families to gather in Moldova this week, reveals details at the last second*, Montgomery: Southern Poverty Law Center (2018). Available: <https://www.splcenter.org/hatewatch/2018/09/12/anti-lgbt-hate-group-world-congress-families-gather-moldova-week-reveals-details-last> (Obtained on 2019-03-10)

a stance for introducing anti-LGBT legislation.⁵⁹² According to a newsletter from the International Organization for the Family, his address at the event dealt with topics including:

“[...] the importance of uniting countries in the east with those in the west to present a global defense of the natural family. Brown will point out that ideas to deconstruct the family and redefine institutions such as marriage, parenthood and gender often start with elites in the west, and are then pushed by wealthy leftist ideologues like George Soros who use their power and influence to spread them worldwide.”⁵⁹³

The MP of the Russian Duma Yelena Mizulina attended the event. Patriarch Kirill was going to attend but had to cancel and instead sent another representative to fill his slot.⁵⁹⁴ President Dodon held an address to the participants of the event in which he put emphasis on his perception of the harmful effects of allowing LGBT rights events in Moldova:

“I would like to focus on the propaganda of the phenomena that offend our values and public morality. I am convinced that such propaganda should not take place in our society. Organising festivals and other events that promote immoral principles must be strongly deprecated, even to the extent of outlawing them.”⁵⁹⁵

On 14 September, GenderDoc-M issued a statement in which it responded to Dodon’s address, calling him out on the fact that he instigated discrimination against the LGBT community and that this was “a serious violation of law and a severe act of discrimination.”⁵⁹⁶

In their 2018 report, GenderDoc-M stated that “hate speech is already a weapon of politicians who build their electoral campaign on fears and prejudices, helped by representatives of the Moldovan Orthodox Church”, and regretted that Moldova has an inadequate legal framework which, along with the vicious practice of law enforcement, let hate speech and hate crimes go on without sanctions.⁵⁹⁷

III. The political climate and church-state relations in the Republic of Moldova

In 1813, following Russia’s acquisition of the province known as Bessarabia as a result of the Bucharest Treaty (1812), Bessarabia was annexed into the canonical jurisdiction of the Russian Orthodox Church in 1812. In 1918, Bessarabia was incorporated into Greater Romania, then annexed by the Soviet Union which resulted in the creation of the Moldavian SSR in 1940. This resulted in that Orthodox congregations on both banks of the river Dniester were integrated

⁵⁹² Article: *Brian Brown Named President of Anti-LGBT World Congress of Families*, Montgomery: Southern Poverty Law Center (2016). Available: <https://www.splcenter.org/hatewatch/2016/06/02/brian-brown-named-president-anti-lgbt-world-congress-families> (Obtained on 2019-03-10)

⁵⁹³ Article, *op. cit.* 591.

⁵⁹⁴ *Ibid.*; Article: *Pat. Kirill Accepts President Dodon's Invitation to Attend World Congress of Families in Moldova*, Orthodox Christianity (2017). Available: <http://orthochristian.com/109543.html> (Obtained on 2019-03-10)

⁵⁹⁵ Address: *Address of the President of the Republic of Moldova Igor Dodon to the Participants of the World Congress of Families*, Chişinău: Presidency of the Republic of Moldova (2018). Available: <http://www.presedinte.md/eng/discursuri/d-i-s-c-u-r-s-u-l-presedintelui-republicii-moldova-igor-dodon-la-congresul-mondial-al-familiilor-chisinau-14-16-septembrie-2018> (Obtained on 2019-03-10)

⁵⁹⁶ Declaration: *Declarația Centrul de Informații GENDERDOC-M* (Romanian) [Declaration of the GenderDoc-M Information Centre], Chişinău: GenderDoc-M (2018). Available: <https://gdm.md/ro/content/declaratia-centrul-de-informatii-genderdoc-m> (Obtained on 2019-03-10)

⁵⁹⁷ Report, *op. cit.* 579, p. 1.

under the bishopric of Chişinău, led exclusively by Russian-speaking clergy. The Soviet regime closed most churches and all but one monastery on the territory of the Moldavian SSR.⁵⁹⁸

Since the Republic of Moldova declared its independence from the Soviet Union on 27 August 1991, the Orthodox church has gained an astonishing revival. This re-emergence of religion in the public sphere seems to be tied to the uncertainty of Moldovan statehood and the geopolitical struggle between Romania and Russia.⁵⁹⁹

For example, the Moscow Patriarchate was directly involved in the case of *Metropolitan Church of Bessarabia and Others v. Moldova*, in which the Metropolitan Church of Bessarabia (Bucharest Patriarchate) pursued its right to exist alongside the Moldovan Orthodox Church (Moscow Patriarchate) in Moldova, and in which the ECtHR ruled in favour of the applicant.⁶⁰⁰

It is noteworthy that the country was the first after the collapse of the Soviet Union that voted communism back into power in 2001. Hale has described that Moldova increasingly looked like the post-Soviet patronal presidential countries had looked in the mid-1990s. They had been in the early stages of constructing strong centralised political machines out of the chaotic competing-pyramid systems that had characterised the initial transition from Soviet rule.⁶⁰¹

Between 2001-2009, the Church enjoyed a strong position when the Communist Party was in power and its leader Vladimir Voronin was head of state. Voronin was a personal friend of Patriarch Alexii II and the only leader of a CIS country to attend the inauguration of Patriarch Kirill. Voronin has remained a figure close to the Russian Orthodox Church, and was the only politician that Kirill decorated on a visit to Chişinău in October 2011.⁶⁰²

On 23 February 2012, the city of Bălţi adopted a resolution in which it proclaimed support for the Moldovan Orthodox Church and renounced LGBT rights activism in the public sphere:

“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 Bălţi city residents.”⁶⁰³

I remember from when I lived in Moldova in spring 2018, that on the one side there are strong forces that want Moldova to be absorbed by Romania, and on the other there are forces that seek close cooperation with Russia; some Communist party leaders even want Moldova to join the Union State of Russia and Belarus.⁶⁰⁴ Andrei Amram writes that unless Moldovan society is able to reach some consensus on towards where its state-building process is leading, societal problems will be mirrored in the religious life of the country.⁶⁰⁵

⁵⁹⁸ Avram, Andrei: *Orthodox Churches in Moldova*. In: Leustean, *op. cit.* 218, 402-417, p. 403.

⁵⁹⁹ *Ibid.*, p. 402.

⁶⁰⁰ Rimstad, *op. cit.* 204, p. 40f; ECtHR (First Section), Judgment of 13 December 2001 (Final on 27 March 2002), *Metropolitan Church of Bessarabia and Others v. Moldova*, no. 45701/99.

⁶⁰¹ Hale, *op. cit.* 52, p. 378.

⁶⁰² Avram, *op. cit.* 588, p. 410.

⁶⁰³ Venice Commission, *op. cit.* 78, p. 5.

⁶⁰⁴ Avram, *op. cit.* 588, p. 411.

⁶⁰⁵ *Ibid.*, p. 417.

As I stated in my previous paper, I think it is especially important to build human rights both from the institutional side as well as anchoring these values throughout the population. This may be an extremely difficult task in Moldova, where the majority of the population consists of pious Orthodox Christians and the discussion on human rights for sexual minorities is one of the most difficult ones to take with Church representatives. Within the foreseeable future, the Church will continue to play an important role, not least politically as king-maker. Setting a strict boundary between spiritual and worldly power is not close at hand.⁶⁰⁶

Since the general election in 2014, the Democratic Party under its oligarch leader Vlad Plahotniuc managed to obtain the lion's part of the parliamentary seats, although the party only got 15.8 % in the 2014 ballot. In 2018, a pro-European candidate won a by-election for the mayor's office in Chişinău, and the election was invalidated by a local court.⁶⁰⁷ This resulted in that the EU froze all aid to Moldova and stated in a resolution on 14 November 2018 that Moldova is "a state captured by oligarchic interests".⁶⁰⁸

When I wrote my paper, I stated that the political situation in Moldova is relatively stable, compared to the big turbulence of 2015-2016, and that the political actors' main focus is the general election to Parliament which was to be held either in late 2018 or early 2019; it was later decided to be held on 24 February 2019. Now when the general election has just passed, it is clear that no party managed to secure majority in the ballot,⁶⁰⁹ which the Associated Press apprehends "will likely deepen a rift between pro-Western and pro-Russian forces, amid concerns about endemic corruption and crumbling democracy".⁶¹⁰

⁶⁰⁶ Andersson, *op. cit.* 7, p. 24.

⁶⁰⁷ *Ibid.*, p. 11.

