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Analyzing anti-homosexual legal act as a tool of limitation: case study of Russia

Master Thesis

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I have written the Master's thesis independently.

All works and major viewpoints of the other authors, data from other sources of literature and elsewhere used for writing this paper have been referenced.

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Abstract

This thesis aims to analyze the situation of the LGBT minorities in Russia and establishing the reasons and consequences of limiting their activities and fundamental rights through the adopted anti-propaganda legal act “On protection of children from information that promotes the negation of traditional family values”. The legal act in turn will be analyzed for determining its necessity and proportionality as well as its conformity to Russian legislation and the International human rights instruments. By these means the research will be held on the grounds of case-study research as the focus is concentrated on the analysis of a specific event (adoption of the anti-propaganda legal act as object and the legal act as a subject).

For research purposes the case will be examined through the anti-propaganda legal act itself together with international instruments on protection of human rights, academic articles from scholars and reports from NGO’s will be additionally included to the research and analyzed in order to determine how the legal act is perceived in Russia and what arguments are used concerning the topic of inconsistency of the adopted anti-propaganda legal act.

Keywords: Russia, LGBT, Human rights, Homosexual propaganda

Contents

Abstract	iii
Introduction	1
I. History of LGBT minorities in Russia	7
2 International Human Rights law in the Russian Legal System	16
2.1 Article 11 Freedom of assembly and association (Alekseyev v. Russia case).....	20
2.1 Article 10 Freedom of expression (Fedotova and Bayev cases)	25
II. Adoption of anti-propaganda legal act	29
2.1 The preconditions for adopting the act	29
2.2 Chronological developments of the act.....	31
2.3 Consequences of the act adoption.....	35
General discussion	42
Conclusion.....	50
Bibliography	53

Introduction

After the collapse of the Soviet Union, Russia passed through certain political changes and reforms. On 28 February 1996 Russia joined the Council of Europe, and on 30 March 1998 ratified the European Convention on Human Rights, which meant adjustments to the legal acts contrary to the provisions of the Convention; also, Russia undertook fulfilment of the International Covenant on Civil and Political Rights. This meant securing and safeguarding the rights and freedoms of all citizens by European norms. In terms of the protection of human rights gradually there was certain advancement in the early stages - in 1993 decriminalization of homosexuals¹ took place as a starting point for the equal treatment for people with homosexual background. However, on June 11, 2013 the State Duma of the Russian Federation passed a bill supplementing the Code of Administrative Offences of Russia, Article 6.21², which establishes liability for “The promotion of non-traditional sexual relations among minors” in order to “protect children from information that promotes the negation of traditional family values”³. The legal act came into force on 30 June, 2013.

The main purpose for the legal act adoption was protection of children from information that could be considered harmful to their health and development. Directly after the adoption of the bill strong negative reaction came from human rights defenders and the Lesbian, Gay, Bisexual, Transgender (LGBT) community within the country as well as on the international level from such organizations as Amnesty International, Ministries of Foreign Affairs of Great Britain, France, the State Department of the

¹ “О внесении изменений и дополнений в Уголовный кодекс РСФСР, Уголовно-процессуальный кодекс РСФСР и Исправительно-трудовой кодекс РСФСР” от 29.04.1993 № 4901-1 (In English: "On Amendments to the Criminal Code of the RSFSR, the Criminal Procedure Code of the RSFSR and the Corrective Labour Code of the RSFSR" from 29.04.1993 № 4901-1)

² Федеральный закон Российской Федерации “О внесении изменений в статью 5 Федерального закона “О защите детей от информации, причиняющей вред их здоровью и развитию” и отдельные законодательные акты Российской Федерации в целях защиты детей от информации, пропагандирующей отрицание традиционных семейных ценностей” (In English: Federal law of 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 Russian Federation in order to protect minors from information that promotes denial of traditional family values”)

³ BBC Русская служба: “Госдума приняла закон о “нетрадиционных отношениях”” (In English: The State Duma adopted a law on "non-traditional relationships"), 11.07.2013

United States and from professional sportsmen⁴ (as the bill was adopted before the Olympic Games in Sochi 2014).

This way the legal act prohibiting the propaganda of non-traditional sexual relations among minors came out very provocatively, as it conflicts with the general concept of human rights respect and protection. The focus of this research is to examine the adopted legal act: the reasons for its adoption, the act's conformity with the legislation of the Russian Federation and the United Nations Universal Declaration of Human Rights (UDHR)⁵, as well as the results obtained from adopting it: in particular, the outcome after the legal act adoption.

The results of the research will be presented by using academic researches, reports and analyses regarding the situation with LGBT in Russia (in this case - the legal acts that limit or forbid the activity of sexual minorities; as well as the forms of support to the LGBT community). The conceptualization of the research is analyzing the adopted legal act: the reasons for adopting it and how it was accepted by the society in Russia and how it was perceived abroad. The purpose of the research is to understand on which grounds those laws were adopted as well as to see what the outcome was after adopting it.

The research of the following thesis will go over the hypothesis "The growing political and media attention toward sexual minorities in Russia is forcing the state to adopt increasingly restrictive legal measures in an attempt to regulate and control this minority behaviors and activities". By these means, the primary task of this thesis will be analyzing the anti-propaganda legal act, the situation around sexual minorities in Russia in the fields of jurisdiction (Russian Law and International Human Rights) and to analyze the conditions that led to the adoption of the anti-propaganda legal act:

- Is the new legal act in conformity with or does it violate the Russian State constitution and its international obligations?
- What were the reasons for the adoption of the legal act?

⁴ RT.com: "Pole vault champion Isinbayeva under fire over 'gay propaganda' comments", August 16, 2013

⁵ Universal Declaration of Human Rights, Article 7

Thus, attention will be paid to the adopted legal act in Russia “The protection of minors from information harmful to their health and development”⁶ and to examine the arguments, which are used to defend the legal act and actions of the Russian authorities who are against providing equal rights to the LGBT minority groups in Russia. The research will be focusing on Russian legal act and Russian approach to the LGBT community. In this regard the data used will consist of reports (reports on general situation of LGBT community in Russia and violation of their rights), academic works of those scholars, who study the LGBT topic in Russia, as well as legal acts (case law as well as International and Russian jurisdiction) and Human Rights principles. This data will allow determining whether a legal act has been passed as a preventive measure to limit the actions of LGBT groups in general (as a domestic initiative), or is it the new state’s policy of controlling specific group of citizens.

According to the Russian constitution, which was adopted in 1993, by Article 1 the Russian Federation is “a democratic Federal law-bound State with a republican form of government”⁷. So, by these means the new law must be analyzed in accordance with the existing constitution in order to determine, if the new legal act is relevant to constitutional provisions, as well as to identify where do breaches occur and why. For these purposes the focus is to determine whether or not the legal act covering “Propaganda of nontraditional sexual relations among minors” is conformity to the existing acts of the Russian constitution and International instruments.

The thesis will be divided into three parts: the introductory part, which will explain the research and historical background which will provide an overview of the development of the LGBT society in Russia; the main part, which will cover the legal act “The protection of minors from information harmful to their health and development” with Russia’s position in International law, reasons and outcomes from the adoption, and ending with general analysis and conclusion in the third part. Each of

⁶ Федеральный закон Российской Федерации “О внесении изменений в статью 5 Федерального закона “О защите детей от информации, причиняющей вред их здоровью и развитию” и отдельные законодательные акты Российской Федерации в целях защиты детей от информации, пропагандирующей отрицание традиционных семейных ценностей” (In English: Federal Law “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 minors from information that promotes denial of traditional family values”)

⁷ Конституция Российской Федерации, Глава 1 “Основы конституционного строя“, статья 1

the sections will be divided into sub-sections; each will consist of a theoretical approach that creates the basis for the analysis. Thereby, the thesis is going to be divided into stages, which will allow understanding how the historical background influenced the current position of LGBT in Russian state, also including different positions and arguments of the parties involved. An important direction of the thesis will be also going over the analysis of the case law *Alekseyev v. Russia*⁸, which will show the process of struggle for equal rights before the European Court of Human Rights.

The following thesis will cover the Russian anti-propaganda legal act case in detail together with the LGBT situation in Russia. The legal section will analyze the anti-propaganda legal act in relation to the Russian constitution and the international instruments; whereas the sociological section of the thesis will be more descriptive by the nature, as it will be mostly cover explanatory part of the research – historical part of the LGBT movement in Russia with analysis of reasons for the legal act adoption and its results.

Thus, the overall research method of the thesis is the Case study. The nature of the case study is defined as an analysis of persons, events, decisions, periods, projects, policies, institutions, or other systems that are studied holistically by one or more method⁹. Also, there is a distinction between the object and the subject: the object is defined as the analytical frame through which the subject explicates; and the subject – as the case itself¹⁰.

In case with the following thesis - the object is presented as a specific event (here – the adoption of the anti-propaganda legal act in Russia and its consequences) and the subject is presented as the project (here - the Federal Law №135-FZ itself). Even though the thesis will be using the analytical approach due to the descriptive nature of the research (describing what event took place, how did it happen and what are the results), the problem-solving approach is also present for the purpose of determining the possible solution to the problem.

⁸ *Alekseyev v Russia* Application Nos 4916/07, 25924/08 and 14599/09, Merits, 21 October 2010

⁹ Gary Thomas (2011), “Typology for the Case Study in Social Science Following a Review of Definition, Discourse, and Structure”, *Qualitative Inquiry* 17(6), 511-521, p 513

¹⁰ *Ibid*, abstract

In the legal section important part will be analyzing the Federal Law №135-FZ and briefing cases that are related to the issue. Federal law and the legal cases will be analyzed by the standard Law School analysis procedure similar to the IRAC method¹¹, which is:

- Observing the legal act (facts, issues)
- Detection of violations (what is wrong and why)
- Analysis

The anti-propaganda legal act was analyzed by the matter of determining conformity: the correspondence or violation with the Russian constitution and its international obligations of providing and respecting human rights. The instruments for regulation of both universal human rights and direct rights and freedoms (in this case, the rights and freedoms of man and citizen of Russian Federation) are covered in the research.

Importance of briefing cases, in turn, presents the detailed nature of the cases: exact facts and issues of the case, ruling of the court with explanation and argumentation. Briefing cases will be done in the same way as the legal act - with the IRAC standards and will consist of:

- Facts of the case
- Issue
- Ruling of the court
- Analysis

The selected cases show the violations that face LGBT activists when conducting their activities and the stages that need to be done in order for the protection of their rights. A separate sub-section (“International Human Rights law in the Russian Legal System”) will provide analysis of Russia’s compliance with international standards as well as the implementation process, as well as covering the analysis of the implementation plays role in case of using international instruments over the domestic laws.

¹¹ See “How to Brief a Case Using the “IRAC” method”
Available at: <http://www.csun.edu/~kkd61657/brief.pdf>

Necessity of broadening the legal analysis by other contextual factors (in this case, these factors are politics, society, culture and history) is that the construct of the anti-propaganda legal act does not pass the compliance with the Constitution, but nonetheless it is supported by the authors of the legal act from a social point of view (using cultural and moral background as the reasoning's). For this reason, a deeper and more thorough analysis of the legal act is necessary in a broader context.

If in the legal part of the study materials were selected on the basis of analyzing the legal act (which allow analyzing the legal act in relation to international instruments), then in the sociological part of the research collection of materials was done in a different matter. As this section of the research covers the historical part together with analysis of the legal adoption (namely, on which grounds was the legal act adopted, how it was perceived by the LGBT community and what kind of outcome was received from the adoption), the tool used to collect materials is mixed method: along with the academic materials which were analyzed, surveys and interviews (which were given to news agencies) with the analysis are present in the research as well. Surveys and interviews, in turn, allow determining how the legal act adoption is perceived by the public. In both legal and sociological parts of the research implied the usage and work with documents: in the legal part those are legal instruments, in sociological part – academic articles, surveys and interviews.

Defined research questions with the hypothesis allowed narrowing the search of materials for the research: as the focus of the research is set on a specific event and on a specific group, only the materials that are developing the hypothesis and research questions were used in the following research.

I. History of LGBT minorities in Russia

The current chapter provides an overview of the LGBT movement in Russia and how did the sexual minorities developed from 1980 to 2014. The historical part chapter covers the actions that were taken by the LGBT activists in the early period in Russia after the collapse of the Soviet Union and the steps that were taken in order to be recognized in the society as a group and to receive support from the State. At the same time, international support and solidarity will be presented together with challenges, which the LGBT community in Russia faces nowadays and in what format their activities take place.