⁶⁰⁸ European Parliament: Resolution of 14 November 2018 on the implementation of the EU Association Agreement with Moldova (2017/2281(INI)), Brussels: European Parliament, p. 3. Available: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0458+0+DOC+XML+V0//EN&language=EN> (Obtained on 2019-03-10)

⁶⁰⁹ Article: *Early results: no party secures majority in Moldova ballot*, Washington: Washington Post (2019). Available: https://www.washingtonpost.com/world/europe/moldovans-head-to-polls-opt-between-moscow-and-west/2019/02/24/f7fe2f00-37f8-11e9-8375-e3dcf6b68558_story.html?utm_term=.27b23b7f44c1 (Obtained on 2019-03-10)

⁶¹⁰ Article: *Moldova parliamentary ballot: what's at stake?*, Chişinău: Associated Press (2019). Available: <https://apnews.com/d687f541c8f64f1d89198def4797fcc0> (Obtained on 2019-03-10)

Conclusions

7. Conclusions

I make the following conclusions in respect of the first research question and sub-questions:

What is the stance of the Council of Europe and the European Court of Human Rights concerning freedom of assembly for LGBT rights activists?

- How has the Court's jurisprudence developed concerning the right to freedom of assembly for LGBT rights activists?
- How has the Court perceived the importance of the protection of the feelings of religious believers *vis-à-vis* the actualisation of the right to freedom of assembly for LGBT rights activists?

My interpretation is that while the ECtHR has a history of supporting blasphemy laws as well as laws protecting the “feelings of religious believers”, its main emphasis has been on the latter, under the pretexts of “safeguarding religious peace” or to condemn violations of the “spirit of tolerance”. While I think that interpreting the ECHR in this way may potentially stand in the way for democratic debate and sound critique of religions, I do not necessarily see that this today poses a risk towards the realisation of the right to freedom of assembly for LGBT rights activists, since the ECtHR has held that there must be a “high degree of profanation” (see *Wingrove*) connected to the insult of religious feelings. This is important because the Russian Federation has held that organising public LGBT rights events insult the feelings of religious believers, which is a view that is not compatible with the jurisprudence of the ECtHR.

My perception is rather that a changed view on the role of public morals in society, towards the Russian Orthodox view, could establish a new framework, through which the established rights in the ECHR would be understood in a way more restrictive towards LGBT rights. However, I think that the Russian Orthodox view on human rights seems to be incompatible with contemporary human rights jurisprudence as well as with the foundations of the whole concept.

While the two older cases of *Handyside* and *X. Ltd. and Y.* both signalled that the State should enjoy a wide margin of appreciation concerning public morals, and that homosexuality may constitute an especially sensitive subject, I do not think that they seem to put any substantive barriers towards the freedom of expression in the context of LGBT. I think that it is positive that in *Bayev*, the ECtHR expanded the expressions protected under Article 10 by ruling that a state cannot suppress ideas and opinions by adopting and implementing laws that use broad and vague terminology.

The decision also obliges states to recognise and value individual rights, regardless of sexual orientation. I also think that Judge Dedov's dissenting opinion, in which he stated that it seems like the “Russian authorities are the only ones who would like to protect private life in this way”, is suggestive of how the Russian Federation views freedom of expression in the context of LGBT and attempts to change the civilisational discourse on the role of public morals in the context of LGBT rights.

From 2007 onwards, the ECtHR has crystallised its view that “real pluralism” is an inherent part of a pluralistic democracy, which is the only political model compatible with the ECHR, and that banning LGBT rights demonstrations under the pretext that they encourage violent counter-demonstrations is *not* a valid claim as long as the State has the resources to safeguard these events. I think that a Grand Chamber decision in the recent case of *Alekseyev and Others*

would be necessary to erase any loopholes and make it clear, once and for all, that the definition of democracy held in the ECHR by necessity entails public visibility for LGBT rights activists.

I make these conclusions in respect of the second research question:

What role has the Moscow Patriarchate played in the Russian Federation, Ukraine and the Republic of Moldova in shaping anti-LGBT legislation?

While the Russian Orthodox Church (Moscow Patriarchate) has not re-entered its previous role as the Russian state church, and as a civil society actor is entitled to hold political views according to democratic principles, it is clear that there is a strong religious/political intersection in Russia that puts the Church into a position from which it may conduct very effective lobbying in the political sphere – especially in matters such as public morals, where the neo-traditionalist government under Vladimir Putin shares the views with the dominant Orthodox clergy. This special position of the Church is also codified in the 1997 Law ‘*On Freedom of Conscience and Religious Associations*’. Attempts have been made to alter the moral views also within the international community, and while Russia has had some successes in the U.N. within the “‘traditional values’ bloc”, it does not seem to have made impact on the West; one explanation may be that the Orthodox view on human rights is incompatible to the concept of human rights law as was previously mentioned.

Furthermore, following the Pussy Riot incident some steps have been taken in Russia towards protecting the “feelings of religious believers”, which seems to be interpreted more extensively by the Russian CC compared to the interpretations of the ECtHR. This may be problematic if the Church is given a stronger say on what constitutes religious feelings. My argument here is that (1) if the Church defines the scope of the “feelings of religious believers” and how they should be accorded protection from “moral harm”, e.g. in relation to the right to the freedoms of expression and assembly for LGBT rights activists; and (2) these “feelings” would actually be accorded protection under domestic law and/or international human rights law; then (3) the Church is given a certain amount of power in how domestic law or international human rights law can be limited in relation to the rights of LGBT rights activists.

The newly-established Orthodox Church of Ukraine seems to be more adjusted to being a civil society actor in a democratic setting, because while it does not condone LGBT rights events, neither does it call upon them to be prohibited by politicians. What direction the Republic of Moldova will take is yet to be seen, since the country is culturally and politically divided and is therefore ambivalent on whether to mainly seek closer relations with Europe or the Russian-speaking world. The Moldovan Orthodox Church has to decide for itself whether it wants to stay with the Moscow Patriarchate; its decision and faith should be respected. At the same time, the strengthening in Moldova of European norms and the presence of European actors is positive for the development of LGBT rights. An important factor for Ukraine and Moldova is that both countries have signed extensive association agreements with the European Union, bringing them closer to the European family.

I make these conclusions in respect of the third research question and sub-questions:

How is the right to freedom of assembly of LGBT rights activists realised in the Russian Federation, Ukraine and the Republic of Moldova?

- How has the legal and factual situation of LGBT rights activists developed in these countries since the decline of the Soviet Union?

- What has been the impact of the ECtHR (the “Strasbourg effect”) in these countries in respect of the implementation of the right to freedom of assembly of LGBT rights activists?
- Taking into account that the Russian government has refused to take measures to implement the ECtHR’s judgments, what implications does this have for Russia’s membership in the Council of Europe?

While all three countries decriminalised *muzhelozhstvo* in the early 1990s, mainly with the ambitions to join the Council of Europe and to make closer association with the European community, the realisation of the right to freedom of assembly for LGBT rights activists has been complicated in these three countries, mainly due to their post-Soviet cultural heritage, patronal politics, and religious/political intersections with their respective recognised Orthodox Churches, all of which until this year have been affiliated with the Moscow Patriarchate.

Regarding Ukraine and the Republic of Moldova, being members of the Council of Europe and subjected to the legislative powers of the ECtHR has been a key factor in ameliorating the situations for LGBT people, not least in the context of the right to freedom of assembly. In Moldova, the first Pride march that was legally held with full police protection was the direct result of the ECtHR’s decision in *GenderDoc-M v. Moldova* in 2012. In 2018, when I participated in Moldova Pride together with colleagues from the Embassy of Sweden in Chişinău, the police managed to guard the event so that it could be held the whole planned course. Concerning Ukraine, the situation for LGBT people has drastically changed after the Euromaidan in 2013-14 and with the ambitions of the new government to fully become a part of the European community. In the context of the right to freedom of assembly, Pride marches are recurring events in several cities and the authorities seem to have learned from their experiences and have become more able to neutralise violent counter-demonstrators.

While the situation in Russia seems to have calmed down in later years, except for the situation in the Chechen Republic, it is still very unstable and the authorities may at any time clamp down on LGBT rights groups, especially when trying to hold demonstrations. I think that a stabilising factor is that Russia is a member of Council of Europe, and while Russia has not repealed its “gay propaganda” legislation, I think that the situation would have been much worse without this European connection. Depending on future developments, there may be implications for the Russian Federation’s membership within the Council of Europe, but an expulsion from the organisation has only happened once before, and I do not think that LGBT rights would ever have enough weight to be the decisive factor for expelling Russia, when compared to the advantages of keeping Russia within the organisation.