The starting point of actions in support for sexual minorities took place during the late years of “Stagnation period” and the early years of “Restructuring” in the 1980’s. During these years LGBT activity started to open up to the society and began appearing in media: it was the beginning of producing newspapers specifically touching the same-sex relation, science conferences on the LGBT topics as well as movie festivals.

In particular, there are some developments and events that are remarkable in the history of the LGBT community in Russia, as they were conducted during the Soviet period before the decriminalization. In 1984, a group of people led by Alexander Zarembo created their own “Gay laboratory”, established contact with the Finnish Association of gays and lesbians and were able to forward information to the West about the plight of LGBT people in the Soviet Union¹². In November 1989, Roman Kalinin created the first Soviet newspaper for gays - “Subject”, which was published up to 1993¹³. Later, on May 28th-30th of 1990, Tallinn hosted the first on the Soviet territory international scientific conference related to the situation of sexual minorities¹⁴. Finally, in July 1991, the “Fund Tchaikovsky” and “Association for Sexual Minorities” held in Moscow the first international gay and lesbian film festival and conference¹⁵.

¹² Laurie Essig (1999), “Queer in Russia. A story of sex, self and the other“, Duke University Press, p 58

¹³ Кон И. С (2003), “Лунный свет на заре. Лики и маски однополной любви“ (In English: “Moonlight at dawn. Faces and Masks of same-sex love“), 2nd ed. (М.: Олимп, АСТ), p 369

¹⁴ Jeffrey Weeks (1990), “History Workshop. Sexual Minorities and Society, International Scientific Conference, Tallinn, Estonia, 28-30 May 1990”, Oxford University Press, p 223

¹⁵ Rex Wockner: “Happier days for Russian gays“, Archive.today, June 6, 2007

Even though these steps were done during the time of changes in the Soviet Union, it was still complicated for the sexual minorities to conduct them openly: these kinds of activities were always under the supervision of the KGB, and as a result that brought negative outcome: activities of groups were usually disrupted, activists were arrested or had to keep silent to avoid imprisonment¹⁶. The lack of unity between activists and their projects is also one of the elements why these steps were small-scaled and were not influential in global terms. This also explains why the most ambitious actions were not realized – like the attempt to present one of the activists as a candidate for becoming a new president of Russia¹⁷.

In 27 May 1993 Russia decriminalized prosecution of gays¹⁸, yet those people who were sentenced to imprisonment by Article 121 were not in fact rehabilitated and were forced to serve their sentences to the end¹⁹. Finally, in 1999 homosexuality was excluded from the list of diseases (after acceptance of ICD-10²⁰).

The period from 2000 to 2014 were also important for Russian LGBT community in terms of activities and forms (especially during Russia's changes and reforms²¹), yet also did not bring any significant change. This timeframe holds those initiatives that managed to maintain its positions. The period of 2000-2010 was also the most active in the sphere of creation and registration of the LGBT groups. At this point, the following organizations²² began to operate:

- 2004: Project “LaSky” (charitable organization for the prevention of HIV / AIDS)
- 2005: “GayRussia.Ru” (Human rights project)

¹⁶ Essig, pp. 58

¹⁷ Kommersant.ru: “Либертарианцы: президент может быть гомосексуалистом” (In English: “Libertarians: The president may be homosexual”), April 29, 1991

¹⁸ “О внесении изменений и дополнений в Уголовный кодекс РСФСР, Уголовно-процессуальный кодекс РСФСР и Исправительно-трудовой кодекс РСФСР” от 29.04.1993 № 4901-1 (In English: “On amendments to the Criminal Code of the RSFSR, the Criminal procedure code of the RSFSR and the Corrective Labour code of the RSFSR” from 29.04.1993 № 4901-1)

¹⁹ Interfax.ru: “Геем не разрешили провести митинг на Лубянской площади” (In English: “Gays were not allowed to hold a rally on Lubyanka Square”), December 14, 2010

²⁰ ICD-10, category of classifications F66

²¹ Барсенков А. С., Вдовин А. И. (2008), “История России. 1917-2007” (In English: Barsenkov A.S., Vdovin A.I. (2008), “History of Russia. 1917-2007”), p 772-777

²² Projects LaSky, GayRussia.ru, Russian LGBT Network, Coming Out

- 2006: “Russian LGBT Network” (the first and only Russian Interregional Human Rights LGBT organization)
- 2009: “Coming out” (autonomous non-profit organization)

Despite the fact that the period of 2000-2014 was active in terms of demonstrations and attention received in both Russia and the Western countries, nevertheless it did not bring any significant changes: results that were achieved during “Restructuring” started to lose their positions. Appearance of human rights organizations also did not bring any significant results: despite the fact that some of the LGBT NGO’s managed to register without lawsuits is a positive moment, many actions continue to be prohibited. This applies to the parades that were supposed to take place are either under a ban or dispersed by police as an “unauthorized event”. Another moment is the initiatives, which have anti-LGBT character: as an example, the Federal Law “On the donation” (donation of blood) in 2008 allowed gay people to donate blood, but in 2013 a proposal was made to return gay-people to the risk group and to exclude from the blood donation²³.

In some cases though, LGBT groups are recognized, for example, for the first time in St. Petersburg the court invalidated a ban gay parade on “Big Moscow Street”²⁴ and ECHR found bans gay pride parades in Moscow in violation of the European Convention on Human Rights and Fundamental Freedoms²⁵. Yet in practice decision of ECHR also did not bring any pressure on Russian authorities, and so the gay parades continue to be prohibited.

In comparing with the “Perestroika” period (1980-1990), the successes of Russian LGBT are rather conditional: while Perestroika was only beginning and, in some cases, advances were made as innovative steps towards democracy, the period of

²³ РИА Новости: “В ГД готовят поправки о запрете гомосексуалистам быть донорами крови“ (In English: “In State Duma are preparing amendments to ban homosexuals from being blood donors“), August 26, 2013

²⁴ Newsru.com: “Суд Петербурга пошёл навстречу секс-меньшинствам: запрет гей-парада впервые признан незаконным” (In English: “The Court of St. Petersburg went towards sexual minorities: ban on gay pride parade for the first time declared illegal”), October 7, 2010

²⁵ Newsru.com: “Европейский суд окончательно признал незаконным запрет гей-парадов в Москве“ (In English: “The Court finally declared illegal the ban on gay pride parades in Moscow”), April 13, 2011

2000-2014, however, is designated as conservative when the State is starting to take reverse direction in the matter of legal defense.

As it can be seen from the actions done by Russian LGBT groups the social practices were taking place and did have specific results. However, when comparing activities of the early 1990's and the period of 2000 - 2014 there is a distinguishable difference. In general, sexual minorities show more open activities: if in the early stage many meetings and publications were limited in terms of availability, then starting from the 2005 many articles, reports and guidance's²⁶ concerning conditions of the sexual minorities are open to the public and are not limited in access. These include reports from "Russian LGBT Network"²⁷, reports from Moscow Helsinki Group²⁸ and others NGO's²⁹, which are made publicly available.

Another moment of how the issue of LGBT in Russia received international attention and support can be seen when the Sochi 2014 Winter Olympics took place: as the legal act got adopted before the Olympics, it created doubt for some countries to participate in the event. The idea of boycotting was considered as a weak strategy, and it was proposed to use this opportunity to "draw attention to the existing problem"³⁰: those are mostly campaigns of raising awareness. The examples of these campaigns of support are different by the nature, but nevertheless showed Russian LGBT activists that they are heard and supported. In Stockholm, about 2,000 people gathered to show their support for Russian LGBTs as part of Sweden's "Live and Let Love" campaign³¹. Similar action was taken in Paris, where various NGOs gather to form the Olympics rings to protest against human rights violations in Russia³²; while in Canada, the rainbow flag was raised at Calgary, Halifax, Quebec City and Toronto to protest

²⁶ Российская ЛГБТ-сеть, секция "Доклады" (In English: Russian LGBT Network, section "Reports")
Available at: <https://www.lgbtnet.ru/ru/library>

²⁷ Российская ЛГБТ-сеть, секция "Доклады" (In English: Russian LGBT Network, section "Reports")
Available at: <https://www.lgbtnet.ru/ru/repts>

²⁸ Moscow Helsinki Group, Библиотека ("Library")
Available at: <http://mhg-main.org/biblioteka>

²⁹ Article 19
Available at: <https://www.article19.org/resources.php?lang=ru>

³⁰ Skift: "New York LGBT group calls for boycott of Russia's 2014 Winter Olympics", Jul 11, 2013

³¹ Advocate.com: "Swedes Sing Russian Anthem for LGBT Support", January 31, 2014

³² Canada.com: "LGBT protests focus on Olympic sponsors Coke and McDonald's", February 2, 2014

Russia's anti-gay policies³³. The United Kingdom's government decided to provide extra funding's for the gay rights campaigners in Russia³⁴. Some activists went further and sent an open letter to the 10 biggest Olympic sponsors, urging them to denounce the law and run ads promoting equality for lesbians, gays, bisexuals and transgender people³⁵. Finally, some professional athletes come out with statements of being gay to show their support : the United States' runner Nick Symmonds³⁶, Canadian Olympic speed skater Anastasia Bucsis³⁷, Olympic gold medalist Brian Boitano³⁸, Olympic snowboarder Callan Chythlook-Sifsof³⁹ and Olympic swimmer Ari-Pekka Liukkonen⁴⁰ came out publicly as gay and urged to raise awareness about Russia's anti-gay laws.

The maximum impact from these actions although is raising awareness, beyond that nothing has changed. After all, petitions in front of State institutions, usage of symbolic and appeals to various authorities are temporary and do not imply that any action will be actually made. In other words, these actions are not sufficient enough to bring improvements. But just after the Olympics had come to an end, the topic of supporting the LGBT community in Russia started to lose sight, and eventually became less urgent.

In history of the LGBT community in Russia over the past couple of decades the issue of recognition had always been a problematic topic: all attempts to receive support and recognition have failed or did not bring significant changes. From the one hand, it can partly be explained especially the fact that it was a punishable criminal case. From the other hand, the activity of the LGBT community itself failed to receive attention. For example, the strong position of the authorities and inability to engage in dialogue, lack of unity in actions and ideas between LGBT communities in Russia, and insufficient infrastructure of LGBT in Russia, could be defined as main impediments.

³³ Towleroad.com: "Newfoundland and Labrador communities to raise gay pride flags during Olympics", February 6, 2014

³⁴ BBC.com: "Sochi 2014: UK cash for Russian gay rights campaigners", January 29, 2014

³⁵ Stlois.cbslocal.com: "Sochi Olympics Surrounded by Turmoil", January 31, 2014

³⁶ Theguardian.com: "US athlete Nick Symmonds speaks out against Russia's anti-gay law in Moscow", August 14, 2013

³⁷ Theglobeandmail.com: "Olympic speed skater Anastasia Bucsis 'so proud to be gay'", September 3, 2013

³⁸ The Huffingtonpost: "Figure Skater Brian Boitano Comes out as gay ahead of Sochi Olympics", December 19, 2013

³⁹ Towleroad.com: "U.S Snowboarder Callan Chythlook-Sifsof: I'm gay", February 10, 2014

⁴⁰ Towleroad.com: "Finnish Olympian swimmer Ari-Pekka Liukkonen comes out as gay to raise awareness about Sochi", February 2, 2014

Thus, such factors may predetermine the negative attitude of the state authorities to the idea of granting full equal rights for homosexual people: mainly in terms of allowing carrying gay pride parades and marches (which take place in Europe and the United States), adoption of children by the same-sex couples, allowing same-sex marriage and improving the existing limitations on allowing to assemble and to disseminate information, including to the minors. In general, some support to the idea of improving the situation of sexual-minorities (in terms of removal of existing restrictions and providing equal opportunities) can be seen from representatives of some political parties⁴¹ and authorities^{42 43} in Russia, but in practice nothing was done and there is no advance in this direction.