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Supplement A



FACULTY OF LAW
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Simon Andersson

Rainbow over the Dniester

Paper on the actualisation of the right to freedom of assembly
for LGBT rights activists in the Republic of Moldova

JUZN05 Professional research work

Paper, Master of Laws programme
30 higher education credits

Supervisor: Per Nilsén

Term: Spring term 2018

Preface

In the spring of 2018, I was on internship at the Embassy of Sweden in Chişinău and had the opportunity to watch the country's development and sharp political turns from a close-up perspective. On 19 May, I participated in the annual Pride march together with staff from the Swedish Embassy and other foreign missions in Moldova, the United Nations in Moldova, the LGBT rights organisation GenderDoc-M, and other activists.

I want to thank the Ambassador of Sweden to the Republic of Moldova, Signe Burgstaller, and my supervisor during the internship, Anja Jahn-Günther, for providing me with sharp comments and a rewarding work experience. Kudos also to the Law Faculty at Lund University and to the Swedish Institute, that awarded me with a scholarship via the Visby Programme to cover my expenses for the entire internship.

Simon Andersson

Stockholm in August 2018

I. Introduction

The purpose of this paper is to research the actualisation of the right to freedom of assembly for LGBT rights activists in the Republic of Moldova.

The Embassy of Sweden in Chişinău has sub-delegated funds from the Swedish International Development Cooperation Agency (Sida) and is one of few core support contributors to the sole LGBT rights organisation GenderDoc-M (GDM), which works on a non-profit basis to promote the actualisation of human rights for LGBT persons in the Republic of Moldova.

Sida has provided core support to GDM since 2010. Previously, this support was provided through the organisation Human Rights Defenders, but since 2018 it goes directly from Sida via the Embassy to GDM as non-earmarked funds. For the period 2018-2020 the core support is approximately SEK 5 000 000.¹

I will first present a broad overview of the situation for LGBT rights in the Republic of Moldova, including statistics, earlier experiences of Pride marches, attitudes towards LGBT and the role of the Orthodox church. This also includes an insight into the situation for LGBT rights in the breakaway region or *de facto* republic of Transdnistria, that resides within Moldova's internationally recognised borders in the eastern fringe of the country.

I then provide the reader with an insight into international treaties, agreements, etc. that Moldova is party to and the relevant domestic legislation. Especially important today is the European Union's Association Agreement and visa liberalisation regime with Moldova.

This will constitute the basis for an analysis and discussion on how demonstration rights for LGBT rights activists can be actualised in the Republic of Moldova, within the framework of international human rights law and by means of the soft power of the European Union.

II. The situation in the Republic of Moldova

1. History of previous Pride marches

Homosexuality between consenting adults has been legal in the Republic of Moldova since 1995, when the country joined the Council of Europe.²

The first Moldova Pride was held in Chişinău by GDM in 2002. In 2005, the City Hall of Chişinău banned LGBT rights demonstrations, as was dealt with in the case *GenderDoc-M v. Moldova* in the European Court of Human Rights (see section IV(1.2) of this paper).

Between 2005-2007, GDM tried to organise Pride festivals and marches in Chişinău, but these were banned or otherwise prevented on seven different occasions and allowed on none. The

¹ Article (Swedish): *Andrei kämpar för HBTQ-rättigheter trots dödsbot*, Swedish International Development Cooperation Agency (2018). Available: <https://www.sida.se/Svenska/Har-arbetar-vi/Europa/Moldavien/resultatexempel/Andrei-kampar-for-hbtq-rattigheter-trots-dodshot/> (Obtained on 2018-08-01)

² Ottosson, Daniel: *State-sponsored Homophobia : A world survey of laws prohibiting same sex activity between consenting adults*, ILGA (May 2010), p. 44. Available: https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2010.pdf (Obtained on 2018-08-01)

local authorities prohibited Pride events under the pretext that there was an impending threat of counter-demonstrations by religious organisations.³

On 11 May 2008, the police stood by as the Pride parade was prevented by crowds that surrounded, intimidated and attacked parade participants. The Mayor of Chişinău, Dorin Chirtoacă (Liberal Party; Partidul Liberal, PL), had banned the parade the evening before. The Pride march was finally cancelled after the bus carrying the 60 participants was halted by hundreds of violent anti-gay protesters while the police stood by and watched.⁴

In 2009, GDM decided not to try to hold a demonstration, but other related events were held. In May 2009, Sören Juvas, president of Sweden's national LGBT rights organisation RFSL, was beaten up when he visited Chişinău to participate in Pride. He was stopped by police as he left a pub and asked if he was in town for Pride and if he was gay. When he answered both questions affirmative, he was taken to a police station and then released. Juvas was attacked by a group of men when leaving the police station and GDM suspected that the assailants were either police men in civilian clothes or sent out by the police.⁵

In 2010, GDM tried to hold a demonstration which was again banned by the Mayor of Chişinău, Dorin Chirtoacă, who commented: "How can I protect them? They should protect themselves in "activities" that they do. The Mayor cannot protect this kind of people." The Court of Appeal supported the ban, which was later overturned by the Supreme Court of Justice (SCJ). However, the SCJ neither recognised the discriminatory nature of the ban nor decided that the City Hall was obliged to prevent similar situations in the future.⁶

In 2011, GDM decided not to hold a demonstration, because they deemed it too dangerous.⁷

On 13 May 2012, the LGBT Pride festival "Rainbow over the Dniester" was held. A march was planned to be carried out in support of adopting the draft Law of Ensuring Equality. A number of NGOs under the umbrella of the Non-discrimination Coalition and other HR organisations were to participate in the march. Prior to the event, several organisations said that they would not support the event, because it could negatively affect the parliamentary vote on adopting the law. The final law was adopted on 25 May 2012 but LGBT people were intentionally excluded from the list of protected social groups in the law. However, LGBT people may still achieve some protection under the phrase "or other status" which extends the protection to other discrimination grounds not specifically mentioned in the law.⁸

³ Report: *Report on homophobic speech by members of Moldova's parliament*, GenderDoc-M and ILGA-Europe (2011), p. 4-5. Available: https://nanopdf.com/download/report-on-homophobic-speech-by-members-of_pdf (Obtained on 2018-08-01), p. 4.

⁴ Ibid, p. 4f.

⁵ Ibid, p. 5f; Article (Swedish): *Pride – på liv och död*, Aftonbladet (2009), Available: <https://www.aftonbladet.se/ledare/a/yvzOxR/pride--pa-liv-och-dod> (Obtained on 2018-08-01)

⁶ Report: *Cases of discrimination against people from LGBT community registered by the Information Centre GenderDoc-M during the 2010*, GenderDoc-M (2010), p. 1. Available: https://gdm.md/files/untitled%20folder/report-GENDERDOC-M-2010_eng.pdf (Obtained on 2018-08-01).

⁷ Report: *The 2011 Report on state of human rights of LGBT people in the Republic of Moldova drawn by the GenderDoc-M Information Centre*, GenderDoc-M (2011), p. 1f. Available: https://gdm.md/files/untitled%20folder/report-GENDERDOC-M-2011_eng.pdf (Obtained on 2018-08-01); *Report on homophobic speech by members of Moldova's parliament*, p. 6.

⁸ Frolov, Angela: *Report on the state of LGBT people's rights in Moldova*, GenderDoc-M (2012), p. 9. Available: https://gdm.md/files/untitled%20folder/report-GENDERDOC-M-2012_eng.pdf (Obtained on 2018-08-01)

On 12 June 2012, the ECtHR found the Republic of Moldova responsible for violation of the right to the freedom of assembly in the case *GenderDoc-M v. Moldova* and for discrimination on the ground of sexual orientation (see section IV(1.2) of this paper).⁹

On 14 February 2013, a small group of activists held the first legally recognised Pride march in Chişinău with full police protection.¹⁰ A bigger Pride march was planned to be held in the city centre on 19 May. However, on 15 May, the Mayor of Chişinău, Dorin Chirtoacă, filed a lawsuit and subsequently won it against holding it in the city centre. He demanded the event to be relocated to a remote secluded park zone because of possible counter-demonstrations and public order disturbances. Counter-demonstrators were free to hold a rally in the same place and consequently succeeded in carrying it out.¹¹

On 17 May 2014, the Pride festival “Rainbow over the Dniester” and a march titled “It’s time to be yourself!” were held in Chişinău. Police protected participants from counter-demonstrators, several of whom were arrested. This was the second time when the march achieved police protection and the first time when its time and location were not altered.¹²

Between 13-17 May 2015, the Pride festival “Rainbow over the Dniester” under the slogan “Because I Live Here” took place in Chişinău. A transport company that were to rent out minibuses for the event was warned by persons that presented themselves as police officers that if they assisted GDM, they would have big problems.¹³

A group of counter-demonstrators appeared at the starting point of the march and walked along it on the sidewalk. The counter-demonstrators threw rotten eggs and an egg landed in front of the U.S. Ambassador James D. Pettit while he was making a speech. A group of priests headed by the religious extremist Ghenadie Valuţă went to the march route and sprinkled holy water over it to “clean the uncleanness and infamy” from the place.¹⁴

On 14 July 2015, GDM held a protest march against hate crimes in Bălţi. The day before, the GDM representative Angela Frolov was informed by the police that they would ensure protection of participants, but demanded that participants would not carry the rainbow flag and that they would only hold a protest rally in front of Bălţi Police Inspectorate. They were asked not to protest outside the City Hall because there was a Ştefan cel Mare (Stephen the Great) monument installed in front of it, which is one of Moldova’s national symbols.¹⁵

GDM refused to comply and organised a march with the rainbow flag starting at the City Hall. During the march, some passers-by were shouting hateful slurs and demanding prohibition of

⁹ Ibid, p. 8.