Another reason of LGBT community in Russia failing to improve its conditions is due to the lack of cooperation between the LGBT groups and their periodic internal contradictions in their actions. Two identified as the most active groups are projects “GayRussia” and “Russian LGBT Network”: both have similar aims to bring support the LGBT communities in Russia and call for the elimination of discrimination based on sexual orientation in supporting the rights of sexual minorities. However, both groups are working individually from each other in terms of their activities and methods of raising awareness and receiving support. For example, the activists of the project “GayRussia” (in particular, the head of projects Nikolai Alekseev) are mainly known for their public actions⁴⁴ and their attempts to conduct gay-parades. The activity of the group, started in 2005, managed to attract attention and supporters, however, not all activities are accepted equally enthusiastic: some activists from other LGBT projects were against the idea of holding parades, as saw it as a direct provocation⁴⁵. Similarly, members of “Russian LGBT Network”, for example, are opposing to the initiatives of holding pride parades in so called “carnival style”, as in Europe and the United States.

41 Русская Народная Линия: “Голубое «Яблоко» с гнильцой внутри” (In English: “Blue “Apple” with rotten inside”), April 5, 2011

42 ГейАльянсУкраина: “Российского депутата, некогда поддерживавшего гей-движение, лишили поста в Госдуме” (In English: “Russian deputy, who once supported the gay-movement got deprived from his post in the State Duma”), September 24, 2014; or Радио Эхо Москвы: “Открытость власти - готово ли к этому общество и сама власть?” (In English: “The openness of authorities – is the society and the authorities themselves ready?”), March 23, 2009.

44 GayRussia.ru: “Кампании: свобода собраний” (in English: “Campaign: freedom of assembly”)

45 Росбалт: “Некоторые геи боятся проводить парад в Москве” (In English: “Some gays are afraid to hold a parade in Moscow”), July 29, 2005

Chairman of the “Russian LGBT Network” Igor Kochetkov explained why their group does not support such events:

“We do not really understand the goal. Rather, the goal is clear - to draw attention to the problem. But the organizers did not announce, what's the problem. And since the word “gay parade” causes irritation in the society, it would be better not to use it. We should be dealing with informational and cultural programs”⁴⁶.

A similar comment Kochetkov passed to activists for picketing in front of schools: even though understanding the matter of such actions, he still condemned it, stating that this is not the best way to counter the homophobic law and urged not to follow such methods⁴⁷. In this way, directions of activities of the groups and results of their actions can be seen as different: while some activists actually pursue the idea of having the same standards as in the West, the others assume that their task is to integrate into society and be more involved in information and cultural programs without standing out⁴⁸. Different position took the chief editor of the gay magazine “Queer” Eduard Mishin in 2005, when he mentioned that even though prohibiting gay parades is unfair, it still does not solve the existing problems⁴⁹. Similar opinion shared the new chief editor of “Queer” Vladimir Voloshin 5 years later, stating that he sees no sense of trying to fight for the rights of homosexuals, if there is no oppression from the state⁵⁰.

Inability to cooperate was demonstrated during an unauthorized march, which Alekseev had planned to arrange in Moscow back in 2006⁵¹ when some members of the LGBT community in Russia urged not to give in to the provocations. The noteworthy part here is exactly the dispersed opinions within LGBT society in Russia, as it probably was anticipated that all sexual minorities would support the idea. This example confirms

⁴⁶ 812'online: “Зачем секс-меньшинства провоцируют общество?” (In English: “Why do sexual minorities provoke society?”), April 18, 2012

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Радио Эхо Москвы: “Состоится ли гей-парад в Москве?” (In English: “Will there be a gay-parade in Moscow?”), August 2, 2005

⁵⁰ Комсомольская Правда: “В Москве прошел самый масштабный гей - парад за последние 5 лет” (In English: “Moscow hosted the most ambitious gay-parade in the last 5 years”), May 2, 2010

⁵¹ Gaynews.ru: “Представители ЛГБТ сообщества России снова призвали не поддаваться на провокации” (In English: “Representatives of the LGBT community in Russia ones more urged not to yield to provocations”), July 18, 2006

lack of unity in a sense that this decision was taken without any discussions and the prior consent of the representatives of other LGBT organizations, as well as not all activists from other LGBT organizations in Russia were supporting this decision. In other words, that decision could have unpredictable results and would cause negative effects for the LGBT community⁵².

In addition to that the interregional project “PULSAR” offered its own version of weak LGBT activism in Russia: wide-range community centers for be consulting and presenting the sexual minorities rights (special health centers, law firms) either remaining undeveloped or completely absent⁵³. Thus, Human rights organizations and LGBT groups could devote more efforts to improve these issues and then, with a solid base, continue to struggle for equal rights. In a way, the idea for LGBT society creating a center that would be functioning constantly (any day of the week) would be beneficial⁵⁴. The absence of these institutions makes the Russian LGBT community vulnerable, as well as does not allow for gathering and holding internal meetings for cooperation purposes, though it could solve some specific issues, like providing info-hours and psychological assistance to victims of violence. As was mentioned, the idea of providing parades as a method of raising awareness does not solve the other problems, which can be different forms of discriminations (in terms of employment or health care).

Thus, it is possible to designate the reasons of why the LGBT community in Russia has not yet received recognition from the state: the particular qualities of some of the groups are different, which does not allow creating joined actions which could have had more effect. In addition to that, some groups are excessively active (in terms of having more appearances on the streets, including actions that are intersected by law-enforcement authorities⁵⁵), others are more moderate and do not allocate “high-profile cases”, but nevertheless have certain results (as the example of the “rainbow flash mob”

⁵² Ibid

⁵³ Межрегиональный проект “PULSAR”: “ЛГБТ активизм: Сокращая путь к переменам”, Омск 2010 (In English: Interregional project “PULSAR”: “LGBT activism: Reducing the way for change”, OMSK 2010), p 7

⁵⁴ Ibid, p 8

⁵⁵ Lifenews.ru: “На пикете у Мосгордумы задержали гей-активистов” (In English: “On the picket at the Moscow City Duma detained gay-rights activists”), May 27, 2012

in St. Petersburg⁵⁶). At the same time it is worth noting coalition for civil equality “Together”⁵⁷ (“Вместе” in Russian), which started its activities St. Petersburg in 2013 and, in turn, conducts activities aimed at working with LGBT teenagers, related to providing equality and creative evenings for the sexual minorities⁵⁸.

To some extent, it can be assumed that different views on the solution to the problem is the reason for lack of interaction between the groups, even though joined actions could have brought more advantages. Although, absence of any forms activity does not bring any results and does not improve the situation of sexual minorities, precisely excessive activity (sometimes even provocative⁵⁹) causes reluctance of accepting sexual minorities and granting them equal rights.

Thereby, social practices of Russian LGBT community are present, yet limited. Lack of recognition and lack of support from the majority of the heterosexual group brings difficulties to advance further and to freely engage in social practices. As we have seen the need for certain legislation to deal with the rights of sexual minorities is required. Most likely such initiatives will not solve the problem completely (considering the negative perception of the LGBT minorities by the majority of Russia’s population), however gradually they should improve the situation. Although rights of sexual minorities is an important topic not only in Russia but on the international level, not always it is possible to adopt abrupt changes in such topics, as the topic of protecting human rights of sexual minorities might seem as something minor and temporarily unimportant.

⁵⁶ Gbtimes: “Rainbow flash mob in Russia”, May 20, 2014

⁵⁷ Coalition for civil equality “Together”

⁵⁸ Ibid

⁵⁹ Baltinfo.ru: “Гей-активист в День ВДВ продержался на Дворцовой площади 15 секунд” (In English: “Gay-activist on the Airborne Day lasted on Palace Square for 15 seconds”), August 2, 2013

2 International Human Rights law in the Russian Legal System

In general, protection of human rights in Russia remains as one of the fields for further improvement: violations of human rights in Russia are not limited with discrimination of sexual minorities, as ordinary citizens (with heterosexual background) are also experiencing difficulties in terms of violations of the fundamental human rights. The Economist Intelligence Unit report that by 2014 Russia was on 132 places out of 167 countries by democracy rating, and on 17th place among states with authoritarian regimes⁶⁰. This report provides the idea that violation of human rights affects all citizens, not only one specific group. However, after the collapse of the Soviet Union Russia was the first CIS state to make a general reform of the judicial system⁶¹.

During the Soviet period the most important international instruments on human rights were adopted *de jure*, but had a rather formal guarantees than practical⁶². The idea of granting advantages of international law over national law was not taken into consideration by that time for the reason of its possible convenience: if a following legal act would be adopted, every citizen would have a possibility of defending under the international law, rather than by the national⁶³. The fact, that those instruments were ratified in practice did not mean their final upper position over national legislation when it covered individual rights: this type of norm was not considered possible in judicial protection⁶⁴. The process of the using the international norms as legal instruments began only during the transition period; until then there was full absence of normative legal regulations of human rights on both national level and international legal obligations⁶⁵.

In terms of protection and recognition of human rights, Russia has adopted many international instruments in addition to those rights that are covered in the Constitution,

⁶⁰ Report from The Economist Intelligence Unit: “Democracy and its discontents. Democracy Index 2014”, p 7

Available at: <http://www.sudestada.com.uy/Content/Articles/421a313a-d58f-462e-9b24-2504a37f6b56/Democracy-index-2014.pdf>

⁶¹ Danilenko G.M (1999): “Implementation of International Law in CIS States: Theory and Practise”, European Journal of International Law, Vol. 10, p 54

⁶² Уляшина Л.В. (2003): “Международно-правовые стандарты в области прав человека и их реализация: теория и практика применения”. Vilnius, European Humanities University. (In English: “International legal standards in the field of human rights and their implementation: theory and practice of application”), p 42

⁶³ Ibid, p 42

⁶⁴ Ibid, p 43

⁶⁵ Ibid, p 44

such as: International Covenant on Civil and Political Rights (ratified in 1973), International Covenant on Economic, Social and Cultural Rights (1973) and the European Convention of Human Rights (1998, with certain reservations). International instruments can be used over the domestic laws, for example, article 15(4) of the Russian Constitution:

- The universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied.

Similar approach is with the Russian Federal law "On international treaties of the Russian Federation", where it is specified in Section 4, article 31(1) that Russia is obliged to carry out its responsibilities:

- International treaties of the Russian Federation shall be subject to the implementation in good faith in accordance with the terms of treaties themselves, international law, the Constitution of the Russian Federation, this Federal Law, other legislative acts of the Russian Federation.

Thus, all freedoms and human rights mentioned in the International instruments are also present in Russian constitution, ensuring the state's responsibility to protect constitutional rights of citizens by law. However, many rights and freedoms are frequent to being breached and disregarded by the state, and thus applicants have a choice of either protecting their rights in domestic courts (from local district courts to the Supreme court or Constitutional court), either protecting them in UN Human Rights Committee or ECHR if struggle in domestic courts will not provide positive result⁶⁶.

Since attempts to submit applications against state are less likely to be justly examined – applying to the European Court of Human Rights is one of the few opportunities for appealing the decision of the state court, it is assumed that Russian courts do have required instruments for fighting against discrimination on the grounds

⁶⁶ See cases: *Alekseyev v. Russia*; *Fedotova v. Russia*; *Bayev v. Russia*

of sexual orientation, but prefer to ignore the problem and not to deal with it⁶⁷. In a certain point, the issue of fighting for fundamental rights is problematic not only in regard to LGBT community, in general, human rights are not perceived as something really important in Russia: while in 1997 60% of Russian would prefer order in state over the respect for Human Rights (27%)⁶⁸, in 2014 the situation remained relatively the same (62% for state over 29% for the respect for Human Rights⁶⁹). Apparently, state order is a fundamental starting point for the further improvements and fundamental rights have less importance. As at the 2014, Russians are quite pessimistic in terms of not only protecting their rights, but also pessimistic believing in the protection of their rights: over 33% of respondents believe that protecting their rights is futile⁷⁰.

One of the approaches for this phenomenon is Russia's problem to actually fully going through implementation process: certain transformation did take place, as some of the categories from international law are implemented into Russian legal system. However, the gap between theory and practise of human rights in Russia is evident⁷¹. This lack of experience is reflected on the cases, that are considered by the courts, yet in general courts do invoke international treaties in individual cases starting from 1995⁷². As it follows, the process of implementation of the universally recognized principles and norms of international law and international agreements in Russia is not completed⁷³; and therefore, one of the effective ways to implement the rules of international law is through general reference to the norms of international treaties⁷⁴.