¹⁰ Sindelar, Daisy: *Of all places, is Moldova leading on gay rights?*, The Atlantic (2013). Available: <https://www.theatlantic.com/international/archive/2013/04/of-all-places-is-moldova-leading-on-gay-rights/274820/> (Obtained on 2018-08-01)

¹¹ Frolov, Angela: *Report on the state of LGBT people’s rights in Moldova*, GenderDoc-M (2013), p. 8. Available: <https://gdm.md/files/untitled%20folder/GENDERDOC-M%20Hate%20Crime%20Report%202013%20Final.pdf> (Obtained on 2018-08-01)

¹² Frolov, Angela: *Report on the state of LGBT people’s rights in Moldova*, GenderDoc-M (2014), p. 8f. Available: https://gdm.md/files/untitled%20folder/raport-GENDERDOC-M-2014_english.pdf (Obtained on 2018-08-01)

¹³ Frolov, Angela: *Report on the state of LGBT people’s rights in Moldova*, GenderDoc-M (2015), p. 13f. Available: https://gdm.md/files/untitled%20folder/report-GENDERDOC-M-2015_English.pdf (Obtained on 2018-08-01)

¹⁴ Ibid, p. 15.

¹⁵ Ibid, p. 15.

the public activity. The police reacted towards aggressors in most extreme cases and journalists would then approach the aggressors and take interviews.¹⁶

On 22 May 2016, the Pride festival and march with the title “Fără Frică” (“Without Fear”) were held. The march continued until the intersection with Vasile Alecsandri Street, where it was blocked by a group of aggressive counter-demonstrators that would not allow further passage to the final destination of the event. As a result, the police suspended the march and evacuated participants from the scene.¹⁷

On 20 May 2017, the Pride festival and march with the title “Fără Frică” were held again. The police shortened the march route due to the presence of violent counter-demonstrators. The President of the Republic of Moldova, Igor Dodon (Party of Socialists; Partidul Socialiștilor din Republica Moldova, PSRM), met the group of counter-demonstrators and congratulated them. The police did not hold anyone accountable for organising the counter-demonstration.¹⁸

On 19 May 2018, the 17th Edition of Moldova Pride and the march with the theme “Fără Frică de Iubire” (Without Fear of Love) were held. This was the first time in history that a Pride march was held in Chișinău from start to finish without any early interruption, kudos to an enormous effort by Moldovan police authorities. Numerous embassies attended the event, namely Argentina, Belgium, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States. The event was also attended by staff from the United Nations in Moldova and other organisations.¹⁹

2. Public opinion towards LGBT persons

In January 2011, Soros Foundation Moldova published the results of a survey covering about 1 200 respondents. The survey found that only about 14 % of respondents were willing to accept LGBT people as neighbours, 13 % as a work colleague, 10 % as a friend, and just 4 % as a family member. This represented among the highest rates of intolerance recorded in Europe.²⁰

In 2015, the Study on Equality Perceptions and Attitudes in the Republic of Moldova was published by the Council on the prevention and elimination of discrimination and ensuring equality (Equality Council) and the Office of the UN High Commissioner for Human Rights (OHCHR), in consultation with the UN Development Programme (UNDP) Moldova.

According to the study, Moldovan society is very categorical towards LGBT persons. Over 40 % of the answers included definitions such as “immoral”, “abnormal”, “foolery”; 33.4 % regarded LGBT people as sick; around 16-18 % related LGBT people to etiquettes such as

¹⁶ Ibid, p. 16.

¹⁷ Frolov, Angela: *Report on the state of LGBT people's rights in Moldova*, GenderDoc-M (2016), p. 12. Available: https://gdm.md/files/untitled%20folder/report-GENDERDOC-M-2016_English.pdf (Obtained on 2018-08-01)

¹⁸ Frolov, Angela: *Report on the state of LGBT people's rights in Moldova*, GenderDoc-M (2017), p. 12. Available: https://gdm.md/files/untitled%20folder/report_GENDERDOC-M_2017_eng.pdf (Obtained on 2018-08-01)

¹⁹ Article: *Police in Moldova use tear gas on anti-LGBT protesters trying to disrupt Pride march*, Pink News (2018). Available: <https://www.pinknews.co.uk/2018/05/22/moldova-pride-2018-anti-lgbt-protests-tear-gas/> (Obtained on 2018-08-01)

²⁰ *Report on homophobic speech by members of Moldova's parliament by GenderDoc-M and ILGA-Europe*, p. 4

“prostitution”, “dangerous”, “paedophiles”, “perverse”. Answers with positive perceptions did not exceed 2 % of the study group.²¹

Both group discussions had respondents who associated LGBT people with the adoption of the Law on Ensuring Equality, because the EU made the adoption of the law a precondition for a visa liberalisation regime. Some participants condemned that the EU demanded that the Republic of Moldova adopted the law, which they perceived as the “law of sexual minorities”.²²

Several respondents during the group discussions had mentioned that as long as LGBT people do not manifest their sexuality publically, e.g. by holding Pride events, they could be accepted in society. However, the majority of respondents tried to convince these respondents that accepting sexual minorities would make them equally guilty of “degradation of the society”.²³

The level of acceptance of marginalised people and vulnerable groups is the key factor in the persistence of discriminatory behaviours. According to the study, the average value of the social distance index (SDI) from vulnerable and marginalised groups is 2.8 points. The highest social distance score is held by the LGBT community with 5.2 points, since half of the respondents opted for removing that group’s representatives from the country. Comparatively, the group of people with HIV scored 4.3 points, meaning that they are not more socially accepted than as visitors to the country.²⁴

The legal protection of LGBT people was understood as promoting the behaviours/identities that are sinful or constitute a disease. Moreover, such protection is regarded as dangerous for public order because it can “attract others” to the same illness or sin.²⁵

3. Attitudes towards LGBT in politics

According to the *Report on homophobic speech by members of Moldova's parliament* from 2011, intolerant language was in several cases expressed by high profile politicians and these cases of intolerant statements were often transmitted widely through broadcast media.²⁶

Some examples can be mentioned of how many Moldovan politicians perceive LGBT rights. Mihai Ghimpu (PL), interim president of the Republic of Moldova between 2009-2010, were asked about how he would vote on the draft Law on Ensuring Equality in 2011, when it still included sexual orientation as a prohibited ground of discrimination. Ghimpu said that:

“It’s better to love a woman than a man, but I voted for decriminalisation of homosexuality because it was one of the conditions to join the Council of Europe. I saw how the eyes of several MPs were shining when it happened. I thought, “Lord! How can I vote for this? [...] Homosexuality is a deviation, nature is nature, but we don’t have to put them in the frontline. We

²¹ Report: *Study on Equality Perceptions and Attitudes in the Republic of Moldova*, Equality Council, OHCHR and UNDP (2015), p. 29. Available: http://md.one.un.org/content/dam/unct/moldova/docs/pub/ENG-Studiu%20Perceptii%202015_FINAL_2016_Imprimat.pdf (Obtained on 2018-08-01)

²² Ibid, p. 31

²³ Ibid, p. 32.

²⁴ Council of Europe: *National Human Rights Action Plan for the period 2018-2022*, p. 6. Available: <https://www.coe.int/t/commissioner/source/NAP/Moldova-National-Action-Plan-on-Human-Rights-2018-2022.pdf> (Obtained on 2018-08-01)

²⁵ Frolov, Angela: *Report on the state of LGBT people’s rights in Moldova* (2017), p. 4.

²⁶ *Report on homophobic speech by members of Moldova's parliament*, p. 1.

don't take patients from psychiatric institutions to bring them on our main square [...] I will not vote for this law."²⁷

The current President of Moldova, Igor Dodon, has made several statements contravening LGBT rights. In 2011, when he was the leader of the Communist Party and a candidate for the 2011 mayoral election in Chişinău, he said in an interview published at Unimedia's website:

"One of the steps to strengthen the birth rate is to strengthen our healthy Moldovan traditions, especially the cult of the family. The divorce statistics in Moldova are alarming. And even more alarming are all sorts of morbid initiatives which suggest legalisation and promotion of sexual relations which exceed normality and traditional Moldovan ethics."²⁸

On 20 June 2017, being interviewed on the "Personal accent" talk show on the Accent TV channel, President Dodon said the following:

"As to what the lady said, to be representatives of all the people [...] Therefore, those who are for the liquidation of the church, those who are for the registration of sexual minorities, excuse me, but I will not be your representative and I cannot be your president"²⁹.

On 15 February 2018, President Dodon said in an interview³⁰ that a state is strong when it has a history and a united people who adheres to its traditional values. He stated that most of Moldovans are Orthodox Christians and have normal, traditionally warm family relations. He referred to the family as a basic social unit and stated that opponents to the Moldovan statehood are increasingly attacking history, religion, traditions and the family, for example by proposing the registration of sexual minorities.

He reminded that a festival celebrating the traditional family were to be held in May, which it later was outside the Presidential Palace and Parliament in central Chişinău. He also reminded that the World Congress of Families will be held under the President's auspices in Chişinău in September 2018, which is an event gathering people such as the Russian Orthodox Patriarch Kirill and U.S. citizen Brian Brown, who is the director of the National Organization for Marriage and president of the World Congress of Families that hosts the event. Brown has previously been supportive of Russia taking a stance for introducing anti-LGBT legislation.³¹

4. The role of the Orthodox church

In 2017, Soros Foundation Moldova presented the study *Church and State in the Republic of Moldova*. According to the study, Orthodox groups limited the category of sexual and gender

²⁷ Promo-LEX Association: *Activity Report 2005 – 2008*, p. 75. Available: https://promolex.md/wp-content/uploads/2008/12/doc_1366544391_eng.pdf (Obtained on 2018-08-01); *Report on homophobic speech by members of Moldova's parliament*, p. 11.

²⁸ *Report on homophobic speech by members of Moldova's parliament*, p. 12; Ciorici, Dumitri (Article in Romanian): *Dodon, împotriva relațiilor sexuale ce depășesc "cadrul normalității"*, Unimedia (2011). Available: <https://unimedia.info/stiri/dodon--impotriva-relatiilor-sexuale-ce-depasesc-cadrul-normalitatii-31336.html> (Obtained on 2018-08-01)

²⁹ Frolov, Angela: *Report on the state of LGBT people's rights in Moldova* (2017), p. 10.

³⁰ Interview (Romanian): *Igor Dodon, Președintele Moldovei: Pledz pentru un protecționism rațional și pentru păstrarea valorilor tradiționale*, Flux Online (2018). Available: <http://flux.md/interviu/igor-dodon-presedintele-moldovei-pledez-pentru-un-protectionism-rational-si-pentru-pastrarea-valorilor-traditionale#> (Obtained on 2018-08-01)

³¹ Article: *Brian Brown Named President of Anti-LGBT World Congress of Families*, Southern Poverty Law Center (2016). Available: <https://www.splcenter.org/hatewatch/2016/06/02/brian-brown-named-president-anti-lgbt-world-congress-families> (Obtained on 2018-08-01)

minorities to homosexuals; professed that they did not know such individuals; and concluded that homosexuality (or at least “cohabitation”, which they regarded the same as “marriage”) was newly introduced in Moldova.

Representatives of the Orthodox Church provided a view that if the State guaranteed LGBT rights, it would endanger public morality. Many Orthodox representatives feel discriminated against when homosexuals hold parades and other public events, but they do not make equal use of their own rights to publicly present their own values.

The study also found that there was approval of the public display of Orthodox values, but disapproval of the level of violence and hatred that counter-demonstrators against Pride demonstrations attempt to provoke.³²

On 25 May 2018, Moldovan Metropolitan Vladimir asked the President, Speaker, Prime Minister and Minister of the Interior to ban LGBT rights marches similar to the one that was organised by GDM on 19 May. He stated that such actions are “immoral and an insult to religious groups and the majority of society. According to article 8 in the law on meetings, authorities have every right not to allow such an action, which directly attacks public morality and clearly violates the liberties of other people. This destructive phenomenon must be stopped because it is harming our openly Orthodox society that supports family values”. He also asked authorities to repeal the Law on Ensuring Equality that was adopted on 25 May 2012.³³

5. Short on the political climate in the Republic of Moldova

The political situation in the Republic of Moldova today is relatively stable, compared to the big turbulence of 2015-2016. The political actors’ main focus is the general election to Parliament that is planned to be arranged in late 2018 or early 2019. Today, the Democratic Party (Partidul Democrat din Moldova, PDM) under its oligarch leader Vlad Plahotniuc has the lion’s part of the parliamentary seats, although the party only got 15.8 % after the last general election in 2014. The journalist Natalia Morari has said of Plahotniuc that “nobody considers Plahotniuc pro-European. He is pro-Plahotniuc and pro-corruption”.³⁴

The previous Mayor of Chişinău, Dorin Chirtoacă, was detained on 25 May 2017 by anti-corruption police with regards to suspected irregularities concerning public procurement of parking lots in the city. He was then placed in house arrest and suspended from the Mayor’s office, which has been criticised locally and internationally³⁵ as undemocratic. On 16 February 2018, Chirtoacă announced his resignation.

³² Voicu, Ovidiu, Cash, Jennifer and Cojocariu, Victoria: *Church and State in the Republic of Moldova*, Soros Foundation Moldova (Chişinău, 2017), p. 51. Available: http://soros.md/files/publications/documents/Studiu_Biserica%20si%20Stat_EN.pdf (Obtained on 2018-08-01); Frolov, Angela: *Report on the state of LGBT people’s rights in Moldova* (2017), p. 3.

³³ Mitropolit Vladimir: *Adresarea Înaltpreasfinţitului Mitropolit Vladimir în legătură cu desfăşurarea Marşului „Fără frică de Iubire”*, Biserica Ortodoxă din Moldova (2018). Available: <http://mitropolia.md/adresarea-inaltpreasfintitului-mitropolit-vladimir-catre-presedintele-republicii-moldova-presedintele-parlamentului-republicii-moldova-prim-ministrul-republicii-moldova-si-ministrul-afacerilor-inter/> (Obtained on 2018-08-01)

³⁴ Higgins, Andrew: *Moldova is rattled as Washington welcomes a feared tycoon*, New York Times (2016). Available: <https://www.nytimes.com/2016/06/04/world/europe/moldova-vlad-plahotniuc.html> (Obtained on 2018-08-01)

³⁵ Report: *Local democracy in the Republic of Moldova : clarification of the conditions surrounding the suspension of the Mayor of Chişinău*, Council of Europe (19 October 2017). Available: <https://rm.coe.int/local-democracy-in-the-republic-of-moldova-clarification-of-the-condit/168075c1de> (Obtained on 2018-08-01)

A by-election was held on 20 May 2018 with a second round of the election on 3 June. The election is seen as a strong indicator of the state of politics before the general election to Parliament. The two favourite candidates were Silvia Radu (“independent”, but with strong ties to PDM) and Ion Ceban (PSRM). If Radu would have won, this would have meant that PDM had consolidated its power both in the Government and in the City of Chişinău. On the other hand, Ceban was the only candidate that would attract more Russian-leaning voters, since his party PSRM has close ties to Moscow.

What is interesting with this by-election is that neither of them won, but Andrei Năstase from the pro-European Dignity and Truth Platform, who won more than 52 % of the votes in the runoff against Ion Ceban. However, the Chişinău City Court has not validated Năstase’s mandate and declared the elections results null on 19 June.³⁶

III. The strange case of Transdnistria

The Pridnestrovian Moldavian Republic³⁷ (further referred to as Transdnistria) is an unrecognised break-away state or *de facto* republic with its own judicial system. The republic is only recognised by the other *de facto* republics of Abkhazia, Artsakh and South Ossetia and is considered by the UN to be part of the Republic of Moldova. However, a “peacekeeping mission” from the Russian Army is still on duty in the region and the European Court of Human Rights has on several occasions held that human rights violations in the region have fallen within the scope of the Russian Federation.³⁸

The UN expert Thomas Hammarberg, who has previously worked as Ambassador of the Swedish Government on Humanitarian Affairs between 1994-2002 and Council of Europe Commissioner for Human Rights between 2006-2012,³⁹ visited the region in 2013 and published a report on the human rights situation in Transdnistria.