⁶⁷ Maria Shabanova, (2009), "Rights of LGBT minority in Russian law and practice", pp. 193

⁶⁸ Ibid, p14

⁶⁹ Report from The Economist Intelligence Unit: "Democracy and its discontents. Democracy Index 2014", p 14

⁷⁰ Ibid, p 16

⁷¹ Искевич И.С, Сучкова Е.А. (2014): "Конституция РФ и условия имплементации международно-правовых норм в Российское законодательство", Университет им. В.И. Вернадского. Специальный выпуск (49) (In English: "The constitution of the Russian Federation and the conditions of implementation of international legal norms in Russian legislation", V.I. Vernadsky University. Special issue (49)), p 31

⁷² Danilenko G.M (1999): "Implementation of International Law in CIS States: Theory and Practice", European Journal of International Law, Vol. 10, p 58

⁷³ Минина Н.В (2011): "Проблемы имплементации норм международного права в Российской правовой системе", Центральный филиал Российской академии правосудия (г.Воронеж) (In English: "Problems of Norms implementation of international law in the Russian legal system", Central branch of the Russian Academy of Justice (Voronezh)), p 4

⁷⁴ Ibid, p 4

As for the topic of LGBT rights in Russia, the report of the Human Rights Commissioner of the Russian Federation mentioned Russia as a “a country with a developed system of traditional values and population policy” and, at the same time, confirmed existence of opposition to LGBT community and its activities⁷⁵. The report of the Human Rights Commissioner of the Russian Federation also shows a vivid example of the LGBT case in Russia: rights of LGBT are violated, however, no massive violations have been detected and no complaints to the Commissioner have been received⁷⁶.

Comparing to the International standards, the violations against LGBT in Russia are falling under Articles 6, 10, 11, 13 and 14 by the European Convention for the Protection of Human Rights and Fundamental Freedoms⁷⁷:

- Article 6 Right to a fair trial
- Article 10 Freedom of expression
- Article 11 Freedom of assembly and association
- Article 13 Right to an effective remedy
- Article 14 Prohibition of discrimination

The articles 6 and 13 are important due to the principle that everyone has a right for effective remedy and receiving a fair trial. This is one of the obstacles as sexual minorities and human rights activist are skeptical that these rights are met when it comes to court hearings due to the strong prejudices of judges⁷⁸. These are very serious issue, as possible prejudices do not allow LGBT minorities to represent their interests in court⁷⁹.

⁷⁵ Ibid, p 23

⁷⁶ Ibid, p 24

⁷⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms

⁷⁸ Rainbowspectrum.wordpress.com: “Нарушения прав ЛГБТ-граждан и инструменты их защиты” (In English: “Violations of the rights of the LGBT-people and their protection tools”)

⁷⁹ Валерий Созаев, Ксения Кириченко, Игорь Кочетков (2011), “ Чего хотят ЛГБТ-активисты?”, Российская ЛГБТ-Сеть (In English: “What do the LGBT activists want?”, Russian LGBT-Network), p 20

Available at: <https://lgbtnet.ru/sites/default/files/lgbt-activists.pdf>

To the mentioned above is worth carrying another Article, but not from the constitution, as from the Criminal law Chapter 29 Article 282, “Inciting of National, Racial, or Religious Enmity“⁸⁰: according to this Article of the Criminal Code is prohibited any form of hatred, hostility and violence against any kind of social group. The article specifies the following notion of hatred, hostility, and humiliation of human dignity:

“Actions aimed at the incitement of national, racial, or religious enmity, abasement of human dignity, and also propaganda of the exceptionality, superiority, or inferiority of individuals by reason of their attitude to religion, national, or racial affiliation, if these acts have been committed in public or with the use of mass media“⁸¹

Importantly, under Article 282 of the Criminal Code of the Russian Federation is hardly used when it comes to making complaints or applying to the court⁸²: prosecution bodies as a rule refuse to initiate criminal proceedings on its grounds, as law enforcements do not see LGBT as a social group⁸³.

In addition, the major violations of the LGBT minority is based but not limited to⁸⁴ on violation of the right to freedom of thought and expression, the right of assembly, rallies, and demonstrations, thus these major obstacles at the demand to be unacceptable and removed. Therefore, the following sub-chapter presents how these obstacles are being addressed by the current legislation and juridical practice in Russia.

2.1 Article 11 Freedom of assembly and association (Alekseyev v. Russia case)

The Article 31 under the Russian constitution covers the freedom to assemble⁸⁵:

⁸⁰ Уголовный кодекс РФ (УК РФ) от 13.06.1996 N 63-ФЗ, статья 282 (In English: “Criminal Code of Russian Federation (C.C R.F) from 13.06.1996 N63-FZ, Article 282”)

⁸¹ Ibid, Article 282 (1)

⁸² Валерий Созаев, Ксения Кириченко, Игорь Кочетков (2011), p 28

⁸³ Ibid, p 29

⁸⁴ Ibid, p 22-23

⁸⁵ Конституция Российской Федерации, Глава 2, статья 31 (In English: Constitution of Russian Federation, Chapter 2 article 31)

- Citizens of the Russian Federation shall have the right to assemble peacefully, without weapons, hold rallies, meetings and demonstrations, marches and pickets.

The important moment in case of Article 31 would be determining on what can be accepted, acknowledged and allowed, in the point of view of the State as an assembly, demonstration, marches and pickets. It appears that in case with Russia⁸⁶, even if these assemblies and demonstrations are to be held in the correct forms (with all of the formalities done in the correct matter), will send a request for carrying out and will gather the sufficient number of supporters – the town’s authorities can still reject the initiative.

Under the pressure of intolerance against sexual-minorities, the idea of holding these pride-parades and awareness campaigns for support and tolerance can create complexity in terms of providing public order during the event as required by the state constitution. According to the European Convention on Human rights, Article 11(2)⁸⁷, there should be no restrictions, other than those, that are prescribed by law and are necessary in a democratic society in the interests of national security or public safety. Based on these principles, the official parades of sexual minorities in large cities at this stage do not seem to be possible to be allowed. In this way it is not only about political decision for banning these events, but also in terms of organization of the assemble and providing security as required by constitution, especially when these events in general do not pass without incidents.

Thus, the restrictions and limitations regarding the sexual minority activities that take place in Russia are formally justified by both Russian constitution and by the European Convention of Human Rights, yet at the same time, it is clear that this reasoning is very convenient for the state to use when defending the decision; the position of the state in these cases appears as principal and final, as the limitation section of the articles is frequently used as the main argument against LGBT assemblies.

⁸⁶ GayRussia: “Мэрия Москвы запретила гей-парад в столице девятый год подряд” (In English: “Moscow Mayor's Office banned a gay pride parade in the capital of the ninth year in a row”), May 20, 2014

⁸⁷ European Convention for the Protection of Human Rights, Article 11(2)

Case law: Alekseyev v. Russia

Alekseyev v. Russia is one of a few case studies in Russia that demonstrates the procedure of how LGBT activists struggle for their rights and what steps they take to receive justices⁸⁸. The significance of the case is based on the fact, that there are actually 3 cases from one applicant, which were united into one proceeding. Gay activists after every refusal to conduct a gay pride parade in Moscow tried to appeal in the courts (in sequence from lower to higher), after which Alexeyev sent the applications to the European Court of Human Rights⁸⁹.

A well-known human rights activist and LGBT supporter in Russia, Alekseyev, between May 2006 and May 2008 tried to organize several gay pride marches in Moscow to draw attention to discrimination against the gay and lesbian minority in Russia⁹⁰. Despite the fact, that required by law notification of the details of each march was provided to the then mayor of Moscow Yuri Luzhkov, all attempts were denied. Furthermore, Luzhkov refused to give permission to hold the march on grounds that the situation itself (holding the gay parade) is absolutely unacceptable for Moscow and Russia⁹¹. By the Russian national law, Alekseyev was limited on the grounds of the following Federal law "On meetings, rallies, demonstrations, marches and pickets» (№ 54-FZ of 19 June 2004 - the "Law on Assemblies")⁹², which provides for the applicable provisions of the Articles 5, 8 and 18 of the law⁹³

All episodes presented to the court (respectively, events of 2006, 2007 and 2008) were reviewed as a one whole case "*Alekseyev v. Russia*". In the claims, Alekseyev pointed out how the Moscow administration prevents gay pride parades and restricts freedom of assembly and the right to an effective defense in court, because he

⁸⁸ Alekseyev v Russia Application Nos 4916/07, 25924/08 and 14599/09, Merits, 21 October 2010

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ NewsRu.com: "Тверской суд Москвы запретил проводить гей парад в столице" (In English: "Tver Court of Moscow banned the gay parade in the capital"), May 26, 2006

⁹² "Федеральный закон Российской Федерации от 19 июня 2004 г. N 54-ФЗ" О собраниях, митингах, демонстрациях, шествиях и пикетированиях (In English: "Federal Law of Russian Federation from June 19, 2004 N 54-FZ "On meetings, rallies, demonstrations, marches and pickets"")

⁹³ Article 5: The organization of public events, Article 8: Locations of the public event, Article 18: Provision of conditions for holding a public event

had no effective remedy in respect of the alleged violation of his freedom of assembly⁹⁴. By the European Convention of Human Rights Alekseyev's case was analyzed and judged by the violations of Articles 11 (freedom of assembly and association), 13 (effective remedy), and 14 (prohibition of discrimination).

An unanimous decision the court found that there was violation of Articles 13 and 14 in conjunction with Article 11 of the Convention.

In practise the Article 18 "Provision of conditions for holding a public event" from the the "Law on Assemblies" could be rebuttal - the Moscow administration referred to the fact that it was not possible for the public authorities to guarantee the safety of those taking part in the planned events⁹⁵. It is also the task of the organizing party to create conditions appropriate for the activity: by Article 5 "The organization of public events" section 4 (V) the organiser of the public event must:

"ensure, within their competence, public order and the safety of citizens when holding the public event..."

In other words, the administration considered that the event does not meet the requirements as established by the state nor would it be possible for the activists to insure the public and picketers safety. This effect is for the most part can be achieved if to hold a picket - parade in an informal setting, but to hold such an event privately is not possible for several reasons: firstly, the procession itself will not go unnoticed, and during the procession there are likely to be possible acts of aggression against picketers; secondly, LGBT community and human rights activists certainly inform about the event in order to attract attention. One of the main arguments of the Government of Moscow and was the fact that it was denied in the interests of public order and the prevention of disorder, health, morals and the rights and freedoms of others⁹⁶. Nevertheless the court found that defence like cannot be taken as an argument:

⁹⁴ Alekseyev v. Russia Application Nos. 4916/07, 25924/08 and 14599/09, Merits, 21 October 2010, para 3

⁹⁵ Paul Johnson (2011), "Homosexuality, Freedom of Assembly and the Margin of Appreciation Doctrine of the European Court of Human Rights: Alekseyev v Russia", *Human Rights Law Review* 11:3, 578-593, p 584

⁹⁶ Alekseyev v Russia Application No 4916/07, 25924/08 and 14599/09, Merits, 21 October 2010, para 12

- “The mere existence of a risk is insufficient for banning the event: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat of violent clashes”⁹⁷.

The issue is, that not always it is possible to predict possible hazard of the event, especially considering how intolerant the Russian society is towards the sexual minorities. Arranging an event that is known to become unstable and turn into riot is a very short-sighted step. In this case, it may be noted that not only the administration refused to issue permits on the basis of possible riots, but there didn't seem to be any interest from the state in cooperation: the organizers expressed their willingness to cooperate with law enforcement agencies to ensure security and public order actors⁹⁸. Here, the critical moment would also be the fact that the city would hardly be interested in sending the law enforcements to protect the participants of the picket from the crowd: this would require additional forces and it is unlikely that the city would be willing to put up defence units that could suddenly be useful in another place (because of that, sending elite forces for protection is not a wise decision to take).

Another reason that the Moscow administration mentioned was the “ideas of the event were not neutral to the rest of society”⁹⁹; however this explanation was also considered invalid. The court stated that it wasn't meant for the majority to always prevail and that the balance must be achieved for the purpose of ensuring fair and proper treatment of minorities¹⁰⁰, but on the other hand this is how it works: the majority rule determines most of the cases, including the holding of such parades. But nevertheless a certain compromise could be made, but so far none was proposed.

The case “*Alekseyev v. Russia*” is important in the point of how LGBT activists and supporters struggle for the equal rights. Notwithstanding, except for the symbolic meaning, after this victory nothing significantly changed – gay pride parades and pickets for ending discrimination and supporting equal rights for LGBT are still banned in Moscow and the activities are limited in Russia regions.

⁹⁷ Ibid, para 79

⁹⁸ Ibid, para 11

⁹⁹ Ibid, para 60

¹⁰⁰ Johnson (2011), p 589

In general, episodes when individuals or group of people are subjected to fines for “homosexuality promotion” have a periodic nature, and in rare cases the fined decide to launch an appeal to European Institutions on Human Rights. In many ways, these episodes are similar in nature: a single person or a small group of activists, who were engaged in activities related to equal rights of LGBT community were arrested and accused by the newly adopted legal act. However, some activists actually continue to struggle for their rights further – in domestic courts and later on to the ECHR.

2.1 Article 10 Freedom of expression (Fedotova and Bayev cases)

Another freedom that is violated due to uncertainty of interpretation is the freedom of expression. By ECHR freedom of expression is covered in article 10; in Russian constitution – in article 29 (1)¹⁰¹:

- (1) Everyone shall be guaranteed the freedom of ideas and speech.

The given article of the Constitution guarantees freedom of person’s speeches, ideas and announcing them publicly, yet in practice the situation is different: freedom of ideas and speech is in certain point limited and regulated by the state¹⁰². In Russia, pickets where activists claim homosexuality is normal is not considered as freedom of speech, but rather more like “imposition” of ideas from a specific group - the requirement to recognize homosexuality in a country, where majority of the population is fundamentally against accepting it. Even when it comes to publicly announcing and reminding of violations that take place in regards to sexual minorities on the streets, and raising awareness and support for equal treatment – most of the people already have a preconceived feeling, which strengthens homophobic sentiments.

Freedom of ideas and speech is very closely related to the freedom of information, as these two fundamental freedoms are very dependent on each other: in some cases of public events LGBT activists are not only providing ideas and speeches

¹⁰¹ Конституция Российской Федерации, Глава 2 “Права и свободы человека и гражданина“, статья 29 (In English: constitution of Russian Federation, Chapter 2 “The rights and freedoms of man and citizen”, Article 29)

¹⁰² Конституция Российской Федерации, Глава 2 “Права и свободы человека и гражданина“, статья 55(3) (In English: constitution of Russian Federation, Chapter 2 “The rights and freedoms of man and citizen”, Article 55(3))

(like demand for equal rights to the LGBT society and that being gay is normal¹⁰³), but are also providing possibility to receive information (see Fedotova and Bayev cases below). A specific section in the Russian constitution under article 55(3) regulates the possible limitations of freedoms of ideas, speech, information and assemblies:

- The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.

Thus, fundamental rights may be limited as much as will be needed in some specific cases for protection of rights of citizens and state security.

Cases of Fedotova and Bayev

The cases of Fedotova and Bayev are similar to Alekseyev case in terms of procedures, yet if Alekseyev was fighting for his constitutional rights in general, Fedotova and Bayev filed a complaint on a specific episode. Needless to say, for Fedotova this was not the first time of filling complains – she gained notoriety after an attempt to register same-sex marriage with Irina Shipitko in Moscow in May 2009. After the refusal of Moscow Tver registrar and the Russian courts she filed a complaint to the European Court and ultimately the marriage registered in Toronto.

On March 30, 2009 two gay activists from the LGBT project GayRussia.Ru and Moscow Pride Nikolai Bayev and Irina Fedotova held in Ryazan rally against homophobia and discrimination ban promotion¹⁰⁴. They came to the streets with posters “Homosexuality is normal” and “I am proud of my homosexuality. Ask me about it.”¹⁰⁵. The action took place during the day near Ryazan schools and the Ryazan regional children’s library¹⁰⁶. Both activists were detained by police and charged with

¹⁰³ Gayrussia.eu: “Полиция прервала одиночный пикет Алексея Давыдова у входа в главную детскую библиотеку страны”, July 24, 2013

¹⁰⁴ Irina Fedotova v. Russian Federation, Communication No. 1932/2010

¹⁰⁵ Nikolay Viktorovich Bayev against Russia, European Court of Human Rights, Application no. 67667/09

¹⁰⁶ GayRussia.ru: “Верховный Суд России подтвердил невиновность Ирины Федотовой, привлеченной к ответственности за гей-пропаганду у детских учреждений Рязани”, December 13,

committing an administrative offense of promotion of homosexuality to minors. Both participants were found guilty of propaganda of homosexuality (of an administrative offense) and were fined by a court for 1,500 rubles each.

Just like Alekseyev, Bayev and Fedotova did not succeed in domestic courts and submitted their law suits to the International courts (Fedotova submitted to UN Human Rights Committee and Bayev submitted to ECHR). In both cases the court was analyzing the following question:

- Has there been a violation of the applicants' right to freedom of expression (by the European Convention of Human Rights)?

Article 10 of the European Convention on Human Rights provides the right to freedom of expression and information, which is fixed by the paragraph 1:

- 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.

As it was seen from the actions of the activists, their objective was to draw attention and to express their opinions; however the place they chose for these actions was next to school and children's library, which in turn was the reason for their detention and prosecution. In the end, Fedotova has won the case in UNHRC and later at Russia's Supreme Court; Bayev's case on 2015 remains on undecided level. As Alekseyev mentioned, the case of Fedotova is now second successful case in international courts and the first international legal assessment of legal acts on prohibition of homosexual propaganda¹⁰⁷.

Despite the fact, that Russia adopted International instruments for protection of the Human Rights after the collapse of the Soviet Union, it does not mean that these instruments will be used in the correct direction, as in some cases it can be seen that the

2013 (In English: “Russia's Supreme Court has confirmed the innocence of Irina Fedotova, who was prosecuted of gay propaganda near Ryazan childcare facilities”)

¹⁰⁷ GayRussia.ru: “Комитет ООН по правам человека признал российские запреты гей-пропаганды нарушающими Пакт о гражданских и политических правах”, November 23, 2013 (In English: “The UN Committee on Human Rights has found Russian bans on gay propaganda in violation of the Covenant on Civil and Political Rights”)

Soviet practices and habits remained in the Post-Soviet and Russian societies. Therefore, it is not only the current power of the state that is limiting rights of the sexual minorities, but also the strongly established attitude of the ordinary citizens, to whom any reference to LGBT topic appears as something *de facto* unacceptable.

II. Adoption of anti-propaganda legal act

The following chapter will provide with the adoption, development and consequences of the Russian anti-propaganda legal act adoption: the sections will show the reasons used by the initiators when presenting the legal instrument and the features of the legal act: its meaning and how it is perceived by the society.

2.1 The preconditions for adopting the act

Despite the decriminalization process, in the segment of 2000-2006 some attempts were made for adopting the anti-homosexual tools. The first initiatives were presented by Deputy Alexander Chuyev three times: in 2003, 2004 and 2006¹⁰⁸, and all of the attempts have failed. Chuyev's initiatives were presented as amendments to the Criminal Code of the Russian Federation and not on the Federal level. The main reason which was mentioned for the initiatives adoption is the prohibition for promotion of homosexuality due to advances of homosexual propaganda in all media and in all spheres of cultural life¹⁰⁹, and that it can affect minors: according to Chuyev, the legal act was aimed to protect children from possible interest of trying out homosexuality, when it would be presented in a positive manner¹¹⁰. The main idea behind the initiative was to exclude public from "homosexual propaganda" – from public actions, which can be showing homosexuality as a positive phenomenon¹¹¹. Despite the fact, that the initiatives were declined, Chuyev claimed that due to social importance of the issue - the law draft will be presented again, but by other initiators¹¹².

The idea of limitation was also presented in a report by the group of Russian legal experts¹¹³, who highlighted the principality of the sexual minorities, for example,

¹⁰⁸ Законопроект № 311625-4 "О внесении дополнения в Уголовный кодекс Российской Федерации, предусматривающего уголовную ответственность за пропаганду гомосексуализма" (In English: The bill № 311625-4 "On amendments to the Criminal Code of the Russian Federation, which comprises criminal liability for promotion of homosexuality")

¹⁰⁹ Новые Известия: "Срок – до пяти лет...отдыха. За пропаганду гомосексуализма хотят наказывать отстранением от работы" (In English: "Term- up to five years...of rest. For promoting homosexuality want to punish by removal from work"), June 22, 2006

¹¹⁰ Ibid

¹¹¹ Ibid

¹¹² Ibid

¹¹³ Понкин И.В., Кузнецов М.Н., Михалева Н.А. (2011), "ДОКЛАД "О праве на критическую оценку гомосексуализма и о законных ограничениях навязывания гомосексуализма" (In English: Report "The right to critical evaluation of homosexuality and of lawful restrictions on imposition of homosexuality"), p 7

the aggressive nature of the politics of sexual minorities, especially when it comes to criticism on homosexuality. Different forms of banning LGBT activities, as well as any assessment or critical views on the issues of homosexuality, are seen by the LGBT society only as a direct “discrimination”¹¹⁴. Therefore, Ponkin, Kouznetsov and Mikhaleva believe, that the failure occurs in the freedom of belief and freedom of expression for those, who wish to express their opinions during the public debate, especially when it does not go along with the position of the LGBT society¹¹⁵. The report “The right against Xenomorph’s in the field of public morals” states that the adopted anti-propaganda legal act covers only the propaganda field and does not concern private life of the LGBT community. In other words deliberate imposition of homosexuality as one of the societal norms is preventing parents from the normal implementation of the educational functions¹¹⁶. Particularly, the adopted anti-discrimination legal act was adopted in order to control possible activities that will be raising topic of possible “pride” of being homosexual, and from this point of view there will always be reasons for state to intervene.

Another suggestion of the anti-propaganda legal act adoption is the idea of creating distraction from the problems, that were taking place in Russia¹¹⁷: namely, results of the 2012 elections and the preparations for Sochi Olympics in 2014 created negative attention with perturbation, and thus the adopted legal act managed to distract both Russian and West societies from the negative topics¹¹⁸. Despite the fact that this suggestion is plausible, it cannot be considered as a main one for the reason that such initiatives against LGBT communities were actually taking place earlier as well, when there was no actual need for any form of distraction.

It is worth to consider that there are no legal instruments in Russia that would be officially or directly forbidding LGBT activities. The adopted anti-propaganda legal act forbids dissemination of information, which can be considered harmful for the minor’s

¹¹⁴ Ibid, p 7

¹¹⁵ Ibid, p 11

¹¹⁶ “Право против ксеноморфов в области общественной нравственности: Методология противодействия: Сборник”(2008) (In English: “The right against xenomorph’s in the field of public morals: Methodology of counter: Compilation), p 39

¹¹⁷ Human Rights First, “Convenient Targets. The Anti -“Propaganda” Law & the Threat to LGBT Rights in Russia”, August 2013, p 4

¹¹⁸ Ibid, p 3

development; however, the legal act as such does not regulate the LGBT community and does not restrict them of conducting their activities (in reality, however, most of the activities are being banned by the state). By these factors it appears that decision of creating and adopting the anti-propaganda legal act was not due to some specific action or activities that started to take place in Russia, but rather as a continuation of what was practiced in the Soviet Union – this way, possible future initiatives from the LGBT communities will have to face an already existing legal instrument.

The idea of the continuation of non-recognition of LGBT people as a social group can be seen by a survey that was conducted in 2013. The results of survey showed, that Russia had a clear, anti-homosexual position: approximately 74% of Russians were against and believed that homosexuality should not be accepted by society¹¹⁹. This number is redoubtable and should be taken into consideration when it comes to topics of accepting and supporting sexual minorities on the official level. By the principle of the “Majority rule” this is a vantage point: as the opinion of the majority will be taken into account, such initiatives will have a place to be; hence – such initiatives will always receive support from the part of the population that is against homosexuality.

2.2 Chronological developments of the act

The original version of the Federal law № 436-FZ was adopted in December 29th, 2010 with the purpose to determine information by categories and establish the regulations on whether or not the information falls under the ban on the distribution¹²⁰. The legal act received some criticism, mainly because of illegible explanations¹²¹¹²² of what is meant by the “family values” and by “sexual relations”. Thus, under Article 5 “Types of information harmful to health and (or) development of children”, section 2 (2.4) determined, that to prohibited information applies the one, that:

119 PewResearchCenter: “Russia’s anti-propaganda laws in line with public’s views on homosexuality”, August 5, 2013

120 Федеральный закон Российской Федерации от 29 декабря 2010 г. N 436-ФЗ

121 Zakon.ru: “Некоторые пробелы ФЗ “О защите детей от информации, причиняющей вред их здоровью и развитию””, (In English: “Some gaps FZ “On protection of children from information harmful to their health and development””), June 6, 2012 or Fontanka.ru: “Детей защитят от “вредных” книг и фильмов” (“Children will protected from “harmful” books and movies”), January 4, 2011

“Denies family values and generates disrespect for parents and (or) the other members of the family¹²³”

The following statement even though determines that denial of family values is the prohibited for of information, nevertheless it does not fully explain what can be understood by the “denial of family values”. In other words, the “family values” and “denial” can be interpreted in different ways, but no specifics are mentioned in the legal act.