Hammarberg visited the region again in May-June 2018 for publishing a follow-up report later this year. I listened to one of his briefings at the UN office and also met him when he visited the Embassy to meet, among others, the GDM representative Angela Frolov and Ion Manole who is Executive Director of the human rights organisation Promo-LEX Association.

In his first report, Hammarberg wrote that the Transdnistrian Constitution (see section V(2) of this paper) contains a list of internationally recognised human rights (including the right to freedom of assembly) and that the *de facto* authorities have also pledged unilaterally to respect some of the key international treaties, including the two UN Covenants on human rights and

³⁶ Article: *Moldovan Court Annuls Chişinău Mayoral Election Results*, RFE/RL’s Moldovan Service (20 June 2018). Available: <https://www.rferl.org/a/moldovan-court-annuls-chisinau-mayoral-election-results/29305971.html> (Obtained on 2018-08-01)

³⁷ Name in Russian language: “Приднестровская Молдавская Республика (ПМР)”, “*Pridnestrovskaya Moldavskaya Respublika (PMR)*”, or just “Приднестровье”, “*Pridnestrovye*”; Name in “Moldavian” language (a Romanian dialect spelled with Cyrillic letters) as used by *de facto* authorities: “Република Молдовеняскэ Нистрянэ (PMH)”, “*Republica Moldovenească Nistreană (RMN)*”; Name in Romanian language as used by Moldovan authorities: “Unitatea teritorială autonomă cu statut juridic special Transnistria”, “*Transdnistrian autonomous territorial unit with special legal status*”, or just “Stînga Nistrului”, “*Left Bank of the Dniester*”.

³⁸ See e.g. ECtHR (Grand Chamber), Judgment of 19 October 2012, *Catan and Others v. Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06, § 112.

³⁹ Wikipedia (English): *Thomas Hammarberg*. Available: https://en.wikipedia.org/wiki/Thomas_Hammarberg (Obtained on 2018-08-01)

the ECHR.⁴⁰ Since Transnistria is not internationally recognised as a state, it cannot be party to international human rights treaties, but the *de facto* authorities can still choose to apply standards which are consistent with international norms.⁴¹ However, Hammarberg holds the impression that the norms play only a limited role in the Transnistrian judicial system and do not seem to have inspired the law-making process.⁴²

He mentioned that people at large in the region appeared not to be very familiar with the human rights provisions endorsed by the *de facto* authorities.⁴³ He identified the need to create a culture of human rights and accountability, for example by introducing an independent and well-resourced Ombudsman on human rights in the region⁴⁴ and to implement human rights education in schools, community organisations and the media.⁴⁵

He reasoned that the lack of teaching on human rights standards – in the basic school system; at university level; and in vocational training – seems to be one reason why there are gaps in the implementation of human rights in the region.⁴⁶

On the topic of civil society groups' cooperation with the *de facto* authorities, he thought that these groups disseminate information about human rights and should be seen as an asset in the region. However, he meant that some of the organisations felt that their activities were looked upon with suspicion by the authorities and that they had met bureaucratic barriers. This was especially emphasised by groups which had cooperation with Moldovan NGOs on the right bank of the Dniester, i.e. outside the Transnistrian region.⁴⁷

During the meeting I participated in at the Embassy on 31 May 2018, Hammarberg reaffirmed these key points, especially on the lack of human rights education and suspicion towards civil society organisations working in the region. Angela Frolov mentioned that it is practically impossible to work with LGBT rights in Transnistria. She stated that no lawyers want to cooperate and that Transnistrian police have previously taken people they suspect of being gay from the streets and obtained their telephone contact lists.

She also mentioned that previously, the organisation No. 19 Civic Club was working on LGBT issues but that working there was too dangerous. A heterosexual couple was behind No.19 Civic Club but stopped their work when their son got beaten up by homophobes in Transnistria. Further, there is no law on homosexuality in Transnistria because the *de facto* authorities say LGBT people do not exist there. Frolov thought that Russian legislation (in this case the Russian gay propaganda law from 2013) influences the Transnistrian legal system. She meant there have been some positive changes concerning LGBT rights in the Republic of Moldova, but that there have been no positive changes in Transnistria.

Promo-LEX Association started in 2002 when a group of lawyers wanted to promote democracy in the Republic of Moldova, including in the Transnistrian region, by promoting

⁴⁰ Hammarberg, Thomas (Senior Expert): *Report on Human Rights in the Transnistrian Region of the Republic of Moldova*, United Nations in Moldova (2013), p. 4f. Available: http://md.one.un.org/content/dam/unct/moldova/docs/pub/Senior_Expert_Hammarberg_Report_TN_Human_Rights.pdf (Obtained on 2018-08-01)

⁴¹ Ibid, p. 13

⁴² Ibid, p. 13

⁴³ Ibid, p. 5

⁴⁴ Ibid, p. 9

⁴⁵ Ibid, p. 10

⁴⁶ Ibid, p. 40

⁴⁷ Ibid, p. 41

and defending human rights, monitoring the democratic process, and strengthening civil society.⁴⁸ The organisation does not focus on LGBT rights but is still relevant here, because it has been the only organisation from outside the region that was allowed to operate there.

In 2015, the organisation was expelled from the region by the Transdnestrian KGB and Ion Manole now hoped to send a message through Thomas Hammarberg that “human rights are not a political issue; they should be respected” and that the organisation’s aim is not to criticise the *de facto* authorities, but to identify human rights problems and help come with solutions. Manole further stated that lack of justice in the region should not be tolerated from the international community and that impunity is a factor on all levels in Transdnestria and no one is responsible for HR violations.

Hammarberg affirmed that NGOs working in Transdnestria are constantly scrutinised on whether their work is “social” (accepted) or “political” (not accepted). He made a remark that there are deep prejudices in society and that the Russian Orthodox Church is against human rights work and constantly hammers in its reactionary positions on social issues.

Two examples of anti-LGBT sentiments in Transdnestria have been documented by GDM.⁴⁹ The first case concerned Carolina Dutca, a photographer and student at Taras Shevchenko Transdnestria State University in Tiraspol, who in 2016 developed a photo exhibition with the title “No Silence” reflecting on discrimination of LGBT people in the region.⁵⁰ The exhibition was to be held on 2 November 2016 in the No. 19 Civic Club in Tiraspol.

On 31 October 2016, she was summoned to the Special Department of the University to discuss with a representative of the State Security Committee (Transdnestrian KGB), who threatened her into signing a document that the photos would not be exhibited in public. When Carolina refused to sign the document, the KGB representative insisted that she complied with his advice adding, “I haven’t put a gun to your head yet”. For security reasons, Carolina cancelled the exhibition in Tiraspol. Eventually, she appealed to Promo-LEX Association for legal assistance and several media sources in the Republic of Moldova covered the story.

The second case took place on 11 December 2016 when Artiom Zavadovschi, LGBT Community Development Programme Coordinator at GDM, travelled from Kiev to Chişinău by bus. He was detained and questioned at the Transdnestrian customs who enquired about the GDM leaflets he had in his backpack. He was finally allowed to continue his journey.

IV. International legislation

The law of treaties is based on two principles: the first, that treaties need to be based on the free consent of states; the second, that once consent to be bound has been expressed and the treaty has entered into force, the treaty shall be kept by the parties in good faith – *pacta sunt servanda*, codified in Art. 26 VCLT.⁵¹

⁴⁸ Promo-LEX Association: *Mission Statement*. Available: <https://promolex.md/misiune/?lang=en> (Obtained on 2018-08-01)

⁴⁹ Frolov, Angela: *Report on the state of LGBT people’s rights in Moldova* (2016), p. 13.

⁵⁰ Article: *LGBT in Transdnestria: Carolina Dutca on her Banned Photo Project*, Post Pravda Magazine (2017). Available: http://www.postpravdamagazine.com/no-silence-carolina-dutca_interview/ (Obtained on 2018-08-01)

⁵¹ Klabbers, Jan: *International Law*, Cambridge University Press (2013), p. 43.