The similar unclear issue is regarding the theme “sexual relations”, as by the legal act that information was divided into age categories which were covered from Article 7 (“Information products for children under the age of six years”) up to Article 10 (“information product for children who reached the age of sixteen year”): as an example, information on sexual relations between a man and a woman is allowed for minors who have reached the age of twelve, and only on condition that this information “does not exploit the interest in sex and not of the exciting or offensive character”¹²⁴.

This in turn creates difficulties to Chapter 3 of the legal act – “Requirements to turnover of information products”: by Article 11 paragraph 4 (1)¹²⁵ the textbooks and teaching aids are exclusion to Article 5:

- Turnover of information products containing the information prescribed in Article 5 of this Federal Law, with no sign of information products is prohibited except for:
 - 1) Textbooks and manuals recommended or permitted for use in the educational process in accordance with the legislation of the Russian Federation in the field of education;

The complexity in this case would be to understand the principle of how to determine by the following articles what kind of information is considered as limited and what books can be considered as unsuitable for the minors (and to determine what

123 Федеральный закон Российской Федерации от 29 декабря 2010 г. N 436-ФЗ, Article 5, section 2 (2.4)

¹²⁴ Ibid, Article 9 (3)

¹²⁵ Ibid, Article 11 para 4 (1)

age would be more appropriate for discussing such topics), as in this case the educational level also is vulnerable to changes.

Another fact for consideration is the overall purpose of the legal act to be adopted: for instance, ECHR held that the restriction (here – the adopted anti-propaganda legal act) must correspond to a ‘pressing social need’ and be ‘proportionate to the legitimate aim pursued’ in order to be fully in order with Article 10(2)¹²⁶ of the European Convention of Human Rights:

- “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...¹²⁷”

Particularly, the legitimate purpose for the adoption of the legal act existed. During the cases *Handyside v. the United Kingdom* and *Smith and Grady v. the United Kingdom* the ECHR ruled differently: the interference with Article 10 was regarded as necessary in a democratic society for the purpose of interference¹²⁸. In addition to this, ECHR in the earliest practices did discuss on the importance of restrictions by article 10(2) for the purpose to protect the right to convey information or ideas that may offend or disturb the State or any sector of its population¹²⁹.

The second amendment to the original version was adopted as Federal Law № 135-FZ in June 29th, 2013¹³⁰. The legal act was introduced as “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”. This meant that the legal act has brought additional provisions to the existing original.

¹²⁶ Paul Johnson (2015), “Homosexual Propaganda’ Laws in the Russian Federation: Are They in Violation of the European Convention on Human Rights?”, p 49

¹²⁷ European Convention for the Protection of Human Rights, Article 10(2)

¹²⁸ Ibid, p 50

¹²⁹ Ibid, p 48

¹³⁰ Федеральный закон Российской Федерации от 29 июня 2013 г. N 135-ФЗ г

Article 6 (21) of the law “Propaganda of nontraditional sexual relations among minors”, covers the definition of what is considered as a propaganda of ‘non-traditional sexual relations’ among minors¹³¹. This article establishes administrative responsibility for "propaganda of nontraditional sexual" and presented changes to the information section: by the article, information that promotes non-traditional sexual relationship is also prohibited. It states the following:

“Propaganda of non-traditional sexual relations among minors expressed in distribution of information that is aimed at the formation among minors of non-traditional sexual attitudes, attractiveness of non-traditional sexual relations, misperceptions of the social equivalence of traditional and non-traditional sexual relations, or enforcing information about non-traditional sexual relations that invokes interest in such relations, if these actions do not constitute a criminal offence, - is punishable...”

The direct explanation of “propaganda” here includes any type of an advertisement that would be showing non-traditional sexual relations as a “normal behaviour” or that would be forming the attractiveness of non-traditional sexual relationships. Thus, article 6(21) presents what will be considered as propaganda. But some complexity is present in the legal act as well: while determining what could be considered as a violation, the article at the same time equates to the violations the idea of a social equivalence of traditional and non-traditional sexual relationships, as well as imposition of information on non-traditional sexual relationships. Unfortunately, the article does not explain on what is considered as “imposition of information”, which makes it complicated to use the article in practice in the correct manner.

Thus, the law had not been examined in detail for possible ‘gaps’ that can cause inconsistencies and difficulties in certain interpretation. Some experts pointed out that there is no clear definition of what is meant by the term “homosexuality” and

¹³¹ Федеральный закон Российской Федерации от 29 июня 2013 г. N 135-ФЗ г. Москва, “О внесении изменений в статью 5 Федерального закона “О защите детей от информации, причиняющей вред их здоровью и развитию” и отдельные законодательные акты Российской Федерации в целях защиты детей от информации, пропагандирующей отрицание традиционных семейных ценностей”

“propaganda”¹³². However, the initiator of the anti-propaganda legal act, Deputy Elena Mizulina, considers that when finalizing the law such formulations were selected that allow to distinguish propaganda from simple information¹³³. Mizulina also mentioned that if the child is looking for information on his own, it is not considered as propaganda, as there is no purposeful formation¹³⁴. Such statement can be seen contradictory, as children can, in fact, intentionally (out of interest) search for and familiarize the information, which has homosexual topic. Same thing would apply to Mizulina’s statement on clear definition of what can be considered as propaganda: by Mizulina’s assertion, cultural works and news stories that raise the topic of homosexuality are not falling under the prohibition¹³⁵. In practice, however, it turned another way, as after the anti-propaganda legal act adopting started checks for the presence of banned topics: the “forbidden” information was searched in the concert of Lady Gaga¹³⁶, in sports shops¹³⁷ and in serials¹³⁸. One of the requests to check for possible presence of gay propaganda was even issued for the website “Gay.ru” (in other words – does the LGBT-related server contain propaganda of homosexual relations¹³⁹). These cases are having rather episodic character, but nevertheless they do not correspond to Mizulina’s statement on what falls under the “propaganda”, which makes the adopted anti-propaganda legal act incompetent.

2.3 Consequences of the act adoption

All forms of homosexual activity in Soviet period (both public and private) were considered as criminally punishable. After 59 years in force, the Article 121

¹³² Коммерсант.ру: “Самарские депутаты забрали гомосексуализм в свою компетенцию” (In English: “Deputies of Samara took homosexuality in their competence”), June 19, 2012

¹³³ Gazeta.ru: “Людей ведь раздражают не геи, а пропаганда” (In English: “People are irritated not by gays but by propaganda”), June 10, 2013

¹³⁴ BBC Русская служба: “Госдума приняла закон о “нетрадиционных отношениях”” (In English: The State Duma adopted a law on "non-traditional relationships"), 11.07.2013

¹³⁵ Ibid

¹³⁶ Metronews.ru: “Концерт Гаги не смогли проверить на наличие гей-пропаганды: нет методик” (In English: “Concert of Gaga could not verify the existence of gay propaganda: no methods”), January 29, 2013

¹³⁷ МК.ру: “Милонов ищет гей-пропаганду в спортивных магазинах” (In English: “Milonov seeking gay propaganda in the sports shops”), June 30, 2015

¹³⁸ Lenta.ru: “Московский депутат потребовал проверить «Интернов» на гей-пропаганду” (In English: “Moscow deputy demanded to check the "interns" on gay propaganda”), October 12, 2015

¹³⁹ TheKievTimes.ua: “Роскомнадзор не нашёл запрещенной гей-пропаганды на сайте Гей.ру” (In English: “Roskomnadzor did not found the banned gay propaganda on website Gay.ru”), November 18, 2013

("Sodomy") got excluded from the Russian Criminal Code¹⁴⁰, which meant renunciation for persecution of people for homosexuality (but, however, it did not cancel the penalty for forcible sexual actions). 17 years later, the idea of prosecuting people with homosexual background returned, but with the approach of limiting these people in their civil rights. In case with the current issue it is important to determine what happens, when such initiatives and measures are adopted by the state.

The original purpose of the following anti-propaganda legal act is the protection of morals of society and specifically - protection of minors from information, which can be harmful to their development before reaching adulthood. The principle of protecting morality in Russian society is one of the frequently raised in this topic, as the LGBT society is seen as an unacceptable phenomenon. Besides that, the level of support to LGBT society in Russia is quite low: in order for the sexual minorities to engage in more social practices and conduct events they would require to gain more support not only from abroad, but in Russia as well.

On July 29th and 30th, 2013 Dmitry Isakov got arrested and fined for staging a one-man protest in the centre of the town of Kazan with banners, thus becoming the first person to be fined for conducting homosexual propaganda under Article 6.21 (as the date of legal act adoption coincident with the protest)¹⁴¹. In addition to be fined for promoting propaganda, activist had lost his working place in the Kazan branch of the "Sberbank" (in Russian: "Сбербанк России"). Activist lodged an appeal to the European Court against the decision of the court (for promoting propaganda accusation). Up to 2015, there is no official information on status of the appeal. Despite the experience, activist continues to take part in the LGBT activity in Russia¹⁴².

This is a typical example of LGBT practice in Russia when it comes to social and legal practice. However, the fact of losing employment is usually not fixed,

¹⁴⁰ Закон "О внесении изменений и дополнений в Уголовный Кодекс РСФСР, уголовно - процессуальный кодекс РСФСР и исправительно – трудовой кодекс РСФСР", от 29.04.1993 № 4901-1 (In English: "On amendments and additions to the Criminal Code of the RSFSR Criminal - Procedural Code of the Russian Federation and the corrective - Labour Code of the RSFSR" from 29.04.1993 № 4901-1)

¹⁴¹ Грани.ру: Дмитрий Исаков, казанский ЛГБТ-активист (In English: "Dmitry Isakov, Kazan LGBT activist")

¹⁴² Трибуна.ру: "Дмитрий Исаков: «Главное – объединить ЛГБТ-сообщество Казани»", June 6, 2014 (In English: "Dmitry Isakov: "The important thing - to unite the LGBT community of Kazan"")

therefore it is complicated to determine if every accused LGBT supporter faces with the dismissal from the work on the grounds of his sexual orientation or not. Another issue for consideration is the fact that not many LGBT activists are writing complains or turn to the police when they believe they were discriminated on the work place or being targeted on the streets – many find this action useless because are confident, that the investigation will not be conducted and those guilty will not be punished¹⁴³.

Despite the fact, that the legal act has been enacted to limit the actions of LGBT people in the dissemination of information as well as in their activities, in practice the situation took another direction: Russian LGBT community received support from many Western countries and from the domestic compatriots as well; which, in turn, means that not everyone accepts the adopted anti-propaganda legal act and shares its purpose. Hence, it can be pointed out that despite the action taken by state, the LGBT community in Russia from adoption of the legal act did actually gain some certain benefits: despite the attention that was paid to the preparation for the Winter Olympic Games in 2014, the case with violation of rights of Russian LGBT minorities caught not only international attention, but also world support and protest. This allowed raising the issue of both equal rights and treatment of sexual minorities in Russia, which in turn allows activists and supporters to conduct their activities more confidently (as in some cases activist were considering the initiatives in more pessimistic attitudes).

The confidence in protecting their rights can be seen on the actions of activists, which are being taken after the adoption of legal act. Hence, in January 2014 a lawsuit was filed in the European Court of Human Rights, as in Arkhangelsk the Court drew two LGBT activists responsible for pickets near the children's library and fines imposed on them¹⁴⁴. Activists claimed that the law violates their right to freedom of expression guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms. It is worth noting, that considering the idea behind the legal act and the place activist chose in order to receive attention, the claim that “violation of the right to freedom of expression“ took place in this case will not appear to be an effective defense

¹⁴³ Human Rights Watch: “Россия: безнаказанное насилие в отношении ЛГБТ” (In English: “Russia: the unpunished violence against LGBT”), Detsember 15, 2014

¹⁴⁴ Вести.ру: “Геи требуют разрешить пропаганду гомосексуализма среди детей”, January 27, 2014 (In English: “Gays demand to allow the promotion of homosexuality among minors“)

in court. Because the chosen location was in front of the children's library with the posters slogans "ask me about it"¹⁴⁵, these actions are falling under the anti-propaganda legal, yet at the same time the slogans are giving a more enlightenment background, rather than idea of advertising homosexuality.

As the legal act was adopted on the "Federal" level - is applicable on the entire Russian territory, and all acts of lower legal force shall not contradict with it. By these means, regional laws that were adopted against LGBT propaganda have lost their power after the adoption of the Federal Legal act. Before the Federal Law, there were certain regions that have adopted legislative bans on homosexual propaganda on the regional level: Ryazan region, Arkhangelsk region, Kostroma region, Novosibirsk region, Magadan region, Samara region, Krasnodar Territory and in St. Petersburg¹⁴⁶. By the Russian Constitution, any person or entity having the right of legislative initiative can propose Federal law draft, and if the initiative has passed through State Duma, Federation Council and is signed by president – the the law is considered to be finally adopted¹⁴⁷.

Back in 2012, Arkhangelsk court refused to recognize the law banning homosexual propaganda as "invalid"¹⁴⁸ ruled by argument that the law can be misinterpreted and that the main reason to accept it in the Arkhangelsk region is the fact that the "promotion of homosexuality among adolescents may awaken early interest to this sphere, the pursuit of early sexual relations, including homosexuality that constitutes a violation of their rights"¹⁴⁹. In this case, the Court, on the one hand, limited the rights for sexual minorities to share information concerning homosexual topics, but on the another hand, clearly identified that the adopted law does not interfere with the right to receive and share information regarding homosexuality and to hold public events in the manner prescribed by the law. Thus, it is complicated to determine on which grounds should the sharing of such information or pickets take place in order to

¹⁴⁵ GayRussia.ru: "Акция активистов GayRussia.Ru против закона о запрете пропаганды гомосексуализма в Рязани", March 30, 2009

¹⁴⁶ Humanrightsfirst.org: "Convenient Targets: The Anti-"Propaganda" Law and the Threat to LGBT Rights in Russia", November 26, 2013

¹⁴⁷ Конституция Российской Федерации, Глава 5 статья 104 пар. 1(In English: Russian State constitution, Chapter 5 article 104 para 1)

¹⁴⁸ Российская газета: "Архангельский суд отказался отменить закон о запрете гей-пропаганды" (In English: "Arkhangelsk court refused to overturn a law banning gay propaganda"), May 22, 2012

¹⁴⁹ Ibid

be in compliance with the law. This example is one of the kind at the moment, as in other regions where the legal act was adopted no similar activity against the adoption of the act was detected.

For the most part the LGBT activists and their supporters are considering the adoption of the anti-propaganda legal act as a contrary to international instruments¹⁵⁰. Thus, they concluded that the ban on “homosexual propaganda” proves that it prohibits any expression of support for LGBT or any public expression of sexual orientation or gender identity, and that this in any case is not compatible with the protection of the right to freedom of expression and freedom of peaceful assembly. This statement supports the fact, that because of the newly adopted legal act, these specific rights are limited, and as the main direction of the new legal act was essentially prohibiting homosexual propaganda among minors, it would also cover the limitations for the LGBT supporter’s actions. The problem is that when referring to the protection of minors there is no clear decision on how and in which fields to bring limitations: in the media, speeches or parades - one way or another, minors have access to information; therefore, filtering media in order to fully secure one specific group from harmful information is impossible.

The activists also suggested that variety of sexual orientation and gender identity is all a part of the human condition, and therefore attempts to silence LGBT people cannot be represented as a matter of protection of morals, which is a generally accepted standard or the protection of children from harmful information¹⁵¹. These limitations of sexual minority activities do not bring any positive changes into society in general, and so far there was no initiative to find compromise level. Therefore, it is clear that no positive improvements can take place in the nearest future, while state continues to treat sexual minorities with ignorance. This case does not affect the minors directly, but in a way still involves them as a reason for such initiatives and reforms. Basically, the legal act has turned into a symbolic kind of a preventive instrument, which was created before the appearance of proportional reason itself, but with a specific goal of protecting

¹⁵⁰ Article 19 (2013): “Именем традиции: попытки заставить замолчать представителей сообщества ЛГБТ“, (In English: “In the name of tradition: attempts to silence the representatives of LGBT community”), p 23

¹⁵¹ Ibid, p 24

minors from homosexual topics – from information, that appeared to be harmful for their development.

The prohibition of “homosexual propaganda” did bring certain limitations in different forms: not only this prohibition affected the LGBT society in expressing their identity and to participate in public and political life, they are also deprived from the opportunity to defend their fundamental rights - such as the right to education and the right to health¹⁵², as well as it lead to limitations on media, which is dealing with LGBT topics¹⁵³. Adoption of such an instrument does question the competence of Russian institutions: the proportionality of the adopted legal act does not seem to be exactly necessary as it is presented by the initiators; and it is obvious that the adopted legal act is not really fully supported by the public. In addition to that, the question of competence can be seen through earliest initiatives for the following restrictive legal act: when these initiatives were presented by deputy Chuyev in 2003, 2004 and 2006, the Russian government did not support the following initiatives¹⁵⁴, as the initiatives was in violation with article 29 of Russian constitution and articles 8, 10 and 14 by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Russian Criminal Code¹⁵⁵. Thus it appears that Chuyev initiatives that were clearly not consistent with the existing legal instruments and therefore were rejected actually got adopted on the Federal level, while having similar to the failed drafts format. The fact, that more people started supporting sexual minorities in Russia also proves the point of the legal act inconsistency with the international human rights norms.

When summarizing the consequences from the anti-propaganda legal act adoption, it can be noticed that in general the outcome was more in favour to the LGBT group: not only the international support to the Russian LGBT community has grown, after case of *Alekseyev*, Russian LGBT activists began to actively asserting their rights

¹⁵² Article 19 (2013), p 26

¹⁵³ Lenta.ru: “Любовь здесь больше не живет. Чем обернулся антигейский закон для СМИ, пишущих о геях и лесбиянках” (In English: “Love does not live here anymore. What the anti-gay legal act turned to for the media, which is writing about gays and lesbians”), June 30, 2015

¹⁵⁴ Законопроект № 311625-4 “О внесении дополнения в Уголовный кодекс Российской Федерации, предусматривающего уголовную ответственность за пропаганду гомосексуализма” (In English: The bill № 311625-4 “On amendments to the Criminal Code of the Russian Federation, which comprises criminal liability for promotion of homosexuality”)

¹⁵⁵ Ibid

by all means and conducting more events. The state in this case managed only to strengthen limitation and get support from the part of the population, which is against sexual minorities but not more. The adopted undeveloped legal act, in turn, questions the competence of State Duma, which passed the legal act, whose samples were found in violation not only to Russian legal instruments, but International as well.

General discussion

As the previous chapters mentioned the legal acts violations and gaps in terms of terminology, that do not allow to interpret the legal act in the correct form, it is necessary to determine these complications. As it comes to both anti-propaganda legal act and social practices the main unifying point would be the violation of the right to information, as it is the information that is received from freedom of expression and freedoms of assemblies.

Here, the issue is that even though everyone has a right to share and transmit information, in case with seeking and receiving information regarding same-sex relations there is a different procedure: this specific information for LGBT communities has to be subjected to verification. Additionally, it is unclear what kind of information must and can be used for the minors – “propaganda” is prohibited, but at the same time there is a need to conduct information sessions, which in fact are inevitable. In practice it is impossible to completely limit access to information or to prohibit it - the information regarding the same-sex relations in any case will be presented to minors in one form or another (it may be delivered as a negative subject or it may be presented as one of phenomena in society); blocking process in this case also will not make any difference. The issue in this case is that it is not always about transmitting, producing and disseminate information, it is also about seeking and receiving it.

By the Article 29 (4) under the Russian constitution covers the freedom of information¹⁵⁶:

- Everyone has the right to seek, receive, transmit, produce and disseminate information by any legal means.

As the legal act implies “protection of children from information that inflicts damage to their health and development” there is also a question regarding in what form information regarding same-sex relations can be considered as “damaging to health and development”. If everything is inclined to the fact that such information may cause harm to the children’s development, then the information should be present in such a

¹⁵⁶ Конституция Российской Федерации, Глава 2 “Права и свободы человека и гражданина“, статья 29 (in English: constitution of Russian Federation, Chapter 2 “The rights and freedoms of man and citizen, Article 29”)

form in which it would be approved by the law. Another complication is the fact of protecting children from harmful information by means of regulation of information: completely protecting minors from information related to same-sex relations is not possible: even if such information will be limited by the age restrictions in educational institutions (like biology classes) - this information can be obtained at least in the following sources:

- Classical and Fiction literature
- Media (Internet, Television, Radio broadcasting, Newspapers)
- Informal connection (communication with peers, parents, trips abroad)

When taking these factors into account it becomes clear that completely isolating minors from any form of what can be seen as “gay propaganda” is not possible in practice. Therefore, it would be an appropriate initiative to review the adopted act once more in order to specify exactly in which cases the information can be considered harmful for the minors. While such means are not met, it is possible to interpret the legal act in different ways, especially when limitations to freedom of ideas, speech and information are allowed even by the European Convention on Human Rights.

The conditions that are related to limitations are set in the Article 29 (2)¹⁵⁷:

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

Thus, the matter of free speech, ideas and information does require certain editing, as there is possibility that some ideas or information may involve provocative or offensive material. As it was mentioned, it is important to distinguish on where is propaganda and where is the freedom of ideas, speech and open opinion; and where is the right of transmitting and sharing information: the sexual minorities are not promoting their lifestyle (as it is mistakenly seen and presumed by many citizens) – the protesters and LGBT supporters are only demanding equal rights and treatment in accordance with the law. Restriction to this information on the grounds of “health and

¹⁵⁷ Конституция Российской Федерации, Глава 2, статья 29 (in English: Constitution of Russian Federation, Chapter 2 article 29”)

development” is unjustified and unproportional. In this case it is also a matter of violation of “freedom to assemble”, as holding the gay – pride parades and registering LGBT groups is something that falls under the right to assemble.

Analysis of the Russian anti-propaganda legal act adoption together with comments from the experts showed that the legal act hold certain errors and because of that does not have clear definitions and can be applied inappropriately¹⁵⁸, as well as it does not stay in conformity with the Russian Constitution. This fact means difficulties in terms of using the legal act in practice, when it will come to going over the applications to court (as with cases *Alekseyev, Fedotova and Bayev v. Russia*). Despite these apparent violations, the legal act is not planned to be updated to the appropriate level; and even though there were statements by lawyers and specialists regarding inconsistency of the legal act – the “anti-propaganda” legal act remains in force without any appropriate changes.

Social practices of the LGBT community in Russia are strongly affected by the changes that take place in the Russian society, as not only they depend on the broad participation of practitioners (here – the sexual minorities themselves), but on other actors of the society as well (here – heterosexual group and state officials). Which means, that the sexual minorities in Russia are very dependable on other actors when it comes to organizing activities? The best way of holding an event is by having support from parties like officials and local citizens, which in case of Russia is not possible due to mostly homophobic position from the mentioned two parties. On the current phase the LGBT community is capable of raising awareness yet is very limited in it. Hence, if there would be more support from heterosexual group – the sexual minorities would receive more possibilities on conducting their activities. Despite the fact, that some people welcome the idea of providing sexual minorities with equal rights, the majority stays conservative and does not allow this possibility to form. This can also be explained by the fact, than many consider LGBT movement as a phenomenon from West, which is being integrated into Russian society. In general, it this idea can be explained by the fact, that most of the support for the Russian LGBT organizations comes from abroad (some of the criticism comes from the United States, who is very

¹⁵⁸ Newsru.com: "Антигейский закон" был принят Госдумой во втором и третьем чтениях (In English: ““Anti-gay law” was passed by the State Duma in the second and third readings”), June 12, 2013

supportive to LGBT movement¹⁵⁹), and is seen as nothing more than interference in Russian internal affairs¹⁶⁰.

As it follows from the previous chapters, there were no serious causes for Russia to adopt the following legal act: the activity of sexual minorities by that time was not in a stage that would create concerns, yet the initiatives presented by deputy Chuyev in 2003, 2004 and 2006 had a direct importance of protecting people (especially – minors) from propaganda of non-traditional sexual relations. Despite the fact, that initially there was a certain idea of what should be considered as propaganda, in time it was clear that the anti-propaganda legal act could be used in different fields.