Once a treaty enters into force, it has to be interpreted in line with the rules of interpretation to be successfully applied. In short, in Art. 31 VCLT is stipulated that treaties shall be interpreted in accordance with the ordinary meaning to be given to the words in their context, and in light of the treaty's object and purpose.⁵²

1. European Convention on Human Rights

The Parliament of the Republic of Moldova ratified the European Convention on Human Rights on 24 July 1997.⁵³

1.1. Articles 10 and 11

Article 10 on the freedom of expression and Article 11 on the freedom of assembly and association are relevant.

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

The freedom of expression is essentially a negative right, since it does not give individuals a right of access to newspapers or broadcasting media. It does not place a duty on the state to impart information to the public and does not obligate the state to provide subsidies to ensure that there is a plurality of opinions expressed.⁵⁴

The Court is aware that the freedom of expression can come into conflict with other rights. It has emphasised that the restrictions in Article 10(2) must be narrowly interpreted and that the necessity for them must be “convincingly established”.

Nonetheless, the margin of appreciation granted to states varies according to the legitimate aims pursued. The Court has usually allowed a wide margin of appreciation in matters of morality, on the basis that a common European conception of morality is lacking.⁵⁵

Article 11 – Freedom of Assembly and Association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of

⁵² Ibid, p. 53-54

⁵³ Council of Europe: *Republic of Moldova and the Council of Europe*. Available: <https://www.coe.int/en/web/chisinau/republiv-of-moldova-and-the-council-of-europe> (Obtained on 2018-08-01)

⁵⁴ Cameron, Iain: *An Introduction on the European Convention on Human Rights*, Iustus Förlag (6th Edition, 2011), p. 127.

⁵⁵ Ibid, p. 130.

lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The ECtHR has stated that Article 11 is *lex specialis* in relation to Article 10 and has emphasised that Article 11 cases should be seen in the light of article 10.

In principle, a state should not ban a demonstration entirely on the basis that it could attract violent counter-demonstrations. Further, the right to demonstrate is not only a negative right, so a state may be under the duty to ensure its realisation. This means that the state is obliged to protect demonstrators against violent counter-demonstrators.⁵⁶

1.2. Case law

Bączkowski and Others v. Poland

Bączkowski and Others v. Poland is the first case in which the ECtHR ruled unanimously that the banning of an LGBT Pride parade in Warsaw in 2005 was in violation of articles 11, 13 and 14 of the ECHR. The judgment was delivered on May 3 2007 and affirmed that banning such events goes against the right to freedom of assembly and association.

In *Bączkowski*, the Court stated that democracy is the only political model compatible with the Convention,⁵⁷ and that in a democracy a balance must be achieved which ensures fair and proper treatment of minorities.⁵⁸

Alekseyev v. Russia

The case is based on three applications under Article 34 of the European Convention of Human Rights (ECHR) against the Russian Federation by a Russian national, Mr. Nikolay Aleksandrovich ALEKSEYEV, on 29 January 2007, 14 February 2008 and 10 March 2009. It concerned an alleged violation of the applicant's right to assembly due to the banning of public events he attempted to organise in Moscow in the years 2006, 2007 and 2008.

The Court cited its judgment in *Bączkowski*, where it stated that democracy is the only political model compatible with the Convention, and that in a democracy a balance must be achieved which ensures fair and proper treatment of minorities.⁵⁹

However, In *Alekseyev*, we can also identify a development towards recognising that LGBT rights must by necessity encompass civil and social participation. Most important, the Court rejected the claim that protecting the rights and freedoms of religious believers provides a justification for discriminating towards LGBT persons.⁶⁰

The Court stated that the risk of a violent counter-demonstration is insufficient for banning an event, especially when the numbers of protesters would be manageable by the authorities.⁶¹

⁵⁶ Ibid, p. 134.

⁵⁷ ECtHR (Fourth Section), Judgment of 3 May 2007, *Case of Bączkowski and Others v. Poland*, no. 1453/06, § 61.

⁵⁸ Ibid, § 63.

⁵⁹ ECtHR (First Section), Judgment of 21 October 2010, *Case of Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, § 70.

⁶⁰ Ibid, §§ 78-79.

⁶¹ Ibid, § 75.

GenderDoc-M v. Moldova

This case concerned that Chişinău authorities had denied the applicant, the LGBT rights organisation GenderDoc-M, the right to hold a Pride demonstration outside the Parliament on 27 May 2005. The applicant complained of a violation of its right to peaceful assembly.

On 15 September 2008, the Government agreed that there was an interference with the applicant's right to freedom of assembly but that authorities had pursued a legitimate aim, since 98 % of the Moldovan population was Christian Orthodox, a religion that does not tolerate same-sex sexual relations or marriage.⁶² However, on 1 April 2010 the Government agreed that there had been a violation of Article 11 of the Convention.⁶³

Therefore, the Court ruled that the Republic of Moldova had acted in breach of the freedom of assembly and association of the applicant. The Court also ruled that this ban had been discriminatory of sexual minorities, under Article 14 of the Convention, in conjunction with the breach of the freedom of assembly.⁶⁴

2. United Nations

The Republic of Moldova joined the United Nations on 2 March 1992 by the adoption of the UN General Assembly Resolution AG A/RES/46/223.⁶⁵ The United Nations in Moldova works with civil society and media to better monitor and promote human rights, equality, democratic governance and rule of law in the Republic of Moldova.⁶⁶

2.1. Universal Declaration of Human Rights

Articles 19 and 20 of the Universal Declaration of Human Rights (UDHR) are relevant here.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

2.2. International Covenant on Civil and Political Rights

These principles are also codified in the International Covenant on Civil and Political Rights (ICCPR), that was ratified by the Republic of Moldova on 26 January 1993 and entered into force on 26 April 1993. Articles 19 and 21 are relevant here.

⁶² ECtHR (Third Section), Judgment of 12 June 2012, *Case of GenderDoc-M v. Moldova*, no. 9106/06, § 23.

⁶³ *Ibid*, § 24.

⁶⁴ *Ibid*, § 55.

⁶⁵ United Nations General Assembly: *Admission of the Republic of Moldova to membership in the United Nations*. Available: <http://www.un.org/documents/ga/res/46/a46r223.htm> (Obtained on 2018-08-01)

⁶⁶ Government of the Republic of Moldova and United Nations Moldova: *Towards Unity in Action : United Nations – Republic of Moldova Partnership Framework 2013 – 2017*, p. 6. Available: http://md.one.un.org/content/dam/unct/moldova/docs/pub/strateg/UNPF_Action_Plan_2013-2017_En.pdf (Obtained on 2018-08-01)

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right 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.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (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 21

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

3. European Union Association Agreement and visa-free travel for the citizens of the Republic of Moldova

The Republic of Moldova's even closer ties with the European Union is an important driving factor for the reform process in the country and the relation has been intensified in recent years, not least within the framework of the Eastern Partnership. The EU and the Republic of Moldova have signed an ambitious Association Agreement (AA) that replaced the previous partnership and cooperation agreement. The AA provides for a Deep and Comprehensive Free Trade Area (DCFTA) between EU and the Republic of Moldova.⁶⁷

From April 2014, Moldovan citizens are allowed to travel visa-free to the Schengen countries. Some of the prerequisites for the visa-free regime was that the authorities of the Republic of Moldova made serious implementation efforts with regard to the Law on Ensuring Equality and the National Human Rights Action Plan, and to strengthen the Ombudsman's office.⁶⁸

Article 21 of the AA states that the respect for democratic principles, human rights and fundamental freedoms, as proclaimed in the UDHR, the ECHR, the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe, and the Charter of Paris for a New Europe of 1990, shall form the basis of the domestic and external policies of the Parties and constitute an essential element of the agreement.

Article 3(b) on aims of political dialogue states that one aim to strengthen the respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms, including the rights of persons belonging to minorities, and to contribute to consolidating domestic political reforms.

Article 4(b) on domestic reforms states that the parties shall cooperate on ensuring respect for human rights and fundamental freedoms in the Republic of Moldova.

⁶⁷ European Union: *ASSOCIATION AGREEMENT between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part*, Official Journal of the European Union, Volume 57 (30 August 2014). Available: http://www.3dcftas.eu/-system/tdf/EU-Moldova%20AA_0.pdf?file=1&type=node&id=70&force (Obtained on 2018-08-01)

⁶⁸ European Commission: *Commissioner Malström on visa-free travel for the citizens of the Republic of Moldova*, Brussels (2014). Available: http://europa.eu/rapid/press-release_STATEMENT-14-137_en.htm (Obtained on 2018-08-01)

V. Domestic legislation

1. Constitution of the Republic of Moldova

The current Constitution of Moldova⁶⁹ was adopted on 29 July 1994 by the Moldovan Parliament. It came into force on 27 August 1994. Article 32 on the freedom of opinion and expression and Article 40 on the freedom of assembly are relevant.