On the other hand, if to examine this situation from another point of view – until the legal act was adopted - there was less discontent and less demands from the sexual minorities in regards of providing equal rights. Therefore, the reason for the critique from both Russian activists and foreign activists concerning the legal act - is mostly because of the adoption of the anti-propaganda legal act itself. From the causation perspective: absence of this anti-propaganda legal act would not result into increasing activity of the LGBT community in Russia, and would not affect the Russian society in any negative way. The adoption of the anti-propaganda legal act, in turn, resulted to increasing activity of activists (as a form of protest), which, in turn, forced the state to actively intersect into activities of sexual minorities. So, the more advancing the sexual minority will try to be in Russia, the more state authorities can undertake in order to limit them in actions by using limitations on the legal basics.

In a certain point, as it was pointed out, the anti-propaganda legal act gave an opportunity for many people (including professional athletes) to openly declare about their sexual orientation: this fact shows that by some specific reasons people had no intention of opening up (“coming out” as a figure of speech), but they finally managed to do it for showing support and to raise awareness of need for equal treatment because of the attention which the Russian legal act created. In addition to that, the fact of violation of the rights of sexual minorities in one particular country was able to bring attention for a limited time to the problem of sexual minorities as a general issue.

¹⁵⁹ Лента.ру: “Госдеп США вступился за права геев в России“ (In English: “The US State Department has stood up for gay rights in Russia”), November 24, 2014

¹⁶⁰ Gay Star News.com: “Putin warns West not to interfere on “gay issues“ in Russia“, June 26, 2013

One of the reasons for adoption of the legal act was the idea of “protecting minors from information, which is harmful to their development”. Whereas this position could be considered as a conclusive, the definition of forbidden information and its implementation in practice causes disputes: the fact that fully limiting such information to minors would result to prohibition of dissemination of information, which was not taken into account; limiting information can create difficulties for those minors, who have a different sexual background unlike their peers, as well as there is no research done that would prove negative impact of such information on minors. Special attention in this case should be given to the minors who are having “untraditional orientation” – limitation of information and misunderstanding will result to negative outcomes, as for these children such information highly required. Lack of information in this case is an important moment for consideration: due to the fact, that most hatred comes from the times when homosexuality was considered as a sexual offence, it is complicated to prove otherwise. The mentioned lack of institutions that could disseminate information about same-sex relationships also makes the situation of sexual minorities in Russia tense: because of the newly adopted legal act it is unclear or whether or not such institutions would be considered as a legitimate center or will be shut down due to their activities.

Russian state is not ready to acknowledge the sexual minorities and grant them equal rights before the law. Despite the fact, that some part of Russian society shows support and would approve these changes, the overwhelming majority of society still considers this proposal with hostility. Research on the history of sexual minority’s movement in Russia demonstrated that this kind of initiative had to be taken during early 1990’s, because Russia at that time was more pliable, flexible and open, especially as this particular step could have been taken as a step towards democratization. Now, when the internal structure of the state has formulated, adopting such decisions will be made with strong complications.

In general, certain reflections can be made on the issue of strengthening the measures to curb the promotion of LGBT minorities in countries with authoritarian regimes. On example of some countries it can be assumed that the measures include the

inability of these groups to have any potential political impact¹⁶¹. This way is implied withdrawal from old practices and cultural traditions¹⁶². The similar approach could be taken to the idea of state's ignorance to fully deal with the topic of providing human rights to the population¹⁶³. In terms of cultural traditions it is mostly related to the "family model". In authoritarian states the debates on the "family model" under UN Human Rights Declaration takes place as well: while opponents declare Declaration's importance of preserving the "classical family model" as one of the main arguments, the supporters of the sexual minorities see the Declaration as a tool which allows same-sex marriage as a fundamental human right¹⁶⁴. This way, in some authoritarian countries homosexuality is not considered as an unforeseeable phenomenon from a cultural perspective, but is not considered as a norm either¹⁶⁵.

When returning to the matter of state support to the sexual minorities, it appears that Russia did not make any significant advance or changes, nor does it seem that any changes are planning to take place: in regions the position is either neutral or in favor for adopting the anti-propaganda legal act, with no initiatives for considering the adoption of legal instruments that would protect conditions of the sexual minorities, including their civil rights. As it was mentioned before, the adopted legal act against propaganda can cause complications for future instruments that would allow the LGBT community to feel less oppressed. Even though some certain groups manage to continue working and raising awareness, in total there is still have a big gap in terms of receiving state support and protection. Even if to combine the presence of activists who support the Russian LGBT movement inside and outside of Russia it is evident that it did not bring any significant change or improvements: it is not enough just to receive supporting statements, there is a need for actions, that will allow to negotiate in terms of improving the situation of sexual minorities by providing the legal protection in terms of anti-discriminatory instruments.

¹⁶¹ Caitlin Wyndham (2014), "The political consequences of the LGBT Movement in Vietnam: understanding mobilization and impact in a non-democratic context", p 5

¹⁶² Timothy Hildebrandt (2011), "Same-sex marriage in China? The strategic promulgation of a progressive policy and its impact on LGBT activism", *Review of International Studies*, 37, pp 1313-1333, p 1321

¹⁶³ *Ibid*, p 1324

¹⁶⁴ *Ibid*, p 1317

¹⁶⁵ *Ibid*, p 1321

The official permission to carry out gay pride parades is also remaining under consideration: in practice, the decision of ECHR on *Alekseyev v. Russia* case did not affect the decision of prohibiting any form of gay parades in Moscow. In general, the reason of prohibition of the pride parades remains the same - the content of the event (in other words - the purpose of the marches) continues to evoke perplexity in most part of the society, as well as the gay marches themselves are seen not as a way of raising awareness in the society, but a way of advertising homosexual relations among heterosexual people, including minors¹⁶⁶. Full rejection of these activities, on the other hand does not solve the problem: as it can be seen in case of *Alekseyev v. Russia* – some activists can struggle without accepting any obstacles. Such type of perseverance in turn also causes a certain feeling of anxiety in Russian society, because the gay community appears as a more aggressive (especially under slogan “no compromise”¹⁶⁷). Nevertheless, in St. Petersburg some of the gay activists managed to conduct certain events by agreement with authorities without any complications¹⁶⁸, which means that depending on the format it is possible for sexual minorities to engage in their activities.

The matter of providing equal rights and protection from discrimination to Russian LGBT community will remain as a challenge for Russia: it is possible that in time progressive changes will appear, but many factors, such as the actions conducted by the LGBT activists (as an example Bayev and Fedotova), position of state authorities, and the attitude of most of the citizens do not allow accepting changes. On the other hand, it is worth noting that Russian society does take steps in improving the negative attitude to the sexual minorities. Weak level of support and rejection of LGBT majority of the population also plays a significant role in the present case, as this support could change the attitude of the state to the LGBT community in general and take into account existing problems.

Thus, in order to avoid hostile attitude among residents there is a need for the Russian LGBT groups and state authorities to actually start a dialogue. Inability to negotiate between participants also plays important role in this case, as if the parties

¹⁶⁶ ДОКЛАД “О праве на критическую оценку гомосексуализма и о законных ограничениях навязывания гомосексуализма” (In English: Report “Right to a critical evaluation of homosexuality and lawful restrictions of imposition on homosexuality”), p 24

¹⁶⁷ See slogan of GayRussia.ru organization

¹⁶⁸ Queer Russia: “IDAHOT “Rainbow Flashmob” 2014 in St. Petersburg”

would come to an agreement there would be more possibilities of going further with recognition. Additional complications here bring reports from Human rights activists as well as from the initiative groups: the criticism is often exaggerated, especially when it comes to discrimination against sexual minorities. Possibly, the fact that victims do not always report a crime, makes the presence of episode itself is questionable and some of the data in the reports should be accepted conditionally.

Conclusion

The aim of the thesis was to analyze the preconditions to the Federal law “On protection of minors from information Harmful to Their Health and Development” and to determine its conformity with the Russian legislation and international obligations, as well as to analyze the reasons and outcomes of the legal act adoption.

As it follows from the research, there were different reasons for the legal act adoption, and in a certain point of view this action is related to the state direction of controlling specific group of population: the clear approach of the state to raise importance of “cultural values” and to limit those practices, which don’t fall under that category. The very same approach can be seen in the field of constantly improving health regulations by previous experience (often with the Soviet past, like GTO normative).

It can also be established that one of the causes for the adoption of the anti-propaganda legal act remains a certain level of the long-practiced intolerance towards the LGBT society and the reluctance to provide equal rights for sexual-minorities, as well as the absence of anti-discriminatory working tools that would be providing protection to the sexual-minorities. The absence of these instruments, in turn, does not allow establishing the legitimacy of the initiated by the sexual-minorities marches and assemblies, especially since adopted legislative act is limiting many activities. Research showed that Russia experiences issues in terms of providing equal rights to the citizens in general, as well as the fact, that the adopted legal act does not in fact meet both Russian constitution and International standards. When analyzing the conditions of Russian sexual minorities before and after the adopted legal act it is obvious that LGBT community in Russia remains limited in their actions, even though certain advances were done in terms of protection of their rights through the European Court of Human Rights, as it was in the *Alekseyev* case.

As it was pointed out, another moment for consideration is that the legal act was adopted with significant errors in terms of defining “propaganda” actions, which ultimately does not allow determining precisely cases of propaganda of same-sex relationships to minors from using the right to freedom of information and assembly.

Despite the fact that no initiatives to revise or to modify the legal act was taken in order to make it in accordance with the state constitution and standards of ECHR, inconsistencies in the legal act are obvious. In practice, this brings complications in those cases where it is important to distinguish between “sharing information” from “propaganda”. The same issue applies with regard on holding marches and pickets as Constitutional right, but nevertheless these are marches of sexual minorities are subjected to rejection. Some complication gives the fact that periodically checks in various resources (for example, media) take place for the presence of "propaganda" of homosexuality. The conducted research therefore demonstrated the inconformity of the adopted legal act with the state constitution. The Human rights office of the United Nations calls such laws discriminatory in both intent and effect¹⁶⁹.

Despite the fact, that the law was in development for long time, certain details have remained undeveloped: the absence of a precise definition of “propaganda” and inconsistency with the constitutional rights (for free speech and for meetings) in reality should not have allowed for the legal act to be adopted. The similar issue was pointed out in the earlier initiatives that were rejected precisely because of inconsistency with the Constitution and International norms. Some complexity also brings the fact, that after the criticism, which was given by legal experts - the legal act was not recalled for revision. This can create difficulties in future, when Russian state will decide to adopt anti-discriminatory instruments or will reconstruct the legal act. The consequences in this case can be identical as in the case *Lawrence v. Texas*¹⁷⁰, as there will be a need to review the cases, which were decided by the anti-propaganda legal act. However, in the *Lawrence v. Texas* case the Texas legislation was found invalid and got reversed; the possibility that the same result will be achieved in Russia is vague, especially when it did not take place after the case *Alekseyev v. Russia*.

The violations of “freedom of assembly”, “freedom of ideas, speech and information” continue to take place, as the actions of the LGBT community in Russia (such as marches and possible pride-parades) are not advancing in terms of recognition by the state. At the same time, regardless on the criticism of the adopted legal act there

¹⁶⁹ Advocate: “United Nations Urges Russia to Repeal Antigay Laws”, August 20, 2013

¹⁷⁰ *Lawrence v. Texas*. 539 U.S. 558. 123 S. Ct. 2472. 156L. Ed. 2d 508 (2003)

doesn't seem to be any approach of actually initiating revision for the purpose of changing the anti-propaganda legal act, in order for it to be in conformity with the Russian constitution.

Hence, the basic meaning of the adopted legal is to limit activity of the LGBT society in Russia: formally, the activists may conduct their activities as long as they meet the requirements and the LGBT supporting organizations continue to function. As it was specified, this is one of the ways of regulating population, and in this case – regulating a specific group. The Second amendment to the Federal law “On protection of minors from information Harmful to Their Health and Development” did become stumbling block for both Russian internal and external policies, and until initiatives on improving the legal act and providing anti-discriminatory instruments will appear – the legal act will remain undeveloped and will bring significant difficulties for both LGBT activists and Human rights activists who are working on promotion of equal rights in Russia.

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