Article 32 – Freedom of Opinion and Expression

1. Every citizen shall be guaranteed the freedom of thought and opinion, as well as the freedom of expression in public by way of word, image or any other means possible.
2. The freedom of expression may not harm the honour, dignity or the rights of other people to have and express their own opinions or judgments.
3. The law shall forbid and prosecute all actions aimed at denying and slandering of the State and people, instigation to sedition, war of aggression, national, racial or religious hatred, incitement to discrimination, territorial separatism, public violence, or other manifestations encroaching upon the constitutional order.

Article 40 – Freedom of Assembly

Meetings, demonstrations, manifestations, processions or any other assembly are free and may be organised and conducted only peacefully and without the use of any kind of weapon.

2. “Constitution” and Criminal Code of Transdniestria

The “Constitution” of Transdniestria⁷⁰ was adopted by referendum on December 24, 1995 and signed into law by then *de facto* president Igor Nikolaevich Smirnov on January 17, 1996.

Article 18 states that human and civil rights and liberties may be restricted by law only to the extent required for ensuring the security of the state, protection of public order, morality, health, rights and freedoms of other persons.

Article 27 states that everybody shall have to right to free expression of views and convictions and may produce and disseminate information by any lawful means, except for state secrets and information aimed against the existing constitutional system.

According to Article 32, the state shall guarantee freedom of assembly, rallies, marches, demonstrations and pickets, which do not violate law and order, as well as rights of other citizens of the Pridnestrovian Moldavian Republic.

Article 47 states that exercising rights and liberties is inseparable from fulfilment of duties before society and state by a citizen and person.

The Criminal Code of Transdniestria came into force in June 2002. The only reference to LGBT is made in Article 131, which states that committing sodomy, lesbianism and sexual intercourse with a person under the age of sixteen is illegal. However, the article does not state that

⁶⁹ Presidency of the Republic of Moldova: *Constitution of the Republic of Moldova*. Available: <http://www.presedinte.md/eng/constitution> (Obtained on 2018-08-01)

⁷⁰ Foreign Department of the Pridnestrovian Moldavian Republic: *Constitution of the PMR*, archived version. Available: <https://web.archive.org/web/20110727083252/http://mfa-pmr.org/index.php?newsid=644> (Obtained on 2018-08-01)

committing 'sodomy and lesbianism' above 16 is illegal. This may imply that same-sex sexual activity is *de jure* legal but *de facto* illegal.⁷¹

3. Law 26/2008 on Freedom of Assembly

The actualisation of the freedom of assembly in the Republic of Moldova is codified in the law 26/2008 on freedom of assembly.⁷²

According to Article 4, the law applies with respect of the principles of proportionality; non-discrimination, regardless of race, nationality, ethnic origin, language, religion, gender, opinion, political affiliation, wealth, social origin or any other criteria; legality; and presumption in favour of organising an assembly.

According to its Article 8(c), reasons for prohibiting an assembly include violation of public order and violation of public morality.

4. Draft law no. 861 on amending and competing of the Law on Protection of Children against the Negative Impact of Information

On 24 March 2017, eight MPs from PSRM registered a draft law no. 861 on amending the Law on Protection of Children against the Negative Impact of Information.

The authors proposed to complete its article 1 with the term "*Homosexuality – asexual perversion that constitutes a sexual attraction towards individuals of the same sex; pederasty, sexual inversion*"; to complete article 3 with terms such as "*of homosexual character*" and "*homosexual*" after "*pornographic*"; and to complete article 4 with the term "*images that promote homosexuality*".

The aim of the draft law is to censor public dissemination of information about non-heterosexual relationships and/or identities. The target is mass media outlets and NGOs working with human rights, especially when organising events such as Pride marches.⁷³

The law is equivalent with the Russian gay propaganda law "for the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values" which was signed into law by the President of the Russian Federation, Vladimir Putin, on 30 June 2013.

VI. Analysis and conclusions

When the Republic of Moldova is approaching 27 years of independence, it seems today to be standing at a crossroads between Europe and the Russian sphere. The country was previously the bread basket of the Soviet Union and had a prosperous farming and wine community, which changed abruptly with the fall of the Soviet Union that ruined the country's economy. Nearly a quarter of the population has moved abroad in search of a better life. The country was the first

⁷¹ Wikipedia (English): *LGBT rights in Transnistria : Law regarding same-sex sexual activity*. Available: https://en.wikipedia.org/wiki/LGBT_rights_in_Transnistria#Law_regarding_same-sex_sexual_activity (Obtained on 2018-08-01)

⁷² Republic of Moldova: *Law No. 26-XVI of 2008 on Assemblies*, unofficial translation (22 February 2008). Available: <http://www.refworld.org/docid/4c3c81092.html> (Obtained on 2018-08-01)

⁷³ Frolov, Angela: *Report on the state of LGBT people's rights in Moldova* (2017), p. 1.

after the collapse of the Soviet Union that voted communism back into power. With its post-Soviet heritage, the country still has huge problems with weak institutions and an oligarchy that uses its political instruments for personal gains. The Orthodox Church has been an especially important factor in creating a collective identity for the Moldovan people.

However, the country has also taken important steps towards building an identity as a European country. It joined the Council of Europe in 1995 and today the EU is one of the most important factors in the country's reform process. There are two types of influence the European Union may have: the first form being direct impact, through demanding strengthened actualisation of human rights, e.g. when it demanded serious implementation efforts with regard to the Law on Ensuring Equality and the National Human Rights Action Plan, and to strengthen the Ombudsman's office. While the Association Agreement itself makes no mention about LGBT rights, but only more general mentions on securing respect for human rights and fundamental freedoms, it is clear that the EU regards the right to organise Pride marches as an essential part of the right to freedom of assembly.

The second form is indirect impact, which mainly comes through "euro-integration" and convincing Moldovan society that to be a European country, it has to follow through on European values on fundamental rights. In this context, the long-term goal should be to reinforce that LGBT rights are human rights. Another form of indirect impact is that the EU delegation and the foreign missions of EU member states often support LGBT rights initiatives.

The Embassy of Sweden in Chişinău is one of the most ambitious actors, giving an extensive core support to the only LGBT rights organisation in the Republic of Moldova and having staff participating in solidarity events and Pride marches.

I think it is especially important to build human rights both from the institutional side as well as anchoring these values throughout the population. This may be an extremely difficult task in the Republic of Moldova, where the absolute majority of the population consists of pious Orthodox Christians and the discussion on human rights for sexual minorities is one of the most difficult ones to take with representatives of the Church. Within the foreseeable future, the Church will continue to play an important role, not least politically as king-maker. Setting a strict boundary between spiritual and worldly power is not close at hand.

The international community can do more to create a dialogue between the Church and civil society. However, I think that the approach should be carefully executed and initially concern topics where some consensus can be reached. From the material I have read when writing this report, I think that the time is ripe to discuss the right to freedom of assembly and association and that everyone should be protected from violence when making use of this right. On the longer term, making an effort to change delusions about LGBT people and try to create a change of values is necessary to make LGBT rights durable in the Republic of Moldova.

That the 17th Edition of Moldova Pride was a success and the march with the theme "Fără Frică de Iubire" was the first time in history that a Pride march could be held from start to finish in the Republic of Moldova indicate that these changes are already under way.

Another issue is that of Transdnistria, where no progress seems to have been made. Compared to the rest of the Republic of Moldova, the population of Transdnistria seems to have weak ties to the rest of Europe while the *de facto* authorities sustain good relations with the Russian Federation. The region has a special status within the Republic of Moldova's internationally

recognised borders and the so-called “5 + 2 Talks” (carried out by Transdniestria, Moldova, Ukraine, the Russian Federation and OSCE, plus the U.S. and the EU as external observers) are still held to maintain peaceful relations. Depending on the progress for LGBT rights in the rest of the Republic of Moldova, there may be changes under way in Transdniestria.

However, it is more likely that the region strengthens its ties and tries to unify with Russia, breaking the status quo since the military conflict in 1992 that is still unresolved. That the Russian Army still has a “peace-keeping mission” posted in the region is indicative of how it regards the region. If this would happen, I do not see how rights for sexual minorities could be approached in the region neither in the short nor in the long run.

I expect that the work ahead is on a very long term, and only through successfully strengthening the work on a grassroots level may the actualisation of LGBT rights in the Republic of Moldova become real. Depending on what direction the country takes after the general election to Parliament, this progress may either take a huge step forward or backwards. In this process, it is important to remember that the progress is more far ahead than ever before, and that the legal and political instruments for its realisation are present.

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